THE EVOLUTION OF MIGRATION POLICY IN POST-APARTHEID SOUTH AFRICA

EMERGING THEMES AND NEW CHALLENGES

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ABBREVIATIONS AND ACRONYMS

ACMS	African Centre for Migration and Society
AIPSA	Association of Immigration Practitioners of South Africa
AISA	Africa Institute of South Africa
ALP	AIDS Law Project
ANC	African National Congress
BMA	Border Management Agency
BSA	Business South Africa
BUSA	Business Unity South Africa
CDE	Centre for Enterprise and Development
CoRMSA	Consortium for Refugees and Migrants in South Africa
COSATU	Congress of South African Trade Unions
CPLO	Catholic Parliamentary Liaison Office
DHA	Department of Home Affairs
ECRI	European Commission against Racism and Intolerance
FEDUSA	Federation of Unions of South Africa
FIPSA	Forum of Immigration Practitioners of South Africa
HRC	Human Rights Committee
HRW	Human Rights Watch
HSRC	Human Sciences Research Council
IFP	Inkatha Freedom Party
ISS	Institute for Security Studies
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
LSNP	Law Society of the Northern Provinces
LSSA	Law Society of South Africa
NACTU	National Council of Trade Unions
NUM	National Union of Mineworkers
PASSOP	People against Suffering, Oppression and Poverty
RAB	Refugee Appeals Board
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SADC	Southern African Development Community
SAHA	South African History Archive
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
SAMP	South African Migration Project
SANAC	South African National AIDS Council
SAPS	South African Police Services
SCCT	Scalabrini Centre of Cape Town
SCRA	Standing Committee for Refugees
SIHMA	Scalabrini Institute for Human Mobility in Africa
TAC	Treatment Action Campaign
UNHCR	UN High Commissioner for Refugees
WNLA	Witwatersrand Native Labour Association

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PREFACE

International migration is perceived by states as a global challenge and its governance represents a controversial matter for policy-makers, who try to ramp up their consensus over policy matters. In recent years, scholars have debated migration policies' effectiveness, grappling with the question of why such policies tend to fail and produce unintended consequences. In this respect, it is worth noting that, for various reasons, migration policies generate expectations that are not capable of being met. Firstly, whereas on the one hand immigration policies can introduce selective criteria and restrict or encourage access to the territory of certain classes of migrants, on the other hand, they are not capable of determining patterns, flows, volumes and dynamics of human mobility. The lack of a profound understanding of the determinants of international migrations, coupled with the fact that evidence-based research is, in general, neglected by policy-makers, constitutes a further challenge to the process of policy formulation. Secondly, migration policies have failed because it is difficult to strike a balance between the needs of different groups with vested interests – including private enterprise, trade unions, business associations and civil society groups – which all pursue their own personal agendas. Lastly, inefficient administrative systems are responsible for migration policies being implemented incorrectly and, therefore, being ineffective.

In post-apartheid South Africa, migration policies and legislation have failed the declared objective of enhancing the *development potential* of migration, leaving critical issues such as social cohesion and integration unsolved. A large emphasis has been placed on the *securitisation* of migration and the tightening of the immigration regime in an attempt to crack down on irregular arrivals. Furthermore, with regard to the first admission of asylum-seekers, the inability to reconcile the national interest of maintaining borders' integrity with respecting moral and legal obligations has placed the asylum system under tremendous stress. The restrictive measures in the immigration regime have resulted in large numbers of migrants turning to the country's asylum system as a means of regularising their stay temporarily. From 2005 to 2011, South Africa received the highest number of individual asylum applications globally, with a peak of over 200 000 applications. This has led to widespread corruption practices and the inability to process asylum applications adequately and timeously.

In 2014, the South African government began reviewing the current immigration regime with the intention of crafting a new comprehensive migration policy able to synthesise *development, security and international obligations*. This process, which envisages the drafting of a Green Paper to be released by March 2016, leading to a White Paper and a comprehensive legislation overhaul, represents a unique opportunity for civil society to inform South Africa's impending new migration policy-making.

Given its context, *The evolution of migration policy in post-apartheid South Africa: Emerging themes and new challenges* – far from being an exhaustive synthesis of the migration policy framework in South Africa – aims to inform readers about some of the present challenges, the recurrent themes of discussion, and the legislative amendments and policy shifts that have occurred in the country over the past 15 years.

We hope that the upcoming policy and legislative drafting, as well as the process of public consultation, will lead to a rethink of effective strategies to inform a good and ethical governance of migration. As remarked by Graziano Tassello, an esteemed Scalabrinian migration scholar, 'given the complexity of the phenomenon of migration, its effective governance would, at least, require overcoming unjustified fears and conduct a debate based on the real dynamics of international migration'.

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INTRODUCTION

The post-apartheid migration policy framework in South Africa is characterised by a complexity stemming largely from competing logics, interests, actors and rationales that influence policy-making. For example, a liberal constitutional framework that guarantees rights to non-citizens seems to be increasingly at odds with political and social rationales that see migrants as competitors for jobs and social services and, therefore, undesirable and expendable. Given South Africa's apartheid past and the pressures that come with it, as well as regional historical migration patterns that flowed towards South Africa, the task of immigration policy-making becomes even more challenging.

It is no surprise then that scholars like Khan (2007:2) argue that 'South Africa's legislation falls short of covering the complex spectrum of migrants and presently it has only two instruments of law dealing directly with immigration; the Immigration Act of 2002 and the Refugees Act of 1998'. The task at hand, then, is to provide a thorough review of the two primary instruments of migration law in post-apartheid South Africa, covering their evolution from conception to contemporary legislation. The publication is thus divided into two parts. Part One reviews the Immigration Act of 2002 and its various amendments, and Part Two reviews the Refugees Act of 1998 and the various amendments related to it.

The methodology consists of a review of both immigration and processes, including submissions presented by civil society groups. The review of these submissions is complemented by SIHMA's analysis with the aid of academic resources, media reporting, international legislation and conventions, as well as other relevant sources. The publication is thus based on a desktop review of the evolution of the post-apartheid migration and refugee frameworks in South Africa up to the contemporary process of policy review initiatives. It starts off by setting the migration context from which the rationale for the 1999 White Paper on International Migration is discussed. The political context of the immediate post-apartheid aftermath related to the government of national unity and the inherent power struggles as they relate to immigration policy is then contextualised. This is followed by a summary of sub-missions on the 2001 Immigration Bill, and a discussion of the relevant themes emanating from it. It then moves on to a discussion of the 2002 Immigration Act and consequent amendments.

Part Two analyses the refugee policy framework in South Africa. It begins by offering a brief synopsis of the refugee framework evolution, which evolved from the 1998

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Refugees Act. The next point of discussion is the 2008 Refugees Amendment Bill and the various submissions from civil society, as well as the 2010 Refugees Amendment Bill and its related submissions. The recent 2015 Draft Refugees Amendment Bill is also analysed and commented on. Analysis then shifts to contextualising the various rationales that have influenced shifts in migration policy and practice in South Africa. This puts into context the various logics leading to what seem to be more stringent migration policies in South Africa, before drawing conclusions.

Apart from discussing past immigration and refugee policies, this publication is cognisant of the fact that, in 2014, the South African government began reviewing the current immigration regime with the intention of crafting a new migration policy for South Africa. This process envisages the drafting of a Green Paper[1] to be finalised by March 2016, leading to a White Paper[2] and a comprehensive overhaul of legislation. This presents opportunities for civil society and social movements to inform and influence South Africa's impending new migration policy-making. Informing and influencing policy effectively requires sound knowledge of the immigration terrain, especially after 1994, in terms of the various legislations and amendments, recurring themes, policy shifts, and political and scientific logics[3] about migration issues. While not exhaustive, this analysis of the political context and social impact of the law isolates major issues, themes and policy shifts, thereby creating an informative outline of the South African post-apartheid migration policy framework.

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1   A Green Paper is an initial discussion document that contains formative ideas and themes on a particular topic. It precedes a White Paper.

2   A White Paper can be described as a definitive version of a policy containing the essential principles and details to be formulated into a Bill.

3   For instance, on the difference between political and scientific logic, Amit and Kriger (2012) note that 'although in line with the country's Constitutional ideals, the country's asylum and immigration laws stand apart from public sentiment. As migration to South Africa has grown, foreigners have increasingly been blamed for the country's socio-economic ills, including high crime and unemployment rates'. See Amit R & Kriger N (2014) Making Migrants 'Il-legible': The Policies and Practices of Documentation in Post-Apartheid South Africa. *Kronos* 40 (1): 269–290.

PART 1
The post-apartheid migration framework

South Africa's new democratic dispensation found itself saddled with an immigration policy that has been described as one of the 'dying Acts of apartheid' (Hart 2013: 171) – the Aliens Control Act of 1991.[4] This legislation constituted democratic South Africa's immigration policy until the enactment of the 2002 Immigration Act. Even so, prior to that time the South African government committed substantial resources to producing new migration policy and law-making. This process included amendments to the Aliens Control Act (1995), the Green Paper on International Migration (May 1997), the Refugees Act (1998) followed by the White Paper on International Migration (1999) and, finally, an Immigration Bill released in 2001, which then became an Act in 2002 (see Box 1).

BOX 1
THE LAW-MAKING PROCESS IN SOUTH AFRICA

The process of crafting legislation begins with an initial discussion document called a Green Paper that contains formative ideas and themes on a particular topic emanating from the ministry concerned. The Green Paper is then published for comments and suggestions from the public and other interested parties. Taking these comments and suggestions from the public and civil society on board, a more refined document called the White Paper is then drafted. The White Paper spells out a more definitive version of a policy position containing the essential principles and details to be formulated into a Bill. A White Paper is thus the foundation on which legislation is based and closely resembles the next document in the law-making process, the draft Bill. Before a Bill is introduced to, and tabled in, Parliament, it is called a draft Bill. The draft Bill has to go to the relevant cabinet committee in Parliament for approval before it is released for public comment and scrutiny. After public commentary, the ministry makes the required changes to the draft Bill. This version of the draft Bill is then sent to the state legal advisor for legal approval. It is then tabled in Parliament by the relevant minister. Once it has been tabled in Parliament, a draft Bill becomes a Bill and is given a number. The released Bill will then go through the process of becoming a law. There is a series of steps in this process. Firstly, the Bill is sent to the National Assembly (NA), which in turn refers it to the relevant Portfolio Committee. The Portfolio Committee reviews the Bill and asks for public comment. The Portfolio Committee then makes the necessary changes to the Bill, taking public comment into account. Next, the NA considers the Bill, and then votes on it. The Bill then goes to the National Council of Provinces (NCOP), in which the appropriate Select Committee considers it. Once both houses of Parliament have agreed to a final version of the Bill, it is sent to the president. The president then signs the Bill, which becomes an Act and law in South Africa. For more information, see www.etu.org.za and www.parliament.gov.za.

According to Peberdy (2009: 6), 'the first attempt to alter the migration legislative framework came in 1995 with an amendment to the 1991 Aliens Control Act which in the words of Home Affairs was meant to improve control over immigration'. The amended Aliens Control Act placed greater emphasis than before on the skills and

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4   The Aliens Control Act of 1991 was a racist, apartheid-era immigration policy that discriminated against non-white immigrants. In terms of the Act, it was an offence to 'employ, enter into any agreement with, conduct any business with, harbour, or make immovable property available to illegal immigrants'. See Maharaj B (2004) *Immigration to post-apartheid South Afric*a. Geneva: Global Commission on International Migration.

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qualifications of potential migrants and the Department of Home Affairs (DHA) (1998) stated that 'no one in the unskilled and semi-skilled categories would be accepted as an immigrant worker'. Whereas in 1995 the Aliens Control Amendment Act removed the racial requirements of the original Aliens Control Act of 1991, the deterrent and draconian nature of the Act remained intact (Gordon 2010). As such, despite the amendment, the Aliens Act was not congruent with the ideals expressed in the new South African Constitution and the spirit of the new democratic dispensation.

The Green and White Papers on migration

The 1997 Green Paper and the 1999 White Paper on International Migration proved to be different and somewhat contradictory documents in their philosophy with regard to migration governance. Neocosmos (2010: 78) highlights that:

> [t]he build-up to the publication of this Green Paper rightly gave the impression that it was expected that this report would suggest the liberalisation of the existing law. Of course given the extremely repressive character of existing legislation, only liberalisation had any meaning, so that the publication of the Green Paper was hailed as signalling a 'Break with (the) Racist Past' (Williams 1997) in that it recognised that migrants and immigrants can be an asset to South Africa.

The amended Aliens Control Act placed greater emphasis than before on the skills and qualifications of potential migrants

In its recognition that migrants could be assets to South Africa, the Green Paper proved to be progressive. Further, the Green Paper proposed that the 'problem of unauthorised migration should in part be dealt with by giving *bona fide* economic migrants from other SADC countries, who have no intention of settling here permanently, increased opportunities for legal participation in our labour market' (South African Government 1997: 11). However, the positive and progressive philosophy of the Green Paper was lost in the next process of migration policy-making. The 1999 White Paper stressed, in fact, that the intention of migration policy was 'to cultivate an environment which does not offer them (migrants) opportunities of employment and free available public services which they cannot find in their countries of origin' (South African Government 1999: 31). Subsequently, the White Paper argued that 'a highly restrictive migration policy should be adopted in order to reduce the number of people for whom the government and the economy needed to "provide" for' (Ibid.).

This further positioned migrants as a 'threat' as they were deemed to be an extra constituency, adding pressure to services and economic needs for which the South African government had to provide. This is evidenced in the tone of the White Paper's executive summary, which stated that the 'administrative and policy emphasis is shifted from border control to community and workplace inspection with the participation of communities and the cooperation of other branches and spheres of government' (Ibid.).

Instead of viewing migrants as an asset, the intent of the White Paper thus reflected the intention to police foreigners. As Duncan (2015) sees it, 'underpinning this logic seems to be an exclusive "us-and-them" nationalism, premised on sealing South African identity up from influences from the rest of the region'.

Crush and Williams (2001:1) alert us that the 'intent of any Bill is to give effect to the policies laid out and accepted by government in a policy White Paper'. This means

that there must be alignment between the philosophy of the White Paper and the immigration legislation that emanates from it.

It is from this premise that this section reviews submissions and presentations of civil society and other interested parties in the White Paper on International Migration to identify the contributions, concerns and recurring themes with regards to migration policy and whether these contributions and concerns were carried through to the final policy draft. However, the focus of this review is on the White Paper, rather than on the Green Paper. This is deliberate in light of the fact that during its first meeting and briefing in May 1998, the Task Team was briefed by its Chairperson, on behalf of the Minister of Home Affairs, on its parameters and terms of reference, which were skewed towards the White Paper as the foundation and basis for the impending immigration legislation. These parameters and terms of reference included, amongst other things, the instruction that:

> [t]he Task Team would not be bound by the findings, recommendations and policies set forth in the Green Paper, which could be taken forward, reconsidered or altered on the basis of the comments received or additional different findings made, or opinions reached, by the Task Team; the White Paper should be inspired by practical considerations rather than by theory alone and should serve as a guideline capable of being immediately translated into the required legislation, if any, and transformed into administrative practices supported by the relevant structures and operating within existing budgetary and logical constraints, including the scarcity of human resources. (South African Government 1999: 6)

It is important to note that there are also preliminary considerations that were endorsed by the White Paper Task Team and informed their thinking in drafting the White Paper, the document that formed the blueprint for the subsequent Immigration Bill. In the preliminary considerations, it was put forward that the drafting of the White Paper:

> sought to let people who add value to our society in and to keep those that do not, out. We believe that this can and must be done. The people who can add value to our growth and development are those who invest, are entrepreneurs and promote trade, those who bring new knowledge and experience to our society, and those who have the skills and expertise required to do the things we cannot properly do at this stage. Such openness to the world should be welcomed. At the same time, our history has been disadvantageous to sections of our population, excluding them from participation in the skills and educational market. There should therefore be affirmative action in immigration, in the sense of compelling all employers to search for suitably qualified South Africans first and to invest in their training and development. There is also a hierarchy of interests to be considered. Our obligations are to serve our people first; the people of the region and the member states of the Southern African Development Community (SADC) second; the people of Africa third; and the rest of the world last. (Ibid.: 7)

These beliefs speak to the frame of reference that was set to guide the Task Team in drafting a White Paper that was to act as a foundation for the Immigration Bill. This

Instead of viewing migrants as an asset, the intent of the White Paper thus reflected the intention to police foreigners

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Consequently, we note that from the inception of the first post-apartheid major migration policy, migrants – especially lower-skilled African migrants – have always been portrayed as 'problematic' to South African society

logic or set of *problematiques* arguably form the leitmotif that has run through migration policy-making from the inception of democracy up to contemporary migration-policy-making processes. This begs the question as to what informed this set of principles. Do these principles stem from sound academic and research knowledge, from political logic, from popular sentiments and myths, or from media representations of immigration issues? These problems are said to have been deduced from taking note of public complaints, inputs and comments received about the application of the Aliens Control Act relating to the fact that:

> [t]he Aliens Control Act has not been effective in preventing the entry of large numbers of illegal immigrants. In fact, the overwhelming concern of the public which emerged during the hearings was about preventing and redressing illegal immigration; given the growing number of illegal and legal aliens. It is impossible to police their activities in South Africa because emphasis is placed on border control and the few available immigration officers are too busy with administrative procedures to do field work. It has been noted that illegal aliens have the following negative impact on the provision of services and on our society: they compete for scarce resources with millions of South Africans living in poverty and below the breadline; they compete for scarce public services, such as schools and medical care, infrastructures and land, housing and informal trading opportunities; they compete with residents and citizens for our insufficient job opportunities, and offer their labour at conditions below those prescribed by law or the applicable collective bargaining agreements; a considerable percentage of illegal aliens have been involved in criminal activities; and they weaken the state and its institutions by corrupting officials, fraudulently acquiring documents and undeserved rights and tarnishing our image locally and abroad. (Ibid.: 13)

The influence of these beliefs has been pervasive in post-apartheid migration policy-making from inception. As a result, themes of control, restriction, deportation and xenophobia are prominent in South African migration policy. Consequently, we note that from the inception of the first post-apartheid major migration policy, migrants – especially lower-skilled African migrants – have always been portrayed as 'problematic' to South African society, a perspective that laid the foundation for the xenophobic attacks of 2008 and 2015 as well as state-sponsored operations such as *Operation Fiela* in 2015 (see Box 2).

Turning to the White Paper, its orientation emphasised a migration 'control agenda' premised on inland and in-society enforcement practices and policies such as the arrest, detention and deportation of undocumented migrants. It comes as no surprise that 'such official state led policy set the tone for negative views of citizens who also view foreigners as the cause of many social problems and, therefore, support more restrictive and anti-asylum policies' (Crush 2013).

As a result, the White Paper accepted that 'the migration system should enable Government to retain control on who may enter the country and the conditions and length of his or her stay as one of its main policy parameters' (South African Government 1999). In this endeavour, the Task Team on migration policy also proposed to seek the collaboration of employers, communities and trade unions to make sure that labour and immigration laws were duly enforced. This narrative, arguably, implicitly

rooted the 'us/them' and 'othering' mentality that is pervasive in South African society with regard to migrants.

BOX 2

OPERATION FIELA

Within the new discourse of linking migration to national security, the government launched Operation Fiela in 2015. According to government communications, Operation Fiela/Reclaim was an intervention that came as a result of concerns from communities. Operation Fiela/Reclaim was a multidisciplinary, interdepartmental operation aimed at eliminating criminality and general lawlessness from communities. However, the timing of the operation – soon after the 2015 xenophobic attacks – feeds into the thesis that equates migrants with criminality. It was launched by the government following a spate of xenophobic attacks that left at least seven people dead in Gauteng and KwaZulu-Natal. According to the *Mail & Guardian*, Jeff Radebe, Minister in the Presidency, revealed that during Operation Fiela, over 15 000 undocumented immigrants were repatriated. With synchronised operations in July 2015 across all provinces, it was revealed that a total number of 2 908 people were arrested, with 1 123 of them being undocumented immigrants.

White Paper on international migration: Hearings

The South African Migration Project's[5] (SAMP) (1999) submission zeroed in on the issue of the number of immigrants in South Africa, an issue that still permeates immigration policy and discourse in contemporary times. The White Paper claimed that 'South Africa has reached its *carrying capacity* and cannot accommodate an increase in its population' (South African Government 1999). This claim thus formed the basis of the popular analogies of 'floods' and 'waves' of immigrants flocking to South Africa. SAMP's submission highlighted that the number of immigrants had to be viewed as proportional to other variables, such as economic growth, which would be better placed to determine the 'carrying capacity'. SAMP noted that in relation to the White Paper, migration policy was mainly being pushed by an overt focus on 'illegal immigration' and suggested a broader approach beyond 'immigration control', arguing that a sound migration policy should be crafted first and that only later should enforcement concerns be dispensed with.

In another submission (2000) that showed the pervasive 'illegal immigration and control' logic with regards to immigration, private citizen Mr Mthuthuzeli Khaye revealed that his submission was based on his personal research and listening to people. He submitted that his views were anti-migration. Khaye commented that South Africa's policy towards immigrants was too open because of the influence of human rights organisations and that, consequently, the country had received too many foreigners.

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5   The Southern African Migration Programme (SAMP) is an international network of organisations founded in 1996 to promote awareness of migration–development linkages in the SADC. SAMP conducts applied research on migration and development issues, provides policy advice and expertise, offers training in migration policy and management, and conducts public education campaigns on migration-related issues (http://www.queensu.ca/samp/).

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However, the claim of too many migrants having entered South Africa and of the country having reached its 'carrying capacity' is difficult to sustain in light of evidence.[6]

The South African Human Rights Commission's[7] (SAHRC) submission (2000) focused on several issues, including the issue of xenophobia. The submission noted the intent to introduce 'a community-based enforcement policy whereby the emphasis moves from border control to community-based enforcement and workplace inspection' (ibid.: 9). The consequences of such a community-based enforcement strategy and workplace inspection were raised by the SAHRC as they related to issues such as abuse of the strategies to settle agendas, growing mistrust in communities and institutionalised racism. SAHRC stressed the importance of having human rights ideals inform migration policy with the state as guarantor of those rights to all inhabitants. In similar tones, The Human Rights Committee[8] (HRC) submission (2000) was focused on the enforcement provisions of the White Paper. The proposal to include the community, employers and educators as partners in enforcing and controlling undocumented migrants was questioned. The HRC rightly noted that it was difficult to verify the motives behind reports on migrants from communities, employers and educators, for example. Furthermore, the proposals left room for unscrupulous employers to use migrant labour and report them for deportation to avoid paying wages, for example.

'a community-based enforcement policy whereby the emphasis moves from border control to community-based enforcement and workplace inspection'

Business South Africa's[9] (BSA) (2000) primary issue of disagreement with the White Paper was the proposed levy[10] as a strategy for controlling legal skilled migrants. The provision was meant to discourage employers from employing foreigners as it meant that they would have to pay a ratio of the salary paid to the foreign employee into a national fund meant to be used to train South Africans. In any case, BSA pointed out that businesses prefer to employ citizens because of various economic logics such as the costs of relocating foreign employees. BSA noted that a liberal policy towards skills coming into the country was beneficial to South Africa given the contributions towards growth that entrepreneurial migrants make, for example. They stressed the negative effects of a skills shortage in relation to South Africa's growth, highlighting that there was a need for a massive injection of skills to compensate for the loss of skilled workers who had migrated overseas. The BSA's view presented a neo-liberal approach to migration that is pervasive with globalisation

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6   In this regard, see Landau L (2004b) *Myths and Decisions in South African Migration Management and Research*. African Migration Alliance Workshop, 10–11 March 2005, Pretoria. Working Paper Series #11.

7   'The South African Human Rights Commission (SAHRC) is the national institution established to support constitutional democracy. It is committed to promote respect for, and observance and protection of, human rights for everyone without fear or favour. The Commission was inaugurated on 2 October 1995 under the Human Rights Commission Act 54 of 1994 and as provided for by the Constitution of the Republic of South Africa Act 200 of 1993.' (http://www.sahrc.org.za/home/index.php?ipkContentID=1)

8   'The Human Rights Committee (HRC) is a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its states parties. It falls under the United Nations.' (http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx)

9   Business South Africa (BSA) is a confederation of 19 business and employer organisations and is a member of the Pan-African Employers' Confederation as well as the SADC Employers Group. It is also the South African business representative in the International Labour Organization.

10   In Section 8.5.1, the White Paper (1999) stipulated that 'employers who employed foreigners would pay into a national training fund a ratio of the salary' as prescribed by regulation. This contribution would go towards the training of South Africans. In this system, employers would hire foreigners at a higher cost than that at which they could hire equally trained South Africans and would be contributing towards the training of their compatriots.

and amenable towards the movement of skills over unskilled movement. Within the neo-liberal logic to which South Africa subscribes, there should be openness to movement of skills and capital. These are ideas that have filtered into migration policy – however, within the southern African regional context, they ignore historical trends based on South Africa's exploitation of unskilled labour and its subsequent economic, cultural and political movements. In light of this history, Duncan (2015) argues that 'the most sustainable, socially just response to migration is to open the region's borders to migrants, rather than to seal them up even more. Regional integration and immigration needs to take place on terms set by labour, rather than capital'. In this line of thought, the SAHRC disagreed with the White Paper policy that encouraged the recruitment of skilled migrants to the disadvantage of unskilled migrants, including those already present in South Africa. They advocated for a regional approach to the governance of migration that was able to incorporate other actors and member states within the SADC region.

The Congress of South African Trade Unions[11] (COSATU) (2000) stipulated that the White Paper should 'give expression to South Africa's Reconstruction and Development Programme's (RDP) principle that minimum standards with regards to the rights of workers must be established across the region' (Ibid.). This hinted that South Africa's migration policy had to take cognisance of the regional dynamics in terms of historical labour migration movements. COSATU's submission also touched on the issue of compulsory deferred pay, an issue that relates to the regional migration labour system. COSATU's concern was that compulsory deferred pay was a relic of the apartheid system carried out in Mozambique and Malawi, amongst other countries. The system comprised of bilateral agreements, particularly between South Africa, Mozambique and Malawi, stating that portions of migrant workers' salaries would be deducted and paid upon their return to their home countries. However, COSATU reported that payment issues had arisen, especially with migrant workers in Mozambique, and called for better management of the system as well as for giving workers a choice by making the deferred pay voluntary rather than compulsory.

Relevant themes for discussion

A number of submissions raised concerns about some of the provisions in the White Paper and identified four areas of concern in the document: i) general human rights violations; ii) potential for corruption; iii) immigration and gender mainstreaming, and iv) migration policy and international law.

General human rights violations

In particular, the SAHRC was concerned about the explicit intention to limit the right to freedom of trade, occupation and profession. The problem with this proposal, according to the SAHRC, was that the issue of limiting migrants' rights was going to be left to the legislature in the process of drafting laws instead of being the domain of the courts to resolve. The legislature is, in fact, susceptible and sensitive to the political logics and sentiments of its constituencies and, in a climate in which migrants were and continue to be seen as a 'burden' on the country's resources,

'the most sustainable, socially just response to migration is to open the region's borders to migrants, rather than to seal them up even more. Regional integration and immigration needs to take place on terms set by labour, rather than capital'

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11 'The Congress of South African Trade Unions (COSATU) was launched in December 1985 after four years of unity talks between unions opposed to apartheid and committed to a non-racial, non-sexist and democratic South Africa. Its main broad strategic objectives are to improve material conditions of its members and of the working people as a whole, to organise the unorganised and to ensure worker participation in the struggle for peace and democracy principles.' (http://www.cosatu.org)

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migrants become an expandable constituency. As such, the logic of the SAHRC, which continues to be relevant today, proposed vesting the limitation of rights function to the judiciary, which would guarantee a higher degree of impartiality and lack of bias. Thus a limitation of rights in the Bill of Rights as proposed by the White Paper was seen as falling foul of the principles of constitutional democracy.

COSATU noted that the White Paper argued for an overt bias in migration policy centred on serving South Africa first, followed by the SADC, Africa and, lastly, the world. Such a hierarchical view of immigration policy not only risked contradicting the Bill of Rights and its emphasis on 'everyone', but may also have contributed to the pervasively negative attitude towards providing services to non-nationals, as widely reported at Home Affairs offices and border posts (COSATU 2000). A hierarchical view of immigration could thus have led to an 'us' and 'them' mentality that has prevailed in immigration policing and service provision, for example. Given these negative consequences, the SAHRC's proposal stipulated that any migration policy should be 'informed by a basic respect of individual human rights, not state sovereignty' (SAHRC 2000).

Lawyers for Human Rights[12] (LHR) (1999) has identified the rights of foreigners as vital, as 'the truest test of a country's commitment to human rights is its ability to protect the most vulnerable. These *vulnerable persons* include refugees and those seeking political asylum as well as migrant workers and undocumented migrants' (Ibid.). The White Paper proposals of workplace and community enforcement were considered reminiscent of strategies of the bygone apartheid era, based on exclusion, state control and racial discrimination.

> In this context,
> exclusionary practices
> were no longer based
> on race but, arguably,
> on nationality

In this context, exclusionary practices were no longer based on race but, arguably, on nationality. Furthermore, the proposed community and workplace policing strategies not only potentially raised the stakes between citizens and foreigners by causing unnecessary suspicion, fear and paranoia, but also seemed contrary to Chapter 2, Section 10, of the Constitution, which stipulates that 'everyone has inherent dignity and the right to have their dignity respected and protected' (South African Constitution 1996). In this case, the constitutional requirement for dignity relates to migrants living dignified lives and not having to live in fear, looking over their shoulders in a state of constant panic about community or workplace policing.

Potential for corruption
The White Paper recognised the risk of corruption in the migration policy proposals. Section stipulated that:

> [s]pecial provision should be made for a rigorously sanctioned offence in respect of granting of or allowing for unfair and illegal advantages to persons for financial consideration. The Immigration Service will be issuing documentation and permits, which have economic value and, therefore, the risk for corruption exists. The Immigration Service should have an

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12   'Lawyers for Human Rights (LHR) is an independent human rights organisation involved in human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. To this end, it provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, who are victims of unlawful infringements of their Constitutional rights.' (http://www.lhr.org.za)

internal investigative unit which constantly monitors, tests and upgrades the internal systems, conducts internal investigations and prosecutes frauds. This unit should not oust the jurisdiction of other organs of the state with law enforcement responsibilities, so as to avoid that such unit becomes a mechanism to keep in-house and cover up, rather than expose, cases of corruption. (South African Government 1999)

As such, an internal investigative unit was envisaged to deal with corruption from within the DHA. However, the SAHRC submission stipulated that although this was a welcome move, it was not a holistic strategy for dealing with the problem of corruption. This was especially so given the position of migrants and their weak status in society. The need by migrants for various documentation from the DHA in order to regularise their stay makes them especially susceptible to unscrupulous officials who demand bribes in return for services.[13] It is interesting to note that even before the White Paper was in place, the problem of corruption had been identified by Friedman (n.d.), who suggested that:

> *South Africa's migration control regime is highly open to corruption. Reports show that some officials sell documents to immigrants who do not qualify – in one case, they are said to do so in a way which binds labourers to farmers in a feudal relationship. Allegations have been made that political parties register immigrants as voters to increase their share of the vote. It has been suggested that there is a widespread perception that anyone can become a legal immigrant if they pay an official enough money. Any system, which gives latitude to officials to regulate people's lives, is open to corruption. But immigration control is particularly susceptible since it requires officials to implement a form of control, which is unenforceable.*

Immigration and gender mainstreaming

Specific policy pronouncements on gender mainstreaming in the White Paper were missing. The submission from COSATU highlighted the missed opportunity to elaborate on specific strategies for dealing with issues of gender. Migration policies have profound implications on gender, especially when considered in light of their regional orientations in southern Africa. Migration in southern Africa is often a household strategy to diversify income through remittances resulting in positive impacts on household development (Crush, Williams & Peberdy 2005). Given this background, there is a correlation between a strict immigration policy as envisaged by the White Paper that precludes undocumented migration, on one hand, and household strategies to improve lives across the region on the other. With labour migration for agriculture and the mines mainly being a male-dominated sector, an immigration policy that reduces this type of migration might, for example, force female undocumented migration.

According to SAMP (1999), 'evidence from Lesotho suggested that this was already a serious problem. Migration is practised as a household strategy and migration

The need for various documentation from the DHA by migrants in order to regularise their stay makes them especially susceptible to unscrupulous officials who demand bribes in return for services

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13   The problem of corruption within the immigration system has not been dealt with effectively, as revealed by a recent report by the African Centre for Migration and Society (2015), which suggests that 'corruption and bribery have permeated nearly every level of the country's asylum system; from border crossings, to queues outside Refugee Reception Offices (RROs), to what takes place inside those offices'. See African Centre for Migration and Society (ACMS) (2015) *Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System*.

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policy should likewise be formulated and applied in household strategy terms'. In other words, the call was for migration policies to be cognisant of their regional effects and impact on gender issues that could result in a shift towards the feminisation of migration in the southern African region. Undocumented female migration may also involve border jumping and interactions with corrupt officials and conduits, which might leave women exposed to potential sexual abuses and other human rights violations. This highlights aspects of gender issues related to immigration policy about which the White Paper was silent.

Migration policy and international law

With the emergence of the democratic dispensation, South Africa sought to become part of the international community after years of isolation due to its apartheid policies. Part of this strategy to reacquaint itself with the international community was to become signatory to a number of international treaties and conventions. Amongst the international legislation to which South Africa bound itself was the 1951 UN Convention Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugees in Africa. The principles contained in these international conventions and legislation are applicable to, and enforceable upon, all signatories in their domestic legal frameworks. They also impose duties and various obligations. However, COSATU (2000) noted that 'the White Paper makes no specific reference to these international treaties and how they must be given effect to in national policy'. It is interesting to note that this omission of aligning international law and domestic legislation in the White Paper emerged again during the drafting of the 2001 Immigration Bill. To fast-forward a bit, during the 2001 Immigration Bill drafting process the United Nations High Commissioner for Refugees[14] (UNHCR) (2002) rightly noted, for example, that 'certain aspects of the Immigration Bill that touch upon refugee related issues may undermine the principles contained in international refugee and human rights law, and the Green Paper, White Paper and Refugees Act of 1998'. These contradictions between domestic immigration policy and the principles of international law have continued to be a flashpoint in South Africa's migration policy to date.

Political context: Post-apartheid government of national unity[15]

Following the release of the Green and White Paper on international migration, a draft Immigration Bill was released in February 2000, charting the way to formalising South Africa's shift in terms of migration policy from the apartheid era to a new democratic dispensation. A revised version of this was adopted as the 2001 Immigration Bill and subsequently became law in South Africa (Immigration Act No. 13 of 2002), which was then amended by the 2004 Immigration Amendment

> It is interesting to note that this omission of aligning international law and domestic legislation in the White Paper emerged again during the drafting of the 2001 Immigration Bill

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14 'The Office of the United Nations High Commissioner for Refugees (UNHCR) was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees.' (http://www.unhcr.org/)

15 'Between 27 April 1994 and 3 February 1997 South Africa was governed under the terms of the interim Constitution of South Africa. Clause 88 of the interim Constitution required that any party holding twenty or more seats in the National Assembly could claim one or more cabinet portfolios and enter the government. This arrangement was known as the provision for a Government of National Unity (GNU) [...] The requirement for the GNU lapsed at the end of the first Parliament in 1999. Even so, the Inkatha Freedom Party and the Azanian People's Organisation continued to hold seats in the government, as minority partners, until the elections of 2004.' (https://en.wikipedia.org/wiki/Government_of_National_Unity_(South_Africa))

Act (No. 19 of 2004) before eventually being implemented in 2005. As Crush (2008a) noted, 'the 2002 South African Immigration Act was produced by a process that many NGOs and Parliament criticized as procedurally flawed'. Siddique (2004: 22) further argued that 'one major drawback of the formulation of the Immigration Bill, as with any Parliamentary process on which there are widely differing views held within the community, is that passage of the Bill through Parliament was not a quick or easy process'. This highlights the fact that the Bill encountered several problems in the making and that the government was not convinced of the legislative outcome. In 2003, the enactment of the Bill was suspended because its regulations were challenged as unconstitutional.

To understand government dissatisfaction with the 2002 Immigration Act, context is important. In a sense, the approach taken by the South African government towards immigration since 1994 has been, at times, rather confused and contradictory. Bernstein and Weiner (1999: 196) allude that 'it appears as if the government has no coherent grasp of the migrant question'. This stems from the fact that there seemed to be competing mandates between different government departments involved as well as conflicting policies of the departments, which adds complexity to the crafting of the new immigration policy. As Kotzé and Hill (1997: 18) point out:

> [t]he two departments with the highest degree of involvement in the formulation and implementation of immigration policy are the Department of Home Affairs and the Department of Foreign Affairs. However, these two areas were split between members of the Government of National Unity (GNU). The African National Congress (ANC) was given control of Foreign Affairs, whilst the Inkatha Freedom Party (IFP) was given control of Home Affairs. Whilst the primary responsibility for immigration policy rests with the Home Affairs, Foreign Affairs handles negotiations concerning the impact of South Africa's migration policy on the rest of the region, and any other international discussions. Because of different political backgrounds and philosophies, inconsistencies emerged between the two departments in their approaches to immigration policy. For example, Foreign Affairs pursued a policy of closer links with the rest of the SADC, partly due to a desire to redress wrongs perpetuated by the apartheid government. At the same time, the Home Affairs advocated the adoption of a more stringent approach to migration management.

Unsurprisingly, when the ANC regained control of the ministry in 2004, the new Home Affairs Minister Nosiviwe Mapisa-Nqakula – taking over from Mangosuthu Buthelezi of the IFP – immediately stated that 'there is a need in the long term for Government to look at a more holistic review of our immigration policy and for a possible rewrite of the Act' (Crush & Dobson 2007: 437). However, save for various amendments, sweeping reform has proved elusive.

The next section illustrates the process that led to the signing of the 2002 Immigration Act and includes comments, submissions from civil society on the 2001 Immigration Bill, and the themes that emerged from these processes. The rationale behind the shift in practice towards internal control of undocumented migration is also analysed, revealing some of the logic behind the first significant post-apartheid migration policy, the 2002 Immigration Act.

In a sense, the approach taken by the South African government towards immigration since 1994 has been, at times, rather confused and contradictory

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The 2002 Immigration Act

The 2002 Immigration Act was published in the Government Gazette in May 2002. In April 2002, DHA made a presentation at the WTO–World Bank Symposium on the movement of natural persons,[16] which spelt out the rationale and thinking of the policy-makers with regard to the first post-apartheid migration policy in South Africa. In this presentation, DHA (2002) argued that:

South Africa presents a mixture of characteristics, as it is undoubtedly a developing country, but with a higher level of prosperity relative to the rest of its continent, which makes it a target of migratory influxes, therefore raising the need for management and control measures which are typical of developed countries. Furthermore, South Africa finds itself operating under extreme budgetary restraints and social pressures which do not allow sufficient resources to be allocated towards migration control, and, therefore, any of its measures in this field must rely on and require minimum administrative capacity and be aimed at maximum simplification, objectivity and transparency in order to achieve maximum efficiency and effectiveness.

Mirroring this mixture of characteristics, the ANC chair of the Parliamentary Portfolio Committee on Home Affairs called the Immigration Act of 2002 'a product that we can all live with, a phase reflecting the heterogeneous character of post-apartheid migration legislation' (Segatti 2011: 45).

Submissions on the 2001 Immigration Bill

The Immigration Act of 2002 is the culmination of a process emanating from the Green and White Papers on international migration and leading to the 2001 Immigration Bill before the Act was signed in 2002. The 2001 Immigration Bill signalled a shift in thinking about immigration in South Africa. Within the framework of the 2001 Immigration Bill, it was emphasised that South Africa was:

about to make a profound paradigm shift from a mind-set wishing to control foreigners within its boundaries, to a new approach which registers the fact that foreigners are part of our society in numbers and varieties which Government can no longer define nor control upfront. Therefore, the new policy will be less concerned about the presence of foreigners and much more concerned about enforcing the restrictions on their activities but would shift administrative capacity and emphasis from the issuance of permits into the enforcement of the law in workplaces, educational institutions and other places in which foreigners may conduct activities which they are not authorised to conduct. (Lambinon & Oriani-Ambrosini 2002)

The DHA (2002) assessed that the international trend in immigration control was to allocate vast resources to processing and issuing permits rather than migration control. However, Home Affairs was cognisant of the domestic immigration climate immigration, with the sentiment of the White Paper having clearly spelt out a

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16   See Joint WTO–World Bank Symposium on the movement of natural persons (Mode 4) under the GATTS presentation by Ivan Lambinon, Deputy Director General, Mario GR Oriani-Ambrosini, Ministerial Advisor, Department of Home Affairs of the Republic of South Africa, 'Mode 4 Trade – The Regulators' View', Geneva: 12 April 2002

preference for immigration control and enforcement measures over a more liberal stance on migration. In this ethos of law enforcement, the then Minister of Home Affairs, Mangosuthu Buthelezi, asserted that 'the Bill intended to open the front door to beneficial immigration to South Africa and close the back door to illegal immigration' (Lambinon & Oriani-Ambrosini 2002).

Submissions and comments on the 2001 Immigration Bill were made in April 2002 by organisations such as COSATU, NACTU[17] and FEDUSA[18] (who made a joint submission), the IDASA[19]/SAMP project, the Centre for Development and Enterprise,[20] (CDE) the Africa Institute of South Africa[21] (AISA), the Institute for Security Studies[22] (ISS), South African Police Service (SAPS) and the UNHCR, amongst others. All the organisations recognised the need for a new migration legislation that reflected the democratic principles of South Africa's new democratic regime. However, civil society expressed reservations about the extent to which the Bill upheld the principles enshrined in the Bill of Rights with respect to migrants and refugees.

IDASA/SAMP's view was that the Bill essentially promoted an immigration policy geared towards controlling, apprehending and deporting undocumented migrants. The COSATU, NACTU and FEDUSA joint submission represented the views of labour, which stressed dissatisfaction with the continued use of the system of compulsory deferred pay. Their submission emphasised the need to have a migration policy that was sensitive to the regional orientations of migration in southern Africa, especially the historical aspects of migration policy that had previously been used to control and recruit a cheap labour force. CDE submitted that the prevailing logic to restrict immigration as a strategy for limiting competition for jobs was flawed. The CDE cited international examples such as Australia to emphasise the positive correlation between economic growth development and skilled migration. The CDE posited that the so-called unemployment problem was, in fact, a 'skills' problem. Again, as with the submission of BSA in the White Paper, the CDE seemed to favour a liberal approach of skilled migrants whose input was seen as important for development and progress. This issue of skilled migrants is pertinent in South African migration

> the then Minister of Home Affairs, Mangosuthu Buthelezi, asserted that 'the Bill intended to open the front door to beneficial immigration to South Africa and close the back door to illegal immigration'

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17 'The National Council of Trade Unions is a result of a merger between the Council of Unions of South Africa (CUSA) and the Azanian Confederate of Trade Unions (AZACTU) that took place on the 5th of October 1986 in Broederstroom. It is a council of trade unions committed to unity based on working class principles'. (www.nactu.org.za)

18 'The Federation of Unions of South Africa (FEDUSA) is a trade union that represents workers in aviation, health, catering, automobile industry, hospitality, municipalities, education, medical services and banking. The FEDUSA Parliamentary Office comments on social justice and civil and workplace rights'. (http://fedusawrites.tumblr.com)

19 The Institute for Democracy in Africa (Idasa) was a democratisation and rights organisation whose mandate was to monitor the quality of democracy and hold decision-makers accountable. It closed down in 2013 due to lack of funding.

20 'The Centre for Development and Enterprise (CDE) is an independent policy research and advocacy organisation. It is one of South Africa's leading development think tanks, focusing on critical national development issues and their relationship to inclusive economic growth and democratic consolidation. By examining South African and international experience, CDE formulates practical policy proposals outlining ways in which South Africa can tackle major social and economic challenges. CDE has a special focus on the role of business and markets in development.' (http://www.cde.org.za/what-we-do1/)

21 'The Africa Institute of South Africa (AISA) was first established in 1960 as a non-profit organisation'. (http://www.ai.org.za/)

22 'The Institute for Security Studies is an African organisation which aims to enhance human security on the continent. It does independent and authoritative research, provides expert policy advice, and delivers practical training and technical assistance. [The goal of the ISS] is to advance human security in Africa through evidence-based policy advice, technical support and capacity building.' (https://www.issafrica.org/about-us/how-we-work)

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This issue of skilled migrants is pertinent in South African migration policy as there seems to be a disjuncture between the state and various actors' adherence to a neo-liberal logic that favours the movement of skills and capital

policy as there seems to be a disjuncture between the state and various actors' adherence to a neo-liberal logic that favours the movement of skills and capital versus the reality of a history of unskilled labour movement in southern Africa. In light of this logic, COSATU, NACTU and FEDUSA highlighted their concerns about the unsubstantiated evaluation and bias for skilled over unskilled migration in South Africa. This is in light of the pervasive assumption, in both the White Paper and 2001 Immigration Bill, that only skilled migrants add value.

The bias of migration policy that overtly favours skilled immigrants and capital informed AISA assessment that the Bill discriminated against Africans, favouring wealthier westerners instead, for example. Their view was that priority was given to people with capital to invest at the expense of the poor from developing countries. The orientations of the Bill in terms of access to South Africa for foreign migrants were deemed discriminatory as they essentially premised access based on wealth. The Institute was in favour of an open-door policy to migration. AISA also made a correlation between migration policy and South Africa's role on the African continent. The thinking behind this was that underdevelopment and poverty in other African countries pulled people towards South Africa, and thus the more South Africa engaged in developmental issues and projects on the continent, the less people became compelled to migrate to South Africa.

The ISS also weighed in on South Africa's positioning as a prime destination for African migrants, warning that only improved management of immigration policy and practice would help to regulate migration to South Africa and not a policy based on exclusion, which the ISS argued was too expensive. The ISS proposed that better management of migration would result in improved knowledge about the profiles of migrants coming to South Africa and knowledge that most undocumented migrants were not involved in serious crimes.

SAPS submitted that the Bill did not clearly spell out the role of the SAPS in immigration control and policing, and further emphasised that 'the Bill should clearly state that the powers of the Department of Home Affairs will only relate to the enforcement of this Bill and will not impact on the powers and functions of SAPS'. However, it seems that SAPS has become the principal enforcement agency of migration policy, especially as it relates to control and policing. In this regard, it is worth noting that over the years, most raids and 'control' or 'search-and-seisure' operations on migrants, including 2015's Operation Fiela, were conducted by the SAPS, which begs the question as to whether there is not a prevalent association between migrants and crime by the SAPS.

Relevant themes for discussion

An assessment of the various submissions on the 2001 Immigration Bill reveals several cross-cutting themes amongst civil society, suggesting common issues and concerns. These are discussed below.

Skilled and unskilled migration

The development of post-apartheid South Africa's migration policy is grounded on the need to encourage economic growth and employment as reflected by the drive to attract professional skills to the country. The White Paper, Immigration Bill and the 2002 Immigration Act all promote the idea that only skilled migrants add value to

South Africa.[23] According to this perspective, South Africa's economic development requires a boost via an injection of foreign skills. However, only skilled migration is seen as economically beneficial to South Africa, with unskilled migration posited not only as a burden on the country's social services and economic resources, but also as consisting of seemingly never-ending 'waves' and 'floods' of people arriving in South Africa. Inevitably, 'the socio-economic burden of this apparent influx of non-citizens has created a political panic' (Algotsson & Van Garderen 2001: 2). Migration policy-making has not escaped from this myth and the official figures of undocumented migrants used by the DHA in recent years have been questionable. For example, Tati (2008: 5) points out that 'around the end of the 1990s, an estimated figure came from the Human Science[s] Research Council[24] (HSRC) putting the number between 2.5 and 4 million, with an upper limit of 12 million. This turned out to be an unrealistic figure, although the report was widely quoted and used by Home Affairs'. Nevertheless, an African Centre for Migration & Society[25] (ACMS) report (2015) notes that 4.4% of the South African population was born outside South Africa. The report also notes that migration trends have been largely domestic, but this has been ignored in policy planning and public concern has neglected these trends. The report stated that 44% of Gauteng's population was born in a different province, with the number being 28.1% in the Western Cape province.

Migration control

LHR (2001) suggested that an emphasis on migration control was prevalent in the Bill Paper. The DHA sought to create 'a climate of cooperation with other organs of the state […] to encourage them to take responsibility in the implementation of the Bill and further create a climate of cooperation with community organs of civil society […] to encourage them to cooperate with the Department' (Ibid.). These intentions, LHR argued, reflected a vision of cooperative control between the DHA and communities in policing undocumented migrants and in making South Africa a hostile place for them. A vision of cooperative governance and control of foreigners between the state and local communities has arguably created fertile conditions for the xenophobic attitudes that are prevalent in communities, as evidenced by the outbreaks in 2008 and 2015.

In this line of thinking, we note that the former Director General of Home Affairs was quoted as follows:

> *Approximately 90% of foreign persons, who are in RSA with fraudulent documents, i.e. either citizenship or migrant documents, are involved in other crimes as well … it is quicker to charge these criminals for their false documentation and then deport them than to pursue the long route in respect of other crimes committed.* (Billy Masethla cited in Crush & Peberdy n.d.: 1)

Migration policy-making has not escaped from this myth and the official figures of undocumented migrants used by the DHA in recent years have been questionable

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23   Chapter 4, paragraph 3 of the 1999 White Paper proposes that 'the people who can add value to our growth and development are those who invest, are entrepreneurs and promote trade, those who bring new knowledge and experience to our society, and those who have the skills and expertise required to do the things we cannot properly do at this stage'.

24   'The Human Science[s] Research Council (HSRC) was established in 1968 as South Africa's statutory research agency' (http://www.hsrc.ac.za/en)

25   'African Centre for Migration & Society' (ACMS) is one of the leading scholarly institution for research and teaching on human mobility. (https://www.wits.ac.za/acms/)

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In this context, the existence of an affordable transport system servicing regional migration routes as well as brokers, dealers, corrupt practices and porous borders within an inter-connected regional migration framework made deportations a temporary solution at best

In light of this attitude, LHR explained that strategies of immigration control based on employer sanctions and intensive efforts to 'track and expel' undocumented persons have failed elsewhere, with the United States abandoning them. LHR has long warned that 'the migration policy itself can potentially contribute to xenophobia as much as the government's enforcement of it' (LHR 2001).

Mangosuthu Buthelezi, the leader of IFP who, under the terms of the Government of National Unity, controlled the Ministry of Home Affairs until 2004, placed a strong emphasis on the idea of community enforcement. He framed this approach in the following way:

> It is not the presence of foreigners per se which will ever form the object of investigation and law enforcement by migration. The future of law enforcement places the focus of enforcement elsewhere. The activities of foreigners are monitored where it counts, namely in workplaces, learning institutions and at the interface between government and its citizenry. (Parliamentary Monitoring Group 2002)

This has led to the proposition that there is state-based discourse and involvement in xenophobia (Neocosmos 2010). The argument is that the state itself created conditions and policies that are xenophobic towards foreigners; thus, for civil society, instead of focusing only on communities when xenophobic outbreaks occur, there is also a need to interrogate the role of the state in fostering a culture of xenophobia in South Africa. Within the broader framework of migration control came the specific turn towards 'internal control' of undocumented migrants, and other interventions – such as massive deportations – as discussed below.

Migration policy and regional obligations

The SAHRC pointed out that 'the immediate post-apartheid migration policy regimes' formulation, skewed in favour of skilled migrants, does not take into consideration Southern Africa's past comprising of a region-wide migration system that was being pulled towards South Africa as cheap labour for South Africa's industrialisation' (SAHRC 2002). They further argued that the proposed solution to criminalise 'unskilled' migrants was disastrous. After being deported, in fact, migrants would have found ways and means to come back to South Africa at the next available opportunity, undermining the whole deportation system. In this context, the existence of an affordable transport system servicing regional migration routes as well as brokers, dealers, corrupt practices and porous borders within an inter-connected regional migration framework made deportations a temporary solution at best.

BSA and COSATU shared the same sentiments about the need to consider migration policy through regional lenses, emphasising that the drafting of migration policy ought to involve other states in the region and be formulated as part of a regional outlook fostering regional development. In this framework, it is short-sighted for South Africa to draft a migration policy that is inward-looking in a region that is characterised by various long-standing trends of regional migration – more so, trends that are historically set towards South Africa as their destination. Migration within southern Africa has historically been embedded to interlink the stability, in economic, social and political terms, of neighbouring countries such as Lesotho with work provided in South Africa. This means that migration policy ought to be

crafted in a framework that seeks to promote regional socio-economic development in order to address some of the root causes that trigger undocumented migration to South Africa.

To highlight the complexity of the regional dimension of migration, COSATU (2000) noted in the White Paper that 'there has to be recognition of how the majority of so-called illegal migrants were the products of destabilisation by the apartheid system'.[26] Further, Martinello (2011: 18), in his research on migrant labour in southern Africa, concluded that:

> [a]gencies of recruitment of [the] labour force[27] [...] operated in position of monopsony, on behalf of the interests of the mine owners, [… and] were forwarded by bilateral political, [and] economic agreements between the dominant South African economy and other satellites states in order to create an even more organic and integrated economic and political framework that could sustain the process of accumulation of capital. This shows the structural and long term relation that linked the capitalist mode of production and migrant labour in the region and at the same time has proved the fact that the South African connection integrated on an unequal base different countries and different social formations within the regional division of the labour, compelling the satellites to 'specialize' themselves in the selling of their labour force.

All this suggested the need for regional sensitivity in the development of migration policy, a sensitivity that still rings true in contemporary processes of crafting migration policy and legislation. BSA also emphasised the existence of bilateral labour agreements and practices with neighbouring countries such as Lesotho, which ensured that Basotho miners were legal migrants whose stay in South Africa could be regularised as long as there was work for them to conduct. The confluence of labour migration and bilateral agreements in southern Africa has a long tradition. For example, Kowet (1978: 93) laid bare that:

> [t]he activities of the WNLA[28] were initially limited to Mozambique under the Miler agreement which specified the following terms of exchange of labour. In return for the grant to the gold-mining companies of the right to recruit African labourers in Mozambique, the railway freight rates between Lourenco Marques (Maputo since 1975) and Johannesburg... and the customs duties on goods entering the Transvaal from the British colonial ports [would be lowered].

The Miler agreement, which allowed South African mining companies to recruit migrant labour in Mozambique in return for lower freight and customs levies (to

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26 For example, 'the migrant labour system in the mines was based on a "permanent temporary status" for mine workers which itself has created a problem of illegality […] COSATU made a call for amnesty and the granting of permanent resident status to such miners'. See COSATU (2000) Submission to the Home Affairs Portfolio Committee on the White Paper on International Migration. Available at http://www.queensu.ca/samp/Comments/Cosatu.htm

27 These included the Witwatersrand Native Labour Association (WNLA/WENELA), the Native Recruiting Agency (NRC) and the Rhodesia Native Labour Association (RNLA), amongst others.

28 See note 29.

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Mozambique), speaks to the deep entrenchment of the economic and political interests of the business and colonial sectors of various colonial states that fuelled labour migration based on win–win agreements such as the one above.

Given the regional migration context highlighted above, the SAHRC and COSATU both called for coordination between South Africa and the SADC in drafting migration policy, as South Africa's migration policy needed to take into consideration the complexity of the regional dimension of migration.

Xenophobia and myths

Section 29(2)(e) of the 2001 Immigration Bill states that 'the Department of Home Affairs shall educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees, and conduct other activities to prevent xenophobia' (see Box 3). However, no concrete steps or processes were mentioned in pursuit of this endeavour, leading to the conclusion that the 2001 Immigration Bill failed to address the issue of xenophobia and how this interacts with migration policy, in any meaningful way.

The SAHRC (2002) highlighted that the history of migration policy in South Africa was deeply steeped in racism.[29] COSATU (2002) stressed that it was important to engage with facts and lay bare the myths that surround migration in South Africa, myths relating to the numbers of undocumented migrants in South Africa and their impact on social services. Such myths resulted in citizens' resentment towards foreigners; this was also fuelled by the media, which – over the years – has portrayed migrants not as individuals whose hard-working attitude, skills and entrepreneurship can benefit South Africa, but as 'masses', 'floods', 'hordes' and other similar terms with negative connotations. The SAHRC's view was that all myths about migration were originated by a lack of understanding on the determinant of international migration.

BOX 3

XENOPHOBIA

In 2008, xenophobic attacks broke out across South Africa for several weeks as 'community policing and enforcement' took a turn for the worse. By the time the violence subsided, 62 people had been killed, 670 had been injured, unknown amounts of property and possessions had been destroyed or looted, and more than 150 000 people had been displaced from their homes across the country (Segatti & Landau 2011: 10). The latest wave of xenophobic attacks against foreign nationals started in the province of KwaZulu-Natal in 2015. The 2015 xenophobic attacks began reportedly after Zulu King Goodwill Zwelithini made comments calling for foreigners to return to their countries. Although the king denied responsibility, claiming he was misquoted, the violence spread from KwaZulu-Natal to Gauteng. Post-apartheid South Africa, according to some commentators, 'has developed an aggressive and chauvinistic nationalism which excludes foreigners'.[30]

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29   According to Friedman (n.d.), 'it is necessary to recall that the Aliens Control Act, which made residence in South Africa a gift bestowed by the authorities, was originally a racial law, since it stipulated that those granted permanent residence or citizenship must be readily assimilable by the white inhabitants. See Friedman, S. *Migration Policy, Human Rights and the Constitution*. Centre for Policy Studies. Available at http://www.queensu.ca/samp/transform/Fried.htm

30   Athalie Crawford, 'Counting the cost of our descent: Xenophobia in South Africa today', in *New Routes* 1/2010. Available at http://www.xenophobia.org.za

In 1999, LHR proposed a solution to xenophobia, calling for a multi-team approach and involving the DHA, other government departments and civil society to strategise about holistic approaches to combatting xenophobia. For example, the SAHRC had initiated an advocacy programme called 'Roll Back Xenophobia' in 1998 in order to respond to the issue of xenophobia. However, this commendable initiative did not see the participation of government, media, communities and other civil society actors. It seemed, also, that without a multi-party discussion and strategy on xenophobia, the state remained unaware of its culpability in fuelling xenophobia indirectly through its policies. To expand on this point of the state's institutions and their role in promoting xenophobia, Section 29(2)(c) of the Bill states that 'the Department of Home Affairs shall liaise with the SAPS to educate and instruct law-enforcement agencies to detect illegal foreigners'. Consequently, it is noted that the South African Local Government Association[31] (SALGA) argued to be part of this policing process. In their submission to Parliament (2002) they proposed that, due to the fact that municipalities are law-enforcement agencies, the DHA should also have liaised with them with regard to policing matters. The proposal to rope municipalities in to 'police' migrants instead of suggesting measures to integrate them into their constituencies exacerbated the discourse about state's responsibility for fuelling xenophobia.

On the other hand, changes from border controls to inland policing measures arguably also contributed towards creating anti-foreigner sentiments. As noted by Peberdy (2010: 11):

> [u]sing skills developed in the apartheid years black Africans from the rest of the continent are subject to stop and search operations run by the South African Police Services (SAPS) sometimes in conjunction with the army. These are sometimes anti-crime operations but at others they take place to specifically locate undocumented migrants and have been given names like 'Operation Passport.' Irregular migrants are identified by a range of superficial physical features such as: skin-colour (Africans from further north are held to be darker than South Africans); TB vaccination marks (many other African countries vaccinate children on their forearm whereas South Africans are usually vaccinated on their upper arm); by traditional scarification marks; and by accent, language ability and dress.

In light of this, the SAHRC suggested alternatives for dealing with the issue of xenophobia. The SAHRC pointed at the European experience as a potentially positive case study from which South Africa could learn. In this vein, the SAHRC suggested that South African policy-makers look at the European Commission against Racism and Intolerance (ECRI), a body of the Council of Europe that was set up by the Summit of Heads of State and Government of the member States of the Council of Europe held in Vienna in October 1993. The Commission forms an integral part of the Council of Europe's action to combat racism, xenophobia, anti-semitism and intolerance. It was highlighted that the ECRI had built best practices and policies on how segregation related to racism, xenophobia, anti-semitism and intolerance.[32]

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31 The South African Local Government Association (SALGA) is an autonomous association of municipalities that derives its mandate from the Constitution of the Republic of South Africa. This mandate defines SALGA as the voice and sole representative of local government. SALGA interfaces with Parliament, the National Council of Provinces (NCOP), Cabinet as well as provincial legislatures. See http://www.salga.org.za/

32 The full policy proposals suggested by ECRI are available at http://ecri.coe.int/en/02/02/03/e02020301.htm

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Paradigm shift towards internal control of undocumented migration

This policy relates to Vigneswaran's (2008a) contention that governments have sought to reduce and deter undocumented migration through 'internal' controls by excluding undocumented migrants from government services and by moving their detection away from the border, deeper within national jurisdictions. Thus, in the South African context, between 1998 and 2004, the Department of Home Affairs attempted to implement an internal control policy. The core tenet of this approach was to shift 'administrative and policy emphasis from border control to community and workplace inspection' (South African Government 1999).

A rationale of deterrence underpinned this new approach. Instead of interventions towards the integration of migrants from a human rights prescription, the South African approach[33] 'was to transform the host environment into a place where undocumented migrants would feel unwelcome, and thereby be encouraged to return home, or better yet, to not come at all' (DHA 1999, quoted in Vigneswaran 2008b: 784). To implement this approach, the DHA has regularly coordinated with the SAPS to launch various operations, such as Operation Crackdown, geared towards the deportation of migrants. Table 1 shows deportation trends and volumes, from South Africa, between 1994 and 2005.

Table 1 South African repatriation/deportation of undocumented migrants

Repatriations/ removals	Mozambique	Zimbabwe	Lesotho	Total*
1994	71 279	2 931	4 073	90 692
1995	131 689	17 549	4 087	157 084
1996	157 425	14 651	3 344	180 713
1997	146 285	21 673	4 077	176 351
1998	141 506	28 548	4 900	181 286
1999	123 961	42 769	6 003	183 861
2000	84738	45 922	5 871	145 575
2001	94 404	47 697	5 977	156 123
2002	83 695	38 118	5 278	151 653
2003	82 067	55 753	7 447	164 294
2004				167 137
2005				209 988

This figure includes countries other than Mozambique, Zimbabwe and Lesotho
Source: Department of Home Affairs Annual Reports

For some, as Vigneswaren (2008a: 7) noted, 'this shift towards internal measures of control, constitutes evidence of states' continued capacity to limit unwanted migration whilst others are more sceptical of the state's ability to change its enforcement policies

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33   The operation lasted for one week in 2000. It involved a daily average deployment of 68 police and five army officers, and 8 884 police and 240 army personnel transported in 258 vehicles in operations comprising raids and roadblocks. This figure includes countries other than Mozambique, Zimbabwe and Lesotho.

pointing to the difficulty of compelling other government agencies and officials to enforce immigration laws'. In the latter category, COSATU (2002) raised concerns over the workability of these proposed control mechanisms in terms of implementation. This feeds into Lahav and Guiraudon's (2006: 4) assertion that implementation is 'an oft missing variable in the public policy literature, especially with respect to immigration control'. Implementation problems were cited not only in relation to the daily interactions between the DHA and its 'clients', but also in co-ordination efforts between the Department, the SAPS and the 'community' at large, for example. In this context, the South African History Archive[34] (SAHA) (quoted in Vigneswaran 2008b: 787) thus questioned whether highly publicised police raids could, for example, be meaningfully regarded as evidence of the success of community enforcement.

On the other hand, it was feared that plans to mobilise the community to work in cahoots with the state in flushing out undocumented migrants would have fuelled xenophobia. Human Rights Watch (HRW)[35] (1999) warned that the emphasis on community-based enforcement would, in practice, leave too much room for abuses and vigilante acts to be committed against foreigners. The incidences of foreign-owned shops being looted during xenophobic attacks attest to this. HRW further emphasised that current experience indicated that 'many individuals will be targeted for police or public harassment on the basis of skin colour, language or accent, and that South Africans as well as foreigners will be the victim of such stereotypes' (1999). To expand on this, Neocosmos (2010: vi) uses the term *native foreigners* to refer to the black South Africans in our 'new' South Africa who, because they conform to the stereotypes that the police and home affairs officials have of 'illegal foreigners' today (their skin may be 'too dark', for example), are arrested along with the more genuine foreigners. This speaks to the stereotyping prevalent within the whole immigration control and enforcement mentality, which projects itself, in practice, on blacks more than on whites. Thus, although the policy may have passed the constitutional conformity test, in practice it is implemented in a manner that is racist, resembling the character of the apartheid state. The SAHRC (2002) rightly stressed that:

> [b]ecause of the nature of xenophobia in South Africa, as practised by both citizens and authorities, the largest number of people falling foul of this enforcement policy will be black Africans. In particular, people who are darker skinned will more often be accused of being illegal migrants and therefore subject to institutionalised harassment. To enact legislation which institutionalises this policy will fall foul of the Constitution.[36]

34 'The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting, supporting and promoting greater awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.' (http://www.saha.org.za/about_saha.htm)

35 'Human Rights Watch is a non-profit, nongovernmental human rights organization. [...] Human Rights Watch defends the rights of people worldwide by investigating abuses, exposing the facts widely, and pressurising those with power to respect rights and secure justice. Human Rights Watch [...] works as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all.' (https://www.hrw.org/africa/south-africa)

36 For example, Section 9(3) of the Constitution stipulates that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

'this shift towards internal measures of control, constitutes evidence of states' continued capacity to limit unwanted migration whilst others are more sceptical of the state's ability to change its enforcement policies pointing to the difficulty of compelling other government agencies and officials to enforce immigration laws'

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Thus, in evaluating internal enforcement mechanisms against undocumented migrants, (Vigneswaran 2008b: 796) highlighted that:

> [e]nforcement activities were routinely driven by the other actors' ongoing performance of immigration enforcement functions. As mentioned above, during the Apartheid era, the police were primarily responsible for enforcing both immigration and influx controls on South African streets. In some respects, checking passes and regulating movement was the core of SAPS' responsibilities, for which they regularly drew in support from the Army, […] and other security agencies. These practices have continued in the present and have come to dominate the manner in which South African immigration laws are enforced, even though the principal objectives of the police have shifted from racial domination and segregation to crime-fighting. SAPS have been the primary driver of immigration enforcement practices generally, and internal enforcement in particular. SAPS have had the capacity to determine when and where community enforcement occurred.

This logic of linking undocumented migrants and crime goes a long way to explain the high number of deportations from South Africa

This logic of linking undocumented migrants and crime goes a long way to explain the high number of deportations from South Africa. Those deported are mainly unskilled migrants who are a weak constituency as, on one hand, official immigration policy thinking is biased towards skilled immigration and, on the other, law enforcement agencies link them to criminal activities. The 'weak' position of this constituency explains why various human rights abuses, beatings, extortion and, sometimes, illegal deportations are commonplace practices without any major repercussions to perpetrators. Furthermore, it is said that Metropolitan governments have also found it useful to link immigration policing with their efforts to tackle informal housing such as shacks and other by-law infringements (Mboyane 2002; Somniso 2000). This has weakened the position of undocumented migrants further.

The 2004 Immigration Amendment Act

According to the Catholic Parliamentary Liaison Office[37] (CPLO) (2005: 1), 'the Immigration Act of 2002 is a prime example of a law that needs detailed and well thought out regulations in order to be usefully implemented, as well as rigorous monitoring and evaluation to make sure that it is achieving its objectives'. The political tugging between the IFP and the ANC, and their different views of immigration policy, meant that when the ANC finally took control of the DHA, amendments to immigration policy were high on the agenda. As noted by Segatti and Landau (2011: 45), the 2002 Immigration Act 'was amended at Thabo Mbeki's request'. This process commenced with the 2004 Immigration Amendment Bill, which received various submissions and comments from civil society before the 2004 Immigration Amendment Act was signed in October 2004.

IBN Consulting (2005) noted that, since April 2004, the DHA has been led by the ANC in the person of Minister Mapisa-Nqakula. They further commented that 'this significant political change clearly affected immigration politics, as some directions of the Buthelezi-Ministry were revised opening up for more transparency and less

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37   'The Catholic Parliamentary Liaison Office (CPLO) is the official vehicle for contact and dialogue between the Catholic Church in South Africa on the one hand, and the country's Parliament and government on the other'. (http://www.cplo.org.za/)

discretion within the authority' (Ibid.). These changes were reflected in the fact that on 26 August 2004, Malusi Gigaba, the Deputy Minister of Home Affairs, introduced the 2004 Immigration Amendment Bill in the National Council of Provinces. Mr Gigaba remarked that government shared the view of the Chief State Law Advisor that urgent amendments were necessary to correct fundamental flaws in the principal Act. According to Gigaba, quoted in CPLO (2005: 2):

> [w]hat was needed was an immigration policy that facilitated economic development, attracted foreign skills and investment, and reflected South Africa's commitment to human rights and the security of citizens and residents. In addition, immigration policy should be consistent with foreign policy objectives, particularly with regard to SADC and the continent. The Amendment Bill, with the regulations, was a short-term intervention, and the government would continue to develop and refine its immigration policies in the medium-term.

However, according to Segatti (2011: 45), the 2004 Immigration Amendment Bill simply reflected the three options that the ANC had chosen in 2002. These were, firstly (Segatti 2001: 45):

> [m]inimal Constitutional conformity – that is, alignment with Constitutional rights, such as spouses' rights including the rights of homosexual couples. The second is the pursuit of a dual system of limited permanent highly skilled immigration and temporary lower-skilled migration, mainly through corporate permits. The third is the retention of power mainly through government services and the concentration of power in the Department of Home Affairs […].

Submissions on the 2004 Immigration Amendment Bill

Submissions from civil society groups on the 2004 Immigration Amendment Bill provided inputs in the drafting of the 2004 Immigration Amendment Act. The ANC, now in control of the DHA, focused on amending the immigration policy to reflect its own philosophy on migration, which was not always in line with civil society's views. In this regard, Section 7(1) of the 2002 Immigration Act made provisions for public participation in the process of making various Regulations. According to the Immigration Act of 2002, Section 7(1)(b):

> [t]he Minister shall have the power to make regulations called for, or conducive to, the implementation of this Act and in making regulations in terms of this Act, the Minister shall (b) having considered public comments received, publish and table in Parliament draft regulations soliciting further comments during a period not shorter than 21 calendar days […]

Section 7(4) further stated that 'Regulations shall be consistent with this Act, and shall not disregard the advice of the Board and public comments in an arbitrary or capricious manner'.

However, the 2004 Amendment Bill deleted Section 7 and substituted it with Section 8, which scrapped public participation of civil society and vested in the Minister the power to make Regulations relating to numerous issues, including:

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*the steps to be taken to prevent the entry of illegal foreigners into the
Republic and to facilitate the tracing and identification of illegal foreigners
in, and their removal from, the Republic; [...] the times and places of, and
the manner of conducting, an enquiry relating to, or the examination of,
persons entering or desiring to enter the Republic or who, having been
found in the Republic, are suspected of being prohibited persons or
unlawfully resident therein [...] the permits and the certificates which may
be issued under this Act, the requirements for the issuing of permits and
certificates and the conditions to which such permits or certificates may be
subjected, and the circumstances under which such permits or certificates
may be cancelled or withdrawn.*

PricewaterhouseCoopers'[38] position (2004) was that the provisions of public
participation had strengthened the 2002 Immigration Act. They proposed that it was
not in South Africa's interests to alter Section 7 of the Act as this would represent
'an erosion of the democratic principles and fair administrative process within the
Immigration Act' (PricewaterhouseCoopers 2004). The Association of Immigration
Practitioners of South Africa (AIPSA),[39] (2004) as with the previous submission,
also weighed in on the issue of the erosion of public participation and consultation
in the process of regulation and policy-making. AIPSA opined that eliminating
public participation was problematic, especially given the history of South Africa's
immigration policy such as the Aliens Control Act, which was a top-down policy
that served the discriminatory and racist practices of the political principals back
then (Ibid.). As such, public participation can only be positive as it acts as a system
of checks and balances, limiting excesses. Another important aspect of public
participation is that it allows perspectives 'from below' – that is, perspectives from
those who stand to be impacted by policy.

On the same topic, BUSA[40] (2004) noted that the removal of public participation –
and, thus, the transparency of processes – would have left the DHA with unlimited,
unhindered power over migration matters such as permits, permanent residency and
declaration of undesirable persons, amongst others. However, BUSA's submission
was also concerned with the massive skills shortage that South Africa was experiencing.
Their position called for a freer flow of skilled immigrants to South Africa, highlighting
that international evidence and surveys pointed to the fact that migrants actually
increased employment opportunities in the local economy, leading to economic
growth and development.

COSATU and the National Union of Mineworkers[41] (NUM) (2006) cited their interests
as the need to ensure that the migration policy law should not be used as a tool

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38 PricewaterhouseCoopers is a network of firms involved in delivering quality in assurance, tax and
    advisory services (http://www.pwc.co.za/)

39 The Association of Immigration Practitioners of South Africa is the body that represents immigration
    practitioners in South Africa.

40 Business Unity South Africa 'BUSA aims to ensure that organised business plays a constructive
    role in ensuring an economic and socio-economic policy environment conducive to inclusive
    economic growth, development and economic transformation. It represents a unified voice of
    business, which serves to keep business interests at the heart of economic and socio-economic
    policy'. (http://busa.org.za/)

41 'The National Union of Mineworkers (NUM) was founded in 1982. Its birth was facilitated by
    comrades Cyril Ramaphosa who rose to be its first General Secretary, James Motlatsi who turned
    to be its first President, and Elijah Barayi who became its Vice President and later the President of
    Cosatu in 1985 when the federation was formed.' (http://num.org.za/About-Us/History)

and mechanism for exploiting migrant workers as cheap labour or for undermining general labour standards. Further, they submitted that the targeting of foreign skills ought to be implemented in a manner that did not compromise local skills development or cause instability in the labour market. More generally, they argued that there was a need to address broad transformative objectives initiated after 1994 and to recognise South Africa's role and responsibility as members of the SADC region and the African continent. They submitted that their experience of engaging with the previous immigration policy and legislative processes (including the 1999 White Paper on International Migration and the 2002 Immigration Act and its Regulations) had been an extremely frustrating one as a result of the obstructive stance of the DHA. In these previous processes, COSATU pointed out that civil society input and recommendations on migration policy were ignored, to a large extent. Their view was that the 2004 Immigration Amendment Bill constituted only an initial step towards developing a more appropriate migration policy and legislative framework than the one that was currently in place. The Law Society of the Northern Provinces[42] (LSNP) (2004) also supported the need for a complete overhaul and review of the current immigration legislation, stressing the need for an immigration policy based on sound research and accurate information regarding the overall role and impact of migration on the South African economy.

To understand the calls for a complete overhaul of immigration legislation, it is insightful to note the tenor with which the policy was crafted. Neocosmos (2010: 99) alerts us that:

> after [only] a few months in office, the minister of Home Affairs Mangosuthu Buthelezi announced in 1998 that 'if we as South Africans are going to compete for scarce resources with millions of aliens who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Programme'.

Consequently, the 'migrant control' mentality was so pervasive in immigration policy that the majority of stakeholders found fault with the Act as it did not adequately address their issues of concern. For example, the business sector and the Mbeki government hoped to use immigration policy to alleviate South Africa's skills shortage, but found the Act too restrictive. On the other hand, stakeholders concerned with human rights highlighted that the Act disregarded migrant rights and promoted xenophobia. Crush and Williams (2005: 23–24) expressed the opinion that 'the Immigration Act was developed in a policy vacuum by a Minister and his advisors who were not members of the governing party and whose ideas about immigration were not always consistent with government policy'. Given this context, the general outlook was for a complete review of immigration policy. However, this proved elusive, with the favoured approach being tweaking policy by way of amendments.

In these previous processes, COSATU pointed out that civil society input and recommendations on migration policy were ignored, to a large extent

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42   'The Law Society of the Northern Provinces (incorporated as the Law Society of the Transvaal), was established during 1892 and is the statutory body governing the attorneys profession in the four provinces constituting the former Transvaal province, i.e. the Gauteng, Mpumalanga, North West and Limpopo Provinces.' (http://www.northernlaw.co.za)

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The danger was
that the Immigration
Advisory Board was
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stamping board for
policies and decisions
aligned with the
interests of the
government

Relevant themes for discussion
The reduced role of civil society

The reduced role of civil society and public participation through the repeal of Section 7, and the drastic reduction of the formal consultative role of the Immigration Advisory Board expressed in Section 8 of the 2004 Immigration Amendment Bill, were common themes of concern amongst civil society groups. In this regard, it is worth noting that 'the South African Constitution makes provision for public involvement in law-making, oversight and other processes of Parliament. As such, issues of public participation in policy processes consequently reflect on the strength and quality of the participatory democratic processes in South Africa. In this sense, Penninx (2005: 35) remarked that:

> [t]he primacy of the policy makers is seriously conditioned because democracy is not just the application of formal majority rule; the quality of democracy can best be measured by the extent to which public debate is systematically used as an instrument to reach consensus or compromise among different interest groups.

This, arguably, becomes more pertinent in the migration policy framework where policies and Regulations impact on migrants as newcomers who are not only a minority but are also a weak political constituency. Decisions that impact on migrants' lives should, in the spirit of democracy, at least be made in the processes that make provisions for their participation or, at least, the participation of civil society as a representative of migrants' interests.

The Immigration Advisory Board

The amendment of Section 4 of the Immigration Act of 2002 by Section 5 of the Immigration Amendment Bill of 2004 highlighted that 'the Minister shall designate from the members of the Board a Chairperson and Deputy Chairperson of the Board' (Immigration Amendment Bill 2004, Section 5(b)). Members of the Board comprised, for example, at least a representative from the Departments of Defence, Education, Environmental Affairs and Tourism, Trade and Industry, Foreign Affairs, Justice and Constitutional Development, Labour, Safety and Security, National Treasury and representatives from the National Intelligence Coordinating Committee and the South African Revenue Service. Section 5(a)(vi) provided that the Minister could appoint 'up to five individual persons […] on the basis of their knowledge, experience and involvement pertaining to immigration law, control, adjudication or enforcement'. The only independent people on the Board were a representative of organised business and one from organised labour. Such a scenario essentially rendered the Board a government board. In light of this, BUSA (2004) noted that civil society had no chance of winning any resolution put to vote due to the overwhelming majority of government officials on the board. The danger was that the Immigration Advisory Board was likely to become, for all intents and purposes, a rubber-stamping board for policies and decisions aligned with the interests of the government. The fact that the Board was to be chosen by the Minister, without nominations, made this glaringly clear. BUSA rightly concluded that the board had 'no powers of significance (executive or otherwise) except for the ear of the minister if she/he wishes to tender it'.

As SAMP (2004) concluded, the effect of the 2004 Immigration Amendment Act was clearly to 'reduce the advisory role of civil society and human rights experts

on the Immigration Advisory Board'. In this light, the reduction of the number of civil society and human rights experts on the Immigration Advisory Board can be contrasted with the increase in the powers of the Minister in appointing the board's members and thus exercising control over the board.

The 2011 Immigration Amendment Act

After the signing of the 2007 Immigration Amendment Act (the second amendment to the 2002 Immigration Act), which dealt mainly with technical issues,[43] the 2011 Immigration Amendment Act introduced far-reaching changes to the existing norms, making access to the asylum system more difficult. Firstly, it sought to reduce the duration of the asylum transit permit,[44] commonly known as the Section 23 permit, which – based on the provision of the 2002 Immigration Act – was valid for 14 days. However, the Immigration Amendment Act Section 15[45] changed the validity of the asylum transit visa[46] to five days, and further provided for a preliminary procedure to be conducted at border posts to determine whether applicants satisfied the criteria to make an application for asylum. The Act also required applicants for temporary visas (i.e. work visas) to show up in person at the offices of the DHA, or at the South African Embassy in their respective countries, to submit a request for visas. Therefore, attorneys, advocates and immigration practitioners who used to lodge applications on behalf of their clients had their 'range of action' sensibly reduced.[47] Finally, the Act introduced harsher measures for those who had over-stayed in the country for a stipulated number of times by declaring them *undesirable persons*. The Act was promulgated on 22 May 2014 when the Immigration Amendment Act Regulations were published in the Government Gazette.

Submissions on the 2010 Immigration Amendment Bill

During the process of public consultation, numerous submissions were presented by civil society organisations and other stakeholders that raised concerns about a range of themes and proposed amendments seeking to: i) reduce the duration of the asylum transit visa and introduce 'pre-screening' process for asylum-seekers at borders; ii) repeal immigration practitioners; and iii) increase punitive measures for defaulting on immigration laws.

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43 An example of these technical changes was the extension of the duration of an *intra-company transfer work permit* from two to four years. According to the then Minister of Home Affairs, Minister Mapisa-Nqakula, this was done to accommodate a request from a number of multinational companies to increase the duration of permits from two to four years to facilitate the deployment of their staff. In the view of government, such measure was in line with the idea of pursuing a migration policy based on the recruitment of skilled migrants and capable of creating enough flexibility to attract foreign skills.

44 To apply for refugee status, asylum seekers, while at the border, need to express their intention to lodge an application for asylum. They are subsequently issued an asylum transit visa, which allows them to travel to the nearest Refugee Reception Office. These centres are located in Pretoria (Marabastad), Durban and Musina.

45 Section 15 of the 2011 Immigration Amendment Act amended Section 23 of the principal Act as follows: 'The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at the port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum'.

46 Following the provision contained in 2014 Immigration Regulations, all permits are now called visas with the exception of the Permanent Residence Permit.

47 The 2011 Immigration Amendment Act repealed Section 46 of the 2002 Immigration Act, which allowed 'immigration practitioners the trade of representing another person in the proceeding or procedure flowing from the Act'.

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Relevant themes for discussion
The asylum transit visa

LHR's submission on the 2010 Immigration Amendment Bill opposed the provision to reduce the duration of the asylum transit visa, pointing out that a shorter time would have led to fewer people being able to submit an application on time. They further commented that asylum-seekers faced enough obstacles to make it to the Refugee Reception Offices[48] within a 14-day period, and that the introduction of a five-day limit was likely to increase their vulnerability and the risk of arrest, deportation and corrupt practices.

The ACMS and the Consortium for Refugees and Migrants in South Africa's CoRMSA[49] (2011) reiterated the fact that limiting the period for asylum-seekers to report to the nearest Refugee Reception Office would have made it impossible for them to apply before their asylum transit visas expired. The UCT Refugee Rights Unit[50] (2011) further observed that the reduction of the amount of time for the validity of the asylum transit visa was extreme and unwarranted. Their submission emphasised that not all asylum-seekers enter the country through a port of entry near to a Refugee Reception Office. Furthermore, asylum-seekers who have been forced to flee their countries often lack the necessary resources, including money, for travelling. Robberies, beatings, extortions, sickness, and communication and information break-downs are just some of the difficulties that asylum-seekers may experience that could prevent them from reporting to a Refugee Reception Office within five days.

Given these considerations, this amendment increased the risk of *refoulement*[51] for asylum-seekers by limiting their access to the asylum system and by raising the prospect that once declared an illegal foreigner, an individual in need of international protection was unable to legalise his or her status and was, therefore, at the risk of deportation. Both international law and South Africa's domestic legislation state that no person shall be returned to a country in which they may face persecution or a threat to their lives or freedom; such a condition applies regardless of an individual's ability to obtain documentation. In the light of South Africa's history of discrimination and political persecution, as well as its re-entry into the international community with firm values of democracy and human rights enshrined in the Constitution, it is an unexpected turn in the country's moral values and codes to make asylum-seekers susceptible to *refoulement* to countries in which they could face persecution and threats to their lives because they could not report to a Refugee Reception Office in time. This represents a quantum leap and a disjuncture between the need to control

> it is an unexpected turn in the country's moral values and codes to make asylum-seekers susceptible to *refoulement* to countries in which they could face persecution and threats to their lives

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49   'The Consortium for Refugees and Migrants in South Africa (CoRMSA), formerly known as the National Consortium for Refugee Affairs, is a registered Non Profit Organisation whose main objectives are the promotion and protection of the rights of refugees, asylum seekers and migrants. It is comprised of a number of member organisations including legal practitioners, research units, and refugee and migrant communities.' (http://www.cormsa.org.za/)

50   'The Refugee Rights Unit was founded in 1998 as a Project within the UCT Law Clinic, aimed at providing legal support services to the growing number of refugees and asylum seekers in South Africa.' (http://www.refugeerights.uct.ac.za/)

51   According to the UNHCR, '[t]he principle of *non-refoulement* is the cornerstone of asylum and international refugee law. Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in the Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights. These rights are threatened when a refugee is returned to persecution of danger'. See http://www.refworld.org/docid/438c6d972.html

and regulate the asylum system on one hand, and excessive punitive measures for failing to adhere to the legislation despite valid and legitimate reasons on the other.

The 'pre-screening' process

The Bill introduced a sort of 'pre-screening' process at border posts to determine whether a person would meet certain criteria (which were not made explicit) to lodge an application for asylum. This provision was fiercely resisted by civil society groups during the consultation process as not only problematic but also unlawful. LHR (2010) noted that a 'pre-screening' process, presumably conducted by an immigration officer, contradicted the 1998 Refugee Act, which grants powers to a Refugee Status Determination Officer to establish whether asylum-seekers have a valid refugee claim. They further argued that the contested practice would also have discouraged asylum-seekers from entering the country through official border posts and encouraged them to favour 'border jumping' and irregular entries. This was seconded by the UCT Refugee Rights Unit (2011), which underlined that the determination of an asylum-seeker's claim must be conducted by a properly trained Refugee Status Determination Officer, who has the requisite knowledge of international and domestic refugee law and refugee status determination procedures. In their submission, they stated (Ibid.: 3) that 'it cannot be stressed enough that it is not the responsibility of an Immigration Official at a port of entry to conduct any sort of status determination that may prevent an asylum seeker from entering the country and duly lodging an application for asylum at one of the designated Refugee Reception Centres in the country'.

The potential for mistakes to be made at the border as to who does and does not qualify to apply for asylum may have massive consequences for peoples' lives, and should not be taken lightly, they further commented.

Repeal of immigration practitioners

The 2010 Immigration Amendment Bill sought to ban immigration practitioners. In this regard, the submission of the Forum of Immigration Practitioners of South Africa[52] (FIPSA) (2011) pointed out that the repeal of Clause 46 of the 2002 Immigration Act 'would have serious consequences, should the Bill be passed, as the applicant's right to representation in immigration matters, a right entrenched in the Constitution, would be removed and immigration practitioners would also lose their current recognition and right to do business in this field'. In the same vein, the Law Society of South Africa (LSSA) (2011) expressed concern that the repeal of Section 46 was legally contentious and would be opened up to legal challenges from immigration practitioners. The ACMS (2011) also opposed this amendment, saying that it would have created scope for illegal and fraudulent people to set up operations supposedly on behalf of, but in fact to the detriment of, vulnerable immigrants. In the ACMS's view, what was needed was better licensing and regulation of immigration practitioners, instead of their outright ban; moreover, they noted that immigration practitioners were a vital component of the recruitment process. They assisted skilled migrants, as it was unrealistic to expect high-level executives to spend hours queuing at government offices to apply for the permits they required (Ibid.).

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52   'FIPSA is a voluntary association that was established by a group of immigration practitioners after the dissolution of the Association of Immigration Practitioners of South Africa (AIPSA) and with the intention of joining forces to monitor and improve the industry's service standards and image in its dialogue with the Department of Home Affairs and other third parties, as well as in networking with and amongst each other.' (The LSSA represents the attorney profession in South Africa, which comprises attorneys and candidate attorneys. (http://www.lssa.org.za/)

The potential for mistakes to be made at the border as to who does and does not qualify to apply for asylum may have massive consequences for peoples' lives, and should not be taken lightly, they further commented

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CoRMSA stressed
that migration
policies geared
towards controlling
and stemming the
flow of refugees,
asylum-seekers and
economic migrants
to South Africa were
highly ineffective

Punitive measures for defaulting on immigration laws

The 2010 Immigration Amendment Bill sought, also, to increase punitive measures against people who defaulted on immigration laws. There was no adequate explanation for the increment and, in the absence of a comprehensive migration policy, the proposal was seen by civil society groups as unnecessary. CoRMSA (2011: 5) pointed out that 'the increased punitive nature of the proposed Immigration Amendment Act is problematic in that the system itself is often unable to properly process individuals, and thus many are exposed to criminalisation as a result of inefficiencies in the system. For example, asylum seekers are often arrested on their way home from a day of queuing unsuccessfully outside of a Refugee Reception Office'. In other words, the submission remarked that people also default because of administrative failures and thus a blanket application of punitive measures was not reasonable.

The People against Suffering, Oppression and Poverty[53] (PASSOP) (2010) likewise believed that these punitive measures were impractical to implement as they ignored the reality of a clogged legal system and overcrowded jails. Their view was that, even before any of the realities and consequences of the 2010 Immigration Amendment Bill would come into effect, the DHA had notable inefficiencies. Therefore, increasing penalties and punishments for various immigration offences would only have increased the workload of an already overburdened department. The UCT Refugee Rights Project (2011) submitted that the proposed dramatic increases in the penalties for contraventions of the Immigration Act, including those for overstaying, were too exigent, pointing out that some foreign nationals overstayed due to situations beyond their control, such as being hospitalised.

Peninsula Immigration's[54] submission (2010) was generally in support of the tightening of immigration rules in respect to foreign nationals on issues such as overstaying. Their view was that any migration policy should reflect the *national interest* of South Africa and its citizens. They further argued that South African citizenship status should not be accessible to non-nationals as South Africa was not their country of birth and therefore citizenship was not their birthright. In further support for stringent immigration policy, it was suggested that non-nationals should have a minimum of ten years' residency in South Africa before they could qualify for permanent residency. However, the organisation opposed the repeal of Section 46 of the 2002 Immigration Act, which made it mandatory for immigration practitioners to be the main people who assisted immigrants in attaining permits from the Department of Home Affairs (Peninsula Immigration Submission 2011). Such a provision was a direct threat to (presumably) a large part of their operations as well as those of other players in the immigration services industry, and could potentially cost jobs.

CoRMSA's submission (2011) pointed out the need for an overhaul and thus a complete, comprehensive policy on migration, rather than the preferred method of piecemeal amendments. CoRMSA stressed that migration policies geared towards controlling and stemming the flow of refugees, asylum-seekers and economic

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53   'PASSOP is a not-for-profit human rights organisation devoted to fighting for the rights of asylum-seekers, refugees and immigrants in South Africa.' (http://www.passop.co.za/)

54   'Peninsula Immigration is a service company registered and certified with the Department of Home Affairs specializing in South African Immigration with branches in the United Arab Emirates and South Africa. It assists individuals and corporate clients settle their trans-located employees and families into a new environment as efficiently as possible.' (http://www.southafrican-immigration.org/)

migrants to South Africa were highly ineffective. The reality, they pointed out, was that despite punitive, deterrent and control measures, refugees, asylum-seekers and economic migrants will always find 'back-door' strategies to enter South Africa. Instead, they offered a different perspective that correlated proper migration management with a positive impact on the South African economy in terms of job creation and investments (Ibid.).

LHR also raised concerns about the automatic determination that those who held expired asylum transit permits would be classified as 'illegal foreigners'. They pointed out that a brief study of migration in southern Africa revealed that such penalties would not decrease the number of migrants across South Africa's borders, but would rather force people to choose irregular migratory routes, thereby defeating the purposes of the Act of encouraging these persons to identify themselves at border posts.

Too much power vested in the Minister

Several submissions highlighted the issue of the Bill vesting too much power in the Minister and the Director-General. LSSA (2011) challenged the provision that made it necessary for a foreign national to have to apply for a change of status from outside the country as investing the Minister and the Director-General with too much power to 'legislate by regulation' on who qualified to apply for specific permits within the Republic. In this regard, Watters (2010) asks 'why would it require that in order to extend their current permits, the foreigner and his or her family have to pack their bags, return to their country of origin, apply for an extension back home maybe at an Embassy far from the foreigner's home, and await the outcome before returning to South Africa (if approved)?' The Minister's power to determine 'which kinds of business are deemed to be "in the national interest" for the purposes of granting business permits (Clause 11) and the economic sectors in which businesses will be permitted to apply for corporate permits (Clause 13(a))' (CDE 2011: 6) was also contested. The CDE requested the Portfolio Committee to send the Bill back for redrafting, as it was inadequate. According to the CDE, the Bill ought to have been cognisant of the need to attract skilled migrant workers to the country as opposed to being exclusionary. In their view, the proposed amendments to the Immigration Act in their current formulation were not capable of attracting and recruiting skilled migrants but would, in fact, act as a deterrent. The organisation submitted that the Bill should not restrict business permits to only those whose businesses were considered in the 'national interest'. Instead of leaving so much power in the hands of the Minister and the Director-General, the CDE proposed that Parliament become involved in the matter of pronouncing which businesses are in the 'national interest'.

In the light of South Africa's migration policy, the proposed amendments invested the Minister of Home Affairs with too much power to make decisions without sufficient oversight from Parliament. This raised questions regarding the principles of good governance, the need for checks and balances and the role of Parliament in oversight of the powers delegated to the persons of the Minister and the Director-General. The CDE (2011: 8) further stressed that 'by granting the Minister and Director-General such wide latitude, Parliament would be permitting not only the present officials but all officials who might be appointed in the future, the authority to make and shape migration policy'.

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A brief analysis
indicates that
Somalis constitute
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of the refugee
population (115 223)
in South Africa

PART 2
The refugee framework in South Africa

An important piece of post-apartheid migration legislation is the Refugee Act (No. 130 of 1998), which became active in 2000 following the publication of its Regulations. The 1998 Refugees Act was then amended[55] in 2008, 2011 and 2015.[56] In August 2015, a Draft Refugees Amendment Bill, introducing substantial changes to the asylum system, was released for comments.

Since 1994, South Africa has hosted increasingly large numbers of asylum-seekers and refugees, mainly from Africa, with contingents from the DRC, Somalia, Zimbabwe and Ethiopia (Makhena 2009). A brief analysis indicates that Somalis constitute 34.8% of the refugee population, followed by DRC nationals at 26.1% and Ethiopians at 16.3%. These three nationalities represent the bulk of the refugee population (115 223) in South Africa (DHA 2015a). Between 2008 and 2012, the volume of asylum applications was as high as 150 000 per year, while from 2005 to 2011, the country received the highest asylum applications globally, with a peak of over 200 000 in 2009 (UNHCR 2012).

The section below reports some of civil society's submissions on the amendments to the 1998 Refugee Act. Far from being an exhaustive summary, it highlights some of the most relevant themes of discussions as well as major points of concern.

The 2008 Refugees Amendment Act

According to the DHA (2008), the Refugees Amendment Bill of 2008, which later became the Refugees Amendment Act No. 33 of 2008, stemmed from the need to transform and streamline the refugee status determination process. The DHA argued, in fact, that the status determination process for individuals claiming asylum in South Africa remained a 'complex, tedious and contentious issue, both for asylum seekers and for the Department itself' (DHA 2008). Moreover, lengthy delays in the asylum procedure had created an enormous inconvenience for asylum-seekers, as their status remained uncertain for long periods and thus negatively impacted on their socio-economic livelihoods. It was further noted that, in recent years, South Africa had seen an ever-increasing number of asylum applications. In this regard, addressing Parliament during the second reading debate of the Refugees Amend-ment Bill in 2008, the Deputy Minister of Home Affairs remarked that 'most of these migrants enter the country irregularly and should they realise the need to regularise their status, then they seek asylum. This resulted in the clogging up of the asylum system, creating huge backlogs which had made it difficult to process genuine cases on time' (DHA 2008).

Government faced enormous challenges in managing a mixed flow of migrants, which included refugees as well as those who fall into the category of economic migrants and seek opportunities to conduct work and informal trading. The steady increase in the number of applications was seen by government as the result of

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55 These amendments have not entered into force. In 2014, a Draft Amendment Bill for the Regulations was published in the Government Gazette.

56 Section 21(5) of the Refugees Act, 1998 (as amended by Section 13 of Act 33 of 2008) was amended to correct a constitutional defect and to confer a discretion upon the Refugee Appeals Authority to allow any person, including the media, to attend or report on asylum-seekers' hearings.

a large volume of asylum claims lodged by alleged 'economic migrants' and illegitimate claimants without protection needs.

The Minister of Home Affairs at the time, Dr Nkosazana Dlamini-Zuma, is on record as stating that 'we would like to be firm and very strict with those who are abusing the asylum system, knowing very well they are not refugees' (DHA 2011) (see Figure 1).

FIGURE 1

'MAX' IS FROM THE HORN OF AFRICA OR ASIA AND IS SEEKING OPPORTUNITIES

Pays smuggling syndicate $$ and gets a visa and ticket to a neighbouring country

Jumps the border; gets picked up and taken to the safe house

NEIGHBOURING COUNTRY
Bribes paid on both sides of the border

Applies for asylum

Runs small shops, linked to illicit economy, syndicates

SECURITY ISSUE
- Could have false identity
- Uses weak processes and fraudulent documents of several departments
- Poor and uncoordinated data on the how, why, where and what of 'Max'
- Poor monitoring and enforcement by several departments and spheres of government
- Gaps exploited in policies, laws and processes of several departments

Asylum claim rejected

Fraudulent marriage

Residence permit — divorces/bring real wife

'Max' is a citizen of RSA

Source: Department of Home Affairs (n.d.)

This line of thinking reinforced a public and state discourse based on the distrust of *bogus asylum-seekers*,[57] a 'hostile and sometimes xenophobic narrative, reflecting old patterns of exclusion, which have increasingly focused on undocumented black African migrants and to a lesser extent refugees from the rest of Africa who are perceived as a threat' (Peberdy 2009: 138).

Given this context, the 2008 Refugees Amendment Bill intended to introduce, delete and amend certain definitions contained in the 1998 Refugees Act. Furthermore, it sought to establish a single Refugee Appeal Authority by dissolving the Standing Committee for Refugee Affairs (SCRA) and the Refugee Appeals Board (RAB)[58] with the reasoning that this would have provided for greater efficiency and flexibility. In light of this, the DHA argued that they had decided, by amending the 1998 Refugees Act, to rationalise the number of administrative and appeal entities currently stretching the bureaucracy involved in the status determination process.

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57 This term refers to 'unfounded asylum applicants'.

58 The Standing Committee for Refugee affairs (SCRA) is a body that is involved in the scrutiny and consideration for asylum status. It is meant to act as a safeguard so that there is consistency of decision-making by the Status Determination Officer who examines asylum-seeker cases in the first instance. The SCRA reviews decisions that the Refugee Appeal Board (RAB) refers to them. Asylum applications whose outcomes are abusive, fraudulent or manifestly unfounded are also sent by status determination officers for review to the SCRA. The SCRA thus has the power to review and reverse or withdraw the status of refugees based on a number of considerations.

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'There were in fact,
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his or her appointees'

The Bill also vested the Director-General of Home Affairs with the power to open Refugee Reception Offices (RROs), and appoint Refugee Status Determination Officers and other administrative staff without prior consultation with an independent body as it was the now dissolved Standing Committee for Refugee Affairs.[59] Finally, the Bill sought to amend Section 36 of the Act to allow the Director-General of Home Affairs the discretion to determine visa endorsements and conditions for asylum-seekers[60] (i.e. the right to work and study) as well as to withdraw a person's refugee status.[61]

Submissions on the 2008 Refugees Amendment Bill

The Legal Resources Centre[62] (LRC) noted that it was highly misleading to say that the Refugees Amendment Bill's main objective was to substitute various definitions. 'There were in fact, two substantive changes: the decrease in judicial oversight of the process and the increase in control by the Director-General and his or her appointees [which] was particularly disturbing in the light of the Ruyobeza case where the court was at pains to promote the independence of the Standing Committee'[63] (LRC 2008). LHR (2008) further commented that the Bill intended to confer the power to supervise and regulate the work of Refugee Reception Offices, which previously was the competence of the dissolved Standing Committee for Refugee Affairs, to the Director-General. Essentially, the proposed amendments reflected the position and stance of the government and the DHA, rather than the government and its Department towing the line of legislation and its binding principles. As such, the CPLO[64] (2008) pointed out that 'amending the Act in order to comply with the policies of a largely dysfunctional Department is problematic; surely it is Home Affairs that should be complying with the Act as the law of the land'.

The Bill's proposal to dissolve both the SCRA and the RAB, and to replace them with a Refugee Appeals Authority, was supported by UNHCR, which welcomed the introduction of a single entity to process refugee appeals. However, LHR opposed this move as an 'attempt by the Department of Home Affairs to increase its control over policies and conditions relating to asylum seeker permits and other refugee matters' (LHR 2008).

The AIDS Law Project (ALP)[65] and Treatment Action Campaign's (TAC)[66] 2008

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59   Clause 10 of the Bill, which amends Section 8 of the 1998 Refugees Act.

60   Clause 15(a) of the Bill, which amends Section 22 of the 1998 Refugees Act.

61   Clause 29 of the Bill, which substitutes Section 36 of the 1998 Refugees Act.

62   'The Legal Resources Centre (LRC) is South Africa's largest public-interest human rights law clinic'. (http://www.lrc.org.za/)

63   The Standing Committee on Refugee Affairs (SCRA) is a body that is involved in the scrutiny and consideration for asylum status. It is meant to act as a safeguard so that there is consistency of decision-making by the Refugee Reception Officers or Status Determination Officers who examine asylum-seeker cases first. The SCRA reviews decisions that the Refugee Appeal Board refers to them. Asylum applications whose outcomes are abusive, fraudulent or manifestly unfounded are also sent by refugee reception officers or status determination officers for review to the SCRA. The SCRA thus has the power to review and reverse or withdraw the status of refugees based on a number of considerations.

64   CPLO Briefing Paper 188.

65   The AIDS Law Project (ALP) is at Wits University Centre for Applied Legal Studies. It is an organisation that researches many of the difficult social, legal and human rights issues around AIDS. See www.hst.org.za

66   'The Treatment Action Campaign (TAC) was founded in December 1998 to campaign for access to AIDS treatment. It is widely acknowledged as one of the most important civil society organisations active on AIDS in the developing world.' (www.tac.org.za)

submission[67] strongly opposed the intention of the Bill to repeal Section 27(g) of the 1998 Refugees Act, which specifically provided for refugees to be 'entitled to the same basic health services and basic primary education which the inhabitants of the Republic', and to amend Section 27(b), stating that 'a refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution […]'. The Bill sought, in fact, to amend Section 27(b) to introduce a more restrictive definition so that it would read as: 'a refugee is entitled to full legal protection, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, 1996, (except those rights that apply only to citizens)'.

The 2008 Refugees Amendment Bill further introduced a section regulating specific 'rights and obligations' for asylum-seekers. In particular, Section 27A(d) stated that 'an asylum seeker is entitled to the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as those rights apply to an asylum seekers.'

Concerns were also raised due to the fact that the Bill was silent on the right, for both refugees and asylum-seekers, to take up employment, undertake self-employment and to study, as it only provided for them the right to 'seek employment' (LHR 2008).

The ALP and TAC's submission pointed out the inadequate health conditions of police holding cells and the lack of sanitation facilities of Refugee Reception Offices, issues about which the Bill was silent. The general lack of healthcare facilities and the poor hygiene of the conditions were, in fact, seen as a catalyst for the spread of diseases such as tuberculosis. Likewise, the South African National AIDS Council's[68] (SANAC) (2008) submission focused on health issues, pointing out that field research conducted in Johannesburg had revealed that refugees faced challenges in accessing antiretroviral drugs through the public health system. Such challenges included outright denial of services, and excessive fees charged to refugees and asylum-seekers combined with a lack of knowledge of refugees and asylum-seekers' health rights.

The Johannesburg Methodist Church's submission (Parliamentary Monitoring Group 2008) focused on the apparent disconnection between intention and delivery of services to asylum-seekers and refugees, especially in the light of South Africa's outstanding Constitution. They were concerned that refugees were often criminalised as a result of negative reporting in the media and the police's attitude of associating migrants and refugees with crime (Ibid.).

CoRMSA's (2008) position was that, while the 1998 Refugee Act provided a progressive legal framework for the protection of refugees, several challenges had arisen in its implementation. These included the unresolved issue of xenophobia

> the Bill was silent on the right, for both refugees and asylum-seekers, to take up employment, undertake self-employment and to study, as it only provided for them the right to 'seek employment'

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67   This submission was endorsed by many other organisations listed as follows: the AIDS and Rights Alliance of Southern Africa (ARASA), AIDS Consortium, Children's Rights Centre (CRC), Consortium on Refugees and Migrants in South Africa (CoRMSA) and the Forced Migration Studies Programme (FMSP) (Wits), Lawyers for Human Rights (LHR), the Legal Resources Centre (LRC), People Against Suffering, Oppression and Poverty (PASSOP), the Public Interest Law Unit at Webber Wentzel Bowens Attorneys, the Rural Doctors Association of South Africa (RuDASA), the Southern African HIV/AIDS Clinicians Society (SAHCS), the South African Council of Churches (SACC), Wits Law Clinic, and Young Women Across Borders.

68   'The South African National AIDS Council (SANAC) is a voluntary association of institutions established by the national cabinet of the South African Government to build consensus across government, civil society and all other stakeholders to drive an enhanced country response to the scourges of HIV, TB and STIs.' (www.sanac.org.za)

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and the increasing number of Zimbabwean asylum-seekers who had left their country due to the 2008 economic and political crisis.

The 2011 Refugees Amendment Act

According to the DHA, the main objectives of the 2010 Refugees Amendment Bill, which later became the Refugees Amendment Act No. 12 of 2011, were to clarify how applications for refugee status that were rejected as manifestly unfounded were to be dealt with,[69] to empower the Director-General to establish the Status Determination Committee[70] and to revise the provision relating to the withdrawal of refugee status.

The Act sought to create for each Refugee Reception Office a Status Determination Committee, established by the Director-General, in place of the Refugee Status Determination Officer, with the purpose of processing asylum claims. The rationale behind this amendment was that applications for asylum would have been dealt with more efficiently and impartially by a committee than by a single individual. Furthermore, the Act provided for applications rejected as manifestly unfounded, abusive or fraudulent to be automatically reviewed by the Director-General, while asylum-seekers whose applications had been rejected as unfounded had to be dealt with by the Refugees Appeals Authority.

Submissions on the 2010 Refugees Amendment Bill

Several submissions on the 2010 Refugees Amendment Bill were presented by civil society groups. The LSSA submitted that all too often, the DHA made the incorrect conclusion that asylum applications were abusive, fraudulent or manifestly unfounded, and this had been proved by poor motivations for rejection (LSSA 2010). They further argued that Refugee Status Determination Officers often ignored the 1998 Refugee Act, as well as the UNHCR Guidelines on Procedure and Criteria for Determining Refugee Status, and had very little knowledge about the situation in most asylum-seekers' countries of origin (Ibid.). As such, all sorts of avoidable mistakes often led to rejected applications. Furthermore, the LSSA submitted that an automatic review by the Director-General without the asylum-seeker being afforded an opportunity to make submissions on the rejection was procedurally unfair. However, the contention then focused on the feasibility of the Director-General being able to conduct reviews of rejected applications personally, as this would have added an extra burden to his workload.

PASSOP highlighted that the high rate of rejected applications was a direct result of the drive to fast-track the process of refugee status determination. In light of this,

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69   Asylum-seekers at a Refugee Reception Office (RRO) are assisted to complete an asylum-seeker application form before they are issued a Section 22 Permit, which legalises their stay in South Africa whilst they wait for the outcome of their application. The are three possible outcomes: i) the application is granted; ii) the application is rejected as manifestly unfounded, abusive or fraudulent; or iii) the application is rejected as unfounded. The Standing Committee for Refugee Affairs (SCRA) then automatically reviews all manifestly unfounded decisions. The SCRA either upholds the Refugee Status Determination Officer (RSDO) decision or refers it back for reconsideration. In cases of unfounded decisions, the applicant is given 30 days to submit an appeal with the Refugee Appeal Board (RAB). The RAB hears the appeal and confirms the RSDO decision, substitutes the RSDO decision, or refers the case back to the RSDO for reconsideration.

70   The 2015 Draft Refugees Amendment Bill omitted all provisions referring to the Status Determination Committee and re-introduced the Refugee Status Determination Officer.

they submitted that before reviewing the mechanism of appeal it was necessary to have fair and lawful first-instance decisions. Besides, it was submitted that a high number of rejected applications would only have served the purpose of pushing people out of the asylum system by increasing the number of undocumented migrants (PASSOP 2008).

The introduction of the Status Determination Committee was endorsed by the LLSA and the Forced Migration Studies Programme at Wits University; however, the Refugee Rights Unit at UCT raised some concerns regarding the qualifications needed to be appointed as a member of the Committee as these qualifications had not been explicitly stated. Furthermore, no oversight of the Status Determination Committee was mentioned in the Bill, contradicting the fundamental principal of 'checks and balances'.

LHR's submission (2010) expressed anxiety about the poor decisions reached by Refugee Status Determination Officers for a variety of reasons, including inadequate expertise and training. They highlighted the need for refugees to obtain travel documents and proper identity documents similar to those issued to South African citizens. It was, in fact, noted that due to employer and service providers' lack of knowledge, many refugees faced obstacles in accessing a whole range of services. In this regard, the CPLO and the Scalabrini Centre (2010) pointed out that some of the documents issued to refugees by the DHA were not long-lasting; they suggested introducing an alternative form of documentation more similar to a South African driver's licence or a credit card.

As for the previous amendment to the 1998 Refugees Act, the 2011 Refugees Amendment Act did not bring into consideration inputs received through sub-missions as the Act was pushed through Parliament leaving all the amendments intact.

The 2015 Draft Refugees Amendment Bill

In August 2015, the DHA invited public comments on the Draft Refugees Amendment Bill, which proposed significant changes to the asylum system, including limitations to the right to work for asylum-seekers. The Bill re-established the Standing Committee for Refugee Affairs with the power to determine the conditions under which asylum-seekers may work or study whilst awaiting the outcome of their application. It gave also more power to the Director-General in the administration of the Act, including the possibility of revoking the right to work or study if asylum-seekers fail to provide a proof of employment or of enrolment for study, and to disestablish Refugee Reception Offices (RROs) without prior consultation with the Standing Committee for Refugee Affairs. Finally, the Bill granted the Minister of Home Affairs the power to withdraw and cease refugee status in respect of certain categories of individuals. The restrictive nature of the Bill is remarked by additional provisions to exclude[71] asylum-seekers – for instance, those who fail to report within five days of entry into the Republic, and those who do not enter through an official port of entry – from refugee status.

It gave also more power to the Director-General in the administration of the Act, including the possibility of revoking the right to work or study

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71   Sections 4(1)(h) and 4(1)(i) of the 2015 Draft Refugees Amendment Bill.

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The tone of the
2015 Draft Refugees
Amendment Bill is
to be understood in
terms of a shift in
thinking and practice
that sees migration
as an issue of
national security

Submissions on the 2015 Draft Refugees Amendment Bill

LHR (2015) raised concerns that some of the exclusion criteria[72] contained in the Bill contravened South Africa's international obligations in terms of the 1951 United Nations Convention Relating to the Status of Refugees. In the same light, the Scalabrini Institute for Human Mobility in Africa (SIHMA) found the stringent nature of these provisions to be problematic.

With regard to additional criteria for exclusion, such as those relating to asylum-seekers who had committed a crime in South Africa, LSSA (2015) argued that having committed a crime does not invalidate an asylum-seeker's claim to refugee status. They emphasised that South Africa ought to keep upholding refugee rights rather than continue to encroach upon and erode the values proclaimed in the Constitution and the Refugees Act of 1998. They further noted that restrictions were not the best way to deal with the issue of an overburdened asylum system and suggested that the DHA and government deal effectively with corruption matters and craft better policies to facilitate temporary labour migration within southern Africa. A migration policy framework able to take into account regional dynamics of mobility is, in fact, necessary to effectively address some of the challenges faced by government, including those related to a high number of individuals who turn to the asylum system as a last resort to acquire a legal document.

The Scalabrini Centre's (2015) submission highlighted that the proposed amendments sought to restrict the possibility for asylum-seekers to work and study. A limitation of the right to work potentially deprives asylum-seekers of the only means to support themselves while in South Africa and represents not only a violation of the constitutional right to dignity but also 'a restriction upon their ability of live without positive humiliation and degradation' (Scalabrini Centre 2015). They concluded that the overall tenor of the Bill was negative and that many of the new provisions were overly restrictive and, in many cases, contrary to the Constitution as well as the 1951 Refugee Conventions. They further proposed that amendments to the Refugees Act 'should be made in concert with the migration policy review process to ensure that policy and legislative changes are addressed in a holistic manner and are harmonised to increase the viability of the entire system' (Scalabrini Centre 2015: 2–3). Moreover, they remarked that the asylum system cannot be fixed unless structural challenges are addressed and that these challenges require more than piece-meal legislative amendments – they require nothing less than a complete overhaul of current policy (Scalabrini Centre 2015: 2–3).

SIHMA (2015) also stressed this point by highlighting that the proposed amendments were geared towards reforming the asylum system in line with governmental and departmental policies but before the completion of policy formulation. This is a case of 'putting the cart before the horse', as no policy document has been released yet to illustrate government's new comprehensive approach to international migration.

The tone of the 2015 Draft Refugees Amendment Bill is to be understood in terms of a shift in thinking and practice that sees migration as an issue of national security. With restrictive practices and measures already implemented through the immigration system, the liberal refugee framework is seen as a 'loophole' that undocumented

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72   Section 4 of the 2015 Draft Refugees Amendment Bill.

and unskilled migrants exploit to legalise their stay. As such, this Bill forms part of a broader strategy to restrict unskilled migration through internal and external measures. Unfortunately, this strategy risks 'throwing the baby out with the bathwater' by denying and frustrating genuine asylum-seekers in its bid to weed out those who do not satisfy the criteria for refugee status. Some of the proposed amendments risk drastically restricting the possibility of individuals' accessing a fair and efficient asylum procedure. The inability to lodge applications due to time constraints, the reduced number of available Refugee Reception Offices, and new, stringent criteria that exclude individuals from refugee status and that cease refugee status, could leave asylum-seekers and recognised refugees undocumented, without alternatives for remaining in the country legally.

Shifts in migration policy and practice

Since the enactment of the 1998 Refugees Act and the 2002 Immigration Act, there has been a steady shift towards a more restrictive approach to human mobility. This is evidenced by a variety of procedures and measures across the social, political and legislative frameworks. These seemingly disparate actions only make sense when analysed via an underlying logic that points to higher and stronger barriers to entry for migrants and emphasises border control and security initiatives.

In his 2009 State of the Nation address, President Jacob Zuma indicated the intention to create a Border Management Agency (BMA).[73] Porous borders were, in fact, cited as posing a national security threat. In this regard, it is worth noticing that in 2010 the DHA moved into the Justice and Crime Prevention cluster,[74] increasing its focus on security measures such that limiting access to the asylum system became intertwined with national security. In 2012, the ANC made a resolution recommending the establishment of a BMA and in 2015, Cabinet approved the submission of the Border Management Authority[75] Bill to Parliament. According to Minister in the Presidency Jeff Radebe, 'the Bill aims to establish the BMA, which will balance secure cross-border travel, trade facilitation and national security imperatives' (Government Communications 2015). The BMA set up by the DHA is meant to filter and regulate foreigners coming into South Africa and is envisaged to be functional by 2017.

In tandem with this logic of border control, an ANC policy discussion paper entitled 'Peace and Stability' (ANC 2012) reiterated the need to position the DHA as the pillar of security, service delivery and the developmental state. It is argued that 'a major reason for the failure to manage immigration securely and effectively was the failure to realise that Home Affairs is a highly strategic security Department'. With regard to the asylum system, the policy document stated that:

> over 95% of applicants of those claiming asylum in SA are not genuine asylum seekers but rather looking for work or business opportunities [...]

in 2010 the DHA moved into the Justice and Crime Prevention cluster, increasing its focus on security measures such that limiting access to the asylum system became intertwined with national security

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73   The Border Management Agency 'is intended to coordinate the functions of the many departments active in the border management, including the SA National Defence Force (SANDF), which is responsible for securing the border line. The SA Revenue Service deals with goods movement, while police enforce the law and maintains public order. The departments of agriculture, health and transport have regulatory roles. The state security agency plays a "vital cross-cutting role" while the national Treasury and the Public Works Department are also active' (Sidimba 2015).

74   Previously, it was part of the Governance and Administration Cluster.

75   This will be the overarching authority on all matters at South Africa's ports of entry.

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who are allowed to earn a living while awaiting adjudication of their applications, which with appeals that can take many months. While awaiting the outcome of their applications, many applicants endeavour to regularise their stay through other means […] which are often fraudulent. (ANC 2012)

There seems to be congruence between the logic expressed in this policy document and current practices. In similar tones, the DHA (2015c) stated that 'the majority (88%) of asylum applications adjudicated during the 2014 calendar year were rejected either as unfounded (39%) or manifestly unfounded (49%). These findings further confirm that the majority of asylum claims indeed fall outside the definition of a refugee as outlined in Section 3 of the Refugees Act No. 130 of 1998'.

The move towards immigration control aligned with restrictive measures to preclude individuals from accessing the asylum system, such as administrative obstacles and the closure of urban Refugee Reception Offices. These restrictions have been implemented to curb the perceived tide of undocumented migrants from accessing legal status in the country under the auspices of national security. This has led to the conclusion that 'South Africa's asylum system exists only to refuse access to the country and makes no attempt to realise the goal of refugee protection [...] it functions sorely as an instrument of immigration control' (Amit 2012: 99). It thus seems that new discourses about migration have not only emerged but have also been put into practice as part of a strategy to control and stifle documented and undocumented migrants.

The ACMS and LHR (2013) raised the alarm that these changes had not been preceded by explicit policy documents setting out the nature and purpose of these practices. In particular, the closure of urban RROs has raised great concern amongst civil society groups. Under the refugee framework, in fact, the primary point of contact between refugees and the state occurs at the RROs where asylum-seekers are attended to and their documentation is processed. Prior to 2011, there were six RROs in operation across the country, located in Johannesburg, Pretoria, Port Elizabeth, Cape Town, Durban and Musina. The RRO in Port Elizabeth was closed to new applicants in October 2011, the one in Johannesburg in May 2011 and the one in Cape Town in July 2012, leaving only three RROs available for newcomers: Pretoria, Durban and Musina. The closures of RROs were justified as necessary due to their unsuitability within urban areas and they were not considered by government as strategically located. However, these closures were undertaken in isolation, without any policy debate or clear explanation of their strategic rationale.

> **The closures of RROs were justified as necessary due to their unsuitability within urban areas and they were not considered by government as strategically located. However, these closures were under-taken in isolation, without any policy debate or clear explanation of their strategic rationale**

The closure of urban RROs had a significant impact on access to the asylum system. For example, in 2010, 185 918 asylum applications were received, while in 2011 the number dropped to 87 020 and in 2012 had reduced further to 85 058 (Africa Check 2013). Professor Loren Landau attributed this decline to the Special Dispensation Permit that was made available to Zimbabwean asylum-seekers living in South Africa (See Box 5) as well as to the closure of urban RROs to new applicants (Africa Check 2013).

It is poignant to note that coupled with a more restrictive migration framework there has been a progressive encroachment on curtailing the 'the right to work' for asylum-seekers. To begin with, the Employment Services Act of 2014 states that

'an employer may not employ a foreign national within the territory of the Republic of South Africa prior to such a foreign national producing an applicable and valid work permit, issued in terms of the Immigration Act'.[76] Following on from this, the Draft Refugees Amendment Bill of 2015 contains restrictive provisions related to the right to work and trade for asylum-seekers. These provisions are in contrast with the *Watchenuka*[77] case in which the Supreme Court of Appeal stated that the general prohibition of employment and study contradicts the provisions of the Bill of Rights. Specifically, the judgement stressed that '[t]he freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity'.[78] Furthermore, in 2014 the Supreme Court[79] ruled that the right to work for refugees and asylum seekers extends to the right to self-employment. The judgment stated that 'if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid […]'.

BOX 4

THE SPECIAL DISPENSATION PERMIT

The Special Dispensation Permit was launched in 2009 to regularise undocumented Zimbabweans living in South Africa legally and, at the same time, to relieve pressure on the overburdened asylum system. This permit granted Zimbabweans the right to live and work legally in the country. The rationale of this permit was to create a record and regularise the stay of undocumented Zimbabweans who had been living in South Africa without proper documentation. Another purpose was to provide amnesty for those who had obtained fraudulent identity documents. A total of 294 511 applications were received by the DHA, of which 242 731 were granted and 51 780 either rejected or not finalised (Africa Check 2014). The permits were valid for four years from issue until 31 December 2014. However, in August 2014 Home Affairs minister Malusi Gigaba announced that Zimbabwean nationals could re-register and would thus be able to remain in South Africa legally until the end of 2017 (Africa Check 2014). A total of 208 967 applications were lodged by Zimbabwean nationals by 31 December 2014 (DHA 2015a). In 2015, in a move welcomed by stakeholders in the immigration field, who have long argued that similar projects should be extended to African migrants from other nationalities, the DHA announced that the Special Dispensation Permit would be extended to Basotho nationals from 2016.

These restrictive measures seem to be in direct response to the dominant myth that foreigners 'steal' jobs. To put this into perspective, according to the Inter-Ministerial Committee on Migration Report (2015), the Presidency, on behalf of the Inter-Ministerial Committee on Migration, indicated that:

> *the primary cause of the violence against foreign nationals is the increased competition arising from the socio-economic circumstances in South*

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76 Section 8 (1).

77 Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003).

78 Ibid.

79 *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014).

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*Africa. Statistics show a growth in the number of unskilled immigrants
entering the country since 2008. This is in the context of slowing economic
growth and a decline in unskilled job creation. This has been heightened
by a decade of poor implementation of immigration and border controls.*

Given these views, the limitation of the right to work for asylum-seekers appears
to be part of a 'protectionist' strategy aimed at preserving jobs, informal work and
trade for South African citizens only in response to the perception that migrants
are taking jobs that South Africans 'ought' to have. The popular belief that migrants
dominate the informal sector is not supported by evidence-based research;[80]
however, as pointed out by Landau (2004b: 1), 'myths, in South Africa, have power
in shaping policy'.

Conclusions

South Africa's migration policy can be analysed within a framework that tries to
accommodate a series of contradictions of interests. It has yet to come to grips fully
with the development nuances of historical and contemporary regional migration
trends. Historically, the capitalist system was largely built on the supply of unskilled
labour migrants from the region towards South Africa's mining, manufacturing and
commercial farming industries. Currently, the interdependencies and connected-
ness of migratory movements within southern Africa are mostly neglected by
policy-makers, despite non-state actors having highlighted the need to give human
mobility a regional outlook.

During the apartheid era, migration in South Africa was characterised by the
consolidation of what Wa Kabwe-Segatti termed as the 'two-gate policy'. She
remarked that the 'front gate' welcomed people who corresponded to the racist
criteria of the apartheid government, while the 'back gate' prevented unwanted
migrants from entering and allowing cheap and relatively docile labour in temporarily.
To a great extent, a 'two-gate' policy still pervades South Africa's migration policy,
albeit informed by a different rationale and challenges. On one side is an immigration
regime that has progressively restricted access to unskilled economic migrants –
and, to a certain extent, to professionals and qualified workers due to bureaucratic
inefficiencies. On the other side is a refugee framework that has granted access to
a large number of asylum-seekers. Bound by international obligations, as well as
by the need to revamp its image, South Africa has, in fact, adopted a liberal and
progressive refugee framework.

In a region characterised by high rates of mobility and mixed migration flows, the
imbalance between the restrictive immigration framework and the liberal refugee
protection framework has resulted in undocumented migrants turning to the country's
asylum system in large numbers as a means to regularise their stay. Given this context,
which is underpinned by massive social pressures and false myths about migration,
South Africa has adopted 'internal control' measures such as promoting 'community
enforcement' with the aim of detecting and deporting undocumented migrants.

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80   In 2014, the Gauteng City – Region Observatory, in collaboration with Wits University, the University
     of Johannesburg and the provincial government, conducted a survey of the informal sector in
     Johannesburg. The study came to the conclusion that the belief that international migrants
     dominate the informal sector is false as fewer than 2 out of 10 people who owned a business in the
     informal sector were international migrants.

In addition to restricting legislative amendments, the closure of urban Refugee Reception Offices, the forthcoming restrictions on the right to work and trade for asylum-seekers, the creation of a Border Management Agency and the launch of police operations such as Operation Fiela have all signalled encroachments to curtail the liberal nature of the refugee framework and to increase both internal and external strategies for controlling migration. This appears to be a strategic move to satisfy security-based and nationalist calls for greater control while evading rights and interest-group-based pressures for liberalisation.

The concern is that this strategy of introducing significant legislative changes seems to be taking place before, and in disjunction with, the process of migration policy review. In 2015, government announced the intention of finalising a Green Paper on International Migration by the end of March 2016. This process is envisaged to result in a White Paper and a comprehensive overhaul of migration legislation. With the amount of political, economic and social resources that have already been already poured into this strategy, the constitutional provision for public involvement in law-making, as well as civil society's ability to influence the process of policy formulation, risk being compromised. The risk is that the impending migration policy is likely to formalise existing strategies and current practices.

Given these views, the limitation of the right to work for asylum-seekers appears to be part of a 'protectionist' strategy aimed at preserving jobs, informal work and trade for South African citizens only in response to the perception that migrants are taking jobs that south Africans 'ought' to have

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migration policy
in post-apartheid
South Africa:
Emerging themes
and new challenges

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'Although developed countries are not always able to absorb the entire number of those who intended to migrate, it should however be noted that the criterion for determining the threshold of sustainability cannot be only that of the simple protection of one's own welfare, without taking into account the needs of those who are forced to ask for hospitality.'

John Paul II, *World Migration Day* message 1992

International migration is perceived by states as a global challenge and its governance represents a controversial matter for policy-makers, who try to ramp up their consensus over policy matters. In recent years, scholars have debated migration policies' effectiveness, grappling with the question of why such policies tend to fail and produce unintended consequences. In this respect, it is worth noting that, for various reasons, migration policies generate expectations that are not capable of being met.

In post-apartheid South Africa, migration policies and legislation have failed the declared objective of enhancing the development potential of migration, leaving critical issues such as social cohesion and integration unsolved. A large emphasis has been placed on the securitisation of migration and the tightening of the immigration regime in an attempt to crack down on irregular arrivals. Furthermore, with regard to the first admission of asylum-seekers, the inability to reconcile the national interest of maintaining borders' integrity with respecting moral and legal obligations has placed the asylum system under tremendous stress.

The evolution of migration policy in post-apartheid South Africa: Emerging themes and new challenges, far from being an exhaustive synthesis of the migration policy framework in South Africa, aims to inform readers about some of the present challenges, the recurrent themes of discussion, and the legislative amendments and policy shifts that have occurred in the country over the past 15 years.

We hope that the upcoming policy and legislative drafting, as well as the process of public consultation, will lead to a rethink of effective strategies to inform a good and ethical governance of migration.

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