

CONCLUSION

Jonathan Klaaren and Jeff Handmaker



It has been said that one of the greatest tests of a country's democracy is how its government and people treat foreigners. The many years of struggle in South Africa against an unjust regime, together with a destabilisation campaign by the previous government, made the southern African region host to one of the largest refugee populations in the world. As South Africa now becomes host to increasing numbers of forcibly displaced people, the results of the test this apartheid legacy poses for the new, yet entrenched, South African democracy are being vigorously critiqued. This book has aimed to be part of that critique and part of that democracy.

South Africa has, of course, firmly committed itself to human rights, entrenching human rights in its national legal system.¹ The post-apartheid state has also made a principled commitment in international law to refugee protection, through ratification of various international conventions, including the United Nations Convention (and Protocol) Relating to the Status of Refugees² and the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.³ With the 1998 Refugees Act (which came into force on 1 April 2000) the South African government has effected a range of statutory protection mechanisms for refugees.

Dual Rationale

One way that we can attempt to position the theme of refugee protection within the character of the South African democracy is by exploring the human rights and humanitarian rationales behind the South African entrenchment of refugee protection. These rationales were at least in part

articulated on the day that the Refugees Act was adopted by the post-apartheid Parliament. The philosophy and content of refugee protection are inevitably, and we think appropriately, the subject of democratic debate and deliberation. In this conclusion, we sketch out a distinction between these two rationales as well as a distinction between a traditional and a forced migrant definition of a 'refugee'. In our view, both of these distinctions have strengths and weaknesses. Some of the tensions that arise within the refugee rights community and within the government institutions charged with the tasks of refugee protection stem from disagreements about these rationales and definitions.

Both of these justifying rationales were raised during the course of the passage through Parliament of South Africa's Refugees Act 130 of 1998. To lawyers, there is often a significant difference between these two rationales. The first is binding; the second is not, at least not in the absence of an armed conflict.⁴ While South Africa cannot avoid its international human rights obligations, it can in most cases shape and change the humanitarian policies that it chooses to implement.⁵

The first sentence of the 'long title' of the Refugees Act states the human rights rationale. The stated purpose of the Act is: '[t]o give effect within the Republic of South Africa to the relevant international legal instruments, principles, and standards relating to refugees'. In section 6, several treaties and other international documents are explicitly listed, including the Universal Declaration of Human Rights.⁶ In formally presenting the Refugees Act to Parliament, then Deputy Minister of Home Affairs Lindiwe Sisulu cited these instruments and emphasised that the Act was based on a matter of principle.⁷

The other rationale – humanitarian concern – has also been present but has perhaps generated more controversy. To begin with, Deputy Minister Sisulu took particular care that day in Parliament to deny that the Act was based on 'goodwill'. Addressing herself to 'academics and some members of the media', she specifically denied that the Act was 'a favour whose return we have to be constantly reminded of' where 'most members of the ruling party were themselves refugees'. She called for 'an end to this cheap type of emotional blackmail'. Yet, while the Deputy Minister was busy denying that her legislation was primarily motivated by the rationale of humanitarian concern, effectively saying 'We are not returning a favour, we are doing this because it is right and our obligation,' other Members of Parliament were explicitly calling upon the authority of the government and stressing qualities of dignity and mercy in their comments. For instance, Mr Mokotjo stated:⁸ 'To welcome a refugee and to assist him or her is nothing but a humanitarian obligation, which applies to the international community, to safeguard the human dignity of all people. It is, as the saying goes, justice tempered with mercy.'

In our view, both the human rights and the humanitarian rationales do have their limitations. On the human rights side, one of the first things that constitutional lawyers in South Africa teach their students is that no right

is absolute. All rights can be limited; some more than others. Indeed, there is a special clause in South Africa's Constitution that provides limitations on limitations.⁹ One can also see the humanitarian rationale as limited. Not only is it not binding but it is often weighed against other immediate concerns, such as those of security.

Taking into account the limited nature of both of these rationales, one can argue that the primary purpose of the Refugees Act is not to provide refugee protection, as it should, but rather to preserve control over another category of persons who are not categorised as refugees in terms of international refugee law definitions. These are the so-called 'irregular migrants', more popularly, and derogatorily, referred to as 'illegals'. Introducing the Act in Parliament, then Deputy Minister Sisulu stated:

A clear distinction has to be drawn between migration for economic or social reasons and flight motivated by fear of persecution. A substantial number of illegal immigrants also abuse the refugee regime to stay and work in the country. They place unnecessary pressure on the system thereby delaying genuine applications, which is why today we have 20,000 cases outstanding. Provision has been made in the Bill to fast-track manifestly unfounded and fraudulent claims.¹⁰

Earlier, the then-chairperson of the parliamentary portfolio committee on Home Affairs, Mr Desmond Lockey, stated:¹¹

Too many of our citizens do not understand the difference between refugees, illegal immigrants, and economic migrants, and this sometimes accounts for the animosity towards refugees ... We must educate our people that asylum is not an alternative means of immigration, but an international human rights obligation. As a free and open democratic society, we must teach our people that refugee protection is our universal duty until conditions in sender countries change, which will enable such refugees to return safely.

Other participants in the legislative debate were as clear about the distinction but with a different emphasis. For instance, Mr Botha stated:

We must therefore act very carefully in order to make a clear distinction between political refugees and persons leaving their countries of birth for other reasons ... Although we have empathy with and feel sorry for people who, for some or other reason, are forced to leave their country, we cannot and may not care for them at the expense of our own people. We must never allow that to happen.¹²

Can an Effective Distinction be Made?

This distinction between those granted asylum and undocumented migrants, between political refugees and 'irregular migrants' or 'illegals', is not as clear as lawyers and politicians might wish it to be. Some examples demonstrate this ambiguity. On Thursday, 3 September 1998, three Senegalese nationals were attacked and killed on a crowded Pretoria-Johannesburg train.¹³ Media reports confirmed that persons on the train

were coming back from an employment rally and that the foreign nationals were holders of section 41 asylum-seeker permits, which were documents issued under the Aliens Control Act, which formerly governed refugee status determination. Two years later, the Human Rights Commission found a number of refugees at the Lindela detention camp after a week-long 'anti-crime' action¹⁴ by the police in the inner-city Hillbrow neighbourhood of Johannesburg. The distinction between political refugees and undocumented migrants did not seem to make much of a difference in these situations. Indeed, xenophobia itself does not distinguish on the basis of legal status in its operation.¹⁵

The difference between political refugees and undocumented migrants also did not seem very clear to the initial drafters of the Immigration Act. In a number of ways, the Act as initially drafted attempted to reassert the control and primacy of a restrictive immigration policy over South Africa's refugee protection obligations. In any event, its provisions fell dangerously short of the protection that refugees require under international law and South Africa's own law.¹⁶ Perhaps most worryingly, the draft Act provided that the Immigration Service would be able to issue regulations that would override the provisions of the Refugees Act.¹⁷ Such a measure would have given effect to neither the human rights nor the humanitarian rationale of the Refugees Act. The submission by the National Consortium for Refugee Affairs (NCRA) to the parliamentary committee that considered the Immigration Bill pointedly raised concern over this issue. The NCRA decried the Immigration Act's usurping of the role of the Refugee Appeals Board by Immigration Courts, specialised institutions to be created under the Act in the face of opposition from the Department of Justice and Constitutional Affairs.¹⁸

As is evident from these examples, the various distinctions identified and discussed are hardly clear or natural ones. One location of the political debate about refugee protection is within the academic community. A question that practically minded academics and practitioners are trying to answer is how far does this field go? What does 'forced' or 'irregular' migration actually mean? Should one respect strict definitional limitations of the international legal regime? Can one argue that undocumented migrants do fall within this field of study since the southern African (SADC) region is a labour market that itself is the result of force, both economic and military? Or do we maintain a narrow focus on political refugees? These debates – while academic as well – have clear policy implications. Some commentators have argued for 'comprehensive approaches' in dealing with so-called 'irregular' migration (see also further below).¹⁹ Definitional issues, such as who is a refugee, also continue to remain contentious,²⁰ with some having called for a 'reformulation' of the purpose of refugee law altogether.²¹ We must not be surprised that these distinctions are made and used in the field of politics. Politics is at its core pragmatics. In early 2000, the South African Department of Home Affairs issued a statement

regarding Mozambicans fleeing the floods then devastating that country. The unambiguous message was that any such 'refugees' would be returned.²² The message from the South African government was: as much as we want to help, the human rights of these persons are limited.²³ Such an episode poignantly raises the issue of the limits of human rights and indeed the limits of our humanity. Accepting and precisely delineating such limits is a difficult business, as hard as that of limiting socio-economic rights or rights to dignity and expression. We expect that we shall continue to see in the development and elaboration of the South African refugee protection regime an articulation of the democratic premise of the South African constitutional order.

Pressing Issues

We pause by noting the obvious as well as the urgent. One volume cannot begin to do justice to the entire subject; we have necessarily had to be more selective in what we could include. In any event, as we reflect on refugee protection in a not so newly democratic South Africa in 2006 – that is to say, fully ten years after the adoption of the 1996 Constitution – we can discern a number of refugee protection issues with current and pressing significance.

One set of pressing issues relates to local government and refugee protection. There is a growing recognition, not least among municipal leaders in the cities themselves, that refugee protection and reception are areas about which they need to be better informed. Cape Town adopted its first refugees policy in 2003 and Johannesburg is also beginning to pay greater explicit attention to its practices towards non-South African Africans as well as other refugees within their boundaries. Academics have begun to gather and assess data concerning refugees and forced migrants living in urban centres.²⁴ This trend should be noted and encouraged. It is clear from the chapters in this collection that not only that national agencies lack capacity to deal with refugee protection adequately; there are strong indications that local government structures also lack this capacity. However, there is increasing acknowledgement of this by both municipal and national leaders. Addressing these service delivery gaps for both refugees and South Africa's citizens will go a long way to achieving effective local integration and reception.

A second set of current issues, referred to earlier, is around the concept of 'irregular migration', otherwise known as 'illegals', 'secondary movers' or the so-called 'asylum-migration nexus'. The essential message in this concept of irregular migration is that attention ought to be focused on mechanisms to reduce the numbers of such persons applying for refugee status. Ever since the concept arose in a discussion paper by IOM and UNHCR in 2001,²⁵ there have been regular attempts to try and (re)introduce it, particularly by IOM. However, in a comprehensive

response paper to the proposals of 2001, a group of NGOs, including refugee and migration experts, argued that such a notion of an 'irregular migrant' was inherently flawed.²⁶ Emphasising that the discussion paper did 'not give sufficient recognition to the complex factors that cause the flight of migrants and refugees', the response paper provided an alternative perspective on the 'nexus' between asylum and migration and produced several recommendations in order to inform the discussion.

Unfortunately, it appears that five years later, in 2006, states are still not convinced of the futility of such a concept and a critical discussion on irregular migration is still urgently needed. Here, South African refugee and migration advocates and experts have a key role to play. South Africa is a country where many proposed policy measures to control irregular migrants have flowed from this state-led discussion on the asylum-migration nexus; such policies have also been tested in South Africa, though mostly without success. The government of South Africa co-chaired (with Switzerland) a UNHCR group on irregular movement and so feedback from South African advocates and experts could have a significant impact on these discussions.²⁷

A third set of pressing issues are around trafficking. In the views of some, this issue is one of true urgency. Indeed, the South African Law Reform Commission embarked on a road show until 30 June 2006, soliciting comments and policy proposals for a new piece of legislation on trafficking.²⁸ The legislation proposed by the Law Commission would criminalise conduct that facilitated the trafficking in persons, including: debt bondage, practices relating to documents, including their confiscation, and using the services of victims of trafficking. The Commission has proposed discussion around prohibiting summary deportation and around allowing victims temporary residence on the condition that they assist in the investigation and prosecution of the traffickers. While these proposals are worth discussing, in our view, the urgency of this effort must be questioned, which seems to flow from a poorly informed discussion on irregular migration. We have not seen the kind of real data that convince us that this issue must rise to the top of the reform agenda and take precedence over other issues, such as increasing capacity in refugee status determination and refugee protection.²⁹

A fourth current and also related issue is the relationship between security concerns and the purpose of refugee protection. This is an issue that has become especially prominent in South Africa in recent years, in the light of cases such as KK Mohamed, Kaunda and Omar-Rashid, all of whom were accused of, but never charged with, having been involved in acts of terrorism. As discussed in Goodwin Gill's chapter, we feel that it is important to maintain a clear distinction between the principles of refugee protection and efforts to combat terrorism.

A fifth and final pressing issue is the current mooted revision of the base model in the Refugees Act. The Department of Home Affairs has signalled that the Refugees Act is up for revision. Eight years after its passage, and

six years after having come into force, this is not necessarily a bad thing. Of concern, however, is the stated desire to revise refugee protection legislation in order to achieve 'streamlining'. Of concern as well are reports we have received in September 2006 that the Department was reverting to an earlier practice of requiring asylum-seekers to liaise exclusively with the reception centres at which they originally applied, restricting their freedom of movement and residence. While there are certainly places where improving bureaucratic efficiency will result in improving refugees' protection, we would continue to hold to the notion that refugee protection be seen as a matter of human rights enforcement rather than simply one of managerial workloads and case processing rates.

Acknowledging these pressing current issues brings us back to the nature of South Africa's refugee protection regime and the individuals working within it. As we have endeavoured to illustrate in this collection, policy development in South Africa has been the product of much debate and extensive interventions from role-players inside South Africa and from abroad. In particular, civil society organisations and academics have played a crucial role in stimulating critical discussions and in providing concrete solutions. While some in this debate see a series of problems to be overcome, we see such debate as a vital benchmark of the potential for the South African government and civil society to jointly, though not always mutually, address the very real and practical challenges facing them. Many persistent and new challenges will face the government and civil society organisations during the coming years in the implementation of the Refugees Act and in broader issues of refugee protection. These challenges demand a concerted effort to build institutional capacity and a renewed commitment to fundamental principles that are part of the human rights culture in South Africa and enshrined in this country's Constitution.

Challenges for Government

There are challenges aplenty for government here. The Department of Home Affairs is currently struggling with a number of different issues. Not least among these is an inherited and entrenched pattern of (mal)administration within the Department, a pattern that works against transformation. This frustrates the ability of some within the Department in their attempts to bring its policies in line with the Constitution. Further, as the experience of the backlog projects has shown, the Department struggles with seriously limited financial resources and infrastructure, as well as inadequately trained and experienced personnel, who are far too few in number.³⁰ In general, refugee administration officials are insufficiently trained to make full and effective use of even the limited information technology provided for them, or to act in accordance with the law, while maintaining the necessary empathy required in dealing with traumatised asylum-seekers and refugees.

In sum, there is currently a limited official capacity to make accurate and efficient determinations on refugee status. While improving in pockets, as de la Hunt and Kerfoot's chapter in this collection illustrates, decisions are often of a low quality. In addition to a greater investment in resources, training of officials is urgently needed in the areas of interviewing techniques, international and domestic refugee law, status determination and research skills and finally management-related issues. The Department has begun to show itself open to joint training initiatives with civil society organisations, a trend to be encouraged.

Challenges for Civil Society

There are challenges as well for civil society. Of the many posed in this collection, a particular challenge for civil society concerns legal representation. Persons who apply for political asylum in South Africa rarely have legal advice, let alone assistance or representation. Where there is assistance, the quality of that assistance can be a matter of concern.

Legal representation is needed first to address 'due process' issues in the asylum determination procedure. Without this, applicants and their legal representatives may not feel as though a claim for political asylum has been fairly considered, and suspicions of bias may develop.³¹ The credibility of the asylum procedure is enhanced when lawyers act as 'watchdogs' against the potential abuses of power or bias on the part of administrative officials. Secondly, as confirmed by comprehensive reports by international and South African human rights organisations,³² there is a need for lawyers to take up cases involving arbitrary arrest and apprehension of asylum-seekers and refugees as suspected 'illegal immigrants' by the immigration authorities and especially members of the South African Police Services. The overlap here between refugee issues and broader migration issues is strong, demanding a comprehensive human rights perspective.³³ Finally, refugees and asylum applicants face discrimination on a daily basis by the authorities and general public on issues ranging from access to schools and hospitals, to employer-related issues, all of which can be addressed through effective legal representation, either by paralegal advisers or qualified lawyers.³⁴

More broadly, local NGOs assisting refugees encounter daily challenges. Dealing with clients of very different cultural backgrounds, often with severe psychosocial problems, not to mention confusion and uncertainty in terms of the asylum process and/or social assistance offered, requires special skills or extensive resources. These skills and resources are often in short supply, requiring comprehensive approaches involving all relevant stakeholders, as discussed in Chapters 8 and 10 of this collection.

These daily challenges have deepened under the regulations themselves, which brought the Refugees Act into force and introduced new restrictions. Due to the lack of government financial support and inadequate material

assistance provided by NGOs, refugees and asylum-seekers had until April 2000 traditionally worked to earn a living. Yet the regulations forbid this as a general rule, at least until the application had passed the 180-day mark. The introduction of this policy posed a particularly difficult challenge for service providers. The *Watchenuka* decision of the Supreme Court of Appeals on 28 November 2003 in favour of a destitute Zimbabwean asylum-seeker and her son eased this situation somewhat, but only for those asylum-seekers in the most desperate of situations and for those who have been able to persevere and obtain a decision in their favour from the Department.³⁵ Moreover, even with work authorisation, for those refugees who do not have easily marketable skills, finding employment can pose major obstacles.

Challenges for Research and Advocacy

And, finally, there are challenges for research and advocacy. The end of this collection is but a beginning. There is a need for focused research and renewed advocacy efforts in the specific field of refugee protection as well as in the broader field of forced migration. Crucially, these efforts must involve meaningful input from the refugee and asylum-seeker as well as the broader migrant and immigrant community. We invite continued critical discussion on the issues raised in this book as well as other issues, such as long-term solutions and meaningful assistance, which arise daily in the field of refugee rights and forced migration studies in South Africa.

Notes

1. For an updated collection of fundamental human rights developments in South African constitutional law, see I. Currie & J. De Waal, *The Bill of Rights Handbook*, 5th edn (Johannesburg, 2005). On constitutional law generally, see S. Woolman, T. Roux, J. Klaaren, M. Chaskalson and A. Stein, *Constitutional Law of South Africa* (Johannesburg, 2004).
2. 189 UNTS 150 and 606 UNTS 267; South Africa acceded to the Convention and Protocol on 12 January 1996
3. 1000 UNTS 46; South Africa acceded to this Convention on 16 December 1995
4. This humanitarian rationale should to some extent be distinguished from international humanitarian law. While it is beyond the scope of this particular study, it is important to point out that, particularly in the context of an armed conflict, international humanitarian law applies to a wide range of issues, invoking extensive obligations on the part of states as well as non-state actors, concerning both the behaviour of combatants and the protection of civilians. See A. McDonald, ed. *Yearbook of International Humanitarian Law* (Cambridge, 2005) (published on an annual basis) and M. Sassoli and A.A. Bouvier, *How Does Law Protect in War?* 2nd edn (Geneva, 2006).
5. Philosophers too make this distinction. A communitarian such as Micheal Walzer argues in favour of protection for refugees precisely because they are persons

without community. His philosophy is understood to support a humanitarian rationale for the protection of refugees. In contrast, political liberals such as Bruce Ackermann argue in favour of protection for refugees based on individual political rights. For an encapsulation of this philosophical debate within the context of the broader immigration debate, see 'The Exercise of the Immigration Power: the Moral Constraints' in T.A. Aleinikoff, D.A. Martin and H. Motomura, *Immigration: Process and Policy*, 5th edn (St Paul, 1995), 74–99.

6. Section 6(1) provides:
This Act must be interpreted and applied with due regard to – (a) the Convention Relating to the Status of Refugees (UN, 1951); (b) the Protocol Relating to the Status of Refugees (UN, 1967); (c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969); (d) the Universal Declaration of Human Rights (UN, 1948); and (e) any other relevant convention or international agreement to which the Republic is or becomes a party.
7. *Hansard*, National Council of Provinces, col. 3104 (Thursday, 12 November 1998).
8. *Ibid.*
9. Section 36(1) provides:
The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.
10. *Hansard*, National Council on Provinces, col. 3102 (Thursday, 12 November 1998).
11. *Hansard*, National Assembly, cols. 7756–57 (Thursday, 5 November 1998).
12. *Ibid.*, cols. 7761–62, (Thursday, 5 November 1998).
13. South African Human Rights Commission, *Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act* (Johannesburg, 1999).
14. Various media, including the *Mail and Guardian*, *Business Day*, *SAPA* and others, reported on 31 March 2000, on 'Operation Crackdown', which had resulted in the arrests of a number of suspected 'illegal aliens'.
15. See J. Handmaker and J. Parsley 'Migration, Refugees and Racism in South Africa', *Refuge* 20, no.1 (2002), 40–51.
16. This was confirmed by the Parliamentary Monitoring Group, Home Affairs Portfolio Committee, *Social Services Select Committee: Joint Meeting*, Immigration Bill: Public Hearings, 23 April (Cape Town, 2002), Last accessed on 2 September 2006 at www.pmg.org.za referring to submissions by various NGOs and UNHCR to the Parliamentary Portfolio Committee in Parliament that was considering the then Immigration Bill: 'All the organisations recognised the need for new immigration legislation but none were convinced that the Bill went far enough to uphold principles contained in the Bill of Rights especially in respect of the protection of refugees.'
17. See J. Klaaren, 'Preliminary Analysis of the Effect of the draft Immigration Bill on the Refugees Act', unpublished, 2000, and Home Affairs Portfolio Committee, (see note 16, Appendix Six (Submission by the NCRA), Item 1:
One of the significant changes made by the Immigration Bill to refugee protection is at the level of administration ... The administrative and institutional structure of the Refugees Act (presently part of the migration section of the Department of Home Affairs) would be subordinate to this organisational restructuring. There is no special place or consideration for refugee protection administration within section 55(2).
18. Home Affairs Portfolio Committee (see note 16), Appendix Six (Submission by the NCRA), Item 3.

19. See J. Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* The Hague, (1998), especially 146–76.
20. For a comprehensive review of ‘post-cold war developments’ in relation to refugee protection, see P. Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited*, The Hague, 1997.
21. See J. Hathaway, ‘Temporary Protection: Challenge or Solution?’ in *Perspectives on Refugee Protection in South Africa*, J. Handmaker, L. De la Hunt and J. Klaaren eds., Lawyers for Human Rights (Pretoria, 2001), 41–49.
22. *Business Day*, 6 March 2000 reported that Kwa Zulu Natal (KZN) province was expecting thousands of refugees escaping floods in Mozambique. Mozambique’s western and northern borders were largely inaccessible, leaving KZN as the only option for escaping the flooding. According to Home Affairs spokesperson Hennie Meyer, flood victims do not qualify for refugee status ‘in terms of SA’s agreement with the Organisation for African Unity and the United Nations’ and would be returned to their country of origin. The South African National Defence Force (SANDF) added two extra check points and a ‘roving’ roadblock along the border. IRIN (Johannesburg, 1 March 2000) reported that United Nations High Commissioner for Refugees representative Mengesha Kebede stated, ‘It is up to the host government how it deals with people entering their country fleeing natural disasters.’ As a statement of law, it is by no means clear that this is incorrect. G.S. Goodwin-Gill, *The Refugee in International Law*, 2nd edn (Oxford, 1996), 26 (distinguishing between UNHCR’s functional responsibilities – which may include persons fleeing natural disasters – and member states’ legal obligations); see also Y. Maluwa, ‘The Refugee Problem and the Quest for Peace and Security in Southern Africa’ *International Journal of Refugee Law* 7 (1995): 669, noting the role of environmental factors in the causes of refugee flight in Africa.
23. In the situation dealing with the amnesty granted by Cabinet to former Mozambican refugees, the Department of Home Affairs has similarly used human rights rationales to limit humanitarianism. See J. Handmaker and J. Schneider, *The Status ‘Regularisation’ Programme for Former Mozambican Refugees in South Africa*, Working Paper for the Wits Research Unit on Law and Administration (Johannesburg, 2002).
24. L.B. Landau, *Forced Migrants in the New Johannesburg: Towards a Local Government Response* (Johannesburg, 2004).
25. UNHCR, *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, (Geneva, 2001). Ref: EC/GC/01/11 Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b3892256> (last checked, 21 August 2006).
26. Human Rights Watch (ed.), ‘NGO Background Paper on the Refugee and Migration Interface’, presented to the UNHCR Global Consultations on International Protection (Geneva, 2001)
27. There is much documentation on the irregular migration discussion archived on the UNHCR and IOM websites – search on www.unhcr.org or www.iom.ch. In particular, see a June 2006 document: UNHCR, *Addressing Mixed Migratory Movements: A 10-Point Plan of Action* (Geneva, 2006). Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=44ca0eda4> (last checked 4 September 2006).
28. South African Law Reform Commission, *Discussion Paper 111: Trafficking in Persons* (Pretoria, 2006). Available at <http://www.doj.gov.za/salrc/index.htm>.
29. For a similar conclusion, see R. Pharoah, *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa*, ISS Monograph no 123 (Pretoria, 2006).
30. In these circumstances, with a gradually increasing number of persons applying for asylum, a major backlog of applications developed, which a UNHCR-coordinated

- programme subsequently attempted to address, although the results did not quite match expectations. See Handmaker, Chapter 6 of this collection.
31. See de la Hunt and Kerfoot, Chapter 5 of this collection.
 32. See Human Rights Watch, *'Prohibited Persons:' Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (New York, 1998) and South African Human Rights Commission, *Illegal?*, Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act, Johannesburg, 1999, 23–25. The latter is available at: www.sahrc.org.za. A more recent analysis is Human Rights Watch, *Unprotected Migrants: Zimbabweans in South Africa's Limpopo Province* (New York, 2006). Available at <http://hrw.org/reports/2006/southafrica0806/>.
 33. In this regard, it is notable that the legal NGO Lawyers for Human Rights changed the name of its Refugee Rights Project to the Refugee and Migrant Rights Project, reflecting a broader recognition that these are issues that affect most migrants (i.e. non-South African citizens), irrespective of their legal status.
 34. There are also efficiency reasons why there is a need for advice and representation for asylum-seekers, by well-trained lawyers. First, for various reasons, not least the trauma they may have experienced, asylum-seekers are often unable to adequately argue their case on their own behalf. Secondly, the fact-finding aspect of the asylum procedure, regarded as the most crucial aspect, is greatly improved in circumstances where asylum-seekers are legally well represented. When the fact finding is not done correctly, there is a far greater burden placed on government officials and, in the case of legal challenge, judges to make final determinations. There is also a higher risk of inappropriate decisions. See Chapter 5 of this collection.
 35. *Watchenuka v. Minister of Home Affairs*, Cape Town High Court, Case No 1486/02. The degree of compliance with *Watchenuka* is not clear and likely has varied from office to office. Initially after *Watchenuka*, all permits were meant to be issued allowing work and study. However, just prior to the time of finalisation of this manuscript, a reversion of policy took place.