

# "Crossing Borders"

## A comparison of US and South African Border Control Policies

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## Introduction

*They just say: “Go, you brought nothing with you.” The people who come back are often killed at the border. We are killed trying to get to our families after we are sent back here alone.*

(Johnstone and Simbine, 1998: 170)

These words, taken from an interview of Francisco Chiure in Mozambique on the 16<sup>th</sup> of March 1996, are a powerful reminder of the realities of modern migration, and the desperation of those who will do anything to cross the border between Mozambique and South Africa.

Prior to 1994, South Africa was infamous throughout the world for its racialised policies and seemingly limitless measures of social control. Despite pressure from the international community, the previous government showed itself to be stubbornly resistant to change, reinforcing its control through a police force that was:

‘always in the front line in the enforcement of apartheid ... (and) ensured that black South Africans were kept in their places in segregated and inferior institutions’ (Cawthra, 1993: 1).

This unforgiving nature of the previous government extended to foreigners, including refugees from the war in Mozambique<sup>2</sup>, who braved a collection of horrors, including dangerous wild animals in Kruger National Park (which borders both countries) and a fence generating a lethal electric voltage in their desperation to avoid border control officials and reach relative safety in neighbouring South Africa.

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While South Africa has since seen dramatic political changes in recent years, and Mozambique too has at last achieved some degree of political stability<sup>3</sup>, migration to South Africa from Mozambique and other countries has continued and perhaps even increased. The numbers of migrants entering South Africa in recent years continue to be heavily contested, ranging from conservative estimates of several hundred thousand, to heavily exaggerated figures ranging into the 'millions', supported by 'pseudo-scientific' data (Crush, 1997). Whatever the numbers, it is clear that the nature of most regional migration is 'circular', with migrants expressing little wish to remain permanently (Crush, 1999: 128). In such a context, it is difficult to understand that while employer demand plays a significant role in stimulating cross-border migration, 'enforcement targets employees, not employers' (Ibid: 131).

Popular perceptions of a 'flood' of foreigners, lack of capacity to make timely, reliable determination on refugee status, a policy framework wholly inadequate to meet the needs and reflect the realities of modern migration trends, and numerous other factors have presented considerable challenges to the South African government in the post-1994 era, characterised by democracy and a commitment to human rights.

Attempts to deal with this issue through policy reform in South Africa have been fraught with difficulties, with the government torn, on one hand, between its domestic and international human rights obligations and, on the other, with growing pressure to address the 'immigrant problem'. During the course of these debates, much reliance has been had on the United States migration policy and border control mechanisms, to the extent that US officials have been involved in conducting surveys of South African border control mechanisms and making recommendations, conducting training of South African officials and even participating in government task teams developing policy. This concerns us somewhat, since the migration and border management systems in the United States have not only consistently failed to achieve their objectives, but the effects of their implementation have raised a number of serious human rights concerns as well (HRW, 1995 and 1997).

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<sup>2</sup> It is by now very well established that this war, described by a US State department official as 'one of the most brutal holocausts against ordinary human beings since World War II' (Footnote 31 in Prohibited Persons, Ibid.) was part-sponsored by the South African government itself.

<sup>3</sup> However, since the maintaining of a Peace Accord between warring forces in 1992, Mozambique has been beset with a crippling economy and environmental disasters generating a "new generation" of forced migrants, not least the devastating floods that displaced hundreds of thousands in 2000.

It is our intention in this report to do three things, namely: to survey the operation of migration policy and border management mechanisms in South Africa and the United States, to critique the desirability of drawing on US policy and border control mechanisms in the South African context and, finally, to identify areas for further research.

Ultimately, we believe it is important to broaden the dialogue on migration policy and border control / management, both to share positive experiences and to learn from the mistakes of the past. Indeed, the story of Francisco Chiure could just as easily be one of a migrant from Latin America, crossing the border between Mexico and the United States of America and leaving behind economic destitution (and possibly persecution) to seek a better future in a 'land of milk and honey'<sup>4</sup>.

In section I of this study, we provide an overview of migration policy in South Africa and attempts to reform this policy; section II discusses recent developments in US Migration Policy. Section III discusses the mechanisms of border control in the implementation of this policy in South Africa, asking whether South Africa may be 'learning from bad practice'. Section IV addresses various measures of gaining entry to South Africa, focussing on temporary entry, access to the refugee status determination procedure and detention. Section V discusses the extent to which one can secure residence in South Africa, while Section VI addresses the limits and capacity to challenge both detention and removal. Section VII briefly highlights key rights of foreigners and Section VIII to an extent summarises the above by highlighting certain dominant themes influencing migration policy in both South Africa and the United States, ranging from security and control and national politics to resource issues and inter-governmental relationships.

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<sup>4</sup> This expression, commonly used to describe the USA, has been used in recent years to describe the position of South Africa in relation to her poorer neighbours – NIDS: 1997)

## Section I: Migration Policy Development in South Africa

South Africa's policy on entry and residence, including temporary migration, immigration (permanent residence) and refugee determination, has fallen under the Aliens Control Act, an omnibus piece of legislation that (even in its latest versions) was very much rooted in the previous government's over-arching policy of apartheid (Peberdy and Crush: 1998).

### *Efforts to Reform*

Attempts to overhaul the country's migration policies began in 1995, with a statutory amendment<sup>5</sup> to the Aliens Control Act No. 96 of 1991. It was Parliament's intention to bring the Act more in line with the country's new constitution. Before being amended in 1995, s. 55 of the Act even provided that no decision of the Department was reviewable by a court or tribunal, and persons could be held in detention indefinitely, without judicial review (Handmaker, 1999). The 1995 Amendment removed this provision and provided that detention for periods beyond 30 days ought to be subject to review, although in practice it appeared that this was rarely happening (Ibid)<sup>6</sup>. In short, despite the reforms, there were still concerns that the Aliens Control Act fell far short of constitutional expectations (Klaaren, 1998). Clearly more comprehensive reforms were necessary.

The development of a refugee policy as part of the Department's broader migration framework has received greater priority. From 1994 until the 1<sup>st</sup> of April 2000, with the support of the United Nations High Commissioner for Refugees (UNHCR), the South African government had been processing individual applications for political asylum, treating asylum seekers as "exceptions" under the Aliens Control Act. Implementation, however, had its fair share of problems (Handmaker, 1999).

Following a well-organised lobby on the part of NGOs, a Refugees Act was passed at the end of

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<sup>5</sup> Aliens Control Amendment Act, No. 76 of 1996

<sup>6</sup> This was one of the results of a Human Rights Commission inquiry, which from March 1998, investigated the manner in which persons are apprehended and detained under the Aliens Control Act. Participating NGOs included Wits Law Clinic, Centre for Applied Legal Studies and Lawyers for Human Rights. 'Illegal? Report on the apprehension and detention of suspected undocumented migrants', South African Human Rights Commission, February 1999. Available at <http://www.lhr.org.za/refugee/hrcreport.htm>

1998. However, expectations of a more progressive approach towards refugees were quickly diminished. Regulations, which did not come until two years afterwards in April 2000, made clear that the South African government intended to severely limit access to refugee protection and reduce the reception conditions of asylum seekers in a bid to “discourage” illegal migration, notwithstanding the fact that persons genuinely fleeing persecution would have little, if any, means to survive on their own, and that those intending to enter on non-Refugee Convention grounds would be no less discouraged, since their intention was simply to gain entry to South Africa in the first place. Further, proposed amendments to the Act would have the effect of diluting the rights contained in the Refugees Act even further<sup>7</sup>.

A more general policy on immigration and border management has taken longer to develop. In 1997, a draft Green Paper on International Migration was released, the product of an NGO-managed consultative process. It contained progressive recommendations aimed at scrapping the current system based overwhelmingly on “security” concerns, in favour of one that responded, more pragmatically, to South Africa’s objective labour needs. Unfortunately, the events that followed disclosed an explicit rejection by the South African government of most of these ideas, and a return to a policy of control, motivated largely by security concerns.

Policy development in South Africa has seen a great deal of involvement from advisors of the US Government. The US government had taken a major interest in South Africa’s policy development since at least 1996/97, when it sent over a team of border control officials to review South Africa’s air, land and sea parts and provide recommendations (NIDS, 1997). These recommendations became the basis of South Africa’s “Collective Approach to Border Control” (Ibid.), which since 1997 has regulated the co-ordination of border control between the four responsible authorities, namely the South African Defence Force, Revenue Service (customs), Police Service and Home Affairs.

#### *Involvement of the US Immigration Service*

In 1997, the US Immigration Service established an office in Johannesburg, joining officials of

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<sup>7</sup> See details of the amendment and explanatory memo at: [www.lhr.org.za/refugee/docs.htm](http://www.lhr.org.za/refugee/docs.htm)

the United Kingdom who had been investigating cargo operations in Durban<sup>8</sup>. The office has since maintained an advisor from the INS to the present day.

The US government was further acknowledged for its role in the policy developments that followed, and was represented on the "Task Teams" that produced the White Paper on International Migration, released for public comment on May 1999, and various, subsequent Draft Immigration Bills, the most recent (at the time of writing) being released for comment in June 2001.

*Moving Backwards? An examination of the Proposed Immigration Regime*

Both the White Paper and Bill bear little resemblance to the Green Paper, containing provisions that formalise restrictive practices towards immigration.

There are a number of areas of concern that can be raised about the proposed documents, which for some considerable time were the subject of much political wrangling between the South African government, Parliamentary Portfolio Committee on Home Affairs and the Department of Home Affairs<sup>9</sup>.

Two broad areas for observation were raised by South African NGO Lawyers for Human Rights (LHR) in response to the White Paper (LHR, 1999)<sup>10</sup>, namely: the continued, ideological approach of control over management and fear that certain provisions contained within the White Paper and Bill would fuel the existing xenophobia in the country.

It has been LHR's contention that:

'The immigration regime proposed falls seriously short of the standards of human rights protection afforded non-South Africans in this country, and that additional thought ought to be given to its viability in discussion with various government and non-governmental

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<sup>8</sup> 'US to lend a hand in SA's fight against illegal aliens', Sunday Independent, 22 June 1997.

<sup>9</sup> See, e.g., 'Commentary on Immigration Bill impasse', Financial Mail (South Africa), 23 March 2001

<sup>10</sup> LHR first published its concerns regarding the White Paper in 'Refugees and the 'Community': A preliminary review of the White Paper on International Migration', *Botshabelo*, April / June 1999, vol 2, no 2, Lawyers for Human Rights.

role-players.'

LHR raised concerns over the White Paper's style of 'border control' that reflected a continued, uncompromising approach, believing such to be not only very expensive, but "of limited benefit, since it has been credibly established that most persons are entering South Africa for short periods of time and returning"<sup>11</sup>.

Furthermore, inability to deal with high levels of corruption has undermined the system, not only in the minds of those victim to these abuses of authority, but in the view of South Africa's parliament, which in 1999 accused the Department of Home Affairs of 'not doing enough' to address the problem<sup>12</sup>.

LHR also opposed the government's proposal to make South Africa 'less attractive' to potential migrants – indeed it is by now well established that such punitive measures are often of only temporary benefit and are always in danger of violating human rights norms. As migration expert, Bimal Ghosh, has concluded:

'As for the punitive measures, in order to be effective as a deterrent to future inflows, they need to be exceedingly onerous so that the human and financial cost of irregular entry may outweigh the anticipated benefits. But such draconian measures inevitably raise issues of human and civil rights in modern democracies.' (Ghosh, 1998: 148).

Ghosh goes on to warn that, apart from failing to stem irregular migration, such stringent measures have the highly undesirable effect of turning migrants to traffickers to gain entry into a country.

### *Xenophobia – entrenching itself in policy?*

South Africa has been experiencing a disturbing rise in attacks against foreigners in recent

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<sup>11</sup> The 'circular' nature of migration is well documented by the Southern African Migration Project: see J. Crush, 'The Discourse and Dimensions of Irregularity in Post-Apartheid South Africa', *International Migration*, vol. 37, no. 1, 1999, p. 125-151, and numerous SAMP "Policy Papers", available at [www.queensu.ca/samp](http://www.queensu.ca/samp)

<sup>12</sup> 'Home Affairs not doing enough about corruption', SA Press Association (Parliament), 20.10.1999

years, both directed by the general public towards foreigners (Handmaker, 2000)<sup>13</sup> and by the police in its aggressive enforcement of the immigration law in a manner that resembles the previous government's earlier enforcement of the notorious pass laws (Handmaker, 1997; HRW, 1998; Handmaker and Parsley, 2001).

Arguably one of the greatest sources of anti-foreigner sentiment is the mis-perception that South Africa is faced with a 'flood' of migrants from neighbouring countries (Crush, 1999), spurred on by sensationalist media reports (FXI, 1999), and an increasingly widespread belief that strong controls are needed to counter this. The 'moral panic' that has been created by this perception fuels concerns by the average South African over unemployment, lack of access to basic social services and health care, inadequate education, etc. and has spawned an aggressive enforcement of the provisions of the Aliens Control Act. While it cannot be denied that there has been an increase in migration to South Africa since the dismantling of apartheid, there is scant evidence to suggest that this is anywhere near the scale claimed by politicians and popular media.

The policy framework proposed by the South African government in the Migration White Paper and Immigration Bill suggests greater involvement of the community in border control:

In this White Paper 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... an interdepartmental committee will be established to coordinate law enforcement and community action. (WPIM, 1997: Executive Summary)

This approach seems to be motivated by a belief that the community not only has a 'vested interest' (see below), but is in fact responsible for contributing to border control efforts, in the same way that they are responsible for reporting crime.

it is possible to promote a different management of migration issues which makes a

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<sup>13</sup> A particularly disturbing incident involved an attack on a train against three foreigners by a mob of South Africans demonstrating against unemployment. All three foreigners, who were selling sweets and other items to

community responsible for cooperating with internal policing actions to ensure that illegal immigrants are not attracted to South Africa.

(WPIM, 1999: section 4.4.1)

Finally, while the policy documents continue to stress reliance on 'the community' to assist in detecting undocumented migrants, there is merely tacit recognition that there is a danger that such an approach will lead to an increase in xenophobia.

The I.S. should enforce immigration laws within each community and cooperate with police structures and community interests to ensure that illegal aliens are not harboured within the community and that the community does not perpetrate crimes against aliens or display xenophobic behaviour (WPIM, 1999: section 5.3).

Most worryingly, perhaps, such an approach draws heavily on nationalistic sentiment.

Theoretically, the migration policy could choose to shape the future composition of the South African population by giving preference to certain types of individuals who are deemed to be more desirable as members of our national community than others.

(WPIM, 1999: section 7.1)

This approach further draws, to a significant extent, on the recommendations of the INS (below), based on experiences in the USA that make use of the 'community' in enforcing migration control, as discussed in the following section.

Beyond the actions of the police and other agents of border control, LHR warned that the "the migration policy itself can potentially contribute to xenophobia as much as the government's enforcement of it" (LHR, 1999: 4). Apart from the obvious need for media and politicians to restrain themselves from deliberately making anti-foreigner statements, it was felt that the policy itself ought to not only include a commitment on the part of the government to proactively combat xenophobia, through such initiatives as the *Roll Back Xenophobia*

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passengers, were killed, either thrown from the window into the path of another train, or chased to the roof where they were electrocuted. 'Train from hell to Irene Station', *Pretoria News*, 4 Sept. 1998

campaign<sup>14</sup>, but reject any approach that relied on the community to actively contribute to border control initiatives since such an approach can in many instances 'fan the flames' of anti-foreigner and racist sentiment. Such anti-xenophobia initiatives must attempt to respond to the highly complex nature of xenophobia in South Africa, with origins ranging from the divisive, racist policies of the past to South Africa's long-term isolation from the rest of the African continent (Morris, 1998, Bouillon, 1996).

While the government's implementation of the new legislation will obviously be the ultimate indicator, recent analyses indicate that the future migration policy of South Africa will not draw from the White Paper as much as was previously thought<sup>15</sup>. Successive draft Immigration Bills put forward by the Department of Home Affairs have so far not won the support of the Parliamentary Portfolio Committee on Home Affairs, which has oversight over all policy relating to migration. However, with the notable exclusion of the proposed immigration service, it seems clear from the latest draft Immigration Bill (presented for comment at the time of writing) that many of the punitive and *control* elements proposed by the White Paper, recommended by the INS and indeed contained in the old Aliens Control Act, will in fact be incorporated in the final policy. Thus, we feel it is worthwhile carefully examining both the content and experiences of implementing the migration policy of the US.

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<sup>14</sup> Further info: [www.sahrc.org](http://www.sahrc.org) <or> [www.lhr.org.za/rollback.rollback.htm](http://www.lhr.org.za/rollback.rollback.htm)

<sup>15</sup> E-mail from V. Williams (SAIMMIG e-mail discussion list, 18.5.01: "The white paper as we know it is being ignored".

## **Section II: Overview of US Migration and Asylum Policy**

The United States Immigration and Naturalization Service (INS), part of the US Ministry of Justice, is responsible for all aspects of cross-border movement of people into the USA, ranging from policy matters to implementation. Responsibility for cross-border movement of goods falls under the authority of US Customs. Border enforcement is provided by the US Border Patrol, which is part of the INS.

The INS Immigration Officers process entry documents at the border, make initial assessments of a person's documented status, and make decisions on asylum and immigration applications and applications for naturalisation. INS officers may also decide to detain persons pending a final decision on their immigration status. An immigration judge (also falling under the authority of the Ministry of Justice), following a decision of the Board of Immigration Appeals, may review these decisions in one of various immigration courts situated throughout the country. The US State Department / Ministry of Foreign Affairs is also involved to the extent that it processes applications for visas granted overseas through its consulates and embassies, and is involved in setting priorities for the admission of resettled refugees from camps overseas.

### *US Asylum Policy*

United States' asylum law derives from the 1951 Convention Relating to the Status of Refugees and the Convention's 1967 Protocol, the latter of which was ratified in 1968 (Pistone, 2000). With the passage of the Refugee Act of 1980, the Protocol's non-refoulement obligations were implemented into U.S. law. Specifically, the Refugee Act authorizes the Attorney General to grant asylum protection to refugees present in the United States (Id). According to the United States Immigration and Naturalization Service, the United States granted asylum to 16,810 persons in fiscal year 2000 (INS: 2001).

The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) radically altered United States asylum law. Significantly, there are three aspects to IIRIRA which have increased the barriers to gaining refugee status and radically affected the rights of asylum seekers in the United States: (1) asylum seekers are required to file their

application for asylum within one year of their arrival, except in cases where there has been substantial changes in their home country; (2) the procedures for deportation and exclusion have been dramatically revised whereby INS officials now have the power of summarily deport asylum seekers – known as “expedited removal” in the legislation; and (3) mandatory detention of asylum seekers. Further, this legislation virtually eliminated all discretionary power of agency officials to grant exceptions to individual immigrants.<sup>16</sup>

Under expedited removal procedures, refugees arriving at a U.S. port of entry without proper travel documents or documents suspected of being fraudulent must overcome onerous procedural hurdles before they are eligible to apply for asylum at a removal hearing before an immigration judge.<sup>17</sup> First, aliens are interviewed by INS officers whose function is to prohibit unauthorized entry in the United States. Refugees who claim asylum are then subject to a second interview by an asylum officer to assess whether they have a “credible fear” of persecution. Following the “credible fear” interview, individuals who deemed not to have a credible fear of persecution are subject to immediate deportation or “expedited removal.” If an individual passes the credible fear interview, whereby they display a credible fear of being persecuted in their home country then they are placed in detention.

### *US INS Detention Policy*

The INS uses three types of detention facilities for asylum seekers: government owned Service Processing Centers (SPC), operated by the detention and deportation branch of the INS; contract facilities which are run by private prison corporations; and state, local and county jails where the INS rents beds and asylum seekers share space with criminal inmates (Pistone, 1999). According to recent testimony before the U.S. Congress, over 22,000 aliens are being detained by the INS with 60 percent of those being housed in local and county jails.<sup>18</sup>

The INS now manages the fastest growing prison population in the United States.<sup>19</sup> In the past three years, the number of detainees has tripled with costs of detention reaching \$1 billion. What is perhaps most disturbing about these developments however is that the detention of

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<sup>16</sup> See, Sachs, Susan, “Second Thoughts: Cracking the Door for Immigrants,” *The New York Times*, July 2, 2001.

<sup>17</sup> Pistone, 2000

<sup>18</sup> “Religious leaders urge immigration reforms,” *Newark Star Ledger*, May 21, 2001.

resident aliens and refugees in the United States has become a money making operation for local jails and prisons corporations. In fiscal year 2000, the INS' total budget for detention was \$900 million of which \$287 million was used to pay for bed space - resulting in a small fortune to many local governments who are able to sell empty beds in their county jails to the INS.<sup>20</sup>

Besides the fact that local governments and private corporations are profiting from the detention of resident aliens and refugees, another major concern which has emerged in the United States system of detention is the issue of near indefinite terms of incarceration. Recently, in response to a lawsuit challenging the legality of the INS detention policy, INS documents revealed that 851 people have been detained for three years or longer.<sup>21</sup> INS records further show that 361 of the agency's longest-held prisoners include asylum seekers and others who have not been convicted of any crime requiring detention under recent changes in asylum laws.<sup>22</sup> Recently, however, court challenges to the US INS detention policy have been made in the cases of Zadvydas and St. Cyr, discussed below in Section VI.

#### *US Border Control Policy*

Beginning in the 1990s under the policy goals of "controlling" illegal migration to the United States, the government began committing unprecedented resources to policing initiatives along the U.S.-Mexican border. While the effectiveness of these policies has been widely debated recent reports from various border watchers have revealed two major trends in response to these policy initiatives. First, illegal border crossings have been "spatially restructured to circumvent areas of high border enforcement" and second, the whole border regions comprising Texas and California has become increasingly more dangerous to cross for migrants than it was prior to the new enforcement efforts resulting in increasing fatalities amongst migrants.<sup>23</sup>

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<sup>19</sup> Minnesota Public Radio, Marketplace Morning Report, June 26, 2001.

<sup>20</sup> Id.

<sup>21</sup> Malone and Trejo, "Asylum changes sought: Congress hears from detained immigrants," Dallas Morning News, May 3, 2001.

<sup>22</sup> Malone, Dan, "851 Detained for Years in INS Centers," Dallas Morning News, April 1, 2001.

<sup>23</sup> Eschbach et. al, "Causes and Trends in Migrant Deaths Along the U.S.-Mexican Border, 1985-1988," University of Houston.

### **Section III: Mechanisms of Control in South Africa – Learning bad practice?**

Control of undocumented migrants in South Africa is effected through internal and external controls. The racial nature of 'profiling' undocumented migrants on the basis of racialised criteria has led to a number of persons being apprehended and taken into detention when they possessed a valid visa or permit to reside (SAHRC, 1999). Mechanisms of internal control have even led to South African citizens being arrested, on the grounds that they have 'dark skin and a strange manner of dressing'<sup>24</sup>. The South African Police Service is primarily responsible for enforcing internal controls, a situation that has led to a number of allegations of corruption and abuse of power<sup>25</sup>.

As referred to earlier, external controls are the responsibility of four agencies responsible for border control: Police, Immigration (Home Affairs), Customs (Revenue) and, to a lesser extent, the military<sup>26</sup>. The Department of Home Affairs continues to be primarily responsible for policy issues, making administrative determinations on residential status (including temporary permits for work, business, study or medical reasons), immigration permits and refugee status and exercises some external border control. The Police service plays the most substantial role in terms of manpower, enforcing internal control measures (detecting, apprehending and detaining suspected undocumented migrants) and manning several of the land border posts, in some cases jointly with Home Affairs. In addition to regulating the movement of persons, the police are also responsible for detecting illegal smuggling of goods and prohibited items (drugs, weapons, etc.) and, together with Customs, regulating the transport of legal goods.

The role of the military is largely confined to patrolling the perimeter fence that separates South Africa from neighbouring Mozambique and monitoring electronic detection systems. Whenever an unauthorised detection is noted, the military is expected to track down the undocumented migrant; though as we observed during a short field visit in January 2001, in practice a substantial number of unauthorised detections are never followed up due to lack of manpower.

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<sup>24</sup> 'Police assault South African mistaken for illegal immigrant', *The Star*, Johannesburg, 11 March 2001

<sup>25</sup> *The Star*, Ibid and 'Corruption: Swoop on police Illegal Alien Unit', *Pretoria News*, 10 September 1998

<sup>26</sup> Additional role players mentioned include the National Intelligence Agency, South African Secret Service and Departments of Trade and Industry, Health, Agriculture, Foreign Affairs, Environmental Affairs & Tourism, Correctional Service, Transport, Public Works, Justice and Welfare (NIDS, 1997)

### *Collective Approach to Border Control*

The activities of all four separate governmental authorities responsible for border control are managed through a 'Collective Approach to Border Control' (NIDS, 1997), which was an initiative begun in mid-1997, seeking to get beyond the previously 'disjointed' approach and create a 'unified and accountable command structure for border control' (Grobler, 2001). It followed a report prepared for the National Inter-departmental Structure (NIDS) on Border Control by The Operational Working Team on Border Control.

The Report 'Implementation Plan for a Collective Approach to Border Control' addressed the various aims and functions of various levels of border control officials, from the national level to the port of entry level (NIDS, 1997: 10-11). It spoke of a phased programme of action, planned to take place over a one and a half year period, starting middle 1997 and completing at the end of 1998, intending to bring the three main authorities (Customs, Immigration and Police) 'under one roof', allocating existing staff to new positions and assigning new roles rather than hiring additional staff (Ibid: 15).

The Report made various recommendations regarding South Africa's land borders, airports, sea borders and informal border crossings. The recommendations aimed at restricting access to controlled areas at sea borders and airports, but interestingly also recognised the need to continue maintaining informal border crossings, on the grounds that:

'communities are being artificially divided by colonial borders, and provision must be made for estranged families to visit each other'.

More precisely, the Report sought to clarify the roles and functions of the various players responsible for border control, aiming at 'uniform guidelines and control mechanisms for ports of entry', reducing 'red tape' and making provision for the sharing of facilities (in particular intelligence information and technology). Further, the Report made recommendations with regard to (acknowledged) levels of corruption and 'detention facilities for illegal immigrants'.

The Report was to be followed by a 'Business Plan', to be drawn up by the Inter-Agency

Structure established by the various authorities agreement to the Plan. While other reports were submitted to the NIDS Task Team for consideration<sup>27</sup>, numerous officials acknowledged that the NIDS report was particularly influenced by the observations and recommendations of two reports by the US Customs Service (US Customs, 1997) and US Immigration and Naturalization Service (US INS, 1997).

#### *SA Report by the US Immigration and Naturalization Service*

The report by the US INS was 'pursuant to a request from the South African Government to the United States Department of State' (US INS, 1997: 2). It was clear that a substantial motivation for requesting US assistance was a concern over crime<sup>28</sup>. The INS Inspection Team, which was composed of border control and inspections officials based at various sea, air and land border posts in the United States, was split into four teams, making assessments of a selection of South Africa's land borders, seaports and airports. Its aim was (in part) to 'provide a working methodology by which other problems can be identified and attacked' (Ibid: 12).

The INS strongly encouraged the South African government to prioritise 'illegal migration':

'foremost, the (South African Government) and its citizens must make control of illegal immigration one of its top priorities' (US INS, 1997: 4)

Once this was done, the report recommended, the South African government could then concentrate on resources (staff and technology) and a 'comprehensive enforcement strategy'. Observations and recommendations were also made regarding a wide range of issues, including the organizational command structure, the role of the military, technology issues, personnel and training, budget and equipment, etc.

The recommendations that were made seemed to be strongly influenced from a solely US

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<sup>27</sup> Other documents mentioned in the report, but so far not made publicly available, include a the 'National Intelligence Coordinating Committee (ICOC) Report to the Cabinet committee on Safety and Intelligence (CCSI)', 'The Customs Law Enforcement Task Group (CLETG) document for the Executive Head for SA Revenue Services' and 'A draft document prepared by Mr I Lambinon for the Department of Home Affairs'.

<sup>28</sup> According to the report, the request was in relation to the South African Government's efforts "to assist that government combat the growing crime problem", (US INS, 1997: 2).

perspective, drawn from the experiences of much-criticised INS Programmes such as 'Operation Hold the Line' and 'Operation Gatekeeper', with questionable applicability in the local context. Indeed, the NIDS itself recognised some limitations. For example, a recommendation that the South African border officials introduce a policy of 'fee for service' (Ibid: 6) was something ultimately not taken up by the authorities. Indeed, it is hard to imagine most of the persons travelling through the border posts being in a position to pay such fees.

The US INS Report recommended that the community be more involved in border policing, on the (somewhat dubious) claim that 'the community has a vested interest in border control' (Ibid: 7).

Emphasis was also placed in the US INS Report on holding train, ship and airline companies accountable for border control, through a comprehensive systems of fines, believing that this would be a 'force multiplier to border control' (Ibid: 8).

As mentioned earlier, the Report was unequivocal in its belief that the South African government needed to 'make control of illegal immigration one of its top priorities', repeating this statement both at the beginning and at the end of the report. While the report claimed that 'numerous intelligence documents, both national and international, have concluded that the illegal alien situation in South Africa (was) out of control', it did acknowledge the 'tremendous pressure' the authorities in South Africa were facing, ranging from increasing air traffic to porous land borders. (Ibid: 12)

Somewhat confusingly, the Report also referred to the large numbers of refugees in Africa, claiming that:

'People become refugees by weather changes that affect agricultural production and political changes that affect human rights' (Ibid: 12)

## Section IV: Who Goes There?<sup>29</sup> – Getting through the gates

In view of the many competing interests, gaining access to South Africa's territory is made possible through what have been described as 'two gates', namely the Aliens Control Act 1991 and the various bi-lateral treaties between South Africa and neighbouring countries concerning temporary migrant workers (Crush, 1997). As mentioned earlier, the Aliens Control Act currently regulates all aspects of migration / immigration, with the exception of asylum, which is regulated by the Refugees Act and accompanying Regulations.

### *Temporary Entry*

The Aliens Control Act provides for temporary entry of persons for a variety of conditions, primarily: work, business, tourism, study and medical reasons. Those entering without documentation, or whose temporary documentation has been revoked for contravening a condition (for example, staying beyond the period designated in the permit without applying for a renewal) are considered to be 'prohibited persons'. It may be possible to 'regularise' one's status as a prohibited person, as was the case for former Mozambican refugees (Handmaker, Johnston and Schneider, 2001) and persons who applied for refugee status and received a 'section 41' permit, prior to the coming into force of the Refugees Act 1998 in April 2000 (Handmaker, 1999a: 296).

### *Regulating Undocumented Entry*

Undocumented entry is an administrative offence in terms of the Aliens Control Act and shall likely continue to be in terms of the (proposed) Immigration Act, although certain methods of entry (e.g. smuggling) are criminal offences and punishable by imprisonment. Pressure on the police to 'catch' undocumented migrants in South Africa has resulted in a number of persons with a valid legal permit and even South Africans considered to be "too dark" or having a

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<sup>29</sup> This expression is partly attributed to the title of an early report from the Human Sciences Research Council, a (mostly government funded) think tank established in Pretoria in the 1980's that has traditionally produced a great deal of research commissioned by the government to justify its policies. Who Goes There?: Perspectives on Clandestine Migration and Illegal Aliens in Southern Africa (Ibid.), Minaar and Hough.

“strange manner of dressing”<sup>30</sup> being apprehended, detained and (allegedly) even deported (SAHRC, 1999).

However, notwithstanding the various administrative controls set up to regulate entry and track undocumented migrants inside South Africa, the fact is that the authorities are unable to stop undocumented migration: some officials openly acknowledge this<sup>31</sup>.

### *Access to the Asylum Procedure*

Technically, it should be possible to apply for political asylum on request at the border and officials have been trained by UNHCR to recognise potential asylum applicants. Attempts to compromise this fundamental principle of international refugee law that an asylum seeker ought not be punished for his/her illegal entry (e.g. for having transited a ‘safe country’) have been successfully challenged in court<sup>32</sup>.

Nevertheless, it is feared that the government’s increasing tendency towards non-entrée, reinforced by various restrictive entry requirements is having a negative effect on the ability of asylum seekers to gain access to the asylum determination procedure in South Africa (de la Hunt, 2000).

### *Detention*

It is possible to detain a suspected undocumented migrant, and this often happens. Persons declared to be ‘prohibited persons’ are often sent to Lindela Repatriation Centre, a privately run holding centre, prior to their deportation. Asylum seekers who entered the country undocumented are often detained pending a decision on their asylum application, although the stated policy of the department is not to hold such persons if it appears that the application will take ‘unreasonably long to process’ (Handmaker, 1999a: 295).

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<sup>30</sup> ‘Police assault South African mistaken for illegal immigrant’, *The Star*, 11 March 2001

<sup>31</sup> Interview with border control officials in Mpumalanga, 12 January 2001.

<sup>32</sup> Departmental Circular No. 59 of 2000 provided that asylum seekers who had ‘transited numerous safe neighbouring countries to reach the RSA ... should be referred back from where they come from. If they insist on entering the Republic they should be detained. South African NGO Lawyers for Human Rights successfully challenged this Circular in the courts. See [www.lhr.org.za/refugee/caselaw/lhr.htm](http://www.lhr.org.za/refugee/caselaw/lhr.htm)

Detention may be reviewed by a judge in terms of section 55 of the Aliens Control Act, a provision also provided specifically in respect of asylum seekers in section 29 of the Refugees Act. However, in practice it appears that the s.55 review rarely takes place in practice (SAJHR, 1999).

## **Section V: Securing Residence**

It is fairly well established that the type of migration to South Africa is predominantly circular in nature and, as Crush has stated, 'very few migrants have any intention or wish to settle permanently in South Africa' (Crush, 1999: 128). Nevertheless, particularly for persons who have been resident in South Africa for decades and whose children may have been born and grown up in South Africa, there is a need for the policy on access to permanent residence to be rationalised.

It has been the case (in terms of the Aliens Control Act) that permanent residence is available only on a discretionary basis, and this policy is set to continue in terms of the (proposed) Immigration Act, with the exception that the Minister's discretion might be tempered somewhat through mandatory consultation with an 'Immigration Advisory Board'. Where it was once the 'exclusive domain' of certain white immigrants to South Africa, recent policy developments have broadened access to permanent residence to larger groups of people.

In terms of the current legislative and policy framework, there are currently three main ways of obtaining permanent residence. The first continues to be through an application to the Department of Home Affairs, normally following a period of 5 years temporary residence in the Republic, or on the basis of marriage to a South African citizen or 'same-sex life partner' relationship with a South African citizen<sup>33</sup>. Attempts to introduce an exorbitant fee to spouses of South African partners have been struck down by the courts as being unconstitutional<sup>34</sup>.

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<sup>33</sup> This extension to the rule that only heterosexual spouses were entitled to apply for permanent residence was established in the case of National Coalition for Gay and Lesbian Equality (and others) v. Minister of Home Affairs (and others), CCT 10/99, decided by the Constitutional Court on 2 December 1999. Available at: <http://www.law.wits.ac.za/judgements/1999/natcoalsum.html>

<sup>34</sup> See Dawood (and another) v. Minister of Home Affairs (and others), CCT 35/99, Decided on: 7 June 2000

The second means of obtaining permanent residence is through a discretionary decision of the Minister of Home Affairs to 'regularise' the status of a person otherwise declared to be a prohibited person. This discretionary power was utilised in the last few years on a large scale in three separate programmes of 'amnesty' (Williams and Crush, 1999). This has been extended in recent years to: miners who had lived and worked in South Africa for five years, a programme that later extended to persons from SADC countries who had been employed for the last five years and finally former Mozambican refugees in South Africa who had not taken part in the UNHCR-led repatriation programme and decided to stay. The latter programme was criticised as, amongst other issues, as having not having learned from the mistakes of earlier amnesties (Handmaker, Schneider and Johnston, 2001).

Finally, in terms of section 27(c) of the Refugees Act, a refugee:

is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely

The government has always proved to be reluctant to extend permanent residence to refugees, and thus refugee status in South Africa has, with few exceptions, always been temporary (Handmaker, 1999: 299). Recent attempts to 'set back' applicants with refugee status to asylum seekers permits was challenged by lawyers in the case of Musa<sup>35</sup>, leading to a reversal in this policy.

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<sup>35</sup> Musa (and others) v. Minister of Home Affairs (and others), Case: 28248/2000, High Court of South Africa (Transvaal Provincial Division), Decided 27.2.2001. Available at: [www.lhr.org.za/refugee/caselaw/musa.htm](http://www.lhr.org.za/refugee/caselaw/musa.htm)

## **Section VI: Challenging Removal and Indefinite Detention**

Much of the litigation in South Africa has been initiated at the stages of 'rejection', where the applicant fears continued persecution (refoulment), has exhausted all administrative remedies and faces deportation as an undocumented migrant or has been 'summarily' and wrongly determined to have committed a deportable offence.

Such litigation is initiated in terms of South African administrative law, namely judicial review of administrative decisions, an area of law that is continuing to develop in South Africa, particularly since the constitution entrenched in law administrative justice guarantees, providing remedies to an increasing number of persons.

Further, section 55 has been used to great effect by lawyers as a means to challenge continued detention at deportation facilities such as Lindela Repatriation Centre and, consequently, removal from the Republic.

### *Court Challenges in the US*

In the US, recent court cases on the issue of detention present encouraging developments, both in setting certain limits to detention and ensuring the right of detained persons to judicial review.

The case of *Zadvydas v. Davis* reached the United States Supreme Court in June 2001 and helped clarify the issue of indefinite detention. In the case, the petitioner, Kestutis Zadvydas, a resident alien born, apparently of Lithuanian parents, in a German displaced persons camp was ordered deported because of his criminal record. Since Zadvydas was neither a citizen of Germany or Lithuania, these countries refused to accept him. When Zadvydas remained in custody after the removal period expired, he filed a writ of habeas corpus for his immediate release from detention. While the U.S. District Court granted Zadvydas' writ, the Fifth Circuit reversed this decision concluding that his detention did not violate the U.S. Constitution because eventual deportation was not impossible, good faith efforts for removal continued and the

detention was subject to administrative review.<sup>36</sup> In a further appeal, the U.S. Supreme Court agreed to hear the case.

In the case, the Supreme Court rejected the government's view, first argued by the Clinton administration and then by the Bush administration, that U.S. immigration laws authorized and the Constitution permitted indefinite, perhaps even lifelong detention of immigrants adjudged deportable but unable to be repatriated.<sup>37</sup> The Supreme Court found that the government's view presented a "serious constitutional threat" under the Fifth Amendment's guarantee of due process with Justice Breyer holding for the majority that after six months of detention, if deportation did not seem likely in the "reasonably foreseeable future," the government would have to produce special reasons for keeping someone in detention.<sup>38</sup> Or as Justice Breyer stated,

"government detention violates the Due Process Clause unless it is ordered in a criminal proceeding with adequate procedural safeguards or a specific justification outweighs the individual's liberty interest."<sup>39</sup>

In another case scaling back the power of the United States government to summarily deport aliens, decided a week before the *Zadvydas* decision, the Supreme Court ruled in *Immigration and Naturalization Services v. St. Cyr*, that judicial review of deportation decisions "is unquestionably required by the Constitution," even though the 1996 IIRIRA legislation appears to bar judicial review.<sup>40</sup>

In the words of constitutional scholar David Cole, what both the *Zadvydas* and *St. Cyr* cases show is the Supreme Court's "fundamental recognition" that as "persons" living in the United States, noncitizens are entitled to protections of the U.S. Bill of Rights "not explicitly limited to

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<sup>36</sup> *Zadvydas v. Davis et. al.*, No. 99-7791, June 28, 2001.

<sup>37</sup> In hearing this case the Supreme Court consolidated several cases including the case of a man from Cambodia who was in detention but ordered deported for criminal activity. Since the U.S. has no repatriation agreement with Cambodia, this man, along with thousands of others from Cuba, Laos and Vietnam faced years of prolonged detention. See Greenhouse, Linda, "Justices Place Limits on Detention Cases of Deportable Immigrants," *The New York Times*, June 29, 2001.

<sup>38</sup> *Id.*

<sup>39</sup> *Zadvydas v. Davis et. al.*, No. 99-7791, June 28, 2001.

<sup>40</sup> Cole, David, "A Legal Battle for Immigrants," *New York Times*, July 1, 2001.

citizens.”<sup>41</sup> Further these cases are the most far-reaching decisions thus for the view that the U.S. Constitution “protects the liberty of all persons in the United States, including aliens, whether their presence in the United States is unlawful, temporary, or permanent.”<sup>42</sup> In response to these decisions, the INS issued a press release stating that eligible individuals will be “released from detention soon” but will remain under INS supervision and subject to removal from the United States. However, the press release went on to state that most former detainees will be eligible for work authorization.<sup>43</sup>

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<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> INS Press Release on Supreme Court Detention Decisions, July 3, 2001.

## **Section VII: Rights of foreigners**

The rights of foreigners in South African law is also an area of developing jurisprudence, and notwithstanding the constitution's equality clause not specifically extending to 'nationality', a number of recent cases have indicated the tendency of the courts to look favourably upon the rights of foreigners. One such example concerns access to permanent residence by same-sex partners. Another important constitutional court case concerned an application by a group of foreign teachers to be granted residence on the basis of their employment<sup>44</sup>.

Rights of access by asylum seeker's children to study, prohibited by Departmental Regulations, has also been established through litigation<sup>45</sup>. However, as Ohazuruike has written:

while there are no specific laws that aim to discriminate against or to restrict refugee rights in South Africa, civil society is yet to respond positively (Ohazuruike, 1999:1)

More generally, systematic discrimination against foreigners has been documented by Human Rights Watch (1998) and the South African Human Rights Commission (1998), leading to a "Roll Back Xenophobia" campaign (NCRA, 1999) by the National Consortium on Refugee Affairs. The campaign focuses on a number of issues, including: violence, media coverage, education and the conduct of police and civil servants (NCRA, *Ibid*).

However, since the wording of South Africa's constitution is broad, extending most of its provisions to 'all persons' or 'everyone', there remains ample space for constitutional litigation (Klaaren, 1996).

## **Section VIII: Dominant Themes influencing migration policy**

Access to South Africa is regulated by out-dated legislation that the government itself has ultimately acknowledged is in need of more than simply amendment. The direction such a new policy will take, however, will depend on a number of influencing factors that have become dominant themes in the debates in South Africa, namely: security and control, international law

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<sup>44</sup> Larbi-Odam (and others) v. Minister of Home Affairs (and others), Case CCT 2/97, decided on: 26 November 1997. Available at: [www.lhr.org.za/migration/larbi.htm](http://www.lhr.org.za/migration/larbi.htm)

<sup>45</sup> Matter of Mutambala and others, a case settled out of court. See: [www.lhr.org.za/refugee/circulars/study.tif](http://www.lhr.org.za/refugee/circulars/study.tif)

and human rights (especially refugee protection) and the vagaries of South African politics.

### *Security and Control*

Addressing migration in the 'new' South Africa has been exceptionally challenging for a government ill-equipped to operate in a human rights framework. Indeed, the very same institutional structures that were set up to enforce the notorious policy of *influx control* are currently being utilised by the immigration authorities, including administrative procedures akin to the treatment of criminal suspects (e.g. fingerprinting) and the use of detention cells that once held pass law violators. Further, the enthusiastic efforts of the police to catch 'criminals', particularly in large-scale operations such as Sword and Shield (1996) and Operation Crackdown (1999) have resulted in the apprehension of suspected undocumented migrants consistently figuring disproportionately high in arrest statistics<sup>46</sup>.

Apart from the US-style proposals recommended by INS officials, both in reports and through participation in policy 'task teams', a number of factors are influencing the government's preoccupation with a 'security and control' agenda. These can be roughly categorised as operational, national and international factors.

**Operational factors** include the fact that the police is constantly challenged by a lack of accountability, lack of co-ordination (both internally and with other authorities responsible for border control) and a police culture with roots in the country's apartheid past. A particularly disturbing example of this was the release of a 'police training video', shot by police officers of the East Rand Dog Unit. The video portrayed the police officers' use of dogs being 'trained' on live human beings, Mozambicans that had been apprehended as suspected undocumented migrants. As the Mozambican Minister for Labour remarked: "The images we have seen are abominable, horrible. It's an assault against human rights."<sup>47</sup>

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<sup>46</sup> 'Police include deportations in crime figures' (Sapa, 06/11, Pretoria) – reported that, out of a total of 4522 suspects that had been arrested for serious crimes in the police's Operation Crackdown in the Pretoria area over the past seven months, 12 were for murder, 23 for rape, 12 for drug dealing and 522 for assault, he said in a statement. Nearly 400 illegal immigrants were also netted from April to October.

<sup>47</sup> Mario Sevene, Mozambique Minister of Labour, reacting to the police dog "training video" portraying Mozambican nationals being set upon by dogs and police officers, PANA, Maputo, 9.11.00.

The entrenched racism within the South African police force, amongst immigration officers and defence force operatives persists, whether displayed by a black or white official. The victims of alleged physical attacks and corruption are almost invariably black and generally of African descent, the implicit assumption being that such persons' lives are of a qualitatively lower standard than others.

**National factors** that have motivated the security and control mindset certainly include political pressures, with the Ministers of Safety and Security (Police), Defence and Home Affairs (Immigration) all at various occasions making statements that foreigners were a 'threat' to the social fabric of the nation, were criminals, brought disease, etc.<sup>48</sup> The impact of such statements confirms the emerging general sentiment in South Africa, exacerbating the rising xenophobia. Further, the training received by police officials continues to stress 'racial profiling', as confirmed in the recent arrest of a South African woman (referred to earlier) who was 'too black' and had a "strange manner of dressing"<sup>49</sup>.

Finally, there are **international factors** that have motivated the government's preoccupation with security and control. It is claimed that South Africa is increasingly being seen as a desirable location for international crime syndicates, including traffickers in drugs (both destined for the South African streets or to be re-routed elsewhere in the world) and people (particularly from Asia). Clearly such trends, if they are in fact as real as they are claimed to be, will be exceptionally difficult issues for the under-resourced South African authorities to tackle.

### *International Law and Human Rights*

The South African government has repeatedly committed itself to human rights, and is keenly sensitive of its international image in this regard. Consequently, certain officials in government have made efforts to condemn xenophobia, both institutionally and within the broader South African society, although this commitment is unfortunately not shared by all within government<sup>50</sup>.

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<sup>48</sup> e.g. 'Kick them out', Editorial in *The Citizen*, July 1997

<sup>49</sup> 'Police assault South African mistaken for illegal immigrant', *Ibid.*

<sup>50</sup> Rights groups slam 'xenophobic' official, *Mail and Guardian*, Nov. 5 to 11, 1999, p. 14

Nevertheless, official commitment to fostering and protecting a human rights culture is strong in South Africa, including the country's commitment to honour the provisions of the UN and OAU Refugee Conventions.

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