



Kramer Law School Building
Middle Campus 1 Stanley Road
Rondebosch 7701
Telephone: (021) 650 5581
Telefax: (021) 650 4107
Email: refugeelawclinic@uct.ac.za
In reply please quote reference

30 September 2016

To: The Director General: Department of Home Affairs

**C/O: Mr Sihle Mthiyane
Director: Policy Development**

BY EMAIL CORRESPONDENCE

Dear Sir or Madam,

**RE: SUBMISSIONS BY THE UCT REFUGEE RIGHTS UNIT: GREEN PAPER ON
INTERNATIONAL MIGRATION IN SOUTH AFRICA, 2016**

A. INTRODUCTION

1. The University of Cape Town's Refugee Rights Unit has been providing free legal assistance to refugees and asylum seekers for over a decade. Amongst its core functions includes assisting asylum seekers with navigating through the asylum process and ensuring that the rights of refugees and asylum seekers in South Africa are upheld and respected.
2. We thank the Minister of the Department of Home Affairs ("DHA") for the opportunity to make these brief submissions and while we welcome the initiative taken by the

DIRECTOR: F.K H A N (BA.HDE.LLB.LLM)
ASSISTED BY: J.CHAPMAN (LLB) M.SCHOEMAN (LLB PGDIP) N.MAURITZ (LLB LLM) POPO MFUBU (B.COM LLB) N.WILLIE (B.SOC.SCI LLB)
CANDIDATE ATTORNEYS: M.LEE (BA LLB) A.TRUTER (BA LLB)
HONORARY RESEARCH ASSOCIATES: T.SCHREIER, L.DE LA HUNT

DHA to adopt a policy aimed at finding better and more efficient ways to manage migration to South Africa from a holistic perspective, we are concerned about certain aspects of the Green Paper on International Migration, 2016 (“the Green Paper”) which might have negative and detrimental effects on asylum seekers and refugees in South Africa. We therefore make these submissions which are focused on how the Green Paper may impact the rights of refugees and asylum seekers.

3. We have herein itemised our concerns regarding the Green Paper. The format and headings of the submissions mimics that of the Green Paper for ease of reference. The discussion which follows identifies the issues of concern and provides suggestions where possible.

B. DOMESTIC AND INTERNATIONAL LEGISLATIVE FRAMEWORK THAT HAS AN IMPACT ON REFUGEE PROTECTION

4. In order to contextualise and locate our submissions, a brief summary of the current legislative framework in respect of refugee protection is necessary.
5. As South Africa re-joined the international community after the fall of apartheid, it shouldered its own share of international engagement and responsibilities with regards to international refugee reception and protection. Amongst the treaties and international instruments signed by South Africa which are of relevance here is the Convention Relating to the Status of Refugees¹, the International Covenant on Civil and Political Rights², the International Covenant on Economic, Social and Cultural rights³, and the Universal Declaration of Human Rights of 1948⁴. Regionally, South Africa is a state party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁵, and the African Charter of Human and Peoples’

¹ Adopted on 28 July 1951, entered into force 22 April 1954 and ratified by South Africa on 12 January 1996 and hereafter referred to as the 1951 Refugee Convention.

² Adopted in New York, 16 December 1966, entered into force 23 March 1976, UN Doc A/6316 (1966), 999 UNTS 171 (ICCPR). South Africa signed this Convention on 3 October 1994 and ratified it on 10 December 1998.

³ Adopted in New York, 16 December 1966, entered into force 3 January 1976, UN Doc A/6316 (1966) 999 UNTS 3 (ICESCR) and signed by South Africa on 3 October 1994

⁴ Adopted on 10 December 1948. Though this is not a treaty, it has a moral and political authority internationally as a minimum standard of states human rights obligations as parties to the United Nations Charter as enshrined in articles 55 & 56 of the UN Charter of 26 June 1945 and binds South Africa as a member of the UN

⁵ Adopted on 10 September 1969, entered into force 20 June 1974 and ratified by South Africa on 15 December 1995 and hereafter referred to as the 1969 OAU Convention.

Rights of 1981⁶. In domesticating its international and regional obligations towards refugee protection South Africa passed the Refugees Act⁷, the Immigration Act⁸ and the Citizenship Act⁹ which all deal in one way or another with asylum seekers and refugees including the Constitution of the Republic of South Africa itself. It is therefore important to have sight of South Africa's domestic and international obligations in relation to refugees when developing a migration policy. The Green Paper should thus honour these commitments and expand on them rather than regress or violate the principles and ethos of their obligations.

C. KEY ISSUES OF CONCERN

DEFINITION OF COMMON INTERNATIONAL MIGRATION TERMS:

6. The definition of the term **asylum seeker** in the Green Paper is incomplete.

Comment: The current definition in the Green Paper has changed the meaning of the term by limiting the definition of a refugee which is not in line with the 1951 UN Refugee Convention or the 1969 OAU Convention.

7. The Green Paper refers to **economic migrants** as foreign nationals who migrate for economic reasons such as seeking employment or to conduct business.

Comment: Perhaps for clarity it would be good to add the word "solely" (i.e. solely for economic reasons...) as we are aware that with mix migration flows some people migrate for more than one reason and one would want to avoid labelling a person who fled persecution and also seeks employment or to conduct a business as an Economic migrant.

8. The definition of **international migration** appears to be taken from United Nations, Department of Economic and Social Affairs (1998), Recommendations on Statistics on International Migration, Revision 1. Sales No. E.98.XVII.14.

⁶ Adopted on 27 June 1981, entered into force 21 October 1986 and acceded to by South Africa on 9 June 1996.

⁷ Act 130 of 1998.

⁸ Act 13 of 2002.

⁹ Act 88 of 1995.

Comment: This definition does not take cognisance of people who move across international borders for less than three months. This group would be very short term migrants or visiting or transient migrants. It may be useful to include this in the definition as at present the definition is silent on this. Furthermore South Africa has an opportunity to be at the forefront of migration data collection and analysis if it were to consider this group that is not currently considered in many if any other jurisdictions. This will help complete the picture on migration and give insight into the reasons for migration in the very short term and help with migration management. In support of this as expressed below it is recognised that 'countries collecting and publishing data on the flows of international migrants use different criteria to identify migrants...'

The United Nations Recommendations on Statistics of International Migration, Revision 11 defines an international migrant as any person who changes his or her country of usual residence. An international migrant who changes his or her place of usual residence for at least one year is defined as a long-term migrant, while a person who changes his or her place of usual residence for more than three months but less than one year is considered to be a short-term migrant. In practice, national definitions and methods of data collection vary, which present some challenges of comparability. In particular, countries collecting and publishing data on the flows of international migrants use different criteria to identify migrants and use different concepts to determine their origin and destination. The major differences in the identification of international migrants for statistical purposes arise because of variations in the definition of residence and duration of stay.¹⁰

Even if the route of considering the very short term migrants is not taken the definition would be clearer if it addresses those who stay for less than three months as a group to bring clarity to the definition.

9. The Green Paper states that **irregular migrants (or undocumented / illegal migrants)** are people who enter a country, usually in search of income-generating activities, without the necessary documents and permits.

¹⁰ INTERNATIONAL MIGRATION FLOWS TO AND FROM SELECTED COUNTRIES: THE 2015 REVISION, Department of Economic and Social Affairs Population Division pg 1 accessed at <http://www.un.org/en/development/desa/population/migration/data/empirical2/docs/migflows2015documentation>

Comment: There is a large degree of conflation of terms here. An irregular migrant is not the same as an undocumented migrant which in turn is not the same as an illegal migrant. For instance an asylum seeker who arrives in South Africa seeking asylum and is making her way to a Refugee Reception Office is may not be penalised in terms of the 1951 UN convention and section 21(4) of the Refugees Act albeit that she is undocumented she is not an illegal migrant. Conversely someone with an expired visa or fraudulent documentation may well be an illegal migrant albeit that they are documented.

Insight into an appropriate definition may be garnered from the IOM Key Migration Terms which define '**irregular migration** as "Movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country. There is, however, a tendency to restrict the use of the term "illegal migration" to cases of smuggling of migrants and trafficking in persons".¹¹

Hence in defining the term 'irregular migrant' it may be suitable to set the definition out stating that it is from the perspective of South Africa as a receiving country or as a sending country or define both. It would certainly be preferable to restrict the term illegal migrant to smuggling of migrants and trafficking in persons and not conflate it with undocumented migrants.

10. The Green Paper defines the term **refugee** as a person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

¹¹ IOM Key Migration Definitions accessed at <http://www.iom.int/key-migration-terms>

Comment: This definition is not in keeping with the Refugees Act 130 of 1998 nor is it in keeping with the 1969 OAU Convention. The definition only includes a refugee in terms of section 3(a) of the Refugees Act and ought to include the extended definition in terms of section 3(b) and dependants of both categories. We trust that this was merely an oversight and that the definition in the White Paper will include a person who 'owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere' and dependants of this person or a person who fled as a result of 'a well-founded fear of persecution...'

11. The definition of the term **resettlement** in the Green Paper is similar to that of the one found in the IOM Key Migration Definitions¹² but has excluded its meaning in the refugee context which may confuse the reader and the general understanding of the term.

Comment: It may be best to include the second half of the definition stating: **In the refugee context, the transfer of refugees from the country in which they have sought refuge to another State that has agreed to admit them. The refugees will usually be granted asylum or some other form of long-term resident rights and, in many cases, will have the opportunity to become naturalized.** (Emphasis added).

CHAPTER 1: OVERVIEW OF INTERNATIONAL MIGRATION IN SOUTH AFRICA

Introduction

12. South Africa's Refugees Act is hailed as one of the most liberal and progressive domestic refugee protection frameworks in Africa. Hence in so far as the current international migration policy and legislation with respect to refugees and asylum

¹² **Resettlement** - The relocation and integration of people (refugees, internally displaced persons, etc.) into another geographical area and environment, usually in a third country. In the refugee context, the transfer of refugees from the country in which they have sought refuge to another State that has agreed to admit them. The refugees will usually be granted asylum or some other form of long-term resident rights and, in many cases, will have the opportunity to become naturalized. - IOM Key Migration Definitions accessed at <http://www.iom.int/key-migration-terms>

seekers is concerned it does not seem wise that the policy should be replaced.¹³ Perhaps the focus should rather be on addressing the capacity constraints, training of officials, efficacy and eradication of corruption¹⁴ to ensure effective implementation of current refugee policy and legislation.

Comment: It is worrying that the tone adopted by the Green Paper is that of securitisation. There is very little to no evidence that refugees compromise South Africa's 'sovereignty... public safety [or] national security.'¹⁵ In fact the sad reality is that many refugees and asylum seekers find themselves victimised by xenophobia at all levels including institutional xenophobia.

The limitations of the current policy and approach

13. 'The current policy on international migration is set out in the 1999 White Paper on International Migration...'¹⁶

Comment: We would add that the current policy is also derived in part from the Refugee White Paper. Moreover our reading of the two policy papers, with a particular focus on refugees and asylum seekers, does not suggest, as provided in the Green Paper, a 'problematical way of thinking and acting about immigration...'

Lack of a risk-based approach to international migration

14. The protection and respect of 'human rights of... other nationals'¹⁷ includes the right to dignity as a fundamental right which includes the right to seek employment for asylum seekers as expressed in the *Wachenuka* case.¹⁸

¹³ 'The Green Paper argues that the current international migration policy must be replaced as it does not enable SA to adequately embrace global opportunities while safeguarding our sovereignty and ensuring public safety and national security' Green Paper at pg 9.

¹⁴ Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System, Roni Amit, 2015 and the Article entitled: Challenging the System on Behalf of Refugees, Valencia Talane accessed at <http://www.corruptionwatch.org.za/challenging-the-system-on-behalf-of-refugees/>

¹⁵ Green Paper at pg 9.

¹⁶ Green Paper White Paper 9.

¹⁷ The Green Paper states at pg 10: 'In the Republic of South Africa (RSA) risks have to be managed within the framework of the Constitution and the human rights of both citizens and other nationals must be respected and protected.'¹⁷(emphasis added)

¹⁸ Minister Of Home Affairs and Others V Wachenuka and Another 2004 (4) SA 326 (SCA)

15. The view that '[j]ob opportunities will not expand and this in turn will generate xenophobia and more instability'¹⁹ seems to be an over simplification and generalisation. Job opportunity expansion does not equate to adopting a risk-based approach to managing immigration. Even if job opportunities were to expand, xenophobia and instability are not merely a function of failure to expand job opportunities. The causes of xenophobia are far more complex and nuanced than this.

Lack of a holistic approach to immigration policy leading to policy gaps

Comment: While we concur and support the view that a more holistic approach to international migration²⁰ and refugee policy should be adopted, this should in no way compromise the protection currently afforded to refugees and asylum seekers. Regrettably this seems to be the tone of the Green Paper which seems to wish to focus on security and lose sight of its obligations in terms of refugee protection.

Comment: Similarly the simplistic suggestion of migration of skilled refugees to visas under the Immigration Act as is currently suggested in the Green Paper may make these refugees vulnerable to the loss of refugee protection and potential violation of the principle of non-refoulement (i.e. a refugee on a work visa does not have the same protection as the holder of Section 24 Formal Recognition of Refugee Status).

Serious policy gaps regarding asylum seekers and refugees.

16. The Green Paper states; 'At the level of policy, legislation, strategy and systems, the asylum seeker and refugee regime that was established through the 1998 Refugees Act has serious gaps that have only been partially addressed through amendments.'

¹⁹ 'Immigration that is not managed through a risk-based approach is poorly managed. This gives rise to systemic corruption as well as exposing all who live in the country to serious risks such as terrorism and the smuggling of drugs. Instability will increase and skilled migrants will not be recruited efficiently, thus undermining development. Job opportunities will not expand and this in turn will generate xenophobia and more instability.' Green Paper White Paper 10.

²⁰ The first Green Paper on International Immigration (1997) covered immigration, asylum seekers and refugees. The White Paper excludes policy on asylum seekers and refugees, which is covered in the Refugees Act. The approach taken in the 2016 Green Paper is that international migration must be dealt with holistically as many aspects are interconnected and this manifests in concrete processes and the lives of people.

Comment: Generally speaking the legislative framework concerning refugees and asylum seekers is good and robust. Its thorough nature is spoken to in the Green Paper itself on pages 24 and 25.

17. In justification for the assertion that there are serious gaps the Green Paper sites large numbers of people especially from SADC applying for asylum, high levels human smuggling and trafficking, no provision made for providing indigent asylum seekers with basic food and accommodation addressed by the courts leading to allowance of work and study as a pull factor and lack of capacity for the two boards dealing with appeals.

Comment: None of these are failings of the legislation or policy. We appreciate that particularly the influx²¹ may have been unforeseen and not prepared for. Efforts have however been made to provide for economic migrants through the dispensation for Zimbabwe, Lesotho and potentially other SADC countries. This will alleviate pressure on the asylum process and allow it to function more efficiently.

Comment: If capacity the Refugee Appeal Board is in issue the solution therefore is to further capacitate the Board by hiring new members and staff. This is a far cheaper and effective solution than the closure of offices and the construction of a one stop centre in Lebombo / Ressano Garcia POE as proposed in the Green Paper. The assertion that there is no additional funding to increase the capacity of the Refugee Appeal Board is merely stated and not explained in the Green Paper.

18. Comment: The presence of trafficking and smuggling²² which the Green Paper alleges are at high levels does not present a gap in the asylum seeker and refugee regime. In fact recent legislative developments with the Prevention and Combating of Trafficking in Persons Act are tailored to address the issue of Human Trafficking compliment the current asylum seeker and refugee regime. Lastly, a number of people who travel to South Africa from Asian countries and from other SADC countries may have genuine refugee claims. These individuals must have access to the asylum system and it is an injustice to label them as economic migrants or smugglers or traffickers without determining the merits of their applications on an individual basis

²¹ Green paper at pg 12: 'not being prepared for hundreds of thousands of SADC citizens claiming asylum so they could work while their claims were being adjudicated. ... largest influx came as result of economic collapse in Zimbabwe'

²² Green paper at pg 12: 'Another factor is the high level of activity of human smugglers and traffickers who bring in people under the guise of being asylum seekers from as far as Asia and North East Africa.'

19. No provision is made 'for basic food and accommodation for asylum seekers.'

Comment: An effective and efficient urban refugee policy makes no provision for basic food and accommodation for asylum seekers on the basis that asylum seekers and refugees²³ will have the right to work and to study to provide for themselves or improve their skills and support themselves and their families.

Comment: The preponderance of evidence and research supports that refugees and asylum seekers primarily create jobs and are to a large extent self-employed and hence provide an economic benefit to the country.

20. The Green Paper proposes that South Africa should adopt an approach to immigration that is strategically managed and which involves the whole of the state and civil society led by the elected government²⁴

Comment: We support this proposal provided that this does not come at a cost to the robust, positive and progressive legislative framework in place. It is incumbent in constitutional democracy that it protects vulnerable minorities which includes asylum seekers and refugees living within their borders.

21. As addressed above the '[v]ision for a new international migration policy in South Africa'²⁵ and the 'Vision and Key principles'²⁶ are generally speaking very positive. Regrettably as expressed above and below the substance particularly with respect to the policies concerning refugee rights and protection in some instances are not in keeping with these ideals.

CHAPTER 2: EVOLUTION OF INTERNATIONAL MIGRATION POLICY IN SOUTH AFRICA

22. Comment: We note the content of this chapter of the Green Paper and do not make comments on it save to say that it provides a good reflection on the 'Evolution Of International Migration Policy In South Africa' and an apt synopsis of 'South African

²³ Recognised refugees however have access to social assistance grants.

²⁴ Ibid.

²⁵ Green paper at pg 15.

²⁶ Ibid.

refugee policy and legislation'²⁷ through the 'Refugee White Paper, 1998'²⁸ and the 'Refugees Act No 130 of 1998'²⁹ and its Regulations.

CHAPTER 3: STATISTICAL PROFILES OF INTERNATIONAL MIGRANTS

23. We appreciate the honesty and transparency in the Green Paper stating that beyond 'projections bases on census data', 'there are, in fact, no official figures available on the total number of foreign residents in South Africa...'³⁰ Projections and estimates approximate the population of foreign nationals may be around 5 % in 2015 with a far larger population as measured in the MCS entering and departing annually.

Comment: This section again conflates irregular migrants with unlawful migrants which ought to be corrected as addressed in the definitions section above.³¹

Comment: As the current figure is unknown and approximations and figures available (eg 2011, 3.3%) are proportionately small, conclusions drawn on the cause or basis for migration are relatively unknown and assertions of overwhelming, mass influx particularly in the asylum/refugee context are unfounded.

Comment: If one considers the top 20 arrival countries at POEs between 2011 and 2015 figures,³² the overwhelming majority of those listed are not refugee producing countries with respect to South Africa. In fact only a small portion of Nigerians and Zimbabweans mentioned would be part of the asylum process and in many instances would have genuine, well founded refugee claims. The small portion assertion is based on the number of Zimbabweans on Special Dispensation permits or visas who would be outside the asylum seeker and refugee regime. Asylum seekers from the DRC, Somalia, Ethiopia and Burundi for example who may be perceived to be arriving in large numbers do not even register in the top 20.

²⁷ Green paper at pg 24.

²⁸ Green paper at pg 24-25. There is also a slight typographic error in this section referring to the 1996 OAU Convention which should be corrected to the 1969 OAU Convention.

²⁹ Green paper at pg 25.

³⁰ Green paper at pg 26.

³¹ I.e. 'total migrant population (legal or irregular) thus equating irregular to illegal- Green paper at pg 26.

³² Table 1: Trends on international movements through the POE- Green paper at pg 26.

24. In terms of the employment figures the Green Paper rightly asserts that “[n]otions that we are being overwhelmed by immigrants are wrong” with more than ‘South Africans... over 90% of those employed in every sector’ and the highest proportion of migrants being self-employed.³³

Comment: In this context it is curious that the Green Paper appears to propose the withdrawal of the right to work and study from asylum seekers. The Green Paper does not provide figures on the number of asylum seekers studying or working and it is hard to understand why such a small proportion of the populous would be considered a burden and be prejudiced in the restriction of their rights. In fact an argument could be made that asylum seekers paying for their studies and those working are making a positive impact on the economy.

25. The proportions of visa and permanent residence applications are noted.³⁴

Comment: In this respect one should be wary to draw conclusion on the economic benefit or value of migrants based solely on the type of visa permanent residence applied for.³⁵ In addition to which applications for permanent residence based Refugee Status constitute a particularly small proportion of applications (4%) and a number of these refugees are particularly well educated and/or contribute through their work considerably to the economy.³⁶ This is important to bear in mind when considering Chapter four of the Green Paper and the ‘*Change of residence status by refugees*’³⁷ to permanent residence discussed below.

Refugee Regime:

26. The Green Paper states that ‘South Africa continues to receive a high volume of asylum seekers, over 90% of whom do not qualify for refugee status.’

Comment: Regrettably this is not an accurate reflection of the percentage of asylum seekers who ought to qualify for refugee status. There are a series of problems in the effective implementation of the Refugees Act and Regulations with

³³ Green Paper at pg 27.

³⁴ Green Paper at pgs 27-29.

³⁵ For instance it does not follow as appeared to be asserted by the Honourable Deputy Director General Jackson Mckay that as the percentage of permanent residence applications on the basis of work permits was lower than those applying for spousal permanent residence less valuable migrants were applying for permanent residence.

³⁶ This assertion is made based on our experience of long stay recognised refugees who apply for certification from the Standing Committee for Refugee Affairs to apply for permanent residence.

³⁷ Green Paper at pg 67.

Refugee Status Determination Officers making poor and numerous incorrect decisions to reject asylum seekers applications³⁸ and this is exacerbated by high levels of corruption.³⁹ The seriousness of the problem and the compromise to the principle of non-refoulement needs to be addressed, with South Africa's reception rate far higher than that of UNHCR and the global country average.⁴⁰ We recommend that the green paper and the white paper that follows address the failing in the refugee status determination process so that genuine refugees receive effective protection and do not fall through the net as it were.

Further comment: It is interesting to note that even at the highest figure reflected '71 914 new applicants were registered...' this constitutes less than 0.0014% above of South Africa's population. The figures reflected are also not in keeping with the green paper's observation under the heading 'Serious policy gaps regarding asylum seekers and refugees'⁴¹ that the asylum seeker and refugee regime was 'not... prepared for hundreds of thousands of SADC citizens claiming asylum so they could work while their claims were being adjudicated.' Approximately seventy thousand asylum applications with a significant proportion of which not coming from SADC countries could hardly be said to constitute hundreds of thousands of SADC citizens and this we would recommend is corrected to avoid the development of policy based on incorrect information.

27. In considering refugee (S24) and asylum (S22) permits analysis there are a number of reasons why permits may not be active. The green paper correctly suggests that perhaps some individuals may have moved onto immigration permits.

Comment: In terms of the proportions of refugees with active permits relative to asylum seekers we would submit that this is at least in part due to the large number of stressors on asylum seekers applications particularly with asylum seekers

³⁸ Consider All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination, Roni Amit, 2012.

³⁹ Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System, Roni Amit, 2015 and the Article entitled: Challenging the System on Behalf of Refugees, Valencia Talane accessed at <http://www.corruptionwatch.org.za/challenging-the-system-on-behalf-of-refugees/>

⁴⁰ **UNHCR's Recognition Rate: Relatively High Overall, But Inconsistent Up Close, 2009 which states:** UNHCR recognized 81 percent of the individual RSD applications that its offices decided in 2008, roughly twice the average global recognition rate of 41 percent. It is highly irregular that the rejection rate in South Africa is so high and this supports the position that the Refugee Status Determination Officers need better training and capacitation for effective refugee protection. Also see Data Analysis Reveals South Africa's High Rejection Rate for Asylum Requests, Alice Corona, 2015 accessed at <http://www.iafrikan.com/2015/07/07/data-analysis-refugee-south-africa/>

⁴¹ Green Paper at pg 12.

experiencing difficulties accessing refugee reception offices, much shorter extension periods (asylum seekers 1 to 6 months) than refugees (4 years), the closure of refugee reception offices in a number of cities and cost of travel to offices of application for asylum extension. We would recommend the opening or reopening of the country's six refugee reception offices for the effective processing of asylum claims.

Irregular migration and deportation

28. We appreciate the recognition here that, as the 'statistics confirm... [there is a] need to find a solution for the documentation of migrants from SADC with lower-level skills since they account for a large proportion of the yearly deportations conducted by the Department [especially as t]his puts a large strain on the budget of the DHA.

Comment: Similarly we appreciate the concluding acknowledgements that 'Socio-economic and geographic data on immigrant communities and data on countries of origin is one priority area... Another is analysis of trends in migration in terms of local, regional and global labour demand and supply.' We submit that this collation of data and analysis ought to include the collection and analysis of up to date country information to assist in establishing effective protection in the Refugee Status Determination process.

CHAPTER 4: POLICY AND STRATEGIC OPTIONS

29. The introductory section of Chapter 4 notes that in order to "inform the policy and strategy options that are put forward...the experiences of officials in administering the Acts [(Immigration and Refugees Act)] were also taken in to account"⁴² however there is no mention of any engagement with asylum seekers, refugees and migrants, who are affected by these two pieces of legislation. It is important that the Green Paper and any subsequent migration policy adopted after the White Paper process is also informed by the experiences of refugees and asylum seekers living in South Africa who are at the coalface of the legislative, policy and administrative framework. We cannot overemphasize the importance of constructive engagement

⁴² Green Paper on International Migration, 2016 at pg 32.

with refugee communities living in South Africa in order to gain key insights into the experiences and challenges faced by these communities.

Management of residency and naturalisation

Delinking of residency from citizenship

30. We are concerned here with the continued use of **“security concerns”** as a basis for the clamping down or reduction on permanent residence to migrants in general and refugees in particular. This rhetoric implies that foreign nationals pose a threat to South Africa however this assertion is neither corroborated nor supported by any evidence. The Green Paper alludes to risks such as “the entry and stay of fugitives from justices who are linked to organised crime”.

Comment: We submit that persons who are fugitives from justice should be dealt with in terms of section 29(1) and section 30(1)(h) read with section 50(1) of the Immigration Act 13 of 2002. “Delinking” temporary residence from permanent residence would not have a deterrent effect where this is concerned.

31. On the issue of **naturalisation**, though we agree that, with regards to refugees, their status in South Africa is envisioned to be temporary, evidence has shown that Africa is prone to unending conflicts and sustained political instability which causes prolonged refugee situations. Permanent residence allows a refugee to embark on a journey towards naturalisation. Apart from the fact that naturalisation brings a refugee status to an end; it allows the beneficiary to enjoy the right to live with dignity.

Comment: The start of the naturalisation process for a refugee in South African is set out in section 27 (1) (c) of the Refugees Act which provides that:

“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”.

Affording a path to naturalisation through permanent residence allows refugees an opportunity to find durable solutions to their prolonged refugee situations which is in

line with South Africa's responsibility in terms of Article 34 of the 1951 Refugee Convention.

The 1951 Refugee Convention to which South Africa is a state party to provides a guideline for the naturalisation of refugees. It moreover urges the State to reduce the administrative difficulties generally encountered when making such application – it encourages the State ‘...to make every effort to expedite naturalisation proceedings and to reduce as far as possible charges and costs of such proceedings’. Apart from the fact that naturalisation brings a refugee status to an end, it allows the beneficiary to enjoy the dignity and human rights that only comes with citizenship. This affords refugees with certainty in their lives and continued stay in South Africa. Many refugees have been in South Africa for more than 15 years and have established new social networks and ties.

South Africa has domesticated the 1951 Refugee Convention including its naturalisation provisions through its Refugees Act, Immigration Act and Citizenship Acts. Despite the adoption of these laws, the naturalisation passage for refugees continues to be onerous due to administrative hurdles which negate South Africa's capability to fulfil its international responsibility towards the naturalisation of refugees. We therefore note with great concern that the Green Paper proposes that the automatic administrative right created by section 27(c) of the Refugees Act which allows refugees to apply for certification and thus permanent residence after sojourning in South Africa for a continuous period of 5 years be removed. In lieu of this, the Green Paper proposes that refugees meet the skills and investment requirements in order to qualify for permanent residence. We submit that this will further create confusion and add more difficulty in obtaining permanent residence for refugees.

Management of asylum seekers and refugees

Situational analysis

32. The Green paper notes that “about 90% of applicants do not qualify as refugees but are seeking work or business opportunities”.

Comment: This statistic is rather misleading because empirical evidence and studies have shown that there is an unspoken policy by the Department of Home Affairs for Refugee Status Determination Officers to reject applications for asylum

rather than to genuinely evaluate them on the merits on a case by case basis⁴³. A finding that 90% of applicants are not refugees is a skewed reflection of the numbers because Home Affairs relies on a statistic that is a result of its own practice of leaning towards a blanket rejection of claims.

33. The Green Paper also notes that the **prolonged and protracted adjudication** of claims and the review and appeals process has become a major pull factor because asylum seekers are allowed to earn a living and study while awaiting adjudication.

Comment: However, as noted above, the delays in the adjudication of claims is a direct consequence of the practice of Refugee Status Determination Officers who reject applications for asylum regardless of the merits and even when applicants are clearly fleeing from areas where there is ongoing conflict. As a result of this propensity to reject applications for asylum, even in light of good merits, has caused many applications to bottle-neck at the Refugee Appeal Board which is charged with adjudicating appeals from asylum seekers whose claims have been rejected as unfounded. The current backlog faced by the Refugee Appeal, is according to the Department of Home Affairs, 12 361 applications⁴⁴. Applications also bottle-neck with the Standing Committee for Refugee Affairs which is charged with reviewing decisions to reject asylum applications as manifestly unfounded or those found to be abusive or fraudulent. The current backlog faced by the Standing Committee for Refugee Affairs is 44 048⁴⁵. There is such a huge backlog of applications that some asylum seekers have been waiting for the resolution of their applications for more than 10 years.

34. The Green Paper also notes that there is a lack of observance of the “safe third country” principle which relates to asylum seekers being required to claim asylum in the first safe country they enter.

⁴³ A study on refugee status determination in South Africa. By Amit, R. 2012. No Way in Barriers to Access, Service and Administrative Justice at South Africa’s Refugee Reception Offices. From <http://fhr.org.za/files/5413/8503/7665/no_way_in_barriers_to_access_service_and_administrative_justice_final_report.pdf>.

⁴⁴ Department of Home Affairs, 2016. 2015 Asylum statistics; Analysis and Trends – Presentation to the Portfolio Committee of Home Affairs. From <<https://pmg.org.za/committee-meeting/22163/>>.

⁴⁵ Department of Home Affairs, 2016. 2015 Asylum statistics; Analysis and Trends – Presentation to the Portfolio Committee of Home Affairs. From <<https://pmg.org.za/committee-meeting/22163/>>.

Comment: We should point out at this stage that the **safe third country principle** only applies in regions where there is a treaty in place to regulate and enforce the principle. No such treaty on a regional nor a bilateral level exists which is similar to the Dublin II Regulation which operates within the European Union. South Africa would thus have no basis to enforce this principle in Africa nor would member states be obliged to accept asylum seekers from South Africa who had previously crossed through their borders.

Neither the 1969 OAU Convention nor the 1951 Refugee Convention establishes this principle nor creates a duty on member states to observe it. It is unlikely that the South African government will be able to convince states in the SADC region to adopt bilateral agreements that enforce the “safe third country” principle. The reason for this is because with a “safe third country” principle in place, responsibility for refugee protection is only shouldered by countries that are geographically closest to countries that produce refugees as we have seen in Europe with Germany and Greece. Without a clear and coordinated joint mechanism in place to ensure shared responsibility sharing for refugees, bilateral agreements to enforce the “safe third country” principle will never come to fruition.

We recommend that the South African government actively engages with countries in the SADC region in order to adopt mechanisms that ensure that member states fairly share the responsibility and burden of receiving and protecting refugees and ensuring effective refugee protection. This however must also be in conjunction with efforts to end prevailing situations in countries that cause people to flee in the first place.

Admission of asylum seekers

35. We are concerned that the Green Paper reiterates the Department of Home Affairs' position that Refugee Reception Offices should be closer to the border. The Green Paper notes that Asylum Seeker **Processing Centres** should be established near the border. The justification for this is that these centres should be near the sites where asylum seekers enter South Africa. The Green Paper proposes that these centres will accommodate asylum seekers during their status determination process and that this will be achieved through a multi-stakeholder collaboration between various departments and organisations including UNHCR.

Comment: Housing asylum seekers at these centres and restricting their movement is in contradiction to South Africa urban refugee policy which allows the free movement of refugees and asylum seekers in South Africa. There is no explanation in the Green Paper as to how these centres will be able to provide facilities to cater for all of the needs of asylum seekers including access to healthcare, education, water, sanitation and food and who will shoulder the burden of funding them. Restricting asylum seekers to these centres places a huge burden on the state to provide and cater for all the needs of asylum seekers. We strongly discourage the establishment of centres where asylum seekers will be housed and their movement restricted. With an urban refugee policy, asylum seekers become self-sufficient and are able to seek employment and provide for themselves and their families.

36. The Asylum Seeker Processing Centres are couched in the Green Paper as **temporary sites** to “accommodate” asylum seekers while their claims are being adjudicated.

Comment: The asylum process in South Africa is laden with backlogs and is seldom completed within a short period of time. These Asylum Seeker Processing Centres will ultimately turn into camps. There is a strong likelihood that asylum seekers will remain at these Asylum Seeker Processing Centres for long periods of time. It is also not clear in the Green Paper as to what will happen to asylum seekers who are already living in urban cities and whose applications have not been finalised. Does the Green Paper envision that they report to these Asylum Seeker Processing Centres and abandon any accommodation, work or studies that they are engaged in?

The primary basis for these centres hinges on the notion that asylum seekers pose a risk to national security, an assertion which has not been substantiated or supported by any evidence.

Removal of the automatic right to work or study for asylum seekers

37. We note with great concern that the Green Paper recommends that the right to work and study of asylum seekers be removed and that the right to work or study be afforded to asylum seekers on an *ad hoc* basis. Both the right of asylum seekers and refugees to engage in work and self-employment have already been adjudicated by our courts. The findings of the courts are rooted in the constitutional rights of asylum seekers and this new proposed policy will infringe those rights.

Comment: In the *Minister of Home Affairs v Watchenuka*⁴⁶ case the Supreme Court of Appeal noted that the freedom to engage in productive work is an important component of human dignity in that human beings are inherently a social species with an instinct for meaningful association. Fulfilling a socially useful purpose is therefore linked to an individual's self-esteem and sense of self-worth.⁴⁷ The court ultimately held that a general prohibition on the on employment where there is no reasonable means of support is a material invasion of human dignity and not justifiable in terms of the constitutions limitation clause.⁴⁸

Research into migration and employment in South Africa has found that migrants were far more likely than the South African born individuals, in the survey, to be self-employed.⁴⁹ The study suggested that the large difference in percentages indicated the vulnerable status of foreign-born workers and could possibly be due to difficulties in obtaining work because of issues such as preferences for employment of South Africans and immigration legislation.⁵⁰ Self-employment within South Africa's informal economy has furthermore been suggested to be an "entry point" for individuals who are excluded from the formal sector by education, skills or poverty.⁵¹ Another report, which considered the economics of Somali informal traders in the Western Cape, found that, contrary to the popular belief that foreigners are taking South African jobs and resources, Somali traders are largely self-employed and have established a tightly knit social structure in which traders support one another and buy stock together. In this way they contribute to the growth of South Africa's wholesale industry and offer their customers, who are often impoverished themselves, low prices and enhanced services.⁵²

We strongly recommend that the new *ad hoc* process for affording asylum seekers with the right to work and the revocation of right to work should be removed.

⁴⁶ *Minister of Home Affairs and others v Watchenuka and another* 2004 (4) SA 326 (SCA).

⁴⁷ *Ibid.* at para [27].

⁴⁸ *Ibid.* at para [33].

⁴⁹ Budlender D. 'Migration and employment in South Africa: Statistical analysis of the migration model in the Quarterly Labour Force Survey, 3rd quarter 2012' *MiWorc Report # 5*, June 2014, at p. 8.

⁵⁰ *Ibid.*

⁵¹ Charman A., Petersen L., and Piper L. 'Spaza shops in Delft: the changing face of township entrepreneurship' (2011) Working Paper 6, African Centre for Citizenship and Democracy, at p. 4.

⁵² ACMS Report, prepared by Gastrow V. with Amit R. 'Somalinomics, A case study of the economics of Somali informal trade in the Western Cape' (2013) available at <<http://www.migration.org.za/uploads/docs-/report-42.pdf>> .

Change of residence status by refugees

38. The Green Paper refers to a refugee who attains permanent residence through certification in terms of section 27(c) of the Refugees Act as having two statuses.

Comment: This interpretation is an incorrect understanding of the application of section 27(c) of the Refugees Act in relation to permanent residence. The granting of certification in terms of section 27(c) of the Refugees Act by the Standing Committee does not equate to permanent residence status in terms of the Immigration Act, but is a declaration that a refugee will remain a refugee indefinitely. The declaration by the Standing Committee merely affords a refugee with a procedural right to apply for permanent residence status. The Green Paper thus conflates certification in terms of the Refugees Act and the application for permanent residence in terms of the Immigration Act.

Upon the acquisition of permanent residence status in terms of section 27(d) of the Immigration Act, a refugee's legal status in South Africa changes to that of a permanent residence and thus is no longer under the auspices of the Refugees Act and their continued lawful stay in the Republic is regulated through the ambit of the Immigration Act. When the refugee's status shifts to that of a permanent resident, they are issued with a South African non-citizen ID document and number and they no longer use their section 24 permits and section 30 identity documents. At no stage should there be a duality of status.

39. A concern raised by the Green Paper is that a refugee with permanent residence is able to **travel** to his country and thus re-avails themselves without sanction. As noted above, once a refugee is granted permanent residence they no longer fall within the ambit of the Refugees Act but the Immigration Act which is not informed by the principle of re-avilment.

Comment: A permanent resident is entitled to obtain a travel document, which allows them to travel to any desired destination, including, in principle, their country of origin.

Regional refugee approach

40. We are pleased that the Green Paper recommends that a regional approach to refugee protection and management be adopted.

Comment: Without a coordinated and uniform approach to refugee protection in the region, many asylum seekers and refugees are left to the mercy of unilateral domestic refugee legislation and policies that are often restrictive and are not in line with the principles, ethos and obligations of either the 1951 United Nations Convention and the subsequent Protocol of 1967 Relating to the Status of Refugees or the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

Comment: The unilateral approach to refugee protection has neither worked in Africa or anywhere else in the world. Without a clear commitment to address the refugee problem in a coherent and coordinated manner in the region, that ensures that all states pitch in and contribute their collective resources regardless of geographic proximity, the refugee problem in Africa will continue to have devastating effects on refugees on the continent. We are therefore pleased that the Green Paper advocates for the harmonisation of policies and legislation by member states that deal with the admission of asylum seekers and status determination. It is recommended that at a regional level African states determine minimum core standards for the treatment of refugees within domestic jurisdictions. A useful point of departure would be to revisit the recommendations of the Final Report on the legal, economic and Social Aspects of African Refugee Problems (1967) which provides as a useful road map of minimum standards that should be afforded to refugees.

Durable solutions

41. Comment: We are also pleased that the Green Paper recommends that there be a clear policy that is adopted with regards to South Africa's stance and approach to how and when cessation is invoked. The Green Paper proposes that all the roles of the various actors and stakeholders be explicitly set out. This we believe would allow far greater clarity for refugees and other stakeholders whenever cessation is invoked.

Conditions for exclusion of asylum seekers and refugees

42. The extension of the **exclusion clause** now contemplated by the Green Paper is a worrying development.

Comment: The net has the potential to be cast too widely and has the potential to violate the principle of non-refoulement (the essence of which is that a State may not

oblige a person to return to a territory where he may be exposed to persecution). This principle is embodied in section 2 of the Refugees Act and has been extended to the return of an individual to place where there is a serious disturbance of the peace.

“The principle of non-refoulement constitutes an essential component of asylum and international refugee protection. Indeed, the principle is such a cornerstone of the asylum regime that it has been recognised as constituting a norm of Customary International Law.”⁵³

43. The Green Paper notes that **withdrawal of refugee** status on the grounds of “serious criminal convictions or breaking of specific conditions”.

Comment: It is important to note that section 34 of the Refugees Act already dictates that ‘a refugee must abide by the laws of the Republic’. Any transgression of the laws renders a refugee subject to criminal sanction in the same way that a South African citizen would.

An individual who transgresses the laws of South Africa can repay his or her debt to society through the criminal justice system without the principle of non-refoulement being violated.

The individual’s fugitive status may well be linked directly to the individual’s refugee claim.

44. The exclusion from refugee status on the basis of being a fugitive from justice in another country may violate the principle of non-refoulement.

Comment: A good example of this would be a homosexual man fleeing from Uganda where he is to be charged and convicted in terms of the Ugandan Anti-Homosexuality Act, 2014.⁵⁴ The individual would technically be a fugitive from justice in Uganda. However, he would clearly be a refugee in that he fears persecution in the form of prosecution on the basis of his sexual orientation and he would have no option to turn to the state for protection.

⁵³ In *C v. Director of Immigration* CACV 132-137/2008 the Hong Kong court of final appeal found that the concept of non-refoulement of refugees has developed into a Customary International Law (at para 67).

⁵⁴ A copy of the Act is available at <<http://www.refworld.org/pdfid/530c4bc64.pdf>>.

Another example is the case of military desertion and draft evasion. In many countries military service is compulsory and conscientious objectors are criminally prosecuted. In other places forced conscription occurs through the abduction of young men. Professor Goodwin-Gill, a prominent academic in the field of refugee law, argues that:

“Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority: it is a political act.”⁵⁵

As a result such an individual may well be both a refugee and a fugitive from justice. His or her exclusion will therefore be a violation of the principle of non-refoulement.

The UNHCR Handbook⁵⁶ is very instructive in this regard. Paragraphs 56 -60 are the relevant paragraphs.

We recommend that the ground for exclusion be removed or at the very least accompanied with extensive guidance or a definition to prevent the incorrect rejection of asylum applications on the basis of this ground.

CHAPTER 5: CAPACITY FOR MANAGING INTERNATIONAL MIGRATION

45. Situational analysis

The Green Paper states; ‘Notwithstanding progress made, there is an urgent need for South Africa to adopt an approach based on a shared vision on the roles and responsibilities of all stakeholders who contribute to secure and effective management of international migration.’⁵⁷

Comment: We concur with the need for a ‘shared vision on the roles and responsibilities of all stakeholders who contribute to secure and effective

⁵⁵ Goodwin-Gill G. *The Refugee in International Law* (1983) at pp. 33-34.

⁵⁶ *UNHCR Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees* (1979, re-edited 1992).

⁵⁷ Green Paper at pg 74.

management of international migration⁵⁸ and recommend that the words 'with in South Africa's constitutional, human rights framework' be added. Hence this paragraph would end as follows: '...who contribute to secure and effective management of international migration **with in South Africa's constitutional, human rights framework**' (emphasis added).

46. The Green Paper notes that 'Most countries have well-established inter-departmental/agency structures for managing inter-sectoral policies that deal with international migration.'

Comment: In principle we would support the establishment of 'a commission that coordinates the processing, protection and support of asylum seekers and refugees' in line with other SADC countries. However, the mandate, vision, role, power and responsibilities of the commission would need to be clearly defined and in line with South Africa's current asylum seeker, refugee law framework and the Constitution.

We recommend further that existing advisory and decision making bodies are strengthened and further capacity for effective performance of their functions be provided. Hence in the same way that this paragraph suggests the 'first step should be to strengthen existing structures, such as the Immigration Advisory Board (IAB)' we would recommend that the Standing Committee for Refugee Affairs and the Refugee Appeal Board are similarly strengthened and capacitated.

47. The Green Paper further notes that 'A key aspect of building national capacity to manage migration – domestic and international – is the development of laws... Funds spent achieving success... will be far less than... required to deal with... poorly drafted and poorly coordinated legislation... [and] drafters must... pay due attention to creating legislation that will enable coordination across society and that protects human rights, including the right to safety and security of all who live in South Africa.'⁵⁹

⁵⁸ Green Paper at pg 74.

⁵⁹ Green Paper at pgs 76 and 77.

48. Comment: We agree that drafters must pay due attention to creating legislation that will enable coordination across society and that protects human rights, including the right to safety and security of all who live in South Africa'. However, cognisance is not given to the well drafted Refugees Act and its regulations following the Refugee white paper. We would not agree that this legislation is 'poorly drafted' and are sceptical of the view in terms of 'funds spent in achieving success' that redrafting legislation and policy would be preferential to improving or adapting current legislation in the few instances where it may fall short.

CONCLUSION

49. The Green Paper states: 'The broad understanding of international migration advocated in the Green Paper accords with principles adopted by international bodies such as the UN, the AU, the International Organization for Migration (IOM), International Labour Organization (ILO) and the United Nations High Commissioner for Refugees (UNHCR). It recognises the rights of nations to security and self-determination within a framework of universal human rights and shared responsibilities.'⁶⁰

Comment: The conclusion that the 'Green Paper accords with principles adopted by [these] international bodies...' is not entirely accurate. While the vision and key principles of the Green Paper assert for the most part a human rights ethos respectful of migrant's fundamental dignity, a number of the provisions commented on above are not in accord with these body's principles. For instance the fundamental principle of *non-refoulement* as a key principle of the United Nations High Commissioner for Refugees (UNHCR) is prejudiced in certain respects. We would recommend that the Green Paper, and White Paper to follow, adopt an approach that is more in accordance with these international bodies principles and takes better cognisance of the 'framework of universal human rights'⁶¹ the green paper seeks to recognise.

50. We note with great concern that the Green Paper as a whole is silent with respect to statelessness persons and unaccompanied and separated foreign children. These are aspects that ought to be addressed and are of utmost importance. These omission leaves a large group of vulnerable people without a mechanism to address their plight and the challenges they face

⁶⁰ Green Paper at pg 77.

⁶¹ Ibid.

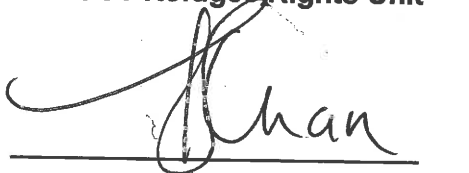
D. CONCLUSION OF SUBMISSIONS

51. We thank the Minister of the Department of Home Affairs (“DHA”) for the opportunity to make these brief submissions and trust that our submissions will prove useful and informative.

We appreciate and acknowledge the noted ‘objective of a Green Paper is to build consensus and receive inputs before drafting the official policy document, a White Paper⁶² and appreciate the opportunity to contribute and assist in the process.

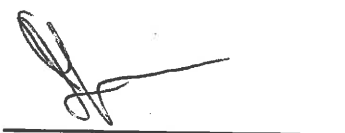
Yours faithfully,

The UCT Refugee Rights Unit




Fatima Khan

Refugee Rights Unit Director



James Chapman

Senior Attorney



Popo Mfubu

Attorney

⁶² Green Paper at pg 78.