

Comments on the White Paper on International Migration

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Submitted by the Refugee Rights Project of Lawyers for Human Rights

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Introduction

From 1979, the work of Lawyers for Human Rights has always represented a fundamental belief in the universal principles of *human rights and justice for all*, drawing reference to international human rights instruments and the "rule of law" in its numerous challenges to the former apartheid system. Since 1994, South Africa has literally "transformed" its statutory laws. It now has a government which is representative of the majority of its citizens and one of the most progressive constitutions in the world, which guarantees a wide range of fundamental human rights principles to *all persons*. In light of these new dispensations, LHR remains faithful to its central purpose to promote and protect fundamental human rights, but it recognises that now there exist new challenges, namely *Making Rights Real*.

In light of these constitutional principles and fundamental values, LHR has identified the rights of foreigners to be of critical importance in these new dispensations, believing that the truest test of a country's commitment to human rights is its ability to protect the most vulnerable. These "vulnerable persons" include refugees in this country and those seeking political asylum as well as migrant workers and undocumented migrants. LHR has been very active in policy debates on migration, through written submissions to policy papers, participation on the Refugees White Paper Task Team and as a member of the National Consortium on Refugee Affairs (NCRA). While LHR appreciates the value and importance of engaging in dialogue with government (e.g. through policy *Task Teams* and NCRA), it always reserves the right to critique both the process and product of policy development.

Consistent with this transformation, the South African government has passed various legislation with the view to ensuring that the "Rule of Law" also respects human rights. In the area of *cross-border migration*, this has included amendments to the Aliens Control Act (1995), the Draft Green Paper on International Migration (May 1997), followed by the Draft Refugees White Paper, leading to the Refugees Act (1998) and finally the White Paper on International Migration¹, released on 31 March 1999.

LHR is concerned that the *White Paper on International Migration* 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 role-players². Four main issues are of particular concern, relating to border control, xenophobia, the interface which South Africa's migration policy will have to make with the Refugees Act³ and the need for further, extensive training of officials.

Border Control vs. Management

One cannot consider migration / immigration policy in the absence of a policy for its implementation. As LHR stated in its October 1997 comments on the Collective Approach to Border Control document:

"while effective enforcement is certainly a key issue, it requires more than professional and efficient enforcement mechanisms. It also depends on the existence of a legislative framework which is in itself sound and workable."⁴

LHR appreciates that the White Paper considered implementation issues, acknowledging that "an immigration system for South Africa cannot rely heavily on effective border control"⁵. However, it is not clear why the proposals contained in the Draft Green Paper on International Migration received such little attention in the White Paper. The credibility of the approach to migration / immigration proposed in the Draft Green Paper (itself a product of extensive research and public hearings) has been confirmed by a growing volume of credible research, notably by the Centre for Applied Legal Studies at the University of the Witwatersrand, Centre for Policy Studies and Southern African Migration Project. It is unfortunate that the White Paper ignored most of the Draft Green Paper's policy recommendations, which LHR generally supported⁶ as being an approach which was not only in South Africa's social and economic interests, but in compliance with international human rights norms.

While the White Paper does seem to support a migration/immigration policy which *aims* to reflect South Africa's objective labour needs, there has been (similar to the Draft Green Paper) inadequate thought as to how this policy will be realistically implemented. It is evident that in both the *current and proposed* implementation of its immigration/migration policy, South Africa has opted for an uncompromising approach reflecting "US-style" border controls, including sanctions on employers and border controls in the style of "operation hold the line"⁷. This approach has proved to have serious, negative human rights consequences⁸ and has placed great strains on South Africa's diplomatic relations with its neighbours⁹.

Worst of all, this approach is very expensive and of limited benefit, since it has been credibly established that most persons are entering South Africa for short periods of time and returning - in other words, most migration to South Africa tends to be of a "circular" nature¹⁰. Strategies of border control which rely on employer sanctions and intensive efforts to "track and expel" undocumented persons have been shown to fail, and have even been largely abandoned by many countries, including the United States¹¹.

The government has not adequately addressed the level of corruption amongst the police force and home affairs officials¹². Widespread corruption within the Department of Home Affairs, Police and other agencies responsible for the implementation of the Aliens Control Act has seriously undermined the government's credibility, drawing critical attention of Parliament¹³, South African Human Rights Commission¹⁴ and others. This is an issue requiring *urgent* attention, and can in our view only be resolved by a comprehensive, independent investigation, preferably by an institution such as the Office of the Public Protector.

LHR welcomes the White Paper's acknowledgement of "discriminatory immigration policies and practices" and a commitment to "reformulate" the structure in order "to reflect a more systematic and objective approach which reduces the system of administrative discretion"¹⁵. However, of great concern to LHR is the White Paper's proposal to "reduce the pull factors" so

as to make South Africa "unattractive" to potential, undocumented migrants, rather than address the "push factors" which are the reasons why people left their countries in the first place. The approach provides that the "community" be partly responsible for enforcing this migration policy, together with a "professional security service". It is ironic that South Africa, with its unfortunate, past obsession on "control" and "security" that had a terrible effect on so many people's lives, should be repeating the very same, costly mistakes in its migration policy. LHR *strongly disapproves* of this approach, believing it not only to be ineffective, but one which shall exacerbate the current xenophobia in the country.

LHR supports "clear criteria", in the determination of who may be permitted to enter South Africa, with or without a visa, and agrees with the government that this will reduce administrative discretion. Indeed, the discretion of individual officials ought to be reduced as much as possible, with clear administrative accountability for decisions taken.

The concept of "undesirable" persons is an unwelcome inclusion in the White Paper, explicitly ignoring (or rejecting) the Draft Green Paper's recommendation that terminology more humanely and realistically reflect the reasons *why* people are entering South Africa, and doing away with "old-style" definitions. The White Paper very confusingly refers throughout the document to persons who are deemed to be "undesirable", without adequately defining what sort of persons would fit into this category. It furthermore provides that the re-named "Immigration Service¹⁶" be provided with "flexibility" in order to make "motivated exceptions" to the Immigration Review Board, which is dangerously vague and undermines the White Paper's earlier attempts to curb discretion.

With these concerns in mind, LHR still recognises the value in a *collective approach* in view of the multiple government departments involved in the implementation of South Africa's immigration policy. However, it strongly urges the South Africa government to reconsider the Draft Green Paper's proposals for a more objective approach to immigration and migration that responds to the realities of migration, rather than one motivated purely by "national interests" and out-dated notions of "absolute sovereignty" in maintaining borders.

Additional Papers (most available online)

- [**Prohibited Persons: Abuses of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa**](#), Human Rights Watch, March 1998
- [**Comments to the report "Border Control: Collective Approach Implementation Plan"**](#), LHR, October 1997
- [**Refugees, Migrants, Immigrants and Policy Development: A Critical Look at the 1997 South African Draft Green Paper on International Migration**](#), LHR, Jan. 1998
- *Policy Series*, [**Southern African Migration Project**](#)

Xenophobia (Myths and Misperceptions)

It is important that the government recognise that the migration *policy* itself can potentially contribute to xenophobia as much as the government's enforcement of it. No attempt to "challenge xenophobia" will be successful if the country's migration policy does not respond to realities. In other words, the growing xenophobia in South Africa has no possibility of abating, so long as the migration policy relies on "myths and misperceptions" of *why* migrants and immigrants are coming to South Africa in the first place.

The White Paper seems motivated by the mis-perception¹⁷ that South Africa is faced with a

"flood" or "mass influx" of migrants from neighbouring countries (and further afield) and assumes therefore that strong controls are needed to restrict entry. The White Paper further assumes that the current legislation regulating migration (Aliens Control Act No. 96 of 1991) merely needs amending¹⁸. It is submitted that the unrealistic *existing* policy, combined with irresponsible media reports¹⁹ and political statements, have resulted in a very dangerous social climate in South Africa characterised by growing xenophobia. Apparently responding to the public's concerns, the response of government has been quite unrealistic and disproportionate, deporting in excess of 200,000 suspected "undocumented migrants" a year²⁰ and utilising measures of detection and apprehension which fall far short of constitutional requirements, allegedly resulting in numerous *illegal* apprehensions and detentions²¹. While LHR supports the White Paper's acknowledgement that this approach has not worked, it does not feel that the government's reliance on the "community" will realistically address the level of migration and may even *contribute* to xenophobia through indirectly advocating a form of "vigilantism".

While LHR appreciates the social and economic difficulties South Africa faces in terms of its domestic interests, it cannot ignore the reality that people will come to South Africa so long as "push" factors exist, and no attempt to reduce the "pull" factors will successfully address the problem. On the other hand, government ought to recognise the positive benefits which could be gained from a more pragmatic approach to its migration policy, as proposed by the *Draft Green Paper on International Migration*, and subsequently confirmed by many.

Finally, LHR believes that the Department of Home Affairs ought to work with NGOs, Human Rights Commission and other government departments with the view to developing a specific *strategy* to combat xenophobia. LHR strongly urges the government to participate in the "Roll Back Xenophobia" campaign, which is currently operating under the auspices of the [National Consortium on Refugee Affairs](#), though it addresses issues affecting foreigners generally, and not just refugees. The nature of xenophobia in South Africa is highly complex, and shown to be rooted in the previous government's policy of separation and its isolation from the international community, particularly the African continent²².

In short, LHR believes the White Paper on International Migration to be informed by an unrealistic assessment of what are the current patterns and dynamics of migration to South Africa, and will *contribute rather than counter* xenophobia. This is particularly reflected in the White Paper's assertion that "education (to be provided) at community level to avoid any form of xenophobia"²³, contradicting with the White Paper's call for the "community's" co-operation in reducing undocumented or "illegal" migration. It is quite simply not realistic to take this approach, and is analogous to using a bucket of petrol to extinguish a fire!

Additional Papers:

- *The following SA journals have published numerous items on the subject of xenophobia: [Botshabelo](#) (LHR), [Fugee](#) (Cape Town Refugee Forum), [Crossings](#), [SAMP-IDASA](#)*
- *'[Stop Treating People Unjustly](#)', Sowetan, December 1997 (also available on LHR website)*
- *'[Roll Back Xenophobia Campaign](#)', National Consortium on Refugee Affairs, Braamfontein Statement and National Plan of Action 1999 <http://www.lhr.org.za/rollback.rollback.htm>*

Interfacing with Refugee Act

While the Refugees Act²⁴ is still under discussion with regard to its ultimate implementation, it is clear that this migration policy which is being proposed also has relevance for refugees.

Careful thought must be given to the particular impact that this policy will have on refugees and persons seeking political asylum, and the "interfacing" of both policies.

The Refugees Act provides for long-term, durable solutions for refugees which are likely to result in permanent residence (and eventually naturalisation) for those who have been resident in South Africa as refugees for 5 years or more. The White Paper merely acknowledges that the "resettlement" of refugees ought to be ensured. This ought more appropriately be referred to as *integration*. Furthermore, simply drawing a distinction between refugees and other migrants is not an answer to challenging xenophobia, the manifestations of which do not readily distinguish between legal status. Finally, terms such as "repatriation" or "voluntary repatriation" ought to refer ONLY to refugees. This is a term of international law which refers to refugees who voluntarily choose to return to their country of origin or voluntarily participate in a repatriation programme following a cessation of their refugee status²⁵.

Section 14 of the White Paper ("Definitions") ought to correctly define refugees as "persons defined in the Refugees Act as refugees" and "asylum seekers as persons seeking asylum in terms of the Refugees Act". Repatriation ought correctly to be referred to as "return". Repatriation ought to be defined in relation to refugees whose status has ceased and voluntarily choose to take part in a programme of repatriation, or who voluntarily decide to return to their country of origin.

Finally, as referred to in LHR's comments on the *Collective Approach to Border Control* Document²⁶, it is vital that persons seeking asylum be permitted to do so. This ought to be specifically provided for in the government's migration policy, and recognised by the officers tasked with its implementation. Preventing an application for political asylum could amount to a violation of the fundamental principle in refugee law of *non-refoulement* (i.e. prohibition against returning people to their countries of origin if there is a danger that they may be persecuted).

Need for Training of Officials

Training is an aspect which the White Paper has indeed recognised, and which LHR strongly supports. There have been pioneering efforts by organisations to assist government in its implementation of policy, in a manner which reflects human rights standards²⁷. We strongly urge the government to work with the many, committed non-governmental organisations and human rights institutions, in building the skills base of officials to act in a responsible manner.

Further Consultation

While LHR supports the White Paper's acknowledgement that dealing with refugees is a "human rights issue", it does not believe that the matter stops there. The government's migration policy ought also to reflect its commitment to human rights (both in terms of the constitution and international law). South Africa is urged to ratify the *International Convention on the Rights of Migrant Workers*²⁸.

LHR cannot accept the White Paper's assertion that "the migration policies of the old South Africa could work for the new one"²⁹.

The ACA needs to be replaced with a new Immigration Act, one which reflects the realities of migration to South Africa, and recognises the positive impact which migration and immigration can have to the social and economic interests of the country.

As the White Paper refers, while there were public hearings on migration issues throughout the course of 1997, these hearings were *not* widely advertised and few people in fact attended these hearings. Thus, to conclude, LHR strongly urges the government to consider the responses to this White Paper and, if necessary, to consult more broadly in the development of new legislation, ensuring that all key role-players at government and non-governmental levels are meaningfully involved in the process.

NOTES

1. White Paper on International Migration, Pretoria, *Government Gazette* No. 19920, April 1999.
2. 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, LHR
3. While at the time of writing the Refugees Act had not yet been implemented, it is understood that Regulations to the Act (No. 130 of 1998) are forthcoming.
4. "Comments on the report "Border Control: Collective Approach Implementation Plan", LHR, October 1997.
5. Section 6(4.3.3), White Paper, Ibid.
6. "Comments to the Green Paper on International Migration", Lawyers for Human Rights, July 1997.
7. Indeed, the recommendations with regard to border control followed a report prepared by the United States government, based on short visits by US Immigration Officials to border posts throughout South Africa. The report of the *Collective Approach to Border Control Task Team* incorporated many of the US Report's recommendations, as did subsequently the drafters of the White Paper on International Migration.
8. **Prohibited Persons**, Human Rights Watch, March 1998 and *Report on the Apprehension and Detention of Suspected Undocumented Migrants*, SA Human Rights Commission, 19 February 1999.
9. SAFM Radio Network (Johannesburg, 17/06) reported that Mozambican police say South Africa continues to abuse "illegal Mozambican immigrants" during their repatriation despite repeated protests, and (more generally) '[The Yankees of Africa](#)', *Mail and Guardian*, 26 October 1999.
10. 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".
11. 'INS: Fewer Workplace Raids', *Migration News*, Vol. 6, No. 4, April 1999, University of California, Davis.
12. See generally 'Report on Apprehension and Detention of Suspected Undocumented Migrants', South African Human Rights Commission, February 1999.
13. 'Home Affairs not doing enough about corruption', SAPA (Parliament), 20 October 1999
14. South African Human Rights Commission *Report*, op cit.
15. Section 7(2), White Paper, Ibid.
16. LHR does support this new terminology, as it departs from "military" style definitions of earlier days.
17. J. Crush, 'The Discourse and Dimensions of Irregularity in Post-Apartheid South Africa', Op Cit.

18. Section 5(4), White Paper, Ibid.
19. See "Is the media contributing to South African xenophobia?", *Update*, FXI, May 1999, p. 10
20. Sapa (Parliament 26-10), reports that "147,000 Mozambicans and 86,000 Zimbabweans are deported a year
21. South African Human Rights Commission *Report*, op cit.
22. In addition to the papers suggested, see A. Morris, 'Our fellow African make our lives hell': the lives of Congolese and Nigerians living in Johannesburg', *Ethnic and Racial Studies*, Volume 21, Number 5, November 1998 and A. Bouillon, "New" African Immigration to South Africa, South African Sociological Conference, Durban, July 7-11 1996
23. Section 6(5), White Paper, Ibid.
24. Act No. 130 of 1998.
25. See J. Handmaker, "Returning Home: Learning lessons from the past, and promoting safety and dignity in repatriation and return"(perspectives from the North and South), *AFLA Quarterly*, July-September 1999.
26. Comments to the report Border Control: Collective Approach, et al., LHR, October 1997, p. 7
27. These include (but are certainly not limited to) the Centre for Applied Legal Studies' training programmes for administrative officials generally and other training initiatives by the Centre for the Study of Violence and Reconciliation, South African Human Rights Commission and Lawyers for Human Rights.
28. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 262, U.N. Doc. A/45/49 (1990)
29. Section 5(4), White Paper, Ibid.