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Contents

Introduction

Michael Barutciski

The present issue of *Refuge* exemplifies the analytical diversity of the research and advocacy communities that make up the journal's readership. While the idea of a refugee-focused periodical based in Canada's most diverse city originated in the wake of the Indochinese boat people crisis, the journal today attracts local and international commentary on a variety of challenges relating to the wider subject area of forced migration. The current issue pays tribute to the journal's origins by exploring basic refugee challenges that in many ways have continued to pose problems for academics and advocates over the last decades.

The issue opens with Jennifer Hyndman's article that deals with certain geopolitical considerations related to refugee crises which are often ignored by analysts. The focus is on Somali refugees, while the analytical lessons suggest a wider application. The next article is authored by Dale Buscher who explores a topic that is attracting increasing attention from practitioners and academics over the last few years: urban refugee livelihoods. Louise Kinlen then explores the difference in treatment accorded to resettled refugees and persons who apply for protection via an asylum process. Her study relates specifically to Ireland's refugee policy, but the same dichotomous treatment characterizes other western liberal democracies.

The featured articles are followed by three sections that are devoted to refugee protection questions. The first section is a policy debate between David Matas and James Bissett who explore Canada's recent responses to the arrival of asylum seekers on the country's western shores. Their opposing views help readers understand the contentious nature of the questions raised by the arrival of boat people. The second section is devoted to a regional power that has become one of the most important asylum countries: South Africa. The section is introduced by Tal Schreier, who also contributes an analytical paper along with papers authored by her colleagues Fatima Khan and Justin de Jager. Finally, the issue closes with a section devoted to the last annual conference organized by the Canadian Association for the Study of Refugees and Forced Migration. The section opens with the keynote address that was delivered by UNHCR's Director of International Protection, Dr. Volker Turk. David Murray follows with a study focusing on the challenges faced by sexual minority refugees living in Toronto.

A Refugee Camp Conundrum: Geopolitics, Liberal Democracy, and Protracted Refugee Situations

Jennifer Hyndman

Abstract

Liberal democratic norms are embodied in refugee camps and the states that host them in a multitude of ways: through refugee law and the 'good offices' of the United Nations; in relation to international aid and the prerequisites recipient governments must meet to receive it; and in refugee education to name but a few. In the Dadaab camps of Northeast Kenya, democracy and law meet intense geopolitical pressures. The camps are situated in what was once contested territory during the period of colonial rule. In the early 1990s and again in 2011, as Somalia faced armed conflict and related famine, thousands of refugees fled to the Dadaab camps. The presence of Somali refugees in Kenya is not politically neutral or merely humanitarian. The contradictions between liberal democratic norms and the prevailing geopolitical sentiments that favour keeping refugees in camps them are explored in the context of Dadaab.

Résumé

Des normes démocratiques libérales sont appliquées dans les camps de réfugiés et les États qui accueillent ces camps le font de plusieurs façons : par des lois sur les réfugiés et les bons offices des Nations Unies, par l'aide internationale donnée aux États sous certaines conditions, et à travers l'éducation auprès des réfugiés, pour n'en nommer que quelques unes. Dans les camps de Dadaab, dans le nord-est du Kenya, la démocratie et la loi subissent des pressions géopolitiques intenses. Ces camps sont situés dans un territoire autrefois contesté pendant la période coloniale. Au début des années 1990 et de nouveau en 2011, des milliers de réfugiés ont fui vers les camps de Dadaab, suite au conflit armé en Somalie et à la famine qui en a découlé. La présence de réfugiés somaliens au Kenya n'est pas une situation politiquement neutre ou simplement humanitaire. Les contradictions apparaissant entre les normes démocratiques libérales et les sentiments géopolitiques prédominants en faveur de garder ces réfugiés dans les camps, font l'objet de cet article, dans le contexte des camps de Dadaab.

Introduction

As a field of inquiry, 'refugee studies' is remarkably apolitical given the dramatic human displacement across borders that geopolitics generates. Conflict in and displacement from Somalia today, for example, are imbued with legacies of the Cold War, as weapons left behind by allies from the USSR and later from the US can still be found in use. The Dadaab camps of Northeast Kenya are located in what was once contested territory between Somalia and Kenya during the period of colonial rule. The refugees' presence in the region today is not politically neutral or merely humanitarian.

Herein lies the conundrum; others might call it a contradiction, or more simply geopolitics. Most of the world's states have signed the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol that extends its temporal and geographical mandate, yet the wealthiest of these have found ways to duck many of the legal obligations outlined therein. This same Convention also outlines certain rights to education that refugees shall have. In short, liberal democratic norms and human rights might appear to ensure the provision of protection and education to refugees, but the actual aid, policies and strategies of these liberal democratic governments do not always correspond to these legal

obligations and democratic norms. Instead, refugees are managed *in situ,* stuck in legal limbo without most of the basic human rights to mobility, work, and residence. While *non-refoulement,* or protection from forced return to a dangerous country of origin, remains intact, refugees in Kenyan camps live with long term uncertainty, with their mobility, employment prospects, and legal status restricted.

This short paper makes three related points that advance this argument. First, I outline how refugee camps themselves are geopolitical formations and are in no way immune or irrelevant to geopolitics, whether regional or international. Then I draw on research to show how Somali refugees in the Dadaab camps of Kenya are managed in place, with little concern for the ongoing suspension of livelihoods and human development.[1] Finally, based on the first two points, I elucidate the hypocrisy of the long term camp situation in a context where international aid to refugee-hosting countries is conditional upon democratic reform, 'good governance', and other liberal norms that value civil society that are completely ignored in the context of the camps. One expression of this dark irony is refugee education in the camps. To conclude, then, I offer evidence of refugee education in the Dadaab camps as an expression of liberal democratic norms in a place where such norms are largely being ignored or neglected in relation to the protracted refugee population.

The Geopolitics of Humanitarian Space

The Horn of Africa, including East Africa, has been a strategic space subject to foreign influence during colonial, Cold War, and postcolonial periods, including the contemporary one. European powers staked their claims in the Horn of Africa beginning in the latter part of the nineteenth century, notoriously drawing international borders through single ethnic and linguistic groups and destabilizing the region in the process. In the contemporary moment, the people at whom humanitarian assistance is targeted are largely found in poorer, formerly colonized countries of the geopolitical 'Third World', those states of the Non-aligned Movement that chose to side neither with the First World capitalists or the Second World communists. More than 80% of refugees today live in the global South, with a large number of those in Sub-Saharan (and increasingly North) Africa.[2] The huge flow of humanitarian capital into Africa—in the form of peacekeeping and refugee relief—is far more impressive than the number of refugees and displaced persons who are allowed to leave.[3]

This section of the paper briefly examines relevant colonial, Cold War, and post-Cold War investments in the Horn of Africa. It highlights the relationship of colonizer to colony as this was superimposed upon nationalist claims for an ethnonational state during the period of independence, followed by flows of money and arms from superpowers to countries in the Horn during the Cold War. My analysis aims to highlight how politically charged humanitarian spaces can be, and provides a context for the current round of humanitarian crisis that besets this region today.

The borders that produce refugees and circumscribe their movement in East Africa and the Horn today are predicated on colonial and Cold War political geographies. The establishment of borders during the colonial period was reinscribed by infusions of arms and other investments during the period of superpower rivalry. Today these borders continue to be reinforced by the large, and no less political, flows of humanitarian assistance.[4] Today, the flow of 'First World' resources into the region continues, albeit to serve ostensibly humanitarian rather than colonial or superpower interests. The relative immobility of refugees to leave the region has been juxtaposed with the hypermobility of donor capital to the region.[5] More recently, notable funds have been made available by governments in the global North to develop tactics to keep *prima facie* refugees in 'regions of origin' and prevent asylum seekers from entering their territory.

Drawing the Line, Dividing the Nation: Kenya and Somalia

Most Somalis in Kenya live in Northeastern Province, along the Kenyan-Somalia border, a region formerly known as the Northern Frontier District (NFD). The territorial difference between the Somali nation, as the variegated ethno-national group of all Somali people in Kenya, Somalia, Ethiopia, and the Somalian nation-state has been a major source of geopolitical conflict in the region throughout colonial, Cold War, and contemporary periods.

The Government of Kenya (GOK) has not hidden its disdain for Somali refugees living in Kenya, or for its own Kenyan nationals of Somali ethnicity. Racism and discrimination against Somalis are practiced today just as they were during the colonial period in which Britain ruled Kenya and Northern Somalia, France controlled Djibouti, and Italy occupied Southern Somalia. While the first colonial powers in the Horn exercised only a maritime presence, the 'scramble for empire' among European nations in the late nineteenth century accelerated the process of colonial partition. Unsurprisingly, many borders in Africa were drawn with European interests rather than indigenous settlement patterns or local politics in mind. Conflict over the Kenya-Somalia border can be traced back to colonial occupation at the turn of the century when Britain extended control over the semi-arid region now known as the Northeast Province of Kenya.[6]

The British colonial administration wanted to establish a 'buffer zone' between its borders with Ethiopia and Italian Somaliland (now Somalia) on one side and its railway and white settler population on the other.[7] Accordingly, administrative boundaries were redrawn within Kenya, creating the Northern Frontier District. The 'frontier' in the district's name was elucidated in 1909 when Somalis living in Kenya were prohibited from crossing the Somali-Galla line that divided the NFD from the rest of Kenya. This early effort to contain Somalis in Northeast Kenya led to strategies by subsequent governments to curtail the mobility of Somali Kenyans in relation to other Kenyan nationals.[8] Today, while Kenyan Somalis are no longer subject to such discriminatory restrictions, all refugees (most of who are from Somalia) in the Dadaab camps, which are located in this same part of Kenya, are required to stay in the camps.

The 1909 policy generated significant resistance to colonial rule on the part of Somalis. In response, the British administration—by means of legal ordinance—declared the NFD a closed district in 1926, a move which afforded it broad powers to sweep the Somali problem behind the line, as it were, using whatever force was necessary. A subsequent legal ordinance designated the NFD a 'Special District' that required its Somali inhabitants to carry passes or seek approval from authorities to enter other districts. Little attempt was made by the colonial administration neither to promote neither social nor economic activities in the district nor to integrate it politically with the rest of Kenya. This geographical and socio-economic segregation continued even after Kenya achieved independence. Today, this part of the country remains distinctly poorer and less politically powerful compared to the rest of Kenya.

In 1960, British Somaliland, located in the northern part of the emerging country, united with Italian Somaliland in the South to form the independent Somalian Republic. Despite the formation of this new state, many Somalis remained outside its borders in the Ogaden region of Ethiopia and in the Northern Frontier District of Kenya. Ethnic nationalism and the quest for the unification of the pan-Somali nation under the leadership of the new government of the Republic of Somalia intensified the struggle for self-determination among Somalis in Kenya, whose persistent political efforts succeeded in pushing the British Colonial Secretary to call for a commission that would determine the public opinion of the NFD. A United Nations Commission was then appointed to consult residents of the area and to make recommendations accordingly.[9]

The Commission found that ethnic Somalis in Kenya overwhelmingly preferred unification with the Somalia Republic to their political status as part of Kenya. The British colonial administration was, however, also in the process of negotiating Kenyan independence at the time with president-to-be, Jomo Kenyatta. During these talks, Kenyatta made it clear that he refused to cede Kenyan Somaliland to its neighboring republic. The British administration decided to placate Kenyatta by quickly writing its own *Report of the Regional Boundaries Commission,* a paper that recommended its preferred course of action and reneged on its promise to follow through with the UN Commission's recommendations.[10]

When this decision was announced, the Somalian Republic severed its diplomatic ties with Britain and mounted an insurrection in Northeast Kenya which became known as the 'Shifta War.' Shiftas were, and still are, defined as bandits. Bandit activity is related to the systematic economic marginalization of ethnic Somalis living in this region of Kenya, the Northeast Province of Kenya being one of the poorest regions in the country. By relegating resistance in the area to mere regional 'banditry', the British administration tried to undermine the political legitimacy of Somali actions. In efforts to counter resistance, the colonial administration of the day declared a 'state-of-emergency' in the district in March 1963. Immediately after Kenya's independence in December 1963, the newly independent Kenyan government also declared a state-of-emergency in the Northeastern Province and held the Somalian government responsible for rebel activity in the region.[11]

After Kenyan independence, the political struggle for the unification of a Somali nation continued at regional and continental levels. Somalia looked for support from the Organization of African Unity (OAU), founded in 1963, but found none. While the OAU admitted that the borders of post-independent African states were artificial, it was committed to territorial integrity and the survival of these borders as a practical compromise to achieve peace among African states. Between 1964 and 1967, reports suggest that some 2,000 Somalis were killed by Kenyan security forces.[12] The position of the Government of Kenya, which vowed not to cede any ground to Somalia, had very material implications for Kenyan Somalis. In the struggle to gain independence from colonialism, the new Kenyan government was complicit and reinscribed the colonization of the Northern Frontier District. Soon after, expelling inhabitants of the area became a means of addressing Somali resistance and rectifying insecurity in the region. Although the Republic of Somalia formally renounced its claim on the Northeast Province in 1967, the state-of-emergency policy remained in effect in the region until 1991.

The Militarization of the Border Area: Now and Then

The militarization of both countries through this period is worthy of its own study, yet both this story and the history of conflict in Kenya's Northeast Province point to the area as one that is hardly neutral, despite its humanitarian and refugee camp monikers. This point has been highlighted throughout the fall of 2011, as insecurity became a feature of the Dadaab camps themselves. In October, two Spanish doctors working for Medecins Sans Frontieres (MSF) were abducted in the camps.[13] Their kidnapping remains a mystery at the time of writing, and many more security incidents targeted at Kenyan police in and around the camps have undermined security, inculcating 'banditry' of a new order.

Returning to the summer of 1992, the confluence of drought and conflict in Somalia led to acute famine and displacement both within the country and beyond its borders. Widespread famine and the collapse of the Somalian state exacerbated this situation in which an estimated 500,000 Somali citizens died. Well over a million Somalians were internally displaced and some 600,000 fled the country, many of them seeking asylum in nearby Kenya. While they were not warmly welcomed, the Kenyan government was obliged to tolerate them, partly because of its commitment in international law to the 1951 Convention and 1967 Protocol relating to the Status of Refugees as well as the 1969 OAU Convention, and partly because it needed the continued support through foreign aid of donor countries—many of which had suspended funds to Kenya at that time.

While donor countries awaited a satisfactory outcome of the country's first multi-party elections before reconsidering their aid commitment to Kenya, then President Daniel Arap Moi grudgingly allowed Somali refugees into Kenya on the condition that they reside only in the camps located near the border. Continued provisions of international development aid from Europe and North America to Kenya were conditional upon a proven commitment to democratic process and the country's acceptance of Somalis in need of humanitarian assistance, some of which would also benefit Kenya. During the Moi era in Kenya, a repeating pattern of events is discerned by analyst, Daniel Ehrenfeld who calls it "a sort of 'aid tango'." "First, Kenya wins its yearly pledges of foreign aid, and then the government begins to misbehave, backtracking on economic reform and flexing its authoritarian muscle. Sharp rebukes this, following which Kenya placates its benefactors and the aid is pledged anew."[14]

The recent humanitarian crisis in Somalia and neighbouring countries is a déjà vu: conflict and drought together precipitate new expressions of human displacement, with many people travelling to the Dadaab camps for food. The Dadaab refugee population grew from 308,784 in January 2011 to 463,602 in October 2011, an increase of more than 50% in less than a year. This resulted in an increase from three camps to six, though the latter were approved by the Government of Kenya (GOK) for refugee residence in late 2011. As with shelter, unfortunately, other infrastructure in health and water/sanitation has not kept pace with this growth.[15] Like the early 1990s, conflict and drought have occurred together as a 'dual disaster', generating new waves of human displacement within Somalia and across both the Ethiopian and Kenyan borders with Somalia.[16]

Conditioning Aid and Crisis in Somalia and Kenya Today

In 2011, conflict continues between the African Union troops who support the Western-backed government and Al-Shabab (more precisely HSM, Harakat Al-Shabaab al-Mujahideen), a youth movement of Islamist militants who aim to overthrow this fragile government.[17] Drought has returned to the region, and is said to be the worst in sixty years. Some 3.2 million people in Somalia face starvation and many are inaccessible to humanitarian actors due to the actions of Al-Shabab.[18]

The Al-Shabab insurgency has reportedly 'leaked' into the Dadaab camps. Bulletins that Al-Shabab sympathizers are among the new arrivals of refugees are not uncommon among those refugees who live in the three original camps.[19] Whether the kidnapping of the two Spanish doctors is an act tied to Al-Shabab or represents a kind of piracy that seeks ransom rather than political revenge for Kenyan military incursions remains unclear, yet many subsequent security incidents aimed at inflicting harm on Kenyan security forces suggest that Al-Shabab is present. In retaliation for Kenyan military incursions into Somalia in fall 2011, Al-Shabab made a public statement that Kenyans would pay for their violation of sovereignty and violence against Somalia.[20]

The capacity of communities to cope with such distress and dual humanitarian crises is no doubt eroded by the fact that the displacement from previous rounds of conflict and environmental disaster has not been resolved. Chronic conflict over two decades and repeated drought has taken a terrible toll on the livelihoods and security of people in East Africa and the Horn.

Somalia's weak Transitional Federal Government, the Obama administration, and the United Nations have all blamed the anti-government group Al-Shabab for restricting international aid operations in the areas they control and preventing emergency food distribution. Al Jazeera reports that US policy on aid distribution has also contributed a drought and food crisis.[21] While Al-Shabab has proven obstructionist in preventing the delivery of humanitarian aid to Somali citizens in dire need, it has produced evidence

that the U.S. government has implemented its own conditions on the delivery of food aid to starving people.

Aid organizations in Somalia face strict regulations of food distribution in an effort to deprive Al-Shabab of food for its own forces. While famine conditions were known to be coming to South Central Somalia in the fall of 2011, no food aid was prepositioned there, despite such a strategy being used in other parts of the country, due to the strength and control of Al-Shabab, according to Tony Burns, director of a Somali NGO called SAACID.[22] The United States Office of Foreign Assets Control (OFAC) monitors US food aid distributions in Somalia and elsewhere. OFAC imposed sanctions in Somalia to ensure that no material support, including food aid, would go to Al-Shabab to support its rebel activities. Accountability requirements for food distributions were so stringent that such recordkeeping was hard to manage outside of the capital, Mogadishu. Effectively, the OFAC rules were eventually loosened but not before many lives were lost. The main point here is that access to life-saving food aid was obstructed by Al-Shabab, but that securitizing emergency food for famine relief in policy can have an adverse impact on civilians. Humanitarian aid is supposed to be provided to support the right to life unconditionally, according the Sphere principles.[23]

As I have argued elsewhere, humanitarian assistance in general has become a *de facto* political tool through which the threat to world stability and resources represented by poor countries may be defused by development.[24] Conditions placed on international aid are nothing new in development circles, but the more recent mantra of 'aid effectiveness' is particularly pernicious, given its broadly interpreted liberal democratic requirements of political and economic governance. Identified first by the Organization for the Economic Cooperation and Development (OECD) and promoted by the World Bank, 'strengthening aid effectiveness' is a salient neoliberal policy of development that aims to utilize international assistance most efficiently by eliminating countries with protectionist economic policies or corrupt, unstable governments from the aid recipient list.[25] 'Good governance' and 'sound economic policy' are prerequisites for receiving international aid under this policy rubric.[26]

In theory, 'strengthening aid effectiveness' provides aid to the 'good' low-income developing countries that demonstrate market-orientated economic provisions and the rule of law, including a solid record of democracy and human rights, as well as low levels of corruption. Yet even if recipient governments do abide by the rules of donors from the global North, it has become apparent that states who donate funds to this region, both Somalia and the refugee camps in Kenya, do not hold themselves to the same standards of liberal democratic process, a point I return to in the conclusion.

A Silent Emergency: Containing Displacement in Camps

Despite the acute current humanitarian crises, few refugees fleeing Somalia for Kenya or Ethiopia will get beyond the camps in these initial countries of asylum, or will get Convention refugee status in Kenya or another country of asylum. Convention refugee status is a legal designation that allows refugees who are determined as bona fide to work and provides them with certain protection guarantees when residing in a host country.

Even refugees who arrived in Kenya in the early 1990s have not been afforded this status, as the Government of Kenya stopped granting such status at that time, *despite* being a signatory to the Convention. Instead, Kenya chooses to let them stay under a group designation with many fewer rights, as *prima facie,* refugees. In the Kenyan government's defense, why should it resettle and integrate hundreds of thousands of refugees when Kenya itself is a relatively poor country that struggles to educate and employ its own nationals?

In the short term, emergency humanitarian assistance is being provided to people inside Somalia and to new arrivals in desperate condition at the Dadaab camps. This will avert some death and suffering, and hopefully save lives. And yet just as the Northern Frontier District boundary and the Somali-Galla line it imputed kept Somalis contained in the district during colonial times, so too have refugees been sequestered in this impoverished and arid part of Kenya since their displacement from Somali in the years following the 1991 coup in Somalia.

Refugees in limbo in Dadaab face a long wait in protracted situations. Many if not most of their basic human rights are neglected, or ignored, but not by any one party, government, or *force majeur.* Instead, they receive minimal material provisions to keep them alive, housed, and in basic health. Refugee protection against *refoulement* may be guaranteed, but legal protection and pathways to some kind of status remain elusive for most.[27] In Kenya, basic education up to the secondary level is provided, but the highest level available is not considered comparable to the Kenyan secondary school standard. Access to employment and mobility are suspended for years, even decades.

In the context of the three Kenyan camps adjacent to Dadaab, some refugees have lived there since the opening of the first camp, Ifo refugee camp, in 1992. In the mid-1990s, offering education beyond the primary level was thought to be an incentive for refugees to stay in the camps and avoid repatriation. Sixty percent of the refugees in Dadaab camps

are poor or destitute and often "unable to meet their daily needs."[28]

Refugee camps are always only supposed to be 'stopgap measures', but they have proven to be persistent. The average waiting time for refugees has increased from nine years in 1993 to 17 years in 2003.[29] The liberal democratic values of post-WWII planning gave rise to the international refugee regime, both the legal instruments and the Office of the United Nations High Commissioner for Refugees. And yet neither envisioned the protracted and long term camps where most human rights are, in fact, suspended until a more durable solution is found.[30]

The United States Committee for Refugees and Immigrants (USCRI) calls this 'refugee warehousing' and has launched a tireless campaign on behalf of these refugees for the better part of a decade.[31] UNHCR reports that almost two-thirds of all refugees are in protracted refugee situations (PRS).[32] Bailey et al. chronicle the case of Salvadoran asylum seekers in the US who have also remained in legal limbo for decades, calling their uncertainty and precarious legal status 'permanent temporariness', an apt term for people with *prima facie* group designation as refugees but without documentation or individual legal status to resume their lives.[33]

Externalizing Asylum: Providing Protection Offshore

Inasmuch as refugees lack basic human rights in long term camps, the donor states of the global North that support the food, medical, and housing assistance also actively deter asylum seekers from such camps from coming to their borders to make a refugee claim in a place where more rights might be available. Much has been written about the tactics used to deter asylum seekers from Europe, North America, and Australia, but rarely are these geopolitical practices brought to bear on protracted refugee situations such as those in East Africa and the Horn.[34] Visas, readmission agreements and safe third country agreements are just a few examples of ways of keeping asylum seekers out and preventing them from making claims.

Asylum has been respatialized, by which I mean that the geopolitical valence of refugees has changed since the Cold War, resulting in efforts to assist refugees closer to their homes in 'regions of origin'. This occurred first in the early 1990s through a policy of 'preventive protection' and then in the 2000s through the externalization of asylum.[35] Andrew Shacknove presciently signalled a diminished commitment to asylum after the Cold War ended, noting that "refugee policy has always been at least one part State interest and at most one part compassion."[36] The development of laws, policies, and practices to prevent asylum from being sought in the global North, thus, continues.

The principal architects of the externalization agenda are the European Commission, Denmark, the Netherlands, and Britain.[37] Alexander Betts traces how a political space for special agreements on the secondary movement of refugees and asylum seekers was created by the UN High Commissioner for Refugees, Ruud Lubbers through the 'Convention Plus' initiative in 2002.[38] The initiative aimed to provide a space that enhanced refugee protection 'in the region,' but simultaneously limited access to protection on European soil. As,

> This is not simply a case of placing police and customs officials in third country airports—as Zolberg so cogently points out, but rather the gradual implementation of a system of migration management aligned with development assistance in third countries.[39]

Cooperation by transit countries and states of migrant origin is rewarded handsomely with development assistance from more affluent countries. Australia patronized Indonesia; Italy patronized Libya, until the Arab spring created new and unstable political relations there in the spring of 2011.

In the early 2000s, UNHCR's 'Convention Plus' initiative promoted the local integration of refugees in countries near their homes as a durable solution to long-term displacement, including those in protracted situations. Yet this approach assumed that countries in the global South would be willing to take on additional responsibility for integrating refugees permanently, given the right mix of foreign aid and other financial incentives. It assumed that strengthening capacity to protect refugees in these initial countries of asylum could reduce the need for onward movement [to the global North] for refugees.

Yet, if "African states were to reduce their commitment to the principle of territorial asylum, thereby undermining access to effective refugee protection within the region, this would almost certainly exacerbate the likelihood of onward movement and global insecurity."[40] The authors observe that European states are willing to pay for, but not host refugees; these states' collective views are encapsulated in the conviction that "it doesn't matter where asylum is provided as long as it is provided."[41] The 'Convention Plus' initiative failed in its efforts to persuade first countries of asylum to settle refugees permanently, but one could argue that governments that are signatories to the Convention have succeeded in externalizing asylum offshore, away from their territory where asylum seekers can access rights once they land and file a claim. Protracted refugee camps are one symptom of these geopolitical tactics.

The war in Somalia continues in fits and starts, precluding any possibility for large-scale return. The Government

of Kenya will not consider local integration for Somali refugees, or any other refugees for that matter. The recent political violence and loss of life in Kenya in addition to the long history of ethnonational politics and conflict in Kenya's northeast do not make it a palatable place for such refugees to live in the long term. Currently, their status is temporary and their mobility is constrained. While camp borders are porous to an extent, they cannot officially leave the camps. They do have legal status to live in Kenya beyond the humanitarian structures of Dadaab.

Global Education, Local Limitations

The region's political backdrop is layered, from the colonial transition to independence to the Cold War and now humanitarian aid. The fine line between lifesaving humanitarian aid and refugee protection in the full legal sense is blurred at best. Refugee education is controversial in the camps to the extent that it is not needed for survival and therefore not pertinent to humanitarian operations. Yet for refugees stuck in the 'stopgap-measure-camps', refugee education is essential and codified in international refugee law. It is part of the liberal democratic discourse of rights. As Assistant UN High Commissioner for Refugees, Erika Feller, recently recounted:

> Education is one of the highest priorities of refugees, and has a vital role to play in their protection and ability to find sustainable solutions. Access to education is, though, limited. Refugee enrolment in primary school is only 76 per cent globally and drops to 36 per cent at secondary level. Girls are at a particular disadvantage. In East Africa and the Horn, for example, only five girls are enrolled for every 10 boys.[42]

Education has been declared a 'tool of protection' by UNHCR and a durable solution for refugees by scholars of 'education in emergencies' (EIE).[43] According to article 22 of the 1951 Convention, signatory states "shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education…. [and] treatment as favourable as possible … with respect to education other than elementary education."[44]

Just as refugee education is a right, it is also a development tool. It can also be construed as a protection tool if host governments are willing to settle permanently refugees with education and skills over those without. Most persuasively, refugee education is a portable skill set that is transferable with the person who obtains it, following them wherever they may go.

Refugee education is also a resource in developing countries. Educational services for refugees may exceed the quality and quantity of education offered to the local population or adjacent countries that have experienced chronic conflict. I draw here on the work of Epstein who speaks of "the education refugee", specifically "those who have the means to seek asylum across frontiers in order to access an education not otherwise available."[45] Epstein provides evidence of such migrations from Sudan to Kenya, foregrounding the case of South Sudanese children who grew up in chronic conditions of war, where education was provided sporadically, if at all.

> In a context where families and communities are often divided or dispersed by the upheaval of conflict, schools are seen as key institutions that will play the major role in rebuilding core values, in instilling new democratic principles, and in helping children recover a lost childhood.[46]

What is most relevant for my argument here is Epstein's finding that the curriculum of refugee education in the Kenyan context for Sudanese refugees accentuated liberal democratic values. The curriculum in camp schools overseen by UNHCR in Kenya stood in contradistinction to that of Khartoum schools where Islamification and Arabization agendas prevailed.[47] Epstein describes one of the students from Sudan who travelled to the Kakuma refugee camp in Northern Kenya for his First World influenced education:

> Seven years after reaching Kakuma and enrolling in school, joining the Boy Scouts, performing AIDS awareness skits in drama club, making videos about the drawbacks of polygamy and alcoholism in film club, working in a video hall where tickets were sold to view screenings of Chuck Norris movies, and being elected as a youth representative to the camp management council, Bol, now 22 years old and with a high school diploma in hand, returned to his village. He quickly found a job as a primary school teacher in a private school funded by a former neighbor who now lives in the United States, and as an agricultural project manager with a international non-governmental organization (INGO).[48]

The values of the Boy Scouts, the rights of persons with HIV/AIDS, the cultural politics of polygamy and alcoholism, and the experience with democratic process and representation are all part and parcel of a liberal democratic state with a functioning government to protect individual and group rights. National curriculum is also integrated into Kenyan refugee camps, so to argue that refugee education is simply a 'Western import' is to overstate the case.

Yet the vast majority of refugees in Kenyan camps are Somalis who cannot go home. They have none of the legal status, rights, or entitlements that are codified in the 1951 Refugee Convention and 1967 Protocol, endorsed and signed by the vast majority of countries in the global North.

Ironically, the international refugee regime has largely failed to deliver much more than survival aid in protracted refugee situations, such as this one.[49] My point is that these refugees experience little of the liberal democracy and rights in the curriculum taught in camp schools, despite talk of civil society, liberal peace, and human rights. In the Dadaab camps, a minimal form of protection from *refoulement* (forced return) is provided, but without any solution to this supposedly temporary situation.

Concluding questions for further thought

Refugee students may be taught to be global citizens: to value human rights in the context of liberal democracies, and to work in the spirit of voluntarism to benefit those less fortunate then they are, only to personally experience containment in camps. In the camps, their own educational and vocational pursuits are truncated, and a sense of 'permanent temporariness' prevails, not to mention desperation and depression.[50] They are taught civics and the substance of what it means to be a good liberal subject, and yet are denied access to these most basic concepts and human rights in the context of the camps.

I have argued here that refugee camps are anything but neutral, purely humanitarian spaces. In East Africa and the Horn, they exist in contested territory with long histories of geopolitical disputes. The Cold War and the rising prominence of the Covenant on Civil and Political Rights after World War II led to the dominance of human rights that embodies freedom of expression, movement, and democratic process. Yet these principles have been largely abandoned in practice by states in Europe, North America, and Australia. They have been replaced by measures that aim to keep refugees and asylum seekers away from their borders.[51] The post-WWII human rights-based regime of global governance, itself an expression of liberal democracy, has largely been supplanted by concepts like 'human security', practiced as selective security, which I contend signals the geopoliticization of human life.

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New Approaches to Urban Refugee Livelihoods

Dale Buscher

Abstract

Increasingly refugees live in urban areas—usually in slums impacted by unemployment, poverty, overcrowding and inadequate infrastructure. Host governments often restrict refugees' access to the labor market, access that can be further impeded by language barriers, arbitrary fees, and discrimination. UNHCR and its partners are seldom equipped to understand and navigate the complex urban economic environment in order to create opportunities for refugees in these settings. Based on assessments undertaken in 2010 and 2011 in Kampala, New Delhi and Johannesburg, research findings indicate that refugees in urban areas adopt a variety of economic coping strategies, many of which place them at risk, and that new approaches and different partnerships are needed for the design and implementation of economic programs. This paper presents findings from the assessments and lays out strategies to address the challenges confronting urban refugees' ability to enter and compete in the labor market.

Résumé

De plus en plus, les réfugiés vivent dans les zones urbaines, généralement dans des bidonvilles affectés par le chômage, la pauvreté, la surpopulation et des infrastructures insuffisantes. Les gouvernements qui les hébergent limitent souvent l'accès des réfugiés au marché du travail, alors que cet accès est en outre limité par la barrière de la langue, des frais arbitraires, et la discrimination. Le HCR et ses partenaires sont rarement à même de comprendre les environnements urbains complexes et de s'y orienter, dans le but de créer des opportunités pour les réfugiés vivant dans ces contextes. Basés sur des études en 2010 et 2011 à Kampala, New Delhi et Johannesburg, des travaux récents montrent que les réfugiés dans les zones urbaines utilisent une variété de stratégies de survie économique, dont plusieurs sont risquées, et qu'il y a un besoin de développer de nouvelles approches et des partenariats différents, et de mettre en place des programmes économiques. Cet article présente les résultats de ces études et propose des stratégies répondant aux défis auxquels sont confrontés les réfugiés urbains qui veulent entrer sur le marché du travail.

Introduction

Amongst the world's burgeoning urban populations are refugees fleeing conflict and persecution. Escaping their own countries, they arrive in cities already collapsing under the weight of over-population, inadequate infrastructure and stretched public services. These refugees arrive with little more than the clothes on their backs and crowd into the urban slums of developing world cities like Nairobi, Kampala, Johannesburg, Cairo and New Delhi. There they seek out a means of survival alongside the host community urban poor in neighborhoods plagued by high levels of unemployment, crime, sub-standard shelter, and often limited basic services—potable water, sanitation, garbage collection and public transportation.

Refugees, like internal migrants, seek out urban areas for access to better health care, educational systems, and economic opportunities.[1] Some also seek the anonymity that large urban centers provide. They may leave refugee camps for the urban areas or seek refuge in countries that do not utilize a camp-based model. Some refugees seek protection that they couldn't find in the camps; some come seeking access to other forms of humanitarian assistance and the possibility of third country resettlement.[2]

While fleeing to cities is not new, what is new is that refugees are migrating to urban areas in ever greater numbers.[3] According to UNHCR's 2001 Statistical Yearbook, 13% of refugees were in urban areas, while the organization's

most recent statistics state that 58% of all refugees are in urban areas.[4] The urban refugee population in Kampala, for example, tripled between 2007and 2010,[5] and they appear to be migrating ever-greater distances. One now finds Somalis in Hyderabad and New Delhi, India and Congolese in Johannesburg and Cape Town, South Africa. 80% of all refugees are hosted by developing nations and 42% reside in countries whose GDP per capita is below USD 3,000.[6] Such countries are ill-equipped to receive the refugees and are, more often than not, unable to keep pace with their own urban planning and development needs. The arriving refugees are seen to further contribute to rising crime rates, over-burdening public services, and competing for scarce jobs, housing and resources. Seldom are the refugees in urban areas viewed as potential assets who could contribute to economic stimulation and growth—filling both skilled and unskilled labor shortages and bringing in new skills and talents.

This paper details a qualitative, applied research initiative undertaken by the Women's Refugee Commission focused on building the knowledge base on urban refugees and identifying potential economic strategies and approaches to assist them in achieving self-reliance. The project included field assessments of urban refugee populations in Kampala, Uganda, Johannesburg, South Africa, and New Delhi, India conducted between September 2010 and April 2011. This paper highlights the findings and suggests approaches focused on improving economic opportunities for urban refugees.

Methodology

This article is based on three field assessments undertaken between September 2010 and April 2011 to Kampala, New Delhi and Johannesburg. Available background documents and research on each locale were reviewed prior to the assessments. Local organizations were partnered with on-the-ground organizations to facilitate access to the refugee communities—the Refugee Law Project of Makerere University in Kampala, Don Bosco Ashayalam, a Catholic non-governmental organization in New Delhi, and the African Migration Studies Program at the University of Witwatersrand in Johannesburg.

The methodology employed was qualitative data collection that focused on the voices and direct experiences of the urban refugees. Each field assessment included gender and age disaggregated focus group discussions. The focus groups were with refugee women, men and female and male youth; there were in-depth household interviews with all adult members of the household present (women, men and adult female and male youth), interviews of refugees who manage their own businesses, and with employers who hire refugees as well as with their refugee employees. A sampling of host country urban poor families was also interviewed for comparative purposes. In addition, the field assessments included interviews of key stakeholders, such as the United Nations High Commissioner for Refugees and their NGO implementing partner staff, host government officials, if appropriate, and development actors. NGO projects, host government services and refugee-run businesses were also visited, as were local markets to assess additional opportunities and potential market barriers.

In Kampala, a total of 251 refugees were interviewed. Nine focus group discussions were facilitated (1 each with Congolese men, Congolese women, Congolese youth, a mixed male/female Congolese Village Savings and Loan Association, and a lesbian and gay refugee association from the Great Lakes), 3 with Somalis (men, women and youth), and a mixed adult male and female group from Burundi. In addition, twenty-four household interviews were completed (8 Burundi, 10 Congolese, and 6 Somalis) and 9 refugee businesses (2 Burundian, 5 Congolese, and 2 Somali) were visited and interviewed.

In New Delhi, 356 refugees were interviewed through thirteen focus group discussions (1 focus group each for ethnic Afghan males, ethnic Afghan females, ethnic Afghan community leaders, Somali males, Somali females, Somali community leaders, Hindu Sikh Afghan males, Hindu Sikh Afghan females, Burmese males, Burmese females, unaccompanied female minors, unaccompanied male minors, and a mixed sex group of refugee community animators), as well as forty-eight household interviews (twelve per ethnicity), and fifteen interviews with refugee-run businesses.

The Johannesburg findings are based on interviews with 162 refugees, which include individuals, focus groups and businesses. Seventy-seven interviewees were women and adolescent girls and eighty-five were men and adolescent boys. Data was also collected from extensive household surveys conducted by the African Centre for Migration and Society at the University of Witwatersrand. The first, "African Cities" data set, includes 740 interviews with migrants and host community members in Johannesburg from 2006—2009 and looks at resilience and vulnerability due to generalized socio-economic conditions. The second, "vulnerabilities" data set, conducted in 2009, interviewed 1,000 inner city and 1,000 Alexandra township residents, both migrants and host community, to compare vulnerabilities and the impact of violence, harassment and exploitation on livelihoods.[7]

The household interviews and focus group discussions emphasized qualitative data collection on refugees' economic coping strategies, income streams, major expenses,

access to assets and services, and protection risks. Three refugee populations were targeted for inclusion at each assessment site (Kampala: Congolese, Somalis and Burundians; New Delhi: Afghans, Burmese and Somalis; Johannesburg: Zimbabweans, Congolese and Somalis) to note differences in employment practices, the strength of social networks, and levels of vulnerability. Through purposive sampling, different wealth groups within each of the refugee nationalities targeted were included in the interviews and data collection. The wealth groups (very poor, poor, struggling, and better off) were defined by the refugee community leaders who also assisted with their identification. The "very poor", for example, were characterized as those whose children were not in school, often eating only one meal per day, and living in a single room shared by large families or by more than one family, with no regular means of earning income. The "better off" were those who had steady employment, regular income, lived in larger apartments (2 or more rooms), sent all their children to school—often private schools, accessed health care, as needed, and were able to eat three meals per day.

Cumulatively, the focus group discussions, household interviews, and interviews with refugee employees and refugee small business owners resulted in 160—350 refugees being interviewed per site, with more than 700 refugees interviewed overall. The data gathered was triangulated (refugee data, service provider data and project site observation) to validate and improve data collection accuracy. Refugees participated throughout the process as interpreters, interviewers and community informants.

Limitations

Qualitative research, while rich in content, is by design limited. This study is limited in scope and application due to its qualitative rather than quantifiable data. Wealth groupings were subjective based on the input of refugee leaders and local stakeholders. Refugee interviews, while based on purposive sampling, were often limited to those selected who were available, locatable, and accessible in targeted neighborhoods. In addition, focus group discussion participants can represent biases as they are often pre-selected by community leaders and service providers. As such, findings are context-specific and unable to be generalized to other like-settings. While this snapshot of the economic coping strategies employed by urban refugees and the associated risks have knowledge application and potential programming implications for other urban refugee situations, care must be taken not to make assumptions about the direct transfer of findings to other urban areas. As noted, government policy, refugee's pre-existing skill sets, and local market opportunities and constraints shape and influence what is possible in any urban location.

Background

More than 50% of all refugees now live in urban areas.[8] In response to this changing reality, the United Nations High Commissioner for Refugees (UNHCR) revised its policy on urban refugees in 2009.[9] The revised policy is more rights-based and progressive than the 1997 policy[10] it replaced. The 1997 policy, deemed punitive by many refugee advocates, promoted an encampment policy and implied that refugees in urban areas were largely young men who had the resources to provide for themselves.[11] The 2009 policy, on the other hand, advocates for freedom of movement, the right to live where one chooses including in cities, and access to livelihoods as fundamental to enhancing the urban protection environment.

Historically, under the 1997 policy, UNHCR focused primarily on the provision of protection in urban settings, rather than on service delivery. It was believed that refugees who made their way to cities had the means and skills to provide for themselves and required little outside assistance. Some deemed particularly vulnerable received subsistence allowance, usually for a limited amount of time until they could find their own means of survival. Only as more was learned and as urban refugee populations continued to grow was there a recognition of the need to both revisit the policy and re-think the assistance efforts. In fact, the lack of assistance and support that was the prime reason that nearly every study on urban refugee livelihoods observed negative coping strategies including crime, the use of violence and prostitution.[12]

Host government legislation and non-governmental organization (NGO) service provision, however, have not changed and adjusted in step with the revised UNHCR urban policy. Host governments often do not provide urban refugees with the right to work or even residence permits in order to facilitate the rental of apartments. In fact, UNHCR reports that of 214 countries reviewed, only 37% meet the international standards meaning that all necessary legislation is enacted and enforced and that work permits are issued.[13] In addition to these host government policy and legislative challenges, UNHCR and its implementing partners are struggling to identify and adopt new models for providing protection, access to basic services, and the promotion of self-reliance in urban areas. The complexity of urban socio-economic environments challenge even the most sophisticated of service providers including economic programmers. Compounding these challenges, refugees in urban areas are further marginalized from market access by language and cultural barriers and the lack of social capital.

Social networks, especially in developing countries, play a significant role in securing jobs and accessing opportunities.[14] Without these local, indigenous networks, refugees risk remaining on the fringes of labor market.

As the growth in urban refugee numbers far out-strips a parallel growth in humanitarian financial assistance and as the average length of displacement now extends to 17 years,[15] feeding and providing direct services to these populations is no longer a viable option. Their ability to provide for themselves not only enhances their protection by reducing, for example their need to trade sex for food, but, allows urban refugees to address their own needs without substantive further assistance from the humanitarian community. Not only could economic opportunities restore some of the refugees' dignity, allowing them to make decisions about their expenditures and choices, promoting these opportunities would also allow humanitarian assistance to be used more effectively and sustainably—supporting local economic development or improving government health and education facilities rather than utilizing donor dollars to support food aid and refugee subsistence allowance. This model was tried in the Burundian refugee settlements in rural Tanzania in the 1960's and 70's to considerable success. Refugees were allowed to self-settle and humanitarian assistance was used to build and rehabilitate roads, schools, and health clinics in the impacted region directly benefitting both the refugee and host communities rather than using the funds for direct refugee assistance.[16] When host governments see direct benefits to them and their citizens, they are more likely to allow refugees to fully access their labor markets and their public services.

Understandably, in spite of obligations signed onto for those who have ratified the 1951 Convention Relating to the Status of Refugees,[17] most host governments are reluctant to allow refugees to work. They fear competition and worry that with jobs and income, refugees will *de facto* locally integrate, never to return to their countries of origin. While these concerns are valid, it is also true that refugees with cash in pocket and marketable skills are more likely to return home when such return is safe. This has been demonstrated repeatedly, Albanian Kosovars rushing back to Kosovo to repair their homes,[18] the most highly skilled Southern Sudanese returning from the Kakuma camp in Kenya first because they knew they could find jobs,[19] and the Liberians returning from Guinea to teach, farm, and reclaim homes and properties in Monrovia.[20] Often the residual refugee caseloads aren't those who found ways to make money; but, rather those who did not, that is, those who had no resources to return with and no new skills that would make them marketable upon return an example being the residual caseload of Liberians residing in the Buduburam camp in Ghana.[21]

Specific Contexts

Three distinct contexts were chosen for this study on urban refugee livelihoods. The sites, selected in consultation with UNHCR staff, were chosen to reflect geographic diversity, diversity in host government policy and practice, and varying market opportunities and constraints. Three different refugee nationalities were assessed in each location and were selected based on size (the two largest groups in each location) and vulnerability (the group perceived by UNHCR and the local service providers as the most vulnerable).The cross-section of populations and geographic sites were assessed to provide opportunities for extrapolation of lessons and synthesis of learning for potential global application.

The total number of refugees living in Kampala is unknown. UNHCR has registered over 35,000 urban refugees,[22] while Human Rights Watch estimates that there are over 50,000 refugees in Kampala.[23] The largest refugees groups are the Congolese and Somalis and one-third of the urban refugees live on less and $1 (USD) a day.[24] Kampala is a dusty, poor, congested city nestled amongst increasingly denuded rolling hills. The markets are under-developed and relatively stagnant. Unemployment is high even among highly educated Ugandans. Uganda is a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol as well as to the 1969 Organization for African Unity Convention Governing the Aspects of the Refugee Problem in Africa—agreements that detail the rights of refugees. Uganda has also adopted national legislation in its 2006 Refugee Law which allows refugees freedom of movement and the right to settle in Kampala.[25]

In contrast, New Delhi is a bustling metropolis comprised of expressways, skyscrapers, a subway system, and a dynamic, expanding market. Jobs are plentiful albeit low-end, entry level, unskilled positions. There are over 21,000 persons of concern to UNHCR in New Delhi representing 15,269 refugees and 6,092 asylum seekers.[26] The largest refugee groups are Afghans and Burmese Chin who collectively represent over 90%of the refugee caseload.[27] India is not a signatory to the 1951 Refugee Convention or its Protocol and has not adopted domestic legislation governing refugee issues on their territory. As such, refugees fall under India's *Registration of Foreigners Act of 1939,* the *Foreigners Act of 1946,* and the *Foreigners Order of 1948*.[28] The lack of a coherent national policy framework has led to varied practices and differential treatment for the refugee groups hosted by India. While refugees do not have the right to work, they are

tolerated in the informal market where an estimated 92% of Indians also work.[29]

While there are no hard and fast numbers for refugees in South Africa, it is estimated that the number exceeds 250,000[30] a significant percentage of whom are assumed to reside in and around Johannesburg. South Africa, the economic engine of southern Africa, is a destination for refugees as well as economic migrants. With no formal channels for migration, economic migrants apply for asylum in order to remain in the country and clog the asylum system which negatively impacts those with legitimate asylum claims.[31] South Africa, however, is a signatory to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol, as well as the 1969 Organization of African Unity Convention Governing the Specific Aspects of the Refugee Problem in Africa. Further, South Africa enacted domestic legislation in its *1998 South Africa Refugee Act* which grants asylum seekers and refugees freedom of movement, the right to work, and access to basic public services, such as health care and public education.[32]

The largest refugee groups in Johannesburg are the Zimbabweans, Congolese and Somalis and while historically refugees and migrants settled in the inner city to access markets, housing and public services, today most new arrivals settle in the informal settlements on the outskirts of the city.[33] These informal settlements are characterized by poor physical infrastructure, inadequate education and poor health outcomes.

Findings

Vulnerability

Vulnerability is not the same as poverty, marginalization, or other conceptualizations that identify groups or populations deemed to be disadvantaged, at risk, or in need. Poverty is a measure of current status; but, vulnerability involves a predictive quality. That is, it is a way of conceptualizing what may happen to an identifiable population under conditions of particular risks and hazards.[34]

According to Jacobsen, the context by which urban refugees are exposed to vulnerabilities is predominantly "determined by the laws and policies of host governments and by the way these policies are implemented; the public and private institutions devoted to supporting and managing refugees, and the dominant public ethos towards refugees".[35] As noted throughout this article, host government policies and practices as well as xenophobia and discrimination by host country nationals have a significant impact on both vulnerability and access to opportunity. While 144 governments are State Parties to the 1951 Convention Relating to the Status of Refugees;[36] twenty governments have made reservations to Article 17 of the Convention which is on the right to wage-earning employment.[37] It is the practice, however, rather than the ratification of international conventions or the adoption of domestic legislation, that most affects urban refugees' vulnerability.

In all settings, vulnerability, defined as inclusive of prediction of risks, varied, not unexpectedly, according to wealth groupings. Those categorized as "poor" and "very poor," by far the largest percentage of all refugees in all three locations, lived precariously—locating themselves in marginal neighborhoods, shifting apartments frequently, skipping meals when they couldn't afford food, accessing health services irregularly, and accumulating debt. Their income was erratic, infrequent, and unpredictable. Their children were often not attending school. Those deemed "better off" resided in better, safer neighborhoods, had regular sources of income, were able to put food on the table three times per day, and their children not only attended school but often attended private schools. The "better off' refugees, however, were far fewer in number and, hence, represented a much smaller portion of the refugees interviewed. Those in the "struggling" category fell between the poor and better off groups; they had fairly steady sources of income although at low wages, decent if basic housing, and were able to meet their bills and afford basic necessities. Their children tended to attend government schools and they accessed health care. They had no savings, however, and a shock or illness could quickly have them join the ranks of the poor or very poor.

Vulnerability also varied by nationality. In New Delhi, for example, the Burmese women, according to all key stakeholders interviewed, are most affected by gender-based violence[38] while the Burmese young males are most likely to be engaged in unsafe and exploitative labor practices. The Somalis, on the other hand, report the highest levels of discrimination based on their skin color, dress and religion and the Somali female-headed households are among the most desperate often relying solely on UNHCR provided subsistence allowance to survive. The Afghans, especially the Hindu Sikh Afghans, fare best; living in better neighborhoods, accessing steady employment and availing of services from their mutual assistance association which provides a range of social and educational services to their community.

In Kampala, paradoxically, the Somalis tend to fare better than both the Congolese and Burundians. This largely has to do with their strong social networks and their practice of keeping money within their community. The Somalis in Kampala are concentrated in the central neighborhood of Kisenyi. Congregating themselves into a single, tight-knit, economically well-positioned neighborhood serves to enhance their protection as well as facilitate the development of their own businesses.[39] Wealthier Somalis and the

mosques assist the most vulnerable members of the community, at times paying their rent and providing money for food. Somali women are somewhat protected by their limited movements and their tendency to stay within the confines of their own refugee community. Contrarily, the Congolese women engage in the riskiest livelihood activities, walking the neighborhoods throughout the city, going door-to-door to sell bitenge (the traditional Congolese cloth), jewelry and shoes exposing themselves to harassment, rape, theft, and arrest.[40] Scattered in a number of neighborhoods throughout the city, the Congolese social networks, while supportive, are more fragmented than those within the Somali community. The Congolese churches, for example, play a role in assisting the most vulnerable. Dozens of Congolese refugees live at the churches and the churches supply rice and other food assistance when they are able to those most in need. Less is known about the much smaller Burundian community except that their social networks are weak. They are widely disbursed throughout the city, and that there are high levels of suspicion and mistrust within the community based on previous associations and potential acts committed during the genocide in Burundi.[41]

In South Africa, where gender-based violence (GBV) is endemic, GBV and xenophobia are considered by refugees to be major concerns affecting their vulnerability.[42] Asylum seekers and refugee women are often targets of sexual violence and GBV was seen as the main threat to women and children during the 2008 xenophobic attacks.[43] The threat of GBV can have major consequences for forced migrants' economic activities and household incomes. Women say they risk sexual harassment and violence every time they sell goods on the street or in flea markets, go to work, or take public transportation, and they say they have little recourse or protection from this violence. They report the police are indifferent to their claims, and/or ask for bribes or sex in exchange for services.[44]

The Somalis tend to have stronger social networks in Johannesburg than the Congolese and Zimbabweans. There are at least 60 Somali-owned and operated businesses and a Somali shopping mall in the Somali-impacted neighborhood of Mayfair.[45] However, a third of the Somalis interviewed for a study conducted in 2010 lived in hostels and boarding houses, compared to 13% of other migrants.[46] Boarding houses charge by the day, which helps those with poor cash flow manage their day-to-day costs, but often means higher spending on housing in the aggregate and is indicative of economic vulnerability. Arbitrary evictions, police raids, exploitative landlords, and the lack of secure and affordable housing result in frequent moves among all refugee groups.

Resilience

Economic resilience refers to ingenuity and resourcefulness applied during or after an event.[47] In the context of refugees in urban areas, this resilience implies an ability to care for oneself and family, to somehow manage and survive against sometimes overwhelming odds. The economic coping strategies employed manifesting such resilience are not necessarily positive, safe or beneficial. In fact, the coping strategies often include those that place refugees, particularly women and youth, at high risk of abuse—engaging, for example, in transactional sex, exploitative labor practices, and illegal activities.

In spite, however, of the obstacles facing refugees in urban areas, the Women's Refugee Commission's research in the three target cities has found that majority of refugees to be coping and managing the complexity of survival in often hostile, unfamiliar environments. Not surprisingly, the "better off" and "struggling" wealth groups managed better and had sources of income that were safer and more steady while the "poor" and "very poor" managed through risky, irregular work that was often accessed by fierce determination—begging for day laborer work at construction sites, for example. Many refugee households managed by relying on multiple income streams coming in from working parents and older children in order to not only meet their basic needs for food, shelter and clothing but also to prepare them for unforeseen shocks and financial stresses.[48] A handful of refugees in each location were actually thriving. Some of secured loans from host community members they had befriended and managed to open their own small businesses; a couple, despite the odds, were practicing their professions as doctors and teachers, while others managed to enroll and pay the fees for their children to attend private schools. For the most part, those who were making it in the city were doing so not because of any humanitarian assistance provided but rather in spite of the lack of assistance given.

Refugees who migrate to urban areas tend, on the whole, to be more highly educated and more resourceful. In Kampala, for example, a study found that most of the urban refugees are educated urbanites—70% of the sample interviewed had either finished or been attending secondary education prior to flight and 30% had a college or university qualification. Many were academics, researchers, engineers, teachers and musicians.[49] Self-selection often brings the most entrepreneurial and educated to the cities.[50] There they build and rely on their social networks for support. They quickly learn and tap into all available services and programs. They advocate for themselves and are often relentless in seeking opportunities.

In New Delhi, for example, many Burmese refugees find work in small, irregular factories by going door-to-door to the factory owners pleading for jobs. When they are accepted into employment, they quickly bring in or refer their friends and family members to the same employer. Similarly, many Burmese youth work as caterers and servers at Indian weddings and functions and bring each other in to work collectively for the same catering companies. Within the Somali community in Kampala, established Somali businessmen hire Somali refugees who in turn provide food and financial assistance to the most vulnerable within their refugee community. In these ways, the refugees are not only assisting their own but strengthening the resilience of their communities.

Access to Basic Services

Access to basic services for refugees living in urban areas is frequently impeded by host government policies which restrict health and education services to their own country nationals. These restrictions often necessitate the creation of parallel, refugee-specific services for the urban refugee population, as full access to education, housing, employment and financial services often requires documentation that is not always available to refugees, such as professional qualification, school or banking records and birth certificates.[51]

Transportation costs also impede service access as costs to maneuver the wide expanses that comprise urban areas are often beyond the reach of many refugees. The majority of refugees interviewed in the field assessments report confining themselves within quite restricted districts of the metropolitan areas where they reside. They often stay within their own neighborhoods both for protection and because they can't afford to pay for bus, rickshaw, *boda boda* (for-hire motorcycles) and taxi fare. The financially imposed restrictions on their movements further limit urban refugees' access to employment and basic services. In New Delhi, where traversing the immense, traffic-clogged city is particularly cumbersome, UNHCR's non-governmental organization (NGO) partners have set up branch offices in each of the major refugee-impacted neighborhoods thereby taking their services to the refugees instead of having the refugees travel long distances at significant costs to reach them. In addition, UNHCR has negotiated refugee access to the Indian government-provided free education and health care systems. While less desired by the refugees than the previously accessed private schools and private hospitals that UNHCR subsidized, refugees now have access to primary and secondary education and health care on the same basis as the majority of Indians. This model of supporting access to host government services may require channeling international donor funding directly to host government health and education ministries.

Secondary education, while more widely available in urban areas than it is in many refugee camps, may be difficult to access due to language barriers and work responsibilities. As costs in urban areas are high and refugee families require multiple income streams to meet their monthly expenses, many refugee youth, especially male youth, work in the informal markets rather than attend school.[52] Female youth, on the other hand, are more likely to stay home and assist with household chores and childcare responsibilities. There are few opportunities for 'earning and learning' and even non-formal education classes tend to be offered at times that clash with other work tasks.

In all locations, however, access to tertiary education whether university or vocational training, is problematic and costly, well beyond the means of most refugees. In New Delhi, refugees entering the university system, for example, are charged foreign student fees which are several times higher than the tuition fees paid by Indians. As urban refugees are often highly educated, this can result in refugee young people ending up less educated than their parents.

Assets

While some refugees manage to flee with some of their assets intact, the majority does not and, as such, displacement is a time for economic practitioners to focus on building or re-building assets—social, human and financial—in preparation for an eventual durable solution. While there has been wide understanding of the importance of human and financial capital, only recently has it become so apparent that the social networks in which people interact are integral to their livelihood development. Social capital is vital to helping the poor manage risk and vulnerability.[53] In fact, strong social networks/social capital proved to be the most valuable of assets for the refugees researched in the three Women's Refugee Commission field assessments. Social capital not only enhanced the refugees' protection, whether living near each other or traveling together, but was the most vital source for information dissemination about NGO services, employment opportunities, and housing. In addition, refugees more frequently borrowed money from other refugees, when confronted with emergencies and financial shortfalls, than from any other source. Landau, in a 2011 article, premises that the primary determinants of effective protection have considerably less to do with direct assistance than with individuals' choices and positions in social and institutional networks.[54] In fact, a study further highlighting the importance of social capital examined the social capital impacts of BRAC microfinance programming in Bangladesh and found that the linking of project participants to higher socioeconomic-standing

community members resulted in those among the most vulnerable moving up two economic class levels (out of a possible 5), moving from "vulnerable" to "middle class."[55]

Human capital, especially educational attainment and previous work experience, had a generally positive impact on neighborhood of residence with more educated refugees choosing more expensive, safer neighborhoods and higher quality shelter. However, the more highly educated often had more difficulties accessing the job market. While less educated, less skilled refugees were able and willing to secure employment in the informal labor market, the more highly educated were unwilling to perform unskilled labor and yet were not able, because of host government policies and the lack of recognition of their diplomas and certifications, to secure access in the better paid formal sector. Work in the informal markets in all three sites was often dangerous and, at times, exploitative. The Burmese Chin in New Delhi have, perhaps, the most difficult adjustment as they come almost exclusively from rural, agricultural backgrounds and, hence, the human capital they possess doesn't match the needs of an urban, more structured employment environment. As such, they end up in unskilled, informal sector jobs that require them to work long hours for low pay. Their employers, while reporting that they are hardworking also state that they possess little employment etiquette; they tend not to call in when they're sick, they generally do not give notice before leaving to accept another position, and simply do not show up for work when they have other pressing obligations like an appointment at UNHCR.[56]

Natural capital for refugees in urban areas is all but absent. They are not allowed, in the contexts studied, to buy or own property and the three cities provide little in terms of access to open spaces or natural resources. The density of housing, for the most part, precludes access to even small plots of land for backyard gardening or the raising of small livestock. This is unfortunate as access to communal and public lands for crops and gardens could significantly enhance urban refugees' food security as well as provide an opportunity for those coming from rural backgrounds, like the Burmese, to utilize their existing skills. As urban agriculture becomes increasingly important for all urban populations, host governments will have to consider models for agricultural production closer to and in urban areas as a means of addressing their growing food security needs.

Physical capital, while part of the pull factor contributing to urban migration, can paradoxically also be a limiting factor in the neighborhoods where refugees reside. Inadequate shelter, poor roads, limited public transportation, and the lack of garbage collection, potable water, and sewage systems, may result in urban refugees living in squalor far worse than that in many refugee camps. The poor infrastructure can mean long travel times to reach basic services, limited access to markets, and increased exposure to health risks due to poor sanitation and over-crowding. Refugees in urban areas often move frequently whether because of inability to pay their rent, problems with their landlords, or harassment and protection concerns in their neighborhoods. The frequency of moving from one apartment or shelter to another is a good indication of vulnerability with those most unstable in terms of residence tending to be the most vulnerable.[57]

Access to financial capital is perhaps the biggest barrier urban refugees face in their quest to become self-reliant. Most cannot access formal banks for loans or for a safe place to save. In addition, micro-finance institutions (MFIs) are generally unwilling to loan to refugees because of their unstable living arrangements, lack of residence permits and lack of collateral. Some urban refugees have established informal rotating savings and loans associations within their communities but the loan amounts available tend to be too small to set up businesses. Some refugees, desperate to access credit, borrow from local loan sharks, often at exorbitant interest rates potentially forcing them into a burgeoning cycle of debt.

A number of the refugees, particularly within the Somali community, receive remittances from relatives previously resettled to third countries.[58] While helpful and even life-sustaining for the most vulnerable, the remittances tend to be irregular and, hence, compound precarious living arrangements for the refugees who come to expect and rely on them. Remittances are rare within some of the refugee nationality groups such as the Burmese and Congolese. A fair number of Afghan refugees in New Delhi, though, report arriving with significant savings or cash received from selling their properties inside Afghanistan while other Afghans continue to receive regular payments for rental of properties and homes owned back home.[59]

The Women's Refugee Commission's research found surprisingly low levels of financial literacy among the refugee populations studied including among those who were managing their own small businesses. Household interviews undertaken as well as interviews with refugee-run businesses uncovered an almost complete lack of recordkeeping of accounts by nearly all refugees. Most had little awareness about their gross versus net profits and whether their income allowed them to meet their expenses. For the most part, the refugees' expenses significantly exceeded their income and many reported borrowing money at the end of the month to pay their rent and/or being several months in arrears on rent payments.

Economic Coping Strategies

Economic coping strategies refer to the multitude of activities undertaken to meet basic survival needs—food, water, shelter, and potentially health and education. Economic coping strategies can be positive (safe, legal) or negative (dangerous, risky, detrimental to longer term health). Refugees in urban areas often undertake varied and multiple activities to secure income, shelter and food.

The economic coping strategies employed by the refugees in the three cities studied vary significantly by nationality and by context as the opportunities and socio-economic environments differ substantially. In every location, however, it is the informal, unregulated market that provides access while formal employment is severely restricted. In Johannesburg, where refugees can legally access employment, discrimination, xenophobia and high levels of competition impede access to the formal market while in Kampala, it is the limited opportunities and *ad hoc* manner that the work permit issue is interpreted that impedes access.[60] In New Delhi, refugees are officially not allowed to work although employment in the informal sector is tolerated.

The economic coping strategies refugees are forced to employ can have a profound impact on child protection outcomes. Many of the most desperate refugees pull their children out of school to save even minimal amounts on school fees and related costs—uniforms, books, pencils—and reduce the number of meals they eat per day to one, often consisting of little more than rice. In New Delhi, the Burmese Chin scour the night market for discarded vegetables, such as cauliflower leaves, as supplemental food for their families. The market guards let them in to pick through the rubbish only after the cattle have first been allowed in to eat their fill.

The primary means of income generation for the Congolese women in Kampala is selling *bitenge* (cloth from the Congo) and jewelry door-to-door whereas the Congolese men and male youth go from construction site to construction site trying to pick up daily work as laborers carrying bricks, mixing cement and shoveling mud.[61] The smaller Burundian community in Kampala is more vulnerable and less organized. Some of them are rejected asylum seekers who are mixed in with the refugee population. A number are homeless and live in make-shift cardboard shelters constructed in an alley behind the offices of the Refugee Law Project. Begging, and sometimes criminal activity, reportedly contributes to their means of survival.

The Somalis in both Kampala and Johannesburg, because of their strong social networks, often take care of their most vulnerable members with assistance for food and rent being provided by either the mosques or wealthier individuals from the community. This is less true in New Delhi, where the community is much smaller and where perhaps the Somali transnational trade networks are less apparent. In addition, the Somali population in New Delhi includes a high number of female heads of household, most of who rely on subsistence allowance from UNHCR for their basic needs. In Kampala, where the Somalis feel particularly discriminated against following the July 11, 2010 Al-Shabab bombings during the World Cup, they have a practice of supporting Somali-run businesses thereby keeping their money circulating within their own community—a practice not unlike that practiced by new migrant groups when they were trying to get established in the United States.

In New Delhi, while the Burmese, as noted above, are most likely to work in the irregular factories and as caterers for Indian weddings, the Afghan men and a few of the women often work as interpreters at the high-end, private hospitals for wealthy Afghans flying in from Kabul to seek treatment often unavailable at home. A few from each community have established their own small businesses—kiosks, bakeries, and noodle shops. Some also work as domestic helpers in Indian and diplomatic staff households and a significant number participate in the UNHCR-supported income generation projects which are *de facto* subsidized employment or workfare.[62]

In Johannesburg, about 75% of forced migrants report being economically active and about 50% report having multiple, simultaneous livelihood strategies such as petty trading, casual labor or self-employment.[63] Informal street commerce is the principle livelihood activity for both refugees and the urban poor in Johannesburg. A few refugees have successfully employed micro-franchising schemes where they replicate their shops based in the city center as satellite shops in the informal settlements on the city outskirts with the manager of the micro-franchise paying a fee back to the owner to be part of the franchise.

Regardless of the economic coping strategies employed, the majority of urban refugees, while demonstrating a high level of resilience, remain on the fringes of the economies in which they live. For many their survival is day-to-day, hand-to-mouth subsistence joining the ranks of the urban poor. As Obi states, "unassisted refugees cannot be regarded as 'self-reliant' if they are living in conditions of abject poverty, if they are obliged to engage in illicit activities in order top survive, or if they are obligated to survive on the remittances or the charity of their compatriots."[64]

Protection Risks

Protection is facilitated by legal recognition and documentation, the realization of rights, such as freedom of movement, the right to work, and the right to own land, and

access to justice and rule of law. Whenever any of these are compromised, the risks to protection increase.

Gender-based violence is a serious protection risk for refugee women, girls, and to a lesser extent, boys in all three locations assessed. These risks were often associated with their livelihood strategies as well as with their movement in the public sphere. Travel alone or after dark heightened females' risk as did living in a household without an adult male. While gender-based violence was the most common protection concern, other types of violence were also reported. In post-apartheid South Africa, for example, violence against foreigners has been common and the ongoing threat of such against refugees and asylum seekers impacts their livelihood opportunities. Foreigners are six times more likely to than South Africans to have experienced threats of violence due to nationality or ethnicity[65] and this violence escalated during the xenophobic attacks that reached a crescendo in May 2008 resulting in the large scale displacement of migrant and asylum seeking communities.

The lack of economic opportunities has also led many refugees to engage in transactional sex or turn to the commercial sex as a means of support. In Kampala, a number of gay and lesbian refugees, ostracized by both the host community as well as their own community, report working as sex workers as they deem this the only viable livelihood option available to them.[66] This option, though, is highly risky in the Ugandan anti-gay political environment which renders these sex workers at risk of arrest and detention, and their lack of legal protection limits their ability to demand payment from and negotiate safe sex with their clients.

Other protection risks include harassment, discrimination, unpaid wages, instability, precarious housing situations where landlords over-charge and evict tenants with little warning, theft from homes and businesses, and police confiscation of goods as well as police extortion and arrest.

Conclusion

Promoting an Enabling Environment

Creating economic opportunities for refugees in urban areas is a challenging and complex undertaking. Advocating for and influencing host government policy for recognition of refugee rights in policy and practice is a requisite first step; identifying market opportunities and constraints and refugees' economic coping strategies in response to those opportunities and constraints is the vital subsequent step.

Government restrictions on refugees' right to work, on recognition of refugee certificates and diplomas, and on securing residence permits represent the biggest challenges to refugee self-reliance and refugee protection in urban areas. Governments fail to recognize or acknowledge that without the legal right to work, refugees are forced to enter the gray market, which does not contribute to the tax base, or, alternatively, engage in criminal activities to survive. Even where refugees have the right to work, such as Uganda, the lack of coherent domestic legislation means that this is interpreted differently by different government officials and local employers thereby penalizing the refugees and impeding their access to employment. Costs associated with securing work permits, residence permits and the translation of school transcripts and diplomas serve as barriers to refugee market access.

Building Assets

The field assessments carried out by the Women's Refugee Commission highlighted the importance of human, financial and especially social assets in urban refugees' livelihoods. Social networks not only assisted with access to housing and jobs but were a vital source of information about services and opportunities. Social networks also helped mitigate risks faced by refugees in these environments.[67] There is a need to recognize and support the vital role that these social networks play in urban refugees' protection and survival. Such as through supporting indigenous refugee mutual assistance organizations, capacitating informal refugee savings and loan mechanisms, working with and through refugee religious institutions, women's groups, leadership structures and youth clubs.

Building human assets necessitates assisting refugees' access educational and training opportunities. Identifying and focusing on which local vocational training programs serving host country nationals have job placement components and the best post-training employment records, for example, and how these programs can be capacitated to serve the refugee population. Identification of and facilitating access to existing business development services could build refugees' financial literacy and entrepreneurial skills. Building financial capital requires assisting refugees access salaries, income, credit, and safe places to save. Assessing, for example, whether existing micro-finance institutions could be convinced to provide loans, safe places to save, and micro-insurance to the refugee population and what support this might require.

Creating Pathways

As referenced above, rather than creating parallel programs and services, focus should be on assisting refugees' access existing services including those targeting the urban poor. Existing services have track records and understand the socio-economic context and local markets. This entails mapping current service providers for vocational training, business development services, job placement programs and micro-finance institutions and assessing their

strengths and their potential for extending services to the urban refugee populations. This may require further capacitating through technical or funding support and it may require modifications in program models and approaches. Microfinance institutions (MFIs), for example, exist in virtually every refugee-impacted urban area serving the host country's poor who face the same challenges and reside in the same neighborhoods as the urban refugees. MFIs have a myriad of products—savings, consumer loans, household loans, business loans and micro-insurance that can be tailored to the unique needs of the refugee population. An interview with the director of BRAC in Kampala, for example, indicated that they are willing and ready to extend their services to the refugee population.

While economic programming in urban environments is complex and local markets and opportunities are often limited, starting with and building on what exists both within the refugee populations and with the local economic service providers would facilitate better practice and ultimately should lead to better outcomes.

Notes

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6. United Nations High Commissioner for Refugees, *UNHCR Global Trends Report 2010* (Geneva: UNHCR Field Information and Coordination Support Section Division of Programme Support and Management, 2011), 2.
7. These were referenced with the staff and faculty at the African Centre for Migration and Society. References to the data sets can be found under their online research projects: African Centre for Migration and Society, *Research.* Accessed October 27, 2011. http://www.migration.org.za/projects.
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16. Alexander Betts, "Development Assistance and Refugees Towards a North–South Grand Bargain?" *Forced Migration Policy Briefing* 2 (2009): 5.
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Welcome to Ireland: Seeking Protection as an Asylum Seeker or through Resettlement—Different Avenues, Different Reception

Louise Kinlen

Abstract

Ireland accepts approximately 200 resettled refugees each year under the UNHCR Resettlement Programme and a range of supports are put in place to assist the refugees when they arrive and to help their process of integration into Irish society. Roughly ten times this number of asylum-seekers arrives in Ireland each year, with some coming from similar regions and groups as the resettled refugees. The reception conditions of both groups however are remarkably different, with a number of grave humanitarian concerns having been raised about the reception conditions of asylum seekers. This article explores the background to refugee reception in Ireland, the current reception conditions of the two groups, how they differ and an analysis of whether such treatment is justifiable.

Résumé

L'Irlande accueille environ 200 réfugiés réinstallés chaque année dans le cadre du programme de réinstallation du HCR, et une variété de mesures de soutien ont été mises en place pour aider ces réfugiés lors de leur arrivée et de leur période d'intégration dans la société irlandaise. Environ dix fois plus de demandeurs d'asile arrivent en Irlande chaque année, y compris certains de régions et de groupes sensiblement les mêmes que les réfugiés réinstallés. Toutefois, les conditions d'accueil des deux groupes sont remarquablement différentes, alors que des problèmes humanitaires graves ont été soulevés en ce qui concerne l'accueil des demandeurs d'asile. Cat article explore le contexte de l'accueil des réfugiés en Irlande, les conditions actuelles d'accueil des deux groupes et leurs différences, et examine si ces conditions d'accueil sont justifiées.

Introduction

The vast majority of refugees in Ireland begin as an asylum seeker in which they individually seek to have their claim for asylum recognized under the 1951 Convention Relating to the Status of Refugees (Geneva Convention). If such a claim is not recognized at first instance, they may under certain circumstances apply for subsidiary protection or for leave to remain on humanitarian grounds, granted on Ministerial discretion. Whilst one of three forms of residency may ultimately be granted, for the purpose of this paper, this group is referred to as 'asylum seekers'. The term here includes those who are awaiting an outcome on their claim[1] and are accommodated under the auspices of the Reception and Integration Agency.

In an entirely separate process there are also a small number of people who arrive in Ireland as resettled refugees under the UNHCR assisted resettlement programme. The systems are completely separate and the legal status of both groups cannot be compared. The former (asylum seekers) apply once in Ireland to have a claim for protection or leave to remain recognized and the latter are admitted as refugees, formally recognized so by UNHCR prior to being recommended for resettlement.

The reception conditions of the two groups differ greatly and it is understandable that the two processes require differentiation, with broad recognition internationally that the legal status of an asylum seeker differs from that of a refugee

whose claim has been formally recognized.[2] The purpose of this paper is not to question whether differentiation in their reception conditions is justified, but rather to ask whether the extent of such differentiation is justified and proportionate.

Even without comparison to the reception conditions of resettled refugees, the conditions of asylum seekers arriving in Ireland have given rise to a range of humanitarian and human rights concerns, which have been documented widely.[3] Ireland has not adopted the EU Directive on Laying Down Minimum Conditions for the Reception of Asylum Seekers, 2003 and differs from most other EU Member States (except Denmark) in terms of not granting asylum seekers the right to work until they receive a positive outcome on their application or are given alternative leave to remain, regardless of the duration of the process. Asylum seekers are housed in hostel accommodation for up to seven years in a system known as Dispersal and Direct Provision in which they receive three meals a day and a very small weekly allowance, which has not increased since its introduction in 2000.[4] Ireland has also been criticized by the international community for having the lowest recognition rates of asylum claims in Europe.[5]

In a parallel process Ireland is one of thirteen EU Member States[6] that have participated in the United Nations High Commissioner for Refugees (UNHCR) supported resettlement programme, in which states agree to accept a quota of refugees deemed suitable for resettlement each year. Ireland currently agrees to accept a quota of 200 refugees per year under this system.[7] Ireland is proud of its humanitarian response to worldwide crisis situations and has assisted other countries considering participation in the UNHCR resettlement programme.

Asylum seekers seeking protection under the Convention are not legally treated as refugees until their claim for refugee status has been formally recognized under the Convention. They are not considered to be refugees under the definition of the Convention if granted subsidiary protection[8] but in practice are granted similar entitlements.[9] Those granted leave to remain on humanitarian grounds are granted so at Ministerial Discretion and generally for a temporary period, subject to renewal. Resettled refugees on the other hand have been formally recognized by the UNHCR as refugees having protection needs and meeting specific criteria that make them suitable for resettlement.[10] Other resettlement countries however, such as Sweden or Finland offer similar reception and integration programmes for asylum seekers and resettled refugees.[11] It is argued in this paper, that the extent to which (and length of time) the Irish State deliberately excludes asylum seekers from the humane reception conditions and integration supports as afforded to resettled refugees is disproportionate. The treatment of asylum seekers has been recognized by some commentators as a breach of a number of norms of international human rights law, particularly with regard to social and economic rights and the lack of personal autonomy and freedom.[12] Particular concerns have also been raised in relation to the impact on children and families, including the unsuitability of the environment for raising children.[13] Those who obtain refugee status are entitled to some integration and reception supports, but I would argue that the time period required in waiting is often too long and the process of *de facto* integration has already begun and it is difficult to conceptualize a process of 'reception' after having spent several years in the country.

Is It Appropriate to Compare the Reception Conditions of Resettled Refugees and Asylum Seekers?

The reception conditions of these two groups of refugees are entirely different and differentiation is reasonable based on the different avenues of arrival and legal status. It is argued here however, that such extreme differences in treatment are disproportionate and send contradictory and confusing messages in relation to which refugees are genuine and deserving and those that are 'bogus' or 'fraudulent'.[14] Currently Ireland operates a dual system in which the asylum procedure must first be exhausted before other claims for protection can be made.[15] It is proposed however to bring the laws in line with European norms through the introduction of a single protection procedure in which an application for asylum and subsidiary protection can be made at the outset.[16] Currently the dual process and the requirement to exhaust the asylum claim procedure before applying for other forms of protection mean that the legal process can be very lengthy and cumbersome.

There are however a number of ways in which the processes of resettlement seeking asylum intersect and *de facto* comparisons are made by both the groups themselves, local communities and service providers. This intersection, which emerged in two separate research projects led to the questioning of why their reception differs so greatly. Some of the factors that led to posing this question included the following:

Firstly, Ireland is a small country and for both resettlement and asylum seekers, a policy of dispersal throughout the country and outside the capital city is in operation. Asylum seekers and resettled refugees may therefore be housed in the same or nearby small towns where they come into contact with each other and the distinctions between the two are not always understood by the groups themselves, local communities or some service providers, especially when the groups may come from the same geographical or

ethnic backgrounds. This was confirmed in research interviews in both research projects and feelings of jealousy and resentment existed, particularly where they were housed close to each other.[17]

Secondly, whilst Convention refugees (with recognized status) have a similar legal status to resettled refugees in terms of entitlements to work, education, social welfare etc., official reception programmes are not organized in the same way and intensive language training is only offered in areas with significant populations of refugees. Orientation training as offered to resettled refugees is not available to Convention refugees. It is also difficult to conceptualize a process of 'reception' when a person has already been living in a country for several years. Whilst it can be argued that entitlements will be granted once a claim for asylum is recognized and that it is a matter of temporality rather than an absolute lack of entitlements, it is impossible to ignore that three to seven years of a person's life can be very lengthy and their openness to reception programmes after this period is likely to be different than someone who has recently arrived.

I would argue contrary to official discourse that the process of initial adaptation and reception takes place and therefore commences during the phase as an asylum seeker and not after the granting of refugee status, which is several years later and the process of reception and partial integration has already commenced. The former National Consultative Committee on Racism and Interculturalism in its submission on refugee integration argued equally that integration supports should be provided during this initial reception phase due to firstly the potential consequences of not including asylum seekers (including loss of self-esteem, inability to use skills or contribute to local society) and secondly due to the *de facto* partial integration of asylum seekers.[18] They argued that this dichotomy results in:

> *… a form of partial integration which takes place, but this integration is unplanned; uncoordinated; and largely unsupported, except for the work of the community sector and the basic 'safety net' entitlements for health, social welfare and education.*[19]

Reception by its nature, which refers to the act of receiving within the country, operates during the period when the refugees or asylum seekers first arrive in the country or at least after six months. The organization of reception type supports after the recognition of a claim of asylum (or other forms of protection) can also be difficult as such claims are decided on an individual basis and group programmes therefore more difficult to organize. There is also some evidence to suggest that negative memories of the period spent as an asylum seeker can impede future integration in the host country.[20]

Thirdly, the official discourse in Ireland surrounding asylum seekers is one that seeks to exclude[21] and asylum seekers are excluded from the brief of the Office for the Promotion of Migrant Integration.[22] Previously the Reception and Integration Agency had joint responsibility for the reception of asylum seekers and the resettlement programme. This sometimes caused confusion with service providers who saw some agency staff with responsibility for both areas. Official documents and policies refer to accommodation and services available during the time that asylum seekers await a decision on their application, under the pretext that it exists only as a very temporary situation, and do not necessarily take cognizance of the fact that Ireland becomes a *de facto* home for many people who may spend several years in such a situation and partial integration does begin to take place. The official argument that reception and integration programmes should begin once a person has received official recognition of their status as a refugee can be difficult to justify in practice, when several years of a person's life have been spent living in Ireland (without the right to travel elsewhere[23] and links and contact with their country of origin may be diminishing) and they have adopted their own strategies and coping mechanisms in navigating the system.

Fourthly, in what Hathaway refers to as 'Government obfuscation', Governments such as Australia (and Ireland) commit to resettle a certain number of refugees due to the success of the Government in curtailing 'illegal refugee arrivals'.[24] This dichotomy of transferring resources away from 'undeserving' asylum seekers towards 'deserving' resettled refugees is problematic and clearly signals a desire for an orderly and controlled process of refugee protection as opposed to the messy and complex realities involved in undertaking journeys to seek asylum. Resettled refugees generally also experience complex and harsh conditions in their journeys to and time spent in the refugee camps where they are referred for resettlement. Such hazards however are generally not the preoccupation of the Irish Government and the assistance of UNHCR and IOM simplify the process and their subsequent journey into Ireland.

It is therefore argued here, that contrary to official discourse, the process of reception as a precursor for integration comes into play once a person arrives in the country or at least within six months of arrival. The UNHCR has also argued that access to the labour market should be granted within a maximum period of 6 months,[25] with such a provision also contained in the EU Reception Conditions Directive.[26] The exclusion of asylum seekers from early integration supports has been found to ultimately affect their long-term integration[27] and the 'best interests' of the child

principle enshrined in the UN CRC is not served through such a prolonged period of institutionalization.

Questions also arise in relation to States' determination and definition of who constitutes a refugee deserving of protection and Ireland's very low recognition status suggests that this is interpreted very narrowly. It has also been argued that the Geneva Convention does not distinguish between asylum seekers and refugees and that states use the term 'asylum seeker' to deny refugee status.[28] The lengthy determination process and legal complexities often mean that people are left in this category of 'asylum seeker' for long periods of time.

Scholarly attention to the comparison of these two groups has been very limited and Ireland offers an interesting case study of a relatively generous resettlement programme on one hand versus a policy of containment and deterrence towards asylum seekers.

The questions that I attempt to address in this paper are:

1. In what ways do the reception conditions for asylum seekers and resettled refugees differ?
2. Is the extent of such differential treatment proportionate?

Methodology

This paper is based on the culmination of research and analysis from a number of different sources. Firstly, research was carried out during 2007–2008 in relation to resettled refugees and the integration supports they receive. Secondly, research currently being undertaken in relation to asylum seeker reception policy presented a stark contrast to the high levels of support experienced by resettled refugees. Whilst the two research projects are entirely separate, this led to a questioning of why Ireland treats the two groups so differently and whether it is possible to carry out comparative analysis.

Firstly, I carried out an in-depth review was carried out on the reception, orientation and integration of resettled refugees in Ireland under a European Refugee Fund transnational project on behalf of the Reception and Integration Agency.[29] Fieldwork carried out as part of this review involved in-depth interviews with 33 resettled refugees and focus groups and interviews with a wide range of support agencies from the statutory and voluntary sectors. The research examined *inter alia* the role of orientation and reception programmes for resettled refugees in three towns in Ireland and the extent to which the process of integration had begun.[30] Whilst the focus of this research was primarily on resettled refugees, the issue of asylum seekers and their interactions both with resettled refugees (including marriages and relationships between the two groups) and with statutory and voluntary agencies emerged in the research interviews. The research also demonstrated how early reception and integration supports (including intensive English language tuition) were very beneficial and aided the process of integration.

Secondly, I am currently completing doctoral research on the role of NGO advocacy in influencing public policy making in relation to the reception conditions of asylum seeking families and children. In addition to extensive documentary analysis of policy documents, Government debates and relevant literature, in-depth qualitative interviews have been conducted with twelve key voluntary sector organizations attempting to influence policy in relation to asylum seekers and ten key policy makers and funding organizations. This research does not focus on resettled refugees *per se,* but the interviews conducted have also confirmed the exclusionary nature of asylum reception policy and the discontent of many NGOs and some civil servants in Government departments other than the Department of Justice.[31] In-depth results from this research are not presented here, but the interviews and documentary analysis were very useful in terms of highlighting Government policy and discourse in relation to asylum seeker reception.

Reception in an International Context

The term 'reception' is used both with reference to asylum seekers and resettled refugees both in national and international policy documents.[32] The reception of asylum seekers forms a large part of EU asylum policy and the EU Council Reception Conditions Directive requires Member States to 'take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence' and to provide for the right to work within one year of lodging a claim for asylum.[33] The UNHCR also refers to 'reception' in the context of the asylum process and in their Discussion Paper on Recommended Reception Standards for Asylum-Seekers in the Context of the Harmonization of Refugee and Asylum Policies of the European Union,[34] they point to the principles of non-refoulement and non-discrimination as underpinning adequate reception policies. They also make reference to the ICCPR and the ICESCR, which prohibit discrimination on the grounds *inter alia,* of national origin. The paper also emphasizes the duration of the period during which people await a decision on their claim for refugee status and recommends that asylum-seekers should be entitled to a broader range of benefits if the process is prolonged. The refusal of the Irish Government to allow asylum seekers to work was however based primarily on deterrence

and ensuring that the asylum system does not create any further "pull factors".[35]

A dichotomy appears to have emerged with a liberal and protective approach to the reception of resettled refugees. Research interviews with resettled refugees in the first project confirmed that this process is beneficial and such integration supports are greatly appreciated.[36] On the other hand Ireland's system for the reception of asylum seekers has evolved from a relatively liberal to one, which could now be classified as restrictive, discriminatory and operating within a discourse of exclusion and deterrence.[37] It is also acknowledged that even in the context of official discourse on 'integration', its linkages to security and immigration control and the division of various forms of desirable migrants are ever present.[38]

Background to the Reception of Refugees in Ireland

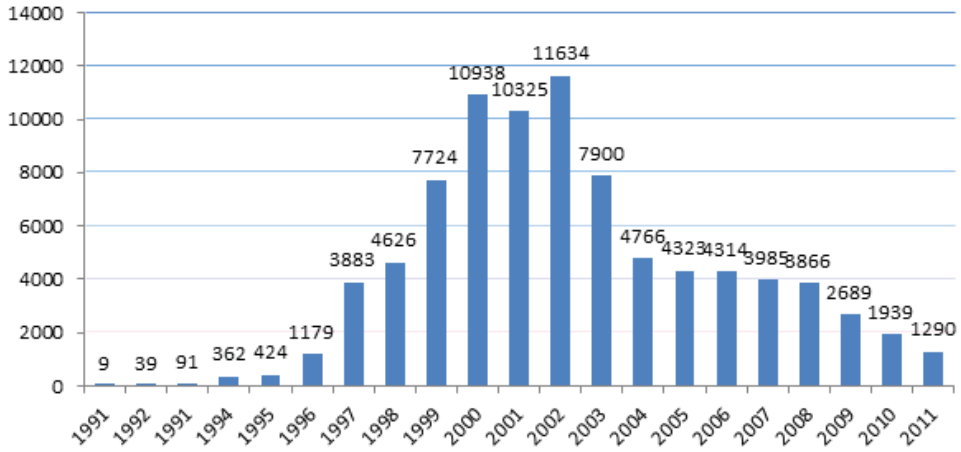
The Arrival of the First Refugees in the 1990s

Prior to the 1990s, the numbers of people arriving in Ireland to seek asylum was very low, with most of the refugee arrivals coming through organized refugee programmes. Unlike other countries, which took in large numbers of refugees following World War II, Ireland accepted very few refugees at this time. It acceded to the Convention on the Status of Refugees in 1956 and in the same year accepted 539 Hungarian refugees which had fled following the failed uprising. This was followed by a small group of Chilean refugees in 1973, 212 Vietnamese refugees in 1979 and 455 Bosnian programme refugees from 1992–1998. For most of these refugees, the supports they received were very minimal, with little English language and other educational or integration supports. In the past, Ireland did not have an established tradition of being a receiving country for asylum seekers or refugees in comparison with other European countries. This was partly due to geographic, political and economic isolation[39] and the fact that Ireland was a small island and not traditionally an access point for people fleeing conflict.

In the 1990s Ireland began to experience a new phenomenon of larger numbers of people arriving spontaneously in the country to seek asylum, leading to a peak in 2003 and declining ever since. The number of applicants received by the Office of Refugee Applications Commissioner (ORAC) since 1991 can be broken down as in figure 1.

The mid to late 1990s proved to be a difficult time as the Irish State struggled with establishing a system for processing asylum applications and receiving and housing asylum seekers arriving on its shores, a system which had heretofore been almost non-existent. The *Refugee Act* was introduced in 1996 and this set some foundations for how Ireland might regulate the process, but was still enacted at a time when numbers were still relatively low. Whilst the *Refugee Act, 1996* was considered a relatively liberal piece of legislation in comparison with other EU States, tighter controls were put in place through the amendments of legislation such as the *Aliens Act, 1935* thus giving greater powers to the immigration authorities and gradually creating a less liberal and more restrictive system of asylum.[40]

Figure 1. Number of Applications Received at ORAC from 1991 to 2010.



Source: RIA, Annual Report 2011, Dublin: Reception and Integration Agency, (2011) http://www.ria.gov.ie/en/RIA/RIA%20Annual%20Report%20(A3)2011.pdf/Files/RIA%20Annual%20Report%20(A3)2011.pdf (accessed June 24, 2012).

The Early 2000s—Immigration, Citizenship and the Right to Belong

The period of 2000–2004 could be described as somewhat of a crisis point for the Irish Government as it grappled with coping with relatively large numbers of asylum seekers arriving on its shores (compared with previous numbers), an emerging but still underdeveloped asylum claim processing system, a general lack of understanding and awareness of refugee issues among the Irish public, few measures of integration and concepts of citizenship and belonging that were changing. There were a number of ways in which the Government sought to curtail this growth and limit the attractiveness of Ireland as a destination for asylum seekers.

One of the ways in which the Irish Government sought to differentiate between asylum seekers and their rights to belong in Ireland compared with 'nationals' of Ireland was through changing the laws of citizenship and who is entitled to it. A referendum in 2004, which changed the laws of citizenship, thus removing the automatic right of children born to non-national parents, has been judged as the most significant event in the politics of immigration in Ireland when: 'constitutional definitions of Irishness narrowed at a time when the composition of Irish society had broadened significantly through immigration'.[41]

Current Reception Conditions for Asylum Seekers and Resettled Refugees

Asylum Seekers Reception

A parallel way in which the Irish Government sought to limit the number of asylum-seekers coming to its shores was the gradual erosion of socio-economic rights and entitlements afforded to asylum seekers. The reception conditions were altered radically during the period 1999–2002 and the commencement of the *Dispersal and Direct Provision Scheme* in 2000 signified the start of a campaign to make life as an asylum-seeker more difficult and therefore less attractive to other potential asylum-seekers. When asylum seekers first started arriving in Ireland during the1990s, welfare benefits were provided, based on the criteria of need, similar to that of Irish citizens and they were entitled to live in independent accommodations, supported by the Government. By 1999 however, there was considerable pressure on the Government and a view held by many politicians that the system was too costly, conditions were too good and that it was likely to create a 'pull factor'. There was also a concern that too many asylum seekers were located in the capital and there was considerable pressure put on the housing system and there was a fear that emergency accommodation could no longer be provided and asylum seekers and others seeking housing could face homelessness.[42] A specialized agency called the Reception and Integration Agency (RIA) was established and given responsibility for the reception of asylum seekers. The 'integration' element of the unit however, was confined to Convention and Resettled refugees.[43] This function was subsequently moved to the Office for the Promotion of Migrant Integration, thus rendering the 'integration' part of the Reception and Integration Agency largely defunct.

In April 2000 Ministerial Circular 04/00 was issued by the then Department of Social and Family Affairs, which effectively created the system of *Dispersal and Direct Provision*. This system was introduced just a few weeks after a similar system was established in the UK[44] and it was officially introduced to address the shortage of accommodation in Dublin and enabled Ireland to fall in line with other EU states that had introduced similar policies.[45] In addition to dispersing asylum seekers throughout the country and away from Dublin, it also introduced the policy of *direct provision* where asylum seekers were no longer entitled to regular welfare payments, but were provided with basic food and shelter and an allowance of €19.60 per adult and €9.60 per child per week.

These rates have not changed since the introduction of the system in 2000. Initially some other supplementary allowances were still available such as child benefits, disability allowance and other family support payments. The introduction and application of the Habitual Residence Condition (HRC) through Section 246 of the *Social Welfare (Consolidation) Act 2005* played a major role in diminishing the welfare supports to which asylum seekers were entitled to. The HRC was originally introduced to prevent welfare tourism when the new accession states joined the EU and prevents those who are not 'habitually resident' in Ireland from claiming a range of welfare benefits. Following some

Table 1. Decisions on Asylum Applications 2011

	Total Decisions	Total Positive Decisions	Refugee Status granted	Subsidiary Protection granted	Leave to remain for humanitarian Reasons	% Total Positive Decisions
EU27	365615	84110	42680	29390	12040	23%
Ireland	2605	150	135	15	0	5.20%

uncertainty surrounding its application to asylum seekers, the *Social Welfare and Pensions (No. 2) Act* was introduced in 2009, containing a blanket exclusion of all persons in the asylum process from being considered 'habitually resident'.[46] As a result asylum seekers are no longer entitled to a range of other benefits other than their basic weekly allowance.

Another hallmark of the Irish system has been the low rate of positive recommendations, both at first instance and for subsidiary protection and humanitarian leave to remain. Table 1 outlines the recognition rates at the various stages in Ireland and across the EU27 in 2011, showing Ireland's rate of only 5.2% of positive decisions, compared with an EU average of 23%.[47]

Humanitarian Concerns

A number of concerns have been raised about the conditions of direct provision and the legal basis on which it was established. These have been widely documented and some of the principal concerns are outlined below:

1) Through the introduction of the HRC and the exclusion from a range of benefits available to the general population, asylum seekers were further marginalized and at risk of social exclusion. They are also excluded from a wide number of national poverty and budgeting surveys as they do not fit the category of a 'household'.[48] Despite a decade of a range of far-reaching strategies to deal with social issues such as racism, poverty and social exclusion and improved outcomes for child well-being, asylum seekers appear to have been implicitly excluded from such measures.[49] A clear example is the overarching vision articulated in the National Children's Strategy of an Ireland where 'all children are cherished and supported by family and the wider society; where they enjoy a fulfilling childhood and realize their potential.'[50] The research on asylum reception policy also raised this dichotomy, with one Immigration NGO research participant recalling how a phone call to a Government office dealing in relation to how the NCS applies to asylum seeking children and those born in Ireland was met with the response that it does not apply to 'those children'. Senior civil servants in Government departments other than the Department of Justice also raised the issue of how service providers at a local level can sometimes be unsure of the exact entitlements each group has and how the policy of Direct Provision can mitigate other policy goals such as the health and well-being of the population.[51]

2) The system is now over ten years in operation, with very few of the concerns raised during this decade and very little has changed, with many of the concerns raised in reports in the early stages[52] still existing and in many ways the system has deteriorated further and there is more widespread recognition of the human rights abuses within the system.[53] Issues that have persisted during this time are numerous and include low levels of financial support, which have not increased with inflation, overcrowding, long periods spent in direct provision whilst awaiting a decision, denial of the right to work or take part in education for the who duration of the time spent awaiting an assessment of an asylum claim, dietary and health concerns, exclusion and discrimination. Human rights concerns include violations of housing rights and right to adequate standard of living (Article 25 UDHR, Article 11 ICESCR) and rights to family life (e.g. Article 8 ECHR), principle of non-discrimination (e.g. Article 2, UDHR), and the right to work (e.g. Article 6 ICESCR and the EU Reception Conditions Directive). Whilst there may be derogations permitted to some rights on the grounds of national security or the preservation of the public good, a defense invoked by the Department of Justice, it is argued that the withdrawals and reduction particularly of social and economic rights is disproportionate. Such policies of exclusion have been justified on the grounds of preserving immigration controls and protecting the welfare state from those who are seen as not having a right to be in the country and the State continues to impose stratifying and restrictive policies.[54]

3) A key concern that existed particularly at the beginning lay with the system of dispersal, which saw the creation of 60 accommodation centres in 24 counties in Ireland,[55] many of which were in small and isolated rural towns and villages, with no history of inward migration or diversity. Unlike other countries such as Sweden, where the local municipalities undergo an intensive period of preparation and are actively involved in the reception of asylum seekers and refugees,[56] very little or no consultation was undertaken with the vast majority of villages/towns where the asylum seekers were to be located and a policy of secrecy operated about the location of such hostels and a deliberate lack of prior consultation with the relevant authorities and service providers, for fear of a backlash or unwillingness to co-operate.[57]

4) The impact of the system on children has been detrimental and there are a number of key concerns involving children's rights and welfare. Children living in direct provision are usually dependents of adult asylum seekers, although some have applications made on their own behalf. Some arrived with their parents and others were born into the system of direct provision and it is the only life they know. Breen has argued that the system disregards the rights of the child and that in relation to Irish-born children, their rights depend on the nationality of their parents, 'which runs contrary to the non-discrimination provisions of national and international law regarding the rights of

the child and the protection to be accorded to the family unit'.[58] Despite ratification of the UNCRC in 1992, a number of human rights concerns have been raised in relation to the treatment of children and families, including violations of the rights to family life, privacy and parental rights.[59] Basic health and nutritional concerns for children have also been highlighted, especially concerning the rationing and control of food and lack of autonomy of parents to provide alternatives. Children in direct provision appear to be excluded from many Government strategies outlining goals for children and the recent proposed wording of the constitutional amendment on children's rights was deferred, partly based on an intervention by the Department of Justice which expressed concern in relation to the resource implications of applying the best interest of the child principle in cases concerning asylum seeking children.[60] Whilst the Geneva Convention is relatively silent on children's rights, it has also been argued that it should be read in the light of the UNCRC.[61] The Committee on the Rights of the Child has also noted that State concerns in relation to immigration control cannot overrule the best interests of the child principle.[62]

The system is hallmarked by one of "enforced idleness" that often persists for several years. Asylum-seekers are entitled to very basic subsistence and even this can be lacking.[63] The long-term impact this may have on children who do not experience role models of their parents being able to work, train or provide for their family is also a cause for concern. This is further compounded by mental health difficulties that can arise both from previous situations of persecution, concerns about other family members and a system that affects people's overall well-being and self-esteem.[64] English lessons (other than at a very basic level) and other integration supports are not provided and asylum seekers are excluded from all Government initiated integration measures. NGOs working with asylum seekers increasingly find it difficult to use public funds for the purposes of assisting asylum seekers.[65] Various NGOs and intergovernmental organizations and human rights bodies have made calls to overhaul the system,[66] yet the Irish Government has repeatedly refused to do so and recently published a Value for Money Review of the system of Direct Provision, which concluded that the system is still producing 'value for money' and therefore should remain. The review however failed to examine the long-term impacts of the system on people's health and well-being and potential health related costs.[67] Following the election of the new Government in March 2011, no substantial changes have yet been made, despite pre-election promises of the new coalition partners to amend the system and it would now appear that budgetary concerns prevail in the current fiscal climate.[68] Some reform of the asylum application and processing system however is anticipated in the new Immigration Residence and Protection Bill.

Reception and Orientation for Resettled Refugees

Overview of Resettlement in Ireland

The reception conditions and overall treatment of resettled or 'programme' refugees operate in stark contrast to those of asylum seekers. The resettlement process comes into play when the UNHCR considers that the other two durable solutions of voluntary and safe repatriation to the country of origin or local integration have been exhausted. There are currently twenty five countries worldwide who participate in resettlement programmes in partnership with the UNHCR, including Ireland. Participation in the resettlement programme is voluntary and there is no legal obligation to do so under international law.

In 1998 the Irish Government agreed to participate in the UNHCR Refugee Resettlement Programme. This Decision was taken following approaches by the UNHCR requesting that Ireland would admit, on an annual basis, a number of "special cases" refugees who do not come under the scope of Ireland's obligations under the Geneva Convention of 1951 as amended by the New York Protocol of 1967. Initially Ireland agreed to accept 10 cases (approximately 40 persons) per year and this was later increased to 200, following a Government decision in 2005. In recent years however, this quota has not been reached and for example in 2011 only 45 refugees were resettled to Ireland.

The resettlement process differs in many ways to the asylum process in that those selected to come to Ireland are already recognized as refugees and as a condition of resettlement are granted long-term residency in Ireland. Whilst there has been some commitment on behalf of the Irish Government to participate in the programme, the numbers of refugees it accepts each year has been contingent on lowering the numbers seeking asylum in Ireland.[69]

Although the channels through which resettled refugees and asylum seekers arrive are very different and their treatment is completely separate, some asylum seekers to Ireland may also come from similar ethnic groups and geographic regions as the resettled refugees (e.g. Sudanese, Iranian Kurds and Congolese).[70]

Whilst Ireland has been taking part in the UNHCR resettlement programme for over ten years, the numbers have been relatively small and it generally has not generated much controversy or debate, and has largely been absent from newspaper headlines, Dáil (Parliament) debates and academic literature.[71] In cases where the subject of resettled refugees have been reported on by the media or by politicians, there has never been any questioning of the validity of their

right to be present and receive assistance from Ireland and much reporting/debates have adopted a sympathetic stance to their plight.[72] Policy discourse in relation to resettled refugees also adopts a stance of sympathy and efforts are made immediately (both pre and post-departure) to assist their integration.

Current Reception Conditions for Resettled Refugees

Resettlement in Ireland is generally organized through a three-stage process. The first stage is *Selection,* which is either carried out by in-country selection missions in the country where the refugees are located or through the dossier method. Since 2005 Ireland has carried out selection missions to Jordan (Iranian Kurds), Thailand (Burmese Karen), Uganda (Sudanese), Bangladesh (Burmese Rohingya) and Tanzania (D. R. Congolese).[73] During the selection missions, pre-departure orientation may also take place where the would-be resettled refugees participate in training about the resettlement process in Ireland and cultural orientation information. The evaluation and piloting of such pre-departure orientation training found that it could be a very useful tool in helping people to prepare for the journey, but that the focus of many people at that stage was on moving "away from" their current situation rather than "moving towards" anything specific and the timing of such training before the completion of the selection process sometimes meant they were too focused on that process to fully concentrate on the pre-departure training.[74] Nevertheless such training offered resettled refugees some opportunity to prepare for their departure to their new destination.

The second stage is called *The Reception Programme* where the resettled refugees are housed in a purpose built centre for a period of six weeks where they undergo intensive cultural orientation training, whose purpose is to "prepare them for independent living in the community".[75] Such training is provided in conjunction with various service providers and covers a wide range of topics and introduces key English terms that the refugees are likely to encounter while in living in Ireland. Children under 18 participate in a separate induction programme that prepares them for mainstream education. The evaluation of the orientation programme found the process to be very beneficial and most interviewees found that it had given them a good introduction to Irish life and culture.[76]

The third phase is now termed *Resettlement and Integration* and involves a period of one year to 18 months where language tuition of 20 hours per week is provided, as well as some support and monitoring through a refugee support worker, usually based in a local development agency. Resettled refugees are usually housed in independent accommodation in the community, with each group usually allocated to a small town. The towns are chosen in advance and the Office of the Promotion of Migrant Integration works closely with the local authorities to ensure that various supports are put in place. Notwithstanding this, Ireland still operates a *mainstream approach* to integration in which service providers are expected to meet the needs of diverse communities through existing budgets and they need to equip themselves with the means to deal with different communities.[77] Whilst integration of resettled refugees is far from being unproblematic, the type of supports such as language training, refugee support workers and overall monitoring of their integration greatly exceed those afforded to asylum seekers. Whilst Convention Refugees and those with Subsidiary Protection may receive some additional supports and are granted the right to work, language training can be difficult to access if not in a large centre and organized cultural orientation programs are not provided in the same manner.[78]

How Do the Reception Conditions of Asylum-Seekers and Resettled Refugees Differ?

There are clear legal differences between the two groups and their legal status *per se* is not comparable. An asylum seeker has arrived in Ireland for the purpose of seeking protection under the Geneva Convention, and it is incumbent on him/her to prove he/she cannot due return to his/her country of origin owing to a well-founded fear of persecution. As explained above, this process can be very lengthy and the current dual system of not being entitled to apply for other forms of protection at the initial stages can protract the process. A resettled refugee on the other hand has been formally recognized as a refugee by UNHCR and is outside his/her country of origin when recommended for resettlement to a third country. It is not incumbent on a resettled refugee to prove individually that he/she meets the criteria set out in the Geneva Convention. The means by which the two groups arrive in Ireland differ enormously, with asylum seekers often engaging on protracted journeys and finding individual and sometimes unofficial ways of entering the country. Whilst it is not illegal to seek asylum, many states in the EU continue to detain asylum seekers on various grounds including their 'illegal entry to the state'. The right to detain asylum seekers under certain conditions was upheld in the ECHR judgment in *Saadi v. UK,* where the majority judgment upheld the detention and justified it as not being disproportionate or arbitrary, nor in contravention of Article 5(1)(f) ECHR.[79]

Whilst resettled refugees may have engaged in protracted and difficult journeys before being accepted by the UNHCR and the Irish Government for resettlement, their journey into Ireland is generally organized and planned in advance,

often in a group, with travel documents and assistance often provided by IOM. This more planned and orderly arrival into Ireland, in addition to the fact that they are invited (as opposed to arriving uninvited seeking asylum) also assists in the provision of planned and organized reception and integration supports.

The numbers accepted for resettlement are very small and in 2011 Ireland only accepted 45 in total.[80] There was some evidence to suggest, for example, that some Iranian Kurds sought asylum in Ireland following the period that a group of Iranian Kurds were resettled in Ireland and some Iranian Kurdish asylum seekers were encountered in hostels close to areas where the resettled group of refugees were living.[81] It must nevertheless be acknowledged that a determination of refugee status is a very individualized process, and sharing the same ethnic background or country of origin does not equate to having similar protection needs, which vary according to current legal understandings of who is a refugee.[82]

Whilst the protection needs of such groups cannot be equated, their integration needs once living in Ireland may be similar. Supports such as cultural orientation, language training and opportunities to integrate are important for both groups, especially as asylum seekers may spend many years in the system and those who are granted refugee status or other forms of protection may make Ireland their long-term home. The UNHCR has also recognized the role that integration and reception supports play for asylum seekers and in its report on Refugee Integration in Ireland, it concluded:

> The reception facilities, length of the procedure and reception policies can play an important role in either aiding or impeding the integration of refugees. Specific recommendations include that reception policies should minimize isolation and separation from host communities, that effective language and vocational skills development should be provided and that the pursuit of employment should be assisted. Access to employment should be granted progressively, taking into account the duration of asylum procedures.[83]

Host communities may fail to draw accurate distinctions between the two groups and a dichotomy can emerge when service providers are asked to treat each differently without a full understanding of the differences between them.[84] It is also important to provide a clear message of welcome and shunning any forms of racism is essential in order to avoid ethnic or racial tensions. It has been suggested that the current system of exclusion of asylum seekers counteracts attempts to address racism and that 'the incompatibilities between a state's goals of challenging racism through the promotion of integration and interculturalism and punitive policies directed at one of the groups most vulnerable to racism in Irish society must be acknowledged'.[85]

Previously the Reception and Integration Agency was responsible for both the accommodation of asylum seekers (reception function) and for the reception and integration of resettled refugees. Since 2011 however, the agency has been split and the functions relating to resettled refugees have been transferred to the Office for the Promotion of Migrant Integration.

Some of the key differences in the reception conditions of asylum seekers and resettled refugees are summarized in table 2.

Is the Extent of Such Differentiation Proportionate?

Under Irish and international law, resettled refugees are already recognized as refugees, whereas asylum seekers must first enter a process in which they attempt to assert that right. Differentiation between the two groups is therefore justifiable. It is asserted here however that the extent of such differentiation is disproportionate and the resulting dichotomy of those perceived as 'deserving' or 'undeserving' too stark and contradictory messages are conveyed. Official discourse relating to asylum seekers is exclusionary and risks furthering racism and social exclusion. On the other hand Ireland is proud of its tradition of accepting resettled refugees and undertakes missions to refugee camps to assist in the choice of those it perceives to be deserving, leaving behind others who could potentially travel independently as an asylum seeker. The model of support for reception and integration exists, but is confined to a small minority. I would therefore argue that certain aspects of it (e.g. basic information about life in Ireland and cultural issues) should be extended to asylum seekers at least after a period of six months, in conjunction with the right to work. Such reception supports would have wider benefits, foster independence and may also assist interactions with and integration with the host community.

Asylum-seekers in Norway, Finland and Sweden are generally provided with state sponsored language training, information programs and work permits. Authorities in Sweden and Norway have noted that "these facilitators of integration are deployed in order to empower asylum seekers and prepare them for life outside the reception facilities, whether that might be in the host country, their home country or somewhere else".[86] The approach the Irish authorities take is in direct contrast to this and concepts such as "facilitators of integration" or "empowerment of asylum seekers" do not find resonance in official discourse. Instead the focus appears to be on immigration control, and as a Department of Justice official stated in response to being

Table 2. Difference in Reception Conditions of Asylum Seekers and Resettled Refugees in Ireland

	Asylum Seekers	Resettled Refugees
Housing	Direct provision accommodation centres, often on the outskirts of small towns. Whole families share rooms and single people or one parent families may share rooms with strangers.	Refugee training centre for first 6 weeks and then transferred to private accommodation in the community, usually paid for through rent allowance.
Income support	€19.60 per adult and €9.60 per child per week. Three meals per day provided. Not entitled to additional allowances such as child benefit.	Same initial income supplement as unemployed people in Ireland, usually the supplementary income allowance of approximately €186 per week per adult. Other allowances apply, including child benefit.
Education and Training	Children attend school and may qualify for language support. Adults not automatically entitled to participate in language classes, but sometimes free classes provided by NGOs.	Children attend school and may qualify for language support. Adult language training free for 12 to 18 months for 20 hours per week.
Integration Supports	NGOs may provide supports, but no European Refugee Fund and other public funds only to be used for minimal reception supports and not for integration.	Refugee support worker post in local development agency for up to 18 months. NGOs may also assist.
Orientation Training	None provided.	6 weeks cultural orientation.
Right to Attend Third Level	Not entitled to.	Entitled to attend. In some cases habitual residence requirement of 3 years needed to qualify for free fees, but this may be under review.
Right to work	No right to work at any stage of the asylum-seeking process.	Entitled to work immediately but may be delayed during the period of language training.

Information retrieved from Citizens Information Board, *Refugee Status and Leave to Remain,* http://www.citizensinformation.ie/en/moving_country/asylum_seekers_and_refugees/refugee_status_and_leave_to_remain/ (accessed December 8, 2011).

questioned about the low rates of recognition or asylum claims in Ireland, that the Government "was determined to address the high level of abuse of the asylum process by people seeking to gain entry to the State for purposes other than protection".[87]

The presumptions in official discourse emanating from the Department of Justice in relation to the asylum system include: (i) The asylum system is open to abuse and must be protected from such abuse at all costs; (ii) in order to do so, it is necessary to make life difficult for asylum seekers here in order to remove incentives for asylum shopping or creating pull factors[88]; and (iii) allowing asylum seekers to work, train or instigating other such "integration facilitators" would detract from the purpose of the asylum system and there is little point in making such investments when the large majority of asylum seekers will ultimately be deported or asked to leave the state. The current fiscal difficulties have further exacerbated the situation.

Whilst many EU countries do have some timeframe in which asylum seekers may not have the right to work and are required to stay in collective accommodation centres, this situation is not usually as protracted as in Ireland. The long-term impacts on children and the unsuitability of the environment for parenting and raising children have been highlighted by many.[89] Breen has argued that the direct provision scheme constitutes discrimination, as set down in the Refugee Convention (1951) and further expanded by the Committee on Human Rights, and under Article 2 of the ICESCR.[90] Whilst the right to equality underpins all human rights instruments, it is not absolute and legitimate differential treatment is sometimes justified on the grounds of state sovereignty, which must also recognize the inherent dignity of the human person. The application of human rights law to immigration and asylum-related issues can be challenging for a number of reasons, including the resistance of governments to such approaches, the shortcomings of human rights law itself including the fact that there

are often immigration exceptions carved into the rights themselves.[91]

Laws or policies that may infringe on human rights are bound by the principle of proportionality, recognized in national and international law. Under such a principle, the law in question should be adequate for the reason it was intended, necessary and proportionate in the sense of being reasonable.[92] I would argue that the *de facto* implementation of the Direct Provision scheme through the Social Welfare (Consolidation) Act, 2005 and the Habitual Residence Clause for such prolonged periods is contrary to the intention of the original policies, aimed at alleviating a potential housing crisis (introduction of Direct Provision) and at deterring welfare tourism in the EU (in the case of the HRC). It would appear that reception policies for asylum seekers, developed at a time when there was a risk of homelessness and numbers were far greater, no longer serve the original aim for which they were intended. It could also be concluded that the effects of such reception conditions on a long-term basis (when originally intended as a temporary measure) are disproportionate and carry unintended negative consequences. The extremely low levels of support provided to asylum seekers during their prolonged reception phase is also disproportionate to the relatively high levels of support given to resettled refugees and are contrary to their long-term integration. It should not however be argued that their levels of support are too high and they are within the norms recommended by the UNHCR guidelines on resettlement.[93]

Many of the difficulties however in relation to the Direct Provision scheme relate to the length of time spent in it, which is not determined by the refugee application procedures (usually within one year), but the delays in subsequent applications for subsidiary protection or leave to remain. This is in contrast to the UK where asylum applications are expected to be concluded within six months, after which time a person can commence their integration into 'life in the UK' including the right to work.[94] It is expected that the reforms of the procedures in the proposed IRP Bill in Ireland will alleviate some of these delays, but without retrospective effect, it is unlikely that it will apply to those currently in the system and no plans have been mooted to provide a fast track process for them.

Ireland has been criticized by the Committee on the Elimination of Racial Discrimination in relation to the need to adopt more measures to avoid negative consequences for asylum seekers,[95] and by the Commissioner for Human Rights[96] in relation to the need for more suitable family accommodation and also urged the Irish Government to address issues of poverty, lack of personal autonomy, right to work and length of time spent in the asylum process.

It is interesting however when one considers that Ireland is the only EU country that has not ratified the EU Minimum Standards Directive, yet it is one of now thirteen countries in the EU voluntarily participating in the UNHCR Resettlement Programme and was one of the first EU countries to join the programme. This dichotomy of restrictive asylum policies versus relatively generous resettlement conditions can be difficult to reconcile, but on closer examination, it is clear that the process of resettlement (with an annual quota of 200, which is not always reached) is a much smaller and more controlled process and provides the State with a sense that it is meeting its international protection obligations in a more controlled manner. Asylum seekers numbers by contrast are at least ten times higher each year (although now decline) and the process by its nature is more complex, *ad hoc* and more difficult to control.

Conclusion

The two processes of resettlement and seeking asylum under the Convention are entirely separate and a comparison between the two groups in a strict legal sense is not possible. Under the resettlement process, the designation of people as deserving of refugee status has already been made (by the UNHCR) and the Irish Government is then able to choose a very small group of people who have been selected as "suitable for resettlement". Asylum-seekers on the other hand arrive with no international backing, often limited documentation and by means that can be complex and unofficial. There appears to be a presumption in official discourse that their claims are not valid, also shown in Ireland's very low acceptance rate in comparison with other EU countries. Under international law, their right to seek asylum is entirely valid and lawful. Once this claim is proven, they are then theoretically entitled to the same international protection and freedom from refoulement in the same manner as resettled refugees.

I have argued here that reception by its nature takes place when a person arrives in a country or within a period of six months and delaying this process for several years is contrary to its very purpose. It would be reasonable if asylum claims were processed within six months and the reception phase (including a right to work) commenced after such a period. The current protracted situation mainly due to adjudication of claims for other forms of protection is untenable and delaying reception and integration supports for several years is inhumane. The extent of the differences in reception conditions between resettled refugees and asylum seekers are disproportionate, particularly when the length of time is taken into consideration. Secondly the messages conveyed in relation to those who are deserving/undeserving and the manner in which Ireland treats

its human rights obligations towards those seeking protection are contradictory and confusing. This paper is not suggesting that reception conditions for resettled refugees are too high, but rather that some aspects of their reception model should equally be provided to asylum seekers during the reception phase and at a minimum after six months of residence in Ireland.

NOTES

1. Under Ireland's dual system, an application for asylum under the Convention must be made first before a subsequent application for subsidiary protection or humanitarian leave to remain can be made. For the purpose of this paper, the term 'asylum seeker' encompasses all applicants, regardless of the stage of the legal process as they are all housed in the same reception hostels and have the same limited entitlements until a final outcome is made on their claim(s).
2. Hathaway, James C. The Rights of Refugees under International Law. (Cambridge [England]; New York: Cambridge University Press, 2005), See also Saadi v UK (Application No 13229/03) 29 January 2008 (Grand Chamber Decision) that upheld the right to detain asylum seekers until their entry was 'authorized'.
3. See for example Free Legal Advice Centres, *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal System in Ireland, 10 Years On* (FLAC: Dublin 2009); Liam Thornton, "Upon the Limits of Rights Regimes" : Reception Conditions of Asylum Seekers in the Republic of Ireland," *Refuge* 24, no. 2 (2007): 86–100; Claire Breen, "The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing," *International Journal of Refugee Law* 20, no. 4 (2008): 611–36; Hans. Pieper, Pauline Clerkin, and Anne Mac Farlane, *The Impact of Direct Provision Accommodation for Asylum Seekers on Organization and Delivery of Local Health and Social Care Services: A Case Study* (Galway: Department of General Practice, NUI Galway, 2009).
4. RIA, *Reception and Integration Agency Monthly Statistics Report, June 2011,* Dublin: Reception and Integration Agency, http://www.ria.gov.ie/en/RIA/RIAJune(A4)2011.pdf/Files/RIAJune(A4)2011.pdf (accessed December 8, 2011)
5. Ireland was recently questioned on this during a universal periodic review of Ireland under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. ICCL and IPRT, *Joint Shadow Report to the First Universal Periodic Review of Ireland under the United Nations Convention against Torture and Other Inhuman, Cruel or Degrading Treatment or Punishmen*t (Dublin: Irish Council for Civil Liberties, Irish Penal Reform Trust, 2011).
6. There are now 25 countries worldwide who participate in the UNHCR Resettlement Programme. The EU countries who have participated include Finland, the Netherlands, Sweden, Norway, the UK and Ireland. Recently resettlement programmes have been announced in the Czech Republic, France, Hungary, Portugal, Spain and Romania. See UNHCR, *Frequently Asked Questions about Resettlement,* Geneva, UNHCR http://www.unhcr.org/4ac0873d6.html (accessed June 21, 2012).
7. Office of the Promotion for Migrant Integration, Resettlement Programme: Introduction, Dublin: Office of the Promotion of Migrant Integration http://www.integration.ie/website/omi/omiwebv6.nsf/page/resettlement-intro-en (accessed December 8, 2011)
8. The entitlement to subsidiary protection stems from the transposition of European Council. "Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted.", 2004. It can be granted to those at risk of 'serious harm' if returned to their country of origin. Between 2006 and 2010, only 34 grants of subsidiary protection were made.
9. An application for Leave to Remain on humanitarian grounds can be made under Section 3 of the Immigration Act, 1999.
10. See UNHCR, *Refugee Resettlement: An International Handbook to Guide Reception and Integration* (Geneva: Office of the United Nations High Commissioner for Refugees, 2002).
11. Denise Thomsson, "An Institutional Framework on Resettlement." In *Resettled and Included: The Employment Integration of Resettled Refugees in Sweden,* ed. P. Bevelander, M. Hagstrom and S. Ronnqvist. (Malmo: Malmo University, 2008); Marita Eastmond, "Egalitarian Ambitions, Constructions of Difference: The Paradoxes of Refugee Integration in Sweden" *Journal of Ethnic and Migration Studies* 37, no. 2 (2011): 277–95.
12. International human rights monitoring processes that have raised concerns in relation to reception conditions for asylum seekers include Commissioner for Human Rights reports in 2007 and 2011, (Council of Europe) See Commissioner for Human Rights. "Report on Visit to Ireland 26–30 November 2007." Strasbourg: Council of Europe, 2008, Commissioner for Human Rights. "Report on Visit to Ireland 1–2 June 2011." Strasbourg: Council of Europe, 2011. The UNHRC Special Rapporteur on Extreme Poverty also raised concerns about the poverty of families and children in the system. See UNHRC. "Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena, Sepulveda, Carmona: Mission to Ireland." A/HRC/17/34/Add.2 (2011), http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.34.Add.2_en.pdf.

13. An analysis of the impact of the system on families, mothers and children are contained in reports such as Akidwa. "Am Only Saying It Now: Experiences of Women Seeking Asylum in Ireland." Dublin: Akidwa, 2010. Uchechukwu Ogbu, Helen. "An Explorative Study of the Experiences of Asylum Seekers in Rearing Their Children in Direct Provision Centres." NUI Galway, 2011. Breen, Claire. "The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing." International Journal of Refugee Law 20, no. 4 (2008): 611–36.
14. Moreo, Elena, and Ronit Lentin. "From Catastrophe to Marginalization: The Experience of Somali Refugees in Ireland." Dublin: Migrant Networks Project, (Trinity Immigration Initiative, 2010).
15. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
16. The 2010 Immigration, Residence and Protection Bill proposed a single determination procedure. A new bill is expected to be introduced in late 2012 or early 2013.
17. Examples of towns where both have been housed include Ballyhaunis Co. Mayo, (the resettled refugee training centre), Sligo and Ballinamore/Carrick on Shannon in County Leitrim. Carrick and Shannon and Sligo formed part of the MOST research project for Ireland. See Louise Kinlen, "The Reception, Orientation and Integration of Resettled Refugees in the Irish Context, Most Project Report: Ireland." (2008), http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7TCEAY11284425-en/$File/MOST_Project%20-%20final_Ireland.pdf. The issue of entitlements of both groups was raised in interviews with NGOs and civil servants both during this research project and in the current research on NGO advocacy and policy making. For a discussion on childcare service provision for the two groups and confusion over entitlements, see also Nicola Dolan, and Catherine Sherlock, "Family Support through Childcare Services: Meeting the Needs of Asylum-Seeking and Refugee Families." Child Care in Practice 16, no. 2 (2010): 147–65.
18. National Consultative Committee on Racism and Interculturalism. "Submission to the Interdepartmental Working Group on the Integration of Refugees in Ireland." Dublin: NCCRI, 1999.
19. *Ibid*, Section 2.2
20. Mestheneos, E., and E. Ioannidi. "Obstacles to Refugee Integration in the European Union Member States." Journal of Refugee Studies 15, no. 3 (2002): 304–20.
21. See Liam Thornton, "Upon the Limits of Rights Regimes" : Reception Conditions of Asylum Seekers in the Republic of Ireland," *Refuge* 24, no. 2 (2007): 86–100; Claire Breen, "The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing," *International Journal of Refugee Law* 20, no. 4 (2008): 611–36; Brian Fanning, Brian, Angela Veale, and Dawn O'Connor, *Beyond the Pale: Asylum-seeking Children and Social Exclusion in Ireland* (Dublin: Irish Refugee Council 2001).
22. See www.integration.ie
23. Under Section 9(4) of the Refugee Act, 1996 a person seeking protection may not leave the country without consent of the Minister for Justice.
24. Hathaway, James C. "Why Refugee Law Still Matters." Melbourne Journal of International Law, no. 25th Allen Hope Southey Memorial Lecture (2007): 89–103.
25. UNHCR, UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008) http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=49be19db2&query=reception conditions EU
26. European Council. "Council Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers." (2003).
27. UNHCR, *Reception Standards for Asylum Seekers in the European Union* (Geneva: Office of the UN High Commissioner for Refugees, 2000).
28. Lentin, Ronit, and Robbie Mc Veigh. After Optimism? Ireland, Racism and Globalization. Dublin: Metro Eireann Publications, 2007.
29. This transnational project was funded under the Community Actions Strand of the European Refugee Fund. The final report is available on Louise Kinlen, *The Reception, Orientation and Integration of Resettled Refugees in the Irish Context, Most Project Report: Ireland* (2008), http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7TCEAY11284425-en/$File/MOST_Project%20-%20final_Ireland.pdf (accessed December 8, 2011)
30. *Ibid.* Whilst the report was produced under a project under the auspices of the Office of the Minister for Integration, the views expressed in this paper are the author's own.
31. See *supra* note 21 and Peter Fell, "And now it has started to rain: Support and advocacy with adult asylum seekers in the voluntary sector" in *Social work, immigration and asylum : debates, dilemmas and ethical issues for social work and social care practice,* ed. Debra Hayes, Beth Humphries and Steven Cohen. (London: Jessica Kingsley, 2004).
32. See for example *supra* note 28. The term 'reception' is used to refer to the agency in Ireland with responsibility for receiving asylum seekers *The Reception and Integration Agency.* It is also referred to as a distinct stage within the resettlement process. See for example http://www.integration.ie/website/omi/omiwebv6.nsf/page/83D9DD3235CC6B2E802575750063B3FA (accessed December 8, 2011).
33. *Council Directive 2003/9/Ec Laying Down Minimum Standards for the Reception of Asylum Seekers* European Council (2003).
34. UNHCR, *Discussion Paper on Recommended Reception Standards for Asylum-Seekers in the Context of the*

Harmonization of Refugee and Asylum Policies of the European Union (Geneva: UNHCR, 2000).

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Asylum Policy Debate

Protecting Boat People

David Matas

Remarks prepared for delivery to Association Québécoise des Avocats et Avocates en Droit de l'immigration, Montreal 21 October 2011

Sri Lankan boat people

I want to talk about Bill C-4. The Bill has the title "The Preventing Human Smugglers from Abusing Canada's Immigration System Act." It was introduced into Parliament on 15 October 2011. It is still at the first reading stage.

Although the legislation is not country specific, its predecessor, Bill C-49 was introduced in October 2010 into the minority Parliament in response to the arrival of Tamil boat people, 76 aboard the MV Ocean Lady in October 2009 and 492 aboard the MV Sun Sea in August 2010. The Minister of Citizenship and Immigration, the Honourable Jason Kenney, on second reading in the House of Commons, justified the proposed legislation by reference to these arrivals[1]. These arrivals were a tiny component of those from Sri Lanka fleeing persecution and seeking resettlement.

The legislation died in the last Parliament because in that Parliament the Conservative government was in the minority and none of the opposition parties would support it. The Conservative government in this Parliament has a majority and has reintroduced the legislation.

Sri Lanka ended in May 2009 a long brutal civil war between the the Government of Sri Lanka and the minority Tamil forces who sought an independent country in the north of Sri Lanka. The war, which went on for twenty six years, resulted in 80,000 deaths. It culminated in a frenzy of killing and mass detention of Tamil civilians.

Tamils in Sri Lanka continue to be victimized by the victors in the war. The systemic discrimination, harassment and persecution of minority Tamils by elements of the majority which sparked the civil war continues with a vengeance now that the Tamil side has lost that war.

Refugee protection and resettlement for Tamil victims, even during the height of the civil war, was never easy. There were too many claimants and there was not enough political will. All sorts of evasive devices were used to prevent the theoretical commitment to protect refugees from translating into the numbers the civil war merited.

As difficult as protection and resettlement for Sri Lankan refugees were before the end of the civil war, they all but collapsed since. Sri Lankan Tamil refugees are now caught between a fiction of change of circumstances ending the threat of persecution and the reality of persecution back home.

The standard refrain from refugee determination tribunals and resettlement officers is that now that the civil war has ended neither protection nor resettlement is necessary. The facts on the ground though tell the opposite story. Persecution for some Tamils has worsened since the civil war has ended, because the protective enclave which once existed for Tamils in the north of the island is gone.

Those who had fled to countries of proximate refuge in the region are stuck. Because of the dangers they face in Sri Lanka, they can not go back home. Resettlement countries will not take them. Yet they can not stay where they are.

Countries in the region where Sri Lankan asylum seekers are found are not signatories to the Refugee Convention and do not respect refugee rights. Malaysia, Indonesia, and Thailand all tell the same sorry tale. Refugees can not work legally. If they work illegally, they are exploited by employers without remedy. Refugees work long hours at low pay at menial tasks in unsafe and unhealthy working conditions for abusive employers. Their children can not go to school. Their movements are restricted. They suffer from food shortages and inadequate medical treatment at high costs. They are denied documentation and are harassed by the police.

Some are detained in crowded, unsanitary, unhealthy conditions. They face the threat of forcible repatriation.

Malaysia introduced an amnesty for illegal migrant workers starting August 1st of this year. Asylum seekers are ineligible.

Tamil refugees have taken as best they can the situation into their own hands. They have become a new boat people, fleeing the countries in the region in which they were caught, seeking at risk to their lives, to get protection in resettlement countries—Australia, New Zealand and Canada. The arrivals on the MV Ocean Lady and the MV Sun Sea were part of this outflow.

B. Vietnamese boat people

We have seen this sad story many times before, refugees fleeing persecution and seeking resettlement by ship and boat. Before I turn to the details of Bill C-4, I want to go back to how Canada and the world reacted to another group of refugees fleeing persecution and seeking resettlement by boat and ship, the Vietnamese boat people.

The American military withdrew from Vietnam in August 1973 leaving to the South Vietnamese the defence of South Vietnam against the attacks from North Vietnam and the Viet Cong. South Vietnam fell to the Viet Cong and North Vietnam in April 1975. The collapse of South Vietnam led to a massive flight of refugees from Vietnam.

The Indochinese designated class

The Government of Canada in response created the private sponsorship system, which exists to this day, and the Indochinese designated class. Regulations said that a Canadian organization or group of five individuals could sponsor a person from designated countries in Indochina to come to Canada.

Until September 1990 the countries designated were Cambodia, Laos and Vietnam. According to the regulations, a person from but residing outside these countries could come to Canada, as long as the person had a sponsor here. The Government of Canada also assisted people from this class to come to Canada under the Government refugee allocation for South East Asia.

There was no need for an applicant to prove that he or she was a refugee. The applicant did not have to prove a well founded fear of persecution. Dislocation and sponsorship were enough, provided the person could show likelihood of successful establishment and criminal and medical admissibility.

The Indochinese designated class was one of the most successful programs the Immigration Department ever ran. The class began 7 December 1978. At least in theory, it remained in effect for Vietnam, Laos and Cambodia till 1 September 1990. Most of the large numbers of Vietnamese who came to Canada came by virtue of this class. In 1979–1980 alone, some 60,000 were admitted.

Though it remained in effect in theory till September 1990, it ceased operation after 14 June 1989 for Vietnamese and Laotians arriving in Hong Kong after 16 June 1988 or in any other Southeast Asian country after March 14, 1989. While keeping the program on the books as a regulation, the Government ceased to operate it administratively for new arrivals.

The Comprehensive Plan of Action

The United Nations held an International Conference on Indochinese refugees in Geneva on June 13 and 14, 1989. Prior to the Geneva Conference, the U.N. held a preparatory meeting in Kuala Lumpur, Malaysia on 8 March 1989.

The Malaysian meeting proposed a draft declaration and comprehensive plan of action on Indochinese refugees. The Geneva meeting accepted the draft. According to the plan, resettlement of refugees from Indochina would cease, except for those who passed screening procedures.

The declaration that accompanied the plan stated that governments were preoccupied with the burden imposed on neighbouring territories by asylum seekers. The declaration also stated that governments were alarmed current arrangements to deal with asylum seekers might no longer be responsive to the size of the problem.

The plan itself had three key components: the establishment of screening procedures, repatriation of those who failed screening, and resettlement of those who passed screening. Early establishment of consistent region wide refugee status determination processes was required under the plan. According to the plan, the status of asylum seekers had to be determined by a qualified national authority, in accordance with established refugee criteria and procedures.

The criteria recognized were not restricted to the 1951 Convention. The Universal Declaration of Human Rights and other relevant international instruments had to be borne in mind and applied in a humanitarian spirit.

The Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status was to serve as an authoritative and interpretative guide and there was to be a right of appeal, with the asylum seeker entitled to advice on appeal. The UNHCR was to ensure proper and consistent functioning of the procedures and application of the criteria.

Resettlement was divided into two categories one for long stayers, and the other for newly determined refugees. Long stayers were all those who arrived before a cut off date (the date screening was established). Long stayers were eligible for resettlement without going through screening.

For those who arrived after the cut off date, only those who passed screening were eligible for resettlement. The plan said a resettlement program would accommodate all those who arrived after the introduction of status determination procedures and were determined to be refugees.

The plan went on to say that persons determined not to be refugees should return to their country of origin. The Chair of the Geneva Conference that adopted the plan in June 1989, Dato Haji Abu Hassan Bin Haji Omar of Malaysia, in his closing statement, indicated that the plan's purpose was to discourage Vietnamese from leaving Vietnam. He said "asylum seekers could no longer assume that they would be automatically regarded as refugees and therefore entitled to automatic resettlement."

Canadian problems

There were a number of problems with this structure. One was that it had no reflection in Canadian law for over a year. The second was that it was an abdication of Canadian sovereignty, delegating Canadian refugee determinations to foreign entities. The third was the inadequacy of foreign screening.

Elaborating on these problems here would take me too far afield. If someone is interested in them, I have discussed them at length in an article published in 1991 in the magazine Refuge.[2]

The Elysia

I would not now suggest a designated class for Sri Lankan refugees. Vietnam, Cambodia and Laos, as Communist states, had exit controls. Sri Lanka does not. Vietnamese refugees had to leave Vietnam by boat because the Government would not let them leave. Sri Lankans can leave Sri Lanka, provided they can get visas from the countries of destination.

The imposition of exit controls imposes a limit on the number of people who can and will leave. If there are no exit controls and no or minimal entry controls either, large numbers of people may leave many of whom have no substantive claim to refugee protection.

An agreement akin to the Comprehensive Plan of Action between countries of proximate refuge and countries of resettlement for Sri Lankan and other refugees in the region is a more plausible option. Countries of proximate refuge would screen. Resettlement countries would take the screened in. The screened out would be repatriated. The Office of the United Nations High Commissioner for Refugees would supervise the application of the plan.

That is an option I canvassed with the Office of the United Nations High Commissioner for Refugees in Geneva. I became involved in the plight of Sri Lankan Tamil refugees because of another boat, 87 Sri Lankan refugees aboard the ship MV Elysia at Tanjung Pinang port Indonesia. The refugees had left Malaysia destined for New Zealand, but were stopped July 10th this year en route by the Indonesian water police in Indonesian waters.

The refugees refused to disembark not wanting to end up in a situation in Indonesia as bad as the situation they left in Malaysia. New Zealand refused to take them.

The Government of Indonesia stated that it would not use force to impose disembarkation on the passengers of the Elysia. The Government has also stated that it would give access to food supplies and medical care, but neither the Government nor the UNHCR nor the International Organization for Migration (IOM) actually provided food supplies and medical care in a sustained manner to the passengers. After running out of food and water, the refugees on August 26th disembarked and were put into Indonesian detention. They are now going through UNHCR registration and refugee determination. They have been moved so I have been told from detention to IOM reception centres.

I went in early September, on behalf of this group, to Geneva to meet with the Office of the United Nations High Commissioner for Refugees to see what could be done to help them. The officials with whom I met stated:

The Office of the United Nations High Commissioner for Refugees is opposed to detention of asylum seekers. The UNHCR promotes alternatives to detention.

Indonesia had before allowed asylum seekers freedom, but recently enacted legislation which provided for detention and began detaining some of them, as the result of the pressure of other states. I presume they were referring to Australia, Canada and New Zealand although no states were mentioned.

Indonesian reaction to efforts to cease detention is to point to Australia, which also detains asylum seekers.

Releasing asylum seekers to reception centres is considerably cheaper for the Government of Indonesia than keeping them in detention.

Other states in the region do not detain asylum seekers.

The passengers on the boat Elysia came from Malaysia. They were not detained there.

The IOM has reception centres in Indonesia which could serve as alternatives to detention. The reception centres may need to be refurbished or expanded. The reception centres can not become detention centres.

Indonesia is not releasing asylum seekers it wants to detain after UNHCR registration or even after UNHCR recognition. Rather it is waiting until there are resettlement offers for the refugees.

There are NGOs who are monitoring the situation in detention of asylum seekers and making reports.

UNHCR registration of asylum seekers whether in detention or not happens almost immediately, within a week. Refugee determination is taking six to seven months.

The UNHCR will accelerate refugee determination for those they identify through registration as vulnerable.

The UNHCR, in addition to pressing for alternatives to detention for all detainees, is asking specifically that women and children be released in conformity with the Convention on the Rights of the Child. Indonesia is not a party to the Refugee Convention but is a party to the Convention on the Rights of the Child. That Convention commits state parties to ensure that children have access to education. Children can not have that access when they are in detention.

The UNHCR is not encouraging a comprehensive plan of action patterned on the Vietnamese boat people model with resettlement states agreeing to resettle those asylum seekers screened in locally. Asia is considerably more developed now than it was twenty five years ago, at the time of the Comprehensive Plan of Action. Today the UNHCR is encouraging states in the region to resettle and integrate refugees.

Malaysia has agreed to regularize of the status of some one million migrant workers through a registration process. The UNHCR is encouraging Malaysia to do the same with its asylum seeker population.

Respect for human rights

Human rights violations against Tamils in Sri Lanka should cease. The best solution to any refugee problem is removing the root causes which generate the refugee outflow.

The response to the Tamil refugee situation then should be threefold. One is to promote respect for human rights of Tamils in Sri Lanka. The second is to promote respect for refugee rights in countries of proximate refuge. The third is to contribute to resettlement, sharing refugee responsibility with countries of proximate refuge.

The traditional resettlement countries should not be expected to resettle all Tamil refugees. Yet, they should be part of the solution, resettle some.

The Government of Canada has got part of this message and made an active effort to promote human rights in Sri Lanka. Prime Minister Stephen Harper has said that at the Commonwealth Heads of Government Meeting in Perth scheduled for next week he would advocate a boycott of a 2013 summit in Sri Lanka unless it improves its human rights record. Harper said:

> "I have expressed concerns about the holding of the next Commonwealth summit in Sri Lanka … I intend to make clear to my fellow leaders of the Commonwealth that if we do not see progress in Sri Lanka in human rights I will not as Prime Minister be attending that Commonwealth summit. And I hope others will take a similar position."[3]

The Government of Canada has also backed an independent investigation into war crimes committed by the Sri Lankan army in the final phase of the civil war. Foreign Minister John Baird, according to a Globe and Mail report, told Sri Lanka's Foreign Affairs Minister, G.L. Peiris, at the UN in New York in September that Canada wants progress on human rights and post civil war reconciliation, pushing back, according to a summary provided by sources, against Mr. Peiris's 'trust us' assurances[4].

Bill C-4

The Government of Canada through Bill C-4 is working at cross purposes. The Bill proposes punitive measures against Tamil and other refugees. The proposed legislation would discourage smuggling by punishing the smuggled.

The proposed law provides for mandatory twelve months detention for every member of a designated arriving group of persons unless the refugee protection claim is finally determined earlier or the cabinet Minister responsible decides that there are exceptional circumstances which warrant the person's release[5]. It further prohibits members of the designated groups from obtaining permanent residence until five years after a claim for refugee protection[6]. The delay in obtaining permanent residence would lead to a delay in family reunification. The proposed legislation denies to the designated claimants the right to appeal negative decisions other claimants have[7].

Designation of a group may occur if the Minister has reasonable grounds to suspect that, in relation to the arrival in Canada of a group, there has been, or will be, smuggling for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group[8]. Smuggling is defined as organizing, inducing, aiding or abetting the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of the Immigration and Refugee Protection Act[9].

Designation of an arriving group would be by the responsible Minister and not the cabinet. The legislation sets out designation criteria, but neither the human rights record of the country fled nor the prior position of the Government on that record is proposed as a criterion.

One can see the problem this sort of legislation poses for human rights promotion. It violates the rights of refugees. The proposed legislation would mistreat people who have already suffered far too much, piling mistreatment in the country of asylum onto the mistreatment in the country of nationality and the country of proximate refuge.

The Refugee Convention prohibits detention of refugees on the sole basis that they arrived in the country illegally[10]. The proposed legislation does just that, holding out the threat of detention of refugees because of the manner in which they arrived.

The Canadian Charter of Rights and Freedoms prohibits arbitrary detention[11], cruel and unusual treatment[12] and deprivation of liberty in violation of the principles of fundamental justice[13]. Detaining the smuggled to stop the smugglers is all three—arbitrary, cruel and unusual, and a deprivation which is fundamentally unjust.

The criteria the courts have set out to prevent detention which is arbitrary, cruel and unusual and fundamentally unjust suggest that Bill C-4, once legislated, would be vulnerable to Charter challenge. In the case of *Sahin* in 1995 Mr. Justice Rothstein set out a number of factors to consider when determining whether detention violates the Charter as fundamentally unjust. One of these factors is the reason for the detention. Another factor is the length of time in detention. He wrote:

> "If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release."[14]

The Government of Canada justifies the legislation as removing the incentives of customers of smugglers. Calling prolonged detention, denial of family unity, unfair refugee determination procedures as disincentives to smugglers is a euphemism. One can assume that if we treat Tamil refugees in Canada worse than they are being treated in Sri Lanka or the countries of proximate refuge, they will not want to come here. However, we should not be violating the human rights of refugees in order to deter smuggling.

I mentioned earlier that refugee determination systems use evasive techniques to prevent a commitment to refugee protection in principle from translating into the numbers the plight of refugees warrant. One of these techniques is a pretense that refugees are irregular economic migrants, queue jumpers, moving from poor countries to rich countries without going through immigration procedures of the country of destination. Some support for Bill C-4 comes from this quarter, a mistaken belief that the boat people are devious queue jumping economic migrants, rather than the desperate victims they are.

The civil war in Sri Lanka was sparked by systematic discrimination and exclusion by elements of the majority against the Tamil minority. The violent Tamil Tiger response does not excuse the mistreatment which generated it. Now that the Government of Sri Lanka forces have won the civil war, the very mistreatment of the Tamil minority which engendered it has become more cruel. This is a victory without magnanimity.

The Canadian legislation is bad in principle. But it is even worse in context. It says to the Government of Sri Lanka, go ahead, mistreat the Tamil minority. We don't care.

Because the legislation was introduced in response to the Tamil arrivals, the legislation sends a message to Sri Lanka that we are not concerned about the mistreatment of your Tamil population. We are more concerned about our own borders and entry policy than what happens to Tamils back home.

The current Government has expressed concern about human rights violations inflicted on Tamils. Yet, when the victims of the failure to follow Canadian advice arrived on our shores, the response of the Government of Canada was to detain the arrivals *en masse* under the current legislation and propose legislation which would, in the future, impose a host of obstacles to the protection and settlement of such a group. While it is uncertain who in the future would be designated under the legislation, it is apparent that the government of the day, if the legislation had been in place at the time, would have designated the 76 Tamil arrivals aboard the MV Ocean Lady in October 2009 and the 492 aboard the MV Sun Sea in August 2010.

The proposed legislation is retroactive to March 2009. The Bill states that a designation of a group for the purpose of mass detention may be made in respect of an arrival in Canada after March 31, 2009[15]. The Tamil refugees aboard the MV Ocean Lady have, to my knowledge, all been released. Those aboard the MV Sun Sea have for the most part been set free. The enactment of the legislation would give the Government the power retroactively to throw into jail the passengers of both these ships. The very choice of the date March 2009 suggests that this was the intent.

One reason for the mistreatment of asylum seekers in Asia is the pressure put on those countries by resettlement countries. Another reason is the poor example resettlement countries give.

As the Comprehensive Plan of Action at the time of the Vietnamese boat people showed, part of the solution lies with the countries of proximate refuge. The solution now is not necessarily the same as the solution then. All the same, the contribution countries of proximate refuge have to make to the solution can not be ignored.

The logic behind C-4 is to discourage new arrivals like those aboard the MV Ocean Lady and the MV Sun Sea. Aside from the cruelty of the means, it is likely to have a perverse effect, leading countries of proximate refuge to mimic its cruelty and prompting asylum seekers in those countries

to flee in much the same way the passengers of the Ocean Lady, Sun Sea and Elysia did.

At the time of second reading of Bill C-49, the predecessor of Bill C-4, the previous Parliament, in October 2010 Immigration Minister Jason Kenney said:

> "we have begun preliminary discussions with our international partners, including Australia, which obviously has a great stake in this issue, and with the United Nations High Commissioner for Refugees to pursue the possibility of some form of regional protection framework in the Southeast Asian region. In part that would entail encouraging the countries now being used as transit points for smuggling and trafficking to offer at least temporary protection to those deemed by the UN in need of protection and then for countries such as Canada to provide, to some extent, reasonable resettlement opportunities for those deemed to be bona fide refugees, which is something we are pursuing."

The Minister went on to justify the need for the proposed legislation on the basis that this solution was mid to long term and something about smuggling had to be done now. Yet, making matters worse for the customers of smugglers in countries of destination is not a workable shortcut.

The mistreatment the refugees receive in their home countries and countries of proximate refugee is real, immediate, experienced. The threat of mistreatment Bill C-4 holds out, even if realized, will always be for the smuggled only a potential, and one, we can be sure, smugglers will disguise and misrepresent.

One form of abuse refugees in countries of proximate refuge suffer is exploitation by smugglers. That exploitation will not end because the smuggled are mistreated in countries of resettlement. On the contrary, that mistreatment will make the exploitation even more pernicious.

Smuggling customer disincentivization will come only from making matters better for refugees back home and in countries of proximate refuge. If Tamils are not being persecuted in Sri Lanka, if they are being treated humanely in countries of proximate refuge, the incentive for them to hire smugglers will evaporate.

The efforts of the Government of Canada to promote human rights in Sri Lanka are commendable and should be encouraged. The Bill C-4 initiative is deplorable and should be dropped. What should take its place is a Canadian initiative to organize a new comprehensive plan of action with countries of proximate refuge in Asia. This time the plan should provide for respect for refugee rights in countries of proximate refuge and a sharing of refugee resettlement amongst traditional resettlement countries and countries in the region.

Notes

1. Hansard, October 27, 2010.
2. "Private Sponsorship of Indochinese" October 1991 Refuge, Volume 11 Issue 1, page 6
3. "Canada seeks Sri Lanka boycott at Commonwealth meeting", Amanda Hodge, The Australian, September 14, 2011
4. "In policy shift, Stephen Harper presses Sri Lanka on human rights", Campbell Clark Sep. 29, 2011
5. Section 12 adding to the Immigration and Refugee Protection Act section 57.1(1).
6. Section 8 adding to the Immigration and Refugee Protection Act section 25(1.01).
7. Section 17 creating in the Immigration and Refugee Protection Act a new section 110(2)(a).
8. Section 5 adding to the Act section 20.1(1)(b).
9. Section 18 replacing Act section 117(1).
10. Article 31
11. Article 9
12. Article 12
13. Article 7
14. *Sahin v. M.C.I.* [1995] 1 F.C. 214
15. Section 34.1

David Matas is an immigration, refugee and international human rights lawyer based in Winnipeg.

Protecting Boat People Reply to David Matas

James Bissett

The paper by David Matas entitled "Protecting Boat People" is, as he points, out designed to be a criticism of Bill C-4, "Preventing Human Smugglers from Abusing Canada's Immigration Systems Act." He argues the Bill mistreats asylum seekers from Sri Lanka; violates refugee rights; discourages smuggling by punishing the smuggled; is in violation of the Refugee Convention and the Canadian Charter of Rights and Freedoms; and he accuses the Government of using "evasive techniques to prevent a commitment to refugee protection."

The major thrust of his paper is that following the brutal civil war in Sri Lanka which ended almost three years ago in May 2009, the Tamil population there continues to be subject to "systemic discrimination, harassment and persecution …" by the Sri Lankan government. He argues that since the civil war has ended the "standard refrain" from refugee boards and settlement officers is that protection and settlement is no longer necessary. And he further argues that those Tamils who have found refuge in countries in the region are afraid to go back home.

The UNHCR does not agree with this pessimistic assessment. The latest country profile on the situation in that country reports that since the end of the armed conflict there has been a "steady improvement in security".[1]

The emphasis in UNHCR operations has shifted from humanitarian relief to early recovery and development. By the end of April 2011, the majority of internally displaced (395,000) had returned home and the remainder living with host families is expected to return this year. The improvement in security is expected to increase the number of voluntary return of refugees from abroad, especially from India.

The UNHCR also stresses that humanitarian and protection—related needs of internally displaced people (IDPs) and refugee returnees remain the main priority. It is also actively involved in providing assistance to community development and institution building as well as being the main provider to IDPs and returning refugees. Clearly this report from the UNHCR would indicate the authorities on the ground in Sri Lanka do not support the allegations made by Mr. Matas.

Furthermore, in an extraordinary press briefing in August 2010, a UNHCR spokesman commended the "exemplary work" of the Canadian Border services agency in coordinating the arrival and reception of the MV Sun Sea passengers. He also added that the UNHCR supports the important work of law enforcement agencies in combating human smuggling while at the same time recognizing that refugees and migrants might sometimes use the same means of illegal transportation, refugees are a distinct group with critical protection needs.[2]

He also pointed out that UNHCR had recently issued revised guidelines to assist decision makers in reviewing asylum claims. The guidelines included the recommendation that in view of the improved security situation, claims by asylum seekers from Sri Lanka should be considered on their individual merit rather than on a group basis.

Mr. Matas outlines in some detail the Comprehensive Plan of Action (CPA) adopted by the United Nations at a conference in June 1989 to help resolve the growing problem of people fleeing Vietnam, Cambodia, and Laos in small boats and seeking refuge in neighboring countries with the hope of eventual resettlement in the industrial countries of the West.

Although the Vietnam War ended in 1975 thousands continued to flee creating serious problems for the countries of first asylum. The aim of the CPA was to bring an end to this unregulated flow of people, which was not only threatening to destabilize the region but was causing the death of many of the boat people through loss at sea and at the hands of pirates.

Mr. Matas describes the plan as having three components: the establishment of refugee screening procedures; the return to their country of origin of those who failed the screening; and resettlement in third countries of those meeting the refugee criteria. People who had arrived prior to the date screening took place were eligible for resettlement without refugee screening.

Obviously the CPA was to bring an end to the exodus of asylum seekers from Indochina. This was confirmed by the chairman of the UN conference in his closing statement, quoted by Mr. Matas, when he said " … asylum seekers could no longer assume that they would be automatically regarded as refugees and therefore entitled to automatic resettlement. It was also formulated in the recognition that if developed countries will take people whether refugees or not who are fleeing desperate conditions at home then the law of "if you take them they will come" applies.

It is not clear why Mr. Matas described the CPA in some detail in his paper. He does suggest there were a number of problems with its structure. For example, that the refugee screening was not done by Canadian authorities and thus was an abdication of Canadian sovereignty and that the foreign screening was inadequate but he does not explain why he has reached these conclusions.

Later in the paper he suggests an agreement similar to the CPA between countries of "proximate" refuge and countries of resettlement for Sri Lankan and other refugees in the region would be a more plausible option. He then outlines the three components of his proposal which sound very similar to the CPA—screening to be done by the "proximate" country; those who failed the screening would be returned; and those meeting the refugee criteria would be taken in by resettlement countries. As with the CPA, the UNHCR would be responsible for the management of the program.

Mr. Matas actually put this proposal to the office of the UNHCR in Geneva in an effort to help solve the problem of 87 Sri Lankan asylum seekers aboard the ship MV Elysia which was stopped by Indonesia authorities en route from Malaysia to New Zealand. However, as might be expected, the UNHCR did not accept the idea of another CPA for Sri Lankan asylum seekers.

Although not saying so in his paper, it is obvious that the UNHCR was simply following its current policy with respect to refugee issues: first to find refuge in the country of origin if possible; second, resettlement in a regional neighboring country in the hope of eventual return home if and when conditions permit—and finally, as a last resort, resettlement in a third country.

Mr. Matas seems to take the position that all those who claim refugee status are genuine refugees and those asylum seekers who pay human smugglers thousands of dollars to human smugglers are if they are caught and penalized in any way are victims. This fails to recognize that human smuggling has become a serious international problem and Canada has become a country of choice for this criminal activity because of our generous asylum policy. Bill C-4 is an attempt to curtail this activity, it is not an effort to prevent genuine refugees from gaining Canada's protection.

Notes

1. See the 2012 UNHCR Country Operations Profile—Sri Lanka (www.unhcr.org/pages/49e4878eb.html)
2. See UNHCR Statement "UNHCR Encouraged by Canada's Handling of Tamil Boat People Case," 17 August 2010, (www.unhcr.org/4cba68ea0.html)

James Bissett is a Distinguished Fellow with the Canadian Centre for Policy Studies. He is the former Canadian Ambassador to Yugoslavia where he served from 1990–1992. He was also Ambassador to Bulgaria and Albania. He had diplomatic postings in the Balkans, London and in the Caribbean where he served as Canadian High Commissioner to Trinidad and Tobago from 1985 -1990. He was an Assistant under Secretary for Social Affairs at the Foreign Ministry in Ottawa. From 1985 -1990 Bissett was Director General of the Canadian Immigration Service. Upon leaving the Foreign Service he served from 1992 -1997 as the Chief of Mission for the International Organization for Migration in Moscow helping the government deal with the thousands of Russians returning from the former countries of the Soviet Union.

Protecting Boat People Reply to James Bissett

David Matas

James Bissett cites the country operation profile on Sri Lanka of the Office of the United Nations High Commissioner for Refugees (UNHCR) and suggests that it does not support my assessment of the human rights situation in Sri Lanka. That profile though is not an assessment of the human rights situation in Sri Lanka, but rather of the working environment for those assisting the internally displaced and voluntary returnees.

The UNHCR is an intergovernmental agency operating within Sri Lanka with the permission of the Government of Sri Lanka. Its operational constraints prevent it from making the clearcut statements about the human rights situation in Sri Lanka that non-governmental organizations operating outside of Sri Lanka are free to make.

Amnesty International USA on its website about Sri Lanka, the Minority Rights Group, in a report published in January 2011 "No war, no peace: the denial of minority rights and justice in Sri Lanka", and The International Crisis Group, in a report titled "Sri Lanka's North I: The Denial of Minority Rights" released in March of this year paint a much more detailed picture. They report disappearances, torture, detention without charge or trial, attacks on journalists and human rights defenders, violent crackdown on protests, extrajudicial punishments, intimidation and harassment, including sexual harassment and rape at the hands of the military, as well as impunity for perpetrators.

All this is done in an atmosphere of creeping Sinhalization, the denial of cultural, religious, and linguistic rights of the Tamil minority. The North and East remain under military occupation. Tamils displaced by the conflict are not allowed to return nor reclaim their properties. The UNHCR in its country profile notes this last problem and states politely "This complex situation requires adequate measures by the Government if it is to be resolved."

Mr. Bissett also refers to a UNHCR statement supporting Canada's handling of the arrival of the Sri Lankan Tamils aboard the Sun Sea. This reference is selective, ignoring UNHCR concerns about Canadian government legislative proposals for mandatory detention, multi-year detention and weakened processing prompted by this arrival[1].

Mr. Bissett is not clear why I referred to the Comprehensive Plan of Action. The reason is the need for an agreement between countries of traditional resettlement and countries of proximate refuge to prevent mistreatment by countries of proximate refuge.

At the time of the Comprehensive Plan of Action, the mistreatment was acute, including pushbacks—refusal to allow Vietnamese boat people to land. While thankfully today countries in the region will allow asylum seekers to land, they are treated, once landed, so poorly they make every effort to leave. There is as much a need for a regional agreement now as then.

The details of the Comprehensive Plan of Action no longer serve as a model, since resettlement in the region shou[2]ld be a possibility. The concept of the Comprehensive Plan of Action, though, an agreement between countries of proximate refuge and countries of traditional resettlement should serve as a model.

Mr. Bissett suggests that the UNHCR is opposed to the sort of regional agreement I have proposed. Yet that is not so. The UNHCR has made no statement on the subject. The Government of Canada has, as the original article notes, in favour of such a regional agreement. The trouble though is that there is no visible indication that the Government of Canada has done anything concrete to follow up that policy statement.

The Refugee Convention limits the refugee definition to fear. A Convention refugee is a person with a well founded fear of persecution. When it comes to addressing the root causes of flight though, lessening the basis for fear is not sufficient. Asylum seekers are motivated both by fear and hope, fear at home and hope for better abroad.

Since the civil war in Sri Lanka ended the basis for fear has abated, though far from ended. Regrettably, the basis for hope has also lessened.

As long as the civil war continued, the Tamil minority population had some hope that through victory, a negotiated settlement, or even a continuation of the one time existing cease fire, respect for their minority rights would be realized. The end of the civil war in Sri Lanka, coupled with a victor who shows not an ounce of magnanimity, offers immunity to the perpetrators, denies the victimization, and ratchets up minority oppression has meant for the Tamil minority of Sri Lanka an end of hope.

There are now more Sri Lankan Tamils outside of Sri Lanka than inside. Unless an effort at reconciliation is made, this diaspora will only increase.

More generally, to impact on asylum seeker flows, including the use of smugglers, it is not sufficient to address only fears, but also hopes, the hope that at home the situation will improve, as well as the hope for acceptance in countries of proximate refugee. Making the smuggled miserable in Canada addresses directly neither these hopes nor fears since, in spite of the enforced misery in Canada, hope, at the end of all that misery, for a better life in Canada remains. All the while hope at home remains dashed and hope in countries of proximate refugee is never born.

Mr. Bissett suggests that I fail to recognize that human smuggling has become a serious international problem. However, one must not confuse means with ends. I certainly reject the solution the Government of Canada has proposed through first Bill C-49 in the fortieth Parliament and then Bill C-4 and Bill C-31 in the forty first Parliament, even in its most recently amended form, as an effective means to end smuggling. The rejection of that means is though not a rejection of the objective of combative smuggling. What the article I wrote attempts to do is instead proposed a more comprehensive solution to the curse of smuggling.

Notes

1. See UNHCR Submission on Bill C 31 Protecting Canada's Immigration System Act May 2012 reflecting and updating earlier concerns with earlier versions of the legislation.

David Matas is an immigration, refugee and international human rights lawyer based in Winnipeg.

Special Section on South Africa

Contextual Introduction to UCT Refugee Rights Unit Special Section

Tal Schreier
University of Cape Town Refugee Rights Unit

Since the mid 1990's, South Africa has received a steady increase in the number of asylum seekers and in 2010 it registered the most individual asylum seeker applications globally,[1] confirming its position as an important destination for asylum seekers from throughout Africa and further afield. For the past fifteen years, the University of Cape Town's (UCT) Refugee Rights Unit has been providing free legal services to refugees and asylum seekers. Over this time, the Unit has beheld a South African refugee protection regime that excels on paper, with a laudable piece of domestic refugee legislation that promotes the local integration of an urban refugee population, however one that has failed in its implementation.

The government of South Africa has consistently been unable to carry out its legal mandate to efficiently and effectively conduct refugee status determinations and provide enabling documentation to refugees. It has also failed in promoting an overall environment of protection of the rights of refugees, and it regularly acts unlawfully. More concerning, in light of the direct implications on *refoulement,* the government has begun to implement a major shift in its refugee policy. It has embarked on the closure of Refugee Reception Offices in the major urban centres, such as Cape Town and Johannesburg, and is pursuing a policy to ultimately move the reception centres to the borders and to restrict the rights of asylum seekers, including their freedom of movement and right to work, pending the final determination of their claims.

With the above in mind, the following four papers in this [special section] focus on some of the specific protection gaps that the UCT Refugee Rights Unit has identified within this current fragile refugee protection regime in South Africa. The article on interpretation within the asylum determination process highlights but one of many critical procedural fairness obstacles that asylum seekers are faced with in presenting their asylum claims to the South African Department of Home Affairs, which is the department responsible for determining refugee status. The paper on family reunification for the refugee focuses on a basic fundamental refugee right that is not being properly safeguarded at this time in South Africa. The report on the challenges facing separated and unaccompanied foreign children in South Africa sheds light on the dire need for South African government officials to address the protection concerns of foreign children, be they refugees or not, within its borders. Lastly, the paper on how the UCT Refugee Rights Unit has attempted to redress the injustices done to the victims of xenophobic violence by the South African Police Services in the Equality Court focuses on refugees' basic fundamental right to equality and access to justice in South Africa.

The failure to provide protection to refugees in the various manifestations outlined in these papers violates the basic notion of surrogate protection, being the fundamental tenet of refugee law. South Africa has an obligation to provide a safe environment, where human rights are upheld, to refugees whose primary source of protection is unavailable to them. These protection gaps and the greater policy challenges that are on the horizon in South Africa can be said to be echoing the unfortunate shrinking asylum space that is currently occurring on the global scene.

Notes

1. "UNHCR Statistical Yearbook 2010," UNHCR, http://www.unhcr.org/4ef9c8d10.html.

Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the University of Cape Town Refugee Rights Unit

Tal Schreier

Abstract

Despite South Africa having a relatively well developed legal and policy framework for securing the rights of children, there are a number of critical protection gaps that exist in terms of the implementation of these frameworks for unaccompanied or separated foreign children by magistrates, social workers and Department of Home Affairs' officials in particular. This report focuses on the key challenges that the UCT Refugee Rights Unit has experienced in the protection of unaccompanied foreign children in the Western Cape province. In addition to setting out the legal and policy frameworks for dealing with foreign children in South Africa, the paper reviews some of the Unit's cases and highlights various challenges in the course of undertaking this work. The key protection gaps that are highlighted include difficulties with or lack of suitable entry by foreign unaccompanied or separated children into South Africa's child care and protection system, the unclear interface between the refugee regime and the child protection regime, inability to access legal documentation, and the poor level of knowledge of the legal and protection frameworks by government and frontline service providers

Résumé

Bien que l'Afrique du Sud ait une structure juridique et politique bien développée pouvant protéger les droits des enfants, il existe un certain nombre de failles critiques dans l'application des lois et des politiques de protection concernant les enfants étrangers non-accompagnés ou séparés de leur famille, et ce entre autre par les magistrats, les travailleurs sociaux et les agents du Département des Affaires Intérieures. Ce rapport se concentre sur les défis centraux auxquels sont confrontés l'Unité des Droits des Réfugiés de la University of Cape Town dans leur travail de protection des enfants étrangers non-accompagnés de la province de Western Cape. En plus de mettre en lumière les lois et les politiques portant sur cette protection, cet article présente des cas particuliers traités par l'Unité, et les défis auxquels elle a été confrontée pendant cette étude. Les failles principales soulevées ici consistent en la difficulté ou le manque d'accès des enfants étrangers non-accompagnés ou séparés de leur famille aux services de santé et de protection des enfants, l'articulation confuse entre le régime des réfugiés et celui de la protection des enfants, l'impossibilité d'accéder à la documentation légale, et le niveau déficient de connaissance des lois et des politiques de protection par les gouvernements et les services de première ligne.

Introduction

Background and Research Objectives

Increasingly, children from countries as far afield as Somalia, the Democratic Republic of Congo and Zimbabwe are migrating and crossing South Africa's borders without

their parents, relatives or care-givers. Some are abandoned by their care-givers or family members once in South Africa. Commonly referred to as unaccompanied minors, such children leave their home countries for a variety of reasons, including war and conflict, forced recruitment as child soldiers, harmful cultural practices, natural disasters and severe poverty. Some children are brought to South Africa by their parents or other adults for education or work opportunities and then left there, while some may be smuggled into the country clandestinely or brought by agents using false travel documents.

Children and adolescents represent the majority of migrants in Africa.[1] Unaccompanied children are some of the most vulnerable migrants and require special protection appropriate for their situation. Irrespective of their reasons for migrating or the means in which they arrive in South Africa, they are particularly vulnerable to violence and exploitation as a result of not having any social or economic protection from caregivers, and also due to their means of travel and stay, which often result in their existence outside the scope of national law enforcement.[2]

Despite South Africa having a relatively well developed legal and policy framework for securing the rights of children, there are a number of critical child protection gaps that exist in terms of the implementation of these frameworks for unaccompanied or separated foreign children by Magistrates, Social Workers and Department of Home Affairs'[3] officials in particular.

The Refugee Rights Unit (RRU) at the University of Cape Town has been providing free legal assistance to refugees[4] throughout Cape Town since 1998. The RRU has as its principal objective the facilitation of local integration of refugees through its rights-based programme of legal assistance, which is founded upon international refugee and human rights law and South Africa's Constitution[5] and Refugees Act.[6] The RRU represents a number of unaccompanied and separated foreign children in the Department of Home Affairs asylum application process and within Children's Court inquiries,[7] with the paramount principles of non-refoulement and the best interests of the child guiding its activities. In addition to its direct legal services work, the RRU has been involved in formulating protocols for dealing with foreign unaccompanied children in the Western Cape.[8]

This paper will focus on the key challenges that the RRU has experienced in the protection of unaccompanied foreign children in the Western Cape, including lack of suitable entry into South Africa's child care and protection system, the unclear interface between the refugee regime and the child protection regime, inability to access legal documentation for this category of children, and the poor level of knowledge of the legal and protection frameworks by government and frontline service providers. This paper will draw upon a considerable amount of research that has already been done on the legal framework and treatment of unaccompanied foreign children in South Africa. However, where other works have focused on the experiences of migrant children in the country's border regions, in particular the large numbers of older Zimbabwean children in the northern region of South Africa,[9] this paper will highlight the experiences of the RRU, the largest pro-bono legal services provider for refugees in Cape Town, which has a relatively smaller caseload of these matters primarily due to its geographic location, being far removed from South Africa's land borders.

In reviewing some of the recent children's matters that the RRU has been involved in, this paper will begin to explore to what extent the Western Cape province, which has been cited as the place where the acceptance of refugee children into the Children's Courts 'has been substantially higher than in the other eight provinces,'[10] is meeting the needs of unaccompanied foreign children in a meaningful manner.

ii. Structure of Paper

Part I of this paper will cover the current legal and policy framework for dealing with unaccompanied or separated foreign children in South Africa. It will include a brief review of the existing international, regional and domestic legislation and government policy documents pertaining to the treatment of these children, all of which demand their protection within South Africa. Lastly, it will include a review of the limited domestic case law on this topic. Part II will review the current *state* of protection of unaccompanied foreign children in South Africa. In particular, it will review some of the critical challenges in the child protection area in general and the particular vulnerabilities of foreign unaccompanied children, who may even demand a higher level of protection. This part will include the experiences of the RRU in its refugee and child protection activities via a review of cases in order to highlight the key challenges. Lastly, Part III of the paper will make conclusions on whether the protection needs of unaccompanied foreign children in the Western Cape are being met and offer some recommendations for the stakeholders for the way forward.

International and Domestic Legal and Policy Frameworks for the Protection of Unaccompanied Foreign Children in South Africa

Introduction

The protection of foreign unaccompanied children in South Africa is prescribed by both international and South African

law. The legislative and policy framework for the protection of unaccompanied foreign children in South Africa is quite extensive. Not only has South Africa signed and ratified many international treaties pertaining to their rights, its domestic legislation concerning children is intended to extend to all children in the country. This section will review in brief some of the key pieces of the legislative and policy framework applicable in securing the rights of foreign unaccompanied children in South Africa. As a number of unaccompanied foreign children may be refugees[11], the frameworks include the international and regional treaties pertaining to refugee protection.

An unaccompanied child is defined as "any person under 18 years of age who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so."[12] Unaccompanied refugee children have specific needs and rights as refugees and also similar needs for care, education and special consideration as other children. Unaccompanied foreign children, whether documented or not, who do not qualify for refugee status also have extensive child protection rights. Both of these categories of children, like South African children, are entitled to protection under national child protection laws and international laws and standards such as the UN Convention on the Rights of the Child[13] (UNCRC) and the African Charter on the Rights and Welfare of the Child[14] (ACRWC). The rights as outlined in these Conventions constitute the consensus of the international community and should not come second place to South Africa's asylum and immigration policies.

International and Regional Framework

The UNCRC is the most comprehensive international treaty pertaining to children. It confirms that all children should be given equal status regardless of their nationality and that all children must be protected from harm and from discrimination.[15] In terms of migrant children, the UNCRC requires states to take appropriate action to ensure that a child who seeks asylum or is considered a refugee receives protection and humanitarian assistance.[16] It also requires family tracing and family reunification whenever possible. Where a family cannot be traced, the child is then deemed protected by the receiving country and is entitled to the same rights as any child in that country.[17]

Similar to the UNCRC, the 1999 ACRWC comprehensively sets out the rights of children with an emphasis on universal norms and principles for the status and protection of children, with non-discrimination and the "best interests" of the child being paramount.[18] It also reinforces the rights of migrant children, in its "non-discrimination principle" in which it guarantees the rights of a child irrespective of the child's or his/her parents' or legal guardian's "race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."[19]

The ACRWC further provides that for a child seeking refugee status, the contracting state must cooperate with international organizations providing family tracing and reunification services, and if family reunification is not possible, the child should be accorded the "same protection as any other child permanently or temporarily deprived of his family environment for any reason."[20]

In addition to clearly providing that all states must prohibit and prevent the sexual exploitation[21] and trafficking[22] of children, the ACRWC most significantly refers to the special protection required in order to secure the rights of unaccompanied, undocumented foreign children. In this regard, Article 25 of the ACRWC states that:

> 1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;
>
> 2. States Parties to the present Charter:
>
> (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;
>
> (b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.
>
> 3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.[23]

The 1951 UN Convention Relating to the Status of Refugees[24] (hereinafter the "Refugee Convention") is the guiding international treaty that sets outs the rights of persons applying for refugee status and the responsibilities of signatory countries that grant asylum. While the Refugee Convention does not specifically mention the rights of children, many of its Articles and principles bear significance on children. Principally, the unanimously adopted recommendation in the Preamble to the Refugee Convention on the Principle of Unity of the Family recognizes the family

as the "natural and fundamental group unit of society" and emphasizes that the essential right of a refugee to a family is constantly being threatened. This principle supports the view that states are required to take the necessary measures to protect the family unit by "protecting refugees who are minors, especially unaccompanied minors and girls with special reference to guardianship and adoption."[25] Furthermore, Article 3 of the Refugee Convention stipulates that the provisions of the Convention should be applied without discrimination, which should be read to include discrimination on the basis of age. The fundamental principle of non-refoulement (non-return) therefore should apply to refugee children in the same manner as it would apply to adults. This principle provides that a refugee may not be returned to a place where his or her life is threatened due to race, religion, nationality, political opinion, or membership of a particular social group.[26]

The 1969 Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa[27] (hereinafter the "OAU Convention") is the regional treaty on the rights of refugees and obligations of African State parties. Like the 1951 Refugee Convention, the OAU Convention does not contain specific rights for children. However, it does include a broader refugee definition, which is significant in terms of helping to assess whether a foreign unaccompanied child would qualify for refugee status in South Africa. The OAU refugee definition offers special protection to individuals, and therefore also unaccompanied foreign children, who have fled from their home countries due to war, civil disturbances and general unrest and violence.[28]

Domestic Legislative Framework

In South Africa, domestic legislation provides significant protection for foreign unaccompanied children, largely in accordance with international norms. The principal legislation in this respect consists of the Constitution of the Republic of South Africa ("the Constitution"),[29] the Children's Act[30] and the Refugees Act.[31] The Constitution provides refugees and asylum seekers with the most direct access to securing their rights. Most of the rights set out in the Constitution are not exclusively applicable to South African citizens; rather they extend to all foreign nationals living within its borders[32] including foreign unaccompanied children.

Section 28 of the Constitution sets out the rights of all children in South Africa, including the "right to family or parental care or to appropriate alternative care when removed from the family environment,"[33] the right to "basic nutrition, shelter, basic health services and social services,"[34] and the right to "be protected from maltreatment, neglect, abuse or degradation."[35] The Constitution also provides that "a child's best interests are of paramount importance in every matter concerning the child."[36]

South Africa's Children's Act[37] of 2005 gives effect to the constitutional rights of children as set out in section 28 of the Bill of Rights[38] and is the primary source of protection for *all* children in South Africa, irrespective of their origin, status or nationality. Unfortunately, the Children's Act does not specifically make any reference to foreign or refugee children, and the effect of this omission is that it arguably leads to a more exclusionary interpretation of the Act, causing many foreign children to fall through the cracks rather than squarely within the robust child protection regime in South Africa.

The South African Refugees Act of 1998[39] reflects many of the standards of protection set out by the 1951 Refugee Convention and the OAU Convention. In terms of rights of unaccompanied children, the Refugees Amendment Act of 2008[40] at section 21(A) states as follows:

> 21(A)(1) Any unaccompanied child who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care contemplated in the Children's Act, 2005 (Act No. 38 of 2005), must—
>
> *(a)* be issued with an asylum seeker permit in terms of section 22; and
>
> *(b)* in the prescribed manner, be brought before the Children's Court in the district in which he or she was found, to be dealt with in terms of the Children's Act, 2005.[41]

Unfortunately, to date, the 2008 Refugees Amendment Act has not yet come into force, as the required regulations that would give effect to the Act still have to be promulgated by the Minister of Home Affairs. The lack of regulations, or clear legislative guidance on this issue, perpetuates the critical protection gap in terms of the proper treatment of unaccompanied foreign children in South Africa. In July 2011, the Chief Director of Asylum Management in the Department of Home Affairs directly requested that civil society members provide input regarding procedures for dealing with unaccompanied foreign children. In particular how to define an unaccompanied foreign child, whether there are categories of unaccompanied children, and what would a proper referral system entail between the Department of Home Affairs and the Department of Social Development[42] once an unaccompanied foreign child was identified.

In response to the above request, the UCT RRU made submissions on how the particular regulation that will

give meaning to section 21A of the Amended Refugees Act should be drafted. The UCT RRU observed that any proposed regulation must "clearly delineate the role of the Department of Home Affairs, the Department of Social Development and the Children's Court … in order to ensure that unaccompanied foreign children are properly dealt with and not left unattended, with lack of access to the services that they require and possibly at risk of being exploited or detained."[43]

In its submission, the RRU highlighted a number of other critical issues, including the need for Home Affairs to put into place mechanisms to be able to properly identify separated children,[44] the need to set up a referral system between the Departments of Home Affairs and Social Development, which should invariably include a mechanism for the recording of each child referred and which must be done without delay, and that a Children's Court inquiry, as contemplated in the Children's Act, should be opened for every unaccompanied foreign child. The RRU emphasized that it is the responsibility of the Children's Court, rather than the social worker alone, to make the necessary determination of whether a child is unaccompanied and in need of care and protection. As such, the Court should also be assisted by a legal opinion from an expert refugee lawyer, to determine whether the child appears to have a refugee claim. If so, then the Court should order that the child be documented as an asylum seeker and then a child-sensitive refugee status determination hearing can take place.

Relevant Case Law

The South African courts have made some significant pronouncements on the rights of unaccompanied foreign children in South Africa, thus in theory removing any doubt of the position of these children within South Africa's borders. In the 2005 case of *The Centre for Child Law v Minister of Home Affairs & Others,45* the High Court of South Africa held that South Africa has a direct responsibility to care and protect unaccompanied foreign children. The case dealt with several unaccompanied foreign children being detained for lengthy periods of time in Lindela,[46] accommodated together with adults, and who stood to be deported to their country by truck. On the recommendation of the *curator ad litem,*[47] who was appointed on behalf of children, the children were transferred to a place of safety pending finalization of their Children's Courts inquiries, but the social workers assigned failed to conduct any further investigations into the children's circumstances.

The Court held that the government officials' behaviour constituted a serious infringement of the children's fundamental rights and that the government's failure to act in the best interests of the children was shameful.[48] It further stated that a crisis existed in the handling of unaccompanied foreign children in South Africa; that such children were treated in a horrifying manner; exacerbated by an insufficiency of resources, inadequate administrative systems and procedural oversights.[49] The Court was abundantly clear that all unaccompanied foreign children found in need of care should be dealt with in accordance with the provisions of the law,[50] including asylum seeker and refugee children, meaning that these children *must* be brought before a Children's Court for an inquiry.[51]

In 2009, the Aids Law Project[52] made an application to the High Court to appoint a *curator ad litem* for 56 named foreign children and any others that would be identified, many of whom were unaccompanied or separated from their care-givers, who were staying at the Central Methodist Church in Johannesburg. The Curatrix provided the court with a comprehensive report outlining her findings into the conditions of the unaccompanied children and her recommendations for the protection of these children. She confirmed that "there needs to be a more effective system for unaccompanied children as they enter the country"[53] and she strongly called for the "full implementation of the standard operating procedures for the identification, documentation, tracing and reunification of children."[54]

In the most recent case of *Shaafi Daahir Abdulahi and others v. Minister of Home Affairs and others*[55] in the High Court, the Department of Home Affairs' Refugee Reception Office refused to allow a seventeen year old unaccompanied foreign Somali child to apply on his own for asylum in the absence of a parent or guardian or a Children's Court order.[56] This was after a social worker had undertaken a home visit to the room that the child shared with some other unaccompanied Somali youth, and came to the conclusion that the child was not in a vulnerable position and decided not to open a Children's Court inquiry as he did not believe that the child qualified as a child in need of care and protection.[57] In the urgent interim application, however, the High Court ordered that the child be documented by the Refugee Reception Office with an asylum seeker permit, pending the finalization of the matter.[58] This case demonstrates an unfortunate misunderstanding that officials may have about foreign unaccompanied or separated children, in this case an *older* foreign child, who although may be able to care for himself, perhaps even find some informal work, is still extremely vulnerable without any documentation[59] legalizing his or her stay in the country.

To conclude, there are a range of legal provisions and precedents available to apply to the protection of unaccompanied or separated foreign children, and South Africa's domestic law provides for comprehensive legal protections for this vulnerable group. Regrettably, the challenges to the

realisation of unaccompanied foreign children's rights lie in the implementation of the norms and standards enshrined in the law. This is particularly so where there are challenges to the child protection system as a whole in South Africa, in particular with regard to the resourcing of the system itself.

Domestic Policy Framework

Although South Africa has signed and ratified a number of significant international and regional treaties and has an extensive domestic legislative framework in place to protect unaccompanied or separated foreign children, the approach on the ground is far from ideal. This is mainly due to the lack of knowledge and understanding of the legislative provisions by the key stakeholders meant to protect vulnerable unaccompanied foreign children. While policy development for the management of unaccompanied foreign children has been progressing over the past several years,[60] the new national Department of Social Development *Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa* (hereinafter the "DSD Guidelines") only surfaced[61] in 2011.

As background, in 2007/8, the UCT RRU developed standard operating procedures for dealing with unaccompanied foreign children, for all stakeholders in the Western Cape.[62] That same year the UCT RRU, in conjunction with the Department of Social Development,[63] the UNHCR,[64] and the South African Red Cross Society,[65] trained over 150 social workers from throughout the Western Cape on these standard operating procedures. Remarkably, at that time, the only publicly available government policy document on unaccompanied foreign children[66] not only incorrectly referred to them as "illegal" and thus outside the national child protection system, but also provided merely superficial guidance[67] to relevant officials on what to do if they encounter such a child.

More recently, however, the National Social Development Children's Act Practice Note No. 2 of 2011,[68] clearly confirms that the Children's Act defines a child as any person under the age 18; that "all foreign children whether documented or not who are reported to be in need of care and protection must be treated or assisted like South African children;" and, that "all the provisions of the Children's Act apply to foreign children."[69]

The 2011 DSD Guidelines refer in detail to the international and domestic legal standards that must be met for the protection of unaccompanied or separated foreign children.[70] It further sets out detailed, however not exhaustive, steps to follow when assisting such children, from identification stage to assessment and documentation stage, through to temporary safe care and then finally to formal placement and options for durable solutions.[71] Aside from these new but not readily available DSD Guidelines, currently there is no other official document in the public domain on foreign unaccompanied or separated children in South Africa.

In conclusion, a policy framework in South Africa finally exists in support of the rights of unaccompanied or separated foreign children, regardless of their documentation or status. It is the wide gap between this new framework and its application or implementation by the relevant government officials that is the most critical challenge to the effective protection of this extremely vulnerable group of migrants. The next section of this paper will focus on the various manifestations of this challenge, as highlighted in cases in which the UCT RRU appeared on behalf of unaccompanied or separated foreign children both within the Department of Home Affairs asylum process and before the Children's Court.

Challenges to Effective Protection

The UCT RRU has provided legal representation to unaccompanied or separated refugee children for the past decade. The key protection gaps that have been identified by the Unit include the lack of suitable entry pathways into South Africa's child care and protection system, the unclear interface between the refugee regime and the child protection regime, the lack of access to legal documentation, and the poor level of knowledge of the legal and protection frameworks by government and frontline service providers. This section of the paper will review some of the RRU's cases and highlight various experiences of the RRU in the course of undertaking this work.

Entry into the Child Protection Regime

The court cases discussed in Part I of this paper were brought by civil society members on behalf of foreign unaccompanied or separated children who were not able to suitably access the child protection system of South Africa. The lack of sufficient knowledge by social workers and magistrates[72] of the legal framework and procedures pertaining to unaccompanied foreign children contributes directly to this problem. In addition, the confusion amongst Department of Home Affairs' officials, social workers and magistrates regarding the interface between the refugee regime and the child protection system is another factor. Lastly, the attitudinal barriers of some government officials must be factored in, as it is difficult to understand why vulnerable children's rights are simply ignored on the basis that they are not South African.[73] These interconnected issues, which ultimately result in foreign children not being able to access the child protection regime in South Africa, will be dealt with together in this section.

It should be noted upfront that difficulties in identifying unaccompanied foreign children in South Africa's urban areas means that these children are excluded from the national care and protection systems. The DSD Guidelines confirm that "due to their particular circumstances, in some cases separated and unaccompanied children may be fearful or distrustful of authorities … [and] this makes them extremely hard to reach by the police and social workers."[74]

The DSD Guidelines, at Section 6.1 specifically state that "unaccompanied [foreign] children should be assumed to be children 'in need of care and protection'[75] and may be placed in temporary safe care." [76] Despite this clear statement, the UCT RRU has observed numerous blockages or refusals by social workers to open up Children's Court inquiries on behalf of foreign unaccompanied or separated children. As was the case in the *Shaafi* matter, the refusal to approach the Children's Court often results from the conflict or what the UCT RRU refers to as 'the stand-off' between the refugee regime and the child protection regime, whereby the Department of Home Affairs refuses to assist the unaccompanied foreign child without a Children's Court order, and the social worker refuses to open up a Children's Court inquiry as he or she does not feel that the child in question is "in need of care and protection."[77]

In the following UCT RRU case, the matter did not even reach the purview of the Children's Court. This case involved a 15 year old orphaned Burundian child who travelled alone to South Africa in 2010 in search of his cousin, ended up in Durban where he met the cousin's sister, and subsequently moved to Cape Town to join his cousin. The UCT RRU referred the child to a social worker on or about August 2011 as the Department of Home Affairs' Cape Town Refugee Reception Office refused to extend the child's asylum seeker permit.[78] Upon request of the UCT attorney, the social worker conducted a home visit and thereafter prepared a report, addressing the guardianship issue and concluding that the boy's cousin "is capable to care for the child concerned; therefore he can remain the guardian and primary care giver to the child concerned."[79] This report was provided by the UCT attorney to the Cape Town Refugee Reception Office, who refused to accept it as the basis for extending the child's asylum seeker permit, stating that they required a formal Children's Court order in order to do so.[80] When the UCT attorney conveyed this feedback to the social worker, the social worker provided a lengthy written response, which included the following reasons why she could not further assist:

> If a Court Order is required, it means that I must open a Children's Court Inquiry in order to get a Temporary Safe Care Order, placing the child in temporary care of Jonathan. To place a child in someone's Safe Care is not easy. I refer to the Children's Act where the Safety Parent has to undergo a full screening to determine his suitability to care for a child as well as a Police Clearance Certificate. His name has to be cleared on the Child Protection Register!
>
> If in his case, the parents are deceased, I need death certificates for both parents. If no one can give me a death certificate, I have to refer the matter to International Social Services that needs to make contact with someone in his country to obtain these certificates. That is a process that can take 6 months to one year.
>
> Once Court is opened, I am responsible to finalise the matter within 90 days. Finalising entails an in-depth investigation into the caregiver's circumstances and suitability. The child concerned's wellbeing must be investigated in—depth. The caregiver must go through extensive training at this office. I also query the possibility to place the child in foster care with Jonathan if he is only an Asylum Seeker.
>
> After speaking about this case in length with Department of Social Development it appears that at this stage, getting a Court Order is not the best route to follow.
>
> According to the Dept. official, she agrees with above information and is of opinion that if I do not follow the correct procedure once Court is opened, I place myself in a position that can bring me in a lot of trouble.
>
> To get a Court Order for the purpose of the minor getting an extension of his Asylum Seeker paper is not a reason to open Court. The Dept. official queries the fact that this boy has a Permit—based on what reasons was this Permit initially issued? Why now does he need a Court Order? I recommend that you go back to Home Affairs with my report and negotiate with them to issue the permit based on my report. Previously I had a similar case, and Home Affairs issued a permit to a young boy based on my report.[81]

While the social worker in this case demonstrated that she had a good grasp of the issues involved, her comments provide insight into the critical state of affairs that has resulted from lack of detailed regulations pertaining to the Amended Refugees Act, as described in the legal framework section above, and/or lack of specific operational guidelines for government officials on how to deal with unaccompanied or separated foreign children seeking asylum. Without any directives on point, the Department of Home Affairs Cape Town Refugee Reception Office is loath to document (or extend a permit) for a child not in the care of their parents, without a Children's Court order, and thus continues

to refer matters to the Department of Social Development for a Children's Court order.

The UCT RRU and the author assert that a social worker may not, as in the above case, unilaterally refuse to refer a matter to the Children's Court as it is for the magistrate of the Children's Court to determine—with the assistance of a social worker's report and other investigations—a child's circumstances i.e. whether the child is in need of care and protection, whether or not to place the child in a place of safety, or to whom to assign care of the child.

The DSD Guidelines provide sufficient guidance on the initial assessment phase that a social worker must undertake when a child is identified as separated or unaccompanied. In this regard, the Guidelines state the following:

> Children who are identified as separated or unaccompanied should be referred to a social worker or police official. Unaccompanied children should be assumed to be children 'in need of care and protection' and may be placed in temporary safe care. If the current care circumstances of separated children do not put them at immediate risk, separated children may be assessed by a social worker without being placed in temporary safe place. However if the separated child appears to be a victim of an exploitative or abusive relationship, he or she should immediately be placed in temporary safe care.[82]

The above directives suggest that once a child is referred to a social worker, investigations by the social worker are to take place (i.e. an obligation exists) in order to determine if the child is in need of care or protection. In this regard, Regulation 54 of the Children's Act[83] is significant, in that it squarely addresses the situation where an investigation by the social worker is pending or underway. The regulation instructs that the matter, even though it is only under investigation, must be brought before the court for a determination.[84]

Furthermore, it is argued that in situations where the court ends up determining that a child is *not* in need of care or protection, the court may in terms of its powers set out in Section 46[85] read together with Section 23 of the Children's Act, order that care of the concerned child be granted to any person having an interest in the care, well-being or development of the child, taking into consideration the best interests of the child, the relationship between the child and the applicant, and any other factor.[86]

The above case clearly brings to the fore one of the key areas of concern of the UCT RRU of unaccompanied foreign children not readily being able to enter the child protection system, due to government officials' blockages and/or a lack of understanding of the legal frameworks, procedures and ultimately the rights of this vulnerable category of migrants. The most worrying result is that simply leaving a child to be undocumented can lead to numerous problems, such as the unlawful discontinued enrolment in school and lack of proper access to basic services like emergency or health care services.

Another disturbing case that recently came to the attention of the UCT RRU and that highlights the issue of officials' dire lack of knowledge of the framework pertaining to foreign children, was that of a Children's Court Commissioner in Mossel Bay[87] who refused to acknowledge the rights of an abandoned foreign child. In this matter, a social worker from the DSD district office in Mossel Bay contacted the author in July 2011 for advice about a case she was involved in. She explained that a Mozambican mother gave birth to a child in a local public hospital and abandoned the child, stating that she was going to go back to Mozambique with her two year old son. Upon advice of the author and on the social worker's conclusion that the abandoned child was in need of care and protection, a Children's Court Inquiry was opened. The magistrate requested that the social worker attempt to track down the father, whom the mother said was South African, but she did not know his whereabouts or his personal details. The magistrate refused to acknowledge that the infant child was South African as no clear evidence existed to prove this.

Unfortunately, despite the report of the social worker that the mother wanted nothing to do with the child and would abandon the child, the magistrate refused to find the child in need of care or protection and instructed the mother that she must take the child with her to Mozambique, going so far as to hand the mother and child over to immigration officials in order to effect a deportation. The social worker later learned that the mother in fact abandoned the infant shortly after re-entering her country of origin. The magistrate clearly decided unlawfully that the foreign child, abandoned in South Africa, was not entitled to care and protection within South Africa. The case demonstrates either a very ignorant magistrate as to the legal and procedural frameworks pertaining to foreign children in South Africa, or a particularly xenophobic one. The social worker on the other hand must be commended for having made efforts to properly inform herself of the legal entitlements of the child and the author understood that she also argued strongly for the care and protection of the infant child in this case. Certainly, the fact that this matter took place in a small town, far removed from the well-resourced Cape Town may have contributed to this unfortunate outcome, where no legal representation was provided to the mother *or* child and where there was no civil society organization that could have readily intervened.

Even in Cape Town, where the UCT RRU have for many years been involved in refugee and migrant children matters in magistrates' courts, as well as working closely with numerous social workers of the Department of Social Development *and* where the actual numbers of such vulnerable children[88] is relatively manageable, the obstacles as described above continue to persist.

In response to the aforementioned resistance that the UCT RRU has experienced from social workers in trying to open up Children's Court inquiries, one of the senior attorneys of the UCT RRU recently approached the court independently as an interested party[89] to open up an inquiry on behalf of an orphaned 14 year old foreign child who left the Democratic Republic of Congo to join his older adult brother in Cape Town. The Department of Home Affairs' Refugee Reception Office had refused to provide the boy with an asylum seeker permit (even as a dependant of his brother) and the social worker refused to open up a Children's Court inquiry for him, as she determined that the boy was not in need of care or protection, since he was being well cared for by his older brother.

The UCT attorney accordingly approached the Children's Court with the brother of the boy, and under section 53 of the Children's Act,[90] applied to the court to open up a Children's Court inquiry directly and without a social worker. The clerk of that court was initially resistant, but in the end allowed the attorney to proceed. At this time, however, the investigations into the matter are still pending. UCT argued in this case, that pursuant to Section 23 of the Children's Act,[91] the court, in determining the best interests of the child, can assign the care for the child to an interested person—in this case the brother of the child—by order of the court. Such an order would ensure that the undocumented foreign child who is being cared for by an extended member of the family, and who appears to have a refugee claim can be documented by the Department of Home Affairs either on his own as an asylum seeker or as a dependant of a refugee.

Legal Documentation

One of the most challenging aspects in the protection of foreign unaccompanied or separated children in South Africa is the issue of legal documentation. Where a child appears to have a refugee claim, it is more readily understood that the child should be documented as an asylum seeker at the Department of Home Affairs' Refugee Reception Office. As discussed above, at this time however, the major barrier to this is the refusal of the Department of Home Affairs to allow for the unaccompanied or separated child's application for asylum without a Children's Court order[92], and the social workers' refusals to open up Children's Court inquiries. Interestingly, in the past, when seemingly less was understood by the relevant officials about the legal frameworks, almost all foreign children—irrespective of whether they had a genuine refugee claim or not—were documented as asylum seekers. In most of these cases, the Department of Home Affairs simply postponed or delayed the finalization of the asylum claims until the child turned 18, partly as a result of their confusion or lack of knowledge regarding how to deal with such cases.[93]

The most significant challenge with regard to legal documentation relates to unaccompanied foreign children who do not appear to have a genuine refugee claim. According to the UNHCR Guidelines on the Protection and Care of Refugee Children[94], the best interest of an unaccompanied foreign child who has been denied refugee status (or who may not qualify for refugee status), requires that the child *not* be returned to his or her country of origin, unless, prior to the return: a parent has been located in the country of origin who can take care of the child and the parent is informed of all the details of the return; or, a relative, or other adult care-giver, government agency or child-care agency has agreed and is able to provide immediate protection and care for the child upon arrival. Accordingly, it would follow that if a foreign child cannot be returned to his or her country of origin, long term planning for the child needs to take place in South Africa.[95]

The UCT RRU advocates that a critical aspect of long-term planning for a foreign child who is not a refugee is the child's documentation needs. Unfortunately, as confirmed by UNICEF, in South Africa there is a serious "lack of accessible documentation for unaccompanied minors … [as] at present there are limited options for documentation of unaccompanied minors according to the Children's Act, the Refugees Act and the Immigration Act."[96] The DSD Guidelines, in the *Assessment and Documentation* section, state that when any unaccompanied or separated foreign child is identified:

> … the child should be immediately registered and documented. This process should be conducted in an age-appropriate and gender sensitive manner, in a language the child understands, by professionally qualified persons. Assessment and documentation should include the compilation of key personal data and further information in order to meet the specific needs of the child and to make a plan for his or her future, This information includes the identity and location of family members, the reasons for being separated or unaccompanied, and an assessment of particular vulnerabilities and protection needs.[97]

The above provisions, while indeed comprehensive, only provide social workers with guidance on the extent of

information that should be recorded about the child, while failing to specifically indicate what type of document the child should have that could legalize their stay in South Africa, until all investigations including family tracing are finalized, and particularly if no reunification in the country of origin can take place. This is a serious oversight as often a child that does not have a refugee claim (and thus does not obtain an asylum seeker document or gets rejected within the asylum adjudication process) ends up for years having nothing but a copy of his or her Children's Court order as the only form of identification in South Africa. Not only does this violate a child's basic right to identification[98], this leads the child to "experience challenges with taking matriculation exams, entering into sport competitions"[99] and could even make them vulnerable to labour exploitation.

This is an area that needs further advocacy in light of the fact that many foreign children in South Africa *cannot* easily be reunified with their families in their country of origin, and/or the safe return to the country of origin cannot take place due to lack of secure of concrete arrangements for care and custodial responsibilities in the country of origin.[100] This means that such children must be placed into formal long-term care in South Africa, and the UCT RRU asserts that these children must be provided with some form of proper legal documentation, enabling their stay in South Africa.

The above problem is certainly heightened when foreign children that have been placed in long term care in the South African child care system, but do not have any South African identification documents (or perhaps had an asylum seeker permit that was issued many years ago and never properly extended, and would in any event not qualify for refugee status), turn 18 and must be removed from the child care system.[101] In such situations, the UCT RRU proposes that a possible option is to apply to the Minister of Home Affairs in terms of section 31(2)(b) of the Immigration Act[102] for a Ministerial Exemption.[103] The Curatrix in the *Aids Law Project* case recommended the same approach in her report. More specifically, that:

> … under [section 31(2)(b) of the Immigration Act] , the Department of Home Affairs would be able to make provision for a system where unaccompanied children are documented and provided with legal papers. The essential aspect for children is that they would not be stateless and could be granted some of the rights that permanent residents acquire, in particular those that will assist them to enjoy the protection that the Constitution affords to children. While the Children's Court procedure is generally the best way to deal with unaccompanied children, it may not be suitable for children who are already 17 years of close to turning 18 years old. Once they attain 18 years, they are no longer children and they will be out of the care system and undocumented. It would be unwise to let these young people wander within the Republic without any documentation.[104]

It remains to be seen how such an exemption application to the Minister would be received, as to date, the UCT RRU has not had response from the Minister in any of its current exemption application cases. There does exist a clear precedent, however, in terms of the Minister's use of this exemption mechanism to grant temporary or permanent residence to other migrants on humanitarian and compassionate grounds.[105]

Conclusions

This paper has demonstrated that while the policy and legal frameworks to protect the basic rights of foreign unaccompanied or separated children are in place in South Africa, it is in the implementation of these rights that there is often a denial of services to or confusion about the rights of different categories of migrant children. This report has further attempted to describe the situation in and around Cape Town having distinguished this region from the borders and rural areas of South Africa. Despite the fact that Cape Town is relatively well-resourced in terms of the number of NGOs servicing refugees and migrant children, the challenges that exist in this area, as evidenced by the above case studies from the UCT RRU, provide a bleak picture of these children's rights continuing to be violated, in particular in the areas further afield from Cape Town.

It is acknowledged that South Africa experiences what is referred to as a mixed flow of migrants, which can be defined as a combination of different categories of migrants arriving into South Africa, each with different incentives and motivations for their migrations and each with varying levels of vulnerability. In this context, unaccompanied foreign children represent one of the most vulnerable categories of migrants, and "active identification and referral of unaccompanied children is often necessary … in order to intercept children who are trafficked, exploited, or simply unaware of the possibility of seeking protection or assistance in the new country."[106]

It is crucial that the government of South Africa is aware of the particular issues covered in this report in particular the areas in which children's rights are being severely compromised or violated. While the new DSD Guidelines, i.e. the pronouncement of policy by the government of South Africa on unaccompanied or separated foreign children is welcome, in other ways the government is demonstrating that its main objective is to actually prevent migration at all costs into the country, rather than to focus on the protection needs of this vulnerable group.[107] Certainly, the

government of South Africa should address the prevention of unsafe migration, such as trafficking, and focus on addressing the root causes of migration. However, it must also strive to create an environment that would allow foreign children growing up in South Africa good prospects of personal development and decent standards of living.

The recent introduction of the DSD Guidelines, which impressively set out the best practice guidelines for dealing with unaccompanied and separated foreign children in South Africa is a significant step towards addressing many of the concerns raised in this paper; however the UCT RRU urges government to widely publicize and provide ongoing training to all relevant stakeholders on these important Guidelines. The UCT RRU further urges the Department of Home Affairs to gazette regulations, to operationalize the Refugees Amendment Act, and provide the much-needed legislative guidance to its officials on procedures to follow when dealing with unaccompanied and foreign children. Lastly, it goes without saying that extra resources should be allocated to government social workers in order to build their capacity to meaningfully apply the DSD Guidelines in favour of the foreign children that they are obligated to protect.

Notes

1. In Central Africa, in the Great Lakes region, and in the East and Horn of Africa regions, children and adolescents constitute 56 per cent of people of concern to UNHCR. In 2009, more than 18,700 asylum applications were lodged by unaccompanied and separated children in 71 countries, constituting 4 per cent of all claims lodged in these countries. Data also indicated that it is often unaccompanied or separated boys who seek asylum, in particular in industrialized countries where about two-thirds of all unaccompanied and separated children are male, and that the number of those seeking asylum was on the rise as compared to only two or three years ago. In developing countries, however, the sex distribution was more balanced. Note: Since 2006, UNHCR has systematically collected data on unaccompanied and separated children claiming asylum including their age, sex and country of origin (the latter since 2007). Despite these efforts, the global number of unaccompanied and separated children who annually submit individual asylum claims remains unknown, largely because of the different registration mechanisms in place as well as the fact that certain countries, such as Canada, South Africa, and the United States of America, do not provide this information. See UNHCR Statistical Yearbook 2009, accessed on 31 October 2011 at http://www.unhcr.org/4ce532ff9.html
2. Liv Feijen, "The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe," *Refugee Survey Quarterly,* UNHCR 2009 at 3, accessed on 31 October 2011 at http://rsq.oxfordjournals.org/content/27/4/63.full.pdf+html?sid=2dfc56b0–2206–40df-a119-eb48390b8d42.
3. The Department of Home Affairs is responsible for the adjudication of asylum claims and the issuance of refugee documentation to asylum seekers and recognized refugees.
4. The RRU provides legal assistance to refugees and asylum seekers, whether documented or undocumented. In South Africa, a refugee is someone who has been granted refugee status from the Department of Home Affairs (DHA) and an asylum seeker is someone who has lodged an application for asylum with the DHA which has not been finalized. For the purposes of this paper, the term refugee shall refer to refugees or asylum seekers (undocumented or not) who have approached the RRU for legal protection.
5. Act 108 of 1996.
6. Act 130 of 1998.
7. A Children's Court inquiry refers to a case brought before the Children's Court in terms of the South African Children's Act 38 of 2005, for example, when a social worker makes investigations into and reports to a Magistrate on whether a specific child is in need of care and protection.
8. This has provided the RRU with the opportunity to engage many key stakeholders and train social workers in the legal and policy frameworks pertaining to unaccompanied foreign children in South Africa. The training was undertaken in conjunction with key partners, such as the Department of Social Development, the International Organization for Migration, the UNHCR and the South African Red Cross Society. In 2008, the UCT RRU trained approximately 150 social workers and in 2011, 120 social workers, from throughout the Western Cape Province.
9. See for example Cerise Fritsch, "The plight of Zimbabwean unaccompanied refugee minors in South Africa: a call for comprehensive legislative action," *Denver Journal of International Law and Policy* (Fall, 2010), 38 Denv J Intl L & Pol'y 623, available at http://findarticles.com/p/articles/mi_hb3262/is_4_38/ai_n55121899/?tag=content;col1; or Save the Children UK, "Children crossing borders: Report on unaccompanied minors who have travelled to South Africa," (July 2007), accessed on 15 October 2011 at http://www.savethechildren.org.uk/en/docs/children-crossing-borders.pdf; or Ingid Palmary, "For Better Implementation of Migrant Children's Rights in South Africa," (UNICEF 2009 Report), accessed on 15 October 2011 at http://www.unicef.org/southafrica/SAF_resources_migrantchild1.pdf, which draws mainly upon research conducted in Musina, Komatipoort and Johannesburg; or "Children Crossing Borders: Report on unaccompanied minor who have travelled to South Africa," (Save the Children UK 2007), accessed on 15 October 2011 at http://www.savethechildren.org.uk/en/docs/children-crossing-borders.pdf; and, CORMSA, "Report to the Government of the Republic of South Africa on the Humanitarian Crisis in Musina,

South Africa, 23 February 2009, " accessed on 15 October 2011 at http://www.cormsa.org.za/wp-content/uploads/Resources/Crisis_in_Musina.pdf.

10. Jeff Handmaker et al., *Advancing Refugee Protection in South Africa* (New York: Berghahn Books, 2008), 196.
11. This paper focuses on the experiences of mainly refugee children, as the mandate of the UCT RRU is to ensure protection for genuine refugees, and the author is drawing mainly on her experience within the refugee context. Although unaccompanied or separated refugee children may be arguably the most vulnerable, one cannot ignore that all migrant children are beneficiaries of special rights and should be protected because they are children.
12. United Nations High Commissioner for Refugees, "Refugee Children: Guidelines on Protection and Care 1994," accessed on 10 August 2011 at http://www.unhcr.org/refworld/docid/3ae6b3470.html, 121. An unaccompanied or separated child is not defined in South African law.
13. *Convention on the Rights of the Child,* 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990), hereinafter the UNCRC.
14. *African Charter on the Rights and Welfare of the Child,* 11 July 1990, OAU (Doc. CAB/LEG/24.9/49, (entered into force 29 November 1999), hereinafter the ACRWC.
15. Art 12 of UNCRC.
16. Art 22(1) of UNCRC.
17. Art 22(2) of UNCRC.
18. Art 4 of ACRWC.
19. Art 3 of ACRWC.
20. Art 23(3) of ACRWC.
21. Art 27 of ACRWC.
22. Art 29 of ACRWC.
23. Art 25 of the ACRWC.
24. *Convention Relating to the Status of Refugees,* 189 U.N.T.S. 150, (entered into force 22 April 1954), hereinafter the Refugee Convention.
25. Palmary, "For Better Implementation," 9.
26. Art 33 of the Refugee Convention.
27. *Convention Governing Specific Aspects of Refugee Problems in Africa,* 1001U.N.T.S. 45, (entered into force 20 June 1974), hereinafter the OAU Convention.
28. Art 1(2) of the OAU Convention states "the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."
29. Act 108 of 1996, hereinafter the Constitution.
30. Act 38 of 2005.
31. Act 130 of 1998.
32. In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* ((2002 (8) BCLR 891 (T)), the court confirmed that the Bill of Rights of the Constitution applies to all persons except with express exceptions (at 897C-D).
33. Sec 28(1)(a) of the Constitution.
34. Sec 28(1)(b) of the Constitution.
35. Sec 28(1)(c) of the Constitution.
36. Sec 28(2) of the Constitution.
37. Children's Act No 38 of 2005.
38. Sec 7(1) of the Constitution confirms that the Bill of Rights is "the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." Section 7(2) states that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights."
39. Act 130 of 1998.
40. Act 33 of 2008.
41. Ibid., section 21(A). This amendment replaced the principal Act's section 32, which dealt with an unaccompanied child in terms of the previous Child Care Act, 74 of 1983.
42. The Department of Social Development is the national government department mandated with ensuring the protection and appropriate care of children in South Africa. Its social workers are the frontline service providers of the Department, who have the statutory authority to conduct investigations into the welfare of a child and open up a Children's Court inquiry.
43. Submission on file with the author.
44. So that where an adult accompanies a child, it will be necessary to establish the nature of the relationship between the child and the adult in order to establish whether or not the adult is in fact the child's primary caregiver. There is otherwise the risk that a trafficked or smuggled child may be documented as a dependant of an asylum applicant, when in fact there is no genuine relationship between the child and the adult. This would entail specially trained officials at each Refugee Reception Office to attempt to ensure than the true nature of a relationship between a child and the principal asylum applicant is confirmed, wherever children are involved and if necessary, the official can refer the child to DSD appropriately so that a Children's Court Inquiry can be opened.
45. *The Centre for Child Law and Another v Minister of Home Affairs and Others,* 2005 (6) SA 50 (T).
46. Lindela is the repatriation facility in Krugersdorp, South Africa, where illegal foreigners are detained while awaiting their deportations.
47. A lawyer appointed by the Court to represent the interests of the children.
48. *Centre for Child Law,* at par 31.
49. Ibid., at par 14.
50. Child Care Act No. 74 of 1983, which was replaced by the Children's Act of 2005.
51. *Centre for Child Law,* at par 20–22.
52. A South African non-governmental organization.
53. *The Aids Law Project v. Minister of Social Development and Others South Gauteng High Court,* unreported, (52895/09)

Curatrix Ad Litem's Report filed 8 February 2010, at par 6.4.1–6.4.2.

54. Ibid. The Curatrix was referring to the, at the time still in-development Department of Social Development Guidelines, which are discussed in greater detail in the next section of this paper.
55. *Shaafi Daahir Abdulahi and others v. Minister of Home Affairs and others,* (26572/2011), North Gauteng High Court.
56. For placement in temporary safe care in terms of the Children's Act as a child in need of care or protection.
57. Ibid.
58. At the time of writing the report, the matter was *sub judice*.
59. as the Department of Home Affairs is refusing to allow such children to apply on their own for asylum, without a Children's Court order.
60. In 2009, the author of this report was invited to a meeting with the head of Child Protection for UNICEF South Africa, Mr Stephen Blight and the National DSD Chief Director International Social Services, Mr Tebogo Mabe to discuss the standard operation procedures for dealing with Unaccompanied Foreign Children that UCT developed in 2008 in the Western Cape. The South African government began working closely with UNICEF and Save the Children to develop its policy guidelines for foreign unaccompanied children from about this point onwards.
61. See below for a discussion of how difficult it is to find this document publicly; furthermore, of the 120 social workers that the author trained in late 2011 on the legal framework pertaining to unaccompanied foreign children in South Africa, not one was aware of this important policy document.
62. In consultation with relevant stakeholders including: UNHCR, DSD, ISS, Red Cross, DHA, a Children's Court Commissioner in Cape Town and partner NGOs following several meetings during 2006 and 2007 to identify protection gaps and determine mechanisms for enhancing protection of refugee and unaccompanied foreign children. Some of the key principles highlighted in the SOPs include that unaccompanied or separated foreign children found in South Africa should be *assumed* to be in need of care and protection; that there is a legal obligation to treat all foreign children in the same manner as South African children if they are at risk; that any person or entity can help identify and refer an unaccompanied foreign child to the DSD or Police; that DSD must open a Children's Court Inquiry for every foreign child who appears to be in need of care and protection as contemplated in the Act; that tracing or family reunification endeavours should begin as soon as possible after identifying an unaccompanied child; that legal representation for the child must be provided for, within the Children's Court process and if the child appears to have a refugee claim, within the asylum process.
63. With DSD provincial office Chief Social Worker Ms. Marie Louw, who was also the Provincial Coordinator for the South African affiliated bureaux of the International Social Services.
64. The Senior Community Services Officer of the Southern Africa regional UNHCR office, based in Pretoria, Ms. Mmone Molestane.
65. The SARCS and the International Committee for the Red Cross are mandated to trace families across international borders.
66. The DHA Director General's 23 May 2002 letter entitled "Procedure in Respect of Unaccompanied Minor Illegal Aliens" and the DHA's Passport Control Instruction No 1 of 2004 entitled "Procedure in Response of Unaccompanied Minor Illegal Foreigners," both of which on file with the author.
67. For example, the one-page DHA letter states that after an immigration official reports a child to a social worker, " … the social worker will be responsible for the Children's Court Inquiry although close collaboration will be important between the social worker and the immigration officer throughout the process." The (5-paragraph long) Passport Control Instruction does go a bit further to state that investigations into the child's circumstances in his or her country of origin must be made through the DSD in collaboration with International Social Services for 'responsible deportation/family reunification' to take place, and that a child must not be detained except as a measure of last resort.
68. Obtained by the author from a civil society partner, that also works with migrant children; copy of same on file with author.
69. Ibid.
70. Unfortunately, the Guidelines are to date still not readily accessible. In fact, they only became known to the author following a public statement made by the Deputy Minister of Social Development referring to them. A subsequent search online for the Guidelines was not successful, and it was not until a more concerted effort was made through the UCT RRU's stakeholder network, that a copy of the document was obtained.
71. Specific recommendations from these DSD Guidelines will be referred to in the evaluation section of this paper below.
72. Sec 42, Children's Act: "(1) For the purposes of this Act, every magistrate's court … shall be a children's court and shall have jurisdiction on any matter arising from the application of this Act for the area of its jurisdiction. (2) Every magistrate shall be a presiding officer of a children's court …"
73. UNICEF, "Children on the Move, A reflection on the challenges of formal placement of non-national unaccompanied minors in South Africa," power point presentation obtained by the author from stakeholder, on file with the author, confirms that "undertones of discrimination [in terms of the attitude of social workers at intake] have been noted in parts of the country. In one location, where children were referred to social workers, discriminatory remarks were cited by the Children including statements

such as " … you do not deserve places that were created from South African taxpayers' money" or " … you are 17 and will be on the streets in one year so there is no point formally placing you."

74. DSD Guidelines at par 6.1.
75. It should be noted that Sec 150 of the Children's Act provides for the definition of a child in need of care and protection, as follows: "150. (1) A child is in need of care and protection if, the child—

    (a) has been abandoned or orphaned and is without any visible means of support;

    (b) displays behaviour which cannot be controlled by the parent or care-giver;

    (c) lives or works on the streets or begs for a living;

    (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;

    (e) has been exploited or lives in circumstances that expose the child to exploitation;

    (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being."
76. DSD Guidelines at par 6.1.
77. This is often the case as the social worker is not aware of how prejudicial it is for a child not to have any enabling documentation in South Africa. Access to school, basic services such as health care, and protection from possible arrest and detention, all result from having the necessary documentation.
78. As background, in 2010 the child was taken by his female relative in Durban to the Department of Home Affairs and was documented at that Refugee Reception Office as an asylum seeker although with a notation on his permit stating "Unaccompany *(sic)* Minor, referred to Social Development for Legal Custodianship." A copy of permit on file at the UCT RRU. The author submits that the DHA official incorrectly wrote custodianship, rather than guardianship, on the permit.
79. Page 2 of the social worker's report, copy on file at the UCT RRU.
80. In an interview with the UCT RRU attorney, notes on files with the author.
81. Excerpts from email from social worker to UCT RRRU attorney, dated 12 October 2011, copy on file with the author.
82. DSD Guidelines at par 6.1.
83. *Children's Act, General Regulations Regarding Children,* 2010, CN R261 in GG 33076 of 1 April 2010.
84. Regulation 54 of the 2010 Regulations to the Children's Act 38 of 2005 states that "(1) A Child—

    (b) who is not in temporary safe care but is the subject of an investigation as to whether he or she is in need of care or protection; must be brought or caused to be brought before children's court … by a designated social worker, or in the case of a child referred to in paragraph (b), be brought by his or her parent, guardian or care-giver for a decision on whether the child is need of care and protection by no later than 90 days after—(ii) the commencement of the investigation, in the case of a child contemplated in paragraph (b) …"
85. Sec 46 of the Children's Act: "A Children's Court may make the following orders: (k) any other order which a children's court may make in terms of any provision of this Act."
86. Sec 23 of the Children's Act: 23.(1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary—

    (a) contact with the child; or

    (b) care of the child.

    (2) When considering an application contemplated in subsection (l), the court must take into account-

    (a) the best interests of the child;

    (b) the relationship between the applicant and the child, and any other relevant

    person and the child;

    (c) the degree of commitment that the applicant has shown towards the child;

    (4) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

    (e) any other fact that should, in the opinion of the court, be taken into account.

    It should also be noted that an application for Guardianship may be made by a care-giver to the High Court, as set out in Sec 24 of the Children's Act. In fact, the author is aware of a number of UCT RRU clients that have approached the High Court for such an order, despite the costs involved in same, in order to overcome the documentation challenges presented at the DHA.
87. Mossel Bay is a small seaside town approximately 350km from Cape Town, located in the Western Cape Province.
88. Referring of course only to those that have been identified and brought to the attention of legal representatives or other service providers.
89. Sec 53 of the Children's Act refers to an "interested party." See note below.
90. Sec 53 of the Children's Act: (1) Except where otherwise provided in this Act, any person listed in this section may bring a matter which falls within the jurisdiction of a children's court, to a clerk of the children's court for referral to a children's court.

    (2) The persons who may approach a court, are:

    (a) A child who is affected by or involved in the matter to be adjudicated;

    (b) anyone acting in the interest of the child;

    (c) anyone acting on behalf of a child who cannot act in his or her own name;

(4) anyone acting as a member of, or in the interest of, a group or class of children; and *(e)* anyone acting in the public interest.

91. Sec 23 of the Children's Act: (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary—

(a) contact with the child; or

(b) care of the child.

(2) When considering an application contemplated in subsection (l), the court must take into account-

(a) the best interests of the child;

(b) the relationship between the applicant and the child, and any other relevant

person and the child;

(c) the degree of commitment that the applicant has shown towards the child;

(4) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

(e) any other fact that should, in the opinion of the court, be taken into account.

92. The Department of Home Affairs is understandably reluctant to provide documentation to an unaccompanied or separated child, in particular as another applicant's dependant, without any proof of relationship between the child and the adult claiming to be a family member.
93. As noted by the author, who has been working at the UCT RRU since 2005.
94. UN High Commissioner for Refugees, "Refugee Children: Guidelines on Protection and Care."
95. Ibid., at 133.
96. UNICEF, "Children on the Move."
97. DSD Guidelines at par 6.2.
98. Art 8 of the UNCRC provides that: "1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."
99. Ibid.
100. DSD Guidelines at par 6.4.1 and 6.4.2.
101. These children may not be refugees but also cannot be reunited with their family in country of origin or otherwise be returned to their home country.
102. Act 13 of 2002.
103. Immigration Act section 31(2) "Upon application, the Minister, as he or she deems fit. after consultation with the Board, may under terms and conditions determined by him or her … grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision."
104. *Aids Law Project,* Curatrix Report at par 6.4.7 and 6.4.8.
105. For example, the recent Zimbabwean Dispensation Project, in which the Minister of Home Affairs, recognizing the humanitarian nature of the crisis in Zimbabwe, granted four-year work, study and business permits at reduced requirements, in terms of Section 31(2) (b) of the Immigration Act, to large numbers of Zimbabwean migrants of humanitarian concern present in South Africa.
106. Feijen, "The Challenges of Ensuring Protection," 9.
107. See for example, Lawyers for Human Rights, *"Home Affairs Prevents Refugees from Applying for Asylum,"* accessed on 2 February 2012, at http://www.lhr.org.za/news/2012/renegade-department-prevents-refugees-applying-asylum-1, which raises concerns about DHA's apparent policy of exclusion of migrants rather than protection.

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Reunification of the Refugee Family in South Africa: A Legal Right?

Fatima Khan

Abstract

Family unity is not considered a right within international refugee instruments and as a result the laws and policies of most states are silent in this regard. Family unity is however a legal concept which is addressed extensively in various other international law instruments. This paper contends that refugee law as a dynamic body of law is informed by these international law instruments and it should not be viewed as an isolated body of law and be denied the benefits there from. The right of family unity is often distinguished from the right to family reunification, which extends protection more specifically to families that have been separated that wish to reunite. Even though few human rights instruments specifically designate a right of family reunification it will be argued that to deny family reunification is to effectively violate the right to family unity. This paper furthermore examines the right to family reunification as it applies to refugees, looking specifically at the current status of South African and international law. It will be emphasised that because refugee law is informed by international human rights law, it can support, reinforce or supplement refugee law.

Résumé

L'unité familiale n'est pas considérée comme un droit au sein des politiques et outils internationaux concernant les réfugiés, et en conséquence, les lois et politiques de la plupart des États n'en font pas mention. Pourtant, l'unité familiale est un concept juridique dûment traité dans les autres politiques et outils du droit international. Cet article soutient que la loi sur les réfugiés, en tant que corpus dynamique de lois, est organiquement lié aux autres lois et politiques internationales, et qu'elle ne devrait pas être privée de leurs aspects positifs, en étant traitée comme un corpus isolé de lois. Le droit à l'unité familiale est parfois distingué du droit à la réunification familiale, qui étend sa protection principalement aux familles qui ont été séparées et qui souhaitent se réunir. Bien que quelques instruments juridiques du droit de la personne mentionnent spécifiquement le droit à la réunification familiale, nous soutenons que nier ce droit revient en réalité à violer le droit à l'unité familiale. Cet article examine le droit à la réunification familiale et comment il s'applique pour les réfugiés, et en particulier dans le cas de l'Afrique du Sud et du droit international. L'article souligne que les lois internationales sur les droits de la personne, parce qu'elles sous-tendent la loi sur les réfugiés, peut en fait soutenir, renforcer et compléter cette dernière.

Introduction

The refugee experience is such that it is common for family members to be separated from each other before or during their flight from their state of origin. In the face of persecution, families adopt strategies, some of which may necessitate temporary separation: sending a politically active adult into hiding, helping a son escape forcible recruitment by militia forces or sending abroad a woman at risk of attack or abduction[1]. Family members may be forced to take different routes out of the country or to leave at different times as opportunities permit. It is also common for refugees to be unaware, often for long periods, whether a family member is alive or dead. The commonality of the experience does not in any way detract from the pain and anxiety felt by those separated from close family members.

Refugees often go to great lengths to find lost relatives and finding a way to be reunited with them can easily assume paramount importance in a refugee's life. Jastram states that whether the separation is a 'chosen strategy or an

unintended consequence of the chaos of forcible displacement,'[2] the separation of a refugee family is rarely intended to be permanent.

Unfortunately family unity is not considered a right within international refugee documents and as a result the laws and policies of most countries are silent in this regard.

Family unity is however a legal concept which is addressed extensively in various international law documents and even though there is no specific provision in the 1951 United Nations Convention Relating to the Status of Refugees[3] (hereinafter the "1951 Convention") and its 1967 Protocol[4], refugee law, as a dynamic body of law, is informed by these international law documents. Since refugee law is informed by these international law documents it should not be viewed as an isolated body of law and be denied the benefits there from.

Family unity in the refugee context means granting refugee status or a similar secure status to family members accompanying a recognised refugee. The country of asylum must likewise provide for family reunification since the refugee cannot by definition return to the state of origin to enjoy reunification there. To facilitate reunification imposes an obligation on the state and whilst it is clear that states may not arbitrarily interfere with existing family unity it is less clear whether a state should be obligated to facilitate family reunification after family members have involuntarily separated from one another.

The United Nations High Commissioner for Refugees (hereinafter "the UNHCR"),[5] and many states consider family reunification a cornerstone of effective refugee protection. Regrettably, the circumstances of war and persecution that fragment refugee families are often followed by administrative and policy restrictions by countries of asylum that prolong the separation of families. This separation and trauma has been found to exacerbate the depression and trauma[6] experienced by refugees and it furthermore impedes the successful establishment and integration of those in asylum states. In addition, family members left behind may be targeted for direct persecution as a result of their relation to the refugee[7] diminishing protection for those who are left behind in states of origin.

This paper examines the right to family reunification as it applies to refugees, looking specifically at the current status of South African and international law. It will be emphasised that because refugee law is informed by international human rights law, it can support, reinforce or supplement refugee law. The right of family unity is often distinguished from the right to family reunification, which extends protection more specifically to families that have been separated that wish to reunite. Even though few human rights instruments specifically designate a right of family reunification, it will be argued that to deny family reunification is to effectively violate the right to family unity.

Some practical impediments facing refugees who have become separated from their families will additionally be highlighted and a specific analysis of a child's unqualified right to be united with family will be undertaken.

Given the increasingly restrictive migration policies of states, family reunification is becoming progressively more difficult; the need for new ideas and approaches is thus more compelling. In view of the fact that the concept of family unity has been visited in South African case-law, a new approach is required in the refugee context as the Refugees Act of South Africa[8] is silent on the issue.

The Right to Family Unity in International Law

The right to family unity is entrenched in universal and regional human rights instruments and international humanitarian law. Even though there is no specific provision in the 1951 Convention, refugee law as a dynamic body of law, is informed by international human rights law and humanitarian law. In addition, several UNHCR Executive Committee conclusions reaffirm the state's obligation to take measures which promote and respect the unity of a family and family reunification.

The 1951 Refugee Convention and its Protocol—Not an Isolated Body of Law

Hathaway[9] endorses the view that the Refugee Convention and its Protocol are part and parcel of international human rights law and not an aspect of immigration or migration. His view is fully in line with the position adopted by several foreign superior courts which have analysed the object and purpose of the Refugee Convention and its Protocol. In this regard, the Supreme Court of Canada in *Canada (Attorney-General) v Ward*[10] expressed the view that:

> The essential purpose of the Refugee Convention is to identify persons who no longer enjoy the most basic forms of protection states are obliged to provide. In such circumstances refugee law provides a substitute protection of basic human rights.[11]

Similarly, the High Court of Australia in *Minister for Immigration and Multicultural Affairs v. Khawar*[12] has linked refugee law more directly to international human rights law when it stated:

> … [The Refugee Convention's] meaning should be ascertained having regard to its object, bearing in mind that the Convention is one of several important international treaties designed to redress violation[s] of basic human rights, demonstrative of the failure of state protection… . It is the recognition of the failure of state

> protection , so often repeated in the history of the past hundred years , that led to the exceptional involvement of international law in matters concerning human rights.[13]

Furthermore, in *Applicant 'A' and Ano'r v. Minister for Immigration and Multicultural Affairs,*[14] the Australian court held that:

> The term refugee is to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights[15] (especially Articles 3,5 and 16) and the International Covenant on Civil and Political Rights[16] (especially Article 23).[17]

Despite the foregoing, many governments are implementing increasingly restrictive asylum policies to deter and prevent asylum seekers from seeking refuge on their territory. Manifestations of this trend includes several measures such as visa control, safe first country arrangements, stricter interpretations of the refugee definition as well as *restricted family reunification rights.*[18] Governments have tended to justify such policies in light of the 1951 Refugee Convention provisions, without further reference or regard to other applicable human rights and humanitarian instruments.

According to the general rule of interpretation of treaties,[19] treaties must be interpreted in their context and in light of their object and purpose. Refugee protection has its origins in general principles of human rights and in the refugee law context, it is generally agreed that norms of protection are framed within a human rights context.

The preamble[20] to the 1951 Convention invokes the Universal Declaration of Human Rights[21] as the means by which States 'have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.' This reference confirms that international refugee law was not intended to be seen in isolation. The inclusion of 'the right to seek and to enjoy asylum from persecution' in Article 14 of the Universal Declaration of Human Rights places international refugee law squarely within the human rights paradigm.[22]

To be able to determine the applicable standard of the refugee's right to family unity and the concomitant right to family reunification the inter-relationship between international and regional human rights law and refugee law needs to be better explored. In this regard, the following questions will be examined in this paper:

[1] Which standard should be applied in the event of a clash between the different bodies of law?;

[2] Which standard takes precedence where the 1951 Convention is either silent, as to the appropriate treatment, or offers a lower standard than international human rights law?; and

[3] Does the higher standard apply?[23]

The Right to Family Life Under International Human Rights Law

There are a number of provisions that elaborate on the right to family life under international human rights law. The objective, however, is to ascertain what obligations human rights instruments place on states to protect family unity and whether these obligations extend to imposing a positive obligation on states.

To begin, Article 16(3) of the Universal Declaration of Human Rights provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.' The right to family is a fundamental human right and Article 16 of the Universal Declaration of Human Rights clearly establishes this right for all peoples, regardless of status.

Protection of the family as the natural and fundamental group unit of society is also confirmed in the ICCPR, at Articles 17 and 23.[24] Article 17 of the ICCPR prohibits the unlawful and arbitrary interference with families and Article 23 states that the family is the natural and fundamental unit of society entitled to protection from the state. Whereas Article 17 can be read narrowly as simply providing a basis for the right to family unity, Article 23 allows far more as outlined by Comment 19 of the UN Office of the High Commissioner for Human Rights, which states that "the right to found a family implies, in principle the possibility to procreate and live together."[25] This further implies that appropriate measures must be adopted to ensure the unity or reunification of families.

Article 10 of the International Covenant on Economic Social and Cultural Rights[26] (hereinafter the "ICESCR"), confirms an obligation on states to ensure the "widest possible protection and assistance" to families. "Protection and assistance" suggests an obligation that goes further than "refrain from interference." states will have to go further and adopt measures to "protect and assist". This is beneficial in the refugee context where, at times, unity can only take place through reunification in the asylum state.

The 1951 Refugee Convention and its 1967 Protocol

Article 5[27] of the 1951 Refugee Convention provides that nothing in the Convention shall impair any right or benefits granted to refugees apart from the Convention. Hence, since the right to family unity and reunification has developed in international law, it cannot be limited by provisions or lack thereof in refugee law. As stated above, the right to family unity applies to all human beings, regardless of their status.

According to Hathaway, a broader perspective than that of the 1951 Convention is therefore necessary to understanding the scope of the right to family unity for refugees.[28] The absence from the 1951 Convention of a specific provision relating to family unity does not mean that the drafters failed to see protection of the refugee family as an obligation. Hathaway argues that the 1951 Convention indeed provides protection for the refugee family in a number of its Articles.[29]

Recommendation B

In addition to the Preamble of the 1951 Convention, refugees' *essential right* to family unity was also the subject of a recommendation approved unanimously by the Conference of Plenipotentiaries that adopted the full final text of the Convention. It states:

> *Considering* that the unity of the family, the natural and the fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
>
> *Noting* with satisfaction that, according to the official commentary of the Ad Hoc Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to the members of his family,
>
> *Recommends* Governments to take the necessary measures for the protection of the refugee's family, especially with a view to: (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country: (2) the protection of refugees who are minor, in particular unaccompanied children and girls, with special reference to guardianship and adoption [Italics added][30]

Hathaway[31] states that while the recommendation is non-binding, its characterisation of family unity as an "essential right" is evidence of the drafters' object and purpose in formulating the 1951 Refugee Convention.[32] He states further that UNHCR Executive Committee Conclusions have repeatedly emphasised the importance of state action to maintain or re-establish refugee family unity.[33]

The UNHCR Handbook

The above mentioned recommendation is reproduced and elaborated in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter the "Handbook").[34] More specifically, paragraph 181 of the Handbook refers to the Universal Declaration of Human Rights, which states that the family is the natural and fundamental group unit of society and therefore entitled to protection.[35] Paragraph 182 restates Recommendation B and paragraph 183 notes that regardless of whether or not states are party to the 1951 Convention or the 1967 Protocol the principle of family unity is observed by a majority of states giving it the status of *opinio juris*.

Paragraph 184 of the Handbook refers to the practice by some states of granting refugee status to the dependants of the refugee heads of households, her or his dependants are normally granted refugee status accordingly to the principle of family unity where the minimum requirement to be a dependant would include a spouse and the minor children.

Hathaway[36] further confirms that although an explicit right to family unity in the refugee context is not found in the 1951 Convention itself, the 1951 Refugee Convention must be understood in light of subsequent developments in international law, including international treaties and agreements, state practice and *opinio juris*.*37*

International Jurisprudence

There is no uniformity in international jurisprudence largely because there is no specific mention of the refugee's family in the definition of a refugee in the 1951 Convention. Notwithstanding that the status of a refugee's family member was considered by the Ad Hoc Committee that drafted the 1951 Convention. The Committee said that 'members of the immediate family of a refugee should, in general, be considered as refugees if the head of the family is a refugee as here defined.'[38]

In many states that are party to the 1951 Convention, there is long standing jurisprudence affirming the principle of family unity. For example, in the case of *Tshisuaka and Tshilele v. Belgium,*[39] the 3rd Chamber of the Belgian *Conseil d'état* refused to expel the spouse of a Congolese asylum seeker from Belgium on the grounds of family unity.

However, according to the Australian perspective, the absence of any provision relating to family unity or family reunification in the 1951 Convention suggests that the founders were not prepared to accept unconditional obligations relating to the families of refugees. According to the Australians, the 1951 Convention's founders regarded these issues as ultimately a matter for the judgment of the country of refuge, to be determined mainly by national asylum and immigration law and policies relating to admission criteria within the framework of international law.[40]

The view of the Supreme Court of the United States in *Sale v Haitian Centers Council41* and the House of Lords in the UK in *T v Home Secretary42* is that decisions to admit persons as refugees to the territory of member states are left to those states.

Regional Instruments: African Standard

Human rights standards in the context of Africa are enshrined in the 1969 African Charter on Human and Peoples Rights.[43] Of importance is that this Charter covers economic, social and cultural rights as well as civil and political rights. Specific mention is made of the family in Article 18 stating that the family is the natural unit of society and as such should be protected by the state.[44]

Also of note is Article 23 of the 1990 African Charter on the Rights and Welfare of the Child[45] extending state obligation to include specific protection for refugee children. In addition it reaffirms the importance of family unity and obliges states to undertake efforts aimed at family reunification.[46]

The 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa,47* (hereinafter the "OAU Convention") is of utmost importance in terms of refugee protection in Africa. This Convention must be viewed in relation to human rights instruments such as the *African Charter on Human and Peoples Rights,* mentioned above.

The drafters of the OAU Convention sought to complement rather than replace the 1951 Convention. This is reflected in Articles 9 and 10 of the Preamble,[48] which stress that the 1951 Convention constitutes the basic and universal instrument relating to the status of refugees. Cognisant of the political climate in which the 1951 Convention was drafted, the drafters of the OAU Convention sought to depoliticise the issue of refugee crises as well as the concept of asylum. This is reflected in Article 2(2), which states that the "grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State."[49] Moreover, Article 2(6) states that for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin. This provision was intended to discourage the setting up of refugee camps on borders, thereby increasing tensions and friction between the sending and receiving states.

Family Reunification and International Law

Family Reunification distinguished from Family Unity

The right of unity is often distinguished from the right to reunification, which extends protection more specifically to families which have been separated and wish to reunite. Many refugees are forced to leave family members behind in their country of origin and to then seek reunification once granted refugee status in the asylum state. In the context of International Refugee Law, the right to family reunification may be qualified primarily because it intersects with the right of sovereign states to control the entry of non-nationals into their territory but it is not entirely defined thereby.[50] Given that the right to family unity is established in International Human Rights Law and international law, and therefore applies to all human beings regardless of citizenship or status, provisions, or lack thereof within international refugee law, cannot limit its scope.[51]

The right to family unity is inherent in the right to family life.[52] As it is so common in the refugee experience for family members to be separated from each other before or during their flight from the country of origin, for refugees, the right to family unity implies a right to family reunification in the country of asylum. More specifically, the refugee cannot return to his or her country of origin to enjoy the right to family unity there.

The right to marriage and family as established within International Human Rights Law entails contrasting obligations on states. On the one hand, states are obliged to refrain from taking action that disrupts families and it is now widely recognised that states must take positive steps to reunite families if they have been separated especially if they are unable to reunite elsewhere.[53]

Indeed, the 1951 Convention does not incorporate the principle of family unity. Nevertheless, UNHCR notes that most states respect the principle and that a failure to allow for family reunification and thereby for family unity, is interpreted as a violation of the right as opposed to evidence that the right does not exist. In this regard, the UNHCR states that the " … [r]efusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities of enjoying the right elsewhere."[54]

Few international human rights instruments specifically deal with the right to family reunification, among these, the 1975 Helsinki Declaration.[55] Although this Declaration is not binding as it does not have treaty status, it is persuasive in that is demonstrates the participant parties' intentions.

Anderfuhren-Wayne[56] notes that at least among some industrialised states, there is a policy of allowing admission of persons who have been separated from their families, where reasonable, noting that states are under a political and moral obligation to conduct their immigration policies so as to avoid unnecessary disruption to family life.[57] It can be argued that refusal to allow family reunification may be considered interference to the right to family unity especially where there is no realistic possibility of the family enjoying that right elsewhere. States should facilitate admission to their territories, at least where it would be unreasonable to expect the families to be reunited *elsewhere.*

The Elsewhere Approach

The *Elsewhere Approach* was largely developed by the European Court of Human Rights.[58] It is an approach

which offers support to the plight of refugee families because, more often than not, refugees cannot be reunited elsewhere but in the country of reception. According to the *Elsewhere Approach,* expulsion or exclusion of a family member is legitimate if other family members can follow and if this can be reasonably expected of them. A determination of reasonableness involves weighing the advantages and disadvantages to the concerned individual against the interest of the state served by its immigration policy. The determining criteria adopted by the European Court for Human Rights include amongst others:

- Consideration of one's ties with the state denying entry;
- Links with the foreign country;
- The economic consequences of moving to another country;

The European Court of Human Rights has decided in two non-refugee cases that a state must allow family reunification if it is the only way for a family to achieve family unity.[59]

Whilst the *Gul* case[60] appears to be a narrowing of the right to family reunification because the applicants could reunite elsewhere—they were not allowed to reunite in Switzerland in this case—the decision bodes well for refugee family reunification. The facts of the case were as follows. The applicant, Mr. Gul, had arrived in Switzerland seeking asylum as he feared political persecution in Turkey due to his membership of a party opposed to the government's actions in South East Turkey. However, once granted a humanitarian permit, he dropped his claim for asylum status. His wife who suffered from epilepsy was allowed to join him three years later for humanitarian reasons. The applicants sought to be reunited with their son on the basis that it was impossible for them to return to their son. The government argued that it was possible for them to return to Turkey and reunite with their son and therefore Switzerland had no obligation to allow family reunion in Switzerland.

Although the above approach has largely been used in terms of immigration matters, in the European Union, its applicability and value to refugee matters is significant. Firstly, the refugee family would only request reunification of a family member if it has established itself in the receiving state. Secondly, it would have nowhere else to go and by the very definition of a refugee, it could not back to its country of origin, unless resettlement to a third country is an option.

The Humanitarian Approach

There are various international resolutions stressing the importance of reunification in connection with the principle of family unity. The Fourth Geneva Convention of 1949[61] devoted considerable attention to the problems of families dispersed owing to war. In addition to provisions aimed at maintaining family unity during a wartime evacuation, the Fourth Geneva Convention provides for mechanisms such as family messages, tracing of family members, and registration of children to enable family communication and if possible family reunification.

Furthermore, in 1981, the UNHCR Executive Committee concluded, with regard to family reunification and refugees, as follows:

> In the application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated families. It is hoped that the countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.[62]

Similarly, the conclusions of the Thirteenth Round Table of the Institute of Humanitarian Law have stressed reunification in connection with unity:

> The humanitarian principle of family reunification is firmly established in international practice … This principle is closely linked to the right of the unity of the family which recognises that the family is the natural and the fundamental group unit of society and is entitled to protection by society and the state… . [T]here exists different situations where families need to be reunited ,solutions must be reached in accordance with relevant international law and the requirements of the particular situation.[63]

For many years, the International Red Cross and Red Crescent Movement has played a major role in preserving family unity and integrity, particularly in facilitating the reunification of families dispersed by war or as a consequence of persecution. Various resolutions of the movement's international conferences encourage national societies, governments and international bodies to facilitate family reunification.

Family reunification often begins with the tracing of separated family members. Recommendations of the 26th International Conference of the Red Cross and Red Crescent Movement state that national societies should:

> … [m]aximise their efficiency in carrying out tracing work and family reunification by strengthening their tracing and social welfare activities and maintaining close cooperation with the ICRC and government authorities and other competent organisations such as the UNHCR the International Organisation of Migration.[64]

Family reunification should therefore be considered as a means of implementing the principle of family unity. If a right should be recognised by states concerning the reunion of the family, it is more a right to enter and live in the receiving state or a right to the protection of the family unit rather than a right to family reunification.

From the above it is apparent that there is no lack of international standards regarding the principle of family unity, rather the issue is with their implementation being hampered by administrative restrictions.

The Child's Right to Family Reunification in International Law

The Convention on the Rights of the Child[65] appears to provide the most holistic and assertive pronouncement on the right to *family reunification*.

In recent years there has been recognition that unaccompanied and separated children are particularly vulnerable and that states face various challenges in providing such children access and enjoyment of their rights. A General Comment[66] was issued in 2005 motivated by the UN Committee of the Rights of the Child's observance of an increasing number of children in such situations. There are varied and numerous reasons for children being unaccompanied[67] or separated,[68] ranging from persecution of the child or the parents; to international conflict and civil war to trafficking in various contexts and forms, certainly the number of unaccompanied or separated children are a growing cause of concern within the refugee sphere.

The right to family reunification for minor children and their parents is codified in the Convention on the Rights of the Child at Article 10:

> In accordance with the obligations of States Parties under article 9, paragraph 1 [a child shall not be separated from his or her parents against their will], applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.[69]

Several elements of this provision are noteworthy:

- First, the explicit link to the Convention of the Rights of the Child in Article 9 means that the obligation there imposed to ensure the unity of families within the state also determines the states' actions regarding families divided by borders.
- Second, one of the Convention of the Rights of the Child's achievements is the recognition that reunification may require a state to allow *entry* as well as departure.
- Third, children and parents have equal status in a mutual right; either may be entitled to join the other. It is not sufficient that the child be with only one parent in an otherwise previously intact family; the child has the right to be with both parents, and both parents have the right and responsibility to raise the child.
- Fourth, the obligation on states to deal with reunification requests in a 'positive' and 'humane' manner means, in most cases, an *affirmative* manner.
- Lastly, that parties shall cooperate with the United Nations to protect and assist a refugee child and to trace the parents or other members of the family of the refugee child in order to obtain information necessary for reunification with his or her family.

While Article 10 does not expressly mandate approval of every family reunification application,[70] it clearly contemplates that there is at least a presumption in favour of approval.[71] The formulation of Article 10 is considerably strongly worded and does not allow much room for significant state discretion, such as 'consider favourably,' 'take appropriate measures,' or 'in accordance with national law.' Anderwuhren-Wayne[72] asserts that states enjoy extensive discretion but she does not identify the basis for this discretion. States cannot maintain generally restrictive laws or practices regarding the entry of aliens for reunification purposes without violating the Convention of the Rights of the Child.[73]

Goodwin-Gill asserts that reservations made by a small number of states to the reunification provision provide additional confirmation that the Convention on the Rights of the Child indeed imposes a general duty to allow entry for family reunification purposes.[74] While it may be argued that state practice is not uniform, outright failures to allow reunification are more properly seen as violations of the right, not as evidence that there is no right.[75]

As with the right to family unity, experts are almost universally in agreement that there is at present a right under international law to family reunification.[76] It has been characterized as a self-evident corollary to the right to family unity[77] and the right to found a family[78] and has been linked to freedom of movement.

In sum, it is now widely recognized that a state is obliged to reunite close family members of a non-citizen on its territory if they are unable to enjoy the right to family unity in their own country, or elsewhere.

South African Refugee Law

The Refugees Act of South Africa[79] reflects the principles contained in various international instruments dealing with refugees.[80] The 1951 Refugee Convention specifically obliges state parties to grant refugees either the same

treatment as nationals of that state or, as a minimum, 'the most favourable treatment accorded to nationals of a foreign country in the same circumstances'[81] in respect of a variety of different rights. The OAU Convention is less specific, but does commit member states to" … [u]se their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."[82]

Both Conventions state that their provisions shall be applied without discrimination.[83] All persons in South Africa share a certain set of basic human rights under international law, regardless of their immigration status. Refugees have, in addition, rights based on international refugee law and the principle of *non-refoulement,* that persons should not be returned to a country where they fear persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion, or which they were compelled to leave owing to external aggression, occupation, foreign domination or events seriously disturbing public order.

An Analysis of the Refugees Act (130 of 1998)

The Refugees Act in its preamble[84] refers to South Africa's acceptance of its obligations under international law and the "other human rights instruments" to which it is a party. The Act refers specifically to South Africa acceding to the 1951 Convention and the OAU Convention. In addition, in a substantive section of the Refugees Act, at section 6,[85] an interpretation in terms of the Universal Declaration of Human Rights and any other international agreement to which South Africa is a party is demanded thus clearly paving the way for a human rights interpretation of the Refugees Act. On the issue of family unity and family reunification, as discussed above, the human rights approach is the preferred approach if the domestic law is silent as is the case with the South African Refugees Act.

Beneficial to refugees generally and with regard to family unity in particular is the fact that the South African Refugees Act provides a more extensive definition of a refugee, than both the 1951 Convention and the OAU Convention; it includes dependants of recognized refugees as being refugees themselves.[86] South Africa thus affords derivative status to the dependant, which automatically includes immediate family members of the recognised refugee. This provision recognizes that not all members of a family necessarily have refugee claims; and it furthermore respects the family as a unit. This is the preferred approach in the light of the fact that the granting of refugee status is meant to be a form of surrogate protection. The host country should strive to provide protection to the refugee not just by physically protecting him or her from persecution, which would be minimum protection, but also so that he or she may live in dignity.

Nowhere in the Refugees Act does it stipulate that a dependant or a family member must be present in South Africa at the time of status determination of the principal applicant. There is therefore nothing in the Act which bars a claimant to seek derivative status even if the claimant arrives at a date later than the principal refugee.

The definition of dependant in section 1 of the Refugees Act includes, "spouse, any unmarried dependent child or destitute, aged or infirm member of the family of the refugee or asylum seeker." *87* While there is not enough clarity of who is considered a member of the family, this is already recognition that the family is more than what is generally considered a nuclear family. The concept of what constitutes a family varies from state to state, and in some circumstances, within regions of a state. The absence of an agreed definition has meant that states may define the term according to their own interest, culture and system.[88]

There is no universally accepted definition of the family, and international law recognizes a variety of forms;[89] more specifically, that a family consists of those who consider themselves and are considered by each other to be part of the family, and who wish to live together.[90] In the refugee context, states have shown a willingness to promote "liberal criteria" with a view toward "comprehensive reunification" of families.[91] Given the range of variations on the notion of family, a flexible approach is needed.[92]

The Refugees Act provides that refugees in South Africa are entitled to the protection of the Bill of Rights[93] of the South African Constitution.[94] Since refugees are afforded the same rights as South Africans a broader definition of who is family should be considered in light of the fact that South Africa's Customary Marriages Act[95] has accepted a broader definition of family than the nuclear family. In this regard, polygamous marriages and their offspring are already considered legitimate in terms South African law.

The Constitution also gives effect to customary law, which allows for a broader definition of family. The South African Constitutional Court has affirmed the following in this regard:

> These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality but also freedom of religion and belief. What is more, s 15(3) 100 of the Constitution foreshadows and authorises legislation that recognises marriages concluded

> under any tradition or a system of religious, personal or family law.[96]

South Africa's broader definition of a family is indeed a more realistic and more inclusive way of defining a family as it takes account the diversity of peoples and the evolving nature of the family. This definition should be thus adopted in any approach that South Africa formulates in terms of family reunification.

The Principle of Family Unity and South African Law

Except for Section 28 of the South African Constitution,[97] which describes a child's right to family care, there is no specific right to family in the Constitution or any other statute in South Africa.

However, in a ground breaking judgment, *Dawood v. Minister of Home Affairs98* the Cape High Court held that the right to dignity must be interpreted to afford protection to the institutions of marriage and family life. The Constitutional Court thereafter confirmed the approach and held that the Constitution indeed protected the rights of persons to freely marry and raise a family. The court stated that:

> Section 25(9)(b) of the [Aliens Control] Act also fell foul of the right to human dignity protected in s 10 of the Constitution, both of South African permanent residents who were married to alien non-resident spouses, as also of such alien spouses. The practical effect of s 25(9)(b) was that, although an alien spouse married to a South African permanent resident was in fact living in South Africa with her or his spouse, the alien spouse could be compelled to leave South Africa and to remain outside the country while her or his application for an immigration permit was being submitted to and considered by the relevant regional committee. *This would result in a violation of the core element of the alien spouse's right to family life and thus a violation of her or his right to human dignity.* Accordingly, s 25(9)(b) also constituted an infringement or a threatened infringement of the South African permanent resident spouse's right to human dignity.[99] [emphasis included]

Even though the Refugees Act is silent with regards to family reunification, in terms of the *Dawood* judgment it may not be necessary for refugees to invoke international instruments[100] for the reason that in terms of the South African Bill of Rights, once inside South Africa, foreign nationals are entitled to the same rights available to "everyone"[101] in the Republic except those that are specifically set aside for citizens such as the right to vote or hold public office. This together with the importance of family unity places an obligation on South Africa to allow for the reunification of refugee families within South Africa.

Practical Impediments

Whilst there is ample evidence of a right to family reunification for refugees in international law and an even stronger case in South African domestic law, there remain many practical impediments to actual family reunification in South Africa.

Firstly, the Refugees Act at Section 33 only refers to dependants of recognized refugees and their rights and obligations *in the Republic*. Secondly, the Act does not prescribe a method for bringing dependants of refugees across South Africa's borders. There is no existing policy or implementation procedure developed by the government even though arguably the right to family unity and the concomitant right to family reunification exist in principle for refugees in South Africa.

When the Family Member is Present in South Africa

The administrative process to join a spouse or a dependant of a refugee to a main applicant's asylum application file at the Department of Home Affairs[102] has in the past not proved to be so problematic.[103] The application would be made in terms of Section 3(c) of the Refugees Act, and the refugee would present him or herself to the refugee reception office and request family joining with a specific member or members of his or her family seeking asylum. In addition to the principal applicant having had to declare his or her spouse and children in the initial asylum application form, the applicant would also have to supply documentary evidence of the relationship with the family member, such as marriage certificate, birth certificate, evidence of cohabitation, or any documentary evidence to prove a relationship issued by the relevant authority of the country of origin such as identity documents.[104]

As the refugee regime in South Africa has matured, more impediments to the smooth joining process of spouses or dependants of refugees, who arrive on their own to join their family members, is becoming evident.[105] Unfortunately, due to the fact that no specific family joining system is in place in South Africa for refugees, Department of Home Affairs officials often refuse a family member's application on the basis of a more restrictive reading of the Refugees Act, in particular that of Regulation 16, which states that " … [d]ependants *who accompanied the asylum applicant* to the Republic may apply for refugee status pursuant to section 3(c) of the Act [emphasis added]."[106]

A broader, human-rights approach interpretation of the Refugees Act on this point should allow for any dependant or spouse to get derivative status, no matter whether they arrive at a later date, after the principal applicant applied for asylum. The refugee definition in the Act itself makes no distinction whatsoever in Section 3(c) between a dependant

who accompanies the main applicant upon making the application or who arrives at a later date.

When the Family Member is Present in the Country of Origin or a Third Country

In South Africa, for a refugee to be able to facilitate reunification with his or her immediate family members outside of the country will require an amendment to legislation, despite as shown above, the fact that the right to family unity and the concomitant right to reunification can be argued to exist in South Africa.

In South Africa, family unity concerns more commonly arise in relation to reunification, rather than refusal of entry at the border. This is due to the fact that when it comes to immigration rights deriving from the principle of family unity, the situation is unclear. A specific right to enter the country is not explicitly stated either in the Refugees Act or the Immigration Act.[107]

The nature of a genuine refugee's flight from persecution or conflict in their state of origin often means that families are divided. This happens for a number of reasons: persons seeking asylum often do not have the choice of making sure that the entire family is seeking asylum at the same time. This is often the case with conflict in Africa, where the predominant number of South Africa's refugees hail from. Factions may attack a village or region without warning causing people to flee. In the confusion, families will often lose track of each other. It is only when they are in the country of asylum that they are able to access the services or communicate through friends and family to find where their family members have fled to.

Sometimes, families choose to leave their country of origin at different times; one member may choose to leave due to the danger to their own family and thus protect them from persecution. Once they reach their country of refuge, they may then decide to bring their family to stay with them. This is often the case when it is the breadwinner who had to leave but still needs to support his or her family.

Parents may leave their children behind in the state of origin because they are fearful that the voyage to the state of refuge is fraught with dangers. It is only when they arrive in the state of refuge that they feel that they can access a government or UNHCR programme to have their children safely brought to join them.

Refugees may leave their families behind under the protection of other people, but those situations may change. Children are often left with other relatives or neighbours. If something were to happen to those people, the child is then left without any support. This may lead to a situation where it is imperative to have the children join their parents.

The problem however arises when dependants who find themselves in third party states or still in their in state of origin request to join their family members in South Africa. Those refugees will then search for legitimate means to bring their families to join them legally. It is in the absence of legal means that people may turn to clandestine means of having their family members join them. This may lead to dangerous border crossings, corrupt payments of border officials, and fears of large-scale smuggling cloaked as family reunification.

For South Africa to be able to facilitate reunification for refugees as a means to ensure the full protection of refugees, it needs to lay a firm foundation for family unity and family reunification in its domestic legislation. Jastram[108] confirms that such provisions are an important method of implementing international standards and represent the best practice in a rights-based approach to protection of the refugee family.

In both Canada and Australia where derivative status is not permitted, separate administrative procedures still exist to ensure family unity, for example, a family sponsorship category within the country's immigration regime, although such procedures may be cumbersome and cause pain and hardship to refugees seeking family reunification. In light of this, it is suggested that South Africa should incorporate family unity and family reunification into its existing refugee legislation as simply and as elegantly included by Bosnia-Herzegovina:

> Refugee status shall in principle be extended to the spouse and minor children as well as other dependants, if they are living in the same household. Entry visas shall be provided to such persons to whom asylum has been granted.[109]

The Refugee Act of Iraq is even more succinct, stating that " … [t]he person who has been accepted as a refugee in Iraq shall be allowed to bring his/her family members legally recognised as dependants."[110]

Conclusion

South Africa's obligations in law require that it set up a system so that otherwise law-abiding people will not turn to clandestine ways of reuniting with their families. In terms of international law and its domestic law, South Africa is obligated to set up a family reunification process for refugees in South Africa so that people are not forced to turn to methods which can result in violence, people smuggling, and further suffering.

While the 1951 Convention remains the central document in terms of international refugee law, at the same time it is acknowledged that the document does not cover

or deal with the range of issues facing refugees today. This paper has demonstrated how refugee law is informed by International Human Rights Law and how it can be used to supplement refugee law, thereby broadening the scope of the 1951 Convention and also strengthening and enhancing existing standards.

Despite the lack of a unified approach internationally, there is a clear understanding of the right to family unity. The right to family life is a clear example of protection afforded to refugees that is inadequate under the 1951 Convention. However other forms of international law and case-law provide authority that the family is an essential institution and indicate a clear concern both for its preservation as well as its promotion.

Refugee law is without a doubt a compromise between the sovereignty of a state and the humanitarian needs of a group of people, arguably a group more vulnerable than any other in society. Most states, including South Africa, are however implementing this right more so from a sovereignty perspective than a protection right for families. Even though the right to the reunification of refugee families cannot escape the competing interest of the individual and the state, it is argued that the actual family situation should be the ultimate determining factor if the family life is to be protected. It is submitted that the question of family unity should be considered from a positive obligation perspective rather than a sovereignty position and the humanistic quality in this area of law must be encouraged.

Notes

1. Kate Jastram and Kathleen Newland, "Family Unity and Refugee Protection," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* , ed. E. Feller et al (Cambridge University Press, 2003).
2. Ibid.
3. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954).
4. Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967).
5. The Office of the High Commissioner is entrusted, *inter alia,* with the task of promoting international instruments for the protection of refugees, and supervising their application. Under the Convention and the Protocol, contracting states undertake to cooperate with the Office of the UNHCR in the exercise of its functions and, in particular, to facilitate its specific duty of supervising the application of the provisions of these instruments (Introductory note to the 1951 Convention, Geneva, March 1996).
6. C. Rousseau et al. "Trauma and Extended Separation from family among Latin American and African Refugees in Montreal," (Spring 2001), 64 *Psychiatry* 1, 40.
7. Jastram, *Family Unity,* 555, 558.
8. The Refugees Act (130 of 1998).
9. James C. Hathaway, *The Rights of the Refugee under International Law* (Cambridge: Cambridge University Press, 2005).
10. *Canada (A.G.) v. Ward* [1993] 2 S.C.R. 689, 103 DLR 4th 1.
11. Hathaway, *The Rights of Refugees,* 4.
12. *Minister for Immigration and Multicultural Affairs v. Khawar,* [2002] HCA 14 (Aus. HC, April, 11, 2002).
13. Ibid, per Kirby J.
14. *Applicant 'A' and Ano'r v. Minister for Immigration and Multicultural Affairs,* [1997] 190 CLR 225 (Aus. HC, Feb. 24 1997). The articles are discussed below.
15. *Universal Declaration of Human Rights* 10 December 1948, 217 A (III).
16. *International Covenant on Civil and Political Rights* 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), hereinafter "the ICCPR."
17. *Applicant 'A' and Ano'r,* 296–97.
18. Alice Edwards "Human Rights, Refugees, and the Right 'to enjoy' Asylum," *International Journal of Refugee Law* 17(2) (2005): 294.
19. *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), Art. 31(2) states that 'the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

20. The European Court of Human Rights in *Golder v United Kingdom* (1975) E.H.R.R. 524, par 34, has noted that the preamble of an international convention may be used to determine its object and purpose.
21. Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.
22. Erika Feller, "International refugee protection 50 years on: The protection challenges of the past, present and future" (2001) 83 *International Review of the Red Cross,* 843.
23. Edwards, *Human Rights,* 295.
24. ICCPR, Article 23 states that:

    1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State;

    2. The right of men and women of marriageable age to marry and to found a family shall be recognized;

    3. No marriage shall be entered into without the free and full consent of the intending spouses;

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

25. Office of the High Commissioner for Human Rights, General Comment No. 19: Protection of the family, right to marriage and equality of spouses (Art.23): 1990/07/27, Par 5.
26. *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).
27. *The 1951 Convention,* Art. 5.
28. Hathaway, *The Rights of Refugees,* 569.
29. Ibid., 569. *The 1951 Convention,* Art. 4, refers to refugees' freedom as regards the religious education of their children; Art. 12(2) provides that the rights to marriage shall be respected; Art. 22 concerns the public education of children in public schools and Art. 24 concerns family allowances and other related social security as may be offered to nationals.
30. *Final Act of the United National Conference of Plenipotentiaries on the status of Refugees and Stateless Persons,* 1951, UN doc.A/CONF.2/108/Rev.1, 25 July 195, Recommendation B, accessed on 15 August 2011 at http://www.unhcr.org/refworld/docid/40a8a7394.html.
31. Hathaway, *The Rights of Refugees,* 569.
32. Ibid.
33. Ibid. Hathaway quotes the following UNHCR Executive Committee Conclusions: Nos. 1 (XXVI), 1975, para. f. Conclusion No. s 9 (XXVIII), 1977; 24 (XXXII), 1981; 84 (XLVIII), 1997; 85 (XLIX), paras. u–x; 88(L), 1999.
34. United Nations High Commissioner for Refugees, *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* HCR/1P/4/Eng/Rev.2, accessed on 15 August 2011, at http://www.unhcr.org/refworld/docid/3ae6b3314.html.
35. Hathaway, *The Rights of Refugees,* 569.
36. Ibid.
37. Ibid.
38. UN Doc E/EAC.32/5(E/1618), cited in Grahl-Madsen 1966 Vol1 413
39. *Tshisuaka and Tshilele v. Belgium* No. 39227, 2 April 1992, 68 *Revue du droit des estrangers* 66.
40. Interpreting the Refugees Convention—An Australian contribution, found at http://www.immi.gov.au. 181
41. *Sale v Haitian Centers Council* (1993) 125 L Ed 2d 128.
42. *T V Home Secretary* (1996) AC 742.
43. *African Charter on Human and Peoples' Rights* 27 June 981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986).
44. Art. 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral;
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community;
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions;
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

45. *African Charter on the Rights and Welfare of the Child,* 11 July 1990, OAU (Doc. CAB/LEG/24.9/49, (entered into force 29 November 1999).
46. *African Charter,* Article 23: Refugee Children states that:

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.
4. The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

47. *Convention Governing the Specific Aspects of Refugee Problems in Africa,* 10 September 1969, 1001 U.N.T.S. 45, (entered into force 20 June 1974), hereinafter the "*OAU Convention.*"
48. *OAU Convention,* Preamble, Article 9 states that "Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment." Further, *OAU Convention,* Preamble, Article 10 states that "Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government,

calling upon Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa."

49. *OAU Convention,* Article 2(2).
50. Hathaway, *The Rights of Refugees,* 576.
51. Ibid.
52. Ibid., 556.
53. Edwards, *Human Rights,* 314.
54. United Nations High Commissioner for Refugees, "Summary Conclusions on Family Unity Global Consultations on International Protection, Geneva Expert Roundtable," (8–9 November 2001), organised by the UNHCR and the Graduate Institute of International Studies, paragraph 5, accessed on 1 July 2012, at http://www.unhcr.org/refworld/publisher,CUP,THEMGUIDE,,470a33bed,0.html.
55. *The Final Act of the Conference on Security and Cooperation in Europe,* 1 August 1975, 14 I.L.M. 1292 (the Helsinki Declaration)**.** although not binding as it did not have treaty status, Article (1)(b) Reunification of Families states that the "participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family, with special attention being given to requests of an urgent character—such as requests submitted by persons who are ill or old."
56. Cynthia S. Anderfuhren-Wayne, "Family Unity in Immigration and Refugee matters: United States and European Approaches," *International Journal of Refugee Law,* Volume 8, No. 3 (July 1996) 349.
57. Ibid.
58. *Gul v Switzerland,* 19 February 1996, No. 53/1995/559/645 and *Ahmed v Netherlands,* 28 November 1996, No. 73/1995/579/665.
59. Ibid
60. Ibid.
61. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention),* 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950), defines humanitarian protection for civilians in a war zone.
62. United Nations High Commissioner for Refugees Executive Committee, *Conclusion No.24 (XXXII) Family Reunification,* 21 October 1981, sections 1, 5.
63. International Review of the Red Cross, Conclusions on Family Reunification, 1988, (formulated at the thirteenth Round Table of the International Institute for Humanitarian Law, San Remo, 6–10 Sept.1988), Conclusions 1, 2 and 3.
64. Ibid.
65. *Convention on the Rights of the Child,* 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990).
66. UN Committee on the Rights of the Child, "CRC General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin," 1 September 2005, CRC/GC/2005/6
67. Unaccompanied children are children, as defined in Art. 1 of the Convention of the Rights of the Child, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. According to the UNHCR the term unaccompanied minor rather than orphan should be used .An child is an orphan only if both parents are dead and this requires a careful verification and must never be assumed. Once a child is labelled an orphan adoptions are encouraged rather than focussing on family tracing, foster placement and community support.
68. Separated children are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may therefore include children accompanied by other adult family members.
69. *Convention on the Rights of the Child,* (1989) Art. 10(1).
70. Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires,* (Dordrecht: Martinus Nijhoff,1992), 206.
71. Jastram, *Family Unity,* quoting P.J. van Krieken, "Family Reunification," in *The Migration Acquis Handbook* (ed. P. J. van Krieken, T.M.C. Asser Press, The Hague, 2001) 123, who acknowledged that Art. 10 does not 'leave much room for machination and manipulation.'
72. Anderfuhren-Wayne, "Family Unity."
73. E.F. Abram, "The Child's Right to Family Unity in International Immigration Law," *Law and Policy,* 17(4) (1995) 423–4 confirms that a "state cannot as a matter of law or policy determine that family reunification for a category of sundered families will take place somewhere else in the world, and that family unity will be respected only by ushering the local child or parent to the airport. There is no true observation of a right if that right cannot be realized except abroad. States do not normally have the power to ensure the realization of a right outside of their own jurisdiction. A policy to reject most requests of any category of persons to enter a country for purposes of family reunification, except under restrictive conditions or exceptional circumstances, violates the Convention."
74. Guy S. Goodwin-Gill, "Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities." in *Children on the Move: How to Implement Their Right to Family Life,* ed. Jaap Doek et al (The Hague: Kluwer Law International, 1996).
75. They are certainly treated as such by the UN Committee on the Rights of the Child, which has used peremptory language in this regard, recommending for example that Australia introduce legislation and policy reform "to *guarantee* that children of asylum seekers and refugees *are* reunified with their parents in a speedy manner." Concluding observations of the Committee on the Rights of the Child:

Australia, UN doc. CRC/C/15/Add.79, para. 30 (10 Oct. 1997).

76. Summary Conclusions on Family Unity, UNHCR Global Consultations on International Protection Expert Roundtable (8–9 Nov. 2001) para. 1.
77. Executive Committee Conclusion No. 24 (XXXII) 1981, para.1: 'In application of the principle of family unity and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.'
78. Human Rights Committee, 39th Session, 1990, *General Comment 19* para. 5. Conclusions on Family Reunification, XIIIth Round Table on Current Problems in International Humanitarian Law (1988), International Institute of Humanitarian Law, para. 2.
79. The Refugees Act (130 of 1998), hereinafter the "Refugees Act."
80. According to the preamble, the Act is meant to give effect to the following international instruments to which South Africa has acceded: the Convention relating to the status of refugees (1951) ; The Protocol relating to the status of refugees (1967) ; The OAU Convention governing the specific aspects of the refugee problems in Africa(1969) .
81. Art 7 'EXEMPTION FROM RECIPROCITY—Except where this convention contains more favourable provisions, a Contracting state shall accord to refugees the same treatment as is accorded to aliens generally.'
82. OAU Convention, Article II.
83. The 1951 Convention, Article 3 and the OAU Convention, Article IV.
84. Refugees Act *Preamble*—'WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.'
85. Refugees Act, Section 6: Interpretation, application and administration of Act:

6. (1) This Act must be interpreted and applied with due regard to—

[…]

(d) The Universal Declaration of Human Rights (UN,1948);

(e) Any other relevant convention or international agreement to which the Republic is or becomes a party.'

86. Refugees Act, Section 3, Refugee status

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) 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; or

(c) is a dependant of a person contemplated in paragraph (a) or (b).

87. Refugees Act, Section 1 Definitions.
88. Edwards, *Human Rights,* 304.
89. Human Rights Committee, General Comment 28, Equality of rights between men and women (Article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000). See also Geraldine van Bueren, "The International Protection of Family Members' Rights as the 21st Century Approaches,"17(4) *Human Rights Quarterly,* 1995, 733–40.
90. International Committee of the Red Cross, *Commentary on the Additional Protocols,* Sandosz et al eds. (Geneva: Martinus Nijhoff, 1987) para. 2997.
91. UNHCR Executive Committee Conclusion, "Protection of the Refugee's Family," No. 88 (L) 1999 (b)(ii),
92. UNHCR, "Background Note: Family Reunification in the Context of Resettlement and Integration," Annual Tripartite Consultations on Resettlement (20–23 June 2001) para. 14.
93. Refugees Act, Section 27(b) states that a refugee is "enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution …"
94. South African Constitution (Act 108 of 1996).
95. Customary Marriages Act (120 of 1998).
96. *Daniels v Campbell NO and others* 2004 (5) SA 331 (CC).
97. Children—Section 28(1) Every child has the right–

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

98. *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C).
99. *Dawood v Minister of Home Affairs* 2000, CCT35/99.
100. Johann de Waal and Iain Currie, *The Bill of Rights Handbook;* (Cape Town: Juta and Co., 2001) 372.
101. *Dawood,* at 1044C and *Johnson v The Minister of Home Affairs* 1997 (2) SA 432 (C).
102. The government department responsible for the adjudication of refugees in South Africa
103. The author of this paper, as the current Director (since 2006) of the UCT Refugee Law Clinic, a legal aid clinic in Cape Town that provides assistance to refugees within the South African asylum process, has succeeded in making

numerous such applications on behalf of refugee clients over the years.

104. Refugees Act Regulation 16(3).
105. The current manner in which the Department of Home Affairs haphazardly provides or denies refugee documentation to spouses and family members who join the main applicant at a later date is the subject of research being conducted by the author, which will also look to how refugee spouses are treated where they marry in terms of their customary law, either within or outside of South Africa's borders.
106. Refugees Act Regulation 16(1).
107 South Africa Immigration Act, No. 13 of 2002.
108. Jastram, *Family Unity,* 23.
109. Bosnia and Herzegovina Law on Immigration and Asylum, 23 February 1999, accessed on 15 August 2011 at http://www.legislationline.org/documents/id/6284, Article 54.
110. The Political Refugees Act of Iraq, No. 51 (1971), Article 11.3.

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Interpreting for Refugees: "Where practicable and necessary only?"

Fatima Khan

Abstract

Legal interpreting is a highly specialized profession, not simply a function that any bilingual person can perform. Countries that have laws and regulations on court interpreting have them on the basis that everyone (including linguistic minorities) has the right to due process. In South Africa legal interpreting takes place in a variety of state institutions and the Refugee Reception Offices of the Department of Home affairs is one such setting. The present study investigates legal interpreting at asylum determinations and hearings. The focus is on two stages of the asylum application, which are crucial for determining refugee status. This paper aims to explore the right of an asylum seeker to an interpreter at these stages of the status determination procedure. It will also compare this right to the existing right in international law and assess whether South Africa has met the minimum requirement to enable a due process.

Résumé

L'interprétation juridique est une profession hautement spécialisée, et non une simple fonction que toute personne bilingue peut effectuer. Les pays qui ont des lois et des règlements sur l'interprétation juridique les ont développés en raison d'une reconnaissance que tous (incluant les minorités linguistiques) ont droit à une procédure régulière. En Afrique du Sud, l'interprétation juridique est pratiquée dans une variété d'institutions d'État, et le Bureau de l'Accueil des Réfugiés du Département des Affaires Intérieures en est un exemple. Cette étude examine en particulier la pratique de l'interprétation juridique lors des décisions et des audiences liées aux demandes d'asile. L'étude se concentre sur deux étapes de la demande d'asile, cruciales dans la détermination du statut de réfugié. Cet article explore le droit du demandeur d'asile à l'interprétation juridique durant ces deux étapes de la détermination de son statut. On y compare également ce droit aux droits existants dans le droit international, et évalue si l'Afrique du Sud rencontre les conditions minimales nécessaires à une procédure régulière.

Introduction

While court interpreting,[1] often referred to as legal interpreting, is far from a new issue, it is true that it has become a more complex one. With at least a quarter million people from twenty different countries entering South Africa annually for the purpose of seeking asylum[2] and therefore necessarily having to engage in a highly complex interaction with the government of South Africa at the Department of Home Affairs to acquire a legal status, the need for interpreters has increased tenfold. Whether stemming from a deliberate disregard of this complex status determination process at the Department of Home Affairs or from a failure to understand it, many asylum seekers have had to engage South African courts as well. More attention therefore needs to be paid to the use of interpreters in all legal settings in South Africa and not only at the Department of Home Affairs.

Many asylum seekers do not speak the language of the host country and as a result they depend on the skills of an interpreter. The question of what these skills should include, and the role the interpreter should play, is far from clear even beyond the Department of Home Affairs or South Africa generally. It is also debated internationally, with academic scholars and the United Nations High Commissioner for Refugees (hereinafter the "UNHCR") favouring a liberal interpretation of the interpreter's role, while the judiciary, on the other hand, insisting on a restricted role.[3] This

debate is based on the inherent problems which interpretation creates.

In 1952 Jean Herbert coined the phrase a 'necessary evil' for interpreters;[4] the law has progressed since and this 'necessary evil' has developed into a right. Interpretation is not an absolute right or a fundamental basic human right, but rather a procedural one that will be applied when 'practicable and necessary.'[5] The attitude to this right is obvious from its use and implementation; the research undertaken for the purposes of this paper reflects that it is still largely viewed as a necessary evil.

This lack of enthusiasm around the use of interpreters can be attributed to many factors, such as proceedings taking twice as long,[6] the difficulty in making a credibility judgment if communication is not direct, the difficulty for the lawyers to cross-examine and discredit witness credibility,[7] and the delay it causes when interpreters are not readily available. However, the right to an interpreter cannot be ignored.

In 1929 the Irish Chief Justice in the case of *Attorney—General v Joyce and Walsh* expressed the view that giving evidence in ones vernacular was a 'requisite of natural justice, particularly in a criminal trial.'[8] Waterhouse states that it is doubtful that the Chief Justice anticipated the increased number of non-native tongue speakers in the courts.[9]

This paper emphasises that this right is not the right to use the native tongue but rather as confirmed in international case-law[10] the right is a procedural one to understand and participate in one's own trial. The United Nations Human Rights Committee has been particularly adamant that the use of interpreters is unrelated to the issues of minority language speakers.[11] This is mainly the case with refugee matters; refugees are not demanding that their language be recognised in their country of asylum, they merely want to be able to effectively communicate their refugee claim.

In the Canadian case of *Andre Mercure v Attorney-General*[12] the Court held that the right to be understood is not a language right but rather 'one arising out of the requirements of due process.'

South African courts in terms of the Section Thirty-five (three)(k) of the Constitution, Act 108 of 1996, have also had to consider the question of the use of the native tongue as a language right as opposed to a due process right.[13] The paper aims to address two things: firstly, whether the right to an interpreter has been properly understood and implemented by the Department of Home Affairs as a procedural right and secondly, whether it has reached the minimum standard necessary to safeguard this procedural right. Qualitative research by the UCT Refugee Law Clinic was undertaken to understand how the Department of Home Affairs is approaching this right. Recommendations will be made on how to safeguard this right by comparing it to other jurisdictions.

In the first section this paper will undertake an analysis of the right to an interpreter as it appears in international law and in South African law. Furthermore, given the importance of context a brief sketch of the Department of Home Affairs' asylum process and the various bodies responsible for determining refugee status in South Africa will be highlighted in section two. Section three discusses of the role of an interpreter, the competences, the necessity and the impact the lack of interpreters has on proceedings. Section four will conclude with an analysis of the research undertaken and reflect on the law and the role of the interpreter in South Africa and compare it to minimum standards set in other jurisdictions.

Overview and Analysis of International, Regional, and Domestic Legal Requirements of the Right to an Interpreter

An overview of the international, regional and domestic requirements of the right to an interpreter will be discussed in this section; and, more importantly, how this right can be extended to asylum proceedings.

Already in the sixteenth century, laws existed which regulated the judicial interpreting in the Spanish colonies.[16] Similarly, Cassim states, that King Edward III instructed lawyers to use English in the courtroom to address the fact that 'citizens had no knowledge of that which is said for them or against them.'[15] In South Africa, the Magistrates Court Act Thirty-Two of 1944 at Section Six[16] provides for the provision of an interpreter if, in the opinion of the Court, the accused is not sufficiently conversant in the language in which evidence is being given. The same provision prevails in the Supreme Court Act Fifty-nine of 1959.[17] Though both the Magistrates Court and Supreme Court refer to interpreters in criminal matters only, it is apparent that the value and necessity of this has been recognised by the Department of Home Affairs at asylum determinations and hearings. The right to an interpreter, although restricted to 'where practicable and necessary,' is specifically referred to in the Refugees Act[18] as well as in the Regulations[19] to the Refugees Act. This paper will give an overview of the right to an interpreter in criminal proceedings and the reasoning behind this and argue that therefore the right to an interpreter should be extended to refugees at asylum hearings.

International Law

It is important to recognise that the right to an interpreter is an integral part of the right to a fair trial or hearing and that the right to a fair trial is a right recognised in international

human rights law documents outlined below, notwithstanding the 1951 United Nations Convention Relating to the Status of Refugees (hereinafter the "Refugee Convention") and its 1967 Protocol.[20]

The 1951 United Nations Convention Relating to the Status of Refugees

Article Sixteen[21] of the Refugee Convention specifically grants refugees and asylum seekers access to courts. Significantly, no reservations to this article are permitted and all refugees are thus granted access to court notwithstanding the length of their stay in the country of asylum. According to Hathaway, although the Refugee Convention fails to eliminate many problems faced by refugees, the drafters of the Convention have helped refugees overcome the practical impediments to accessing courts by assimilating them to the status of nationals.[22] They are afforded the same treatment as nationals with regard to *free* access to courts, however, if the state lacks the resources and the judicial apparatuses to extend additional services such as legal aid and interpreting services to its own citizens, then it is not expected to extend it to refugees. The right to an interpreter is not expressly mentioned in the 1951 Refugee Convention but can be inferred there from. Fair trial rights generally would include access to courts and broadly speaking, it would include the right to an interpreter, legal aid etc.

The right to an interpreter is however specifically mentioned in the International Covenant on Civil and Political Rights (ICCPR) and this paper contends that since refugee law is informed by international law, it should not be viewed as an isolated body of law and be denied the benefits there from.[23]

The International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights[24] expressly guarantees the right to access the services of an interpreter at Article Fourteen (three)(f).[25] It however restricts the right to an interpreter to an accused in a criminal charge. The right to the free assistance of an interpreter where he or she does not understand the language of the court is guaranteed. It is mostly by virtue of Article Fourteen (three)(f) that the services of interpreters are provided for and used in several jurisdictions such as in the European Union.

It could be argued that this right is reserved for criminal proceedings, however according to Laster and Taylor[26] a more general reading of the ICCPR suggests that it could be extended to civil proceedings. In the 1987 United Nations Human Rights Committee matter of *S.W.M.Brooks v the Netherlands*[27] where Article Twenty-six[28] was under discussion, Laster and Taylor argued that it is possible for the right to an interpreter to be extended to all types of matters to ensure "equal protection of the law."

They argue that if Article Twenty-six of the ICCPR stipulates a general principle of equality it could be used to extend the right to an interpreter to all types of matters to ensure fair treatment and to prevent a prejudicial outcome in any kind of matter. This basic acknowledgement of rights should extend to refugee determination proceedings as well.

European Convention on Human Rights

The right to an interpreter or translator during criminal proceedings is laid down in Article Six (three)(e) of the European Convention of Human Rights.[29] Pursuant to this article every defendant has the right to free assistance of an interpreter, if he or she does not understand or speak the language of the court. Though South Africa is not bound by the European Convention of Human Rights, the precedents set at the European Court for Human Rights can have persuasive value in South African courts if a similar section or article is adjudicated upon.

According to the European Court of Human Rights there is no fair trial if no interpreter is provided. The decision in *Kamasinski v Austria*[30] goes further by remarking on the quality of the interpreter to be provided. In *Brozicek v Italy*[31] the European Court of Human Rights indicated that the interpreting must be 'adequate.'

Why Criminal Matters Only?

In most jurisdictions it is accepted that not only must interpreters be allowed at criminal trials but they have to be provided by the State because the consequences of not being heard are potentially very harmful. The result could be conviction of an innocent person or a criminal record that could result in very negative consequences for the accused. That logic needs to be extended to asylum hearings because the consequences could potentially be far more harmful; it could lead to persecution or risk to life upon return, the very reason why people seek asylum in the first place.

Whether interpreters are allowed or not should as a "matter of common sense and common humanity depend on the gravity of the consequences."[32] Significant fundamental human rights such as the right to life and liberty will be infringed if refugees are erroneously returned to their country of origin.

In addition, the cardinal principle in refugee law, the non-refoulement clause at Article Thirty-three[33] is under attack as a result of a state practice that does not guarantee the use of an interpreter at refugee status determinations. Article Thirty-three of the Refugee Convention prohibits contracting states from returning refugees "in any manner

whatsoever," to a country where their life or freedom would be threatened.[34] Where interpreters are not provided or even where the competences of the interpreters are questionable refoulement takes place in a less direct form.

States are guilty of violating non-refoulement by not following fair administrative procedures, which would be the case if interpreters are not allowed or if incompetent interpreting occurs at asylum hearings or determinations. The consequences are therefore as harsh if not harsher than when the right to an interpreter is denied in criminal proceedings.

The South African Refugees Act and Refugees Act Regulations

Section Five (one) of the Regulations to the Refugees Act[35] 130 of 1998 states that " … [w]here practicable and necessary," the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process. Research[36] has revealed that many asylum seekers have been prejudiced in the past because the Department of Home Affairs claimed that often it was not practicable for the Department to provide competent interpretation.

On the other hand, section Thirty-eight (one) (f) of the Refugees Act 130 of 1998 provides for the provision of interpreters at all levels of the asylum process. There thus appears to be a conflict between the Act itself and its Regulations that provide for interpreters only "where practicable and necessary." The usage of this phrase allows the Department of Home Affairs to decide when it is practicable or necessary.

The terms "practicable and necessary" therefore need further analysis. When the applicant is unable to communicate it is logically always "necessary" for the use of an interpreter. Without an interpreter it is obvious that no status determination interview can be properly conducted. This is typically the scenario at the Department of Home Affairs with a large number of asylum seekers unable to speak English, the language officially and exclusively used at the Department of Home Affairs.

The Oxford dictionary defines practicable as "capable of putting into practice, with the available means."[37] The term "where practicable," therefore allows for the shifting of responsibility by the Department of Home Affairs. The Department of Home Affairs is under an obligation to provide only if it is possible for them. It may not be possible for many reasons, with lack of sufficient resources the most likely. The obligation in this instance is not just to hire interpreters, but to hire competent interpreters, and finding competent interpreters in such a range of languages is in itself challenging.

Kerfoot and de La Hunt[38] briefly outlined the pre-2010 practice at the Department of Home Affairs' Refugee Reception Offices where the burden was placed on the refugees to provide an interpreter; the Department thus evading its obligation. They refer to interpreters working freelance at the Refugee Reception Offices and the practice of asylum seekers bringing their own interpreters who usually required payment. There was clearly no recruitment policy and no method to test competency; the ad-hoc manner in which the interpreting occurred did not guarantee a fair administrative procedure at all.

The current research reveals that the above procedure as outlined by Kerfoot and de la Hunt has changed at the Department of Home Affairs. The Department now provides interpreters, but these interpreters are not employed by the Department, they are employed by a non-government organisation called Refugee Ministries and placed at the Refugee Reception Offices.

South African Case-Law and the Constitution

The terms "where practicable and necessary" are analyzed in various South African High Court judgments however bearing in mind that these judgments refer to indigenous languages which in terms of the Constitution[39] must be protected and their use promoted. Much of the case-law on the right to an interpreter in South Africa has developed through the criminal law.

In the case of *Mthetwa v De Bruin and Another,*[40] the appellant argued that he did not understand the language of the court sufficiently, being a native isiZulu speaker. It was ruled that because he spoke enough English and that the court staff and judiciary did not speak the isiZulu at all, it was impractical to conduct the court in isiZulu. The court stated that the Constitutional provision is clear, that is, if it is not practicable to use the language in court, the proceedings must be interpreted in that language. The usage of the word practicable gives the court power to determine when it is feasible or not to conduct the hearing in the language choice of the appellant.

If that reasoning is extended to provision of interpreters, that is, the Department of Home Affairs will only provide interpreters if feasible, it leaves the asylum seeker extremely vulnerable. The asylum seekers will have to source their own interpreters, increasing their vulnerability and exposing them to exploitation.[41]

Asylum seekers are not demanding that matters be heard in the language of their choice; the purpose of the use of any language with regard to status determinations of asylum seekers is simply to ensure effective communication; therefore it is more akin to a fair trial right as at section Thirty-five (three)(k) of the Constitution[42] which provides that "every accused has a right to a fair trial, which includes the right to be tried in a language that the accused person

understands or, if that is not practicable, to have the proceedings interpreted in that language."

Recently, however the High Court[43] substituted its decision for that of the Refugee Status Determination officer because fair procedure, which included the right to an interpreter, had been violated.

The Asylum Process in South Africa

The use of interpreters to access justice in South Africa, a country with eleven official languages, is not an uncommon or unexplored phenomenon. In South Africa legal interpreting takes place in a variety of state institutions. The Refugee Reception Offices of the Department of Home Affairs is one such setting. The present study investigates legal interpreting at asylum determinations and hearings. The focus is on two levels of the asylum application, which are crucial for determining refugee status.

Several interactions with the Department of Home Affairs are required before refugee status is granted or denied. It is during these interactions that interpreters are required but are not necessarily provided, or those provided are untrained. The procedure for applying for refugee status in South Africa in accordance with the rules and regulations of the Refugees Act 130 of 1998 is undeniably a complicated legal procedure. Interpreters must therefore have a linguistic understanding of the complex legal concepts within refugee status determination such as alienage, non-refoulement, persecution as opposed to prosecution, and state responsibility, for the interpretation to be effective.

Given the importance of context the paper will provide a brief sketch of the asylum process including all the interactions with the Department of Home Affairs and the various bodies responsible for determining refugee status in South Africa.

The Right to Seek Asylum

The right to seek asylum is enshrined in the Universal Declaration of Human Rights[44] and regulated under the 1951 Refugee Convention and its 1967 Protocol. According to these documents refugee status is to be granted to anyone who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself to the protection of that country."[45]

South Africa has incorporated the 1951 Refugee Convention definition as well as the definition in the Convention Governing the Specific Aspects of Refugee Problems in Africa,[46] (hereinafter the OAU Convention) into its national law at Section Three of the Refugees Act, as follows:

> A person qualifies for refugee status for the purposes of this Act if that person-
>
> (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
>
> (b) 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; or
>
> (c) Is a dependant of a person contemplated in paragraph (a) or (b).

The determination of refugee status in terms of the above definition is a highly complex legal determination and special structures are needed for this determination. Concepts such as "persecution," "well-founded-fear," and "membership of a particular social group," within this definition, require a legal interpretation. Despite the fact that consistent efforts at establishing standard practices for refugee status determinations are made by UNHCR,[47] it is up to the individual signatory states to create a legal framework and institutional structures and procedures for conducting refugee status determinations under national law.

In terms of its national laws, South Africa has set up such a determination procedure. It is a two-tier procedure as is generally found elsewhere and also typical of most legal processes, a first instance determination and an appeal hearing if necessary.

Refugee Reception in South Africa

The first step in the asylum process is for the asylum seekers to lodge an application in person at one of the Refugee Reception Offices of the Department of Home Affairs. This is done in terms of Section Twenty-one of the Refugees Act, which states that the application for asylum "must be made in person." The application requires the completion of a nine-page eligibility determination form referred to as the BI-1590.[48] This form is exclusively in English and it includes questions with regard to the applicant's personal details, country background and reasons for applying for asylum. This form is issued to asylum seekers on the day that they apply for asylum and it must be completed

on the Department of Home Affairs premises on that day. Applicants with no knowledge of English are therefore unable to complete the application form without the help of an interpreter. Not only must the reception officer receive this form from the applicant, the reception officer is under an obligation, in terms of the regulations[49] to assist where necessary to ensure the proper completion thereof. At the end of this procedure asylum seekers are issued with a section Twenty-two temporary asylum permit. The issuance of this temporary asylum permit is obligatory; the refugee reception officer has no discretion. This first step in the application process is however very important as it is often used as the basis of the claim at the later determination stage, even if proper assistance was not provided at this initial stage. Countless times the Refugee Appeal Board[50] and the Standing Committee of Refugee Affairs[51] have also made credibility findings against asylum seekers on the basis of lack of consistency between first and later interviews.

Refugee Status Determination

Following the issuance of the asylum seeker permit after the applicant completes the BI-1590 form, the asylum seeker must have a status determination interview with a Refugee Status Determination Officer. The Refugee Status Determination Officer is empowered in terms of section Twenty-four (three) of the Refugees Act to make a decision with regard to the status of the applicant. The applicant may be granted status or may be denied status with the right to appeal the decision at the Refugee Appeal Board. The applicant may also be rejected as manifestly unfounded with the right to have the decision reviewed by the Standing Committee for Refugee Affairs.

The Refugee Status Determination Officer, when considering the application must have due regard for the rights set out in section Thirty-three[52] of the Constitution and in particular ensure that the applicant fully understands the procedures, his or her rights and responsibilities, and the evidence presented.

The Refugees Act Regulations refer to the interaction between the asylum seeker and Refugee Status Determination Officer as a non-adversarial interview. The Refugee Status Determination Officer conducts the hearing "to elicit information bearing on the applicant's eligibility for refugee status."[53]

Hence, the Refugee Status Determination Officer must be able to communicate with the applicant and again where the Refugee Status Determination Officer is unable to communicate with the asylum seeker, the use of an interpreter is necessary. The research conducted for this paper has reflected a number of irregularities at this stage, which will be highlighted and discussed later.

In addition to the interview that must necessarily be done via an interpreter, it becomes compulsory for the Refugee Status Determination Officer to explain the procedure once rejected whether as manifestly unfounded or unfounded.

Appeal and Review

The review by the Standing Committee of Refugee Affairs and the appeal by the Refugee Appeal Board are the final stages of the determination in terms of the Refugees Act. It is particularly at the appeal stage, where legal counsel is allowed to represent appellants, that interpretation is one of the aspects scrutinised. In the author's experience the discrepancies between the BI-1590 and the interview with the Refugee Status Determination Officer largely occur as a result of inadequate interpretation. Often these discrepancies are remedied at the appeal stage as recognised in the unreported case of *Van Garderen v Refugee Appeal Board*.[54]

Inadequate interpretation has also been used as a basis for review in the High Court in the *Matter of Deo Gracias Katshingu*[55] where the applicant stated that the Refugee Status Determination Officer failed to provide competent interpretation in circumstances where it was plain that this was necessary. Bozalek J held that:

> … the applicant did not enjoy the hearing he was entitled to in terms of the relevant provisions of the Refugees Act, the Regulations framed pursuant thereto and the provisions of the Constitution. The most egregious shortcoming in this regard, was the second respondent's failure to provide an interpreter competent in English and French, in the absence of which no hearing or process, it seems to me, could have taken place.[56]

The Interpreter's Role, Competences, and Qualifications

Legal interpreting is a highly specialised profession[57], and not simply a function that any bilingual person can perform. Countries that have laws and regulations on court interpreting have them on the basis that everyone, including linguistic minorities, has the right to due process.

Waterhouse, following a literature review, lists the necessary skills of interpreters as those including "linguistic ability, memory, sensitivity, ability to build rapport and inspire confidence, objectivity, diplomacy, patience, tolerance, cultural, social and political awareness, the ability to listen, analyse and repeat a message, good hearing and clear speaking, physical stamina and strong nerves as some of the many qualities needed to be a competent interpreter."[58]

Competency

As stated by Judge Bozalek in the matter of *Deo Gracias Katshingu*[59] competent interpreters are necessary, not only so that applicants can state their claim, but also to safeguard procedural rights.

Regulation Five of the Refugees Act states that the "interpreter must be competent to translate a language spoken and understood by the applicant, to a language spoken and understood by the Refugee Reception Officer or Refugee Status Determination Officer."[60] The Regulation however fails to address the manner in which competency could be measured and there is not a mechanism to address the issue of incompetent interpreters.

Addressing the competency of interpreters has, however been accomplished effectively in other jurisdictions. For example, Holland's Sworn Translators and Interprets Act[61] that came into operation on the first of January, 2009, states the necessary competences for interpreters. Firstly, this Act established a Quality Institute, which advised on the necessary competences. Secondly, it listed the actual competences that the interpreter should have such as: at least a secondary education in the language and be a native speaker, a certificate or a sub-certificate for an interpreter, and course work experience in the region of the foreign language for the person involved.

Similarly the European Union has devised a framework on the right to interpretation[62] by adopting common minimum procedural standards. Article Six of this framework allows for interpretation to be free of charge in criminal proceedings when the suspect does not understand the language of the court. This right extends throughout the proceedings. At Article Eight member states are expected to ensure sufficiently qualified interpreters to provide accurate interpretation. If this fails there should be a mechanism in place to replace the interpreter. At Article Nine the Framework states that proceedings should be recorded to facilitate verifying the accuracy of the interpretation.

Role and Function of the Interpreter

The role of the interpreter has been extensively examined by academics, with Mickelsohn[63] asking whether interpreters should be "invisible, neutral, participative, active, a member of the investigating team or team with the applicant?" Granger and Baker[64] have found evidence of role conflicts amongst interpreters themselves in their study. According to these authors, while most interpreters considered direct language translation their primary goal, in practice the study revealed that interpreters have found themselves in situations that required careful balancing. Some interpreters considered it part of their job to be a "cultural broker, technical explainer and advocate."[65]

Berk-Seligson's[66] study on court interpreting began with the premise that "interpreters should be physically invisible and vocally silent." In fact, she found that the impact of interpreters on legal proceedings was far greater than had been imagined. Interpreters can manipulate language to shift blame and structures and affect sympathy, and change speech style in terms of politeness, formality and verbally more active than realised which strongly affects the court's power relations.[67] The research undertaken at the Department of Home Affairs by the Refugee Law Clinic corroborates these findings of Berk-Seligson.

According to Steytler, an interpreter's function is unambiguous: "to translate accurately, comprehensively, and without bias, all communications in court to a language in which the accused can understand."[68] The role of the interpreter is thus to facilitate the communication where one party is not conversant in the court language. He or she should deliver an expert service and assume a neutral position in the context between the parties.

Channon, states that "a good court interpreter must have the ability to translate faithfully without adding to the questions asked or the answers given."[69] He also notes that the interpreter must be "completely impartial and take no personal interest in the outcome of the case" and the interpreter must "remain unaffected by anything he sees or hears."[70] This approach has been adopted by the Asylum and Immigration Tribunal in the United Kingdom in the matter of *AA and the Secretary of State for the Home Department* where the Adjudicator held that " … it was in the highest degree undesirable for the interpreters as Court official to be asked to contribute in any way to the determination of a contested issue. In his task of comprehension and communication, the interpreter needs to have and maintain the confidence of all those with whom he deals, including the witness evidence whose is being interpreted, the representatives of both parties and the judge."[71]

The authors cited above (Berk-Seligson, Channon, and Steytler) have all illustrated how important interpreters are in guaranteeing one's right to due process by ensuring one's 'presence' in court. This notion of linguistic presence (i.e. the defendant cannot be present at his/her trial if he/she does not understand the language of the proceedings) was established in the 1974 matter of *Arizona vs Natividada*.[72]

Type of Interpreter: Legal Interpreters, Community Interpreters or Active Intermediaries?

Fenton sees the debate surrounding the rights and obligations of community interpreters as a concurrence of two positions: interpreting and advocacy. According to her, interpreting means a "close rendition of what is heard with cultural adjustments strictly limited to linguistic elements,

while advocacy includes interventions by the interpreter on behalf of the clients and for their perceived benefits."[73] Legal interpreters have set themselves apart from community interpreters with their own set of professional principles.

Barsky pleads for the role of the interpreters in asylum matters to be extended to one of an active intermediary.[74] He proposes strategies ranging from intervening with questions and clarifications to adding unsolicited supplementary information on the historical political and social situation of the claimant's country. Barsky is clearly arguing to use the interpreter to compensate for inadequate status determination techniques. The research conducted for the purposes of this paper reveals that even though interpreters are aware of how the incompetence of Refugee Status Determination Officers fails claimants they nevertheless report in trying as far as possible not to play this extended role. Asylum claimants have been unable to comment on whether interpreters played a more active role than they ought to.

Measurement Standards and Research Conducted

It has been highlighted above that the right to an interpreter is essentially a procedural right that derives from the right to a fair trial. The aim of the research conducted for this paper was to establish whether the procedural right has been adequately extended to refugees and asylum seekers in South Africa and thereafter to measure whether this right has been fairly applied at all stages of the status determination process by comparing it to minimum standards as identified in other jurisdictions.

Establishing the appropriate criteria for interpreting proficiency is a difficult task; however this has been done in a number of jurisdictions in Europe and in the United States of America. These countries have given effect to legislative provisions, which state that competent interpreters should be provided, by adopting certification programs to ensure that interpreters used in courts and tribunals are qualified. The Holland Sworn Translators Act, the European Union framework and the Federal Courts Act of 1978[75] in the United States are all examples of programs adopted to establish measurable criteria for qualifications and competency. According to Mikkelson, it is evident that these programs were developed because where interpreters were used on an ad hoc basis, the consequences were disastrous.[76]

Research Statistics and Analysis

The University of Cape Town Refugee Law Clinic has been representing large numbers of rejected asylum seekers before the Refugee Appeal Board and before the Standing Committee of Refugee Affairs over the past fifteen years.[77] The Refugee Law Clinic is often informed by rejected asylum seekers that they were rejected because they were not able to relate their claims effectively because of language constraints or because interpreters put words in their mouths or significantly filtered what they said. Thus rejected asylum seekers are claiming that ineffective interpretation has been a cause in their rejection.

Rejected asylum seekers and interpreters have been interviewed to ascertain whether lack of proper interpretation could have been a factor in their rejection both at the initial stages by the Refugee Status Determination Officers, and at the final review or appeal stage before the two quasi-judicial bodies.

Interviews with Asylum Seekers

Qualitative semi-structured interviews were conducted with asylum seekers covering topics including: their experience of the status determination process at the Department of Home Affairs' Refugee Reception Offices; their expectations of the interpreters; whether they understood the processes through which they were taken; whether they thought they were treated fairly; the problems they faced; and, whether it was dealt with to their satisfaction.

Interviews were conducted with a total of 124 rejected asylum seekers from the twenty-sixth of September 2011 until the fourteenth of December 2011. All of these asylum seekers were assisted to lodge an appeal with the Refugee Appeal Board. Lodging an appeal necessitates the completion of an appeal affidavit in terms of rule four (two) of the Amended Refugee Appeal Board Rules.[78] Of the 124 rejected asylum seekers assisted, it was established that eighty-six asylum seekers needed the assistance of an interpreter at the application stage as well as at the determination stage. It was also established that interpreters were provided by the Department of Home Affairs at both these stages; to assist with the BI-1590 form (mentioned above) as well as at the status determination interview, and in most cases it was the same interpreter. The author asserts that having the same interpreter at both stages in itself became problematic as the interpreter did not have a clear understanding of his or her role. A further factor was the evident inadequate interview skills of the Refugee Status Determination Officers.

The overview provided is based on the eighty-six asylum seekers that needed the assistance of an interpreter. It is apparent from this statistic that a very large percentage of asylum seekers need the assistance of an interpreter and it is clear that the Refugee Reception Office will not be able to function without the assistance of interpreters. The research established that interpreters were provided by the Department of Home Affairs for all asylum seekers who needed assistance at all stages of the status determination. Not a single applicant interviewed was allowed to bring their own interpreter; in one instance a minor was forced

to use the services of the interpreter provided by Home Affairs and the family member was not even allowed to be present.

The asylum seekers who were interviewed believed the interpreters to be employed by Department of Home Affairs. All asylum seekers were pleased and relieved to have someone present that could understand them and assist them to communicate with the Department of Home Affairs. Not a single asylum seeker even in direct response to the question "did you trust the interpreter?" responded by saying that they did not. Generally, the interpreters provided were viewed in a positive light and it is evident that the asylum seekers felt a kinship with the interpreters; interestingly, they seemed to view the interpreters as community interpreters rather than professionals; meaning they believed the interpreters to be present for their assistance rather than for the benefit of status determination process.

It was only upon more in-depth questioning about the role of the interpreter and the competences of the interpreter that the asylum seekers started to focus on areas of the interpretation that were not necessarily to their benefit. For example, not all interpreters spoke the preferred languages of the asylum seekers. Some of the asylum seekers would have preferred to speak, for example, Lingala, a language generally spoken in the western part of the Democratic Republic of Congo (DRC) but were forced to speak Swahili, a language from the eastern part of the DRC, because the interpreter present could not speak Lingala. This would not be reflected on the decision yet it is clearly a procedural element of the interview that may affect the outcome. Rwandan asylum seekers similarly were assisted by Burundian interpreters and though they could largely communicate with the Burundian interpreter they upon reflection highlighted the fact that the Burundian interpreter failed to pick up on the different nuances in the languages.

Upon being interviewed, many asylum seekers were surprised to learn that what they told the interpreter was not reflected in its entirety in the written decision of the status determination officer. Many found that only a fraction of what they said was reflected in the decision. One asylum seeker remarked that he told a lengthy story to the Refugee Status Determination Officer and the interpreter only said a few words. He reflected upon questioning by the researcher that at the time he did not do or say anything; it was only when the lack of information or the minimum information was brought to his attention by the researcher that he realised that the interpreter was not as competent and as helpful as he initially thought.

Some asylum seekers were surprised to find that the decisions of the status determination officer reflected a completely contrary account of their asylum claim to what they told the interpreter and the status determination officer. Asylum seekers failed to understand the irregularities as reflected in their decisions. This is not an unexpected phenomenon. Abuya[79] refers to the omniscient interpreter (those who put words in the mouths of the applicants) and the distortional interpreter (those who misconstrue statements made by claimants).

All asylum seekers signed the BI-1590 document, which was filled in with the assistance of an interpreter and took receipt of the status determination officer's decision by signing the decision, without being aware of what they signed. Asylum seekers had no way of verifying their version of what was said at the hearing.

It is clear from the above that safeguards need to be put in place if fair procedure is to be *guaranteed*.

Interviews with Interpreters

Various open-ended interviews were conducted with interpreters for asylum seekers and refugees based at the Department of Home Affairs Refugee Reception Office in Cape Town in an attempt to establish their proficiency, their competences, the manner in which they viewed themselves, how they were viewed by the Department of Home Affairs and by the asylum seekers as interpreters.

The official language at the Department of Home Affairs Refugee Reception office in Cape Town is English according to all the interpreters and the asylum seekers. In the author's experience as a practicing refugee attorney for the past nine years it is evident that the officials at the Department of Home Affairs Refugee Reception Office communicate only in English to all refugees and asylum seekers. This means that the interpreter must be able to speak English and at least one other language. Often however interpreters were roped in to extend their services in their second or third language. For example, the Somali interpreter interviewed attested to being used as an Arabic interpreter (though Arabic is his second language); he was also asked to interpret in Swahili even though it is a language he learnt while travelling through Kenya and Tanzania.

Bearing in mind the competences set out in the Holland Sworn Interpreters and Translators Act and other Acts detailed above, interpreters were asked questions to assess their competences. They were also asked questions with regard to their role perception and their feelings toward their job.

The Level of Education

All the interpreters interviewed had a tertiary education in their first language and at least a secondary education in English. Some of them had tertiary education in English, one of them with an Honours degree in English and French

and an Honours degree in Linguistics obtained in South Africa.

The qualifications of all interpreters were verified through the South African Qualifications Authority.[80] Though it is apparent that a minimum education standard has been set for the hiring of interpreters none of the interpreters have any specific training in interpretation.

Job Opportunity

Some of the interpreters interviewed have been interpreting for asylum seekers at the Department of Home Affairs since 2008 on an ad hoc basis as outlined by Kerfoot and de la Hunt above. Many changes in the hiring of and expectations have occurred in the past four years with some of the most significant changes taking place during 2011. Most of these earlier positions were voluntary in the sense that the interpreters were not officially employed by the Department of Home Affairs or any other agency. The Department of Home Affairs realizing that it would be impossible for them to operate without interpreters allowed interpreters on their premises to interact with and assist refugees. Any fees earned were as a result of the interpreters own negotiations with the applicants. Despite the fact that it was a voluntary position at the time, the Department of Home Affairs nevertheless expected the interpreters to submit their curriculum vitae, which were scrutinised by the Department officials. They were also received by the Department of Home Affairs and the expectations of the Department were outlined in the initial meeting.

The research reveals interpreters are no longer used on an ad hoc basis; interpreters are in formal employment and refugees and asylum seekers are no longer required to bring their own interpreters or pay interpreters. There is an attempt to bring procedures in line with the law, for instance the nine-page BI-1590 eligibility form is now completed with the assistance of the refugee reception officer[81] and an interpreter.

Role Perception of the Interpreter

The interpreters interviewed were ambiguous about their role, claiming to be both a neutral interpreter as well as a person with strong attachment to the claimants for whom they felt pity and sympathy. This ambiguity in the author's opinion is as a direct result of lack of professionalism and training on the part of the interpreters. Most of the interpreters have felt that it is easy to remain neutral and translate directly if the interviewer is fair and competent and where claimants are easily able to answer the questions posed to them by the interviewer. Interpreters have stated that it became difficult to remain neutral where interviewers have been deliberately misleading and disrespectful to claimants and where claimants were obviously lying. A case in point would be where interviewers have clearly failed to ask someone from a war torn region about the war but instead asked whether they came to South Africa to seek employment or where a claimant alleged that he or she was from a war-torn area and it was obvious to the interpreter that they were not.

The research has thus revealed the necessity for a formal approach to interpreting and for a definite increasing of standards and awareness creation in this regard.

Conclusions and Recommendations

The brief research undertaken reveals that interpreters have not received any training by the Department of Home Affairs. The only qualification expected of the interpreters is that they are adequately literate in the language they interpreter into and from. This is by no means comparable to any recognised skills of interpreters as set out in other jurisdictions.

The meager attempt made by the Department of Home Affairs simply to have interpreters present at hearings does not in any way guarantee the right to a fair procedure as outlined in the Constitution and the Refugees Act. No attempts are made to ensure the competences of the interpreters and neither is there a procedure to remedy the situation if the interpreter is obviously incompetent.

The Department of Home Affairs must set the stage for refugees to be able to effectively communicate their claim, failure thereof, is highly prejudicial as well as unlawful.

Neither the Department of Home Affairs nor the South African courts have set minimum standards for competent and trained interpreters. With so many individuals, not only nationals due to South Africa's eleven officially recognised languages, but also the increasing number of asylum seekers unable to communicate in South Africa's official languages, the need for the setting and implementation of these standards are overdue. Minimum standards and rules and ethics with regard to interpreting must be formalised as a matter of urgency in South Africa and in particular at the Department of Home Affairs.

In South Africa various academics and other interested parties have lobbied for and even established Court Interpreting programs, not only to provide better services but also to raise the profile and status of interpreters.[82] In South Africa various degree and diploma courses[83] are offered by universities but such qualifications are not demanded by the Courts in South Africa for interpreters.[84]

In the United States certification programs were adopted to ensure that the interpreters working in the courts are qualified. The first such program was instituted under the Federal Courts Acts of 1978. Mikkelson[85] made

recommendations for the European Court for Interpreters on the basis of experiences of colleagues in the United States. She noted that these programs in the United States ran into immediate problems because of the low pass rate. South Africa should bear this in mind and not impose testing on interpreters already working in the system without any training.

In conclusion, having noted minimum standards in other jurisdictions it is recommended that for South Africa to ensure competent interpretation in the asylum process as well as the courts, it must undertake the following:

- *Develop training programs,* that is, provide such training for existing interpreters as well as aspiring interpreters. Such training should necessarily include formal interpreting skills as well as knowledge of the law and ethics with regard to interpreting. Aspirant interpreters should only be admitted to the training programs once proficiency in the languages they are interpreting into and from have been established.
- Ensure that formalized *testing and certifications* take place after the training, conducted by individuals who are trained in language and interpreting techniques.
- *Practice materials* should be developed.
- *Seminars* to acquaint Refugee Status Determination Officers, presiding officers and other court staff with the nature of interpreting must be organised and attendance should be compulsory.
- The interpreters must have *qualification*s with regards to the language they are interpreting from and into.
- *Measures* must be put in place to resolve problems that have arisen as a result of problematic interpreting, that is, for the removal of and replacement of the interpreter.
- A *full recording* of the interpreting should always be available just in case the quality of interpretation is questioned at a later stage.

Notes

1. Legal interpreting can be distinguished, for example, from medical or community interpreting; this paper will provide clarity hereon.
2. United Nations High Commissioner for Refugees, "UNCHR Statistical Yearbook 2010: Trends in Displacement, Protection and Solutions," (27 December 2011) ISSN 1684–9051. Available at: http://www.unhcr.org/refworld/docid/4f06ecf72.html [accessed 27 December 2011].
3. De Jongh, "*Foreign Language Interpreters in the Courtroom,*" 286.
4. Kate Waterhouse, "Interpreting Criminal Justice: A preliminary look at language, law and crime in Ireland" *Judicial Studies Institute*" (2009) 42.
5. See, for example, Section 35(3)k of Constitution of the Republic of South Africa , Act 130 of 1996.
6. Discussed in Waterhouse, "*Interpreting Criminal Justice,*" 47. John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (2003).
7. Discussed in Waterhouse, "*Interpreting Criminal Justice*" 47. Rachel Tribe, "Working with Interpreters," *Race, Culture,Psychology and Law* (SAGE, 2005).
8. *Attorney General v Joyce and Walsh* (1929) I.R. 526 per Kennedy CJ.
9. Waterhouse, "*Interpreting Criminal Justice*" 58.
10. *Andre Mercure v Attorney-General* (1988) S.C.R. 237.
11. *S.W.M.Brooks v the Netherlands* Communication No. 172/1984.
12. *Andre Mercure v Attorney-General,* (1988) S.C.R. 237.
13. *Mthetwa v De Bruin and Another* 1998 (1) BCLR 366 (N).
14. Fawzia Cassim, "The right to address the court in the language of one's choice" (2003) 44 *Codicillus* 25.
15. Ibid.
16. Magistrates Court Act 32 of 1944 , section 6(2) reads:
    > If in a criminal case, evidence is give in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not.
17. Nico Steytler, "Implementing Language Rights in the Court: The Role of the Court Interpreter" (1993) 9 *SAJHR* 206.
18. Refugees Act 130 of 1998.
19. Regulations to the Refugees Act, Vol.418, No. 21075, 6 April 2000 Regulation Gazette No.6779.
20. *United Nations Convention Relating to the Status of Refugees,* (22 April 1954) 189 UNTS 150.
21. Article 16(1) states that "'a refugee shall have equal access to courts of law on the territory of all Contracting States."
22. James C. Hathaway, "*The Rights of Refugees Under International Law*" (Cambridge: Cambridge University Press, 2005), 910.
23. Fatima Khan "Family reunification within the refugee context: Is South Africa meeting its International, Regional and Constitutional obligations toward refugees?" *Working paper Series:* No 1/2011 at http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_1_of_2011.pdf, accessed 15 January 2012.
24. *International Covenant on Civil and Political Rights,* 16 December 1966 999 UNTS 171(ICCPR)
25. Ibid, Article 14(3) (f) provides the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

26. Kathy Laster and Veronica Taylor, "*Interpreters and the Legal System,*" (Sydney: The Federation Press, 1996), 26.
27. United Nations Human Rights Committee, Twenty-ninth session Communication No. 172/1984. Netherlands.09/04/87.CCPR/C/D172/1984
28. Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
29. Article 6(3) of the European Convention of Human Rights (ECHR) states that " … [e]veryone charged with a criminal offence has the following minimum rights: … (e) To have the *free assistance of an interpreter* if he cannot understand or speak the language used in court.' www.unhcr.org /refworld/docid/3ae6b3b04.html Accessed October 2011.
30. *Kamasinski v Austria* (Inadequate interpretation in criminal proceedings) (Series A, No 168 Application No 9783/82) European Court of Human Rights (ECHR), 74.
31. *Brozicek v Italy* [1989] E.C.H.R. 23; 10964/84 ,46.
32. *Fernandez v Government of Singapore* [1971] 1 WLR 987 per Lord Diplock.
33. Article 33 of United Nations Convention Relating to the Status of Refugees, (22 April 1954) 189 UNTS 150.
34. James C.Hathaway and J. Dent,"Refugee Rights: Report on a Comparative Survey" (1995) York University, 6.
35. Refugees Act 130 of 1998.
36. Lee-Anne De la hunt and Jeff Handmaker (eds) *Advancing Refugee protection in South Africa* (2008)
37. Oxford Dictionary (7th Edition) 2000.
38. William Kerfoot and Lee Anne de la Hunt, "Due Process in Asylum Determination in South Africa From a Practitioner's Perspective, "in Jeff Handmaker et al., *Advancing Refugee Protection in South Africa* (New York: Berghahn Books, 2008), 89.
39. Act 108 of 1996.
40. *Mthetwa v De Bruin and Another* 1998 (1) BCLR 366 (N) 338.
41. Kerfoot and De la Hunt, "Due process in Asylum Determination," 99.
42. The Constitution note 39 above section 35(3) k.
43. *Deo Gracias Katshingu v Standing Committee for Refugee Affairs and Others* (Unreported) 19726/2010, Western Cape High Court, 11 November 2011.
44. Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A (III) (UDHR). Article 14 deals with the right " to seek and enjoy asylum."
45. Article 1A(2) of the 1951 Refugee Convention.
46. Convention Governing the Specific Aspects of Refugee Problems in Africa,1001 U.N.T.S. 45,entered into force June 20 1974, Ratification Found at http://www1.umn.edu/humanrts/insytree/ratz2arcon.htm Accessed November 2011.
47. United Nations High Commissioner for Refugees, "Refugee Status Determination Handbook: Identifying who is a refugee", accessed on 15 July 2012, at www.unhcr.org /refworld/pdfid/43141f5d4.pdf.
48. Regulations to the Refugee Act 130 of 1998 at Annexure 1.
49. Regulations to the Refugee Act, Regulation 3(2)(a).
50. The Refugee Appeal Board is as independent statutory body created in terms of Section 12 of the Refugees Act, 130 of 1998. Section 26(2) confirms that the "Appeal Board may after hearing an appeal confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(c) in respect of unfounded decisions."
51. The Standing Committee for Refugee Affairs is an independent statutory body created in terms of Section 9 of the Refugees Act. Section 11(e) of the Refugees Act 130 of 1998 states that "… the Standing Committee must review decisions by the Refugee Status Determination Officers in respect of manifestly unfounded decisions."
52. The Constitution, Act 108 of 1996, Section 33.
53. Regulations 10(1).
54. *Van Garderen v Refugee Appeal Board* (Transvaal Provincial Division) No: 30720/2006
55. *Matter of Deo Gracias Katshingu,* 12.
56. Ibid.
57. De Jongh, "*Foreign Language Interpreters in the Courtroom,*" 285.
58. Waterhouse, "*Interpreting Criminal Justice,*" 48.
59. *Matter of Deo Gracias Katshingu,* 12.
60. Regulation 5(3)(b), Regulations to the Refugees Act.
61. Holland Sworn Translators and Interpreters Act, accessed on 1 August 2012, at http://wetten.overheid.nl/BWBR0022704/geldigheidsdatum_06–03–2010.
62. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings at www.eulita.eu/sites/default/files/directive_en.pdf, accessed 7 November 2011.
63. Holly Mikkelson, "The Court Interpreter as guarantor of Defendant Rights," found at http://www.acebo.com/papers/guarantr.htm, accessed on 7 December 2011.
64. Discussed in Waterhouse, "*Interpreting Criminal Justice*" 47. E Granger & M Baker, "The Role and Experience of Interpreters," in Rachel Tribe et al. eds. *Working with Interpreters in Mental Health* (2003)
65. Ibid., 47.
66. Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process,* (The Chicago Press, 2002) 54.
67. Ibid.
68. Steytler, "*Implementing language rights,*" 205.
69. Discussed in Waterhouse, "*Interpreting Criminal Justice*" 47, quoting O.V Channon, *The Role of the Court Interpreter,* (London: Sweet and Maxwell, 1982).

70. Ibid.
71. *AA and the secretary of State for the Home department* (Language diagnosis: use of interpreters) Somalia [2008] UKAIT00039 para 7.
72. *Arizona v. Natividada* 111Ariz.191, 526P.2d (1974)
73. Sabine Fenton, "Expressing a well-founded fear: Interpreting in Convention Refugee Hearings," at http://www.refugee.org.nz/Reference/Sabine.html, accessed on 1 August 2012.
74. Robert Barsky, "The Interpreter as an Intercultural Agent in Convention Refugee Hearings" In *Translator (*1996) Volume 2, 46.
75. U.S. Federal Courts Act of 1978.
76. Mikkelson, "The Court Interpreter as guarantor," 4.
77. Lee Ann De La Hunt, "New Refugee Policies in Southern Africa: Conference paper": (Paper presented at the Oxford Refugee Centre, 5 April 2001.
78. Refugee Appeal Board Rules, as amended (2011), Rule 4(2): " The notice of appeal shall be in the form prescribed by Form RAB(01) and shall include:—
    The full name, current address, date of birth and nationality of the Appellant; all the grounds of appeal and the documents or certified copies thereof on which the Appellant seeks to rely; and
    The signature of the Appellant and in the case of a minor or a person who is incapable of acting on his/her own behalf, the signature of the Guardian/curator acting on behalf of the Appellant.
79. Odhiambo Abuya "Parle vous l'anglais ou le Swahili?" The role of the interpreters in the Refugee Status Determination interviews in Kenya, accessed on 1 August 2012, at www.fmreview.org/FMRpdfs/FMR19/FMR1922.pdf, 48, 49.
80. SAQA is an official body appointed by the Ministers of Education and Labour to oversee the development of the National Qualification Framework (NQF) in South Africa. See www.saqa.org.za.
81. Section 21 (2) (b) of the Refugees act of 1998—the Refugee Reception Officer must see to it that the form is properly filled in.
82. Rosemary Moeketsi and Kim Wallach, "Forensic Linguistics" in *The International Journal of Speech, language and the Law (*2005), Volume 12(1) 77–108.
83. Ibid.
84. Ibid.
85. Mikkelson, "The Court Interpreter as guarantor," 4.

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Addressing Xenophobia in the Equality Courts of South Africa

Justin de Jager

Abstract

South African society bears a legacy of inequality and struggle against oppression. In the Constitutional era, our courts have held that the right to equality is a core fundamental value against which all law and state practice must be tested. South Africa's Equality Courts have been heralded as a transformative mechanism for the redressing of systemic inequality and the promotion of the right to equality. Following the aftermath of the 2008 xenophobic attacks in South Africa, the University of Cape Town Refugee Law Clinic, on behalf of some of the victims of these attacks, launched equality claims against the South African Police Services in order to address the unfair discrimination and xenophobia of police officials in protecting these victims. This paper reviews the two matters launched by the Clinic in the Equality Courts, examining the challenges that effectively reduce the accessibility of the Equality Courts and the difficulty inherent in proving discrimination in equality claims, and commenting on the benefits of using these courts to address xenophobia.

Résumé

La société sud-africaine porte un héritage d'inégalité et de lutte contre l'oppression. Dans la période constitutionnelle, nos tribunaux ont statué que le droit à l'égalité était une valeur fondamentale, à la mesure de la quelle toute loi et pratique d'État doit être testée. Les Tribunaux de l'Égalité d'Afrique du Sud ont été salués en tant que mécanisme de transformation et de redressement des inégalités systémiques, et de la promotion du droit à l'égalité. Suite aux conséquences des attaques xénophobes de 2008 en Afrique du Sud, la Clinique du Droit des Réfugiés de la University of Cape Town a lancé, au nom de certaines victimes de ces attaques, des revendications d'égalité à l'endroit des services de police sud-africains, dans le but de soulever le problème de l'attitude discriminatoire et xénophobe des officiers de police lors de la protection des victimes. Cet article examine les deux causes présentées par la Clinique aux Tribunaux de l'Égalité, les facteurs réduisant l'accès aux Tribunaux de l'Égalité, les difficultés de prouver la discrimination dans les revendications d'égalité, et évalue l'utilité de faire appel à ces tribunaux en matière de xénophobie.

Introduction

Historically, South Africa operated a tightly controlled "closed-border" policy with regards to the vast majority of migrants.[1] However, after the first democratic elections in 1994 the country opened up internationally and became a party to a number of important human rights instruments, including the United Nations (UN) Convention Relating to the Status of Refugees[2] and the Organization of African Unity (OAU) Convention Governing Specific Aspects of Refuge Problems in Africa.[3] In doing so South Africa affirmed its commitment to receive and protect individuals in need of care due to persecution or hostilities in their home countries.

Following this shift in policy and practice towards a human rights orientated migratory regime, an increased inflow of migrants into South Africa .became evident.[4] Regrettably, however, violence against foreign nationals has been an ongoing element of post-Apartheid South Africa.[5] In March 1998, only four years into the constitutional democratic era, a Human Rights Watch report on the situation in South Africa confirmed that:

> Since the 1994 elections, South Africa has seen a rising level of xenophobia. As in many other countries, immigrants have been

> blamed for a rise in violent crime, drug dealing and a rise in drug abuse, unemployment, and other social ills. Immigrants from African countries have been the target of attacks, often because they are perceived as being in direct competition with South Africans for jobs or services. In addition, African immigrants are often the target of random violence and robbery, as criminals perceive them as easy targets because they are unlikely to go to the police. The police and Home Affairs officials have shared this antagonism toward foreigners. The generally negative attitude toward foreigners encourages and condones abuses by police, army, and Home Affairs officials not only against those suspected of being undocumented migrants, but also against non-South Africans who are lawfully in the country, who can expect little or no help from the police when they themselves are victims of crime, including violent assault and theft.[6]

The UN High Commissioner for Refugees has recently reported that xenophobia in South Africa undermines refugees' local integration and the stability of their livelihoods, often compelling individuals to reside in more expensive inner-city areas for fear of attacks in the townships.[7] An analysis of the reference to foreigners in the print media conducted by the Southern African Migration Project in 2000 found that a shocking fifty-six percent of press articles referring to foreign nationals contained at least one negative reference and twenty percent contained four or more.[8] These reports demonstrate the insidious nature of xenophobic attitudes in South African society.

In 2008, xenophobia in South Africa reached new heights, as large waves of violent attacks swept across the country,[9] almost infectiously, leaving sixty-two people dead, 670 wounded, many women raped, over 100 000 people displaced and property worth millions looted, destroyed or seized.[10]

In the aftermath of the attacks the University of Cape Town (UCT) Refugee Law Clinic (hereafter "the Clinic"), which has been providing free legal assistance to refugees[11] throughout Cape Town since 1998, was approached by a number of victims of the attacks. In addition to reporting the loss of their possessions to looters, the individuals reported police officials' refusal to assist them in protecting their property.

The Clinic formulated a response to these allegations that led to the institution of legal proceedings in the Western Cape High Court, sitting as the Equality Court, for an action of vicarious liability against the Minister of Safety and Security on the basis that the members of the South African Police Services (hereafter "the police") exercised their function during the xenophobic attacks in a discriminatory manner and failed to provide adequate protection to the Complainants due to their nationality.

The purpose of this paper is to explore in more detail two of these cases: *Said and others v the Minister of Safety and Security* ("the *Said matter*"),[12] and *Osman v Minister of Safety & Security* ("the *Osman matter*").[13] While the *Osman matter* has been finalised, the *Said matter* is currently pending leave to appeal. One of the objectives of the Clinic in bringing these cases was to test the Equality Courts as a forum for combating xenophobia. The aim was not simply to seek ordinary civil damages but to utilise the wide powers of these special courts to attempt to root out the ingrained xenophobia within the police officials.

Structurally, this paper will commence by outlining the direct link, which the Clinic observed between xenophobia and its clients' right to equality. Phrased conversely, a xenophobic mindset resulted in the discriminatory provision of services by the police to the refugee victims of the xenophobic attacks. The second section will consider the Equality Courts and the perceived advantages, which led the Clinic to institute the proceedings in that particular forum. The third section will then discuss the *Said* and *Osman matters,* outlining the experiences of the Clinic during the litigation process. Finally, this paper will discuss some of the challenges which were experienced during the litigation process in the Equality Courts.

Given the prevalence of xenophobia in South African society, creative measures are necessary to address this problem. One such mechanism is legal accountability through the promotion of access to justice, which entails perpetrators being brought before the courts and affords the victims a forum to have their voices heard. It was the opinion of the Clinic that the objectives and structure of the Equality Courts represented the best forum for this purpose.

Xenophobia and the Violation of the Right to Equality

In order to have the *Said* and *Osman matters* heard in the Equality Courts, as the Clinic set out to do, it was necessary to ground the cause of action within the ambit of the Promotion of Access to Equality and Prevention of Unfair Discrimination Act.[14] What this entailed was establishing a clear link between xenophobia and the clients' right to equality.

The dictionary definition of xenophobia is an 'extreme fear or dislike of people from other countries'.[15] However, the term is more commonly used to denote a hatred of foreigners characterised by a negative attitude towards such individuals.[16]

In his *obiter dictum,* Sachs J in his minority judgement in the *Union of Refugee Women v the Director: Private Security Industry Regulatory Authority17* held that such prejudice was prevalent in South Africa and that it struck at the heart

of our Constitution.[18] Justice Sachs went on to note that the purpose of refugee law is to overcome experiences of trauma and displacement. Adverse treatment in the host country would defeat this objective and induce an experience of alienation and helplessness.[19] Kondile AJ, writing for the majority of the Constitutional Court, confirmed that refugees, by virtue of the fact that they have been compelled to flee their homes for fear of persecution, constitute a vulnerable group in our society.[20] Consequently, discrimination against refugees constitutes discrimination against a vulnerable group and impairs their rights in a serious manner.[21]

In the leading case on state liability for police negligence, *Minister of Safety and Security v Carmichele,22* the Supreme Court of Appeal held that police officers are liable for their failure to perform their statutory and constitutional duties.[23]

It was the case of the Clinic in the *Said* and *Osman matters* that the police had discriminated against the victims of the xenophobic attacks on the basis of their nationality. As a vulnerable group the police owed a statutory and constitutional duty of care to the individuals and had those individuals not been foreigners the police would have exercised their function differently. In this way, it was the argument of the Clinic that the litigants were the victims of discrimination, which had infringed their rights to equality and dignity resulting in both constitutional and general damages.

In essence, the deeply ingrained xenophobic attitude of the police officers, who were charged with quelling the xenophobic attacks, adversely affected the exercise of their function. However, eradicating such a manifestation of xenophobia requires more than a simple damages claim paid by the state. Rather, it requires a reshaping of the perspectives of the police officers on the ground. For this reason the Clinic identified the Equality Courts as a forum for attempting to address the problem.

The Equality Courts

In 2000, the Promotion of Equality and Prevention of Unfair Discrimination Act ("the Equality Act")[24] was passed with the intention that it would be the key legislative tool for the enforcement and promotion of the right to equality.[25] The drafters of the Equality Act sought to achieve this end by providing victims of unfair discrimination, hate speech and harassment with a forum to provide access to justice and an effective remedy.[26] Although the main impetus for the creation of the Equality Act was likely addressing the inequalities of South Africa's Apartheid era,[27] Section One of the Act expressly includes "nationality" among the prohibited grounds of discrimination and defines nationality as "ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature."[28]

The Act designates all Magistrate Courts and High Courts as Equality Courts for their area of jurisdiction.[29] In doing so the intention is not to extend jurisdiction to the courts to hear equality matters in their normal capacity, but rather to create special Equality Courts for the various areas, which would be staffed by trained judicial officers and administrative clerks.[30]

Training of staff in the nuances of the Equality Act and in equality jurisprudence plays an important part in the Equality Court's divergence from the normal practice adopted in South African courts. The Equality Act Regulations[31] expressly require the judicial officer to ascertain the relevant facts and question the parties and witnesses.[32] For Albertyn *et al.33* this active involvement of the judicial officer could assist in the creation of an accessible, informal and participatory proceeding, levelling the playing field in the case where a disadvantaged party may not have the resources to obtain skilled lawyers.[34] This model is more akin to an inquisitorial structure as opposed to the adversarial system upon which the South African legal system is currently based and as such judicial officers may not be accustomed to relinquishing their customary role as a "neutral umpire."

Within the context of this inquisitorial court structure the Equality Courts are intended to be public spaces which allow for the proliferation of different voices, previously denied under apartheid South Africa.[35] In this way the Equality Courts are not merely special rooms for dealing with equality matters but a transformative tool for bringing about greater justice for all.[36] This notion of the courts as a "public space" was first proposed by Bohler-Muller in 2000.[37] She suggests that the transformative jurisprudence of equality requires that individuals not be seen as independent rights-bearing entities but rather within a contextual reality.[38] For Bohler-Muller the "ethic of care," as she explains dictates that competing interests be weighed and that conclusions be reached which are the least harmful to the most vulnerable party.[39] Effectively, the challenge for Equality Courts is not to simply address each case mechanically, but rather to contextualise the cause of action so as to tailor a remedy which addresses not only the discrimination in question but rather goes to the root of the problem, addressing societal discriminatory structures. In doing so the courts are the guardians, of sorts, for vulnerable categories of individuals. The *Bench Book for Equality Courts,40* which is the text developed as the training programme for judicial officers, requires that presiding officers take account of the differences among South Africans so as to ensure fair and just decision making in the challenging area of Equality.[41]

This requires a comprehensive approach to social context education, despite such training being a complex task.[42] Nevertheless, proper contextual judging must be seen as a powerful and effective way to ensure a move towards substantive equality and supports the independence and credibility of the judiciary.[43]

This "public space" where Complainants are permitted to have their grievances heard by an adjudicator trained to view the incident through a socially conscious lens attracted the Clinic to the Equality Courts. It was felt that given the vulnerable place of refugees in society, and the harm they suffered, the cases had to be handled with due care by an adjudicator with the proper mindset.

The other key dimension of the Equality Court which drew the Clinic to the forum was the extensive powers with which these courts are vested. Section 21 of the Equality Act confers wide power on the court in order to address both individual and systemic forms of inequality.[44] Albertyn *et al*. suggest systematic violations of equality are not solved by individual court orders, rather the Equality Courts are required to provide relief which addresses the underlying causes of discrimination and seeks to reform the social attitudes, structures and institutions.[45]

In addition to the normal court remedies, Section 21 permits the court to make the following forms of orders: damages in respect of the impairment of dignity, pain and suffering, emotional and psychological suffering;[46] damages in the form of an award to an appropriate body or organisation;[47] availability of specific opportunities and privileges unfairly denied;[48] Special measures for the addressing of the unfair discrimination;[49] an unconditional apology;[50] an appropriate deterrent;[51] and, an order to comply with any provision of the Act.[52] Section 21 further permits the court the power to enforce these remedies through an internal audit of the respondent[53] and a structural interdict requiring the respondent to make regular progress reports.[54]

Albertyn *et al*. suggest that the novelty of these remedies coupled with the complexity of equality matters require presiding officers to be given the skills and resources necessary to engage creatively with these remedies.[55] The jurisprudence seems to suggest that many of the courts have indeed done so to some extent. In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park,*[56] a case in which a teacher had been dismissed by the respondents on the basis of his sexual orientation and refusal to submit to a "cure" for his homosexuality, the court utilised both the damages provisions of the Equality Act, and further ordered remedies in the form of an unconditional apology. Likewise, in *Sonke Gender Justice Network v Malema*[57] the court ordered that Mr. Malema, a prominent political figure in South Africa, make a public apology, by way of press release, and pay damages to an appropriate institution.[58] The Judge even found it fit to offer Mr. Malema some words of wisdom in relation to his place as a public figure.[59]

In short, the Equality Courts have distinct advantages permitting the hearing of inherently sensitive matters in an informal and accessible forum where the courts are empowered to tailor effective remedies to, not only address the matter at hand, but the deeper societal issues for which the Act was intended to combat. For these reasons the Clinic approached the Equality Courts on behalf of a number of clients who had been victims of the 2008 xenophobic attacks. The aim was to not only seek justice for the individuals concerned but also to utilise the Equality Courts as a means to address the xenophobic prejudice held by the police officers who had discriminated against the Clinic's clients.

The UCT Refugee Law Clinic Cases

As a result of the chronology of events the Clinic first launched the *Said matter,* which was soon followed by the *Osman matter.* In order to keep the chronology of events clear this paper will discuss the two cases in the order in which they were instituted.

The cause of action in the *Said matter* preceded the main waves of xenophobic attacks, occurring over a two day period in March 2008. The main attacks then flared up in May 2008 in Johannesburg before spreading to Durban and eventually back to Cape Town[60] where the litigant in the *Osman matter* was then affected.

The *Said matter* saw the rising up of the residents of the informal settlement of Zwelethemba, near the Karoo town of Worcester in the Western Cape. The shops and livelihood of refugees from Somalia, Ethiopia and the Democratic Republic of Congo were looted, and in most cases completely destroyed. The perpetrators were South African residents who were not only the neighbours of the migrant population in the settlement but also the patrons of the small businesses they ran. When the looters took to the street they armed themselves with weapons and shouted xenophobic slogans. It was common cause between the parties that police officers from Zwelethemba, Worcester and Paarl were present in Zwelethemba at the time of the looting.

It was the Complainants' case that the police discriminated both directly and indirectly against them in the exercise of their duties. It was first argued that the police actively refused to provide assistance to the Complainants, thereby discriminating against them by actively guarding the South African owned shops while refusing to provide this same assistance to the Complainants on the basis of their nationality.

The Complainants argued further that their position in South African society, as a vulnerable category of persons,[61]

dictated a higher degree of care. The failure to meet this standard amounts to "adverse effect" discrimination, which occurred irrespective of the intention of the police.[62]

The Complainants sought to invoke the broad powers conferred on the Equality Court,[63] by seeking relief which is three fold: [1] damages; [2] an unconditional apology and public admission of acts of unfair discrimination; and [3] a structural interdict requiring the police to establish a training program aimed at instructing police officers throughout the Western Cape on providing services to refugees in a sensitive manner. The Complainants further requested that the structural interdict be implemented by the South African Human Rights Commission, which was joined to the proceedings as a third party. This combination of remedies was possible within the list of creative remedies which the Act empowers the court to order. It was felt that by utilising this unique mechanism it would be possible for the court to, not only come to the assistance of the destitute Complainants, but also to root out the discriminatory and xenophobic attitude, which lead to the harm which the Complainants suffered.

Despite numerous delays in the proceedings, some of which will be addressed in the next section of this paper, Justice Erasmus handed down a decision on December 8, 2011. The court noted that refugees, as forced migrants, are unable to seek protection from their own governments and embassies and are therefore dependent upon the South African government.[64] It was noted further that discrimination on the basis of ethnic and social origin are within the scope of the right to Equality.[65] However, the court ultimately came to the conclusion that:

> … [T]he balance of probabilities support the view that the police were in fact not given orders to guard either Foreign owned or South African Shops. The evidence suggest that this was a conscious decision taken, motivated primarily by lack of resources, and the primary goal of saving lives, and not discrimination.[66]

On this basis, the court found that the Complainants had failed to prove that the Respondents had discriminated against them.[67] However, the judge expressed his concern that the matter could not be left there.[68] He noted that the police had failed to prevent the looting and when the Complainants attempted to give statements to the police there was a clear lack of sensitivity exhibited by the police.[69] Quite rightly Judge Erasmus stated that:

> I am of the view that the police's failings in the above respects can be at least partly explained by an acute lack of sensitivity on their part to the light of refugees, their particular vulnerability, given their history and the likelihood of being victims of multiple trauma.[70]

In order to address this concern, Justice Erasmus found that, sitting as the Equality Court, he was empowered by the Equality Act to order the South African Human Rights Commission to provide training to relevant stakeholders and monitor and assess the observance with the recommendations it had outlined in its interim report.[71] The report, which was prepared by the Human Rights Commission in terms of the interim order of the court, recommended that the police make adequate resources available to the Zwelethemba police station, provide personnel with sensitivity training and the implementation of effective monitoring of human rights violations and xenophobic incidents.[72] As laudable as this finding is, the Clinic remains convinced that the actions of the police were a manifestation of xenophobic attitudes held by the police, which resulted in the discrimination against the Complainants. The Clinic has therefore filed for leave to appeal in this matter and at the time of writing the matter remains *sub judice*.

Though launched after the *Said matter,* the *Osman matter* ran concurrently with the first case. By May 2008 the xenophobic attacks had returned to Cape Town and rose, resulting in the looting of the Complainant's shop in the informal settlement of Dunoon, near Milnerton in the Western Cape. The Complainant testified that he drove to the shop to find three police vans standing nearby, whilst the looters were still carrying goods out of his shop. He testified that he approached one of the police officers for assistance in removing the remaining goods from his shop. The police officer responded that they would only assist him if his employees were still in the shop, but they would not assist simply to remove goods. He was then instructed by the police to leave Dunoon as the situation was becoming more dangerous. The Complainant testified that he was gravely upset as he had seen his shop being destroyed whilst several heavily armed policemen merely looked on as though this was part of an "evening's entertainment". The Equality Court accepted that a case of discrimination had been made out and therefore the onus shifted to the Respondents. Nevertheless, the court ultimately dismissed the claim, finding that in the absence of further evidence to support the Complainant's version it could not make a determination on his allegations.[73]

What the *Osman matter* illustrates is the stringent burden placed on claimants to prove a *prima facie* case of discrimination in equality claims. Until this point has been reached, the presumption is that no rights violation has occurred. Discrimination is, however, notoriously difficult to prove, particularly in situations where there is no

express discrimination but rather a more insidious attitude. As discussed above, the court held that where a *prima facie* case has been made out this must be weighed against the rebutting evidence adduced by the respondents, however, the Equality Act is not clear on whether the onus shifts conclusively or who bears the ultimate burden.[74] However, this creates a "grey area," alluding to the possibility that a claimant retains some form of residual burden.

A similar shifting burden procedure is contained in the Labour Relations Act,[75] which provides that an employee must prove the existence of a dismissal and then the onus shifts to the employer to either rebut the dismissal or to prove that the dismissal was nevertheless procedurally and substantively fair.[76] In this way the legislature has reversed the general principle that a person who claims a legal entitlement bears the onus of proving the factual basis of that claim.[77] However, within the context of a dismissal it has been established that an employee is still required to adduce evidence that proves the dismissal was unfair. The employee cannot simply rely on a lack of evidence from the employer as grounds for substantiating a blank statement of unfairness.[78] In the same way the finding of Davis J in the *Osman matter* can be seen as a requirement that the claimants adduce evidence to support the allegation of discrimination rather than simply relying on the respondents' failure to rebut the claimant's *prima facie* case. The difficulty with this is, however, linked to the problems with proving discrimination. The effects may be severe but the proof thereof may be all but impossible and therefore the rights violation may go unchecked.

The Challenges Faced in the Equality Courts

Unfortunately, during the course of the proceedings a number of the challenges documented by other authors, which plague the functioning of the Equality Courts as a whole, were encountered.[79] While the Complainants in both matters were represented from the outset by the Clinic and counsel, the need for legal representation was clear. All the Complainants were asylum seekers and refugees residing in informal settlements and would have been unable to secure legal representation had it not been for the Clinic's assistance. The State, on the other hand, briefed both senior and junior counsel at great expense to the tax payers. This clearly illustrates the situation where a well resourced respondent would spare no expense thereby placing a vulnerable indigent complainant at a disadvantage were it not for *pro bono* legal assistance from an organisation such as the Clinic. However, given the complex evidential aspects and legal arguments which were addressed during these proceedings this matter clearly dictated the involvement of skilled litigators. For instance, in the absence of South African jurisprudence on adverse effect discrimination, it was necessary to research foreign law in order to develop an argument. It would be difficult to see how this could be accomplished without the assistance of legal representatives.

Public awareness was clearly a concern for the court in the *Said matter.* The judge consistently noted the need to bring the Equality Courts within the contemplation of the general public as an accessible and prominent forum and as such made numerous accommodations to the press and public. This concern from the judiciary, however, requires the support of the government, NGOs and civil society in order to overcome this challenge.

The most glaring challenge which was highlighted by these cases was the impact of the workload placed on the Equality Court clerk and the detrimental impact that this had on the effective running of the cases. From the outset the Clinic attorneys experienced difficulty with initiating and administering the cases as the representatives of the Complainants by virtue of the fact that the Cape Town High Court has only one trained Equality Court clerk, who acts in her capacity as such over and beyond her function as a clerk of the High Court and work in the High Court Certification office. In her absence no substitute was catered for and ordinary court personnel simply refused to provide any assistance as it was not their function. As a result, where the clerk of the Equality Court was not at work, or unavailable for whatever reason, the Clinic attorneys were required to make numerous trips in order to accomplish the simple task of filing documents. For the attorneys this was a time consuming and costly inconvenience, but an unrepresented, and possibly indigent complainant faced with such obstacles may well be frustrated into abandoning a good case.

This is a clear example of the overburdening of Equality Court staff, which the various commentators have identified is a key challenge.[80] In practice this proved to be a serious hurdle to the proper and timeous administration of the cases and is a critical issue, which the Equality Courts must address in order to properly perform their functions. For instance, the proceedings in the *Said matter,* on one particular day, were set down to be heard in a court which was woefully inadequate, given the number of individuals attending the proceedings. In light of this situation it was necessary to address the court on the administrative inefficiencies of the Equality Courts. Counsel for the Complainants submissions were as follows:]

> M'Lord, may I appeal to you and to those who are responsible for the functioning of [the] Equality Courts that the Equality Court matters have to [be recorded] on the court roll like any other matter. A court has to be assigned before the time like any other court matter. The clerk of the Equality Court has to ensure that she is

> present when Equality Court matters are heard. If she is absent there has to be a substitute assigned like in any other High Court matter… .[81]

Through this address two key administrative failings are highlighted: Firstly, although the Equality Courts are specialist courts operating within the existing court structure they require the same consideration as any other court matter. Specifically, court allocation and recording of the hearing should be done in the normal course. Secondly, the Equality clerk, or her substitute, must be involved in the matter and present at court so as to ensure that the functions ascribed to the clerk by the Act and the Regulations are complied with. These two concerns could be achieved through a policy shift without necessitating structural changes to the Equality Courts. Nevertheless, the impact that this will have on the administration of cases will be an important step forward for the proper functioning of the courts. If the administrative challenges of the courts remain un-addressed, Counsel for the Complainants quite aptly submitted that: *"[t]his matter has to be addressed urgently… otherwise other prospective litigants would be reluctant to refer unfair discriminations to the Equality Court …"82* This should further be seen in the context of the fact that the Complainants in the *Said matter* were represented by the Clinic and Counsel. An unrepresented complainant would face severe prejudice due to these administrative failings and, as stated by Counsel, this may act as a deterrent to individuals whose rights have been violated. It was, however, encouraging that the court did not simply dismiss these submissions out of hand. Rather the Judge stated the following:-

> I will see that the deficiencies in the organisation of the court is brought to the attention of both the court manager and the Judge President. The unfortunate situation is that under normal circumstances, when the High Court sits as a High Court, the Judge sits with his personal registrar and the registrar makes all the arrangements. Unfortunately, the situation has arisen that the registrar of the Equality Court also has other functions and it seems there's room for improvement. The concern that I share with you is that the Equality Court is supposed to be a court that promotes equality and advance those values in our constitution that promotes human dignity and it is not dignified for Complainants to come to a courtroom like this, that is totally inadequate, and I need to address that and I will do that, and may I use this opportunity to apologise to the Complainants for the inconvenience that they are suffering today.[83]

The author hopes that the Judge's undertaking will have an impact and result in this critically needed redress of the administration of the Equality Courts. In this passage the Judge noted an institutional distinction between the Equality Courts and the ordinary courts, which if addressed could resolve many of the overburdening problems currently faced. The handing over of the administrative functions relating to the allocation of courts to each individual Judge's registrar would spread the workload. Moreover, the registrars are accustomed to making such arrangements as it is a function that they ordinarily fulfil.

Concluding Remarks

South Africa bears a legacy of inequality and struggle against oppression, the result of which has been a democratically elected government and a constitutional assertion that the Republic is now based on human dignity, the achievement of equality and the advancement of human rights.[84] Within this context the Equality Courts have been heralded as a transformative mechanism for the redressing of systemic inequality and the promotion of the right to equality. Unfortunately, post-apartheid South Africa has been characterised by deep-rooted xenophobia. This widely held attitude has resulted in violent attacks on foreign nationals and in discrimination against migrants. Refugees in particular are a vulnerable category of migrants who, by virtue of the inherent nature of their condition, are unable to seek assistance from their own country or embassy. As a result they are likely to be the most prejudiced by any discriminatory action motivated by xenophobic opinions.

Despite the state's obligation to protect the people within its territory, and its obligation to provide asylum to refugees, the Clinic's clients who approached the Clinic in the aftermath of the xenophobic attacks complained of discrimination at the hands of the police. This prompted the Clinic to approach the Equality Courts to seek redress for those affected by this disheartening treatment of the migrants who have entered the Republic in search of protection.

During the course of the proceedings the Clinic attorneys experienced firsthand how the poor administration of the courts could be detrimental to a case and particularly if the litigants are unrepresented, how this may lead to the abandonment of a claim and the reluctance to utilise the courts again. The second interesting aspect which emerged during these proceedings was that of the shifting onus of proof. Given the difficulty in proving discrimination, a residual burden of proof is problematic. However, at this stage this question remains open.

As a consequence of the difficulties of proving discrimination, particularly when the events occur during a violent uprising and without clear written instructions, the Equality Court in both the *Said* and *Osman matters* were at pains to find against the Complainants but nevertheless ruled

in favour of the state. The Clinic, however, remains of the opinion that the disparity in the services provided by the police officials to the Complainants, as opposed to the South African nationals, was motivated by xenophobic attitudes. In order to address the root cause of this pervasive problem the Clinic continues to petition the courts for relief.

Given the results in the above-reviewed matters, and the institutional challenges faced in bringing forth these equality claims, the inexorable question which remains to be answered is whether the Clinic would approach the Equality Courts again, and why? This question would be answered in the positive. Through this experience with the Equality Courts the Clinic observed several key benefits. Firstly, there was a great deal of media coverage of the cases, bringing the plight of refugees and the victims of xenophobia to the attention of the South African public. Secondly, the Equality Courts offered the Clinic's clients a notable public space to voice their grievances and also to hear the explanations offered by the police witnesses who testified in court as to the police conduct. Thirdly, the requirement by the court for the South African Human Rights Commission to provide attitudinal training to police officials will expectantly have a positive impact. Lastly, the proceedings ensured that the Police Services were held accountable and this raised a heightened sense of the care needed when handling refugees so as to avoid future liability.

Notes

1. For instance, s 39(2) of the now repealed Aliens Control Act (95 of 1991), contained the following draconic list of so-called "prohibited persons," which included: (a) any person likely to become a public charge by reason of infirmity of the mind or insufficient means; (b) any person who, from information received from a government through official or diplomatic channels, is deemed by the Minister to be an undesirable inhabitant; (c) any person who lives or has lived on the earnings of prostitution; (d) any person who has been convicted in any country of a list of offences ranging from murder to obstructing the ends of justice; (e) any mentally ill, deaf, dump or blind person; (f) any person who is afflicted with a contagious, communicable or other disease, or virus; (g)-(h) any person who has been removed from the Republic by warrant issued under any law.
2. *Convention relating to the Status of Refugees,* 189 U.N.T.S. 150, (entered into force 22 April 1954) [*Refugee Convention*].
3. *Convention Governing Specific Aspects of Refugee Problems in Africa* 10001 U.N.T.S. 45, (entered into force 20 June 1974).
4. In 2008 the Southern African Migration Project (SAMP) gave the following figures: '[p]rior to 1990, most authorized migrants to South Africa came from Europe and neighboring countries… . Between 1990 and 2004, a total of 110,000 legal immigrants entered the country, 27 percent of whom were from other African countries… . Since 1990, South Africa has become a new destination for refugees from the rest of Africa. According to the South African government, there were nearly 160,000 refugee claims between 1994 and 2004… . Of these, the majority (74 percent) were from African countries. Rates of acceptance varied from country to country.… The numbers have continued to grow' (Jonathan Crush, "Country Profile: South Africa: Policy in the Face of Xenophobia," available at http://www.migrationinformation.org/Feature/display.cfm?ID=689). As at January 2012 the United Nations High Commissioner for Refugees (the UNHCR) recorded that there are currently 27,899 Refugees and 219,368 Asylum Seekers in South Africa (2012 UNHCR country operations profile—South Africa available at http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO>).
5. Jean P. Misago, Tara Polzer and Loren Landau, "Xenophobia: Violence against Foreign Nationals and other 'Outsiders'" in *Contemporary South Africa Migration* Issue Brief 3 (June 2010), available at http://independent.academia.edu/TaraPolzerNgwato/Papers/247589/Xenophobia_Violence_against_Foreign_Nationals_and_other_Outsiders_in_Contemporary_South_Africa>. The Consortium for Refugees and Migrants in South Africa (CoRMSA) keeps a database of xenophobic attacks, accessed on 1 July 2012, which is available at http://www.cormsa.org.za/wp-content/uploads/2009-/05/cormsa-database-of-violence-against-foreign-nationals.pdf.
6. Human Rights Watch , "VI. Xenophobia And Attacks against Migrants," in *Report on the Situation in South Africa* (March 1998), available at http://www.hrw.org/legacy/reports98/sareport/Adv-5a.htm#_1_49.
7. UNHCR, "2012 UNHCR Country operations profile—South Africa," accessed on 3 August 2012, available at http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6.
8. Ransford Danso and David Alexander McDonald D.A. "Writing Xenophobia: Immigration and the Press in Post-Apartheid South Africa, " in Jonathan Crush (ed.) *Migration Policy Series No. 17,* Southern African Migration Project, (2000), 20.
9. The timeline of the attacks started on 12 May 2008 with a series of riots in the township of Alexandra (in the north-eastern part of Johannesburg) when locals attacked migrants. In the following weeks the violence spread, first to other settlements in the Gauteng Province, then to the coastal cities of Durban and Cape Town. At this time attacks were also reported in parts of the Southern Cape, Mpumalanga, the North West and Free State.
10. International Organization for Migration, "Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa," (February 2009), accessed on 1 July 2012, available at www.irinnews.org/pdf/IOM_report.pdf. See further Jean P. Misago *et al.*

"May 2008 Violence Against Foreign Nationals in South Africa: Understanding Causes and Evaluating Responses," April 2010 report compiled by the University of the Witwatersrand Forced Migration Studies Programme and the Consortium for Refugees and Migrants in South Africa, accessed on 1 July 2012, available at http://www.cormsa.org.za/wp-content/uploads/2009/05/may-2008-violence-against-foreign-nationals-in-south-africa.pdf.

11. The Clinic provides legal assistance to refugees and asylum seekers, whether documented or undocumented. In South Africa, a refugee is someone who has been granted refugee status from the Department of Home Affairs (DHA) and an asylum seeker is someone who has lodged an application for asylum with the DHA, which has not been finalised. For the purposes of this report, the term refugee shall refer to refugees or asylum seekers (undocumented or not) who have approached the Clinic for legal protection.
12. *Said and others v The Minister of Safety and Security and others* (EC13/08), unreported judgement handed down on 7 December 2011.
13. *Osman v Minister of Safety & Security & others* [2011] JOL 27143 (WCC).
14. Act 4 of 2000.
15. *Longman Dictionary of Contemporary English* 3rd ed. (2005), 1661.
16. Bronwyn Harris, "Xenophobia: A new pathology for a new South Africa?" in Hook D. & Eagle G. (eds) *Psychopathology and Social Prejudice,* (Cape Town: Cape Town University Press, 2002) , 170.
17. *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2007] (4) SA 395 (CC).
18. Ibid., para 143.
19. Ibid., para 144.
20. Ibid., at para 28.
21. Ibid., para113.
22. *Minister of Safety and Security and Another v Carmichele* [2004] (3) SA 305 (SCA).
23. Ibid., para 43.
24. Act 4 of 2000.
25. Cathi Albertyn, Beth Goldblatt and Chris Roederer (eds.), *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act,* (Johannesburg, Witwatersrand University Press, 2001) , 2.
26. Chapter 4 of the Equality Act.
27. The Preamble to the Equality Act provides that '[t]he consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people… . Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy… . This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.'
28. Section 1(xvii) of the Equality Act.
29. Section 16(1) of the Equality Act. Currently, the Department of Justice and Constitutional Development lists 382 courts as being designated as equality courts throughout the country. See http://www.justice.gov.za/EQC-act/eqc_courts.html, accessed on 1 July 2012.
30. Johan De Waal and Iain Currie, *The Bill of Rights Handbook* 4th ed. (Cape Town: Juta & Co., 2001), 228.
31. Regulations 764 of 13 June 2003 (Government Gazette No. 25065), which came into operation on 16 June 2003.
32. Ibid., Regulation 10(10)(b).
33. Albertyn et al., *Introduction to the Promotion of Equality.*
34. Ibid., 27.
35. Narnia Bohler-Muller, "The Promise of Equality Courts," (2006) 22 South African Journal on Human Rights 380 at 396.
36. Ibid., 403.
37. Narnia Bohler-Muller "What the Equality Courts can learn from Gilligan's Ethic of Care: A Novel Approach," (2000) 16 South African Journal on Human Rights, 623 at 641.
38. Ibid., 638.
39. Ibid., 640.
40. Judicial Service Commission and Magistrates Commission *Bench Book for Equality Courts* (undated), a copy of this text was obtained by the author through the University's Government Publications Department. No updates of this work have been published despite a wealth of jurisprudence which has emerged following its initial publication shortly before the coming into operation of the Equality Courts in 2003.
41. Ibid., 23.
42. Rosann Krüger, "Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts," unpublished doctoral thesis, submitted at Rhodes University in December 2008, accessed on 1 July 2012, available at http://eprints.ru.ac.za/1429/1/Kruger-TR09–79.pdf, 219.
43. Lynn Smith, "Judicial Education on Context," (2005) 38 UBC Law Review 569 at 582.
44. Albertyn et al., *Introduction to the Promotion of Equality,* 28.
45. Ibid.
46. Section 21(2)(d) of the Equality Act.
47. Section 21(2)(e) of the Equality Act.
48. Section 21(2)(g) of the Equality Act.
49. Section 21(2)(h) of the Equality Act.
50. Section 21(2)(i) of the Equality Act.
51. Section 21(2)(l) of the Equality Act.
52. Section 21(2)(p) of the Equality Act.
53. Section 21(2)(k) of the Equality Act.
54. Section 21(2)(m) of the Equality Act.

55. Albertyn et al., *Introduction to the Promotion of Equality,* 28.
56. *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] JOL 22361 (T).
57. *Sonke Gender Justice Network v Malema* [2010] JOL 25181 (EqC, JHB).
58. Ibid., para 25.
59. Ibid., para 27.
60. See the outline of the 2008 xenophobic attacks set out at note 9 above.
61. The Constitutional Court has repeatedly affirmed that refugees are a "vulnerable category of person" in South Africa (see *Larbi-odam and others v Members of the Executive Council for Education* 1998 (1) SA 745 (CC), para 19; and, the *Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority and others* 2007(4) SA 295 (CC), paras 28—31).
62. The Constitutional Court has confirmed that proof of intention is not a threshold requirement for either direct or indirect discrimination (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC), para 43; and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), para 41). This is also in keeping with the equality jurisprudence of both Canada (*Ont. Human Rights Comm. v. Simpsons-Sears* ([1985] 2 S.C.R. 536); *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143; and *Eldridge v. British Columbia (Attorney General),* ([1997] 3 S.C.R. 624)), and the European Court of Human Rights (*Timishev v Russia* (Application Nos. 55762/00 and 55974/00); *Zarb Adami v Malta* (Application No. 17209/02); *Sampanis and others v Greece* (Application No. 32526/05)).
63. Section 21(2) of the Equality Act.
64. *Said matter,* para 5.
65. Ibid., paras. 15—28.
66. Ibid., para 45.
67. Ibid., para 50.
68. Ibid., para 51.
69. Ibid., paras 52—53.
70. Ibid., para 57.
71. Ibid., paras 66 & 95.
72. Distilled from the South African Human Rights Commission recommendations reproduced in the judgement at para 93.
73. Ibid., 27.
74. Ibid., p. 25. This same question of whether the onus shifts conclusively was also noted by Justice Erasmus in the Said matter at para 28.
75. Act 66 of 1995.
76. Section 192(2) of the Labour Relations Act.
77. John Grogan, *Dismissal,* (Cape Town: Juta Law, 2002), 91.
78. Ibid.
79. For a discussion of the challenges faced by the courts see "South African Human Rights Commission Parliamentary Equality Review Process," accessed on 1 August 2012, available at www.pmg.org.za/docs/20–06/061016-SAHRC1.pdf, 14; Dana Kaersvang, "Equality Courts in South Africa: Legal Access for the Poor," *The Journal of the International Institute,* Spring 2008, 4; Philippa Lane, "South Africa's Equality Courts: An Early Assessment," (2005), accessed on 1 August 2012, available at http://www.csvr.org.za/wits/pap-ers/papr-ctp5.htm; PIMS-SA report, for IDASA "Equality Courts," para 2.4.4.10, accessed on 1 August 2012, available at www.idasa-.org/media/uploads/outputs/files/A%20Report%20on%20Equality%20Courts.pdf; Krüger, "Racism and Law," 232; E. Naidu, "Equality courts are crying out for work," IOL news (April 10 2005), accessed on 1 August 2012, available at http://www.iol.co.za/news/south-africa/equality-courts-are-crying-out-for-work-1.238411.
80. See, for instance, Krüger, "Racism and Law," 255.
81. Court Record, 24 May 2010, at p. 219, transcripts on file with the author.
82. Court Record, 24 May 2010, at p. 219–20, transcripts on file with the author.
83. Court Record, 24 May 2010, at p. 221, transcripts on file with the author.
84. The Founding Provision set out in s 1 of the Constitution (Act 108 of 1996).

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Canadian Association for Refugee and Forced Migration Studies (CARFMS) conference, 2012

Restructuring Refuge and Settlement: Responding to the Global Dynamics of Displacement

Volker Türk

This was the keynote address at the 2012 Conference organized by the Canadian Association for Refugee and Forced Migration Studies (CARFMS), hosted by the Centre for Refugee Studies (CRS) at York University in Toronto.

It is a great pleasure for me to be here with you today. In the world of refugees and migration, Canada sets an important example globally in terms of its generosity towards the other, its multicultural, multi-ethnic and multi-religious society, its long-standing and rich tradition of asylum as well as its global refugee policies. This tradition is exemplified not least in its annual resettlement programme and Canada's role as a major donor country to UNHCR. The High Commissioner, and UNHCR as an institution, deeply value and appreciate the contributions that the people of Canada, its lively civil society and successive governments have made over time to the protection of refugees and the internally displaced.

In this address I would like to share with you a number of reflections on the changing dynamics of displacement and possible ways forward—the challenging theme of this Conference.

But before doing so, I think it is important to set out briefly the factual background against which this discussion takes place.

At the end of 2010, there were roughly 16 million refugees and asylum-seekers, including 5 million Palestinian refugees. We have detailed population data on 3.5 million stateless around the world but know the overall population is several times larger which is why we continue to map stateless populations. Refugee voluntary repatriation movements in 2010 were the lowest in 20 years. Only 200,000 refugees chose to return home, against an annual average of over a million in the last two decades. The initial estimate for 2011 is slightly better, at some 530,000 returns. Some 26.4 million people were internally displaced, with 3.5 million people newly displaced during 2011. This is a modest decline in their number, down from 27.5 million in 2010.[1] Last year also saw the emergence of several new situations of internal displacement. In Côte d'Ivoire, violence following the November 2010 presidential elections forced an estimated half a million people to flee their homes. In Somalia, the worst drought in decades aggravated the country's chronic instability and led to one of the worst humanitarian emergencies of 2011. In Mali, the number of those displaced

internally has reached almost 150,000 and, according to the Syrian Red Crescent, some 400 to 500 thousand are displaced inside Syria.

In the industrialized world, the year 2011 also witnessed a 20 per cent increase in new asylum applications compared to 2010. However, the increases were not evenly distributed and were evident mainly in the eight Southern European countries, North America as well as Japan and South Korea. For their part, the Nordic countries as well as Australia witnessed a decrease. The USA was the largest single recipient of new asylum applications among industrialized countries, followed by France, Germany, Italy and Sweden. UNHCR conducted refugee status determination in 67 countries, including many countries that are party to the 1951 Refugee Convention, and registered some 80,050 individual applications in 2011. This corresponds to 11 per cent of the global total. It is not surprising that the majority of asylum applications in the industrialized world are lodged by people seeking international protection from war-torn countries or those emerging from conflict, such as Afghanistan, Iraq, Côte d'Ivoire, Libya, Syria and Somalia.

These figures reflect the various developments the world witnessed last year, such as the paradigm shift taking place in North Africa and the Middle East. Yet the figures in the industrialized world need to be juxtaposed with the numbers in some of the main refugee receiving countries in the developing world, notably Kenya, Ethiopia but also Liberia, Niger and other West African countries, plus Mauritania, owing to last year's crises in Somalia, Côte d'Ivoire, and this year's events in Mali, respectively. At the peak of the Somalia crisis last year, for example, several thousand Somalis fled to Kenya and Ethiopia daily. Within a couple of weeks, Mauritania and Niger received some 80,000 refugees from Mali this year, which roughly represents the 20 per cent increase in asylum applications in the industrialized world last year. Tunisia hosted over 100,000 refugees from Libya alone in 2011, despite its own difficulties and political transition. Another interesting phenomenon is the increasing flows to middle income countries, such as Thailand, Malaysia, Turkey, South Africa and Ecuador.[2] We have also been encouraged by discussions with a range of states, including Australia, Belgium, Brazil and the UK to establish statelessness determination procedures to address the situation of people who otherwise end up in a protection void.

To get a full picture, this statistical overview needs to be seen in the broader context of conflict, migration and related developments which are increasingly intermingled with forced displacement issues. Compared to the estimated 7 billion world population [out of whom some 1 billion go hungry although this is not necessarily linked to movement], the estimated global migration figure for 2010 of approximately 214 million people[3] is surprising in that one would, I guess, have assumed a much larger portion of the world population would be on the move. Looking at the figure of international migrants from a comparative perspective, it has increased by some 59 million people over the last twenty years,[4] suggesting higher mobility, primarily for labour reasons. And although violent conflict has declined in the past two decades, one and a half billion people still live in fragile or conflict-affected countries. Another important trend that I would like to flag at the outset is the increase in natural disasters within the last two decades. While in 1990 there were approximately 296 natural disasters recorded, this jumped to 428 in 2010, affecting an estimated 257 million people,[5] including 42 million displaced in 2010 purely as a result of sudden onset natural disasters.[6]

It is against this backdrop that I would like to explore with you three inter-related themes that I hope can be developed further during this Conference.

Asylum

The first theme has to do with the atmosphere around refugee protection today, with asylum space and how to enlarge it. Increasingly we hear about "the Thirties" as an apt description of today's ills. I think it was IMF Head Christine Lagarde who evoked it a couple of months ago when talking about the world's financial crisis. While we need to treat historical comparisons with caution for obvious reasons, they nonetheless evoke an atmosphere, real or perceived, which resonates in today's world. This sort of déjà vu has a lot to do with the uncertainties of the economic [and social] crisis, the high unemployment rates in many parts of the world, the stark and growing inequalities within and between societies, and the seemingly intractable challenges of this century which seem unparalleled in complexity and magnitude, such as environmental degradation, the effects of climate change, population growth or the proliferation of weapons of all types. While history does not repeat itself, we can draw lessons from the past to master the present and the future.

The "Thirties" has particular resonance in the refugee and statelessness domain, remembering how the sentiments prevailing in that decade made people stateless and both created refugees and denied them safety in some instances. Inequality, high unemployment and a sense of loss of control are a dangerous mix. They seem to bring out the shadow side of our human nature, in dealings between individuals and in politics. Inward-looking, protectionist and exclusionary tendencies are often the result, not just in the economic realm, leading to the marginalization of groups, the scapegoating of the other [and in particular what appears

alien to us in the other] and in the case of refugees or stateless people [and migrants more generally] their stigmatization as those who cheat and "abuse" the system, or worse still, are described as criminals. Those on the margins of a society, including refugees, asylum-seekers and the stateless, are easy prey for the gutter press and populist politicians who are eager to play with fire. This phenomenon has already emerged in some countries where the public debate on asylum and migration policies has become so toxic as to preclude any reasonable or clear-headed dialogue. Could this be possible without the indifference of the majorities to the concerns and situation of the minorities?

As Tony Judt remarked before his untimely death in August 2010, "*what we know of World War II—or the former Yugoslavia—illustrates the ease with which any society can descend into Hobbesian nightmares of unrestrained atrocity and violence. If we are going to build a better future, it must begin with a deeper appreciation of the ease with which even solidly-grounded liberal democracies can founder.*"[7] He then concludes by saying that "*much of what is amiss in our world can best be captured in the language of classical political thought: we are intuitively familiar with issues of injustice, unfairness, inequality and immorality—we have just forgotten how to talk about them.*"[8]

We should not be drawn into a fatalistic mindset by the comparison with the past [implied in the "Thirties"]. The fact that parallels are being drawn with that critical point in time does not, of course, mean that there is any terrible or inevitable catastrophe ahead of us today. The course that global events will take in the coming decades will, to an overwhelming extent, be determined by the actions and directions that states—most of which are led by elected politicians—will take. This means that we, as citizens, have choices, and responsibilities, that will play a key role in the shaping of the future.

It is therefore all the more important to recognize that attitudes toward international refugee protection serve as a kind of litmus test of the health of our democratic societies. The institution of asylum is itself a reflection of values such as justice, fairness and equality—its existence an indicator of the importance of these values in society as a whole. Offering sanctuary to those at risk is not just an ancient tradition but a legal and indeed a moral necessity. It is the safety valve for those who aspire to a better world through their political action, for those who are discriminated against because of their religious beliefs, their gender, or who are stigmatized simply as a result of who they are. It was as important when Hungarians or Czechs or Poles fled repressive regimes after the Second World War as it is now when people—for instance, in North Africa and parts of the Middle East—have no choice but to leave their countries because of violence, autocratic rulers or severe discrimination. The importance of asylum cannot be separated from any democratization process, on the contrary it has often been a conduit for democracy.

How is the time-honoured institution of asylum faring today?

The answer is mixed. In 2011 we witnessed the amazing generosity both of people and of countries. Just to give you a few examples, Tunisian families opened their homes to accommodate thousands of Libyan refugees. Similarly people in Liberia welcomed Ivorian refugees, and Jordanians opened their doors to those fleeing Iraq and Syria. A number of countries passed decrees or are working on laws to put these practices on a more solid legal footing. Grass roots organizations in several countries advocated strongly for an open door policy towards refugees and for resettlement of specific groups, to demonstrate international solidarity and burden-sharing. And more generally, in the West, the granting of asylum has paved the way for the integration for tens of thousands of people every year, thus engendering an immediate solution—an aspect that is often overlooked and not sufficiently appreciated.

At the same time, we have also seen signs of what is colloquially referred to as "asylum fatigue" both in the North and the Global South. It is numbers that appear to count. The success of today's asylum policies seems to hinge more on keeping numbers down and people out [or ensuring the perception that these elements are "under control"], rather than ensuring access to safety, the management of the asylum systems in a spirit of solidarity, or crafting solution-oriented arrangements. Regrettably there is a lot of negative discourse in political and public debates around asylum, where legitimate concerns about misuse, smuggling and trafficking trump concerns about saving lives and doing the right thing. Efforts to adapt the institution of asylum to respond to these real challenges should not threaten the effective operation of the entire institution itself. Suffice to note the excessive media reporting on the fate of a luxury cruise ship run aground in Italy earlier this year or on the 100th anniversary of the sinking of the Titanic and compare this to the lacklustre reporting on last year's rescue-at-sea crisis in the Mediterranean, when more than 1,500 refugees and stranded migrants lost their lives attempting to flee Libya by boat. In a particularly sobering report on loss of life in the Mediterranean, the Council of Europe documented the collective failure to come to the rescue of those fleeing Libya by boat.[9] I wonder whether what played out in the Mediterranean last year is not symptomatic of a broader crisis of lack of solidarity and indifference affecting the very core of the institution of asylum today.

What can we do about it? There is no easy answer.

I am convinced that it is important to go back to basics, both in legal and moral terms. Asylum requires the right to flee, granting access to territory, determining claims fairly and expeditiously, as well as ensuring fair treatment plus paving the way for the resumption of normal lives. It requires that refugees should not be forced to turn to smugglers, that they should not be mandatorily detained or be separated from their families, that border control and interception measures are mindful of the needs of refugees and other groups with specific needs, protection and otherwise, and that legal intricacies are resolved with due regard for the fundamental purpose of the legal regime established in their favour. More broadly, but also more basically, it requires treating people with humanity and fairness.

By way of example, appropriate measures are indeed necessary to combat people smuggling and trafficking in human beings. But combating such crimes needs to go hand-in-hand with proper protection safeguards of the sort envisaged by the Palermo Protocols[10]—safeguards to ensure that the victims of such crimes, not least those who are asylum-seekers and refugees, are not penalized and can gain access to protection, in the many cases where it is needed. Mandatory detention regimes for certain categories of asylum-seekers have not only wrought suffering and long-term psychological harm for the detained, but have also provoked a considerable public backlash. UNHCR has regularly pointed to the problems associated with differentiated treatment of various groups of asylum-seekers and refugees, depending on the mode of arrival, to the quality of decision-making, as well as to the need for effective remedies being made available through an appeal process which offers substantive review both of the facts and the law. The difference in mode of arrival does not necessarily justify distinct statuses being accorded to refugees.

A lot more work also needs to be done to explore the potential refugees offer to spur development, both in the developing world but also in the rapidly aging developed world. With so many protracted refugee situations with no end in sight and consistently low numbers of voluntary returns to countries of origin, this requires a new hard look at solutions that combine local opportunities with a development perspective and, in addition, look to broader immigration regimes from which refugees might also benefit. An interesting suggestion was, for instance, made how Dadaab refugee camp in Kenya could become a force for development.[11] In line with this thinking, UNHCR has been working with UNDP on a Transitional Solutions Initiative which aims to transform the humanitarian response to protracted displacement situations, such as in Sudan, Colombia and Nepal, into a development intervention benefiting entire communities.

Another sign of hope was last year's Ministerial Meeting on the occasion of the anniversaries of the refugee and statelessness conventions, which sent an important signal that there are fundamental human values which must not be compromised. The fact that over 100 states solemnly deposited concrete pledges to address refugee protection and statelessness issues will not only improve the fate of thousands of people but is in and of itself a clear message. It was equally important that last week the Organization of Islamic Cooperation held the Ashgabat Conference on Refugees in the Muslim World, pointing out the inter-linkage between Islamic concepts of asylum and their modern legal manifestations. This coming December the annual High Commissioner's Dialogue on Protection will take the form of an inter-faith dialogue on protection, remembering the common heritage of traditions of compassion and welcoming, but also building new alliances that can help address concrete protection issues for displaced and stateless persons.

We need political and moral leadership, combined with individual engagement, to overcome the tendency to exclude and look inwards. Strong voices are needed to explain why it is in everyone's interest to protect the disenfranchised and promote their potential contribution to the economic and social fabric of our societies.

Interdependence

The second theme I'd like to explore is the increasing interdependence and inter-linkage of the causes of human mobility, especially in light of the challenges that I have just mentioned. Obviously, our interest at UNHCR is in those movements that do not occur as a result of a free choice but due to circumstances that are involuntary. Our interest lies in the shared protection concerns that such movements necessitate, whether or not they are covered by existing normative and governance frameworks.

Increasingly, we see, for instance, how food insecurity or water scarcity [sometimes avoidable through effective governance], marginalization of vulnerable groups and violence become interlinked, as well as how inequality exacerbates poverty and could accelerate the spiral of violence. Different UN and development reports are replete with analyses about massive disparities between and within regions and countries, about the unequal sharing of the benefits of globalization, including from a gender equality perspective, and about our current volatile economic model, which has neglected social justice and the impact on the environment.[12] By way of examples, the Asia Development Bank, in a recent report, has warned that Asia's rapid economic growth may undermine stability because the gap between the rich and the poor is

widening.[13] The same can be said with respect to Africa, where governments' ambitious commercialization of agriculture and "land grabs" are destroying traditional livelihoods and pushing people off their lands.[14] Food insecurity combines with and magnifies violence as causes for flight, as we witnessed last year in Somalia. Another recent example is the situation in the Sahel which has been harsh for many years, with millions of people suffering from chronic drought, food insecurity, malnutrition and, more recently, from violent conflict. Since the beginning of the year, this has led to the internal displacement of just under 150,000 people in Mali and an estimated 160,000 refugees in Mauritania, Niger, Burkina Faso, Togo and Guinea Conakry. The displaced are settling in areas parched by drought, where local communities are already struggling to cope with its consequences. The situation in many ways exemplifies the entire spectrum of today's complex mix of challenges ranging from changes in the external environment, weak governance structures, conflict and displacement. The question arises as to what sort of protection needs to be offered to persons who are forced to move because of these "other" causes.

Important causes for forced movements remain indiscriminate violence and complex conflicts involving multiple agents of violence. Civilians will remain the most affected and it will be progressively difficult for humanitarian agencies to operate. Although the number of conflicts has decreased in the past ten years, not many situations have actually been resolved, as illustrated by the many protracted refugee situations around the world. In the meantime there is a transformation in the way violence is occurring, with a strong correlation between state fragility and violence. In many parts of the world, "private actors" of violence are gaining ground, many of whom are involved in organized crime but do not generally fall within the commonly understood category of non-state actors or de facto authorities: gangs, vigilante groups, drug cartels or organisations with radical aims. By way of example, in Iraq armed groups seem to engage increasingly in organized crimes such as extortions, kidnappings for ransom and robberies to fund their activities, resulting in a deadly combination of persecution and common crime.[15] When a state is weak, there is an increase in non-state actors with maleficent objectives, such as in Somalia or in northern Mali. However, state fragility is not only prevalent in Somali-type situations, but also in different parts of otherwise well-functioning states, including middle-income countries. The stereotypical categorisation of "fragile" low-income and "robust" middle-income countries to map violence-induced humanitarian crises is no longer holding true. Sometimes these actors of violence are closely affiliated with national or local authorities, with a marked adverse impact on humanitarian space. UNHCR has embarked on a major research project that, we hope, will help us to develop international protection guidelines concerning persons displaced by indiscriminate violence, conflict and the changing actors of violence.[16]

Another global issue and multiplier of other causes of forced displacement is climate change. Darfur is often noted as an example of how environmental degradation and competition over scarce resources over decades can combine to trigger conflict-induced displacement. Another case in point is the situation in the Horn of Africa, where environmental stress has always been embedded in the region's cycle of conflicts. We have just contributed to a study that examined the interface between climate change, vulnerability and refugee outflows.[17] Some of the more interesting findings indicate, for instance, that many of the refugees interviewed had perceived discernible shifts in the climate in their home countries over the past ten to fifteen years. While they did not refer to the impacts of climate change as a direct catalyst for violent conflict, the scarcity of resources exacerbated by worsening weather conditions was often cited as a multiplier or magnifier of pre-existing conflicts. They also mentioned that violent conflicts and state repression reduced the adaptation capacity of those exposed to climate change. Again, this reveals that there is perhaps a stronger link between "traditional" refugee law premised on a notion of persecution and modern displacement phenomena, such as the consequences of climate change, than hitherto understood. This is certainly the case where the impact of climate change-related processes act as causes of, or exacerbate, conflict, violence, state repression or public disorder. Deleterious action or inaction by a government to address disaster risk reduction or preparedness or, once disaster strikes, to deal with its humanitarian consequences, if related to one or more of the Convention grounds, may well be considered persecution within the meaning of the 1951 Refugee Convention. This said, it is equally clear that there is a normative gap affecting people who may be forced to cross an international border owing to the impact of rapid-onset meteorological events, possibly linked to climate change.[18] It is very encouraging that Norway and Switzerland, joined by Mexico and Germany, deposited a pledge at the Ministerial Meeting last year "*to cooperate with interested states, UNHCR and other relevant actors with the aim of obtaining a better understanding of such cross border movements at relevant regional and sub-regional levels, identifying best practices and developing consensus on how best to assist and protect the affected people*."

Thus if we look at today's crises and those that in future may generate population movements, they range from various forms of violence, human rights violations, acute and

slow onset natural disasters to political instability, epidemics/pandemics, nuclear and industrial accidents, and others. Increasingly, they are intertwined and mutually reinforcing. Some have suggested new terminology, such as the concept of "crisis migration".[19] This is thought-provoking but at the same time I wonder whether such a concept does justice to particularly acute humanitarian situations, the forced displacement angle, the underlying legal and protection framework for people who are forcibly displaced or the indivisibility of human rights.

A stark example of the magnitude of today's displacement challenges is evident in the scenarios that developed as a result of the conflict in Libya last year. Tunisia and Egypt bore the brunt of these displacement challenges, having to cope with over a million people departing Libya. The vast majority of them were migrant workers forced to leave Libya because of the conflict but who could be assisted to return home. But there were also well over 100,000 Libyans who sought safety in both neighbouring countries, as well as some 6,000 refugees, primarily from Eritrea and Somalia, who were stranded at the borders in Tunisia and Egypt. In response, and developing an innovative operational model, IOM and UNHCR launched a massive humanitarian evacuation programme for third country nationals who wanted help to get back to their respective countries of origin in Asia and Sub-Saharan Africa. At the same time, in an effort to demonstrate solidarity with Tunisia and Egypt within a context of international cooperation, UNHCR set in train a Global Resettlement Initiative for refugees stranded at the border, as well as a programme supporting host families. In this crisis, migrant workers were the single largest category of people who were displaced. This is raising interesting questions regarding a gap in the international legal system—how to protect migrants who are "trapped" or "displaced" by armed conflict and other emergencies?[20]

Importantly, these various examples point to the key role of the state. It is clear that the state has crucial responsibilities both in terms of preventing or mitigating causes of displacement and when responding to them. There was a time when commentators predicted the gradual replacement of certain state functions by supranational bodies, be they intergovernmental, commercial or private, or by multinational companies. In the wake of the economic and financial crisis, however, the central role of the state has again come to the fore—with full force. We need to ask ourselves what this means in the context of forced displacement, humanitarian action and protection. Statehood is inextricably linked to providing a safe and secure environment, guaranteeing the functioning of effective institutions and basic services, including the safeguarding of human rights and the rule of law, and a capable administration. If a state cannot deliver or can only partially deliver its core functions -- for instance, by not being able to control all its territory, or because of weak or fragile state structures, and as a result is either unable or unwilling to exercise effectively its core raison d'être in part or the whole of its territory -- a need for international protection may arise.

International assistance and protection are often undermined by lack of humanitarian access and presence. In these scenarios, the resilience of communities and individuals and their ability to protect themselves are critical. UNHCR relies on grass-roots networks and implementing partners to deliver services in many areas, including in countries such as Somalia. At the height of the displacement of Somalis into Kenya in 2011 and the associated security crisis within some of the refugee camps in Kenya, refugees themselves played a significant role in ensuring the continuation of delivery of key services in the emergency situation.

It is also interesting to observe that the Security Council consistently makes pronouncements on the need for humanitarian access and the delivery of humanitarian assistance. The denial to access and delivery by authorities or non-state actors and the consequences for affected populations therefore become an international concern. This may well become a major issue in the future, including from a forced displacement and protection perspective, especially when we may increasingly see government inaction, lack of preparedness, etc. in response to environmental hazards, natural disasters, food and water insecurity and so forth. We may increasingly witness the interconnectivity between government action or the lack thereof [including due to deliberate discrimination], changing weather patterns and their consequences,[21] governance structures on food and water security that do not respond to addressing inequality, as well as operational humanitarian responses to what may well be major sources of displacement in the future.

Again, this points to the interconnectedness of phenomena, of causes of human mobility, of migration and displacement, the way the state addresses them and the legal and protection underpinnings. The interesting feature is that it will, I think, engage UNHCR and the institution of asylum from a traditional mandate perspective. It would be interesting to undertake further research in this regard, including from the perspective of persecution and refugee law. But it is clear that both normative and operational protection gaps exist, which leads me to my last theme: governance.

Governance

Against this backdrop, it is obvious that good governance at all levels will be the linchpin for mastering these challenges. A lot of thought was given to global governance at

the beginning of the 1990s, not least in the wake of the end of the Cold War and the hope for a new quality of multilateral engagement. But not long after the publication of the report by the Commission on Global Governance in 1995,[22] it seems the world has again been struggling to organize itself at different levels to come to terms with the challenges of our inter-connected world today. It is true that progress has been made, for example, with the adoption of the Millennium Declaration and Goals,[23] development of the "responsibility to protect" concept[24] to respond to the most heinous crimes, such as genocide and other crimes against humanity, as well as a major reform of the human rights architecture, just to mention a few. Yet the 2005 UN report "In Larger Freedom" is clear about the urgency of proper governance:[25]

> In a world of inter-connected threats and opportunities, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States… . The world needs strong and capable States, effective partnerships with civil society and the private sector, and agile and effective regional and global intergovernmental institutions to mobilize and coordinate collective action. The United Nations must be reshaped in ways not previously imagined, and with a boldness and speed not previously shown… . it is for us to decide whether this moment of uncertainty presages wider conflict, deepening inequality and the erosion of the rule of law, or is used to renew institutions for peace, prosperity and human rights. Now is the time to act.

With the slow progress on climate change, especially on the urgently needed legally binding agreement to curb carbon gas emissions, and other major global issues, this appeal is even more relevant today than it was seven years ago. Reflecting on multilateralism in today's world, I have discerned at times a push-back against international institutions, a re-emergence of old reflexes with an over-emphasis on national sovereignty and statehood, a questioning of the role of regional human rights mechanisms, notably the European Court of Human Rights as well as the institutions of the Inter-American human rights system, and key principles of human rights, including, in some quarters, the prohibition on torture. Humanitarian work has become more complicated as a result, with access to affected populations recurrently blocked, and established standards, such as the Guiding Principles on Internal Displacement, being challenged on occasion.

Even in the consensus world of humanitarian action and refugee affairs we have seen of late a difficult debate about the value of Executive Committee Conclusions—important standard-setting texts on protection issues adopted annually by UNHCR's governing body comprising 87 states. The Executive Committee did not adopt a Conclusion last year and no agreement has so far been reached whether one will be adopted this year nor, critically, on the way forward.

In fact, what we need today, more than ever before, is a deep reflection about how the world could be structured in terms of rules, governance and institutions to deal with the major global issues in an effective manner. As Brian Urquhart wrote: "*What is needed now is not to abolish national sovereignty but to reconcile it with the demands of human survival and decency in the astonishingly dangerous world we have absentmindedly created.*"[26] In doing so, it is important to bear in mind the achievements to date.

One bright spot in this challenging international environment is, for example, the increasing role of international human rights mechanisms. Despite some difficult starts, the Human Rights Council is advancing with its new mechanisms, such as the Universal Periodic Review, becoming an important tool for reaching consensual and collaborative solutions. During the first UPR cycle, more than 1,600 recommendations concerning the human rights treatment of persons of concern to UNHCR were made to states under review. The Council has increasingly relied on inquiry and fact-finding missions. Its special sessions were used to examine major events and developments such as the human rights impact of natural disasters, the 2010 earthquake in Haiti, the financial crisis or the food price hikes in 2008. Its special procedures have become authoritative sources of monitoring and standard-setting. These positive aspects, however, do not hide the fact that the Council also remains a body where political differences influence outcomes.

Let us also not forget that it is in response to transnational challenges that UNHCR was established as one of the main global humanitarian and protection institutions in the wake of the Second World War. Its creation emerged from the experience of different international refugee institutions that had been established in the inter-war period but, more importantly, recognized the urgency of the international character of protection and humanitarian engagement, not least in the wake of the Second World War. Additionally, UNHCR's mandate for refugees and stateless people has been grounded in public international law, and in particular international treaty law. UNHCR is legally entitled to intercede directly on behalf of refugees and stateless persons who would otherwise not be represented on the international plane. If you think this through historically, this is an amazing advancement over the "interference in domestic affairs" doctrines of the past. The effective exercise of this mandate is underpinned by the commitment of states to cooperate with the Office.[27] Some of UNHCR's

functions are also embedded in international law concepts more broadly, such as the surrogate function of diplomatic and consular protection for refugees or international human rights protection concepts.

In this context, it is also important to bear in mind that UNHCR's involvement in internal displacement and mixed-migration contexts entails close partnership with other actors. The year 2012 marks the 20th anniversary of the mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons. A lot has changed since then. The Guiding Principles were elaborated. The cluster system to respond to humanitarian crises, including internal displacement, has been established. More recently, major regional normative developments include adoption of the Great Lakes Protocol and the Kampala Convention. UNHCR has actively participated in and supported these developments. The same holds true with respect to UNHCR's increasing engagement with others in addressing the international protection needs of those who find themselves in mixed-migration and trafficking contexts, as well as of the stateless.

In short, the international community has created a vehicle that translates its international concern in the forced displacement and statelessness domain into a legal, institutional and operational framework. On a daily basis, this constitutes the nuts and bolts of humanitarian action and protection delivery at the grass-roots level. At times this has meant progressive development of international law and standards. This work always requires international cooperation and partnership both at the intergovernmental, governmental and non-governmental level. This institutional setting is an important achievement of the last century, one that transcends narrow thinking and inwardness. It constitutes the platform on which to build when we look to dealing with the new challenges.

On the international rule of law front, it is encouraging that various initiatives addressing causes of displacement have been addressed through international regulatory and governance frameworks. For example, in relation to the buying of so-called "blood diamonds" the Kimberley Process Certification Scheme[28] was put in place. As for the selling of small arms, we have high expectations for the July UN Diplomatic Conference on the Arms Trade Treaty, where we hope Member States will strive for a comprehensive coverage of an otherwise poorly regulated global trade in conventional weapons.[29] As these examples show, it is clear that new standards will continue to be needed in the future, including in the areas more directly of concern to UNHCR.

It is important for an agency such as ours to reflect constantly about the adequacy of today's tools and instruments, not least in light of the aforementioned challenges. Concepts of state responsibility and international protection, as we are familiar with them today, will need to evolve to take into account not only the global repercussions of human activities but also their inter-generational impact. Standard-setting may well take new shapes and forms in the future, requiring some serious creative thinking. I'd like to give you five examples where a discussion needs to be had on the progressive development of international law and standards.

One area that would benefit from further reflection are protection responses to both sudden- and slow-onset disasters, including if they lead to displacement across borders and are not covered by existing instruments. Last year's Nansen Conference on Climate Change and Displacement in Oslo developed some parameters that both the Norwegian and Swiss Governments have undertaken to take further through the Nansen Initiative, which has been launched this year. A second area where more work is required is in relation to protection of migrants and refugees at sea, to avoid the type of situations to which I referred earlier. A third area applies to regions, such as the Middle East and parts of Asia, where many states are not party to the 1951 Refugee Convention. In such contexts one could think of the development of regional protection regimes that identify the circumstances under which temporary protection would be activated, set out its scope, content and duration, while clarifying procedural and standard of treatment issues. A fourth area would be statelessness where we have recently seen a new dynamic around accessions to the two international statelessness instruments. Moreover, would there not be benefit to codify existing ILC standards in respect of state succession and nationality? And finally, a proper application of the 1951 Refugee Convention needs to be reinvigorated to address the protection needs of people fleeing armed conflict and other situations of violence. I hope this gives some food for thought for important global governance issues in the forced displacement and statelessness domain.

Conclusion

As we see increasingly, if the effects of some of these global issues are not yet being felt because they develop gradually and if there is no immediate crisis, then existing governance systems seem to delay their resolution. It is the same in the case of inter-generational equity and justice. But we can't afford this. The increasingly complex displacement angle is both a visible manifestation of many of today's global challenges, as well as a trans-boundary issue in its own right. It should ring alarm bells more widely and trigger the action required to address the core issues and to craft effective governance around them. It will, I think, not surprise you—in

light of all I have just said—that the next edition of the State of the World's Refugees will have as its theme: "In Search of Solidarity". It is the human value that is both the ingredient for holding societies together in difficult times and for ensuring that basic human rights are respected. It is the human value that has inspired international cooperation and international law and projected a vision of our common heritage. It is also the value that will, if acted upon, guarantee our survival. In this spirit, I look forward to your contributions from this Conference.

NOTES

1. See that latest IDMC report, *The Global Overview 2011, People Displaced by Conflict and Violence,* available at http://www.unhcr.org/IDMC/IDMC-report.pdf
2. See Nicholas Van Hear, "Shifting powers: two decades of migration and global turbulence," *The Compass Blog*, October 11, 2011, available at http://compasoxfordblog.co.uk/2011/10/shifting-powers-two-decades-of-migration-and-global-turbulence/. See also Nicholas Van Hear, "Forcing the Issue: Migration Crises and the Uneasy Dialogue between Refugee Research and Policy," *Journal of Refugee Studies* 25, no. 1 (2012):2–24.
3. See http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en
4. See United Nations, Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008), 2009, available at http://esa.un.org/migration/p2k0data.asp
5. EM-DAT: The OFDA/CRED International Disaster Database available at www.emdat.be
6. IDMC, *Displacement due to natural hazard-induced disasters: Global estimates for 2009–2010,* June 2011, p4.
7. See Tony Judt, *Ill Fares the Land,* 2010, p. 221.
8. Ibid. p. 234.
9. The report is available at: http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf.
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Becoming Queer Here: Integration and Adaptation Experiences of Sexual Minority Refugees in Toronto

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Abstract

Since the early 1990s Canada has become a primary destination for individuals who make refugee claims on the basis of sexual orientation persecution. However, until recently, there was little research focusing on this growing component of Canadian urban queer communities and their experiences of the refugee claim process, and their integration and adaptation to Canadian society. This paper, based on interviews with lesbian, gay, bisexual and transgender (LGBT) refugee claimants and participation in LGBT newcomer support groups in Toronto, explores the formal and informal processes, spaces and practices through which LGBT refugee claimants learn about the Canadian nation-state, citizenship and queer identities and communities, and in so doing enter a space/moment of becoming a 'becoming' refugee as they learn the social, cultural, and bureaucratic processes and norms of the Canadian refugee apparatus.

Résumé

Depuis le début des années 1990, le Canada est une destination de choix pour les personnes faisant des demandes d'asile en raison de persécutions basées sur l'orientation sexuelle. Toutefois, jusqu'à récemment, peu de recherche se sont penchées sur cette proportion grandissante des communautés urbaines allosexuelles canadiennes, sur leurs expériences du processus de demande d'asile, et sur leur intégration et leur adaptation à la société canadienne. Basé sur une série d'entrevues avec des homosexuels – hommes et femmes, des bisexuels et des transgenres (LGTB) demandeurs d'asile, et sur une participation dans les groupes de soutien aux nouveaux arrivants allosexuels à Toronto, cet article explore les processus formels et informels, les espaces et les pratiques par lesquels les demandeurs d'asile allosexuels se renseignent sur l'État, la nation et la citoyenneté canadiennes, ainsi que sur les identités et les communautés allosexuelles. Cet article examine également comment ces demandeurs d'asile deviennent, ce faisant, des réfugiés alors qu'ils apprennent quels sont les normes et les processus sociaux, culturels, et bureaucratiques du système canadien pour les réfugiés.

At a weekly meeting of a peer support group for lesbian, gay, bisexual and transgender (LGBT)[1] refugees in Toronto, two members of a HIV/AIDS organization were making a presentation on stigma, discrimination and oppression. The presentation began with a powerpoint slide displaying the acronym LGBTTIQQ2SA, and one of the presenters asked the group to name, and then define each of the words derived from this acronym. The first few letters were easily answered, with people in the group calling out "Lesbian", "Gay" and "Bisexual", but then things got a bit murkier. Many fewer people were able to name both "T"s (transgender and transsexual) and only one person of the approximately 140 group members was able to explain

what "I" stood for (Intersex). "Queer" was named by a few, but "Questioning" was unknown by all (including me). "2S", (two spirits), was recognized by a few, but "A", (Allies) appeared to be another new label for most people in this group. Following this exercise, one of the presenters handed out sheets of paper with the question, "When I hear (blank space) I know I am being discriminated as a LGBTTIQQ2SA" written at the top. He then asked people to say what they wrote down so he could create a list on a whiteboard at the front of the room, and the group quickly came up with a long list of mostly derogatory terms for homosexuals in different societies: chichiman, battyman, fish (Jamaica), pede (Cameroon), makoume, zame, and sewer rat (St Lucia), koni (Iran/Persian), shoga and moffee (Kenya), kuchu (Uganda) sodomite, onisan (Nigeria). The group was much more lively for this portion, and as some words were named, there was laughter and giggling from other group members who were presumably from the same country or language area. The list got longer and longer, and the group became increasingly animated until the presenter had to ask some people to stop laughing as these terms could be very hurtful to others in this group.

These two adjoining moments, one of relative silence, and another of boisterous noise, which took place during a conversation about naming sexual identities and discriminatory words in different socio-cultural contexts, involving people who have migrated to Canada from multiple countries and who are currently in the process of applying to be a convention refugee on the basis of sexual orientation persecution, encapsulated, for me, some of the complexities of the process of becoming a 'sexual minority refugee' in Canada. In this paper I want to explore the idea and work of 'becoming' a sexual minority refugee. In so doing, we might begin by exploring the meaning of the word becoming, which operates as both adjective and noun: As a noun, becoming is defined as 'any process of change', or as an element of Aristotelian philosophy, that is, "any change involving realization of potentialities, as a movement from the lower level of potentiality to the higher level of actuality".[2] This definition fits quite nicely with the sexual minority refugee claimant, as few arrive in Canada thinking of themselves as 'refugees', and some do not think of themselves as members of a particular sexual minority identity group, or at least do not recognize and identify with sexual minority identities as they are defined and organized in Canada. However, in the period leading up to their Immigration and Refugee Board (IRB) hearing, the sexual minority refugee claimant must learn relatively quickly how to 'be' or at least 'occupy' these identities, as the hearing is usually dedicated to assessing the credibility of the claimant as a member of a particular social group who has faced persecution in their country of origin. In other words, they must prove they are who they say they are and that they have faced hardships based on this identity that meet a standard definition of persecution. They are reminded repeatedly by their lawyers, peer support group leaders and each other that there are a number of components, characteristics and assumptions utilized by IRB Members to determine credibility as a sexual minority refugee, and that if they understand these assumptions and characteristics, then they stand a better chance of a successful hearing. Thus all refugee claimants are incommensurate or potentialities until their hearing, which we might think of as a test of actualization or commensurability[3] in which some do very well, and some do not.

If we think about the hearing as an 'actualization or commensurability test' in which the refugee claimant is trying to convince the Board Member of her credibility as a member of a particular social group suffering from persecution, then I think it is also useful to think about 'becoming' as an adjective, in which it is defined as, 'suitable; appropriate; proper … that suits or gives a pleasing effect or attractive appearance, as to a person or thing, as in a becoming dress'. At the hearing, the refugee claimant is relegated to a position in which they must do everything they can to 'give pleasing effect' to convince the Board Member they are who they say they are as the Board Member has the power to make a final decision on the veracity of this individual's claim. Once again, in refugee support group meetings, conversations between refugees and their lawyers, and amongst refugee claimants themselves, there is a mostly implicit, sometimes explicit understanding of the importance of becoming a 'becoming' refugee at one's hearing, and time and effort is dedicated to learning strategies and techniques that will ensure a successful performance.[4]

In this paper I explore a few of these moments where strategies and techniques of becoming a becoming sexual minority refugee are articulated and developed, based on my participation in these refugee support groups, interviews with refugee claimants and lawyers, and observations in a number of refugee hearings over the period of July 2011 to June 2012. In so doing, I hope to focus on some of the formal and informal processes, spaces, discourses and practices through which sexual minority refugee claimants in Toronto learn about, discuss and debate the terms through which they are defined within the structure of the immigration and refugee system in which they are located. I build on Malkki's observation that the refugee should not be taken as a naturally self delimiting domain of knowledge, and that the category of refugee is an epistemic object in construction[5]. However, rather than analyzing the inequalities inherent in the production and structure of the episteme and the bureaucratic and legal system created around it,

which is where I would locate the majority of recent research on LGBT refugees in Canada[6], in this paper I focus on how the refugee claimant comes to understand the meaning of the episteme and system, obtains the knowledge to navigate this complex system, and in so doing learns to become a becoming LGBT refugee. This process of becoming also invokes particular incarnations of nationalism and citizenship, which are themselves freighted with moral valences of proper assemblages of sexuality, gender, race and class. I will therefore also unpack some of the embedded moral valences contained in the learning process of becoming a queer refugee. My objective is in line with recent queer and feminist studies that demonstrate how discourses and practices of gender and sexuality are critical to the maintenance of liberal and illiberal forms of power and domination and are at the governmental heart of capitalism, secularism, and civil society[7].

More generally, I argue that learning about the relationship between one's own sexual desires and more widely circulating socio-sexual identity terminologies is a never-ending process for everyone due to multiple changing political, cultural and economic forces which continuously impact, undergird and transform those terminologies and their meanings. However, for the sexual minority refugee this process of learning is intensified through migration into a hyper-visible moment of state scrutiny. There are four to five distinct moments or spaces in the life of a sexual minority refugee in which they voluntarily or involuntarily learn about, confront, reflect, and/or claim a particular socio-sexual identity: First, in their country of origin, they learn, as children and young adults, about 'queerness' in a local context, that is, how sexual diversity is viewed, evaluated, rewarded or penalized in their home town, city and country. For those who grow up in urban areas, and/or who have access to electronic communications technologies that provide access to 'foreign content', such as international films, videos, and other media, and the internet, or for those who live in areas where people from 'outside' nations or cultures come to visit, work or live, there is often a second space or moment of learning, in which they read about, encounter, or see images of people who engage in similar sexual activities, but who look, sound and behave differently and utilize a language that makes different associations between those similar sexual practices and identity formations. The third moment/space of learning for a sexual minority refugee begins just after they arrive at Pearson airport or enter the offices of the Citizenship and Immigration Canada in suburban Toronto and submit their application for refugee status. From this moment on, the individual must learn about 'becoming a becoming' LGBT refugee as I outlined above. This is perhaps the most hyper-visible, self-conscious and deliberative period due to the refugee's tenuous position in a system in which the state now scrutinizes their past sexual behavior in order to assess whether that behavior fits a particular definition of sexual identity, and if so, whether that sexual identity is subject to persecution in the individual's country of origin. The fourth moment/space of learning often occurs simultaneously alongside the third; this is the process of learning about how sexual diversity is organized, named and located in their new surroundings, in this case, metropolitan Toronto. This learning occurs partially in the refugee support group meetings and interactions with their lawyers and other groups associated with the refugee settlement process, but it also occurs through everyday experiences of the refugee on public transit, while shopping, in their jobs and in their accommodations and surrounding neighbourhoods. The fifth and final moment/space occurs after a successful hearing[8], in which the now 'official' convention refugee can begin to apply for permanent resident status in Canada, and can make plans for their future envisioning themselves as a potentially full Canadian citizen without fear of deportation. The state's hyper-scrutinization of the convention refugee's sexual orientation retreats (but never completely disappears), and the individual may adjust their sexual desires and practices to identities and behaviours that they are more familiar with; for some this may entail very little change from their pre-hearing life; for others, there may be adjustments that align with their own personal comfort levels and past experiences, and/or which are made in relation to other factors like jobs, family, romantic relationships and community support networks.

Each of these five space/moments merits an individual paper, given their complex locations and differential intensities for anyone who goes through the sexual minority refugee process; in the remainder of this paper I focus on the third space/moment which begins after the refugee claim has been submitted and ends at the hearing, in which the work of 'becoming' is most intense, and becoming is, in a sense, doubled or possibly trebled, as an individual is not only learning about sexual, gendered and other identity formations in their new society, but they are also learning about how IRB members will think about and assess the 'credibility' of their membership in a particular social group (i.e. their sexual orientation), and they are learning the criteria required to meet the definition of 'refugee'. I will argue that this space/moment of becoming a becoming LGBT refugee is similar to Povinelli's observations on the effects of multicultural domination of indigenous subjects in Australia, which works by inspiring subaltern/minority subjects to identify the with the impossible object of an authentic self-identity.[9]

In their article examining issues that arise in eliciting and presenting a refugee narrative when the claim is based upon sexual orientation, Berg and Millbank note that the narrative must be presented as comprehensively as possible early in the claim process because the requirement of consistency of later testimony is a significant feature of refugee adjudication. Sexual orientation refugee claimants face additional challenges because much of the adjudication is based on the personal narrative of the applicant; unlike claims based on political opinion, race, nationality or religion, which more commonly have some form of independent verification of group membership, sexual orientation claims depend mostly on the presentation of internal, often unspoken, or unspeakable qualities, desires, and practices such that extremely private experiences infuse all aspects of the claim[10]. Furthermore, "in the refugee context, it is always the decision maker and not the applicant who has the power to name, the authority to decide who the applicant 'really' is and what sexuality 'really' means"[11]. Berg and Millbank reveal how adjudicators often apply their own understandings of sexual identity based on a staged model of sexual identity development which is based upon specific cultural, gendered, raced and classed experiences and operates with particular assumptions about sexual identity as fixed, discoverable, and moving from a position of closeted to 'coming out', in which the hearing serves as the apotheosis to this narrative[12].

The determination of credibility in sexual minority refugee cases is further complicated when this staged model of sexual identity development is applied to racialized bodies. Most of the refugee claimants I interviewed were from Caribbean or African nation-states and upon arriving in Toronto came to be identified as a 'visible minority' in addition to being a sexual minority. As numerous scholars have noted, the 'black' body is always/already doubted or debated in North American mainstream (white) LGBT discourses based on assumptions about 'down low' (hidden homosexual) practices and 'macho' black masculinities that are problematically classified as homophobic[13]. Doubt or disbelief is augmented when racialized bodies are also refugee bodies: These 'visible minorities', are seeking state protection (and eventually citizenship) based on their claim to being queer and persecuted, but their claims are judged, evaluated and scrutinized through racialized lenses in everyday settings as well as every step of the way through the refugee process, from the Canadian Border Services Agency officers at the airport, to support group volunteers to fellow refugee claimants and finally to the IRB Members. Some of this suspicion may be generated through cross-cultural mis-translations (which are then linked to racialized stereotypes) but I would argue suspicion is more profoundly generated through the racialized, gendered, and classed hierarchies and normativities that undergird the structure of the refugee system itself.

When differential understandings of self and sexual desire come into contact with a state apparatus that requires explicit declaration and proof of a particular (i.e. racialized, gendered, and classed euro-american) sexual identity formation in order to grant protected refugee status, the potential for misinterpretation, and in turn, accusations of 'false claims' are all the more likely. All queer claimants are negotiating culturally proscribed identity narratives before, during and after their hearings, and in the struggle to make hidden, invisible and/or highly personal aspects of the self visible to adjudicators, support workers, volunteers and other queer migrants in an environment built upon the exclusionary process of determining an authentic refugee, the challenge to prove one's credibility as a member of the LGBT social group is heightened for those whose racialized identities are associated with 'problematic' sexualities or attitudes towards sexual diversity.

While Berg and Millbank and others point out the numerous and profound problems inherent in applying a staged model of sexual development' to adjudicate sexual minority refugee narratives, I think it is important to note that many of the refugee claimants I worked with were not entirely naïve about this model and other components of the adjudicating process, and that they spent a great deal of their time and energy learning about the structure and process of the hearing, and what was necessary to ensure that they would appear as 'credible' and 'authentic' both in their file and at the hearing. In other words, the refugee claimants were actively engaged with the system in which they had been placed and exercised agency in their efforts to meet or fit into these assumed standards of evaluation (albeit to greater or lesser degrees depending on the individual claimant).

I now present a couple of discussions and events which serve as examples of how refugee claimants learn and experience the space/moment of becoming a becoming refugee. The first example is a set of comments made by a refugee lawyer during her presentation to an LGBT refugee support group, and the second comes from discussions with two refugee claimants about preparing for their hearings.

At the refugee support group meetings I attended, a number of immigration and refugee lawyers were invited by the facilitator to speak to the group about the refugee process in Canada, preparing for the hearing, and obtaining and working with legal counsel. The visiting lawyers often received the unbroken attention from everyone in the group, as opposed to other presentations that focused on banking or finding accommodation, in which I could see quite a few people texting on their cellphones, or quietly whispering to

each other. Of the four lawyers that I heard speak to the group, each had a significantly different presentation style, with some using anecdotes from hearings they attended to get across their point, and others using power point presentations that contained United Nations Refugee Convention and Protocol definitions and concise lists of what to do and not to do in preparation for a hearing. One lawyer who spoke to the group combined power point slides and a presentation style which a couple of group members noted afterwards was similar to a drill sergeant addressing his troops. The lawyer began by providing the group with a timeline of the refugee claim process, and spent a fair amount of time focusing on the Personal Information Form (PIF), which every claimant must fill out and submit to the IRB within 28 days of making their claim. The most important part of the PIF, she said, is the narrative, "which is where you tell your story", but she then recommended getting a lawyer, "to help make sure it's your own voice." She then provided some insight on the purpose of the PIF and some strategies on how to write it: "When the Board Member gets the story they want to relate the story to the person; the PIF must be in your own voice, it doesn't matter if there are grammatical errors … If the story is too much like a PhD and you only have a grade 5 education, that creates doubt." This comment had some group members laughing. Furthermore, she went on, the PIF must be synchronized with all the other documents that are submitted—i.e. letters from family, lovers and friends, hospital and police records, school transcripts, etc. She then advised, "to take out things that will negatively impact you; if someone who doesn't really know you writes a letter or says something that's not right, take it out". She continued,

> From the day you put in your PIF, your PIF is your bible, like a book you keep close to you; you read it every day; your life depends on it. If you ignore it you could lose your life … Read read read read your narrative. Put yourself in the mind of the judge: How would you make him believe you? What do I need to show that I have same sex partner or friend? If I was punched and kicked and then ran to a friend's house, what is my friend's name? What time of day did this happen? What's the distance between the houses? You have to pre-empt the judge.

The lawyer also commented on the importance of refugee claimants knowing legal definitions:

> You should know the legal definition of a "Convention Refugee": You must demonstrate that you cannot return to your country of origin; that there is serious risk to your life, based on membership of a particular social group—sexual orientation, race, religion, nationality, political opinion all qualify as membership categories … Canada can't save everybody, you can't come claiming that everyone is poor back in Burundi and its hard to get a job."

The personal narrative component of the PIF generated a lot of discussion amongst refugee claimants. Whether they learned about its importance from their lawyers, each other or reading guidelines on the IRB website, the personal narrative was recognized as the central document around which their claim would be built and assessed by the Board Member. Even though claimants at the support group meeting were told by the lawyer that the PIF 'is where you tell your story', the lawyer immediately followed this statement by recommending that they get a lawyer 'to help them tell their story', but didn't elaborate at that moment as to why someone would need help in telling their own story or what kind of 'help' is needed. However, claimants quickly learn that the personal narrative is not simply a matter of telling their 'life story', and that there is a particular structure or framework to this narrative, and that it must include important features or components that address the jurisprudential objective of determining the credibility of a refugee claim. In other words, the personal narrative becomes a document that is viewed as evidence given by the claimant about his or her claim, and that evidence is evaluated in relation to other documents and the testimony of the claimant at the hearing. So even though the lawyer told the group that the PIF must be 'in your own voice', she went on to provide some specific examples of what that voice should comment on or include, i.e. a friend's name, the distance between the house you were punched in and your friend's house, the time of the day at which the violence took place. These are elements of a very particular kind of storytelling, one that fits the parameters of a courtroom in which facts are elicited and tested in order to determine the truth or falseness of a defendant's claim. In other words, the personal narrative is located within and structured by the formulism and formalism of western juridical concepts and processes.[14]

Not surprisingly, listening to presentations like that of the lawyer can stir up anxiety amongst refugee claimants. Ruth, who is in her 50s, from St. Lucia[15], and who self identifies as lesbian, said that the whole PIF process was nerve-wracking, because after she wrote and submitted it to her lawyer, she remembered things that had happened to her that she thought were significant. She said, "there were things you try to forget, or your mind blocked because it didn't want to remember them, but they come back suddenly, maybe even when you're being asked a question." For example, after she submitted her PIF to her lawyer she remembered an incident where she'd been driving her car, and as she passed a man he yelled 'sodomite' and threw a rock at her. She remembered hearing the window glass break, and felt a bit of the

glass hit her, but thought she was ok and drove on, until at a stop sign a woman in another car looked over and told her there was blood coming down the side of her face. She ended up needing two stitches for this. But since it wasn't in her PIF, she wasn't supposed to talk about it. "It's this kind of business that can lead to confusion", she added.

Shawn, who is in his 20s and from Grenada, had met with his lawyer a couple of times to discuss his PIF and how he would be questioned at the hearing. In one of our interviews, he discussed these conversations with his lawyer: David: Did (your lawyer) say that the Board Member probably will ask questions like, which day were you attacked?

> Shawn: Well, the way he said, it's like, 'What happened on June the 22nd, 2010' and I'm supposed to describe what happened. So, you don't want to confuse June 2010 with June 2009.
>
> David: Right … I have heard some people say that they know what happened to them, but when they're in the hearing they're nervous because everybody is looking at you, so it's sometimes hard to remember the dates… . Do you feel like you have to rehearse it to yourself?
>
> Shawn: Yes, I think it reduces the anxiety of it, because I'm used to studying for exams. So, it is an exam that I have to study for.

Shawn had learned from his lawyer that his PIF would become a piece of evidence from which he would be asked questions about 'the facts' in his hearing in order to corroborate his written testimony. Shawn realized that the PIF was a particular kind of story-telling in which certain events, dates, locations and names would form the central line of questioning at the hearing, so he was now approaching it like an exam that he needed to study for. For Shawn, this was not too scary as he was a university student and said he was used to studying for tests. Shawn had also discussed the PIF and other aspects of preparing for the hearing with other refugee claimants. From these discussions, he had learned of the importance of submitting other documents to help strengthen his case, such as media coverage of homophobic events in Grenada.

> David: Do you get, do you share with other refugees when you find good articles or good information, about things back in Grenada, do you share that?
>
> Shawn: Well, Marvin (another refugee who had recently had a successful hearing) would do that, because he went through it. And he loves to do that. So, he would say, Shawn here's an article related to your case. I would read it and I would say, okay this is related or no it's not related. And there are times when I would say to a friend who is going through the refugee claim, 'Here's an article on gay (issues) … you might want to take a look at it. I'm not sure if it's related to your case, but you can take a look at it to see if it's related, yes or no.

In this conversation, Shawn demonstrates his knowledge of the definition of a 'convention refugee' and the IRB hearing structure (thus reinforcing the advice the lawyer gave in her presentation) in that he knows that there must be evidence presented to the Board Member to demonstrate that members of the particular social group that he belongs to face persecution in their country of origin. Through his conversations with other refugees like Marvin who have gone through the process, he was now scanning Grenadian newspapers online and printing out any articles that dealt with gay issues. Shawn felt that the more articles he could find and submit to his lawyer (who would forward them to the IRB as part of his documentation file), the more he would strengthen his chances of a successful hearing. In this case, Shawn knew that his narrative was not enough, and that additional evidence was required in order to meet the criteria of being not just LGBT but an LGBT 'refugee'.

These snippets from presentations and conversations by differentially positioned individuals in the particular space/moment of becoming a becoming LGBT refugee resonate with Povinelli's observations on the effects of multicultural domination of indigenous subjects in Australia, which works by inspiring subaltern/minority subjects to identify with the impossible object of an authentic self-identity. For indigenous peoples this is a 'traditional' form of society and subjectivity associated with an imagined past, but because they are in the present, and part of the present, they can never fully achieve this fantasy, so the multicultural nationalist is always disappointed, and the indigenous can never be really real[16]. The sexual minority refugee faces a similar challenge of identifying with the impossible object of an authentic LGBT self-identity. For the refugee, this is an essentialist form of socio-sexual identity that is associated with a normative Euro-American sexual identity formation, that is, a staged model of sexual identity development applied to one of 4 sexual identity categories (Lesbian, Gay, Bisexual or Transgender). The onus is on the refugee claimant, who often comes from a society that does not operate with this normative model, to prove to the Board Member that their documents, actions and statements, past and present, match this model. Furthermore, this socio-sexual identity must also be linked to a set of assumptions and beliefs attached the object identity of the 'authentic refugee'. Both of these 'impossible objects' are defined by past and present state legislation and policies, the past influenced by international legislation (such as the UNHCR Convention

Relating to the Status of Refugees) and the present influenced by current national and/or regional political regimes. While it may be theoretically plausible (if not imperative) to contend that 'sexual' and 'refugee' identities are malleable, diverse and subject to transformation due to multiple intersecting social, political and economic forces, it is not in the interest of the Canadian refugee determination system to define or think about them in this way (perhaps it is not even possible). Thus, implicit (in the case of sexual identities) and explicit (in the case of refugee identity) definitions and assumptions are developed and applied by the IRB, whose responsibility is determining the credibility and authenticity of the claims of the persons before them according to a model based on western jurisprudential paradigms of determining truth.

As Carole McGranahan notes, for refugee claimants, "the truths they tell in asylum court rest on an always contingent set of situated realities: on state structures of asylum, on social knowledge of the process, on cultural understandings of how to narrate one's life, and on political discourses of truth, rights and hope"[17]. In this paper I have focused on some of the ways in which sexual minority refugee claimants gain social knowledge of the process and strategic understandings of different cultural logics of how to define one's sexual identity and narrate one's life. I have also tried to demonstrate that in the face of daunting challenges in which they must attempt to figure out and navigate a foreign legal and bureaucratic system with its complex and foreign terminologies, moralities and meanings that are designed to exclude as much as they are to include, many refugee claimants devote a great deal of time and energy into learning these new words and worlds, as they recognize that they must learn to present themselves and tell their stories in a certain way, and 'materialize' into a particular formation of sexual identity and refugeeness that matches the adjudicator's formalistic and formulistic definitions and juridical common sense[18]. Attending presentations on how to prepare for hearing given by refugee lawyers, participating in a session on stigma and discrimination which explains the words contained in the sexual identities acronym, or chatting with past refugee claimants about what documents matter, and how to build a stronger file, are examples of the agency of refugee claimants and an awareness of the structures and hierarchies into which they have been placed and must navigate in order to obtain a positive outcome. While there are clearly differing levels of engagement and awareness amongst refugee claimants, most of those whom I interviewed and listened to were constantly learning and working hard to become as becoming as possible.

From the moment they submit their refugee claim to the moment of the decision at their hearing, refugees exist in a space/moment of "incommensurability"[19] a state of affective potential, in which the paradoxical yet unknown enters upon the world of norms, in this case the state's rules and regulations defining the 'proper' refugee, which now includes the sub-category of the 'proper' LGBT refugee. This space/moment of emergence or becoming is key to theorizing the pivot point between incommensurability and mandated commensuration. The emerging or becoming sexual minority refugee is akin to the introduction of an incommensurability into social life, the latter defined through the regulation and operation of intersecting sets of norms[20]. The LGBT refugee claimant quickly learns that they are an unknown quantity in the eyes of the Board Member, and that they will be judged according to a pre-existing set of criteria to determine whether or not they have the state's approval (and all the rights and privileges that go with it) to be identified as a 'convention refugee'. Massumi takes "emergence" as a bifurcation point in which multiple and normally mutually exclusive potentials coexist but from which only one can be chosen[21]. However, the emergence of a sexual minority refugee is marked by a constitutive overdetermination: despite the deeply diverse social, sexual and migration experiences of these individuals, an already existing set of socio-sexual-political classifications of the destination state forces closure of potential through its commensuration with existing norms.

The presentations and conversations focusing on PIFS, LGBTTIQQ2SAs, and other IRB hearing related topics amongst refugee claimants, lawyers and support workers illustrates how "the asylum process rests not only on law but also on the limits of humanity, of how humans treat each other, and on the very grey, often painful space between creativity and vulnerability"[22] Becoming a becoming sexual minority refugee is a process that involves creativity, intense learning, and rapid adaptation to a new set of terms, ideas and norms about the relationship of one's sexual practices and desires to the socio-political world in which they are rendered sensible. The creative and adaptive potential of the refugee claimant, along with the knowledge and skills of their lawyer and their support group facilitators, are crucial components of a successful refugee hearing. However, the stakes are high and stacked against them, as the nervous state continuously works to manage and control migration, and in particular the movement of refugees who are increasingly viewed as illegal interlopers until proven otherwise.[23]

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Notes

1. These are the sexual identity categories utilized by the group in its title. In this article I utilize sexual identity terminologies as they articulated by organizations, individuals and as they appear in texts. As they are articulated by this article and other research on sexual minority refugees demonstrates, all sexual identity terminologies are fraught with historical, political and cultural specificities, which are heightened and intensified when inserted into the bureaucratic and juridical machinery of the immigration and refugee determination system.
2. www.dictionary.com, accessed April 9, 2012.
3. Elizabeth Povinelli, "Radical Worlds: The Anthropology of Incommensurability and Inconceivability," *Annual Review of Anthropology* 30 (2001):319–34.
4. At the same time, these meetings and conversations are never just strategic planning sessions; they are also complex sites of trans-cultural learning about multiple aspects of living in Canada and about the differences and similarities between people from diverse backgrounds. They are also sites of socializing with other refugee claimants and members of the queer community in Toronto, where gossip, flirting, and commiseration over the daily challenges of adapting to life in a new place are exchanged.
5. Liisa Malkki "Refugees and Exile: From 'Refugee Studies' to the National Order of Things", *Annual Review of Anthropology* 24 (1995):495–523.
6. For example, see Laurie Berg and Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants," *Journal of Refugee Studies* 22 No. 2 (2009):195–223; Toni a.m. Johnson, "On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings," *Social and Legal Studies* 20 No.1 (2011):57–78; Sharalynn Jordan, "Un/Convention(al) Refugees: Contextualizing Accounts of Refugees Facing Homophobic or Transphobic Persecution," *Refuge* 26 No. 2 (2010):165–82; Rachel Lewis, "'The Cultural Politics of Lesbian Asylum" *International Feminist Journal of Politics* 12 No. 3–4 (2010):424–43; Edward Ou Jin Lee and Shari Brotman, "Identity, Refugeeness, Belonging: Experiences of Sexual Minority Refugees in Canada," Canadian Review of Sociology 48 No. 3 (2011):241–74.
7. Elizabeth Povinelli, *The Empire of Love*. (Durham: Duke University Press, 2006), 12–13.
8. For those who 'fail' their hearing, the fourth moment/space intensifies as the claimant seeks other legal/bureaucratic solutions to prevent deportation, all of which involve ongoing surveillance and evaluation by state authorities.

9. Elizabeth Povinelli, The Cunning of Recognition Indigenous Alterities and the Making of Australian Multiculturalism (Durham: Duke University Press, 2002).
10. Berg and Millbank, 196.
11. Ibid., 208.
12. Ibid., 207–15.
13. Roderick Ferguson, *Aberration in Black: Toward A Queer of Color Critique* (Minnesota. University of Minnesota Press, 2004); Patrick E. Johnson and Mae Henderson, eds, Black Queer Studies: A Critical Anthology, (Durham: Duke University Press, 2005); Martin F Manalansan IV, "Homophobia at New York's Gay Central" in Homophobias: Lust and Loathing Across Time and Space, ed. DAB Murray (Durham: Duke University Press, 2009); David A.B. Murray, *Opacity: Gender, Sexuality, Race and the 'Problem' of Identity in Martinique* (New York: Peter Lang Press, 2002); David A.B. Murray, ed. *Homophobias: Lust and Loathing Across Time and Space,* (Durham: Duke University Press, 2009).
14. T. Johnson, 62.
15. Names and identifying details of all research participants have been changed in order to ensure anonymity.
16. Povinelli (2002), 6–7.
17. Carole McGranahan, "Anthropology and the Truths of Political Asylum, Part II", Anthropology News 53 No.4 (2012):20–21.
18. Ou Jin Lee and Brotman, 249.
19. Povinelli, 2001.
20. Naisargi Dave, "Indian, Lesbian and What Came Next: Affect, Commensuration and Queer Emergences" *American Ethnologist* 38 No. 4 (2011):650–65.
21. Brian Massumi, *Parables for the Virtual: Movement, Affect, Sensation* (Durham: Duke University Press, 2002):32–33
22. McGranahan, 22.
23. Gregory Feldman, *The Migration Apparatus: Security, Labor, and Policymaking in the European Union* (Stanford: Stanford University Press. 2012).

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