



# The RESEARCHER

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## Welcome to the April 2012 issue of *The Researcher*.

I would like to take this opportunity to introduce myself as the new co-editor of *The Researcher*, which is now a bi-annual publication. The *Researcher* will continue to deliver informative and up-to-date articles on country of origin information, academic papers and legislation which impacts on refugee and protection status determination.

We publish the President's speech at the opening of the Irish Refugee Council's Independent Law Centre and launch of the European Database of Asylum Law.

Enda O'Neill BL writes on the situation of naturalised refugees wishing to apply for family reunification after becoming Irish citizens.

Following several months working at a Refugee Law Project in Uganda, Meg McMahon BL writes on access to justice for male victims of sexual violence.

Lise Penisson of the European Asylum Support Office, Malta provides insight into the development of the EU Common Country of Origin Information Portal.

David Goggins is back with an article on the phenomenon of child witches in Africa, while Kevin Clarke and Niccolo Denti of UNHCR Ireland provide us with an understanding of the impact of the 'Greek Transfer' cases.

As always we welcome contributions for future issues.

*Elisabeth Ahmed*

*Refugee Documentation Centre (Ireland)*

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### Disclaimer

*Articles and summaries contained in the Researcher do not necessarily reflect the views of the RDC or of the Irish Legal Aid Board. Some articles contain information relating to the human rights situation and the political, social, cultural and economic background of countries of origin. These are provided for information purposes only and do not purport to be RDC COI query responses.*

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## When is a Refugee not a Refugee?



by Enda O'Neill, BL.

### Introduction:

The question of when a person stops being a refugee is central to the practical dilemma that has faced many naturalised refugees in Ireland. There is a right to family reunification under the Refugee Act 1996 but there are many refugees in Ireland who have run into obstacles because they obtained citizenship prior to their application for family reunification. Thus we ask, does obtaining citizenship extinguish a refugee's status under the 1951 convention?

Refugee status is, at least in principle, temporary. In addition to the legal permission to remain in a new host country, the grant of refugee status brings with it an associated bundle of rights, one of which is the right to bring certain family members here to live with them who will in turn then be granted the same rights and permissions. Citizenship on the other hand is permanent and offers refugees the prospect of stability and the promise of a more meaningful membership in their new community. In addition, applications for citizenship can be made outside of the normal residency requirements in the case of refugees and thus many people pursue this avenue soon after being granted refugee status. Ironically this new status may have negative consequences for the applicant as some rights specifically associated with refugee status may no longer be available.

The official stance of INIS until recently was that once a refugee has become an Irish citizen their right to family reunification was lost. This stance would appear to have softened and anecdotally we know that applications are currently being accepted from naturalised refugees. Notwithstanding this, enquiries by advocacy groups and immigrant rights organisations suggest that something of a status quo currently exists in that seemingly conflicting advice was received by the Attorney General on this point. Although ORAC may be processing these applications at present, until many of them are ultimately determined we will not be able to say with any certainty that the State's interpretation of the law has indeed changed in favour of permitting such applications.

It is very possible that the recent UK Supreme Court decision of *ZN (Afghanistan) (FC) and Others v. Entry Clearance Officer (Karachi)*<sup>1</sup> played a central role in the State's reconsideration of this issue. However as that decision was primarily based upon an interpretation of the UK's Immigration Rules, in this article I will explore the wider legal arguments on both sides and whether a court considering this question in the context of Irish legislation, would be likely to come to the same conclusion.

### Historical background and the concept of refugee status

Article 1A(2) of the 1951 United Nations Convention on the Status of Refugees defines a refugee as a person who:

*"...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".*

The concept of "alienage", i.e. being outside the country of his nationality, is central to this definition of a refugee:

*"It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country."*<sup>2</sup>

<sup>1</sup> *ZN (Afghanistan) (FC) and Others (Appellants) v. Entry Clearance Officer (Karachi) (Respondent) and one other action*, [2010] UKSC 21, United Kingdom: Supreme Court, 12 May 2010, available at:

<http://www.unhcr.org/refworld/docid/4bf16d452.html> [accessed 3 April 2012]

<sup>2</sup> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, p. 21 (1979)

It is worth pausing at this point to reflect on the historical context in which the 1951 Convention was drafted and the reasons for this requirement. James Hathaway considers the rationale behind this requirement to be threefold:

*“First, the Convention was drafted with a specific purpose in the context of limited international resources. ... Its goal was to assist a subset of involuntary migrants composed of persons who were ‘outside their own countries [and] who lacked the protection of a government’, and who consequently required short-term surrogate international rights until they acquired new or renewed national protection...”*

*Second, there was a very practical concern that the inclusion of internal refugees in the international protection regime might prompt states to attempt to shift responsibility for the well-being of large parts of their own population to the world community...*

*Third and most fundamental, there was anxiety that any attempt to respond to the needs of internal refugees would constitute an infringement of the national sovereignty of the state within which the refugee resided. Refugee law, as a part of international human rights law, constitutes a recent and carefully constrained exception to the long-standing rule of exclusive jurisdiction of states over their inhabitants...*

*None of the three factors which dictated the exclusion of internal refugees - limited resources, concern about state participation, or respect for sovereignty - was so much a matter of conceptual principle, as it was a reflection of the limited reach of international law.”<sup>3</sup>*

These underlying motivations for the concept of *alienage* are borne out in how refugee applicants with dual or multiple nationalities are treated. Article 1A(2) of the 1951 Convention excludes from refugee status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals.

In the light of these considerations, it is not difficult to see why some argue that once a refugee becomes a citizen of a new host state, he no longer requires protection and that by implication his status as a refugee ceases to apply. I shall consider this position in the light of the specific terms of the Convention below and then in the context of Irish legislation, however, if we firstly consider this as a matter of principle I

believe that this position is not necessitated by the principles of refugee status.

The definition of a refugee in this context relates only to the initial need for protection; it is a practical limitation on the scope of international law’s interference with the sovereignty of states where the possibility of protection under national law exists. As the original convention never specifically included provisions on family reunification it cannot be said to have envisioned a situation where refugees would be prejudiced by the practical effects of the grant of citizenship outside of the context of seeking to ensure protection.

I believe the intentions of the drafters of the Convention on this point cannot be ascertained as the treaty, when understood in its historical context, is actually silent on this issue. Although the concept of *alienage* is central to the original grant of refugee status I don’t believe it should be interpreted as prejudicing the rights of refugees once they are granted citizenship in the State that offered them protection in the first instance.

#### ***Revocation of Refugee Status:***

The concept of refugee status defined in the 1951 Convention is potentially a temporary one. “Cessation clauses” are found at Article 1 C (1) to (6) and determine under which conditions refugee status may be revoked:

*“This Convention shall cease to apply to any person falling under the terms of Section A if:*

*(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or*

*(2) Having lost his nationality, he has voluntarily re-acquired it; or*

*(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or*

*(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or*

*(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;*

*Provided that this paragraph shall not apply to a refugee failing under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;*

<sup>3</sup> James Hathaway – The Law of Refugee Status (1991) at p.30

*(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;*

*Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.”* (emphasis mine)

A cursory glance at this provision would also indicate that subsection (3) would appear to apply to naturalised citizens and thus one would imagine the benefits of the convention cease to apply once the refugee acquires new citizenship.

The UNHCR Handbook states with regard to Article 1C(3):

*“129. As in the case of the re-acquisition of nationality, this third cessation clause derives from the principle that a person who enjoys national protection is not in need of international protection.*

*130. The nationality that the refugee acquires is usually that of the country of his residence. A refugee living in one country may, however, in certain cases, acquire the nationality of another country. If he does so, his refugee status will also cease, provided that the new nationality also carries the protection of the country of his new nationality.”*

James Hathaway in his book, *The Rights of Refugees under International Law*<sup>4</sup>, states similarly:

*“If a refugee opts to accept an offer of citizenship there, with entitlement fully to participate in all aspects of that state's public life, his or her need for the surrogate protection of refugee law comes to an end. There is no need for surrogate protection in such a case, as the refugee is able and entitled to benefit from the protection of his or her new country of nationality.”*

Again here I would make the point that these provisions and their interpretation are in the context of the basic need for protection and not necessarily rights ancillary to the grant of refugee status.

### ***The Principle of Family Unity***

The principle of family unity is not contained in the 1951 Convention although most international instruments dealing with human rights consider the family to be one of society's most fundamental units which requires protection. The Final Act of the Conference that adopted the 1951 Convention<sup>5</sup> 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 minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.”*

This recommendation is in practice generally observed by the majority of States, whether or not they are parties to the 1951 Convention or to the 1967 Protocol. The UNHCR Handbook describes the operation of this principle as follows:

*“185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them.*

*186. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.*

<sup>4</sup> James Hathaway - *The Rights of Refugees under International Law* (Cambridge University Press, 2005) at p.916

<sup>5</sup> The Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons

187. *Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees.*

188. *If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him."*

Article 34 of the Refugee Convention provides:

*"The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."*

I would argue that it is in this context that the need for family unity should be considered. It is not strictly required by an explicit provision within the convention but rather is an extension of the general mandate to facilitate the assimilation of refugees and their enjoyment of the right to family life recognised in so many international instruments. This mandate can be said to apply irrespective of whether the family member concerned is a refugee simpliciter or a naturalised refugee.

#### **Right to Family Reunification under European Law:**

Article 11(1) of the Qualification Directive<sup>6</sup> closely reflects Article 1C of the 1951 Refugee Convention; in particular Article 11(1)(c) contemplates that a person shall cease to be a refugee if he has acquired a new nationality and enjoys the protection of the country of his new nationality. Article 38(1) of the Procedures Directive<sup>7</sup> requires that Member States ensure written notice is given when "the competent authority is considering withdrawing the refugee status of a third country national". However Article 38(4) allows for derogation where refugee status lapses by law in the case of cessation in accordance with Article 11(1)(a) – (d) of the Qualification Directive.

In Ireland these requirements are reflected in the terms of the Refugee Act 1996. Ireland has not opted into Council Directive 2003/86/EC on family reunification.

#### **Case law in the United Kingdom**

Case law on this issue in Ireland would appear to be sparse in the extreme. Although informal reports suggest it may have previously been the subject of leave applications it is somewhat surprising that this issue has not been litigated given the number of people likely to be affected and the trenchant stance formerly taken by the INIS.

The UK Supreme Court decision of *ZN (Afghanistan) (FC) and Others* addresses these questions in the context of UK law. However its application here is somewhat limited in that the ratio was based primarily on the interpretation of the UK's immigration rules rather than a wider analysis of the issues discussed above. These rules are something akin to a formal policy document and their application was described in *Ahmed Mahad v. Entry Clearance Officer*<sup>8</sup> in the following terms:

*"The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. ... the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended."*

In the course of the Court's decisions in *ZN* several terms and paragraphs from these rules are parsed and analysed; the judgment is more useful for our purposes however in relation to its comments more generally:

*"It can be said with force that all applications by a spouse or child to join or remain with a British citizen should be subject to the same rules. On the other hand there are coherent policy reasons for applying the same principles to applications to join or remain with a spouse or parent who has been granted asylum both before and after such a sponsor has become a British citizen. An important factor in this regard is that ... one of the purposes of the Refugee Convention is to protect and preserve the family unit of a refugee. The need for protection for a member of such a family unit is likely to be the same whether the sponsor obtains British citizenship or not. Moreover, the risk of persecution may be such that the need for protection for family members is particularly stark."*

<sup>6</sup> 2004/83/EC

<sup>7</sup> 2005/85/EC

<sup>8</sup> *Ahmed Mahad v. Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 48

The court went on to conclude on the basis of the language used in the rules that there wasn't an additional requirement in the absence of express language to that effect, namely that the 'person granted asylum' or the 'person who has been granted asylum' must not have become a British citizen before the application for entry clearance is made:

*"The fact that British citizenship has been granted to the spouse or parent does not change the fact that the spouse or parent is a person granted asylum or a person who has been granted asylum."*

### **The 1951 Convention and Family Reunification under Irish Law**

The Refugee Act 1996 states that it is "an act to give effect to the convention relating to the status of refugees"<sup>9</sup>. It does not directly incorporate the convention but instead seeks to give effect to it by its provisions. The Convention itself is however set out "for convenience of reference" in the Third Schedule of the Act. Thus given the dualist nature of international law here, whilst the Convention may have a bearing in relation to how the Act is interpreted, it is to the terms of the primary domestic legislation we must look when seeking to elucidate the matter further.

Accordingly, as a statutory right deriving from S.18 of the Refugee Act, the right to family reunification for refugees in Irish law should be understood, in the absence of ambiguity, by reference to the ordinary and natural meaning of the words used in that section. In *ZN (Afghanistan) (FC) and Others* the Court of Appeal had previously found against the applicants however its comments with regard to cessation are interesting on this point:

*"There remains the question whether the cessation of refugee status is automatic, or effective only by force of a procedure such as the giving of notice contemplated in the Directives. I accept that it is open to the States Parties to prescribe the procedures under which cessation pursuant to Article 1C(3) will have effect within their individual jurisdictions. Paragraph 189 of the UNHCR Handbook states:*

*'... the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.'*

*If however a State Party has not established any such procedures, cessation of refugee status*

*pursuant to Article 1C(3) will in my judgment take place automatically. If it were otherwise the absence of a domestic procedure would frustrate the operation of the Article."*<sup>10</sup>

This statement should however be read in the context of S.2 of their Asylum and Immigration Appeals Act 1993 which asserts the "primacy of the convention" and states that nothing in the immigration rules "shall lay down any practice which would be contrary to the Convention." Nonetheless, in Ireland, by analogy, where the procedure for revocation of refugee status has been set down in statute, it is to that legislation we must look in seeking to interpret its application

### **Right to Family Reunification under Irish Law:**

The right to family reunification under Irish law is contained in Section 18 of the Refugee Act 1996 (as amended) which states:

*"18.—(1) Subject to section 17(2), a refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner."* (emphasis mine)

The declaration here referred to is defined in accordance with Section 17 whereby the Minister declares the applicant a refugee:

The Act does address revocation in Section 21 in terms very similar to the 1951 Convention:

*"21.—(1) Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—*

...

*(c) has acquired a new nationality (other than the nationality of the State) and enjoys the protection of the country of his or her new nationality,*

...

*the Minister may, if he or she considers it appropriate to do so, revoke the declaration.*

<sup>10</sup> *DL (DRC) & the Entry Clearance Officer, Pretoria v The Entry Clearance Officer, Karachi* [2008] EWCA Civ 1420, para 32.

<sup>9</sup> Headnote, Refugee Act 1996: No. 17 of 1996

(3)(a) *Where the Minister proposes to revoke a declaration under subsection (1), he or she shall send a notice in writing to the person concerned of his or her proposal and of the reasons for it and shall at the same time send a copy thereof to the person's solicitor (if known) and to the High Commissioner.*” (emphasis mine)

When refugees are granted citizenship they are not issued with a notice in writing informing them that the Minister proposes to revoke a declaration. In any case S.18 does not apply to the case of naturalised refugees as (c) refers specifically to a new nationality *other than the nationality of the State*. The combination of these provisions would appear to suggest that such naturalised refugees remain “a refugee in relation to whom a declaration is in force” and so the benefits of S.18 should still apply.

### Conclusion

The addition of the phrase “other than the nationality of the State” into the Irish provisions on family unity, (S.21 (c)), is a curious addition over and above the requirement of the original wording of the Convention and one which is not explained or elaborated further elsewhere. In considering this fact however one should keep in mind that there is nothing to prevent the Irish State from legislating in a manner over and above the minimum requirements of the 1951 Convention or the European directives. Also, when we consider these provisions in the context of the Irish Nationality and Citizenship Act 1956 (as amended) the intention of the legislature would appear to be to ease the process for refugees in applying for citizenship. No intention to alienate them from the bundle of rights normally accompanying that status is apparent.

Given the fact that the principle of family unity is not itself specifically legislated for in the 1951 Convention, S.18 should be construed in accordance with its plain and ordinary meaning as a piece of domestic legislation first and foremost. As we saw in the UK, such a position is not incompatible with our obligations under International Law, specifically the 1951 Convention, and since the words of the statute do seem to state clearly that the grant of citizenship of this country would not be grounds for revocation, such an interpretation would be likely to be upheld by the Superior Courts in Ireland.



## Access to Justice for Male Victims of Sexual Violence; Focus on Refugees in Uganda



by Meg McMahon, BL

### Introduction

All acts of sexual violence violate basic human rights irrespective of who they are committed against or under what circumstances they are committed.<sup>11</sup> Sexual violence against women has been widely researched and documented. Sexual violence against men has garnered increasing publicity in recent years<sup>12</sup> but still remains extremely under-researched and under-reported. This paper will examine the challenges facing male victims of sexual violence. The paper will look at the broad international framework, including definitions of sexual violence and international jurisprudence in the area as well as generally looking at how the term sexual or gender based violence has come to be associated with violence against women.

As a case study the paper will focus on male forced migrants in Uganda who have been victims of sexual violence. The author believes male refugee victims provide an instructive study group. Gender roles are frequently changing in situations of forced migration with men becoming extremely disempowered in the face of violence and lawlessness. Sexual violence is not caused by forced migration but can strike with greater frequency due to broken down systems of protection where services such as medical and legal assistance are not always available. Reporting mechanisms are generally not ideal and therefore the figures of male on male sexual violence are often drastically underestimated. Men may feel emasculated as their traditional role of provider has been diminished in situations where aid agencies are providing the necessities of life. When a man in this situation experiences sexual violence it may be particularly hard for him to admit further weakness. The primary data used in this paper derives from testimonies of forced migrants who presented at Refugee Law Project, Faculty of Law, Makerere University, Kampala.

<sup>11</sup> In this paper the term *sexual violence* will be used synonymously with the acronym *SGBV/P* (sexual and gender based violence and/or persecution). *SGBV/P* incorporates sexual and gender based *persecution* as opposed to *SGBV*, which focuses on sexual and gender based *violence* only

<sup>12</sup> Examples of recent articles on male sexual violence; <http://www.guardian.co.uk/society/2011/jul/17/the-rape-of-men>, <http://www.nytimes.com/2009/08/05/world/africa/05congo.html>

Under-reporting and the low number of studies conducted on male sexual violence means the issue is not recognised as requiring urgent attention. Uganda has been chosen as an example of a society in which homosexuality remains illegal. A legal framework that outlaws homosexuality is often representative of very conservative cultural and societal values where strong stigmas and taboos connected to these issues often mean that it is extremely difficult for male victims to speak out. The perceived link between male on male sexual violence and homosexuality can often prevent male victims reporting their experiences. This barrier to reporting would obviously be compounded in a society, like Uganda where legislators have drafted a bill that proposes the death penalty as a punishment for homosexuality. When men are raped, they may face tremendous personal and social insecurity and fear being judged as homosexual. In these cases, many opt to remain silent in order to avoid being labelled as homosexual.

UNHCR figures for Uganda in 2011 show 135,801 refugees, 20,804 asylum seekers and 125,598 IDPS.<sup>13</sup> There are few statistics available relating to how many forced migrants in Uganda have experienced sexual violence. In a report on the issue from Makerere University, Kampala, it was stated that 39 percent of women and 11 percent of men between the ages of 15 and 49 experienced sexual violence<sup>14</sup>.

We must place these figures alongside those (equally sparse and varying) statistics, which govern male on male sexual violence in surrounding African countries (refugee generating countries for the purpose of this paper). Reports from the Democratic Republic of the Congo suggest that men and boys comprise some 4%–10% of the total number of victims of sexual violence who seek medical treatment.<sup>15</sup> Another statistic suggests that one in four men is sexually violated in the Democratic Republic of Congo (DRC).<sup>16</sup>

Figures estimating statistics of male on male sexual violence should be approached cautiously as methodologies may vary and the figures may still not reflect the actual occurrence of sexual violence due to the reluctance on the part of victims to come forward. The testimonies that will be used in this paper show a deep reluctance on the part of male refugee victims to speak about their experiences.

Although this paper focuses on male forced migrant victims of sexual violence in Uganda, the broader

arguments that the paper makes, namely the fact that international discourse in the area and legal frameworks governing sexual violence need to be broadened in order to fully protect male victims (not just forced migrants or victims in Uganda) should apply universally.

### Discourse Surrounding Sexual Violence

In answering the question “What is SGBV/P?” a group of Kiswahili speaking refugees noted that it is a “bad, shocking and harming act of prostitution which aims at men, women and girls to prove power”<sup>17</sup>.

A 1998 United Nations (UN) report defines sexual violence as “any violence whether physical and/or mental, carried out through sexual means or by targeting sexuality”<sup>18</sup> Gender-based violence has been defined by the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) as violence that is directed at a person on the basis of gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threat of such acts, coercion and other deprivations of liberty. The Committee states that while women, men, boys and girls can be victims of gender-based violence, women and girls are the main victims.<sup>19</sup> There is no specific definition of sexual or gender based persecution. The Office of the United Nations High Commissioner for Refugees (UNHCR), in its Handbook on Procedures and Criteria for Determining Refugee Status, infers from Article 33 of the 1951 Convention that persecution is “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group.”<sup>20</sup>

<sup>17</sup> Focus group with Kiswahili male refugee victims of sexual violence at Refugee Law Project

<sup>18</sup> U.N Commission on Human Rights, Sub-Committee on Prevention of Discrimination & Protection of Minorities ‘Contemporary forms of Slavery: Systematic Rape, Sexual Slavery and Slavery like practices during armed conflict’ Final Report submitted by Gay J. McDougall, Special Rapporteur 21 U.N doc E/CN.4/Sub.2/1998/13 (June 22, 1998)

<sup>19</sup> Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Expanded Definition of Sexual and Gender-Based Violence used by UNHCR and Implementing Partners (based on Articles 1 and 2 of the UN General Assembly Declaration on the Elimination of Violence against Women(1993) and Recommendation 19, para 6 of the 11<sup>th</sup> Session of the CEDAW Committee)

<sup>20</sup> Office of the United Nations High Commissioner for Refugees ‘Handbook on Procedures and Criteria for Determining Refugee Status’ (1979) 59

<sup>13</sup> <http://www.unhcr.org/pages/49e483c06.html>

<sup>14</sup> J Nayiga ‘Prevalence and Determinants of Sexual Violence in Uganda’ (2006) Makerere University Population Secretariat

<sup>15</sup> C McGreal ‘Hundreds of thousands of women raped for being on the wrong side’

<sup>16</sup> L Melhado “Rates of sexual violence are high in Democratic Republic of the Congo. International Perspectives on Sexual and Reproductive Health” 36 (4) (2010) 210-210



Most international instruments dealing with sexual violence either explicitly refer to women as victims or have come to inextricably associate sexual violence with violence against women.

It is necessary to look at the prohibition against and the definitions of various forms of sexual violence referred to in international and regional instruments and international jurisprudence in order to determine the manner in which such instruments are not framed in wide enough terms to offer protection to male victims of sexual violence, or even where they are so framed have come to be inextricably associated with female victims.

Broadly speaking, international instruments and international law have developed in ways that often exclude, whether explicitly or implicitly, men as a class of victims of sexual violence. In fact, there is no international legal instrument that is directed principally at outlawing sexual violence against men. This exemplifies the prevailing belief that it is only women who can be victims of sexual violence. It is imperative that all international instruments, in their definitions of all forms of sexual violence, are inclusive enough to protect male victims as well as female victims. UN Security Council Resolution 1820<sup>21</sup>, for example, demands the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians. It calls for an end to sexual violence in general terms but in the main body of the resolution it exhorts an end to all forms of sexual violence against women and girls in particular.

### **The Prohibition of Rape and Related Offences Under International Law**

The prohibition of rape and other forms of sexual violence has developed with the evolution of International Humanitarian Law, in particular through the additional protocols to the 1949 Geneva Convention. Article 75 of Additional Protocol I prohibits ‘humiliating and degrading treatment, enforced prostitution and any form of indecent assault’<sup>22</sup>. Article 4 of Additional Protocol II specifically adds rape to this list<sup>23</sup>.

There is no overarching definition of rape within International Humanitarian or Human Rights Law. However, the scope of the definition of rape and sexual violence at the *ad hoc* International Criminal Tribunals

for Rwanda (ICTR) and former Yugoslavia (ICTY) has evolved over the last number of years. The emergence of a broad definition of rape, which can better protect male victims of sexual violence, is welcomed. The ICTY propounds a broad definition of sexual violence, which can potentially accommodate male victims;

‘Sexual penetration includes penetration, however slight, of the vagina, anus or oral cavity, by the penis. Sexual penetration of the vulva or anus is not limited to the penis.’<sup>24</sup>

The ICTR (International Criminal Tribunal for Rwanda) in the *Akayesu* case held that rape is ‘a form of aggression’ and that ‘the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts’. It defined rape as a ‘physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’<sup>25</sup>

There are, however, cases where incidents of sexual violence are prosecuted at certain international Tribunals but not prosecuted *as* sexual violence. For example, in the *Blagoje Simic* case, an ICTY trial chamber noted that several prosecution witnesses gave evidence that detainees were subjected to sexual assaults. One incident involved ramming a police truncheon in the anus of a detainee.<sup>26</sup> Yet the finding appeared in a section entitled “Evidence relevant to other acts” and although described by the Trial Chamber as sexual assaults, it was characterised in its findings as torture and no more.

International Human Rights law does not provide adequate protection for male victims of sexual violence. Sexual violence is prohibited under International Human Rights Law through a myriad of international instruments, but as will be shown, crimes of sexual violence have come to be incorporated into very broadly defined rights, which in turn have come to be associated with female victims of sexual violence. Sexual violence is prohibited under International Human Rights Law primarily under the 1984 United Nations Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment. Both the European Court of Human Rights and the Inter-American Commission on Human Rights have, in their jurisprudence, found instances of rape of detainees to amount to torture.<sup>27</sup>

<sup>24</sup> Case No. IT-96-23-I, 26 June 1996, International Criminal Tribunal for the former Yugoslavia, Judge Lal C. Vohrah.

<sup>25</sup> *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <http://www.unhcr.org/refworld/docid/40278fbb4.htm>

<sup>26</sup> Case number IT-95-9-T, 27<sup>th</sup> October, 2003, International Criminal Tribunal for the Former Yugoslavia, para. 728

<sup>27</sup> *Suheyla Aydin v. Turkey*, Case 25660/94, Council of Europe: European Court of Human Rights, 24 May 2005 and

<sup>21</sup> S/RES/1820 (2008)

<sup>22</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

<sup>23</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

CEDAW stated in a General Recommendation that discrimination includes gender-based violence.<sup>28</sup>

The fact that general prohibitions, against conduct such as torture, have been understood to include sexual violence is welcomed. The problem however remains that, under International Human Rights Law there is no specific definition of rape or sexual violence and as a result the discourse in this area has been dominated by women's groups and is understood to refer exclusively to women.

All references to rape and sexual violence must include reference to both male and female victims of sexual violence. This must be consistently applied at all levels of debate. In 2006, at the International Conference on the Great Lakes Region, the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children was promulgated. In this document sexual violence was defined as any act, which violates the sexual autonomy and bodily integrity of women and children under International Criminal Law.<sup>29</sup> This is an instructive example of how increasingly intractable the association has become between SGBV/P and violence against women. All treaties, protocols, debates and discourse on the issue of sexual violence must refer inclusively to male victims as well as women and children.

It is beyond dispute that unprecedented gains have been made internationally by women's groups over the past number of years. Without compromising such gains we must ask whether it is time for men to enter into the equation and for there to be less reliance on gender distinction as regards SGBV/P victims. It is time for international discourse to focus on sexual and gender based violence and persecution regardless of the gender, sex or sexuality of the victim. The conceptualisation and debate of SGBV/P at the international, regional and domestic levels needs to be broadened to refer explicitly to men as well as women. The day has come to open up channels of dialogue globally, nationally and locally so that it becomes acknowledged that men and boys can be victims of sexual violence too.

Article 2 of the African Charter on Human and Peoples' Rights (ACHPR) provides for non-discrimination on the basis of sex. This falls short of an outright prohibition on sexual violence (against men or women). To redress the lack of such a prohibition the African Union (AU) adopted the Protocol on the

*Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-American Commission on Human Rights (IACHR), 1 March 1996

<sup>28</sup> United Nations Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation 19 (Violence against Women)

<sup>29</sup> International Conference on the Great Lakes Region, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, 30 November 2006

Rights of Women in Africa<sup>30</sup>, a supplementary protocol to the ACHPR. It calls for an end to all forms of violence against women including sexual violence and contains a recognition that protection from sexual violence is inherent to the right to dignity. There is no corresponding prohibition on sexual violence against men.

Although there is increasing recognition that men too can be victims of sexual violence, there is still a disparity in terms of the classification of and reference to male victims in international instruments and in jurisprudence dealing with the issue. A 2005 report of the World Bank on 'Gender, Conflict, and Development' observed that 'while it is increasingly recognized that men are also GBV (gender-based violence) survivors in conflict-affected areas, this acknowledgement has not been translated into policies to address male victims.'<sup>31</sup>

### ***Experiences of Reporting and Response Mechanisms***

Male refugee victims of SGBV/P who were seen at Refugee Law Project in general expressed an initial reluctance to report their experiences. Where the victims did speak out, the responses they encountered often justified their reluctance. One young Congolese refugee was kidnapped and raped in Kampala but did not report this to the police until two years later. When asked to explain the delay in reporting the incident he explained that he was afraid he would have to pay money, he did not think the police would do anything and he doubted that he would be offered the service he most needed, namely counselling.<sup>32</sup>

Another Congolese refugee in Uganda stated that; "When you explain this problem no one listens". He also stated that being interviewed by a female police officer heightened the trauma. He was greeted with responses such as "You are a man, you cannot be raped".<sup>33</sup>

In a video advocacy project entitled *Gender Against Men*, conducted by Refugee Law Project, a Congolese refugee victim of SGBV/P in Uganda is recorded as stating that 'It was a way of attacking our identity so that they could diminish us in society. They wanted to show us that they were superior to us, they said that they were showing us that we were women.'<sup>34</sup>

<sup>30</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003

<sup>31</sup> T Bouta, G Frerks and I Bannon 'Gender, Conflict, and Development' (2005) World Bank, Washington DC p. 47

<sup>32</sup> Statement made by a male refugee victim of sexual violence while giving his testimony, April, 2011

<sup>33</sup> Gender Against Men (documentary produced by Refugee Law Project) <http://www.forcedmigration.org/video/gender-against-men/media/>

<sup>34</sup> Gender Against Men (n 33 above)

The following quotation from a Congolese refugee provides an interesting insight into ascribed gender identity and the effect of SGBV/P:

There were things one could never imagine happening. One does not really know how to live as one did before. In society they say that men dominate and women are inferior.<sup>35</sup>

Another significant facet of this man's experience was that he said that when he reported the incident to UNHCR they wanted to build his case around the rape of his daughter rather than his own experience of SGBV/P. He spoke of other men who had experienced sexual violence but who did not want to talk about it and 'break the silence' as 'they did not understand it themselves'. Another Congolese refugee, during interview stated that:

As an African I know my people and culture. A man with a man is a big taboo. God created a man and a woman. If I told the police, I knew it could bring problems according to what I knew through my culture.<sup>36</sup>

### ***Criminalisation of Homosexuality***

The perceived lack of redress and access to justice as experienced by male victims of sexual violence is compounded manifold in a country such as Uganda where homosexuality is outlawed. In his article, Sandesh Sivakumaran identifies this initial hurdle, which is encountered by male SGBV/P victims in a country where homosexuality is illegal:

If male survivors wished to report the abuse and were able to find the words with which to do so, they face the danger of consent being assumed if they were unable to prove the rape. This may lead to a finding of the victim engaging in consensual homosexual activity, which may in turn be a criminal offence under the law of the relevant state.<sup>37</sup>

Homosexuality in Uganda is illegal as explicitly stated in its archaic laws, which have deep-seated links to cultural and societal attitudes regarding the issue of same-sex relations and sexual violence against men. The fact that homosexuality is illegal in Uganda creates an initial obstacle to the reporting of SGBV/P by male victims. If a man wants to report SGBV/P he runs the risk of being prosecuted. According to the Refugee Law Project, there are cases where police, rather than going after the perpetrators, have accused male survivors of rape of engaging in homosexual acts.<sup>38</sup> This clearly hinders the reporting of sexual violence suffered by men and boys. There is no

distinction between consensual and non-consensual "carnal knowledge" under Ugandan law. Reference to consent is simply omitted thereby making it irrelevant in the eyes of the law. This is a determinative factor in hindering victims of SGBV/P perpetrated by someone of the same sex from reporting it.

Section 145 of the Penal Code of Uganda states that:

Any person who has carnal knowledge of any person against the order of nature; has carnal knowledge of an animal; or permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life<sup>39</sup>

Aside from homosexuality being illegal, the definition of rape in Uganda excludes men as a class of victim so legally a man cannot be the victim of rape. The definition of rape in Section 123 of the Penal Code of Uganda refers to 'unlawful carnal knowledge of a girl or woman without her consent'.<sup>40</sup> First and foremost this must be changed or at least needs to be augmented by a parallel charge for male victims of rape or a broader offence of sexual violence couched in gender-neutral terms. At present male victims of SGBV/P in Uganda are absolutely unprotected.

The only provision of the Penal Code Act that does not specifically refer to the female being assumed to be the victim is the offence of indecent practices; which refers to 'Any person who, whether in public or in private, commits any act of gross indecency with another person'.<sup>41</sup>

The maximum sentence for this offence is seven years, which is much less than the death penalty, which is the maximum punishment for anybody convicted of rape. This seems to be the only charge that could be brought by an adult male victim of a sexual assault but again the subjective nature of the term 'gross indecency' could leave male victims out in the cold at the whim of a prosecutor or a member of the judiciary.

In 2007, the Penal Code Amendment Act abolished the distinction between genders with regard to offences committed against children. This is a step in the right the direction but a similar amendment is required for sexual offences against adults. Specifically, a broader definition of rape and/or all other sexual offences must be promulgated. In 2006, the DRC passed a law that provides a formal definition of rape that includes both sexes and all forms of penetration. Uganda must follow this lead. In her article on sexual violence in Eastern DRC, Jessica Keralis notes that while such a change in legislation is of course necessary, many other additional changes are also necessary to protect male

<sup>35</sup> Gender Against Men (n 33 above)

<sup>36</sup> Interview with Congolese refugee, April, 2011

<sup>37</sup> S Sivakumaran 'Sexual Violence Against Men in Armed Conflict' (2007) 18 EUR J. INT'L L. 253

<sup>38</sup> Gender Against Men (n 23 above)

<sup>39</sup> The Uganda Penal Code Act (Cap. 120)

<sup>40</sup> The Uganda Penal Code Act (Cap.123)

<sup>41</sup> The Uganda Penal Code Act (Cap 148)

victims of SGBV/P<sup>42</sup>. She advocates for the enforcing of existing laws and the ending of impunity, the integration of education on civilian protection and sexual violence into military training. Finally she recommends a change in the cultural awareness and re-education which, she submits, is crucial in encouraging victims to come forward and helping them to heal.

Aside from extant Ugandan Law, there are a number of Bills before Parliament, which demonstrate the discriminatory attitude of policy makers in Uganda on the issue of SGBV/P.

The Sexual Offences Bill 2011(Section 19) states that:

Any person who performs a sexual act with another person against the order of nature with the consent of the other person commits an offence, and is liable, on conviction to imprisonment for life.

This provision denotes again an archaic perception of SGBV/P as a question of morality rather than a violent act or an act of persecution committed against an innocent person on the basis of their gender, sex or sexuality.

The Anti-Homosexuality Bill, 2009 is a deeply conservative attack on fundamental freedoms and human rights. Paragraph 3 of the draft bill sets out provisions on what it names as ‘aggravated homosexuality’, which will incur the death penalty as a maximum punishment. Referring to the Homosexuality Bill, Amnesty International notes that in Uganda:

Both the current law (Penal Code Act) and the proposed new law (Homosexuality Bill) violate a number of human rights including the rights to equality and non-discrimination, privacy, liberty and security of the person, freedom of expression, and freedom of thought, conscience and religion.<sup>43</sup>

A Human Rights Watch Report states that:

Under Uganda's existing laws, the police arbitrarily arrest and detain men and women accused of engaging in consensual sex with someone of the same sex. Human rights organisations have documented cases of torture or other ill-treatment against lesbians and gay men in detention because of their sexual orientation.<sup>44</sup>

### **Conclusions and Recommendations**

Sexual violence, whether it is perpetrated against a male or female victim is one of the most fundamental invasions of a person's privacy and well-being, and the

<sup>42</sup> Jessica Keralis, *Beyond the Silence: Sexual Violence in Eastern DRC*, 36 Forced Migration Review (2010) 13-14

<sup>43</sup> “I can't afford Justice: Violence against Women in Uganda continues unpunished and unchecked” (2010) Amnesty International Publications

<sup>44</sup> <http://www.hrw.org/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders>

consequences remain with the victim for life, long after the physical scars have healed. A holistic reappraisal of the whole issue of SGBV/P is required in order to address the vulnerability of male victims. The time has come for the division between male and female victims of sexual violence to be bridged. All definitions of acts of sexual violence, at the national, international level and regional level must explicitly refer to male and female victims. Ingrained stereotypes of sexuality, gender and power relations must be dispelled and we must begin to appreciate that men are also vulnerable and in need of protection.

International instruments, although they purport to address sexual violence in general terms, often focus, in their essence, on sexual violence against women and children. It is imperative that any residual legal, cultural or psychological doubts as to whether men can be victims of sexual violence disappears. All discourse surrounding sexual violence must refer to both male and female victims.

Adequate mechanisms need to be put in place to encourage reporting among male victims. An example of this is men only groups or workshops in which male victims of sexual violence discuss their experiences. This mechanism was used by the SGBV team at Refugee Law Project and was found to facilitate male victims opening up and discussing their experiences. Systematic collection of data is also vital. Local governments, national agencies, and NGOs should coordinate efforts to educate all community members about the definition and consequences of all forms of sexual and gender based violence and persecution. While cultural beliefs about the roles of men and women are not easily changed, national governments must adopt long- range plans to stop the cycle of sexual and gender-based violence and persecution.

Strategies for providing assistance to men and boys on such a very sensitive issue must be put in place. The longer these crimes remain hidden, the more serious the physical, emotional and psychological damage is. As one Congolese refugee stated “The more I am hiding the more I am suffering”<sup>45</sup>.

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## Remarks by President Michael D. Higgins at the Opening of the Irish Refugee Council's Independent Law Centre and Launch of the European Database of Asylum Law, Friday, 17th February, 2012



A dhaoine uaisle, Dia dhaoibh go léir ar maidin. Tá an-áthas orm bheith anseo inniu.

I am delighted to be here today to formally open the Irish Refugee Council's independent law centre and to launch the European Database of Asylum Law. I would like to thank Mrs. Justice Catherine McGuinness, patron of the Irish Refugee Council and Ms. Sue Conlan, Chief Executive, for inviting me here today. As I am familiar with the role and objectives of the Irish Refugee Council and the important advocacy work they do for asylum seekers and refugees, I am especially pleased to be in your company today.

On the occasion of World Refugee Day 2011, the Secretary General of the United Nations, Ban Ki-Moon, said "I ask people everywhere to spare a thought for the millions of children, women and men who have been forced from their homes, who are at risk of their lives, and who, in most cases, want nothing more than to return home or to start afresh. Let us never lose sight of our shared humanity."

Those words of the Secretary General resonate strongly with me. Throughout my public life, in my speeches I have sought to place great value on our shared humanity and the need to champion the protection and promotion of the human rights of those marginalised and voiceless in our society. And what group of people could be more disenfranchised than those fleeing persecution and human rights abuses in their own countries and seeking hope and refuge in a foreign land where the language, culture and social practices may be very alien to an arriving refugee. There is in addition to the social and psychological challenges, the need to read the forms of a local bureaucracy. The situation of asylum seekers and refugees wherever they may find themselves continues to be an issue of significant interest to me as President of Ireland.

The Irish Refugee Council will celebrate its 20th birthday this year. Since its establishment in 1992, it has been working to support and improve the way in which asylum seekers and refugees are dealt with in Ireland, whether in terms of contributing to national policy debate on the matter, or by providing advice, support and advocacy on behalf of individual asylum seekers as the need arises.

In 2011, the Member States of the United Nations commemorated the 60th anniversary of the 1951 Convention relating to the Status of Refugees. The Convention and its 1967 Protocol are the fundamental instruments which form the foundation of the international protection regime for refugees. Ireland acceded to the Convention and Protocol in 1956 and 1968 respectively and their core principles have guided our approach over the years to meeting the needs of those who arrive here seeking refuge.

The Convention was in place for many years before we here in Ireland began to experience the challenge of large numbers of persons arriving here seeking protection. At the time we did not have in place the asylum processing infrastructure that we have today to deal with their protection applications. Much had to be done in a relatively short space of time to deal with the challenge of the ever increasing numbers that continued to arrive and for which we had responsibility. In responding to this challenge, our authorities sought to replace ad-hoc administrative arrangements with a more sophisticated approach to dealing with asylum applications. Although the ad-hoc administrative arrangements met our international obligations at the time, they were not adequate for dealing with higher numbers of applications.

There has always been the challenge too of using a language in relation to asylum and refugee issues that is both morally acceptable and which honours the spirit of the international obligations to which we have committed ourselves.

Ireland has also shown solidarity internationally by continuing to work in partnership with the United Nations High Commissioner for Refugees in the context of our national resettlement programme. This programme, which has been in place for many years, is directed at refugees who are stranded and living in difficult circumstances outside of their countries and for whom going home, or staying where they are, are not realistic or long term solutions for them.

Around a thousand people have been resettled in Ireland down the years under the programme, including twenty four people who were resettled from a refugee camp on the border between Tunisia and Libya in 2010. In the tough economic times we are currently experiencing, there is always the danger that people might question the need for all of this.

However, we must never lose sight of our international and human rights obligations. We must be guided by our moral compass to ensure that we act fairly and humanely in all of our dealings with those people who have been made to feel unsafe, forced to flee and have as a result made no easy decision to leave their home country, often with great risk to their lives and to those of their families, and who have genuine reasons for seeking Ireland's protection. We must remind ourselves of the UN Secretary General's words "never lose sight of our shared humanity".

It is right therefore, that we acknowledge the key role and the great efforts that Ireland has made to ensure that those who are deserving of protection are guaranteed it. It is also right that we acknowledge the distinctive role that NGOs have to play in ensuring that society as whole faces up to the challenge of addressing this issue on the basis of our shared humanity – a role that must be exercised independently and from a rights perspective.

The investigation and assessment of asylum applications is a solemn task. Great care and attention must be paid to each person's application with every opportunity taken to explore and avail of information which assists the person making the application, which also depends on the interpretation by individuals of the duty which attaches to the decision-making process. The Minister, and his or her officials, charged with responsibility under the law in making the vital decision must never lose sight of their shared humanity with the applicant. It is through this prism that I view the two constructive initiatives which you have asked me here to launch today.

Notwithstanding all the State has done, and continues to do, to meet its commitments under the 1951 Convention and other relevant international law, there is always a place for forward-looking and pro-active initiatives from civil society to contribute to the overall quality of the asylum determination process. I would like to acknowledge the support of private philanthropic bodies in this area such as Atlantic Philanthropies, The One Foundation, The Joseph Rowntree Charitable Trust and others.

I understand that the aim of the Law Centre is to identify and address any unmet legal needs of protection applicants in a strategic manner and to promote and deliver prompt legal advice and

representation to those in the early stages of the asylum process. In this way, I hope that the Law Centre will complement the service already provided by the State. Providing other complementary options can only be to the benefit of asylum seekers generally and I have every confidence that the Law Centre will act as a strong and positive voice both at the individual and national level. I look forward to seeing how the Law Centre develops over the years to come.

I am also pleased to launch the European Database of Asylum Law here today. I am certain that it will serve as a very helpful resource for all those involved in the challenging and complex area of refugee status determination and to the courts. Access to relevant and up-to-date legal decisions from a variety of countries and sources can only serve to provide further support for those whose task it is to make decisions, with potentially life changing consequences, for those seeking protection in Ireland.

I understand that the database will include judgments from the courts of eleven European countries. Over time, the possibility of other countries to have judgments from their courts included in the data base will surely serve to increase the use of the resource into the future. Such pan-European cooperation is truly an example of what can be achieved when we positively share resources, skills and commitment for a common purpose. The Irish Refugee Council is to be commended for co-ordinating the development of this database over the last year in partnership with the European Council on Refugees and Exiles, as is the European Commission for providing the enabling funding.

Although the number of people seeking asylum in Ireland is in sharp decline in recent years, the individual needs of asylum seekers do not change and the two initiatives being launched here today will greatly add to the supports already available for those who have to leave their home country to seek protection. As the number of asylum seekers has dropped we now, of course, have an enhanced opportunity of honouring even better the 1951 Convention on the Status of Refugees and responding to the inward migration system that has evolved.

I commend the Irish Refugee Council, its staff and supporters for all the work you do on behalf of a group who, virtue of their circumstances, are often marginalised; I congratulate you on the two initiatives that are being launched today; and I wish you all the best in your future endeavours.

Go raibh mile maith agaibh go léir.



## Aiming at Convergence: The EU Common Country of Origin Information Portal



By Lise Penisson, European Asylum Support Office, Malta

The European Asylum Support Office (EASO) is a regulatory agency of the European Union set up by virtue of Regulation (EU) 439/2010 to strengthen EU Member States' practical cooperation on asylum, enhance the implementation of the Common European Asylum System (CEAS) and support Member States whose asylum and reception systems are under particular pressure<sup>46</sup>.

By a Common European Asylum System, we mean a common European level for asylum procedures, in both legal and practical terms. In this regard, Country of Origin Information (COI) can play a significant role. More convergence in accessing, collecting, analysing and publishing COI will contribute to harmonizing and further improving the quality of the decision making process.

In the particular field of COI, the EASO's duties are to develop a common format and methodology for presenting, verifying and using COI, drafting reports on countries of origin and analysing COI in view of fostering convergence. The task of EASO is also to gather relevant, reliable accurate and up-to-date information in a transparent and impartial manner, by using a Common Country of Origin Information Portal<sup>47</sup>.

### The construction of the Portal: from Concept to Reality

The development of a common web-based entry-point (portal), enabling Member State asylum officials to access COI from multiple sources, and which would later become the basis for a common EU COI database, has been a priority project of the European Commission for several years.

Already in 2006, a Commission communication on strengthened practical cooperation addressed the importance of COI and described the need "to establish an easily accessible common entry point for existing information" which "could be achieved via the creation of a 'common portal' through which all Member States authorities could access, through one stop, all official COI databases, Member States legislation, relevant EC and national legislation and case law as well as other official sources of information. A 'common portal' would provide a useful additional resource particularly for those Member States with less well developed COI resources"<sup>48</sup>.

Developed by the European Commission, the European COI Common Portal, also called the 'EU Common Portal'<sup>49</sup>, underwent three main construction stages (comparative study of existing systems, feasibility study, pilot and portal development). Member States and Third countries were closely associated to the development of this new gateway in the framework of various Eurasil<sup>50</sup> workshops.

#### Comparative and feasibility studies

In 2007, the Commission commissioned a feasibility study on the creation of a common EU-wide web-based COI portal. This study concluded that the project would be worthwhile. An evaluation of Member States' most pressing needs was carried out, as well as a comparison of official databases used by selected Member States and some international organisations (notably UNHCR's *Refworld* and the Red Cross/ACCORD's *ecoi.net* COI repositories).

#### From the pilot phase to the official launch

Following consultation with Member States, the Commission initiated - using the services of an external consultant - the development of a suitable IT solution for the establishment of a common portal.

The pilot project aimed at finding the "best" prototype for the portal was finalised at the end of 2008, and the 'deliverables' were formally accepted in April 2009. The prototype was tested by connecting it with two

<sup>48</sup> Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation, New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System, 17 February 2006, COM(2006) 67 final.

<sup>49</sup> In this article, for simplification purpose, it will also be referred to as the 'Portal'.

<sup>50</sup> Eurasil is a network of government officials dealing with asylum policy, bringing together governmental experts from the EU Member States, Switzerland, Norway, Iceland and Liechtenstein who meet regularly to discuss policy-related and COI matters with a view to improving and maximising convergence in the asylum field. In the year 2012, the Eurasil type activities, amongst which workshops, will be gradually taken over by the EASO under the name of 'EASO Practical Cooperation'.

<sup>46</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

<sup>47</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, Chapter 2, Section 1, article 4.



external data-bases: Germany's *MILo* system and the Red Cross/ACCORD's *ecoi.net* system. The prototype portal proved to be technically functional, enabling users to search for and retrieve documents located on multiple databases linked with the portal in a secure and user-friendly manner. The prototype also demonstrated the feasibility of other desired features of the portal, including the creation of common upload areas, the possibility to distinguish between different user types and the creation of an on-line forum for exchange of information and views. No major technical obstacles to the further development of the portal were encountered. The results of the near-final pilot phase, including a demonstration of the operation of the proto-type, were reported to the Eurasil plenary meeting on 15 December 2008.

The Portal could then enter the last construction phase, namely, the Portal development (completing the development of the portal based on the pilot and ensuring it is available for its users). Officially launched on 25<sup>th</sup> July 2011, the Portal is currently undergoing its first enhancements.

#### Architecture of the Portal

As mentioned previously, the idea behind a common COI Portal was to provide a common access point to COI so as to converge procedures for collecting, analysing and presenting COI, but also to offer additional resources, particularly for those Member States with less elaborated COI systems.

To achieve this, the EU Portal was built as a web application accessible via the internet to Member States representatives and authorised staff. It aims at connecting all the official COI databases owned by Member States, Cooperating Countries and International Organizations<sup>51</sup> to a single web application, while allowing Member States which do not have electronic databases to upload and share COI documents, national legislations and case law into a local dedicated area (called the 'Upload Area'). This 'Upload Area' will also comprise a dedicated space where EASO will display information on common COI methodology, country and thematic workshops, Fact Finding Missions (FFMs), EASO country reports and country of origin networks.

Besides acting as an entry point to COI, legislation and case law, the Portal also allows for communication and exchange of information through a 'Forum', which provides two distinct functionalities, namely an open discussion forum and a communication tool ('Send questions to Member States'). With the Forum feature, users can communicate doubts, issues or information related to COI and other asylum-related matters as well

<sup>51</sup> The UNHCR database, Refworld, and ECOI.net might be connected in the near future.

as to launch suitable questions which will be replied to via a single dedicated email. Users can be updated on novelties related to the Portal or to COI related topics thanks to the 'News section'.

The Portal users have the possibility to search information across the connected IT databases and the 'Upload Area'. Not all COI Portal's users are able to access the same documents however as three types of users categories have been identified: the 'COI specialists' who have access to public and limited access documents, the 'General users' who can consult and retrieve public documents only, and the 'COI National providers' designated by Member States to upload and maintain the corresponding 'Upload Area'.

#### State of Play and Future

As one of EASO's duties is to manage, further develop and maintain the Portal, it will be gradually transferred to the Support Office in the course of 2012<sup>52</sup>. Before taking over the Portal, EASO would like to further develop some features to improve its usability. In doing so, EASO has established a Working Party composed of five Member States, the European Commission and EASO<sup>53</sup>. This Working Party has already met twice to elaborate 'household rules' for the use of the Portal and to elaborate on some of the Portal's functionalities.

As of today, the German web based database *MILo*, is connected to the Portal, while at least three other national databases are expected to be linked in the near future. In parallel with the process of defining quality criteria for the upload area, Member States are welcome to upload COI, national legislation and case law in their national upload areas as well as to search for information across the Portal.

During 2012, besides taking over the administration of the Portal from the Commission, EASO will work on developing long term solutions for the hosting and maintenance of the Portal.

As more and more information converges into the Portal, either through database connection or uploading - making it fully 'live' - it will, without any doubt, provide users with a great opportunity to share knowledge and expertise and to exchange on COI and asylum-related matters. In doing so, it will become an important tool in the further development of the Common European Asylum System.



<sup>52</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office. Chapter 2, Section 1, Article 4 (c).

<sup>53</sup> The Working Party on the Common COI Portal. The members of this group are Belgium, Germany, France, Ireland, the Netherlands (Chair), the EC and the EASO.

## Child Witches in the Democratic Republic of Congo



*RDC Researcher David Goggins Investigates*

### A Belief in Witchcraft

African traditional religion has always included a belief in witchcraft. Even in the 21<sup>st</sup> century there remains a very real fear of the witch. Until recently it was normally adults who were ostracised or punished by the community due to the belief, or at least the accusation, that they had caused harm by supernatural means. In recent years there have been detailed reports published by organisations such as UNICEF, UNHCR, Save the Children, Stepping Stones Nigeria, Human Rights Watch and other credible sources on a rapidly growing phenomenon whereby in many parts of sub-Saharan Africa it is children who have been abused, tortured and even killed following accusations that they are witches. For example, a report submitted to the UN Human Rights Council states:

“Belief in witchcraft is widespread in Africa, as in other parts of the world. However, until recently, violent allegations of witchcraft were not typically levelled against children. In several Central African countries, in particular, there are now alarming numbers of killings of adults accused of being ‘sorcerers’ and a growing recent phenomenon of witchcraft accusations against children and adolescents.”<sup>54</sup>

Typical accusations made against suspected child witches can be seen in a *UNICEF* report which states:

“The main power attributed to child witches is the ability to inflict harm from the invisible world to the visible. In general, this consists of transmitting an illness to a relative who must be ‘sacrificed’ together with fellow witches. Children are thus accused of causing diarrhoea, malaria, tuberculosis, even HIV/AIDS, and of the fatal consequences that may follow. In addition, they are also suspected of bringing about general misfortune, poverty, unemployment, failure, etc.”<sup>55</sup>

<sup>54</sup> United Nations Human Rights Council (25 February 2011) *Written statement submitted by Franciscans International (FI), a non-governmental organisation in general consultative status*

<sup>55</sup> UNICEF (April 2010) *Children Accused of Witchcraft*

### Democratic Republic of Congo (DRC)

Countries where children are at risk of being accused of practising witchcraft include Benin, Nigeria, Cameroon, Gabon, Liberia and the Democratic Republic of Congo. A UNHCR research paper states:

“Cases of children or women being accused of witchcraft have been documented in many African countries, such as Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, the Democratic Republic of Congo, Gabon, Ghana, Mali, Nigeria, Tanzania, South Africa, Uganda.”<sup>56</sup>

It is in the Democratic Republic of Congo (DRC), and especially in the capital city Kinshasa, where this phenomenon has become a particularly serious problem in recent years. In a UNHCR research paper on the subject of witchcraft allegations and the protection of refugees Jill Schnoebelen states:

“In the past, witchcraft accusations in the villages of the Democratic Republic of the Congo (DRC) were generally directed at elderly women, with only rare instances of exorcism or abuse resulting. Since the early 1990s, particularly in large towns, accusations have shifted to children, the number of such allegations skyrocketed, and the subsequent treatment has become increasingly violent. It appears to be a phenomenon that has not and does not exist in rural areas, ‘apart from a very few ill-documented exceptions in areas affected by the war.’ Thus, ‘common cultural roots have been distorted from their primary meaning.’”<sup>57</sup>

A report on the recent appearance of so-called child witches in the DRC published by the charity Save the Children states:

“Accusations of witchcraft against children seem to take shape during African families’ often violent transition from traditional organisation to urban life. To pastors and parents, child witchcraft represents an ‘invisible order’ that acts according to its own logic and lives alongside the social world. It is important to note that the fusion of the imaginary and the real leads to violent actions against children and even murder.”<sup>58</sup>

A *BBC News* report notes:

“Although the belief in sorcery is traditional in the Democratic Republic of Congo, as elsewhere in Africa, many people are concerned that children never used to be blamed in such huge numbers. ‘It is a new problem, because when we grew up we never saw this problem of children accused of sorcery. It is only since life

<sup>56</sup> UNHCR Policy Development and Evaluation Service (January 2011) *Breaking the spell: responding to witchcraft accusations against children*

<sup>57</sup> UNHCR Policy Development and Evaluation Service (January 2009) *Witchcraft allegations, refugee protection and human rights: a review of the evidence*

<sup>58</sup> Save the Children (March 2006) *The Invention of Child Witches in the Democratic Republic of the Congo*

became bad,' said Ange Bay Bay, a children's rights lawyer. When something goes wrong in a family the children are often blamed, she said. So a child can be accused of sorcery when death, an illness or sudden unemployment strikes the home. As Kinshasa's economy and infrastructure collapsed in the last decade, as a result of government corruption and war, so the number of children accused of witchcraft exploded."<sup>59</sup>

An *Immigration and Refugee Board of Canada* issue paper on the situation for street children in the DRC states:

"Some of the organizations that have studied the increase in the number of children living on the streets in the DRC attribute this phenomenon, among others, to war, the deterioration of socio-economic conditions, and the breakdown of family and communal support systems."<sup>60</sup>

A report from *Human Rights Watch* posits that the true reasons for the rise in the number of child witches are economic rather than religious. This report notes:

"It is rare that children who live with both biological parents are accused of sorcery. In interviews we conducted with accused children, every one of them had lost one or both parents and had been living with extended family members who were facing extremely difficult economic problems. A Roman Catholic priest who shelters street children in Kinshasa conducted a survey of 630 children accused of sorcery in 2004. Of that number, only seventeen had both parents living. Children in the DRC who have lost one or both parents are traditionally taken into the care of stepmothers or stepfathers, grandparents, uncles and aunts, or older siblings. But numerous organizations that work with children told us that this tradition was being undermined as a growing number of families were being expected to care for their relatives' children while at the same time facing increasing economic difficulties themselves. They told us that some families were simply unable to cope with the care of their relatives' children, but stressed that sending children to the streets would be culturally unacceptable. Accusations of sorcery, particularly by a religious leader, however, provided an excuse for guardians to chase children from their homes. The same Roman Catholic priest who conducted the survey of accused child sorcerers in Kinshasa told us, 'believe that for the most part, parents or guardians do not necessarily believe it is sorcery. They are just looking for a reason to get rid of the kids, the extra mouths they can't feed.

<sup>59</sup> BBC News (17 January 2003) *DR Congo's unhappy child 'witches'*

<sup>60</sup> Immigration and Refugee Board of Canada (March 2004) *Democratic Republic of Congo: Situation of Children*

The children are the victims of larger social problems and the breakdown of the family.' "<sup>61</sup>

### **Pentecostal Preachers and Exorcism**

A particularly disturbing feature of this phenomenon has been the emergence of self-appointed preachers in churches affiliated with the Pentecostal movement who make a considerable amount of money from "exorcising" suspected child witches. This is commented on in a USAID report which states:

"In today's circumstances, self-made preachers can easily set up their pulpits and mete out predictions for those seeking an easy fix for their grief and misfortune. When prophecies fail, the preachers might easily blame continued misery on spurious causes, such as witchcraft, often turning on children as the source because they are easy to blame and least able to defend themselves. A family seeking the advice of their preacher might, for example, be told that their handicapped child is causing their continued misery, citing the child's disability as a clear indication that he or she is a witch."<sup>62</sup>

The relationship between Pentecostal pastors and allegations of witchcraft is expanded upon in an anthropological study published by UNICEF which states:

"The role of pastor-prophets in these churches seems to be of major importance in the 'antiwitch hunt', not only through the possibility of bringing deliverance to people possessed, but also through their ability to identify witches. In several African cities, these pastor-prophets play an essential role in witchcraft accusations against children. Although they are not always at the origin of the accusation – the person is already suspected by the family or members of the community – they confirm and legitimize the accusation."<sup>63</sup>

This study reveals the commercial nature of the services provided by these pastor-prophets in a section titled "Miracle Merchants" where the author states:

"All the 'spiritual' treatments offered by pastors and prophets belonging to Pentecostal, revivalist and other churches require some form of payment. To my knowledge, no church offers these services for free. While the fee may vary from one church to the next, it is generally higher than most people can afford. For example, one Congolese family, for whom the pastor had detected five cases of witchcraft, had to pay the equivalent of €24 plus a piece of sheet metal for each

<sup>61</sup> Human Rights Watch (4 April 2006) *What Future?: Street Children in the Democratic Republic of the Congo*

<sup>62</sup> United States Agency for International Development (2002) *Abandonment and Separation of Children in the Democratic Republic of Congo*

<sup>63</sup> UNICEF (April 2010) *Children Accused of Witchcraft: An anthropological study of contemporary practices in Africa*

child. Another family had to pay the equivalent of €27 per child, and so on.”<sup>64</sup>

An article published in *The Observer* also alleges that these preachers see witch-hunting as a business, stating:

“Then there are the new fundamentalist Christian sects, of which there are thousands in Kinshasa. They make money out of identifying 'witches' and increasingly parents bring troublesome children to the pastors. 'It's a business,' says Mafu. 'For a fee of \$5 or \$10 they investigate the children and confirm they are possessed. For a further fee they take the child and exorcise them, often keeping them without food for days, beating and torturing them to chase out the devil.’”<sup>65</sup>

The appalling nature of these exorcism ceremonies is described in the *Human Rights Watch* report referred to above which states:

“Many accused children are brought before pastors, cult leaders, or self-proclaimed ‘prophets’ and forced to undergo often lengthy ‘deliverance’ ceremonies in an attempt to rid them of ‘possession.’ Deliverance ceremonies can take place in ‘churches of revival’ (églises de réveil) found throughout Kinshasa and Mbuji-Mayi and rapidly spreading to other cities. The growth in the number of new churches of revival is both a consequence of child sorcery accusations and a cause of new allegations; more than 2,000 churches practice deliverance in Kinshasa alone. Some prophets who run these churches have gained celebrity-like status, drawing in hundreds of worshippers in lucrative Sunday services because of their famed ‘success’ in child exorcism ceremonies. This popularity rewards them for their often brutal treatment of children. Children who undergo deliverance rituals are sequestered inside churches anywhere from a few hours to several days or weeks. Many are denied food and water to encourage them to confess to practicing witchcraft. In the worst cases, children are beaten, whipped, or given purgatives, to coerce a confession.”<sup>66</sup>

In a report to the *UN Human Rights Council* Special Rapporteur Philip Alston also comments on the treatment of children by such churches as follows:

“Churches and cults that practice exorcism play an especially pernicious role, often condoning victimization and subjecting children to ‘exorcisms’ or ‘deliverance’ ceremonies in which they are forcibly isolated and deprived of food and water. In one emblematic case from Province Orientale, one of the

wives of a polygamous man accused her husband’s young son of trying to kill her. The father took the son to be exorcised and a church deacon bound the child while the father and his wife poured boiling water on him. The wife submerged the child in water heated to over 90 degrees. He died of second degree burns. In another case in Katoko, Maniema, an 8-year-old boy died in October 2009 after a local pastor imprisoned him in a ‘prayer chamber’ for 7 days without food.”<sup>67</sup>

### State Protection

In a reference to the lack of state protection for these children Philip Alston states:

“There is almost total impunity for such killings, with witnesses or family members reluctant to report such incidents to authorities, and officials all too often turning a blind eye to preventing or investigating the violence.”<sup>68</sup>

Further criticism of the inadequacy of state protection comes from Jill Schnoebelen who states:

“There are apparently thousands of churches in the Democratic Republic of the Congo that make money by performing deliverance ceremonies and these are subject to very little, if any, oversight. The Minister of Social Affairs estimates that there might be as many as 50,000 children being held in churches—often in dismal conditions—as they await exorcism. Despite the adoption of a new constitution in 2005 that outlawed witchcraft allegations against children, law enforcement, judicial and government officials continue to fail to intervene in cases of abuse in homes and churches. Save the Children finds that the government’s inaction has created ‘an indifference that is killing children and exposing them to repeated abuse.’”<sup>69</sup>

<sup>67</sup> United Nations Human Rights Council (1 June 2010) *Democratic Republic of the Congo (the): Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Addendum - Mission to the Democratic Republic of the Congo* (A/HRC/14/24/Add.3)

<sup>68</sup> *ibid*

<sup>69</sup> UNHCR Policy Development and Evaluation Service (January 2009) *Witchcraft allegations, refugee protection and human rights: a review of the evidence*

<sup>64</sup> *ibid*

<sup>65</sup> *The Observer* (12 February 2006) *Thousands of child 'witches' turned on to the streets to starve*

<sup>66</sup> Human Rights Watch (4 April 2006) *What Future?: Street Children in the Democratic Republic of the Congo*

## Witchcraft and Asylum Claims

The issue of asylum claims resulting from witchcraft accusations is addressed in a UNHCR research paper which states:

“The 1951 UN Convention relating to the Status of Refugees does not specifically mention witchcraft. However, it may offer grounds to consider witchcraft or witchcraft allegations as qualifying an individual for refugee status because of a ‘well-founded fear of persecution’ due to identification as a member of a ‘particular social group’”<sup>70</sup>

In a further reference to members of a particular social group (MPSG) this paper states:

“The Australian Government in its study on the linkage between MPSG and witches, however, also confirms that a social group may be created through the immutable perceptions of its persecutors. As a result, children accused of witchcraft can be legitimately considered as members of a particular social group at risk of persecution.”<sup>71</sup>

*All reports and documents referred to in this article may be obtained on request from the Refugee Documentation Centre.*



## The Nascent Impact of the “Greek Transfer” Cases

*Kevin Clarke & Niccolò Denti*<sup>72</sup>, UNHCR Ireland.

The case of *M.S.S v Belgium and Greece*<sup>73</sup> (the “M.S.S case”) before the European Court of Human Rights (ECtHR), concerned the transfer of an asylum seeker to Greece by the Belgian authorities in application of the Council Regulation (EC) 343/2003 (the “Dublin II Regulation”). Mr S entered the EU through Greece ending up in Belgium, where he claimed asylum. Belgium submitted a request for Greece to take charge of his claim pursuant to the Dublin II Regulation and Mr S was subsequently transferred to Greece. On arrival, according to his reports, he was detained in overcrowded, unsanitary conditions and was deprived of open space and adequate food. Following his release and issuance of an asylum-seeker’s card, he lived on the streets with no means of subsistence. Mr. S alleged that both Greece and Belgium had acted in violation of his Convention rights.

<sup>70</sup> UNHCR Policy Development and Evaluation Service (January 2011) *Breaking the spell: responding to witchcraft accusations against children*

<sup>71</sup> *ibid*

<sup>72</sup> Protection Interns, UNHCR Ireland. The authors take responsibility for any views expressed and any possible errors.

<sup>73</sup> *M.S.S. v Belgium and Greece*, Grand Chamber (no. 30696/09, 21 January 2011)

In June 2010, UNHCR submitted a written intervention as a third party in the case, further to an invitation by the Court.<sup>74</sup> UNHCR expressed the view that transfers pursuant to the Dublin II Regulation should not take place where there is evidence showing:

- (i) a real risk of return/expulsion to a territory where there may be a risk of persecution or serious harm;
- (ii) obstacles limiting access to asylum procedures, to a fair and effective examination of claims or to an effective remedy; or
- (iii) conditions of reception, including detention, which may lead to violations of Article 3 of the European Convention on Human Rights (ECHR).

In these circumstances UNHCR emphasised that a State should apply Article 3(2) of the Dublin II Regulation, even if it does not bear responsibility under the criteria laid down in Articles 5-14 of the Regulation. In the specific case of Greece, in view of “its failure to meet the minimum standards set by the EU Directives, the breaches of rights under the ECHR, including Article 3 in particular, in relation to the reception and detention of asylum-seekers, and the real risk of indirect refoulement in breach of Article 3” UNHCR expressed the opinion that EU Member States should refrain from transferring asylum-seekers to Greece.

In its judgment of 21 January 2011, the Court held that Belgium had violated Article 3 of the ECHR by virtue of having exposed the applicant to risks linked to the deficiencies in the asylum procedure followed in the applicant’s case. The Court stated that it was up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but to verify how the Greek authorities applied their legislation on asylum in practice, which they had failed to do. The Court also held that Greece violated Article 3 of the ECHR both because of the applicant’s detention conditions and living conditions in Greece. The Court noted that as an asylum seeker, the applicant was particularly vulnerable, because of the traumatic experiences that he was likely to have endured.

The Court held that Belgium had violated Article 13 of the ECHR (taken in conjunction with Article 3) because of the lack of an effective remedy against the applicant’s expulsion order. The Court also held that Greece had violated Article 13 (taken in conjunction with Article 3) because of the major deficiencies in the asylum process followed in the applicant’s case.

<sup>74</sup> Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=4c19e7512&skip=0&query=belgium%20and%20greece>

It would appear that most transfers to Greece under the Dublin II Regulation (“Dublin Transfers”) were suspended by EU Member States in response to the M.S.S judgment. In addition, there have been a number of decisions by administrative and judicial authorities throughout Europe in relation to transfers under the Dublin II Regulation to countries other than Greece. The following analysis identifies a number of these cases, although it does not purport to be an exhaustive consideration.

#### *German case law*

In Germany, there have been several administrative court decisions by which Dublin II transfers to Malta were halted as a result of alleged deficiencies in the asylum system. For instance, in a case decided by the Administrative Court of Regensburg, (order of 5 April 2011 – RO 7 E 11.30131<sup>75</sup>), the Court suspended the transfer of a Somali national who entered Malta by boat from Libya and spent several months in detention. The Court held that even if the general practice of detaining asylum seekers while their claim is processed was to be considered in line with Article 5(1)(f) of the ECHR, the actual detention conditions would be a violation of Article 3 of the ECHR. Similarly, the Administrative Courts of Schleswig (order of 8 June 2011 – 11 B 36/11<sup>76</sup>), Magdeburg (order of 28 June 2011 – 5 B 174/MD<sup>77</sup>) and Regensburg again (order of 24 June 2011 – RO 7 E 11.30281<sup>78</sup>) found that the detention conditions of asylum seekers in Malta constitute a violation of Article 3 ECHR.

Regarding Dublin II transfers to Italy, while the German jurisprudence is not entirely consistent, there have been several decisions in which courts have ruled that Article 3(2) of the Dublin II Regulation<sup>79</sup> (the “Sovereignty Clause”) had to be applied. Among others, the Administrative Court of Magdeburg in its judgment delivered on 26 July 2011 (9 A 346/10

<sup>75</sup> Available at:

[http://www.asyl.net/fileadmin/user\\_upload/dokumente/18418.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18418.pdf)

<sup>76</sup> Available at:

[http://www.asyl.net/fileadmin/user\\_upload/dokumente/18702.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18702.pdf)

<sup>77</sup> Available at:

[http://www.asyl.net/fileadmin/user\\_upload/dokumente/18721.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18721.pdf)

<sup>78</sup> Available at:

[http://www.asyl.net/fileadmin/user\\_upload/dokumente/18730.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18730.pdf)

<sup>79</sup> Article 3(2) of the Dublin II Regulation, known as the “sovereignty clause”, allows Member States to examine an asylum application and thus take responsibility for assessing it in substance even if the Dublin criteria would otherwise assign this responsibility to another Member State

MD<sup>80</sup>) held that the sovereignty clause had to be applied since the applicant would face reception conditions in Italy violating the European minimum standards according to the Reception Conditions Directive and it could not be guaranteed that the asylum seekers would face an asylum procedure in compliance with European minimum standards according to the Qualification Directive and the Asylum Procedures Directive. In addition, the Court said that there were serious concerns that the transfer could violate Article 3 ECHR.

Regarding transfers to Hungary, it appears that the German courts are unanimous in rejecting applications aimed at halting transfers. For example, on 13 October 2011 the Administrative Court of Ansbach (AN 11 S 11.30436) concluded that the situation in Hungary cannot be seen as a situation violating Article 3 ECHR and therefore does not lead to an obligation for Germany to apply the Sovereignty Clause according to Article 3(2) of the Dublin II Regulation.

#### *Swiss case law*

On 16 August 2011 the Federal Administrative Court in Switzerland issued its first judgment on transfers to Greece, indicating that Switzerland is obliged to assess the lawfulness of a transfer individually on a case by case basis.<sup>81</sup> If Switzerland finds that there is a real risk of a violation of the applicant’s human rights, it is obliged to apply the Sovereignty Clause. In addition, the Court held that the burden of proof in cases concerning Greece is on the sending state and not on the applicant.

#### *Austrian case law*

On 31 October 2011 the Austrian Asylum Court quashed a first instance decision to transfer asylum-seekers to Hungary pursuant to the Dublin II Regulation.<sup>82</sup> The decision referred to information provided by UNHCR stating that because of irregular entry or illegal residence, asylum seekers are immediately arrested by the Hungarian police, even if they had immediately applied for asylum. In addition, asylum seekers transferred under the Dublin II Regulations are imprisoned. The information provided by UNHCR also referred to alleged ill-treatment by police of asylum seekers in detention facilities.

<sup>80</sup> Available at:

[http://www.asyl.net/fileadmin/user\\_upload/dokumente/19125.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/19125.pdf)

<sup>81</sup> D - 2076/2010 – Decision of Swiss Federal Administrative Court, 16 August 2011

<sup>82</sup> S4 422020-1/2011

### *The case of N.S. and M.E.*

On 21 December 2011, the Court of Justice of the European Union (CJEU) delivered judgment in the joined cases of *N.S. v Secretary of State for the Home Department (C-411/10)* and *M.E and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (C-493/10)*, both of which concerned the proposed transfer of asylum seekers to Greece under the Dublin II Regulation.

For the first time ever, UNHCR was provided with the unique opportunity to officially intervene as a third party before the CJEU due to its third party status at the domestic level both in the *N.S.* case before the Court of Appeal of England and Wales and the *M.E.* case before the High Court of Ireland.

At the core of UNHCR's submission<sup>83</sup> was the view that if there is a real risk that the responsible Member State under Article 3(1) of the Dublin Regulation cannot guarantee the fundamental rights of an asylum applicant, the sending State:

- (a) cannot, by transferring the individual, discharge its own obligations towards that applicant; and
- (b) must instead accept responsibility for determining the claim, which Article 3(2) of the Dublin Regulation enables it to do.

Specifically in the case of Greece, UNHCR, (by reason of its right of access to asylum seekers, to detention facilities and to the administrative and judicial processes within Greece for determining protection claims), was in a strong position to highlight the problems concerning various aspects of the Greek asylum system. In UNHCR's opinion, these problems amounted to a risk of *refoulement* in the case of Dublin transfers to Greece. In UNHCR's view the Greek system did not protect adequately the right to asylum and the right to human dignity, creating a situation that readily meets the burden, the standard and the test for triggering Article 3(2) of the Dublin II Regulation.

In its decision, CJEU held that Member States may not transfer asylum-seekers to the Member State primarily responsible for determining the asylum claim under the Dublin II Regulation (the "Responsible State") where the Member State cannot be unaware that systematic deficiencies in the asylum procedure and in the reception conditions in the Responsible State amount to substantial grounds for believing that the asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment) of the Charter of

Fundamental Rights of the European Union. In such circumstances EU Member States must themselves examine the asylum claim in accordance with the Sovereignty Clause of the Dublin II Regulation where there is no Member State responsible other than the one primarily responsible (in accordance with the criteria set forth in the Dublin II Regulation) or where determining such alternative Member State would take an unreasonable length of time. In its reasoning, the Court found that Member States have a number of instruments at their disposal in order to evaluate the risk of inhuman or degrading treatment in the potential Responsible State, including reports of international non-governmental organisations, reports and proposals prepared by the European Commission and documents prepared by UNHCR.

While the judgment delivered by the CJEU is still relatively recent, its implications and impact are already visible in the latest jurisprudence.

On 6 January 2012, the Belgian appeal body, the Council for Aliens Law Litigation (CALL), in the judgment n. 72.824<sup>84</sup>, found that the applicant, of Somali nationality, had demonstrated an arguable claim based on Article 3 of the ECHR that he would be subjected to inhuman treatment were he to be returned to Malta and thus suspended the execution of the decision to transfer him. The CALL referred extensively to the judgment of the CJEU in *N.S.* and *M.E.* It also referred to *M.S.S. v. Belgium and Greece* and stated that it was settled case law that Article 3 of the ECHR states that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*" The CALL stated that this provision safeguards one of the fundamental values of every democratic society and prohibits in absolute terms torture and inhuman or degrading treatment, irrespective of the victim's situation and actions.

On 3 February 2012 the CALL applied the *N.S.* ruling again in its judgment n. 74.623<sup>85</sup>, in relation to a transfer to Italy. The Council considered that the Aliens Office had not sufficiently examined the situation to assess the consequences of the latest developments in the Mediterranean on the precarious situation of asylum-seekers in Italy. In this specific case, the applicant had no particular vulnerabilities and hence this decision sets a precedent for all applications regardless of their particular status.



<sup>83</sup> Available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4e1b10bc2> and <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d493e822>

<sup>84</sup> Available at <http://www.cce-rvv.be/rvv/index.php/fr/arresten/arresten-rvv>

<sup>85</sup> Available at <http://www.cce-rvv.be/rvv/index.php/fr/arresten/arresten-rvv>