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The RESEARCHER

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Welcome to the October 2012 issue of *The Researcher*.

In this issue of The Researcher we publish the address by the UN High Commissioner António Guterres at The Institute of International and European Affairs Dublin on the occasion of his recent visit to Ireland. Writing on the European Asylum Support Office David Costello, Refugee Applications Commissioner provides us with an understanding of its role, work priorities and some future challenges. We continue to provide contributions from international contributors with Jens Weise Olesen and Jan Olsen from the Danish Immigration Services sharing the Danish experience of Fact Finding Missions.

Writing on The M23 rebellion in North Kivu David Goggins of the Refugee Documentation Centre provides an insight on the recent history of the conflict in this complex region to the present informal ceasefire. Front Line Defenders' Andrea Rocca writes on the important role human rights defenders (HRDs) play and the risks they face defending human rights. Alerting us to the vast challenges facing South Sudan, Patrick Dowling of the Refugee Documentation Centre provides us with an article on The Experience of South Sudan – The World's Newest Country and an article by Aoife McMahon BL 'An effective remedy in the context of asylum applications' is republished with permission.

Elisabeth Ahmed
Refugee Documentation Centre (Ireland)

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The Researcher is published bi-annually by:
The Refugee Documentation Centre, Montague Court,
7-11 Montague Street, Dublin 2, Ireland
Phone: + 353 (0) 1 4776250
Fax: + 353 (0) 1 6613113
RCD@legalaidboard.ie

The Researcher is available on www.legalaidboard.ie, www.ecoi.net and www.Refworld.org/

Editors:
Seamus Keating: SJKeating@legalaidboard.ie
Elisabeth Ahmed: EAAhmed@legalaidboard.ie

Current Challenges of Forced Displacement

António Guterres, United Nations High Commissioner for Refugees

Keynote Address at the Institute of International and European Affairs

Dublin, 11 October 2012[1]

Ladies and gentlemen,
The main objective of this visit is for me to express to the Irish government and the Irish people our deep gratitude for their very strong support for UNHCR's activities worldwide, in particular from Irish Aid. This support has an enormous value, and I appreciate that it is being provided by a country that is striving to recover from a complex economic crisis. Please accept my sincere thanks.

Looking at new global challenges in forced displacement, I would like to briefly discuss three aspects: first, unpredictability as a defining feature of the current international environment; second, the shrinking of humanitarian space; and third, trends linked to the causes of displacement.

Today, four acute refugee crises are unfolding in parallel: Syria, Mali, Sudan/South Sudan and the Democratic Republic of the Congo. Each of these has resulted in significant cross-border displacement, at a time when we are still struggling to manage the on-going implications of a series of emergencies in 2011, in Côte d'Ivoire, the Horn of Africa, Libya and Yemen. At the same time, we also continue to support millions of refugees and internally displaced people affected by protracted crises, including in Afghanistan, Somalia and Colombia. Unfortunately the international community is showing very limited capacity for the prevention and timely resolution of conflict. As a result, new crises multiply and chronic ones persist.

When I began my political career, we lived in a bipolar world. When I was in office as Prime Minister of Portugal, the unipolar world reached its apex. During these periods there was no multilateral governance system, much less a democratic one, but there were clear power relations. Today's world is neither bipolar nor unipolar, yet it is not yet structured as a multipolar world and there is no global governance system. Power relations have become unclear. Actors develop initiatives in ways that are unpredictable, conflicts emerge, situations of social unrest multiply, and there is very little capacity to control the development of these events.

If you ask me what the next crisis will be, I don't have the answer. But I do know that there will be more to come, probably before the end of the year or at the beginning of the next. In the absence of a strong and effective international consensus aimed at the early resolution of conflicts, these represent an enormous challenge for humanitarian actors. We have to significantly increase our activities to respond to new emergencies, at the same time as working to address the on-going consequences of unresolved crises, at a time when resources are stretched.

Those who flee conflict today find themselves in a situation where the capacity of the international system to respond is under considerable stress. We need to do much more to fully respond to the dramatic needs of those forced to flee from the conflicts currently proliferating around the world.

The second challenge relates to the shrinking of humanitarian space. In today's crises, the security of humanitarian workers is increasingly under challenge. In the past, conflicts tended to follow a clearer pattern, usually involving two states or a government and a rebel movement. Humanitarian access was negotiated directly with the parties to the conflict, which generally had clear command structures. But today the actors of conflict are much more diverse.

For instance, in eastern Democratic of the Congo, there is a national army which is often directly implicated in violations of human rights. There are international peacekeeping forces, ethnic militias, political militias, and in some other areas, religious militias. In countries such as Mali there are groups linked to militant radical movements. And in some areas, the political aspirations underlying conflict become folded into the activities of criminals and bandits.

In such environments it becomes almost impossible to identify interlocutors with whom the delivery of assistance and protection can be effectively negotiated. The ability to operate in line with the humanitarian principles of neutrality, impartiality and independence is more important than ever, but increasingly, this is being undermined. For some groups, humanitarian actors have themselves become targets, and others are

[1] This text is an edited version of the keynote address delivered.

simply unable to control the activities of elements who are essentially gangsters motivated by profit.

This results in higher levels of insecurity and shrinking humanitarian space. Humanitarian access may also be restricted in situations where the parties to a conflict wish to avoid witnesses in areas where, for instance, serious violations of human rights are being perpetrated. There continue to be many difficulties in obtaining permission from governments to operate in certain areas of the world today, resulting in a shrinking of humanitarian space and constraints on our capacity to deliver.

The 'responsibility to protect' agenda has been losing ground in the face of a re-assertion of national sovereignty. This has an impact on humanitarian access in many parts of the world. Where people are suffering and humanitarians are unable to be present, as, for example, in northern Mali today, this brings huge frustration for us, but much more significantly, has dramatic consequences for the people we care for.

Finally, I would like to turn to the causes of forced displacement. UNHCR's mandate is clear; it is related to people who have a well-founded fear of persecution or who are fleeing their countries as a result of conflict. But it is becoming increasingly difficult to disentangle these reasons from other factors underlying patterns of migration, and to distinguish between someone who makes the choice to move in search of a better life, from a refugee who moves as a result of conflict or persecution. This distinction, which was much clearer in the past, is becoming less obvious. For people who risk their lives on dangerous voyages from Libya to Lampedusa, or from Bossaso in Somalia to Yemen, it is increasingly difficult to know exactly why they are moving. Is a Somali moving because of war or because of hunger? The reasons are becoming blurred.

We are today witnessing a growing number of inter-related megatrends. These include population growth; we are currently seven billion people, and are expected to reach nine billion by 2050. Climate change, probably the defining element of our times, is another. I prefer not to use the expression 'climate refugees' because the consequences of climate change are extremely complex, and linked to many other factors.

A phenomenon such as drought in the Sahel is not something new; there have been droughts in this area for as long as we can remember. But there has been an amplification of natural disasters, with climate change acting as an accelerator, and interacting with a number of other elements such as food insecurity, water scarcity, incomplete democratisation processes, social marginalisation and urbanisation. All of these megatrends are becoming more and more interrelated, and their impact increasingly complex, leading to social, economic, and even political instability. Water scarcity, for example, can be a complicating factor in the relationship between farmers and herders or between two countries.

All of these factors are forcing more and more people to flee their homes. If they cross an international border, and conflict is involved, then they would normally be considered as refugees under international law. But if people are fleeing because of natural disasters or environmental degradation to a degree that makes life impossible, then in the absence of other elements, this does not result in legal status. And yet, they are still people who have been forced to flee, and they are not economic migrants in the traditional sense. Ireland has a history of people being forced to flee due to famine. These people did not leave the country for a better life; they left because there was no other way, because life became impossible.

Such forms of human displacement are happening more and more frequently in today's world, and so far the international community is not adequately prepared to respond. Protection gaps have emerged, along with complex implications for societies and for international relations.

Norway and Switzerland, in cooperation with a number of other countries – and I hope Ireland will join them – have launched what is known as the Nansen Initiative, aiming at facilitating a global debate on the challenges of cross-border displacement linked to sudden-onset disasters, including those triggered or aggravated by climate change, and trying to find forms of international cooperation and ways of responding to address the protection gaps that these situations create.

UNHCR has a clear mandate, which we are not seeking to expand. But we believe this debate is an extremely important one, and that the international community needs to be prepared to address the complex displacement dynamics which are now becoming visible. In a world that is smaller and smaller, in which for the first time there are physical limitations to economic growth, people on the move will be more and more a defining factor of our times.

The European Asylum Support Office: Role, Work Priorities and Some Future Challenges[2]

By David Costello, Refugee Applications Commissioner and Irish Member of the EASO Management Board

This Article provides a general overview of the principal functions of the European Asylum Support Office (EASO). It looks briefly at the organisational structure and budget of the office and its governance arrangements including the role of the Executive Director, the Management Board and the Consultative Forum for input by civil society into the work of the office.

The article also outlines the work priorities of the office, provides an overview of principal developments to date and suggests some key challenges which may be faced by the EASO in the future.

THE EASO

The European Asylum Support Office is an agency of the European Union established under EU Regulation 439/2010[3] ("the EASO Regulation") and became fully operational in June 2011. The Office is located in Valetta, Malta and its first Executive Director is Dr. Robert Visser who is a former Director General of Immigration, International Affairs and Legislation in the Netherlands Ministry of Justice. All EU Member States participate in the work of the office and its Management Board along with the European Commission and the United Nations High Commissioner for Refugees (UNHCR).

Speaking at the inaugural ceremony to launch the EASO in June 2011, the European Commissioner for Home Affairs, Cecilia Malmström, stated that the EASO is

"*an indispensable instrument to help achieve a more comprehensive and protective Common European Asylum System. Practices for receiving asylum seekers still vary considerably from one EU country to the other and much more needs to be done to achieve a greater convergence of approaches. The Support office will have an important role*" in this regard.

PURPOSE OF EASO

According to the EASO Regulation, the purpose of the office is, inter alia, to

- foster practical cooperation among Member States on asylum in the EU in policy, legislation and operational matters having regard to the implementation of the Common European Asylum System (CEAS) and its legislative basis.
- provide operational support to Member States under particular pressure in their asylum processing and reception systems, notably through the establishment of an early warning system and by coordinating teams of experts, known as Asylum Support Teams.
- contribute to the implementation of the CEAS by collecting and exchanging information on best practices, drawing up an Annual Report on the asylum situation in the EU as well as an Annual Report on the activities of the office and adopting technical documents, such as guidelines and operating manuals, on the implementation of the Union's asylum instruments.

In relation to the latter point, supporting best practice includes publishing reports in the area of country of origin information, supporting the relocation of the beneficiaries of international protection within the EU in respect of states which are faced with disproportionate pressures on their asylum and reception systems and developing common asylum training programmes for national asylum authorities including first instance and appeal.

The EASO has no decision making powers in relation to individual applications for international protection made in EU states.

ORGANISATION, BUDGET AND GOVERNANCE ARRANGEMENTS

The EASO has four functional areas reporting to the Executive Director namely (i) Centre for Information, Documentation and Analysis (ii) Centre for Operational Support (iii) Centre for Training, Quality and Expertise and (iv) a General Affairs and Administration Unit each headed by a senior official.

The budget of the office, which comes from Union funds, amounted to €8 million in 2011 and some €10 million has been allocated for 2012. By 2013 the staff complement of the EASO is expected to be 76 made up of permanent officials and seconded national experts.

[2] This article is written in a personal capacity and should not be reproduced in any manner without the permission of the author.
[3] Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing the European Asylum Support Office (O J of the EU: L 132/11 of 29 May 2010).

The governance arrangements of the EASO are organised around the Executive Director, the Management Board as well as various reporting and audit arrangements common to EU institutions. The Executive Director is appointed by the Management Board for a period of five years (with renewal possible for another three years) following open competition organised by the European Commission. The Executive Director, who is independent in the performance of his or her duties, is responsible for the administrative management of the Office and accountable to the Management Board for this purpose.

The EASO Management Board has various responsibilities under the EASO Regulation including taking decisions for the achievement of the mandate of the Office, the adoption of rules of procedure, the adoption of the EASO Annual Report and the Annual Report on asylum in the EU, the adoption of the EASO Annual Work Programme as well as responsibility for overall staffing and budget matters.

A key aspect of any good governance arrangements is transparency in relation to the delivery of functions. The Management Board places a high priority on the development of a communications strategy for the office which will enable its work programme and priorities to be publicised. A key element in the communications strategy will be a well functioning website and this is being developed at the present time. An information newsletter is also being published and a designated officer of the EASO has been appointed to deal with communications and press matters.

WORK PRIORITIES

Work priorities for the EASO are set out in annual Work Programmes as prioritised by the Management Board. The Programmes translate the organisation's strategy into annual objectives. For 2012, the priorities include the development of the emergency support framework for states under pressure in terms of asylum inflows through the deployment of Asylum Support Teams, the development of a European Asylum Training Curriculum and experts training pool, the development of quality initiatives in relation to asylum procedures, publishing country of origin reports and working on developing best practice and training in relation to asylum applications from unaccompanied minors. Other priorities include the publication of the EASO Annual Report, the development of a new website, enhancing cooperation in the area of resettlement and relations with non-EU states. From an organisational perspective priorities cover staff recruitment, organising meetings of the Management Board and the Consultative Forum as well as developing relations with stakeholders.

EASO – SOME DEVELOPMENTS TO DATE

An important priority of the office to date has been to put in place organisational structures and staffing. In addition, a number of key projects have been commenced and are at various stages of delivery. These include

Asylum Support Teams: In line with its mandate under EU law to assist a Member State facing particular pressures on its asylum processing and reception systems, the EASO can deploy asylum emergency support teams (ASTs) as part of an Asylum Intervention Pool. The Pool is made up of officials from Member States who have expertise in particular areas such as case processing, training, vulnerable applicants, management of reception systems, country of origin information and managing mixed flows of asylum seekers and economic migrants. For this purpose, a database of qualified officials is maintained by the EASO. Emergency support teams have already been deployed to Greece and Luxembourg who, for very different reasons, have both faced particular pressure on their asylum systems.

Early Warning and Preparedness System (EWPS): The EASO is building an Early Warning System with a view to predicting in advance situations which might give rise to increased flows of asylum seekers into the European Union. The situation in Syria is receiving close attention at this time with expert meetings held to monitor developments. The future legal basis of the EWPS is the new EU Dublin Regulation.

Training: The EASO is developing common training modules for officials working in the area of asylum on various aspects of asylum legislation, determination procedures and policy. This is more commonly known as a European Asylum Curriculum. Much of this work is being undertaken in cooperation with Member States and the UNHCR. Common training programmes are also being developed and some have already been delivered by EASO trainers including from Ireland.

Annual Report: In July 2012, the EASO published its 2011 Annual Report on the situation of asylum in the European Union and on the activities of the office. This report provides an overview of asylum developments in 2011 as well as outlining how the office has contributed to the carrying out of its functions and the implementation of the CEAS during its first year of operation.

Country of Origin Information (COI): In July 2012, the EASO published its first country of origin information report on Afghanistan (Taliban Strategies – Recruitment) and a country of origin methodology report setting out standards and guidelines for writing COI reports. This information is important for officials in Member States who determine applications for international protection.

Unaccompanied Minors: Work has commenced on an examination of best practice procedures and approaches in respect of asylum applications from unaccompanied minors including training modules on interviewing minors, safeguards which respect the best interests of the child and the issue of age assessment.

Engagement with civil society: An important part of the work of the EASO as recognised by its founding Regulation is to engage with civil society organisations who operate in the field of asylum at local, national and international levels. A Consultative Forum has been established to provide a mechanism for dialogue, the exchange of information and the pooling of knowledge between the EASO and relevant stakeholders.

SOME FUTURE CHALLENGES

While the EASO is still in the early stages of development, the following are some of the key challenges it will face in the next two to three years which will impact on how the office is perceived in the successful or otherwise delivery of its legal mandate.

Consolidation and strategic delivery of its work priorities: It will be important for the office to remain realistic in what can be achieved and to strategically prioritise its limited resources with a view to concentrating on a few important work priorities in order to achieve visible and measurable results. As far as possible, the emphasis should be on continuity in the work programme having regard to the requirements of the EASO Regulation, and, due to budgetary constraints, building on achievements in an incremental manner. Taking on too many tasks at the one time and not having the resources for effective delivery will simply lead to failure in achieving its work functions.

The strategic utilisation of resources will continue to be a key priority for the EASO and the Management Board in 2013 and key deliverables in the 2013 Work Programme include developing and supporting emergency support functions for EU countries in need, including Greece, developing an early warning system for asylum crises, the development of common training programmes and country of origin reports and the continued consolidation of the EASO as an effective organisation.

Supporting consistency and commonality in the application of the CEAS: Having regard to the special Treaty positions of Denmark, Ireland and the United Kingdom, in relation to EU asylum legislation, Member States are bound by the first phase of the legislative instruments already adopted in areas such as the grant and withdrawal of refugee status, the conditions governing qualification as a refugee, the taking of fingerprints (EURODAC) and the operation of the Dublin Regulation determining the contracting state responsible for processing an asylum application from a third country national. The EASO should continue to highlight initiatives which lead to the common application of EU asylum legislation. This can be achieved, for example, by common training programmes for officials processing asylum claims as well as the development of quality initiatives and country of origin reports. The increasing jurisprudence of the European Court of Justice in relation to asylum will be of guidance to the office in this regard.

Ensuring good governance and confidence building: As well as developing efficient and effective procedures for the management of the office so as to ensure good governance, the EASO should continue to work closely with Member States at all levels, as well as with the UNHCR and other representative groups in civil society, in planning, developing and implementing its activities. Member States do not hold a monopoly on knowledge in relation to the development and operation of asylum systems. Those involved in supporting asylum seekers on the ground (civil society) also have a comprehensive pool of knowledge which can be tapped into by the EASO in developing its activities and work priorities. Good communications will be critical in this regard, for example, by the development of a comprehensive website and through regular face to face interaction with stakeholders.

KEEPING UP TO DATE ON THE WORK OF THE EASO

If you would like to read more about the EASO and some of its publications, you can consult its new website (which is under development) at http://www.easo.europa.eu/

Danish Fact Finding Missions and Refugee Status Determination


By Jens Weise Olesen and Jan Olsen, Danish Immigration Service, Documentation and Research Division, Copenhagen.

Introduction

Since 1996 the Danish Immigration Service's (DIS) COI unit, the Documentation and Research Division has undertaken approximately 100 fact finding missions (FFM) to asylum seekers' countries of origin. In this article we focus on our own experiences from these FFMs and why we undertake FFMs. The article will also include some remarks on why these FFMs are considered essential to the refugee status determination (RSD) process in Denmark.

We acknowledge that there are different opinions concerning the scope of FFMs e.g. the important question concerning whether to opt for "pure" COI FFM reports or more mixed products including COI analysis and COI related conclusions and/or maybe even risk assessments. Our FFM reports do not include any analysis from our part and they do not contain any conclusions, assessments or policy recommendations.

This article is not intended as a recommendation on how to conduct FFMs. Our intention is to present some of the benefits of such missions.

FFM methodology

In the early 1990s the Danish Ministry of Foreign Affairs became less involved in supplying COI for refugee status determination in Denmark. The need for COI however remained, and the DIS decided to give the COI unit the possibility to gather COI by visiting relevant countries and interviewing sources of information. The methodology applied to these FFMs was influenced by the academic background and experiences found in the COI unit at that time i.e. history, anthropology and various other social sciences. Initially the DIS undertook its FFMs by identifying sources of information before and during the mission, preparing its interviews, taking extensive handwritten notes during these interviews, and then simply include in the final FFM report whatever was considered relevant according to the FFM team's terms of Reference (ToR).

Unless requested by the sources the meeting notes were not forwarded for corrections, comments and/or final approval. Danish FFM reports are always published in full (previously in print) on our website (www.nyidanmark.dk/en-us/frontpage.htm).
Throughout the years it has been an integral part of an interview that the source is thoroughly informed about the purpose of the meeting and the fact that the information supplied is included in a report available to all stakeholders involved in RSD as well as to the general public. In general our experience has been that the vast majority of sources have been pleased with the fact that their statements would be made public and references made to their statements. However, under certain circumstances, e.g. security concerns, working relations with the country's authorities or the internal policy of the source, some sources have requested not be have their statements fully sourced or they have requested to be completely anonymous.

Inspired by our FFM cooperation with our sister COI unit in the UK, the Country of Origin Information Service, some years ago we began to apply the principle of approved notes, i.e. sharing and agreeing meeting notes with sources. The merits of approved notes are also highlighted in the European Country of Origin Sponsorship (ECS) *EU common guidelines on (joint) Fact Finding Missions*[4]. By applying this principle we are able to verify the information gathered and we can also be assured that misunderstandings or misinterpretations of statements given to the FFM team by sources do not occur in the final FFM report. In addition, we benefit from having the approved notes returned in a rather short time as we agree with the sources to review the meeting notes within a few days, often two to three days. We also inform the sources that should we not receive the corrected and approved notes within the agreed deadline we assume that the notes have been approved.

It is important to emphasize that any reference to or inclusion of policy recommendations by sources interviewed are omitted in the FFM reports. Neither the fact finding team nor the Asylum Division include any advices or policy directions on refugee status determination in the FFM reports. We strongly believe that the undertaking and reporting of FFMs is kept completely separate from any policy recommendations. A FFM report is to be considered as an independent COI document based on information gathered by the FFM team and that this information is reproduced in the final report as agreed by the sources interviewed

[4]ECS, *EU common guidelines on (joint) Fact Finding Missions: a practical tool to assist member states in organizing (joint) Fact Finding Missions, ECS working group on Fact Finding Missions guidelines,* November 2010, http://www.unhcr.org/refworld/type,THEMGUIDE,,,4d0246f79,0.html

during the mission. On the other hand whenever relevant the FFM team could agree to include published COI e.g. media reports.

The DIS is pleased to note that the EU common guidelines recognise that FFM reports are only based on COI and that they should not include any references to policy recommendations. Research and policy recommendations should be kept completely separate.

There can be several advantages of conducting joint FFMs, and in the past we have cooperated closely with international partners e.g. the Scandinavian countries, the UK and the Danish Refugee Council and others. However, prior to deciding to undertake a joint FFM a number of important issues must be agreed upon. To us it is imperative that the joint FFM report is a publicly available document, that each and every statement in the report is thoroughly referenced and that no analyses or conclusions by the FFM team are included.

Terms of References (ToR)

Any FFM team will need to agree on a ToR, and the ToR forms the backbone of any of our FFMs. The DIS' ToRs are based primarily on input from policymakers, i.e. the DIS Asylum Division as well as the Refugee Appeals Board, but also the so-called Reference Group comprising representatives of among others Amnesty International, the Danish Refugee Council, the National Commissioner of Police, the Danish Bar and Law Society (representing asylum lawyers), the Danish Institute for Human Rights and the Rehabilitation and Research Centre for Torture Victims. Whenever a FFM is undertaken with an external partner the ToR will of course be based on the joint inputs and finally agreed on by the partners.

It is important to emphasize that an agreed ToR is also a practical tool which will guide the FFM team and will have to be observed throughout the FFM. Under normal circumstances there will be no deviation from the agreed ToR. This implies that only information relevant to the ToR will be included into the final FFM report. However, should new and relevant information, not included in the ToR, become known to the FFM team during the FFM then the FFM team will have to agree on whether or not to include such information into its final report. This is particularly important when a FFM is a joint exercise. A well prepared ToR also serves as a tool to structure the FFM report during the reporting phase.

Identifying sources

Before identifying, contacting and consulting sources it is important to ensure that these are relevant according to parts of the ToR. Only rarely a source is relevant to all parts of a ToR. It is equally imperative to ensure that the source is authorized to comment and speak on behalf of his or her organization, agency, embassy etc. It is also important to ensure that sources are reliable and well-informed in terms of the relevant ToR issues.

Regarding joint FFMs it is crucial that all parties in the FFM team agree on the choice of sources in order to avoid disagreements during the FFM itself.

In practical terms a FFM team is facing one of two scenarios. Firstly, the FFM team could already have in-depth knowledge about the country i.e. from previous FFMs and have established a network of well-informed sources. On the other hand, if the country is "new" to the FFM team the situation is quite different and more challenging. In such cases one or two reliable and well-known organizations or individuals have proven to act as what we call "a key". This means that they have helped identify and establish contact with several knowledgeable sources. Such "keys" are particularly important if we have not conducted FFMs to the country in question previously.

No matter how the identification of the sources is handled it is crucial that space is left in the agenda for additional meetings or follow-up meetings with particular well-informed sources.

It is important to consult a balanced selection of sources in order to reflect in the FFM report various opinions. When this is achieved we will get as close as possible to present a true and fair picture in the final report. We do not exclude a source solely because it is biased or has an agenda. However, we will always make full references to sources of information in our reports whenever possible.

FFMs impact on RSD process

The Danish FFM reports are used by the Refugee Appeals Board, DIS' Asylum Division and refugee lawyers as well as other users. The reports play an important role in the RSD process – RSD takes place independently of the DIS Documentation and Research Division – and the FFM reports are frequently being referred to in the decision making process either by first instance caseworkers or the Refugee Appeal Board. In addition asylum applicant's lawyers frequently draw on FFM reports during hearings in the Refugee Appeals Board to support their client's asylum claim. In some cases a specific FFM report is the only publicly available COI, a fact that highlights the importance of a transparent and well documented FFM report as well as the FFMs themselves.

A well prepared and well organized FFM will ensure that decision makers have access to relevant, updated and detailed COI, often in a rather short time, and that this information is focused on issues directly relevant to the RSD process. When there are no other sources of information available to COI units and decision makers a FFM is normally the only option to us. The alternative to a FFM could be to apply the principle of the benefit of the doubt, i.e. granting asylum to applicants who may or may not be in need of protection.

When detecting indicators that a situation in a country has somehow changed and that this change could have consequences for the RSD a FFM may be the most relevant means to gather updated COI. In several cases the DIS and the Refugee Appeals Board have revised its policy towards asylum seekers from a certain country/region before other European countries were able to do so, solely because of updated COI gathered during FFMs. This has been the case for Northwest Somalia (Somaliland) and Northeast Somalia (Puntland), Rwanda, Kurdistan Region of Iraq (KRI), Afghanistan, Iraq, India and Bangladesh. In other cases FFMs have not led to any policy changes but have confirmed that the policy should remain unchanged.

We would also like to point to the fact that in many cases a FFM may ensure that the RSD process is advanced as relevant COI may be available in a rather short time. However, in some cases this is not so. Sometimes we have experienced an unexpected and prolonged writing process as some sources have been unable or unwilling to meet the agreed deadline, or that sources have rewritten or reedited their original statements to such a degree that it has been very difficult to include them in our final FFM report. This has now and then resulted in delays in the writing and publishing process of a FFM report. Another reason is that occasionally a source has to consult with its Head Quarters in e.g. Geneva or Vienna before releasing the meeting note.

Benefits of FFMs

The costs of undertaking FFMs are sometimes substantial and FFMs are time consuming. The preparations and undertaking of FFMs as well as writing up a FFM reports take time, sometimes a lot of time, but this will also depend on how much experience a COI unit may have from previous FFMs and its practical experience from the field.

There are many advantages in undertaking FFMs in order to gather COI. COI is providing any immigration authority addressing asylum claims with a tool to decide whether or not an individual is at risk of being persecuted and to decide whether or not an asylum seeker is in need of protection. Whenever there is a lack of sufficiently detailed, relevant and updated COI, a FFM offers the best option to gather this information which can be directly used in the RSD process.

Another means of providing COI is of course via embassies. Unfortunately, not all embassies have the human resources to supply immigration authorities with the kind of detailed and well-documented COI that is in demand. Besides, COI units have a better understanding of the exact information needs.

A FFM has the advantage of offering COI which may otherwise not be available to the public and the decision makers. In many cases local NGOs with in-depth and on-the-ground knowledge of certain issues may be valuable sources of information for a FFM team. The information provided by such local NGOs may not be available or known to outsiders and a FFM will then be the only option to gather and distribute this information.

Finally, FFMs contribute to the building of expertise and in-country experience as well as experience in working together either in our own COI unit and/or working together with colleagues from other European COI units. Another important advantage of FFM is the fact that we have been able to establish a network of contacts in many countries – a valuable asset in our daily work.

We hope that more European COI units would recognize the benefits and values of undertaking FFMs. FFMs are a means of obtaining transparent, relevant, updated and credible COI when there is no other publicly available and relevant COI or when the existing COI is deemed insufficient.

Democratic Republic of Congo: The M23 Rebellion in North Kivu

RDC Researcher David Goggins Investigates

Background

For the past eighteen years the province of North Kivu in the eastern part of the Democratic Republic of the Congo has been in a constant state of armed conflict. Pre-existing tensions between the Tutsi population and other Congolese ethnic groups, who regarded the Tutsi as interlopers from Rwanda, was greatly exacerbated in 1994 when a million Hutu refugees fled into the DRC following their defeat in the Rwandan civil war.[5] In 1996 the Tutsi-dominated Rwandan army invaded the DRC, ostensibly to protect fellow Tutsi and to finally defeat Hutu forces, known as Interahamwe, who had been responsible for the genocide of an estimated 800,000 people. This incursion resulted in two wars involving ten nations and many militia groups. The second war formally ended in 2003 but the provinces of North and South Kivu remained strife-torn with almost constant low-level warfare between Rwandan proxy forces, Hutu rebels, now known as the Forces démocratiques de libération du Rwanda (FDLR), local militias, known as mai-mai and the newly-created Congolese army, the Forces Armées de la République Démocratique du Congo (FARDC).

This conflict is summarised in an IRIN News briefing which states:

"For many decades, the interwoven issues of citizenship (who is a real Congolese?) land rights and ethnicity, coupled with the absence of effective state authority and the presence of rich mineral deposits, have driven instability and armed conflict in the eastern DRC, whose Tutsi inhabitants have been particularly caught up in the tension between 'indigenous' and 'settler' populations. Much of the fighting during the 1996-1997 and 1998-2003 Congo wars took place in the east."[6]

The 23 May 2009 Agreement

North Kivu once more saw heavy fighting in 2008 when Tutsi warlord Laurent Nkunda led a rebellion against the government of Joseph Kabila. This rebellion ended in January 2009 when Nkunda was arrested following a joint operation between the Congolese and Rwandan armies. Nkunda was succeeded as commander of the rebel forces, known as the Congrès national pour la défense du peuple (CNDP), by Bosco Ntaganda. On 23 May 2009 an agreement was reached whereby the CNDP would be integrated into the regular Congolese army. The CNDP is not the only militia to be incorporated into the regular army. As Thierry Vircoulan, the International Crisis Group's leading DRC analyst, says:

"The army is a conglomerate of militias, in some cases led by suspected war criminals"[7]

The April 2012 Mutiny

This agreement brought a precarious stability to the Kivus which, despite continuing human rights abuses by all parties in the region, endured for nearly 3 years. In early April 2012 heavy fighting resumed in north Kivu province following a mutiny by former CDNP fighters loyal to Bosco Ntaganda.

Human Rights Watch states:

"Ntaganda, a powerful general in the Congolese army, began his mutiny in eastern Congo at the end of March, following government attempts to weaken his control and increased calls for his arrest for alleged war crimes. He was joined by an estimated 300 to 600 troops in Masisi territory, North Kivu province, and at least 149 children and young men recruited by force around Kilolirwe."[8]

That Ntaganda had a well-founded fear of imminent arrest is revealed in a Radio Netherlands Worldwide report which states:

"However, since the conviction of Thomas Lubanga by the ICC last month, the Congolese government has been under increasing pressure to arrest Ntaganda, who was until now considered a vital element for stability and security in Northern Kivu. For the past few weeks there have been rumours spreading in Goma about an imminent arrest. 'Bosco Ntaganda is afraid and he is reacting like a hunted animal, trying to intimidate the enemy,' said a high-ranking FARDC official, who wished to remain anonymous."[9]

[5] International Crisis Group (24 January 2003) The Kivus: The Forgotten Crucible of the Congo Conflict
[6] IRIN News (10 July 2012) Briefing: Crisis in North Kivu
[7] Vircoulan, Thierry (April 2012) Mutinies in the East: Beyond the "Terminator"
[8] Human Rights Watch (3 June 2012) DR Congo: Rwanda Should Stop Aiding War Crimes Suspect
[9] Radio Netherlands Worldwide (4 April 2012) Congo-Kinshasa: General Ntaganda and Loyalists Desert Armed Forces

Bosco Ntaganda

Amnesty International lists some reasons why the authorities want to arrest Ntaganda:

"Bosco Ntaganda is a prime example. In 2008, he was among the CNDP commanders reportedly responsible for the Kiwanja operations which led to the unlawful killings of scores of civilians. CNDP chief of staff at the time, Ntaganda had been issued with an International Criminal Court (ICC) arrest warrant since 2006 for war crimes he is alleged to have committed in Ituri between 2002 and 2003. On 5 November 2008, the day of the killings, Bosco Ntaganda was filmed in Kiwanja and the UN has said that it considers him to have direct and command responsibility for this massacre."[10]

A report published by the Enough Project states:

"For years he thrived in Goma, dining in the finest restaurants, occupying a luxurious villa just yards away from the Rwandan border, and moved with impunity as he raked in a fortune from exploitation of the region's illicit minerals trade—all within sight of the world's largest peacekeeping mission."[11]

Human Rights Watch states:

"Ntaganda moved about freely in eastern Congo, playing tennis and dining at top restaurants in Goma in full view of Congolese officials, UN peacekeepers, and foreign diplomats. No efforts were made to arrest him, although he continued to commit human rights abuses."[12]

The previous reluctance to arrest Ntaganda is explained by a United Press International report which states:

"His faction had served as the protector of economic interests for powerful members of ethnic Tutsi elites on both sides of the Rwandan border, and as a line of defense against rival ethnic militias in the region."[13]

Genesis of M23

In a report on this mutiny Africa Confidential offers another reason for the rebels' actions:

"If Ntaganda was inspired to mutiny by the fear of his own arrest, for M23 it was the threat of their own privileges being hit that saw them take to the bush. Some 1,000 troops were to be redeployed from North Kivu to Kananga in Kasaï-Occidental Province on 23 April. They would have no privileges in their new posting and they had long ruled the Kivus as their own fiefdom, with individuals profiting handsomely from an illicit trade in minerals and other rackets."[14]

On 3 May 2012 a second group of soldiers defected from the Congolese army. This group, led by Colonel Sultani Makenga, denied any involvement with Bosco Ntaganda, claiming that they were motivated by the failure of the Kinshasa regime to honour the agreement of 23 May 2009. This group adopted the name Mouvement du 23 Mars (March 23 Movement), now more commonly referred to as M23.

This claim is contradicted by a Human Rights Watch report which notes that:

"But mutineers who have escaped or defected told Human Rights Watch that the two mutinies are not separate, and that Ntaganda and Makenga operate together from the Runyoni area. These witnesses told Human Rights Watch that Ntaganda remained in overall command of the forces."[15]

A spokesman for this group offered the following explanation for their actions:

"We are mistreated. Army soldiers have to sponge off the people, the money invested for military operations is embezzled by the generals in Kinshasa."[16]

See also BBC News report on why defectors from the Congolese army are joining M23 which says:

"In Bunagana we met two new recruits - Lt Col Justin Papy and Maj John Musinguzi. Both had deserted four days previously. Both said they were motivated by the abysmal conditions in the Congolese army - salaries that amount to less than $100 (£65) per month for a senior officer - and which in any case often go unpaid - corruption, inefficiency, even a basic lack of accommodation for the men. 'One day we had to fight for four days in the bush with no food,' said Maj Musinguzi. 'My men fought even though they had nothing to eat. But the Congolese army cannot win a war this way.' "[17]

Human Rights Abuses

There are credible claims that the M23 group has committed serious human rights abuses. A report from the UN High Commissioner for Refugees states:

"Our staff and partners in Uganda, Rwanda and eastern DRC have been receiving regular and extensive reports of widespread human rights violations and abuses.

[10] Amnesty International (June 2012) 'If You Resist, We'll Shoot You'
[11] The Enough Project (April 2012) Fact Sheet: Who is Bosco Ntaganda: Lynchpin to Security or International War Criminal?
[12] Human Rights Watch (15 May 2012) DR Congo: Bosco Ntaganda Recruits Children by Force
[13] United Press International (UPI) (20 September 2012) Endless Congo war flares amid mutiny
[14] Africa Confidential Vol 53, No.11 (25 May 2012) Rwanda looms larger in Kivu
[15] Human Rights Watch (3 June 2012) DR Congo: Rwanda Should Stop Aiding War Crimes Suspect
[16] Agence France Presse (7 May 2012) DR Congo mutineers decry treatment in army
[17] BBC News (24 July 2012) Uneasy calm inside Congo's rebel-held territory

These include indiscriminate and summary killings of civilians, rape and other sexual abuse, torture, arbitrary arrests, assaults, looting, extortion of food and money, destruction of property, forced labour, forced military recruitment, including children, and ethnically motivated violence. All this is fuelling massive displacement within the province and into neighbouring countries. We estimate more than 470,000 Congolese have been displaced in eastern DRC since April – some 220,000 in North Kivu, another 200,000 in South Kivu while more than 51,000 fled to neighbouring Uganda (31,600) and Rwanda (19,400). The fighting in eastern DRC is conducted without any respect for the safety of civilians and in clear violation of international humanitarian and human rights principles."[18]

A Human Rights Watch report states:

"Witnesses told Human Rights Watch that at least 33 new recruits and other M23 fighters were summarily executed when they attempted to flee. Some were tied up and shot in front of other recruits as an example of the punishment they could receive. One young recruit told Human Rights Watch, 'When we were with the M23, they said [we had a choice] and could stay with them or we could die. Lots of people tried to escape. Some were found and then that was immediately their death.' "[19]

This report also states:

"Since June, M23 fighters have deliberately killed at least 15 civilians in areas under their control, some because they were perceived to be against the rebels, Human Rights Watch said. The fighters also raped at least 46 women and girls. The youngest rape victim was eight years old. M23 fighters shot dead a 25-year-old woman who was three months pregnant because she resisted being raped. Two other women died from the wounds inflicted on them when they were raped by M23 fighters."[20]

The actions of M23 and other groups at large in North Kivu has had grievous consequences for the local civilian population. According to Oxfam:

"It is the crucial harvest season but people are too afraid to go to their fields to farm or are displaced far from home and unable to gather their crops say local organizations Oxfam partners with. A whole host of rebel groups are stealing crops or enforcing illegal taxes if farmers try to transport their goods to market. In Rutshuru people are being charged US $300 for a truck to pass points along the main road and US $50 for smaller vans, putting a massive illegal tax on traders and farmers, while shopkeepers in Rutshuru say they are too scared to keep their businesses open in case they are looted."[21]

Backlash Against Ethnic Tutsi

An unfortunate side effect of the M23 revolt is that it has provided a pretext for attacks against Congolese of Tutsi ethnicity. An IRIN News report on these attacks states:

"More than 100 people have been killed and thousands displaced in ethnically motivated massacres in northeastern Democratic Republic of Congo (DRC) since mid-May, according to government officials. Bigembe Turikonkinko, the sector chief of Katoyi in North Kivu's Masisi territory, has recorded the details of 120 people, primarily women and children, who were killed in 12 village massacres carried out between 17 and 22 May in Katoyi and its environs. The police commissioner in Katoyi, Capt Lofimbo Raheli, says the attacks were carried out by a coalition of two Mai-Mai groups: the Raia Mutomboki, until this year only operational in South Kivu, and the Mai-Mai Kifuafua. According to Raheli, this Mai-Mai alliance is believed to be operating as a collective of smaller groups targeting speakers of Kinyarwanda, the language of Rwanda."[22]

A witness to attacks on suspected Tutsi states:

"They would catch anyone who looks like a Rwandan and beat him and take them to the Rwandan border."[23]

Recruitment of Child soldiers

One of the charges listed against Bosco Ntaganda by the International Criminal Court is that he forcibly recruited child soldiers into his CNDP forces. There is strong evidence that he has resumed this odious practice during the present conflict. Human Rights Watch states:

"Gen. Bosco Ntaganda, who mutinied against the Democratic Republic of Congo in early April 2012, has forcibly recruited at least 149 boys and young men into his forces since April 19, Human Rights Watch said today. Ntaganda, a former rebel leader turned army general, is wanted by the International Criminal Court (ICC) on charges of war crimes for previous recruitment and use of child soldiers."[24]

[18] UN High Commissioner for Refugees (27 July 2012) UNHCR calls for protection of civilian population amid continued fighting in eastern DRC
[19] Human Rights Watch (11 September 2012) DR Congo: M23 Rebels Committing War Crimes
[20] ibid
[21] Oxfam (7 August 2012) Eastern Congo reaches new depths of suffering as militias take control
[22] IRIN News (12 June 2012) DRC: Scores killed as Mai-Mai target Kinyarwanda
[23] IRIN News (13 July 2012) DRC: Top officials warn against witch-hunts, hate speech
[24] Human Rights Watch (15 May 2012) DR Congo: Bosco Ntaganda Recruits Children by Force

This source also states:

"Ntaganda's fighters took children by force at school, from their homes, or from the roadside as they tried to flee on foot or on motorbike taxis. A number of those forcibly recruited were given quick military training, but the majority were immediately forced to porter weapons and ammunition to frontline positions. Many were put in military uniforms or partial uniforms."[25]

Further evidence comes from local resident Jean Claver Rukomeza who said: "I saw at least three or four little fighters accompanying each adult soldier."[26]

There have also been reports of Rwandans being conscripted into Ntaganda's forces. Human Rights Watch states:

"Field research conducted by Human Rights Watch in the region in May 2012 revealed that Rwandan army officials have provided weapons, ammunition, and an estimated 200 to 300 recruits to support Ntaganda's mutiny in Rutshuru territory, eastern Congo. The recruits include civilians forcibly recruited in Musanze and Rubavu districts in Rwanda, some of whom were children under 18. Witnesses said that some recruits were summarily executed on the orders of Ntaganda's forces when they tried to escape."[27]

Rwandan Support for M23

A particularly controversial aspect of this revolt is the degree to which Rwanda has been supporting the M23 rebels. Typical of the accusations against Rwanda is a Human Rights Watch report which states:

"In July, several hundred Rwandan army soldiers, possibly more, were deployed to eastern Congo to assist the M23 take the strategic border post town of Bunagana, Rumangabo military base, the towns of Rutshuru, Kiwanja, and Rugari, and surrounding areas. Local residents and M23 defectors reported earlier Rwandan army deployments in which Rwandan soldiers came for short periods to support the M23 in key battles, withdrew, and then returned when needed. A UN peacekeeping officer in North Kivu corroborated regular surges of support for M23. He told Human Rights Watch, 'Whenever [the M23] make a big push, they have additional strength.'"[28]

In response to these allegations the Rwandan government has vehemently denied any involvement in the M23 uprising. In an interview with the BBC president Paul Kagame stated:

"we are not connected at all with the cause of the uprising of M23. We are not supporting them, we do not intend to because we don't know what they are about or what they want."[29]

Evidence Gathered by the United Nations

The most convincing evidence against Rwanda is contained in a damning report compiled by a group of UN experts. The Introduction to this report states:

"Since the outset of its current mandate, the Group [of Experts] has gathered evidence of arms embargo and sanctions regime violations committed by the Rwandan Government. These violations consist of the provision of material and financial support to armed groups operating in the eastern DRC, including the recently established M23, in contravention of paragraph 1 of Security Council resolution 1807.[30]

An endorsement of this report comes from Richard Dowden, Director of the Royal African Society, who says:

"In compiling the report the highly respected team of researchers and experts consulted 106 organisations from the World Bank to local NGOs as well as hundreds of individuals. There are 75 pages of photographic and documentary evidence. It is hard not to read this well-researched and highly detailed report as anything other than prima facie evidence that the Rwandan government and military command are supporting, enabling and supplying rebels of the M23, Mouvement du 23 Mars, which is another name for the Congres national pour la defense du people, CNDP, in Eastern Congo."[31]

The Current Situation in North Kivu

At present there is an informal ceasefire between M23 and DRC government forces. Business Monitor Online offers the following view of this situation:

"A tacit cease-fire between mutinous soldiers and government troops has only allowed the crisis in the eastern Democratic Republic of the Congo to fester. While clashes between the M23 rebels and government troops have subsided, government administration has nearly collapsed, allowing a variety of dormant ethnic conflicts to reignite. We believe that the situation in the province will continue to escalate, and predict that more will soon join the 470,000 people who have fled their homes."[32]

[25] ibid
[26] Inter Press Service (2 July 2012) About 200 Children Fighting in Uprising in Eastern DRC
[27] Human Rights Watch (3 June 2012) DR Congo: Rwanda Should Stop Aiding War Crimes Suspect
[28] Human Rights Watch (11 September 2012) DR Congo: M23 Rebels Committing War Crimes
[29] BBC News (12 July 2012) DR Congo: UN helicopter gunship fires on M23 rebels
[30] United Nations Security Council (27 June 2012) Addendum to the interim report of the Group of Experts on the Democratic Republic of the Congo (S/2012/348) concerning violations of the arms embargo and sanctions regime by the Government of Rwanda
[31] Dowden, Richard (17 July 2012) Kagame and Congo – How Long Can He Deny Rwandan Involvement in the East?
[32] Business Monitor Online (1 October 2012) Crisis Grows As State Deteriorates

In a presentation to the US House of Representatives Jason Stears of the Rift Valley Institute speculates on the possible outcome of the North Kivu crisis as follows:

"The Congolese army cannot defeat the M23 with military might alone; sooner or later, a deal will have to be struck with the mutineers. An acceptable outcome would include the arrest of the worst offenders within the M23, including Bosco Ntaganda, who is wanted for war crimes by the International Criminal Court, and the reintegration of other officers and troops in the army, but redeployed elsewhere in the country. This would achieve the dismantling of CNDP structures in the eastern DRC."[33]

UN peacekeeping chief Herve Ladsous has accused M23 of setting up a parallel government in the territory that it now controls. According to ABC News:

"The M23 denies that it is creating a parallel administration to run the territory they have controlled for nearly two months in the north Kivu province and says it is only overseeing that the territory carries on being administered while they control it."[34]

In a report for BBC News journalist Andrew Harding postulates that:

"Its ultimate purpose is not to conquer territory or defeat enemies but to strengthen a negotiating position and to win, for its various partners, a bigger slice of power or money or security"[35]

Regarding Rwanda's involvement in the conflict he states:

"The origins of all this go back to the 1994 Rwandan genocide, and the subsequent flight of Hutu civilians and militias into DR Congo. Ever since, the Rwandan government has sought to crush the Hutu fighters responsible for the genocide, and to prevent them returning to undermine Rwanda's hard-won stability and economic growth. And so for years Rwanda has been accused of supporting various proxy armies in the eastern DR Congo, with or without the agreement of the Congolese government. Given the rampant and enduring corruption and chaos within the Congolese armed forces and government, Rwanda wants and - you could argue - needs its own loyal commanders in key positions of operational control in the eastern DR Congo in order to protect its own borders, its legitimate security interests and its far less legitimate economic interests."[36]

Regarding the outcome of this crisis the Institute for Security Studies states:

"Ultimately, the answer to the Great Lakes crisis lies with its leaders. A lack of will on their part will have one simple outcome: The Great Lakes will be plunged even further into chaos, and while the leaders enjoy the protection of well-armed and well-trained bodyguards, ordinary people will remain in the line of fire."[37]

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

[33] US House of Representatives Committee on Foreign Affairs (19 September 2012) Examining the Role of Rwanda in the DRC Insurgency (Testimony of Jason Stears, Rift Valley Institute)
[34] ABC News (22 September 2012) Congo M23 Rebels Accused of Forming Parallel Gov't
[35] BBC News (11 July 2012) The tactics behind DR Congo's mutiny
[36] ibid

[37] Institute for Security Studies (5 September 2012) Congo-Kinshasa: What Lies Between War and Peace in the Great Lakes?

"They're chasing these people to death"[38]:

Human Rights Defenders and Asylum

By Andrea Rocca, Front Line Defenders

The role that human rights defenders (HRDs) play in society is crucial. They are agents of social change, whose work is indispensable in order to bring about progress in communities that may be struggling for their basic rights. Whether they are defending the rights of children, the land rights of indigenous peoples or women's rights, they are instrumental in advancing respect for human rights and democracy.

The work HRDs carry out is broad and diverse as to the issues addressed and can take many shapes and forms, from documenting and exposing human rights violations and advocating for justice to assisting victims. It is a work, however, that is not without risks. For many of them, their engagement in the fight for human rights comes at a high price and their commitment is tested on a daily basis. In many countries, due to their denunciations of abuses, unjust policies or their fight against corruption or tyranny, they become the target of reprisals by the perpetrators of injustice, be they State or non-State actors. On account of their work, they become victims themselves. In 2011, Front Line Defenders publicly reported on the cases of 594 human rights defenders at risk in 70 countries.

Across the globe, they are arbitrarily arrested, threatened, subjected to smear campaigns, assaulted, tortured, subjected to spurious charges and unfair trials, forcibly disappeared and killed. The killing of human rights defenders is unabated across all world regions. In Brazil, one of the only countries in the world with a governmental protection programme specifically designed for human rights defenders, several HRDs and their family members were murdered in 2011 as a result of their legitimate human rights work. Sebastião Bezerra da Silva was murdered in February for his work on extrajudicial killings; land activist Adelino 'Dinho' Ramos and environmentalist José Cláudio Ribeiros da Silva and his wife were killed in May; environmentalist and community leader Joao Chupel Primo was murdered in October. In Africa, the beginning of 2011 was marked by the killing of prominent Ugandan human rights defender David Kato, whose work focused on the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people. The attack against Kato followed a deterioration of the security situation for all LGBTI rights defenders in Uganda, who saw their names and photos repeatedly published together with threats in the media. HRDs and journalists were also killed in Colombia, Democratic Republic of Congo, El Salvador, Guatemala, Honduras, India, Indonesia, Iraq, Pakistan, the Philippines, Thailand, and Yemen. These killings were across a broad range of human rights issues: those who lost their lives included environmentalists, trade unionists, journalists, HRDs working on sexual orientation and gender identity, indigenous peoples' rights, elections, corruption, women's rights, land, and community rights.

Moreover, these human rights defenders are murdered in societies where impunity is rife. Their killings are rarely investigated effectively and the perpetrators brought to justice. This was the case in Burundi for the murder of prominent HRD Ernest Manirumwa in 2009. Even though a powerful national campaign demanding justice was initiated and foreign experts were heavily involved in the investigation, justice was not delivered. Similarly, the 2009 killing of Natalya Estemirova, who did extraordinary work exposing human rights abuses in Chechnya, remains unpunished. Impunity has the effect of further encouraging attacks against human rights defenders, as the perpetrators know they will not pay a price for their violent actions.

The ultimate goal of organisations such as Front Line Defenders, who support HRDs at risk, is to ensure that they can continue to carry out their legitimate work safely in their own country. If this is not possible and they have been forced to flee, we view this as a failure. However, the picture outlined above gives a clear idea of why at times HRDs may have no other choice but to leave. In certain contexts, there may be no security plan or security measure that can effectively prevent a serious attack from occurring.

[38] Human rights defender Enrique Morones about the treatment of Mexican migrants attempting to cross the border with the US. The quote also aptly describes the situation of human rights defenders who are forced to flee their own countries due to persecution because of their human rights work.

When in life threatening situations, many HRDs courageously, and at times recklessly, decide to continue their work unchanged. In some cases, taking good security precautions or going into hiding temporarily, even within the same country, may be an effective solution. In other cases, fleeing their country, at least temporarily, may be the only effective option. Facing serious threats for a long time, this may appear as the only escape route. Going abroad for a short period of time, from a few days to a couple of months, may be relatively easy for those HRDs who have the means or are well connected with local or international support structures. However, when they have to stay out of their country for a longer period of time or permanently, this is often the start of a very long and difficult process.

Support structures for HRDs at risk do exist at the national, regional and international levels. Nationally, in some countries, human rights NGOs have come together to establish a national NGO protection mechanism which can support HRDs at risk by carrying out advocacy and campaigning on their case, help the HRD go temporarily into hiding or providing security measures. These structures are also important to quickly alert other actors who may be in a position to help, such as embassies or international NGOs. However, their number is very limited. Such initiatives exist, for example, in Guatemala, Kenya and Zimbabwe. Typically they are established in countries where HRDs have worked under severe pressure and high risks for a number of years, and where therefore the need for protection is more acute. Similar initiatives also exist at the regional level. Examples exist in South-East Asia and the East and Horn of Africa.

Internationally, several organisations work on the issue of human rights defenders, from different angles and with different approaches. Front Line Defenders was established specifically to support the protection and security of human rights defenders at risk across the entire world. We adopt a comprehensive approach to the protection and security of HRDs, by providing international and national advocacy, practical support including security grants and training in protection. Other initiatives have been established internationally, focussing on certain aspects only or having a more limited geographical scope.

Broadly speaking, situations where HRDs need to flee their country can be categorised in three groups according to the length of time they need to stay away. While what follows is a generalisation, it helps identify the different challenges HRDs face when leaving their country. In general, the longer an HRD needs to stay away the fewer are the options and the support available. Where they can assist with relocation abroad, the support structures mentioned above can in most cases only help in the short term, for a temporary stay. In principle Front Line Defenders can provide transport, accommodation and living expenses to a HRD in a life threatening situation for a maximum of three months.

The situation is different when an HRD needs to stay away from his or her country for a period longer than a few months and up to approximately one year. They can still avail of support by Front Line Defenders or other organisations for the initial few months, but different options must then be explored for the remaining period. This may include enrolling in an academic course, seeking a paid internship in an NGO or other institution, or a fellowship which some universities and international NGOs offer. However, their number is extremely limited and certainly does not meet the demand. Furthermore, there is often a selection process which may take considerable time. For the many who cannot access these options, there is no structural support available and they need to find their own way. For them, as well as for those needing to stay away for the long term, i.e. more than a year, the remaining option is seeking asylum.

Before turning to this however, it is worth highlighting a difficulty which is always encountered, regardless of the length of the stay abroad: obtaining a visa. Some positive initiatives exist. Certain European countries have adopted fast-track visa procedures issued on humanitarian grounds for HRDs at risk who need to leave temporarily. Countries with such procedures include Ireland and Spain. Other countries, while not having a formal separate fast-track procedure, also issue urgent visas to HRDs at risk. This is the case, for example, of Norway, Sweden and Finland. These however are exceptions rather than the rule, and, overall, the picture is very negative. Most Western countries have become increasingly strict in delivering visas and they would deny it if they suspect that the applicant may seek asylum once in their territory. Furthermore, even when there is an actual prospect of obtaining a visa, the process often takes weeks. This does not make it a viable option when the HRD has to flee urgently. In this situation, the most effective option is to travel to a country where the HRD concerned can enter without a visa.

When applying for asylum, a lot depends on where asylum is sought. Some HRDs who decide to leave their country for good, express the wish to settle in a Western country. This may be understandable as in some countries, in particular Northern European countries, there are State support structures which assist the applicant during consideration of the asylum application. Such structures may provide accommodation or a living allowance to cover basic living expenses. Even within Western Europe, however, the picture is very mixed, with some countries such as Italy having extremely poor support available.

A further consideration is the chance of a favourable decision. A Sudanese human rights defender who sought asylum in Ireland in 2009, had his application rejected despite the fact that, in our view, he had very strong evidence of persecution and torture in his own country because of his human rights work. The rate of acceptance of asylum applications in Ireland in 2011 was 3.27%, an increase compared to a 2010 rate of 1.3% at first instance. In Europe in the same year, the average acceptance rate was 24%.[39]

European countries establish and maintain relationships, through their embassies, with HRDs in third countries. HRDs are a very valuable source of information for diplomats. A pre-existing relationship with a European embassy is a crucial factor when a life threatening situation arises. We have witnessed cases where such a relationship was the determining factor in ensuring the speedy delivery of an emergency visa and at times the granting of asylum. However, in all countries, it is only well established national NGOs who have such relations with embassies. The vast majority of HRDs, in the capital and outside, would not. Furthermore, even when such a relationship exists, the granting of an emergency visa or asylum remains exceptional.

In non-Western countries the situation is different in many respects, but not easier. Within some regions, it may be easier to move across borders. Nationals from countries in East Africa, for example, can enter Uganda –which receives a high number of refugees from across Eastern Africa– without a visa. While Uganda has close security ties with several countries in the region, it is generally viewed as a relatively safe place for HRDs fleeing from countries in the region. Both the Ugandan Government and the UNHCR field office would assess asylum applications. Passing this step is a requirement for UNHCR to explore the possible relocation to a third country. During this long time, the HRD must find the means to look after himself. Far from their country, their family, friends and colleagues and without local connections, this is extremely challenging.

The vast majority of HRDs who are forced to flee their country want to be able to return in order to continue their work. In the experience of Front Line Defenders the majority of them are eventually able to do this. But sometimes HRDs are forced to apply for asylum because there is no other option to receive temporary protection. For some HRDs, simply having the possibility to leave at short notice, for example by having a multiple entry visa for another country, is enough for them to feel they can continue to work in very difficult environments. This is why we advocate for specific protection.

Another aspect of the link between human rights defenders and the issue of asylum is that of HRDs who, in their own country, assist migrants and asylum seekers. The general hostility often found in our societies towards immigrants and asylum seekers often extends to those who help and assist them, especially when they work at the grassroots level.

We would like to mention the example of US human rights defender Enrique Morones, who dedicated his life to the rights of illegal immigrants attempting to enter the US from Mexico. He has been the voice of people in need on both sides of the border, and a regional and national advocate for border activists and organizations. He set up Border Angels, an organisation trying to prevent immigrants dying on the trek across the deserts surrounding the Mexican-American border. In summer they provide water, in winter, clothes and they always strive to combat the myths surrounding immigration to politicians, media and neighbours. He is best known for shutting down Americas Minutemen in California and speaking out on racial profiling.

For eight years, Enrique Morones has been a leader of the opposition to Project Gatekeeper. The wall forces migrants to traverse 6000 foot mountains where temperatures below freezing are likely for half of the year, or deserts with forty-five degree centigrade heat and ten meter sand dunes. Since the wall went up, 2650 people have died trying to enter California or Arizona, about one person per day. Half of these deaths have been from exposure in the desert, most of those from heat stress, a long and excruciating event. As always, women and children are the most vulnerable.

[39] Source: Irish Refugee Council. See http://www.irishrefugeecouncil.ie/news/irish-refugee-council-urges-minister-to-address-root-causes-of-problems-in-the-asylum-and-immigration-systems/744

As a result of his engagement, he has been targeted by hate groups like the Minutemen and other vigilante groups organized to "hunt" immigrants. He has been vilified by opposing politicians and news outlets. He has been shunned by potential business clients and was dismissed from his job. He receives weekly phone and often personal hate calls and threats, including death threats, and eventually had to have undercover police protection.

While police and the border authorities adopted a neutral approach to Enrique Morones's work and provided him protection when threatened, police may at times be the source of intimidation against HRDs working on migration. In Italy, Canadian human rights defender Georges Alexandre was subjected to an extensive and irregular search by the police. He was in the island of Lampedusa for approximately five months to monitor the arrival of immigrants by boat and their treatment by the authorities. In April 2011 he was eventually stopped by police while in his van. The officers stated it was a routine search. However, he was questioned about his work and his human rights monitoring activities and his van was searched for approximately two hours. He was then taken to the local police station and further questioned for more than an hour by other officers. His laptop computer was also searched. He was eventually released and only then was he informed of his right to be assisted by a lawyer during the (already occurred) search.

The issue of HRDs having to flee their own country for the medium or long term is certainly the most difficult one to address for the international human rights movement, and cannot be effectively solved until the root causes forcing HRDs to flee are solved. It poses challenges that cannot be addressed by individual organisations, but would require a strong and concerted effort of those international actors, governmental and non-governmental, interested in the protection of HRDs. A positive recent scheme that may help in supporting at least medium term support to HRDs at risk is the Shelter Cities initiative, a network of European cities who can host an HRD from outside the EU for a period of six months, after short-term emergency support has ended. However, initiatives like the Shelter Cities or fast-track visa procedures remain far too limited to address the problem.

"Everything still needs to be built or rebuilt":[40] The Experience of South Sudan ~ The World's Newest Country

Patrick Dowling, RDC Researcher

Cleaning Juba

On the ninth of July 2011 people all over South Sudan celebrated their independence:[41] South Sudan had become the world's newest country, formally seceding from Sudan.[42] The crowd that congregated in the capital Juba, erupted as the "Sudanese flag was lowered for the last time and the new colours of the Republic of South Sudan were hoisted".[43] Independence for South Sudan came after an armed conflict where over two million lives were lost.[44] The World Bank notes how Juba has been cleaned up for the occasion "drabbed in its best colors".[45] IRIN News warns however, that the new country "will require more than unfurling the colours of the new nation".[46] Indeed a power outage during the independence celebrations in Juba, alongside logistical hindrances, served as a symbolic reminder to South Sudan, the enormous challenges ahead administering a country.[47]

Great expectations

A report issued in 2012 suggests that the government of South Sudan has been unable to "meet the overwhelming challenge of building a new state in the face of citizens' expectations of rapid improvements to

[40] Title derives from page 3 of the following report: Reporters Without Borders (5 July 2012), *South Sudan: World's Youngest Country Yet to Embark on Road to Civil Liberties* http://fr.rsf.org/IMG/pdf/report_rwb_south_sudan.pdf

[41] NGO Coalition (6 September 2011), *Getting it Right from the Start: Priorities for Action in the New Republic of South Sudan*, p.6 http://reliefweb.int/sites/reliefweb.int/files/resources/fullreport_162.pdf

[42] United Nations News Centre (9 July 2011), *As South Sudan celebrates independence, UN vows support in quest for peace, prosperity* http://www.ein.org.uk/members/country-report/south-sudan-celebrates-independence-un-vows-support-quest-peace-prosperity

[43] *Ibid*.,

[44] New York Times (7 July 2011), *South Sudan, the Newest Nation, Is Full of Hope and Problems* http://www.nytimes.com/2011/07/08/world/africa/08sudan.html

[45] World Bank (8 July 2011), *South Sudan (Republic of): Southern Sudan Prepares for Independence Day Celebrations* http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-424858.pdf

[46] IRIN News (8 July 2011), *Sudan: Beyond the euphoria of Southern independence* http://www.irinnews.org/Report/93178/SUDAN-Beyond-the-euphoria-of-Southern-independence

[47] Inter Press Service (10 July 2011), *South Sudan: Witnessing the Birth of a New Country* http://www.ein.org.uk/members/country-report/south-sudan-witnessing-birth-new-country

their daily lives".[48] People's hopes have been "sky-high".[49] One resident states that she wants her "children to live in a free country with education and healthy living. I hope the new government in Southern Sudan will deliver these things".[50] It is a time for celebration in South Sudan but there is little time to celebrate.[51]

"Everything is a priority"

Oxfam in July 2012, after one year of independence for South Sudan, notes that more than half of the population does not have enough food[52]. It is a country which is one of the world's least developed regions, profoundly lacking in "physical infrastructure" and the provision of "basic state services".[53] In an interview with a World Bank official President Kirr was asked what he would prioritise, reportedly responding that "Everything is a priority."[54] Elsewhere Kirr stated that there "has been no development in South Sudan. We have no roads, no bridges, no water, no power, nothing at all, no hospitals, and no schools".[55] The United Nations in 2012 states that South Sudan "has faced multiple crises on the security, economic and humanitarian fronts".[56]

Ethnicity

Independence for South Sudan in 2011 was not the only prominent news deriving from the world's newest country: "headlines have been dominated by the violent activities of existing militias, and the announcements of new ones emerging".[57] The New York Times called what was happening "a vortex of violence", where bitter ethnic animosities, only partially in abeyance during the vote for independence, erupted again into "a cycle of massacre and revenge".[58] In the years prior to independence ethnic conflict pervaded in the region: the Small Arms Survey reported an "upsurge" in intra-communal violence in Southern Sudan in 2009;[59] the same source noted that in the year before independence four heavily armed rebellions broke out in Southern Sudan;[60] the Centre for Research on the Epidemiology of Disasters noted the prevalence of "armed inter-ethnic clashes" during 2010 in all of Southern Sudan's ten states;[61] the International Federation for Human Rights in July 2011 reported that more people had died in ethnic conflict in 2011 than in the entirety of the previous year;[62] a paper issued by the United Nations World Food Programme in February 2012 noted 15 inter-ethnic fighting forces in South Sudan.[63] The New York Times reports on "heavily armed militias…marching on villages and towns with impunity, sometimes with blatantly genocidal intent".[64] The aftermath of one attack left a "trail of corpses…stretch[ing]…for miles into the bush".[65] There are over fifty ethnic groups and

[48] Freedom House (2 August 2012), *Freedom in the World 2012 - South Sudan*
http://www.unhcr.org/refworld/country,,FREEHOU,,SSD,,501fcc098,0.html

[49] International Crisis Group (4 April 2011), *Politics And Transition In The New South Sudan*, p.17
http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/sudan/172%20-%20Politics%20and%20Transition%20in%20the%20New%20South%20Sudan

[50] Minority Rights Group International (15 June 2011), *Southern Sudan: The Role of Minority Rights in Building a New Nation*, p.4
http://www.minorityrights.org/10824/briefing-papers/southern-sudan-the-role-of-minority-rights-in-building-a-new-nation.html

[51] International Crisis Group, *op.cit.*, p.5

[52] Oxfam (July 2012), *South Sudan Crisis*
http://www.oxfam.org.uk/what-we-do/emergency-response/south-sudan-crisis

[53] Democracy Reporting International (2011), *South Sudan: Report, Prospects for Democracy in the World's Newest State*, p.6
http://aceproject.org/ero-en/regions/africa/SS/south-sudan-report-prospects-for-democracy-in-the/view

[54] The North-South Institute (29 May 2012), *Uneasy Neighbours: The Elusive Quest for Peace and Stability in the Sudans*, p.7
http://www.humansecuritygateway.com/documents/NSI_UneasyNeighbours_TheElusiveQuestforPeaceandStabilityintheSudans.pdf

[55] Overseas Development Institute (July 2012), *Livelihoods, Basic Services and Social Protection in South Sudan*, p.20
http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?fecvnodeid=140011&groupot593=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&dom=1&fecvid=33&ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&v33=140011&id=146174

[56] United Nations Security Council (26 June 2012), *Report of the Secretary-General on South Sudan*, p.20
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/384/71/PDF/N1238471.pdf?OpenElement

[57] Enough Project (18 April 2011), *Armed Groups Vie for Power in South*
http://www.enoughproject.org/blogs/armed-groups-vie-power-south-sudan

[58] New York Times (12 January 2012), *Born in Unity, South Sudan Is Torn Again*
http://www.nytimes.com/2012/01/13/world/africa/south-sudan-massacres-follow-independence.html?_r=1&hp=&pagewanted=all
See also:
The Guardian (10 January 2012), *Explainer: violence in South Sudan*
http://www.guardian.co.uk/global-development/2012/jan/10/explainer-violence-in-south-sudan
For a discussion of how the civil war(s) impacted upon the dynamics of ethnic relations in Southern Sudan, see also:
Saferworld (February 2012), *Civilian Disarmament in South Sudan, A Legacy of Struggle*, p.3
http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?fecvnodeid=140011&groupot593=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&dom=1&fecvid=33&ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&v33=140011&id=140727 &
Overseas Development Institute, *op.cit.*, p.3

[59] Small Arms Survey (July 2012), *Small Arms Survey 2010: Chapter 11. Back to the Brink: Armed Violence in Southern Sudan*, p.277
http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2010/en/Small-Arms-Survey-2010-Chapter-11-EN.pdf

[60] Small Arms Survey (March 2012), *Reaching for the Gun, Arms Flows and Holdings in South Sudan*, p.4
http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?fecvnodeid=140011&groupot593=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&dom=1&fecvid=33&ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&v33=140011&id=142807

[61] Centre for Research on the Epidemiology of Disasters (1 July 2011), *Health Data in Civil Conflicts: South Sudan under Scrutiny*, p.9
http://cred.be/sites/default/files/WP_282.pdf

[62] International Federation for Human Rights (1 July 2011), *Beyond the Pledge: International Engagement After Sudan's Comprehensive Peace Agreement*, p.2
http://www.fidh.org/IMG//pdf/BeyondThePledge_UK.pdf

[63] United Nations World Food Programme(February 2012), *South Sudan, Annual Needs and Livelihood Analysis Report*, p.31
http://documents.wfp.org/stellent/groups/public/documents/ena/wfp245820.pdf

[64] New York Times, *op.cit.*,

[65] *Ibid.*,

nearly six hundred ethnic sub-groups in Southern Sudan, who all compete, sometimes violently, for the same limited resources.[66]

120 doctors

The United Nations in 2012 contends that food scarcity is one of the most perilous threats to the security of South Sudan.[67] It is a country where over four million people are "at risk of food insecurity", with over a million people at severe risk.[68] Poverty is widespread.[69] Economic development is hindered by a profound absence of infrastructure.[70] South Sudan also lacks in the provision of health, having "some of the worst indicators of health and human development of any country".[71] It is a country with approximately "120 medical doctors and just over 100 registered nurses for an estimated population of nearly nine million people".[72] Out of every 100,000 live births over 2,000 women die, making South Sudan the most dangerous place in the world to give birth.[73] The population of South Sudan increases daily as refugees arrive from ongoing conflicts in Sudan.[74] The Red Cross in June 2012 estimates that over 375,000 people have crossed into South Sudan from Sudan since late 2010, seeking a place in the new country.[75]

Picture depicts a refugee from Sudan with the wooden pole used to carry her children across the border to South Sudan

UNHCR/B.Sokol c2011/2012

Sudan

Landlocked South Sudan is dependent on the infrastructure of Sudan for routing and export of its oil, and in January 2012 Juba shut down its crude output in a disagreement with Khartoum over how much should be paid for this;[76] revenues from oil account for 98% of state income for South Sudan.[77] Conflict broke out on the borderlands between the two countries in March and April 2012 which included bombing raids, cross-border incursions, occupation of oil fields and respective support to proxy militias and rebels.[78] In

[66] Minority Rights Group International, *op.cit*., p.1
[67] United Nations Security Council, *op.cit*., p.17
[68] United Nations World Food Programme, *op.cit*., p.1
[69] Overseas Development Institute, *op.cit*., p.2
[70] World Bank (September 2011), *South Sudan's Infrastructure, A Continental Perspective*, p.15
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/09/27/000158349_20110927142346/Rendered/PDF/WPS5814.pdf
[71] World Bank (2012), *Education in the Republic of South Sudan, Status and Challenges for a New System*, p.19
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/06/28/000333038_20120628035809/Rendered/PDF/705950PUB0EPI0067902B09780821388914.pdf
[72] International Committee of the Red Cross (6 July 2012), *South Sudan: desperate struggle for health care in world's newest nation*
http://www.icrc.org/eng/resources/documents/news-release/2012/south-sudan-news-2012-07-06.htm
[73] Voice of America (16 July 2012), *South Sudan Still Most Dangerous Country For New Mothers*
http://www.ein.org.uk/members/country-report/south-sudan-still-most-dangerous-country-new-mothers
See also:
IRIN News (20 July 2012), *South Sudan: The biggest threat to a woman's life*
http://www.ein.org.uk/members/country-report/south-sudan-biggest-threat-womans-life
[74] Refugees International (25 May 2012), *South Sudan Nationality: Commitment Now Avoids Conflict Later*
http://www.refugeesinternational.org/policy/field-report/south-sudan-nationality-commitment-now-avoids-conflict-later;
Inter Press Service (9 July 2012), *South Sudan Celebrates a Troubled First Birthday*
http://www.ein.org.uk/members/country-report/south-sudan-celebrates-troubled-first-birthday

[75] International Federation of Red Cross and Red Crescent Societies (11 June 2012), *Independence brings its own challenges as thousands return to South Sudan*
http://www.ifrc.org/en/news-and-media/news-stories/africa/south-sudan/independence-brings-its-own-challenges-as-thousands-return-to-south-sudan-57853/
[76] Reuters (21 August 2012), *Preview-Sudan, S.Sudan to talk security, eyeing oil restart*
http://www.trust.org/alertnet/news/preview-sudan-ssudan-to-talk-security-eyeing-oil-restart/
[77] Reuters (4 September 2012), *Sudan, S. Sudan resume border talks with eye to oil*
http://www.reuters.com/article/2012/09/04/sudan-southsudan-idUSL6E8K41OZ20120904
This news report also points out that: "The U.N. Security Council has set a Sept. 22 deadline for the two sides to solve their issues or face sanctions".
Another Reuters report states that the: "…war with Sudan devastated South Sudan, leaving it with almost no industry or infrastructure outside the oil sector".
Reuters (31 August 2012), *S. Sudan to move capital despite oil shutdown - minister*
http://www.reuters.com/article/2012/08/31/southsudan-capital-idUSL6E8JVA2V20120831
[78] Minority Rights Group International (24 May 2012), *South Sudan faces threat of more killings as country jumps in 'Peoples Under Threat' 2012 ranking*
http://www.minorityrights.org/11340/press-releases/south-sudan-faces-threat-of-more-killings-as-country-jumps-in-peoples-under-threat-2012-ranking.html &

May 2012 the United Nations declared that the area along the borderlands between Sudan and South Sudan represented a "serious threat to international peace and security".[79]

State writ

The International Crisis Group notes the ongoing lack of a "peace dividend" for newly independent South Sudan,[80] where citizens have been subject to numerous human rights violations and an absence of protection, from the army and police respectively.[81] The capacity of the government in the provision of security for the country is severely limited outside of Juba; and there, in state capitals, is curtailed by deficiencies in infrastructure and administration.[82] Most citizens of the nascent state look to local ethnic chiefs and traditional structures for resolution of security issues, having little faith in Juba's authority.[83] A report by the International Federation for Human Rights on the initial governance of South Sudan since independence, said it has "not been encouraging".[84] The United Nations notes the lack of ratification of African and international human rights instruments, including latterly ICCPR, CERD & CEDAW, and that state agents are rarely held accountable for their actions.[85] Arbitrary arrests and a growing culture of "political intolerance" are two concerns similarly raised by Amnesty International.[86]

"The greatest statebuilding challenge in the world"

The full expression of a democratic process is one of the challenges facing the new state of South Sudan as it forges the institutions and mechanisms of a state apparatus, which also includes the provision of security and deliverance of basic services to its people.[87] Yet being one of the poorest and most undeveloped countries in the world, South Sudan "needs just about everything – schools, roads, clinics – and it needs them almost everywhere".[88] It is predominantly a rural society, living off subsistence agriculture, "with very low levels of human capital".[89] Most of the available labour force lack the requisite skills "to perform basic jobs, having spent their productive lives employed as full-time warriors instead of workers".[90] A generation of conflict has traumatized South Sudan and "been absorbed into its DNA. War has marked the past and…continues to shape the present".[91] The nebulous idea of national identity means that most South Sudanese coalesce around their local ethnicity;[92] South Sudanese predominantly source their security requirements from those same traditional outlets, as opposed to the central state.[93] The continuing conflicts abounding in South Sudan represent a considerable threat to the burgeoning state[94] and the government has yet to establish the corporate wherewithal to contend with such challenges as it struggles to "make the psychological transition from a rebel group used to issuing orders to a professional government that is accountable and responsible to its citizens".[95] The new nation of South Sudan resides in one of the most remote regions of Africa, where, most of the population lives in unchartered lands and much of the country is inaccessible; as "one official wonders, "How to administer a territory you cannot visit?" ".[96] As the world's newest country, South Sudan "represents perhaps the greatest statebuilding challenge in the world today".[97]

IRIN News (9 July 2012), *Briefing: South Sudan One Year on from Independence* http://www.irinnews.org/Report/95826/Briefing-South-Sudan-one-year-on-from-independence

[79] Minority Rights Group International, *op.cit*.,

[80] International Crisis Group, *op.cit*., p.1

[81] Amnesty International (30 June 2011), *South Sudan: A human rights agenda*, p.1 http://www.amnesty.org/en/library/asset/AFR65/001/2011/en/cc8a1b83-3f66-4391-9fb9-d0074ffe5c89/afr650012011en.pdf

[82] International Crisis Group, *op.cit*., p.18

[83] The North-South Institute, *op.cit*., p.8

[84] International Federation for Human Rights, *op.cit*., p.15

[85] United Nations Office of the High Commissioner for Human Rights (Undated), *OHCHR in South Sudan (2012-2013)* http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/SSSummary2012-2013.aspx

[86] Amnesty International, *op.cit*., p.2

[87] The African Centre for the Constructive Resolution of Disputes (1 October 2011), *The New Sudans: The First 100 Days*, p.3 http://www.accord.org.za/downloads/brief/policy_practice11.pdf

[88] Minority Rights Group International (15 June 2011), *Southern Sudan: The Role of Minority Rights in Building a New Nation*, p.4 http://www.minorityrights.org/10824/briefing-papers/southern-sudan-the-role-of-minority-rights-in-building-a-new-nation.html

[89] World Bank (March 2011), *A Poverty Profile for the Southern States of Sudan*, p.12 http://siteresources.worldbank.org/SUDANEXTN/Resources/South-Sudan-Poverty-Profile.pdf

[90] United States Agency for International Development (February 2011), *Statebuilding In Situations Of Fragility And Conflict*, p.18 http://csis.org/files/publication/110218_Statebuilding_in_Situations_Fragility_Conflict.pdf

[91] Reporters Without Borders, *op.cit*., p.5

[92] Saferworld (March 2012), *South Sudan: Challenges of Inter-Communal Violence and Militia Mobilisation*, p.3 http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?fecvnodeid=140011&groupot593=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&dom=1&fecvid=33&ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&v33=140011&id=142329

[93] United States Agency for International Development, *op.cit*., p.19

[94] Democracy Reporting International, *op.cit*., p.3 http://aceproject.org/ero-en/regions/africa/SS/south-sudan-report-prospects-for-democracy-in-the/view

[95] United States Agency for International Development, *op.cit*., p.18

[96] The Economist (3 February 2011), *South Sudan's future, Now for the hard part* http://www.economist.com/node/18070450?story_id=18070450&fsrc=rss

[97] United States Agency for International Development, *op.cit*., p.17

An effective remedy in the context of asylum applications: a comparative study between France and Ireland

Aoife Mc Mahon BL[*]

EUROPEAN CONTEXT

There has been much judicial and academic attention paid to the notion of an "effective remedy" in the context of asylum applications in recent times both at national and European level. The context of this is the growing competence of the European Union (EU) in the area of fundamental rights. A complex interplay of systems has resulted – between the Strasbourg and Luxembourg courts and between the courts at Union and national level. Ensuing judicial dialogue between these jurisdictions has endeavoured to elucidate the meaning of common notions of fundamental rights.

At European level, this notion of an "effective remedy" was initially to be found at article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which provided for the right to an effective remedy in the following terms:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The European Court of Human Rights (ECtHR) has interpreted this provision in a large number of cases throughout the years. Whereas article 6 has been found not to apply to asylum proceedings[98], article 13 may be engaged where there is an arguable case that another right set out in the ECHR has been violated[99]. In the asylum context (as *a priori* there is no right to asylum contained in the ECHR), such other rights are commonly articles 3 and 8 ECHR and in this regard, the scope of article 13 varies depending on the nature of the applicant's complaint[100].

The Strasbourg Court has consistently held that the rights guaranteed by article 13 ECHR are not as far reaching as those provided for by article 6[101], but the extent of this distinction has yet to be clarified. In the *Silver* case, several principles on the interpretation of article 13 as distilled from the case-law of the ECtHR were set out as follows:

> (a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided[102] and, if appropriate, to obtain redress...
>
> (b) the authority referred to in article 13 may not necessarily be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective...
>
> (c) although no single remedy may itself entirely satisfy the requirements of article 13, the aggregate of remedies provided for under domestic law may do so...
>
> (d) neither article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law...[103].

While principle (b) states that a "national authority" for the purposes of article 13 need not necessarily be a judicial authority, the ECtHR has looked at several factors on a case by case basis in order to determine whether in reality the remedy before it is effective. These factors include whether or not the authority has the power to render legally binding decisions[104], whether or not the authority has access to all relevant

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[98] *Maaouia v. France*, application no. 39652/98, judgment of 12th January 1999 and *Mamatkulov and Askarov v. Turkey*, application no.s 46827/99 and 46951/99, judgment of 4th February 2005.

[99] *Silver and Others v. UK*, application nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, judgment of 25 March 1983, para. 113; *Leander v. Sweden*, Application No. 9248/81, judgment of 26 March 1987, para. 77; *C˘onka v. Belgium*, application no. 51564/99, judgment of 5th February 2002, para. 75.

[100] *C˘onka v. Belgium*, *op. cit.*, para. 75.

[101] *Sporrong and Lonnroth v. Sweden*, application no.s 7151/75; 7152/75, judgment of 23rd September 1982, para. 88; *Silver and Others v. UK*, *op. cit.*, para. 110.

[102] From the cases of *Vilvarajah and Others v. the United Kingdom*, application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991, para. 121 and *Chahal v. the United Kingdom*, application no. 22414/93, report of 27 June 1995, when article 3 ECHR rights of concern, judicial review may be sufficient provided there is anxious scrutiny of the merits of the claim.

[103] *Silver and Others*, *op. cit.*, para. 113. Affirmed in the cases of *Leander v. Sweden*, *op. cit.*, para. 77 and *C˘onka v. Belgium*, *op. cit.*, para. 75.

[104] *Silver and Others v. UK*, *op. cit.*; *Leander v. Sweden*, *op. cit.*; *Chahal v. the United Kingdom*, *op. cit.*.

information[105], the independence of the authority[106], whether or not an application to the authority has suspensive effect[107] and whether or not any time limits for making an application to the authority are reasonable[108].

EU law seems on paper to afford greater protection to the right to an effective remedy in the asylum context. The Charter of Fundamental Rights of the European Union (CFREU) has had binding legal status since the coming into force of the Lisbon Treaty on 1st December 2009. This Charter provides for an express right to asylum (article 18) and a right to an effective remedy (article 47), the latter combining the content of both articles 6 and 13 ECHR.

Secondary law of the EU expands on this: the Procedures Directive 2005/85/EC lays down minimum standards for asylum procedures in the EU and again provides for a specific right to an effective remedy before a court or tribunal at article 39. Recital 27 thereof explains that this phrase "court or tribunal" is to be interpreted within the meaning of article 234 TEC[109] and, similar to principle (c) above, that the effectiveness of the remedy "depends on the administrative and judicial system of each Member State as a whole". The first clause of this recital opens the door to the case-law of the Luxembourg Court concerning article 234 for the interpretation of "court or tribunal".

Considering the case-law from Luxembourg, five criteria for determining whether or not a body is a "court or tribunal" within the meaning of article 234 TEC were set out in the case of *Vaasen-Gobbels* as follows: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes* and whether it applies the rule of law[110]. In later case-law, the criterion of independence was added to this list[111]. Given the interest of the EU in ensuring that Union law is interpreted in a uniform manner, it seems that the Court of Justice generally endeavours to interpret this phrase expansively in order to make the preliminary reference procedure available to all bodies responsible for dealing with questions of Community law. As such, this case-law is of limited assistance for the purposes of elucidating the meaning of an "effective remedy" in the context of asylum applications.

National legislatures and courts are left with the formidable task of deciphering this systems interplay in order to determine how the notion of an "effective remedy" should be interpreted. This article proposes a useful exercise in this regard. If the Procedures Directive is a stepping stone towards the long term aim of establishing a Common European Asylum System, Member States could from now take the initiative of looking to the systems of their counterparts and gleaning therefrom best practices to be adopted. To this end, a comparative study will be undertaken between the procedures in place in the French and Irish asylum application systems, more particularly at the appeal stage from an initial administrative decision, with a view to examining how this notion of an effective remedy is and should be interpreted.

COMPARATIVE STUDY

This paper sets out the main features of the *Cour nationale du droit d'asile* (CNDA), to some extent the French equivalent of the Irish Refugee Appeals Tribunal (RAT), and considers the main distinctions between the two bodies under five headings: nature, suspensive effect, independence, transparency and time limits.

It is first necessary to draw attention to certain differences between the French and Irish legal systems as a whole. French administrative law is conducted in specialised administrative courts. To challenge any action or measure of the executive[112], an action must be taken before the *Tribunal administratif* (the administrative court), with appeal to the *Conseil d'Etat* (the Council of State - the highest administrative court). In these administrative courts, and reflecting the inquisitorial nature of the French civil law system, the role of the *rapporteur public* (until recently the *commisseur du gouvernement*) is unique. Article 7 of the *Code de justice administrative* defines this position as a member of the court who sets out publicly, and in all independence, his or her opinion on the issues that fall to be decided in a given case and the possible solutions that could be reached. This is simply an objective opinion given independent of the parties in administrative proceedings, but nevertheless reveals the investigative nature of the French civil law courts in contrast to the more adversarial common law courts.

[105] *Leander v. Sweden*, *op. cit.*; *Chahal v. the United Kingdom*, *op. cit.*.
[106] *Klass and Others v. Germany*, application no. 5029/71, judgment of 6th September 1978; *Silver and Others v. UK*, *op. cit.*; *Leander v. Sweden*, *op. cit.*.
[107] *C˙onka v. Belgium*, *op. cit.*; *Gebremedhin v. France*, application no. 25389/05, judgment of 26th April 2007.
[108] *Jabari v. Turkey*, application no. 40035/98, judgment of 11th July 2000.
[109] Article 267 of the Treaty on the Functioning of the European Union, formerly Article 234 of the Treaty of Amsterdam, originally Article 234 of the Treaty of Rome.
[110] Case 61/65, *Vaasen Gobbels* [1966] ECR 261 at 273.
[111] Case C-54/96 *Dorsch Consult Ingerieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, [1998] 2 CMLR 237; Case C-17/00 *De Coster v. College des Bourgmestre et Echevins de Watermael-Boitsfort* [2001] ECR I-9445; Case C-195/06 *Osterreichischer Rundfunk* [2007] ECR I-8817.
[112] Legislation must on the other hand be challenged before the French Constitutional Court (articles 61-1 and 62 of the French Constitution; organic law n° 2009-1523 of 10th December 2009 relating to the application of article 61-1 of the Constitution).

In this general legal context, aspects of the particular French jurisdiction of the CNDA of comparative interest in respect of the Irish RAT will be examined.

1) Nature

The French CNDA is an appellate court from administrative decisions of the *Office français de protection des réfugiés et apatrides* (OFPRA)[113], mirroring to some extent the function of the RAT as appellate body from the Refugee Application Commissioner (RAC) in Ireland. Both the CNDA and RAT are permanent bodies established by law having compulsory jurisdiction and applying the rule of law[114].

There is a distinction between the two bodies as regards the legally binding nature of their decisions. The decisions of the CNDA effectively grant or refuse refugee status and are not merely recommendations[115]. The "recommendations" of the RAT are decisive in nature where the recommendation is positive, to the extent that the Minister for Justice must follow them[116]. However, where its recommendation is negative, the final determination of the asylum application is made by the Minister[117].

The nature of these two bodies is perceived somewhat differently in their respective countries. The CNDA was renamed in 2007 from the *Commission de recours des réfugiés* (Refugee Appeals Commission) to the *Cour nationale du droit d'asile* (National Court of Asylum)[118]. This classification as a court, and the first French court to have 'national' in its title, bestowed additional symbolic weight upon the jurisdiction and demonstrates the extent to which asylum application procedures are taken increasingly seriously in France[119]. The CNDA is one of a small number of specialised courts to stand alongside the general administrative courts with an appeal lying to the *Conseil d'Etat*. Such an appeal can only be taken on a point of law and is in practice only taken rarely. In contrast, the Irish courts have suggested that the RAT is essentially administrative in nature, forming part of an indivisible two-stage statutory process[120]. Judicial review proceedings can be taken challenging its decisions and are in practice taken very regularly[121].

Both bodies would seem to have the power to ensure they have access to all information relevant to their mandate, subject to the normal rules of privilege. The CNDA has the same power as other administrative courts to take any procedural measures it considers useful for the proceedings, including the power to order the personal appearance of the applicant and of any witnesses required[122]. Irish law is similar as section 16(11)(a) of the Refugee Act 1996 empowers the RAT to direct the attendance of witnesses and production of documents. There is a difference however in their respective mandates. In addition to its appellate function, the CNDA has the competence to re-examine its own decisions on application of the OFPRA where the latter alleges that the decision was a result of a fraud[123]. It can also examine cases falling within the parameters of articles 31 (prohibition of the penalisation of refugees for having illegally entered the territory of a contracting state), 32 (prohibition of the expulsion of a refugee lawfully within the territory of a contracting state) and 33 (prohibition of refoulement) of the Geneva Convention of 1951 relating to the status of refugees[124]. In contrast, the remit of the RAT solely extends to determining appeals against a recommendation of the RAC under section 13 of the Act of 1996[125] that an applicant should or should not be recognised as a refugee.

2) Suspensive effect

Except for cases falling into the categories of accelerated ("priority") procedures, an appeal taken to the CNDA has suspensive effect[126]. A proposal for a legislative amendment to give accelerated appeals suspensive effect is currently before the French Parliament[127]. An appeal taken on a point of law to the *Conseil d'Etat* does not have such an effect and an applicant in this situation faces possible deportation at any point[128].

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[113] Article L731-2 CESEDA.

[114] See generally articles L731-1 to L733-2 and R732-1 to R733-23 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA) for the provisions relating to the CNDA; sections 15 and 16 of the Refugee Act 1996, as amended, and the second schedule thereto and statutory instrument no.s 423/2003, 424/2003 and 51/2011 set out the legal framework of the RAT.

[115] Articles L731-2 and R733-6 CESEDA.

[116] Section 17(1)(a), Refugee Act no. 17 of 1996.

[117] *Ibid.*, section 17(1)(b). The contrast between the effect of positive and negative recommendations as provided for in this section was highlighted by Cooke J. in the *Dokie* case (*H.I.D. (a minor suing by her mother and next friend, E.D.) and B.A. v. RAC, RAT, the Minister for Justice Equality and Law Reform, Ireland and the Attorney General*, unreported judgment of 9th February 2011, at para. 6).

[118] *Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile*, 20th November 2007, article 29.

[119] This change in name occurred just prior to the deadline of 1st December 2007 for the transposition of the EU Procedures Directive (2005/85/EC) into national law. It would seem that France felt it necessary to have a more formalised judicial body for asylum appeals in order to meet its obligations under article 39 of this Directive.

[120] See cases *B.N.N. v. Minister for Justice and the RAC* [2008] I.E.H.C. 308, [2009] I.R. 719; *A.D. v. RAC and the Minister for Justice Equality and Law Reform* [2009] I.E.H.C. 77, unreported judgment of 27th January 2009.

[121] 749 applications for judicial review of recommendations of both the RAC and the RAT were received by the High Court in 2009, Irish Times, Opinion of 24th February 2011, http://www.irishtimes.com/newspaper/opinion/2011/0224/1224290734750.html.

[122] Article R733-18 CESEDA.

[123] Article R733-6 CESEDA.

[124] Article L731-3 CESEDA.

[125] Section 16(1) of the 1996 Act.

[126] Article L731-3 CESEDA.

[127] *Proposition de loi* n° 1251.

[128] Article L4 *Code de justice administrative*.

In the Irish system, even for cases subject to accelerated procedures, it is not until the decision of the Minister has been made that refugee status is officially granted or denied; the negative decisions of the RAC and RAT are simply recommendations. An applicant does not as such face possible deportation until the Minister has made a negative decision. Judicial review of this decision does not have suspensive effect[129].

3) Independence

Organisational Structure

The rules governing the organisation and status of judges of French administrative courts and judges of the ordinary courts are comprised in separate codes: the former in the *code de justice administrative* and the latter in the *code de l'organisation judiciaire*. All judges are employed on a full-time basis and paid through public funds, but the rules governing promotion and transfer differ somewhat between the two orders of judges. Administrative judges, like ordinary judges, are in practice both independent and irremovable[130]. Their independence has been recognised as a fundamental principle of French constitutional law[131]. The specific administrative court of the CNDA is made up of several sections, each comprising three members: a president (a retired judge of certain specified courts), a nominee of the United Nations High-Commissioner for Refugees and a nominee of a government minister[132]. These members are appointed for a renewable period of three years[133]. The Court is placed under the authority of its president, a member of the *Conseil d'Etat*, appointed by the vice-president of the *Conseil d'Etat* for a renewable period of five years[134]. The president of the CNDA determines the composition of the sections and the allocation of cases between them[135].

Although the terms of office for the members and president of the Irish RAT are the same[136], the fact that both are chosen and directly appointed by the Minister for Justice Equality and Law Reform[137] denies this body the independence derived from the appointing procedures of its French counterpart. A similar problem arises from the fact that it falls to the chairperson of the RAT to allocate cases among its members[138]. The Act of 1996 declares Tribunal members to be civil servants[139] and expressly provides that they "may be removed from office by the Minister for stated reasons"[140]. The Act furthermore gives the Minister for Justice the power to determine the method of remuneration of Tribunal members[141] and in practice such are paid on a case-by-case basis.

Normally, the sections of the CNDA sit as three members. A president of a section can sit alone to deal with matters that do not require a collegial formation (specifically the withdrawal of appeals and dismissal of those found to be manifestly unfounded)[142]. On the other hand, for decisions of principle, a "reunited section" is formed combining three different sections[143]. RAT hearings are conducted by a single Tribunal member sitting alone[144], a considerable divergence from the French practice.

Function of the *Rapporteur public*

One particular concern for the CNDA, which has been the subject of several recent cases before the European Court of Human Rights[145], is the independence of the *rapporteur public* in all administrative law proceedings. These cases confirmed the compatibility of this function with article 6(1) of the ECHR in all but one respect.

The *rapporteur public* presents an objective analysis of a case and gives a recommendation as to its outcome, usually only by oral submissions at hearing. This is the first time the parties and indeed the judges hear these submissions and for this reason the European Court of Human Right (ECtHR) held that there was no violation of the equality of arms principle. If new issues arise from these submissions, the administrative court will invariably adjourn the case to allow the parties prepare their response. The ECtHR took issue, however, with the fact that the *rapporteur* was then allowed participate in the private deliberations of the judges but without a right to vote on the final decision adopted. It was found that this violated the doctrine of appearances or the principle that justice must be seen to be done and amounted to a violation of article 6(1) of the Convention.

[129] Although in both the French and Irish system an injunction (*référé-suspension*) may be sought to restrain deportation pending the determination of the judicial review.
[130] The irremovability of judges of the administrative courts is implicitly provided for at article L233-5 *Code de justice administrative*.
[131] Decision n° 80-119 DC of 22nd July 1980.
[132] Article L732-1 CESEDA.
[133] Article R732-4 CESEDA.
[134] Article L731-1 and article R732-1 CESEDA.
[135] Article R732-1 CESEDA.
[136] Refugee Act 1996, second schedule, sections 1 and 4.
[137] *Ibid.*, section 2(a).
[138] *Ibid.*, section 13.
[139] *Ibid.*, section 10.
[140] *Ibid.*, section 7.
[141] *Ibid.*, section 5.
[142] Article L733-2 and article R733-5 CESEDA.
[143] Article R732-5 CESEDA.
[144] Refugee Act 1996, second schedule, section 11.
[145] *Etienne v. France*, ECtHR,15th September, 2009, n° 11396/08; *Kress v. France*, ECtHR, 7th June, 2001, n° 39594/98; *Maisons Traditionnelles*, ECtHR, 4th October, 2005, n° 68397/01.

These cases resulted in reforms to the relevant French legislation and the *rapporteur public* is no longer permitted to participate in the deliberations of any administrative court, including the CNDA[146]. One notable safeguard afforded an applicant through the role of the *rapporteur public* is that a case cannot be deemed manifestly unfounded, and so not meriting an oral appeal hearing before the CNDA, until it has been examined by the *rapporteur*[147].

This function is unique to the civil law system and stems from its historical traditions. The Irish system has no real equivalent.

4) Transparency

Increasingly linked to the notion of independence is that of transparency. The CESEDA[148] clearly provides that all hearings before the CNDA must be held in public[149]. A president may, on application made to him or her by the applicant, order that the hearing be held *in camera*[150]. This is a relatively informal application: in general, the president informs the applicant of this possibility at the beginning of the hearing and such applications are usually granted as a matter of course. This approach has the advantage of keeping the procedures before the CNDA open to public scrutiny, while allowing an applicant to elect for a hearing in private where they so wish.

The decisions must be reasoned and read out in public[151]. The centre for legal information publishes an annual collection of the decisions of the CNDA. These are available to the general public on the website of the CNDA: http://www.cnda.fr/. Although the French civil law system has no principle of precedent *per se*, these decisions are of persuasive value and are cited by *avocats* in legal submissions.

Section 16(14) of the Refugee Act 1996 plainly provides that "an oral hearing [of the RAT] shall be held in private". Furthermore, until the Supreme Court *Atanasov* decision in 2006[152], previous decisions of the Tribunal were not published. Even now, these decisions are only available to registered users of the Tribunal's Decisions Archive to which access is confined to appeal applicants' legal representatives[153]. The High Court has been slow to accept that these decisions have any precedential value in proceedings before the RAT[154] and in precisely what conditions they can amount to precedent remains uncertain[155]. Although the privacy of proceedings before the RAT is primarily for the protection of the applicant, it does serve to undermine somewhat the legitimacy of the tribunal. Public scrutiny has long been established as one of the most effective means of ensuring that proceedings, especially those affecting human rights, are just and fair.

As regards the publication of statistics relating to the outcome of proceedings before each body, the latest report in France gives a rate of 16% for decisions of the OFPRA overturned by the CNDA[156]. A more dated report suggests that the success rate is 14% in relation to appeals taken from decisions of the RAC to the RAT[157].

5) Time limits

Lodgment of Appeal

The CESEDA provides that an appeal must be taken to the CNDA within one month from the notification of the decision of the OFPRA[158]. Where legal aid is applied for, this interrupts the running of time[159]. An application for re-examination taken by the OFPRA in the case of an alleged fraud must be taken within two months from the date on which the fraud was discovered[160]. For cases relating to articles 31, 32 and 33 of the 1951 Geneva Convention, an appeal must be taken within one week of the notification of the measure in question[161].

This is in stark contrast to the time limits for an appeal to the RAT of a decision of the RAC: a normal 15 day time limit, reduced to 10 or even 4 days for certain accelerated procedures[162].

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[146] Article R733-17 CESEDA. The rules applying to the *Conseil d'Etat* are however slightly different.
[147] Article R733-16 CESEDA.
[148] *Supra* note 18.
[149] Article R733-17 CESEDA.
[150] *Ibid*.
[151] Article R733-19 CESEDA.
[152] [2006] IESC 53.
[153] http://www.refappeal.ie/website/rat/ratweb.nsf/SplashPageForROMDA.html.
[154] The development can be traced through the following cases: *Fasakin v. the RAT and the MJELR* [Unreported] O'Leary J, 21st December 2005; *C.O.I. v. the MJELR* [Unreported] Mc Govern J, 2nd March 2007; *G v. the MJELR* [Unreported] Hedigan J, 27th November 2008; *L.C.L. v. the RAT and the MJELR* [Unreported] Clark J, 21st January 2009.
[155] In a recent case on the subject, *François and Lengo v. RAT and the MJELR* [Unreported] 19th March 2010, Clark J. held that "undoubtedly, the interests of justice and legal certainty would not be served were two or more Tribunal Members to interpret and apply the law in a different manner in cases involving the same objective facts". However, she proceeded to conclude that "having considered the specific decision in NDW's case the Court is satisfied that the Tribunal Member provided correct *if formulaic* reasons as to why he was not bound by those decisions in the circumstances".
[156] UCIJ (*Uni(e)s contre une immigration jetable*), « *Contre rapport, Immigration et droit d'asile* », Paris, le 24 mars 2007.
[157] European Council on Refugees and Exiles, *Country Report – Ireland*, 2004, http://www.esri.ie/pdf/BKMNEXT058_Annual%20Report.pdf.
[158] Article L731-2 CESEDA.
[159] Article 39 of Decree n° 91-1266 of 19th December 1991 in application of Law n° 91-647 of 10th July 1991 relative to legal aid.
[160] Article R733-8 CESEDA.
[161] Article L731-3 CESEDA.
[162] Section 13(4), (5), and (8), Refugee Act 1996.

Phase of Investigation

As in most civil law jurisdictions, all legal proceedings in France commence with a phase of investigation. The time limits and requirements for such are usually set out clearly in legislation. Proceedings before the CNDA are no exception. In the regulatory part of the CESEDA, the necessary requirements are set out[163].

A list of all appeals lodged to the offices of the CNDA is communicated without delay to the OFPRA. The latter must forward the relevant file in its possession to the CNDA within 15 days. This file is then made available to counsel for the applicant. Unless an appeal is considered to be manifestly unfounded at this stage, the OFPRA can present observations within one month of receiving the grounds of appeal.

The president of the section of the CNDA to which a case has been assigned may, by order, fix a date on which the phase of investigation will be closed. This order is sent by registered post to all parties at least 15 days prior to the specified closing date. If such an order is not made, the investigation closes three days before the hearing date. The parties must be given at least seven days notice of the hearing date. Submissions made after the investigation closing date will not be taken into consideration by the CNDA, though the president of the section has the power to reopen the phase of investigation if he or she sees fit. Submissions filed within the specified time limits are communicated to all parties.

For an appeal to the RAT, the only legal requirement as regards submissions to the tribunal is that all grounds of appeal and documentation intended to be relied upon by the applicant be lodged to the tribunal with the notice of appeal within the appropriate time limit[164]. The Refugee Act 1996 (Appeals) Regulations 2003[165] set out certain procedural requirements for appeal proceedings. These are silent on the issue of time limits for submissions, but regulation 8 provides that the RAT shall give at least seven days notice of the time and date of the hearing to the applicant.

Given the short time limits for the lodgement of an appeal in the Irish system, the requirement to lodge all documentation with the notice of appeal seems to place an unduly harsh burden on the applicant, though this tends not to be strictly enforced in practice. A lack of fair and enforced time limits in Irish law leaves the door open for very late legal submissions on both sides.

An issue specific to asylum procedures is how the submission of country of origin information fits into this *audi alteram partem* logic - that both sides should be given sufficient notice of the claims against them in order to be able to adequately respond. The EU Qualification Directive 2004/83/EC at article 4(3) requires that "the assessment of an application for international protection ... includes taking into account: (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application...". This would seem to require the last minute submission of country of origin information. How these two issues of essentially procedural fairness and substantive fairness fit together is a difficulty that will have to be faced by both the French and Irish jurisdictions.

Final decision

The final decision of the CNDA is listed between 15 days and three weeks following the date of hearing[166]. The list is put up on a notice board in the waiting area of the CNDA building giving only the case numbers and whether the decision is positive, negative or indeed put back to a future date. The CESEDA provides that the full decision must be read out by the president of section and sent to the applicant by registered post[167].

Although there is no time limit within which a decision must be given provided for under French or Irish law, the practice in the two systems differs remarkably given that the length of time applicants in Ireland have to wait for a decision from the RAT varies from a month to a year in extreme cases[168].

If the CNDA overturns the decision of the OFPRA, the applicant is officially recognised as a refugee. The CNDA will notify the OFPRA of its decision. It will furthermore inform the local government body and the French Department of Immigration and Integration of the positive or negative nature of the decision[169].

In the case of a positive decision, the local administration must issue a temporary authorisation to remain for a renewable period of three months with the label "recognised refugee" to the applicant within eight days of a request for such made by the applicant (pending more permanent forms of documentation)[170].

[163] Articles R733-10 to R733-15 CESEDA.
[164] Forms 1 and 2, Refugee Act 1996 (Appeals) Regulations 2003, S. I. no. 424 of 2003.
[165] S.I. No. 424 of 2003, revoking and replacing the Refugee Act 1996 (Appeals) Regulations 2002, S.I. No. 571 of 2002.
[166] http://www.cnda.fr/ta-caa/la-vie-dun-recours/.
[167] Articles R733-19 and R733-20 CESEDA.
[168] This issue was raised in the *Edobor and Messaoudi* cases (2004 JR 416 and 2004 JR 417). In these cases, the applicants, having waited over a year from the dates of their oral hearings for a decision of the tribunal member, initiated judicial review proceedings seeking an order of *mandamus*. This was granted by the High Court, but an appeal to the Supreme Court was allowed. A strong dissent from Kearns J., however, raised very serious questions about the administration of the RAT.
[169] Article R733-20 CESEDA.
[170] Article R742-5 CESEDA.

Where the appeal is rejected, the authorisation to remain as an asylum seeker is withdrawn from the applicant and he or she is served with an invitation to leave the territory within one month[171].

These procedures highlight the fundamental difference between the nature of the decisions between the CNDA and the RAT. The former amounts to an official recognition or denial that an applicant is a refugee or person in need of international protection and so all administrative action to give effect to this decision follows as a matter of course. The RAT decision is merely a recommendation to the Minister who will proceed to make a decision and take the necessary action. Although, as stated above, where this recommendation is positive, the Minister is under a legal obligation to follow it. This difference can have a real impact on applicants who are in effective legal limbo until such time as their civil status is definitively recognised.

Further steps

Should the applicant want to take an appeal on point of law to the *Conseil d'Etat*, this must be lodged within two months of the notification of the decision of the CNDA[172]. Although there is no directly equivalent procedure in the Irish system, initiating judicial review proceedings before the High Court is the next step for an applicant in the case of a negative recommendation of the RAT. Where the Minister for Justice decides to follow this recommendation, the next step is to make representations to the Minister. Both of these steps must be carried out within two weeks[173], again, a much shorter time limit within which to challenge a decision to that provided for in French law.

CONCLUSION

The question as to what amounts to an effective remedy in the context of asylum applications is currently of particular relevance in this jurisdiction in light of the recent decision of Cooke J. in the *Dokie* case[174]. Here, the Court held that the Irish asylum application system as a whole, but notably the procedures before the RAT, constituted an effective remedy for the purposes of the requirements of article 39 of the Procedures Directive 2005/85/EC. On considering an application for a certificate of leave to appeal this decision to the Supreme Court under section 5(3) of the Illegal Immigrants (Trafficking) Act, 2000, however, Cooke J. decided to make a preliminary reference to the Court of Justice of the European Union[175]. One of the two questions so referred essentially asks the Luxembourg Court to determine whether or not the Irish system does in fact provide asylum applicants with an effective remedy against first instance decisions.

ADDENDUM

In a recent case of the Supreme Court, *Okunade v. Minister for Justice Equality and Law Reform & the Attorney General*, [2012] IESC 49, Mr. Justice Clarke took the unusual step of setting out 'a suggested structure' for the processing of international protection applications in Ireland. Although making very clear that this was a matter for the Oireachtas, he made certain suggestions in the extreme circumstances of the present structure having "a very real impact on the courts using up, as it does, a significant amount of court time and giving rise to circumstances where … it seems to me that the amount of court resources that have to be allocated is significantly increased by reason of the anomalies in that statutory structure". He alluded in his judgment to such anomalies as the fact that in Ireland, unlike "any other member state of the EU, separate statutory processes for the consideration of applications for refugee status, subsidiary protection and humanitarian leave exist" and emphasised "the desirability of there being a single and coherent structure". His main concern related to anomalies at the stage of applications for judicial review of decisions of both the RAT and the Minister for Justice stemming from the differing procedures set out in Order 84 of the Rules of the Supreme Court and s.5 of the Illegal Immigrants (Trafficking) Act 2000 and so his comments do not directly relate to the procedure for an appeal to the RAT. However, his comments are of relevance to a consideration of the Irish international protection system as a whole and are noteworthy in as far as they take on board the features of such statutory processes in other EU member states.

[171] Article L511-1 CESEDA.

[172] Articles L821-1 to L822-1 and R821-1 to R821-6 *Code de justice administrative*.

[173] Section 5(2)(a), Illegal Immigrants (Trafficking) Act 2000 provides that an application for leave to apply for judicial review must be made within 14 days of the decision. It is noteworthy however that in *TD and AD v. Minister for Justice Equality and Law Reform*, [2011] IEHC 37, Hogan J. held that this 14 day time limit failed to comply with the principles of equivalence and effectiveness under EU law and so could not be relied on as against the applicants in that case so far as the claim based on the Procedures Directive was concerned. Section 3(3)(b), Immigration Act 1999 sets out the 15 day time limit within which an applicant must make representations in writing to the Minister.

[174] *Supra*, at note 20.

[175] *Supra*, at note 12, Case C-175/11 *H.I.D.*, Opinion of Advocate General Bot delivered on 6th September 2012