



THE RESEARCHER

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Welcome to the April 2013 issue of The Researcher!

After what has been a very long and cold winter we are back with the April issue bringing you some interesting reading. Remembering the anniversary of the forgotten convention, Peter Fitzmaurice, Doctoral Fellow and Visiting Lecturer at the Irish Centre for Human Rights, NUI Galway, writes on the 1933 Refugee Convention and the search for protection between the world wars.

Carl Grainger of UNHCR writes on the importance of good quality interpretation in the asylum process. Researching a topical issue Patrick Dowling of the Refugee Documentation Centre writes on Rape in India and the awakening of a nation.

With an article on the Rohingya of Myanmar, David Goggins of the Refugee Documentation Centre provides us with insight on the Rohingya, their lack of rights and their suffering.

Referring to international legal instruments, EU law and Irish case law, Theresa McAteer of the Refugee Legal Service examines the concept of discrimination within the asylum law arena.

Many thanks to all our past and present contributors. If you are interested in contributing to future issues of The Researcher please contact us at the email address below. We hope you enjoy this issue.

Elisabeth Ahmed
Refugee Documentation Centre (Ireland)

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Anniversary of the forgotten Convention: The 1933 Refugee Convention and the search for protection between the world wars



Peter Fitzmaurice, Doctoral Fellow and Visiting Lecturer, Irish Centre for Human Rights, NUI Galway

The modern study of the protection of refugees conventionally commences in the years following the Second World War. The immediate post-war period saw the creation of the United Nations and the emergence of the modern international human rights regime, with which refugee protection is closely entwined.¹ The mass displacements caused by the war led to the setting up of the United Nations Relief and Rehabilitation Agency in 1943, which by the war's end was tasked with refugee protection. In the years following the war, European refugees were repatriated or resettled under the aegis of the International Refugee Organization, which was succeeded by the United Nations High Commissioner for Refugees as the principal UN agency concerned with refugees.²

Finally, the Convention Relating to the Status of Refugees³ was drafted and adopted in 1951, initially limited temporally and geographically. The 1951 Convention and the 1967 Protocol taken together are now universally considered the cornerstone of international refugee protection and the 1951 Convention has been termed 'the *Magna Carta* for refugees'.⁴

Modern readers of the 1951 Convention rightly tend to focus on the refugee definition in Article 1(A)(2) of the 1951 Convention. It is often forgotten, however, that

¹ 'Everyone has the right to seek and enjoy in other countries asylum from persecution' Art. 14 (1), Universal Declaration of Human Rights

² See Louise W. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations, its History and Work 1946–1952* (London: OUP, 1956).

³ Convention Related to the Status of Refugees 189 UNTS 2545.

⁴ James M. Read, *Magna Carta for Refugees* (New York: United Nations Information Services, 1953).

the 1951 Convention actually resurrected a series of earlier international commitments to protect refugees. The preceding article states:

For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation...

The 1933 Convention Relating to the International Status of Refugees⁵ was the first attempt to create a comprehensive legal framework for refugees. It was the first international multilateral treaty to offer refugees legal protection and guarantee their basic civil and economic rights, and was second only to the 1926 Slavery Convention in establishing a voluntary system of international supervision of human rights.⁶ The 1933 Convention, which itself drew on earlier precedents of the law of responsibility for injuries to aliens and international protection of national minorities,⁷ was a milestone in the protection of refugees. Crucially, it was the first international agreement to guarantee the right to non-*refoulement* which, in broad terms, now proscribes the forced direct or indirect removal of a refugee to a country or territory where he or she runs a risk of being exposed to persecution.⁸ The right to non-*refoulement* is considered fundamental to modern international refugee law.⁹

Tragically, the 1933 Convention in many ways marked the high watermark of refugee protection between the wars. The 1933 Convention was severely limited in its scope to those groups already considered refugees under the protection of the League of Nations,¹⁰ and was ratified by only eight countries. As the refugee crisis in Europe came to be increasingly defined by German Jews fleeing the Third Reich, further potential ratifications of states to the Convention were constrained by the dire economic events of the mid-

⁵ Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663 (1933 Refugee Convention).

⁶ Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 25.

⁷ James Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: CUP, 2005) 75.

⁸ The term derives from the French *refouler*, which means to drive back or repel. The prohibition on non-*refoulement* in international law is usually described in relation to three key areas: refugee law, human rights law and customary law.

⁹ See Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009).

¹⁰ The Convention protected Russian, Armenian, and assimilated refugees who were Assyrian, Assyro-Chaldean and a small number of Turks from the former Ottoman Empire.

1930s and then by the outbreak of the Second World War. Nonetheless, given the challenges of the inter-war period, even modest adherence to the provisions of the Convention by a number of states can be seen as a substantial achievement.

Despite these deficiencies, the 1933 Convention also served as a basis for the 1951 Convention. The dominant narrative of the interwar period has traditionally concentrated on the failure of the international system to assist Jewish refugees fleeing the Third Reich up to the outbreak of war. However, as Skran argues, this inter-war period should be seen as a time of great creativity and innovation, when much was accomplished with minimal resources and when millions of refugees were helped to begin new lives.¹¹

[a]1. ORIGINS OF THE REFUGEE PROBLEM IN INTER-WAR EUROPE

It was the First World War, its preceding conflicts (the Balkan wars of 1912–1913) and its aftermath in the Near East (the wars in the Caucasus from 1918–1921 and the Greco–Turkish War of 1919–1922) and the events of the Russian Revolution and Civil War which necessitated and ushered in the inter-war era of refugee protection. The war sent the four dynastic Empires that had dominated Eastern Europe: the Romanov; the Ottoman; the Hapsburg; and the Hohenzollern; into ruin. The transformation from the imperial order to new states bound on national, linguistic, ethnic and religious grounds was accompanied by conflict, persecution and mass displacement.

In addition, the existence of huge masses of refugees following the war coincided with the rise of modern systems of social organization and economic and political nationalism throughout Europe. Many of the refugees were victims of the new style nation states and the consolidation of their existence in the post-war world. The governments of these new states began to limit the entitlement of benefits to their own citizens and assert the distinction between citizens and non-citizens. The visa regimes, introduced during the war, became permanent aspects of immigration control.

The magnitude and scale of refugee movements in inter-war Europe dwarfed all previous experiences. By 1926, more than 20 million people were estimated to be displaced within states, while the refugee population was estimated at 9.5 million.¹² This state of affairs,

¹¹ Claudena Skran, *Refugees in Inter-war Europe – The Emergence of a Regime* (Oxford: Clarendon Press, 1995) 9.

¹² This number was made up of 1.5 million forcibly exchanged between Greece and Turkey, 280,000 exchanged between Greece and Bulgaria, two million Poles awaiting repatriation, two million

however, was neither perceived nor acknowledged amongst policy makers as a refugee crisis demanding a coordinated, international legal intervention. The legal responses were piecemeal at first. For the most part, refugees were left to fend for themselves. The general response was the adoption of more guarded immigration policies and the development of restrictions, beginning in the United States with the Immigration Acts of 1921 and 1924, and the extension of immigration barriers worldwide, constructed a formidable obstacle to the resolution of refugee problems in inter-war Europe.

[a] 2. THE INTERNATIONAL LEGAL RESPONSE AND FIRST REFUGEE AGREEMENTS

The refugee problem of inter-war Europe arose in the absence of any clearly defined rules for the treatment of refugees. In the classic state-centric understanding of international law, the concept of asylum was understood to be the right of states to accord protection to refugees and to refuse to return them to their state of origin.¹³ As Simpson stated in 1939, ‘Asylum is a privilege conferred by the State. It is not a condition inherent in the individual.’¹⁴

The beginnings of more restrictive policies of admittance coincided with the migration of nearly two million people following the events of the Russian Revolution and the subsequent civil war. The Russians, initially, made up the largest post-war group of refugees. These multi-ethnic and multi-confessional populations consisted of individuals, families and even entire armies. Their situation was desperate, without employment or travel documents, and the value of any roubles they had deteriorated quickly. There was little possibility of repatriation by the new Soviet authorities, who by decree rendered those Russians who had fled the Revolution as stateless. In addition, their position was further complicated by their host countries’ relationships with the new Soviet government. Given the now effectively stateless position of most of the Russian refugees, the simplest solution would have been for their host countries to naturalize them *en masse*. The host governments rejected this as a solution, and, in addition, many of the Russian refugees rejected this as an option as they believed their exile was temporary.¹⁵

Russian and Ukrainians, 250,000 Hungarians, and one million Germans.

¹³ Louise W. Holborn, ‘The Legal Status of Political Refugees, 1920–1933’ [1938] *AJIL* 681.

¹⁴ John H. Simpson, ‘The Refugee Problem’ [1939] *International Affairs* 230.

¹⁵ Holborn 682.

In February 1921, the International Committee of the Red Cross appealed to the Council of the League of Nations to take action on behalf of the 'Russian refugees scattered throughout Europe without legal protection or representation'.¹⁶ This combination of events triggered a critical legal response and forced the international community to consider the issue of refugees within a more global framework. Under the stated purposes of the League 'to promote international co-operation and to achieve international peace and security,' the League appointed a Norwegian, Dr. Fridtjof Nansen, to the newly created post of High Commissioner for Refugees to address the problems of the Russian refugees in Europe. He was assigned a tripartite task: arranging the coordination of relief work; securing a definition for the legal status of refugees; and considering a solution through repatriation to Russia, employment in the country in which they were residing, or emigration to other countries.

The response of the League of Nations was the convening of a conference in Geneva in July 1922 which drafted the Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees.¹⁷ The Arrangement was not a treaty and was not legally binding. It recommended a standard of conduct for signatory states. Under the terms of the 1922 Arrangement, governments could issue the identity certificates, but this did not confer citizenship rights upon the bearer. However, it did allow travel over international boundaries. The documents, notably, did not offer a clear definition of the term 'refugee' but stated that the bearer was a Russian national by origin. The certificate was valid for one year and became invalid if the holder adopted another nationality. The document was subject to a fee, and governments readily agreed to issue them precisely because this did not impact dramatically on their sovereignty. It was this document that was later to be known more commonly as the 'Nansen passport'.

These Nansen passports, although only a partial solution to the refugee problem, did mark an important first step in the request for refugee protection. They had a profound effect on the lives of refugees carrying them and allowed them to legally cross international boundaries. Over time, the Nansen passport system served as the foundation for a clearly defined legal status for refugees, and some consider its establishment as the beginning of international refugee law.¹⁸ States quickly adopted the Nansen system. In 1924, the

scheme was extended to Armenian refugees.¹⁹ Armenians had long been a Christian minority of around two million people in the Ottoman Empire. However, their position became more precarious as the Turkish nation state consolidated, with violence against them reaching genocidal proportions during the First World War. Around two thirds of the total Ottoman Armenian population is thought to have died while a mass exodus from Turkey ensued during 1921 and 1922.

The system of Nansen passports for Russian and Armenian refugees was generally well received with the eventual recognition of the scheme by 54 and 38 states respectively. The system also helped host governments to calculate the number of refugees in their territory. However, difficulties arose because the eligible groups were simply referred to as 'Russian refugees' and 'Armenian refugees', with no clear definition of these terms agreed.

Nansen proposed the following definitions to the member governments of the League of Nations:

Russian refugee: Any person of Russian origin who does not enjoy the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired any other nationality.

Armenian refugee: Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy the protection of the Government of the Turkish Republic and who has not acquired any other nationality.

These definitions were adopted in this form on 12 May 1926, in the Arrangement relating to the Legal Status of Russian and Armenian Refugees.²⁰ The definition is by country of origin or ethnic group, and the central element in both is for the refugee claimant to have been deprived of the 'protection' of their former government or successor state and to not have acquired a further nationality. The 1926 Arrangement marks the first formal definition of a refugee in international law. Unfortunately, however, the number of states agreeing to be bound to the 1926 Arrangement fell to 23.

At the end of 1926 the Council of the League of Nations began the process of extending the provisions in the 1926 Arrangement to other groups that were in the same position as the Russian and Armenian refugees. The High Commissioner produced a list of seven groups, encompassing approximately 155,000 persons. However, this report met with disapproval.

¹⁶ (1921) 2 (2) League of Nations OJ 227.

¹⁷ Arrangement with regard to the issue of Certificates of Identity to Russian Refugees (5 July 1922) 355 LNTS 238 (1922 Arrangement).

¹⁸ Skran 104.

¹⁹ (1924) 5 (7) League of Nations OJ 967

²⁰ Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees 12 May 1926, 2004 LNTS 48 (The 1926 Arrangement).

An inter-Governmental Conference was called and held in 1928 to decide all issues relating to refugees and in an Arrangement to extend the protections afforded. The 1928 Arrangement differed markedly from the previous 1922 and 1926 Arrangements in a key way. First, it extended the previous coverage to small numbers of Assyrian, Assyro-Chaldean persons of Syrian or Kurdish origin as well as some persons of Turkish Origin and the mandate of the High Commissioner was also extended to cover these groups. In the absence of diplomatic protection, refugees were entitled to benefit from actions taken on their behalf by a succession of League of Nations High Commissioners.²¹

Second, and more fundamentally, although again in the form of non-binding recommendations, the 1928 Arrangement set standards for the recognition of personal status and addressed issues such as the right to work, access to court, protection against expulsion, equality in taxation and the state's responsibility to honour identity certificates. The 1928 Arrangement signified the League of Nations' first attempt to standardize the rights to be extended to refugees.

These first refugee agreements did not set specific responsibilities for states other than co-operation in the recognition of League of Nations documentation. States assumed that the refugee phenomenon would resolve itself either through naturalization in host states or the return of refugees to their countries of origin when conditions normalized.

[a]3. THE 1933 CONVENTION

The response to the 1928 Arrangement was not satisfactory. As the 'temporary' refugee problem refused to disappear and economic and political instability rose in the 1930s, states increasingly refused to assimilate refugees as most-favoured foreigners, instead focusing resources on their own citizens. Many governments adopted legislation prohibiting the employment of foreigners. Even France, which had been the major country of immigration in Europe and was home to many of the Russian and Armenian refugees, was convulsed with anti-alien feeling.

In August 1931, there was a proposal to the League of Nations to establish a formal convention which would 'stabilise the situation' of refugees with the anticipation of the liquidation of the Nansen International Office at the end of 1938. A Committee

²¹ The mandate of the High Commissioner was gradually expanded throughout the 1920s, and in 1930 following the death of Nansen it was replaced with the Nansen International Refugee Office.

of Experts was set up by the Nansen Office which in their report concluded that a convention was necessary and endorsed a simplified procedure for the conclusion of the convention. Crucially, the draft convention which followed would impose a series of obligations upon signatory states rather than the non-binding recommendations system of the previous agreements.

The Intergovernmental conference met in October 1933 to attempt to find this more secure grounding for refugee protection. Government representatives from 15 states attended the three-day meeting in October of 1933. Two members of the Committee of Experts, Nolde and Rubinstein, were present, as were several prominent refugees representing the Central Committee for Armenian refugees. After three days, agreement was eventually reached on a text and the Convention relating to the international Status of Refugees²² was adopted. The 'simplified procedure' that had been proposed rapidly produced a treaty.

Article 1 stated that the Convention was applicable to those refugees as defined by the 1926 and 1928 Arrangements, that was Russians, Armenians, and assimilated refugees who were Assyrian, Assyro-Chaldean and a small number of Turks from the former Ottoman Empire, although each Contracting Party could introduce modifications or amplifications at the moment of signature or accession.²³

From a contemporary perspective this definition of a refugee in Article 1 of the 1933 Convention is the most striking difference. The approach in the early refugee agreements which the 1933 Convention follows is a group definition or category approach, and stands in stark contrast to the individual definition in the 1951 Convention which defines a refugee as any person who has 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such a fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such a fear, is unwilling to return to it.'²⁴

This group approach required that the refugee be outside their country of origin and be without the protection of the government of that state. This approach does not require that the refugee be in danger

²² 159 LNTS 3663, entry into force 13 June 1935, The Convention had just eight State Parties.

²³ No Contracting Parties attempted to amplify the definition with the Bulgaria maintaining its reservation made to the 1928 Arrangement.

²⁴ 1951 Refugee Convention Article 1A.

of persecution. The refugees defined under the 1933 Convention were stateless in modern terms. The first refugee definitions were formulated because of the dilemma in international law caused by the denial of state protection. The group definition attempted to correct this anomaly in the international legal order. The refugee definition in the 1933 Convention has no potential for exclusion in contrast to the modern refugee definition which obliges the denial of the benefits of refugee status to certain persons who would otherwise qualify as refugees.

The 1933 Convention also built on the success of the Nansen passport system requiring a text of authorization of exit and return on the certificates to allow re-entry. The modern equivalent of the Nansen passport scheme is the Convention travel document. There is direct continuity with the Nansen passport scheme in that under Article 28(2) of the 1951 Convention travel documents under previous schemes are to be honoured by the Contracting States to the 1951 Convention.

The most important addition to the recommendations in the 1928 Arrangement was Article 3 which introduced the critical right to non-*refoulement* which states:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.

It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country.

This was the first explicit obligation of states in treaty law not to expel authorized refugees, and to avoid *refoulement* which was defined to include 'non admittance at the frontier.'

The prohibition of *refoulement* under international and regional human rights instruments has developed greatly in the years following the 1951 Convention²⁵ and has now arguably developed the status of a *jus*

cogens norm in international law.²⁶ However the right to non-*refoulement* in the 1933 Convention could be claimed only by refugees who had been authorized to reside regularly. The other limit to the right to non-*refoulement* was the right of Contracting Parties to adopt police measures resulting in *refoulement* if those measures were dictated by reasons of national security or public order.

The 1933 Convention also contained important provisions in relation to labour conditions (Chapter IV), industrial accidents (Chapter V), welfare and relief (Chapter VI) and education (Chapter VII). Some of these replicated the provisions of the 1928 Arrangement. However three key socio-economic rights, although limited, were added to those rights from the 1928 Arrangement, the right to work, to social welfare and education. Chapter III provided for the right of access to the courts and recognition of legal status which were guaranteed absolutely. Refugees were to enjoy the benefit of legal assistance as if they were nationals of the host state and they were to be exempt from *cautio judicatum solvi*.²⁷

The structure of the 1933 Convention drew on the precedent of aliens' law to establish a mix of absolute rights and contingent rights. It was more common for the contingent rights formula to be used. The Convention states that governments should provide refugees with the 'most favourable treatment' that it accords to nationals of a foreign country in relation to industrial accidents (Art. 8), medical care and hospital treatment (Art. 9), social insurance (Art. 10), admission to relief associations (Art. 11) and education (Art. 12). With liability for taxation (Art 13), exceptionally, refugees were assimilated to citizens of the host state.

Crucially, the Convention also contained an important provision on reciprocity: Article 14 states that 'the enjoyment of certain right and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity.' This is an attempt to ameliorate the fact that refugees do not have a home government to provide reciprocity and without such a provision, that refugees could easily be deprived of basic rights such as the right to inherit, to be a trustee, to obtain a patent, to appear as a plaintiff in court and others.

The rights contained in the 1933 Convention had further application. Despite many of the Contracting States making reservations to key articles, ratifying

²⁶ See Jean Allain 'The *jus cogens* nature of non-*refoulement*' (2002) *IJRL* 533-538.

²⁷ The requirement to post security for costs in legal actions.

²⁵ See Wouters.

countries gradually moved to bring their domestic law in line with the provisions of the 1933 Convention. This was most noticeable in relation to social services.

3.3 State Co-operation and the 1933 Convention

In practice, the 1933 Convention did not significantly expand refugee rights. Only eight states ratified the treaty, several with serious reservations. The worsening economic and political crises that were convulsing Europe meant that the assimilation of refugees' status with that of most favoured foreigners was not a guarantee of reasonable treatment, as the effect of the great depression on unemployment meant that states denied critical social benefits, including the right to work, to all foreigners. The strategy of assimilating refugee rights into aliens' protection, rather than providing equality of treatment as nationals or through naturalization, now led to great hardship for refugees.

The issue of refugees in Europe as with the fate of the League of Nations became increasingly bound up with the rise of Fascism and especially, the rise of National Socialism in Germany, with large numbers of persons beginning to leave the state. A High Commissioner for Refugees Coming from Germany was appointed to address the issue in 1933,²⁸ and the Nansen passport scheme was extended to refugees from the Saar after the reoccupation by Germany. The League of Nations responded to the exodus from Germany by concluding a Provisional Arrangement concerning the Status of Refugees coming from Germany²⁹ and the 1938 Convention concerning the Status of Refugees coming from Germany.³⁰ However, this was a rearguard action. The extent of this retreat from protection can be seen by the 1936 Provisional Agreement, which guaranteed only identity certificates, protection from expulsion, recognition of personal status, and access to the courts. Only seven states were signatories. The 1938 Convention even provided for return to Germany if the refugee did not move to a third country, without just cause.

[a]4. CONCLUSION

The 1933 Convention established the standard that refugees should be accorded the same treatment as that

given to aliens in the host country. It guaranteed all refugees rights, either absolutely or on terms of equivalency or on terms with citizens of most favoured states. Nevertheless the 1933 Convention is noteworthy because it set the first universal standard on the treatment of refugees. The prohibition on *refoulement* was arguably stronger than in the 1951 Convention and the refugee definition termed in a group manner meant that there was no individual status determination process to endure for refugees. In addition there was no provision for expulsion in the 1933 Convention. The structure of the 1933 Convention with its pattern of variant levels of obligation, from absolute to contingent refugees, lives on in the 1951 Convention and subsequent regional refugee agreements. The 1951 Convention built on the rights structure of the 1933 Convention and expanded the socio-economic and civil rights.

The 1933 Convention provided the model for two conceptual transitions which are central to the modern refugee rights regime. Firstly, it introduced the idea of states freely consenting to international supervision of national compliance with human rights. This was a fundamental shift. Secondly, the 1933 Convention adapted and tailored the general principles of aliens law to meet the needs of refugees. The consequential decisions to waive reciprocity, and to guarantee basic civil and economic rights in law, served as a direct precedent for both the modern refugee rights regime and a variety of international human rights mechanisms. Unsuccessful as it ultimately was, for those reasons the 1933 Convention should be remembered on its eightieth anniversary.

An earlier and extended version of this essay was published in David Keane and Yvonne McDermott (eds), The Challenge of Human Rights: Past, Present and Future (Cheltenham, UK: Edward Elgar, 2012). Many of the footnotes have been deleted for reasons of space. This article is not for citation without permission.



²⁸ UN GA Res of 11 October 1933, *LNOJ* 1933 Special Supplement 114, 11–14.

²⁹ Provisional Arrangement concerning the Status of Refugees Coming from Germany (signed 4 August 1936, entered into force 20 August 1948) 77 LNTS 3952 (1936 Provisional Agreement).

³⁰ Convention on the Status of Refugees coming from Germany (signed 10 February 1938, entered into force 26 October 1938) (1938 Refugee Convention).

Interpretation in the Asylum Process



Carl Grainger³¹

The importance of good quality interpretation in the asylum process cannot be overstated. An applicant who does not speak the language of the country of asylum will be entirely reliant on an interpreter to present their claim accurately and the asylum authority will rely on the interpreter to facilitate the effective investigation of the claim. International experience shows that imprecise interpretation can be the difference between a person being granted or refused international protection. Flaws in interpretation can also give rise to delays in the process and unnecessary appeals.

UNHCR, in cooperation with the Irish asylum authorities, has over the last number of years delivered training sessions to interpreters working in the asylum institutions, providing basic instruction on interpreting in a refugee context. UNHCR has also contributed to the training of interpreters working with the Irish Refugee Council's Independent Law Centre. Over the course of these training sessions I have had the chance to meet with and hear the thoughts of scores of interpreters, some of whom have been working within the asylum system for many years. In this article I will consider the role of the interpreter in the asylum process, highlight what I consider to be good practices and identify ways in which I believe applicants, lawyers, presenting officers and adjudicators can work with interpreters to promote high standards of translation.

The Role of the Interpreter

The interpreter's role is to facilitate the transfer of information between relevant parties, to provide a channel of communication. Fundamentally this requires the translation of words – a reasonably straightforward concept – but this in itself is not sufficient for high quality interpretation. A good interpreter will not robotically translate word-for-word, but will express what is being said as accurately as

possible having due regard to context, culture and emotion.

It is particularly important for interpreters to pay attention to words or expressions that can have multiple meanings, or particular cultural meanings. I came across one case where the applicant was asked why he was experiencing difficulties in his home country. His response was translated as "Because I am sick." A line of questioning ensued concerning the applicant's medical history before the interpreter eventually realised that the applicant had used the word "sick" to mean gay. In the applicant's language "sick" was the term generally used to describe gay people, such was the stigma that it carried within that society. Fortunately, the cultural meaning was picked up on by the interpreter who corrected himself and the initial misunderstanding did not prejudice the applicant's claim.

An interpreter should pay due consideration to the intonation and emotional tone of the applicant's speech, as this too will have a bearing on accuracy. The adage "It's not what you said but how you said it" holds true in the asylum context as in other walks of life. The same phrase can sometimes be expressed in a number of ways, each with significantly different meanings. Consider for instance the sentence "I never said he stole my money", which has seven different meanings depending on the stressed word. Naturally, it would not be appropriate for an interpreter to mimic an applicant's emotional distress but it is important that the emotional tone is reflected to a reasonable degree. If an applicant's heartfelt evidence is translated in flat, disinterested monotonous tones this can only serve to undermine its persuasiveness.

The need for precise translation also means that an interpreter must not add to, omit from or modify what has been said. This may seem like common sense but unless it is strictly adhered to even minor digressions from this rule can lead to serious difficulties for an asylum applicant. In one case I observed there was an apparent material inconsistency in the applicant's testimony concerning a specific date. Only at a very advanced stage of the proceedings did it transpire that the applicant had in fact provided the correct date referring to the Afghan calendar but rather than translate this directly and allow the adjudicator to perform the necessary conversion to the Gregorian calendar, the interpreter had undertaken the conversion himself and got it wrong. It is because the interpretation process is inevitably imperfect that asylum adjudicators should be cautious in basing credibility findings on a single word, phrase or date taken from evidence heard through an interpreter.

Impartiality is another important feature of the interpreter's role. Sometimes an interpreter will share

³¹ Protection Associate, UNHCR Ireland. Any views expressed are the author's own.

the same nationality, ethnicity, religion or political affiliation as an applicant (indeed, some interpreters are themselves refugees who have been through the asylum process). By the same token, an interpreter may have difficulties with the applicant, for example because they belong to a rival political party, tribe, religion, or they may engage in activities which do not accord with the interpreter's own moral values. In a small country such as Ireland where there are a number of closely-knit immigrant communities it may sometimes even be the case that the applicant and interpreter know each other. In all of these scenarios it is important that any conflict of interest – or for that matter anything that might be perceived as a conflict of interest – is brought to the attention of the asylum adjudicator.

There is sometimes a misperception on the part of applicants as to the interpreter's role in the asylum process and the influence they have on the decision-making process. For this reason it is always useful if the interpreter's function as a neutral facilitator of communication is made absolutely clear to the applicant at the outset of proceedings. To protect the neutrality of the interpreter, all efforts should be made to ensure that interpreters and applicants are not left in a room alone together. It is also important for the integrity of the process that any conversations between the applicant and the interpreter are translated. Even if the exchange is trivial – asking for clarification, or seeking directions to the bathroom for example – full translation is desirable in the interests of transparency and to avoid any possible perceptions of bias.

It is *not* the role of the interpreter to give evidence. An interpreter should not offer, nor should they be asked to provide, any comment concerning the substantive issues in a case. The interpreter is there to translate and any comments beyond this should be limited to issues arising in the translation process, such as explaining the cultural meaning of a word or other nuances in language. Interpreters will often come from the same country or region as an applicant but they should not be seen as a convenient source of country of origin information for a whole host of reasons, not least the high risk of inaccurate information being provided which may unduly prejudice or benefit an applicant's claim. For the same reason interpreters should not in any circumstances pass comment on the subject of where an applicant says they are from, their ethnicity, their religion, etc., which may be at issue in the case. The appropriate – and far more reliable – means of ascertaining these facts include professional language analysis and/or examining the applicant's knowledge and understanding of, for example, a given country or locality.

Interpretation Technique

There are two forms of oral interpretation: simultaneous, where the interpreter translates as the person for whom they are translating continues to speak; and consecutive, where the speaker pauses regularly to allow for interpretation. Providing accurate simultaneous translation is an extremely specialised skill which only a small minority of elite interpreters are qualified to do. It is also resource intensive and expensive, typically requiring teams of 2-3 interpreters interchanging on 15-20 minute shifts of interpreting, taking notes for the person interpreting, and resting. Consecutive interpretation is slower but does not require the same level of skill and is generally considered to be the more accurate technique for oral translation. For this reason consecutive interpretation is far more common, and this is the appropriate style of interpretation to be used in the asylum context.

It is good practice for interpreters to use direct speech. This means that the translated speech should take the same form as the original. A common mistake is for an interpreter to employ the third person when translating an applicant's testimony expressed in the first person. Failure to use direct speech can give rise to significant inaccuracies in interpretation. Consider the following example of bad practice:

Applicant: "My brother was arrested and I was beaten."

Interpreter: "His brother was arrested and he was beaten."

Here the use of the third person instead of the first person creates confusion as to the subjects of the sentence. Indeed, the translation is most likely to be construed as meaning that it was the applicant's brother who was beaten rather than the applicant, which of course is not what was said.

It is also good practice for an interpreter to translate everything that is said during proceedings for the benefit of the applicant. This means interpreting not only questions put to the applicant but also, for example, legal submissions by the applicant's lawyer, exchanges between the adjudicator and the applicant's representative on procedural matters, and conversations between the adjudicator and the interpreter.

This is desirable for two reasons. First, the outcome of the proceedings will obviously have profound repercussions for the applicant, namely being granted or refused refugee status. In proceedings of such magnitude it is appropriate that the applicant is aware of what is going on at all times. One particular concern is that the applicant's representative may make a mistake in their submissions which the applicant would

like to be able to correct. Secondly, if an applicant is unable to understand what is going on around them there is a risk that they might wrongly perceive there to be elements of unfairness to the procedure, thus undermining their faith in the integrity of the process. For instance, there is the danger that an applicant who witnesses an untranslated exchange between the adjudicator and interpreter – no matter how trivial – might begin to doubt the interpreter’s impartiality.

Of course, the desirability of having all parts of the proceedings translated for the benefit of the applicant needs to be balanced with the importance of conducting interviews and hearings with due expedience. Solutions may be found to overcome this, for example by hearing all testimony through consecutive translation but permitting a more informal whispered simultaneous translation for other parts of proceedings, such as legal submissions.

Working Effectively with Interpreters

Interpreters are sometimes a target for criticism from applicants and those of us who work in the asylum field. Having met with numerous interpreters and listened to their concerns it has occurred to me that before we rush to judge an interpreter we must ask ourselves whether we are doing everything we can to help them. There are many ways in which we can promote higher standards of accuracy in translation through our own conduct.

1. *Speak in short segments.* Any interpreter will tell you that the single most common impediment to accurate translation is people speaking for too long without pausing to facilitate translation. As an exercise to illustrate the importance of this, ask a colleague to read out text to you in segments and then repeat it back to them as accurately as possible. Try segments of one sentence at a time, then two, then three, then four, then five. By doing this exercise you will begin to appreciate the dramatic loss of content and accuracy that can arise in the interpretation process as a result of long portions of uninterrupted speech. Best practice is for one sentence to be interpreted at a time. Indeed, I would go further than this and say that longer sentences should be broken up to allow for accurate translation. In my experience getting into a rhythm of short segments of speech from the outset of proceedings is key, and interpreters, adjudicators, applicants and lawyers all have their part to play in ensuring this happens.

2. *Ask single part questions.* Asking single part questions helps to achieve accurate interpretation. It will often be the case that a target language cannot logically follow the same word order as the source language and some mental gymnastics are required on

the part of the interpreter for a question to be translated in a form that makes sense to the applicant. Multipart questions are liable to create particular difficulties for interpreters and may give rise to inaccuracies.

3. *Use plain and ordinary language.* The more straightforward the style of language used, the better the quality of interpretation is likely to be. Avoid using technical terms, legal jargon, slang or “Irishisms” insofar as possible.

4. *Use direct speech.* For reasons already discussed it is desirable that interpreters use direct speech. Interpreters can be assisted in this regard if questions are phrased using direct speech and are directed to the applicant, not the interpreter. To illustrate this with an example, rather than saying to the interpreter “Ask him how he escaped from prison” or “How did he escape from prison?” the question should be directed straight at the applicant, i.e. “How did you escape from prison?”

5. *Do not interrupt.* Interrupting an interpreter can lead to a loss of content and have a negative bearing on proceedings.

6. *Be sympathetic.* It is in all parties’ interests to have high quality interpretation and it is therefore important that we are all sympathetic to interpreters’ needs. In particular, we should respect an interpreter’s duty to intervene, for example to draw attention to the fact that they are struggling to interpret long or complex segments of speech; struggling to understand the applicant due to differences in dialect, etc.; to explain where words have a particular meaning or multiple meaning; or to explain where a mistake has been made. Interpreters should be encouraged to take notes as a memory aid and to consult a dictionary if in doubt as to the precise meaning of a word.

7. *Recognise when things are going wrong.* There are a number of tell-tale signs that interpretation is not working properly and the earlier that these are noticed, the better. First and foremost, the applicant and interpreter must be able to understand each other adequately. It is good practice to begin proceedings with a number of routine questions before clarifying with the interpreter and applicant that there are no significant communication barriers. Secondly, if during the course of proceedings a large segment of speech is translated in a seemingly truncated fashion, this is an indication that there has been a loss of content and the interpreter is paraphrasing. In this scenario there is a need to start again, having due regard to the need for short segments of speech to facilitate accurate translation. Finally, if the response to a question bears no rational connection to what was asked, or only partly answers the question, this may indeed be a case

of an uncooperative applicant but all too often it can be inadequate interpretation that is responsible.

On a final note, it is important that we are mindful of the extraordinarily challenging role that interpreters play in the asylum process. It is a job that requires mental agility, endurance and considerable skill. Interpreters are generally aware of the high stakes of the process they are involved in and the profound responsibility they bear in helping an applicant to tell their story and assisting the asylum authorities to investigate the claim. Interpreters' work exposes them to vulnerable applicants and some very difficult subject matter. International experience demonstrates that interpreters working in asylum procedures can be susceptible to conditions such as secondary traumatic stress disorder, vicarious trauma and burnout. In my own conversations with interpreters, many have commented on the difficult emotional toll their work can entail. For those of us working in the asylum field it is important that we all look out for each other's welfare, interpreters included.



Rape in India: “A Nation Awakens”³²



Patrick Dowling, RDC

Horror

Rape was reported as being the “fastest growing crime in India” in 2011.³³ In the same year India was listed amongst the “five most dangerous countries” in the world to be a woman.³⁴ An incidence of rape is reported in India every 21 minutes though “even these most horrific of crimes soon get forgotten”.³⁵ A gang rape on a bus in December 2012 in Delhi however, caught nationwide condemnation and latterly international infamy.³⁶

Denial

The victim of the Delhi gang rape succumbed to her injuries endured during the attack and died in a hospital abroad.³⁷ Gang rape in India's capital is

³² Title derives from the following article:

United Nations Population Fund (31 December 2012), *Through a Death a Nation Awakens*

<http://www.ein.org.uk/members/country-report/through-death-nation-awakens-statement-unfpa-executive-director-babatunde-oso>

³³ Inter Press Service (11 March 2011), *India: 60 Registered Rapes a Day*

<http://www.ipsnews.net/2011/03/india-60-registered-rapes-a-day/>;

See also an article in the Washington Post from January 2013 which states:

“According to government statistics, the number of rapes reported nationwide rose 50 percent between 2001 and 2011, when police registered 23,582 cases...Police and activists say part of the increase might be attributable to more reporting, but they also insist that incidents are rising”.

Washington Post (9 January 2013), *In rural India, rapes are common, but justice for victims is not*

http://www.denverpost.com/breakingnews/ci_22340631/india-outrage-rape-common-rural-areas-caste-injustice-corruption

³⁴ Reuters Trustlaw (15 June 2011), *The world's five most dangerous countries for women*

http://www.humansecuritygateway.com/documents/TL_WorldsFiveMostDangerousCountriesforWomen_Results.pdf

The countries are: 1 Afghanistan; 2 Democratic Republic of Congo; 3 Pakistan ; 4 India; & 5 Somalia

³⁵ BBC News (5 January 2013), *The rapes that India forgot*

<http://www.bbc.co.uk/news/world-asia-india-20907755>

³⁶ *Ibid.*,

<http://www.bbc.co.uk/news/world-asia-india-20907755>

³⁷ Human Rights Watch (29 December 2012), *India: Rape Victim's Death Demands Action*

commonplace.³⁸ Delhi has been called the “rape capital of India”.³⁹ A survey undertaken in 2010 found that Delhi was considered to be distinctly unsafe for women, including in public places, both day and night, and that sexual harassment was frequent on public transport, especially on buses.⁴⁰ Public sexual harassment is so prevalent and systematic that many women have learned to accept this form of violence as “normal”.⁴¹ Numerous other accounts of sexual violence, including rapes - and gang rapes - have been reported all over India since the December 2012 Delhi assault.⁴² These include rural India where rape is also common⁴³ though incidents are less likely to enter the public domain due to the subjacent status of women and the denigration of rape victims.⁴⁴ And when a case of rape is brought to the authorities in a rural area, the support of locals is more with the accused than the rape victim and the latter is additionally at risk of

<http://www.hrw.org/news/2012/12/29/india-rape-victim-s-death-demands-action>

³⁸ Reuters (13 June 2012), *India advances, but many women still trapped in dark ages*

<http://www.reuters.com/article/2012/06/13/us-g20-women-india-idUSBRE85C00A20120613>

³⁹ BBC News (10 December 2012), *Delhi police move to protect women workers after rapes*

<http://www.bbc.co.uk/news/world-south-asia-11966664>;

See also a New York Times article from March 2011 compares reported rape cases in Delhi with other large Indian cities:

New York Times (26 March 2011), *Rapes of Women Show Clash of Old and New India*

<http://www.nytimes.com/2011/03/27/world/asia/27india.html?page-wanted=all>

⁴⁰ Jagori and United Nations Women (2011), *Safe Cities Free of Violence Against Women and Girls Initiative. Report of the Baseline Survey Delhi 2010*, p.xi

<http://jagori.org/wp-content/uploads/2011/03/Baseline-Survey-layout-for-Print-12-03-2011.pdf>

⁴¹ Prajnya Trust (28 February 2011), *Gender Violence in India*

<http://www.ein.org.uk/members/country-report/gender-violence-india-0>;

See also Associated Press article from January 2013 which states: “Women who were willing to talk about an unwelcome touch or a crude remark they’d experienced said they had learned to ignore it. Most said they convinced themselves to shrug off these routine assaults and humiliations to avoid angering their attackers, or for fear of bringing shame upon themselves and their families”.

Associated Press (7 January 2013), *Indian women hope that debate sparked by brutal gang rape will lead to changing attitudes*

<http://www.windsorstar.com/news/Indian+women+hope+that+debate+sparked+brutal+gang+rape+will/7782807/story.html>

⁴² The Guardian (29 December 2012), *India gang rape: six men charged with murder*

<http://www.guardian.co.uk/world/2012/dec/29/india-gang-rape-six-men-charged-murder/print>

⁴³ Washington Post (9 January 2013), *In rural India, rapes are common, but justice for victims is not*

http://www.denverpost.com/breakingnews/ci_22340631/india-outrage-rape-common-rural-areas-caste-injustice-corruption

⁴⁴ New York Times (27 October 2012), *A Village Rape Shatters a Family, and India’s Traditional Silence*

http://www.nytimes.com/2012/10/28/world/asia/a-village-rape-shatters-a-family-and-indias-traditional-silence.html?_r=1&pagewanted=all

ostracism.⁴⁵ Meanwhile the police are more likely not only to discourage victims from bringing a case forward,⁴⁶ but also to blame the rape itself on the victim.⁴⁷ Moreover police in India are inadequately trained to cope with rape and rape cases are not thoroughly investigated as sexual violence is not deemed a priority.⁴⁸ Victims of rape therefore, are reluctant to engage with the authorities⁴⁹ and “are left to fight their long lonely battles for justice which, more often than not, is denied to them”.⁵⁰

⁴⁵ Washington Post, *op. cit.*,

⁴⁶ Wall Street Journal (30 December 2012), *Indian Rape Victim's Death Stirs Outrage and Resolve*

<http://online.wsj.com/article/SB10001424127887324669104578210661326864832.html>

⁴⁷ The Guardian (19 December 2012), *Delhi bus gang rape: 'What is going wrong with our society?'*

<http://www.guardian.co.uk/world/2012/dec/19/delhi-bus-gang-rape?INTCMP=SRCH>;

See also The Observer from December 2012 which states:

“The belief that women are responsible for sexual assault is widespread”.

The Observer (29 December 2012), *Angered India demands change after gang rape exposes a society in crisis*

<http://www.guardian.co.uk/world/2012/dec/29/india-gang-rape-society>

⁴⁸ Reuters TrustLaw (4 January 2013), *The Word on Women - Stories of rape dominate headlines in India after gang rape case*

<http://www.trust.org/trustlaw/blogs/the-word-on-women/stories-of-rape-dominate-headlines-in-india-after-gang-rape-case/>;

See also the United States Department of State report of May 2012 which states:

“Law enforcement and legal avenues for rape victims were inadequate, overburdened, and unable to address the issue effectively”.

United States Department of State (24 May 2012), *Country Reports on Human Rights Practices for 2011, India*

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>;

For those who do engage with the legal system, the Working Group on Human Rights in India and the UN in December 2012 states:

“The legal investigation and process subjects the victim-survivors to moral scrutiny and judgment...As a result, sexual violence is rarely reported, and survivors who report, often cannot assist prosecution through the length of long, hostile proceedings”.

Working Group on Human Rights in India and the UN (December 2012), *Human Rights in India, Status Report 2012*, p.120

http://www.indianet.nl/pdf/HumanRightsInIndia_StatusReport2012.pdf

⁴⁹ Prajnya Trust, *op. cit.*,

⁵⁰ BBC News (5 January 2013), *The rapes that India forgot*

<http://www.bbc.co.uk/news/world-asia-india-20907755>;

See also a Washington Post article from December 2012 which comments on shortages in both the ranks of the police and amongst the judiciary:

Washington Post (29 December 2012), *10 reasons why India has a sexual violence problem*

http://www.timesdispatch.com/news/national-world/reasons-why-india-has-a-sexual-violence-problem/article_f3f948f2-e156-50a1-b942-ecc0d34a9ad4.html;

See also a BBC News article from January 2013 which states:

“Some rape cases in India can take up to 10 years in the courts”.

BBC News (11 January 2013), *India judge convicts and sentences rapist in one week*

<http://www.bbc.co.uk/news/world-asia-india-20982152>

Silence

The rape victim from Delhi in December 2012 is one example of the abuse and violence faced by women in India where a woman's status is curtailed within a patriarchal society.⁵¹ "Discrimination against women is systemic in India, embedded in socio-cultural norms and laws that structure the family, community, workplace and the state policies".⁵² Manifestations of such a society results in numerous threats to women and girls including: female foeticide, child marriage and forced marriage, domestic violence, sexual violence, rape, and honour killings.⁵³ "Violence against women [in India] is highly pervasive and perpetrated with impunity".⁵⁴ Those that attack and rape women "...often...do not see their actions as crimes...and do not expect the women they attack to report them".⁵⁵ Reporting is furthermore hindered by the stigma attached to sexual violence where families are more likely to pressurise a victim to remain hushed in order to avoid what is seen as a fount of shame.⁵⁶ One victim of sexual molestation speaking for her fellow victims says: "We stay silent from a sense of shame...or are made to stay silent".⁵⁷

Awakening

Newspapers in India regularly report accounts of sexual violence including gang rape⁵⁸ and a summary

⁵¹ Associated Press (7 January 2013), *Indian women hope that debate sparked by brutal gang rape will lead to changing attitudes* <http://www.windsorstar.com/news/Indian+women+hope+that+debate+sparked+brutal+gang+rape+will/7782807/story.html>;

Patriarchal attitudes are more prevalent in northern parts of the country, see an article from Reuters published in June 2012:

Reuters (13 June 2012), *India advances, but many women still trapped in dark ages*

<http://www.reuters.com/article/2012/06/13/us-g20-women-india-idUSBRE85C00A20120613>

⁵² Working Group on Human Rights in India and the UN (December 2012), *Human Rights in India, Status Report 2012*, p.117

http://www.indianet.nl/pdf/HumanRightsInIndia_StatusReport2012.pdf

⁵³ Reuters, *op.cit.*,

⁵⁴ Working Group on Human Rights in India and the UN, *op.cit.*, p.118

⁵⁵ New York Times (26 March 2011), *Rapes of Women Show Clash of Old and New India*

<http://www.nytimes.com/2011/03/27/world/asia/27india.html?pagewanted=all>

⁵⁶ Wall Street Journal (14 January 2013), *Are There Really More Rapes Happening?*

<http://blogs.wsj.com/indiarealtime/2013/01/14/are-there-really-more-rapes-happening/>

⁵⁷ Associated Press, *op.cit.*,

⁵⁸ New York Times (27 October 2012), *A Village Rape Shatters a Family, and India's Traditional Silence*

http://www.nytimes.com/2012/10/28/world/asia/a-village-rape-shatters-a-family-and-indias-traditional-silence.html?_r=1&pagewanted=all

in January 2013 includes: "a 10-month-old raped by a neighbour in Delhi; an 18-month-old raped and abandoned on the streets in Calcutta; a 14-year-old raped and murdered in a police station in Uttar Pradesh; a husband facilitating his own wife's gang rape in Howrah; a 65-year-old grandmother raped in Kharagpur".⁵⁹ The increase in sexual violence against women across India has led to more women speaking out about gender violence.⁶⁰ The December 2012 gang rape in Delhi has thrust sexual violence into the forefront of Indian discourse both socially and politically.⁶¹ The woman who died in the Delhi gang rape has been called "...Damini, the 'lightning' that struck the conscience of India—and the entire world".⁶² A woman from Delhi said after her death that every " 'Indian girl has died with her today because we all felt so connected emotionally with her...If we forget the issues after her death, it would be the real shame. She died, but she woke us up' ".⁶³ The December 2012 gang rape in Delhi has awoken India to its present plight of sexual violence.⁶⁴



⁵⁹ BBC News, *op.cit.*,

⁶⁰ Inter Press Service (19 October 2012), *Violence Against Women Surging in India*

<http://www.ein.org.uk/members/country-report/violence-against-women-surging-india>

⁶¹ Reuters (29 December 2012), *Death of India rape victim stirs anger, promises of action*

<http://www.reuters.com/article/2012/12/29/us-india-rape-idUSBRE8BR03620121229>

This report by Reuters in December 2012 also states that:

"Issues such as rape, dowry-related deaths and female infanticide have rarely entered mainstream political discourse".

Reuters (29 December 2012), *Death of India rape victim stirs anger, promises of action*

<http://www.reuters.com/article/2012/12/29/us-india-rape-idUSBRE8BR03620121229>

⁶² United Nations Population Fund, *op.cit.*,

<http://www.ein.org.uk/members/country-report/through-death-nation-awakens-statement-unfpa-executive-director-babatunde-oso>

⁶³ Washington Post (30 December 2012), *National uproar over young woman's death triggers public conversation about rape*

<http://tochewon.org/national-uproar-over-young-womans-death-triggers-public-conversation-about-rape>

⁶⁴ Washington Post (29 December 2012), *10 reasons why India has a sexual violence problem*

http://www.timesdispatch.com/news/national-world/reasons-why-india-has-a-sexual-violence-problem/article_f3f948f2-e156-50a1-b942-ecc0d34a9ad4.html

The Rohingya of Myanmar – The World’s Most Persecuted People?



RDC Researcher David Goggins Investigates

Who are the Rohingya?

The United Nations has described the Rohingya of Myanmar⁶⁵ as one of the world’s most persecuted people, with their situation being compared to that of the Palestinians or Roma, yet their situation has been rarely publicised by the Western media and their plight little understood by the outside world. So who are the Rohingya and why are they in such dire straits? One concise definition is that of an IRIN News briefing document which states:

“The Rohingya are a Muslim minority ethnically related to the Bengali people living in neighbouring Bangladesh’s Chittagong District. They form 90 percent of the one million people living in the north of Rakhine State in Myanmar, which borders Bangladesh”⁶⁶

Associated Press writer Todd Pitman gives us a harsher description of the Rohingya’s status when he says:

“They have been called ogres and animals, terrorists and much worse when their existence is even acknowledged. Asia’s more than 1 million ethnic Rohingya Muslims are considered to be among the most persecuted people on Earth. Most live in an anachronistic purgatory without passports, unable to travel freely or call any place home.”⁶⁷

Historical Background

There is considerable evidence that the Rohingya have inhabited the Arakan region, now called Rakhine state, for centuries. IRIN News, for instance, says that:

⁶⁵ Myanmar or Burma? This article will use Myanmar as that is the official name of the country according to the United Nations Group of Experts on Geographical Names. Similarly, the name Rakhine State will be used in preference to Arakan State.

⁶⁶ IRIN News (16 November 2012) Briefing: Myanmar’s Rohingya crisis

⁶⁷ Associated Press Online (14 June 2012) Myanmar conflict spurs hatred for Asia’s outcasts

“Muslims living along the coast of Rakhine State can be traced back to the eighth and ninth centuries when Arab traders settled in the area. Muslims and Buddhists have historically lived on both sides of the Naaf river, which marks the current border with Bangladesh. The British annexed the region after an 1824-26 conflict and encouraged migration from India, including that of labourers, merchants and administrators.”⁶⁸

Further information on the right of the Rohingya to be considered natives of Rakhine State may be found in an International Policy Digest article which states:

“Rohingya Muslims, however, are native to the state of ‘Rohang’, officially known as Rakhine or Arakan. If one is to seek historical accuracy, not only are the Rohingya people native to Myanmar, it was in fact Burma that occupied Rakhine in the 1700’s. Over the years, especially in the first half of the 20th century, the original inhabitants of Arakan were joined by cheap or forced labor from Bengal and India, who permanently settled there.”⁶⁹

Denial of Citizenship

Yet despite all this evidence the military government which ruled Myanmar from 1962 until 2011 refused to recognise the legitimate claims of the Rohingya to citizenship, insisting that they were illegal immigrants from Bangladesh.

The UN High Commissioner for Refugees comments on this lack of recognition in a report which states:

“The Rohingya are virtually friendless among Myanmar’s other ethnic, linguistic and religious communities. They were not formally recognized as one of the country’s official national groups when the country gained independence in 1947, and they were excluded from both full and associate citizenship when these categories were introduced by the 1982 Citizenship Act.”⁷⁰

The consequences of this exclusion are described in a Guardian article, published six months before the beginning of the present crisis, which states:

“By officially denying them citizenship, the government institutionalised the long-held and unofficial discriminatory practices in the Arakan State. As a result, the Rohingya have no rights to own land or

⁶⁸ *ibid*

⁶⁹ International Policy Digest (6 March 2013) Understanding the Plight of the Rohingya Muslims

⁷⁰ United Nations High Commissioner for Refugees (December 2011) States of denial: A review of UNHCR’s response to the protracted situation of stateless Rohingya refugees in Bangladesh

property and are unable to travel outside their villages, repair their decaying places of worship, receive education, or even marry and have children without rarely granted government permission. In addition to the complete denial of their rights, the Rohingya were subjected to modern day slavery, forced to work on infrastructure projects which include constructing 'model villages' to house the Burmese settlers intended to displace them."⁷¹

This attitude is further elaborated upon in the International Policy Digest article referred to above which states:

"Myanmar officials and media wish to simply see the Rohingyas as 'illegal Bengali immigrants', a credulous reading of history at best. The intentions of this inaccurate classification, however, are truly sinister for it is meant to provide a legal clearance to forcefully deport the Rohingya population."⁷²

Myanmar began a transition to a democracy in April 2011 when the quasi-civilian administration of President Thein Sein replaced the military junta. However, the new government still refuses to grant even basic civil rights to the Rohingya.⁷³

The US Commission on International Religious Freedom tells us that:

"Muslims in Rakhine (Arakan) state, and particularly those of the Rohingya minority group, continued to experience the most severe forms of legal, economic, religious, educational, and social discrimination."⁷⁴

Further details of the discrimination to which the Rohingya are subjected may be seen in a US Department of State report which says:

"Without citizenship status Rohingyas did not have access to secondary education in state-run schools. Those Muslim students from Rakhine State who completed high school were not permitted to travel outside the state to attend college or university. Authorities continued to bar Muslim university students who did not possess NRCs⁷⁵ from graduating. These students were permitted to attend classes and sit for examinations, but they could not receive diplomas

⁷¹ The Guardian (1 December 2011) Little help for the persecuted Rohingya of Burma

⁷² ibid

⁷³ Society for Threatened Peoples (11 June 2012) Burma's government stirs up violence between Muslims and Buddhists

⁷⁴ US Commission on International Religious Freedom (20 March 2012) USCIRF Annual Report 2012 - Countries of Particular Concern: Burma

⁷⁵ National Registration Cards

unless they claimed a 'foreign' ethnic minority affiliation. Rohingyas also were unable to obtain employment in any civil service positions. Rohingya couples needed also to obtain government permission to marry and faced restrictions on the number of children they could have. Muslim newcomers were not allowed to buy property or reside in Thandwe, Rakhine State, and authorities prevented Muslims from living in the state's Gwa or Taungup areas."⁷⁶

Military Operations

Over the years the military regime which ruled Myanmar since 1962 made several attempts to drive the Rohingya out of Rakhine State. The most intensive effort being "King Dragon Operation" in 1978 which resulted in over 200,000 Rohingya fleeing to Bangladesh where they have since lived in appalling conditions in refugee camps.

Referring to the events of this period the pro-Rohingya NGO the Foundation for Human Rights and Freedoms and Humanitarian Relief states:

"The Rohingya were subjected to unlawful detention, torture and maltreatment. Communal prayers and Qurban ritual were banned. It is known that during the 1978 King Dragon Operation large numbers of Muslim women, men and elderly people were subjected to torture, imprisoned or executed. Arakanese Muslims are still facing arbitrary detentions, torture and mistreatment."⁷⁷

Similarly, a military operation in 1992 forced another 250,000 Rohingya into exile. By June 2012 it was estimated that there was a total of 1.5 million Rohingya refugees living in Saudi Arabia, Pakistan, India, Malaysia and Bangladesh.⁷⁸

Describing the situation for those Rohingya who managed to reach Bangladesh The Guardian states:

"The Rohingya have not fared much better on the Bangladesh side of the border. The government in Dhaka has refused to allow the UN High Commissioner for Refugees (UNHCR) to register Rohingya arrivals since 1992. This means that all but 30,000 of the Rohingyas are denied refugee status."⁷⁹

⁷⁶ US Department of State (30 July 2012) 2011 Report on International Religious Freedom - Burma

⁷⁷ Foundation for Human Rights and Freedoms and Humanitarian Relief (September 2012) Arakan Report

⁷⁸ Inter Press Service (15 June 2012) Myanmar: Muslim Minority Facing 'Slow-Burning Genocide'

⁷⁹ The Guardian (29 June 2012) Burma's Rohingya refugees find little respite in Bangladesh

A report from the UN High Commissioner for Refugees, in relation to the Rohingya, states:

“Those Rohingya who have moved to Bangladesh in order to escape from the difficulties of life in their place of origin continue to be confronted with serious hardships in their country of asylum. This is not a completely unique situation, as refugees in many parts of the world are obliged to take up residence in areas which are characterized by high levels of poverty, low levels of development, limited local capacity and poor socio-economic indicators.”⁸⁰

Origins of the Present Crisis

Increasing tensions between the Muslim Rohingya and the Buddhist Rakhine culminated in intercommunal violence following the death of a Rakhine woman named Thidar Htwe on 28 May 2012 in the town of Ramri. This woman was said to have been raped and murdered by three young Rohingya Muslims, who were arrested a few days later.⁸¹ One of these individuals has since committed suicide and the other two have been sentenced to death.⁸² However the prompt action of the authorities failed to reconcile the two communities, with Global Insight noting that:

“The rape and murder of the Rakhine girl was the trigger, not the cause of the unrest, and as such the sentencing of the girl’s murderers will not be enough to counter decades of hatred between the two communities.”⁸³

As feared, the murder of Thidar Htwe provided the pretext for ultra nationalist elements among the Burmese majority population to launch a propaganda campaign directed at the Rohingya, which greatly exacerbated the existing ill-feeling towards them. According to the Inter Press Service news agency:

“Websites, blogs and facebook pages based in and outside Myanmar are brimming with hate speech calling for the ethnic cleansing of the Rohingya.”⁸⁴

An opinion piece in the Wall Street Journal implicates a number of actors in the incitement of hatred against the Rohingya, saying:

⁸⁰ United Nations High Commissioner for Refugees (December 2011) States of denial: A Review of UNHCR’s response to the protracted situation of stateless Rohingya refugees in Bangladesh

⁸¹ Banyan’s notebook (13 June 2012) “The most persecuted group in Asia”

⁸² International Business Times (18 June 2012) Two Men Sentenced To Death For murder That Sparked Rakhine Violence

⁸³ Global Insight (19 June 2012) Myanmar Court Sentences Two to Death over Rape, Murder That Triggered Riots

⁸⁴ Inter Press Service (15 June 2012) Ethnic Cleansing of Muslim Minority in Myanmar?

“A vocal minority of media, religious, and political elites conducted a year-long campaign to stoke anti-Muslim sentiment that had simmered for decades. Taking advantage of the lifting of censorship, broadcasters and newspapers decried the supposed crimes of Muslim communities. Politicians and religious leaders played a role as well. The head of the Rakhine Nationalities Development Party is rabidly anti-Muslim, and he and his followers played a central role in stoking the violence in Rakhine State. Other politicians, including members of the opposition National League for Democracy, have called for the expulsion of the entire Rohingya population.”⁸⁵

Commenting on this atmosphere of hatred towards the Rohingya human rights activist Debbie Stothard said:

“People feel it very acceptable to say that ‘we will work on wiping out all the Rohingyas’”⁸⁶

Writer and Myanmar analyst Sai Latt said:

“We have heard of scholars, journalists, writers and celebrities, even the so-called democracy fighters openly making comments against Rohingyas.”⁸⁷

Even Myanmar’s monks have been accused of demonising the Rohingya, with The Independent saying:

“In a move that has shocked many observers, some monks’ organisations have issued pamphlets telling people not to associate with the Rohingya community, and have blocked humanitarian assistance from reaching them. One leaflet described the Rohingya as ‘cruel by nature’ and claimed it had ‘plans to exterminate’ other ethnic groups.”⁸⁸

The Outbreak of Violence in Rakhine State

Major violence erupted in Rakhine State on 3 June 2012 when a bus carrying Muslim pilgrims travelling through the town of Taunggoke was stopped by a Buddhist mob who then beat ten of the passengers to death. According to overseas Rohingya rights groups the victims of this atrocity were not even ethnic

⁸⁵ The Wall Street Journal (25 March 2013) The Dark Side of Burmese Freedom: Buddhist monks and politicians have used an unshackled media to stoke anti-Muslim violence

⁸⁶ Associated Press Online (14 June 2012) Myanmar conflict spurs hatred for Asia’s outcasts

⁸⁷ *ibid*

⁸⁸ The Independent (25 July 2012) Burma’s monks call for Muslim community to be shunned

Rohingya and were killed simply because they were Muslims.⁸⁹

Following this incident widespread sectarian violence occurred in Rakhine State, in which both Rohingya and Rakhine suffered many casualties. A Human Rights Watch report on the ensuing mayhem states:

“Mobs from both communities soon stormed unsuspecting villages and neighborhoods, killing residents and destroying homes, shops, and houses of worship. With little to no government security present to stop the violence, people armed themselves with swords, spears, sticks, iron rods, knives, and other basic weapons, taking the law into their own hands. Vast stretches of property from both communities were razed.”⁹⁰

Reports vary as to the number of deaths resulting from these clashes. A government official estimated that in addition to the 10 Muslims killed on June 3 another 71 people died in the riots.⁹¹ The National Human Rights Commissioner said that at least 78 people had been killed, while there were unofficial estimates that the death toll was in excess of 100 dead.⁹² In addition to the deaths and injuries suffered by both sides to the conflict, the burning of villages in Rakhine State also resulted in the displacement of more than 50,000 Rohingya and up to 10,000 Rakhine.⁹³

Particularly disturbing were claims of partisanship on the part of the security forces, who declared a curfew in five townships which applied only to the Rohingya and not to the Rakhine. Phil Robertson, deputy director of Human Rights Watch’s Asia division, has been quoted as saying:

“Local officials are siding with the Rakhine Buddhists – they are not neutral. There is a 24-hour curfew on Rohingya, while Rakhine Buddhists are allowed to roam and loot.”⁹⁴

Human Rights Watch has alleged that the security forces were actively involved in the violence against the Rohingya, and that following the declaration of a

⁸⁹ Daily Times (5 June 2012) Buddhist vigilantes kill 9 Muslims in Myanmar bus attack.

⁹⁰ Human Rights Watch (1 August 2012) “The Government Could Have Stopped This” – Sectarian Violence and Ensuing Abuses in Burma’s Arakan State

⁹¹ Agence France Presse (21 June 2012) Myanmar: Myanmar unrest leaves ‘more than 80 dead’

⁹² Amnesty International (19 July 2012) Myanmar: Abuses against Rohingya erode human rights progress

⁹³ Agence France Presse (19 October 2012) Myanmar: Muslims trapped in ghetto of fear in Myanmar city

⁹⁴ IRIN News (12 June 2012) Myanmar: Rakhine violence sparks concern

state of emergency on 10 June they carried out discriminatory mass arrests, referring to the testimony of Rohingya witnesses as follows:

“Witnesses told Human Rights Watch that state security forces violently raided predominately Rohingya villages in Maungdaw township, firing on villagers and looting homes and businesses. In several villages, police and Nasaka dragged Rohingya from their homes and violently beat them. Witnesses in villages outside of Maungdaw said dozens of people, including women and children, were taken away in mid-June in Nasaka trucks to unknown locations, and have not been heard from since. Mass arrests of Rohingya have also taken place in Buthidaung and Rathedaung townships. Witnesses in Maungdaw township described several instances in which Arakan men wielding sticks and swords accompanied the security forces in raids on Rohingya villages.”⁹⁵

Allegations by Rohingya witnesses that government forces were responsible for many of the deaths are repeated in a Guardian article which states:

“They point out that many of the victims of the riots died of gunshot wounds, though the rioters were mainly armed with machetes and clubs. ‘It was the government,’ Shah Noor said quietly. ‘Without the military backing, the Moghs would never dare attack us. The government wants to drive us out.’”⁹⁶

October 2012: A Renewal of Violence

On 21 October 2012 fresh violence broke out in towns across Rakhine State, which resulted in widespread arson, looting and murder. Both Rohingya and Rakhine communities were attacked, with each group blaming the other for the bloodshed.⁹⁷ Reporting on the latest intercommunal violence The Economist said:

“From about nine in the morning on October 22nd, smoke could be seen rising on the outskirts of Mrauk-U. Hundreds of Rakhine Buddhists, from the surrounding area, mostly young men headed for the scene by foot and on motorcycles, tuk-tuks and crowded lorries. They armed themselves with a variety of crude weapons--swords, spears, sickles, pitchforks, cleavers, slingshots and petrol bombs. Asked where they were going one tugged at an imaginary beard, and made a throat-cutting gesture. On Monday night, Mrauk-U itself was guarded by similarly armed gangs

⁹⁵ Human Rights Watch (5 July 2012) Burma: Mass Arrests, Raids on Rohingya Muslims

⁹⁶ The Guardian (7 August 2012) Persecuted Burmese tribe finds no welcome in Bangladesh

⁹⁷ The Times (26 October 2012) 100 dead in renewed ethnic violence in Burma

of young men, and some Rakhine villagers came into town for shelter. The next day reports came of fresh fires at two different villages, followed by the new killings.”⁹⁸

Early reports on these clashes suggested that more than 100 people were killed, but this figure was later revised downward, with Agence France Presse putting the death total at 34 men and 30 women.⁹⁹

2013: An escalation of violence?

The spectre of inter-religious violence being spread beyond the confines of Rakhine State resurfaced on 20 March 2013 with an outbreak of violence in the town of Meikhtila in central Myanmar. This violence was said to have resulted from a disagreement between a Muslim gold shop owner and his Buddhist customers. Various sources have put the toll of this latest violence at between 32 and 40 deaths.

The implications of the latest violence are analysed in an Associated Press report which says:

“The emergence of sectarian conflict beyond Rakhine state is an ominous development, one that indicates anti-Muslim sentiment has intensified nationwide since last year and, if left unchecked, could spread.”¹⁰⁰

BBC Religions, referring to the Buddhist attitude to violence, states:

“Buddhism is essentially a peaceful tradition. Nothing in Buddhist scripture gives any support to the use of violence as a way to resolve conflict.”¹⁰¹

In contrast to this perception of Buddhism as a peaceful religion the recent violence has seen the emergence of militant buddhist monks who have campaigned against not only the Rohingya but who are opposed to the presence of any Muslims in Myanmar.

Writing about these radical monks Kashmir Images states:

“Monks, once at the forefront of the pro-democracy movement and viewed with reverence in this devout Buddhist-majority nation have been linked to the unrest. Some members of the clergy have been involved in the violence, while others are spearheading

a move to shun shops owned by Muslims and only visit stores run by Buddhists, identified by stickers showing the number ‘969’, which has become a symbol of their campaign.”¹⁰²

The Dilemma of Aung San Suu Kyi

Pro-Democracy leader and Nobel Peace Prize winner Aung San Suu Kyi is Myanmar’s best known and most widely admired public figure. In view of her status as a national hero and promoter of human rights there were expectations that she would be prominent in calling for justice for the Rohingya, yet she has been seemingly reluctant to champion their cause, apparently for fear of alienating her own supporters.

Commenting on these expectations the International Crisis Group states:

“There have been expectations that Aung San Suu Kyi would take a clearer stand on the violence and human rights violations. She recently told the media that ‘people want me to take one side or the other so both sides are displeased because I will not take a stand with them’. She later issued a joint statement with lawmakers from ethnic minority parties calling for more security forces to be deployed to Rakhine State and called on the government to address the concerns of both communities. However, her unique position in the country means that the expectation will continue for her to break through partisanship and speak much more strongly and clearly against extremist rhetoric and violence, and in support of the fundamental rights of all people in Rakhine State.”¹⁰³

The dilemma of Aung San Suu Kyi is considered by The Guardian, which states:

“To date, Aung San Suu Kyi – who is considered internationally as Burma's most unifying political figure and who has previously stressed the significance of ethnic rights – has been largely absent from debates on the issue and it is unclear why she has not played a greater role. However, analysts largely believe her reticence may stem from a political desire to maintain majority Burman votes for her NLD party, particularly in the runup to the 2015 parliamentary elections.”¹⁰⁴

This viewpoint is also reflected by The Independent:

⁹⁸ The Economist Online (24 October 2012) War among the pagodas: Killings in Myanmar’s Rakhine state

⁹⁹ Agence France Presse (26 October 2012) At least 64 dead as communal unrest rocks Myanmar.

¹⁰⁰ Associated Press Online (25 March 2013) Buddhist-Muslim violence spreads in Myanmar

¹⁰¹ BBC Religions (23 November 2009) Buddhism and war

¹⁰² Kashmir Images (India) (1 April 2013) Religious ‘radical’ driving Myanmar unrest: Experts

¹⁰³ International Crisis Group (12 November 2012) Myanmar: Storm Clouds on the Horizon

¹⁰⁴ The Guardian (20 December 2012) Trapped inside Burma's refugee camps, the Rohingya people call for recognition

“‘The Lady’ has remained uncharacteristically silent on the persecution of Burma's Rohingya, knowing that speaking out would risk alienating many of her political allies who are vehemently opposed to them.”¹⁰⁵

Aung San Suu Kyi's apparent unwillingness to assist the Rohingya has dismayed many of her western admirers, including a senior British minister who said:

“Frankly, I would expect her to provide moral leadership on this subject but she hasn't really spoken about it at all. She has great moral authority in Burma and while it might be politically difficult for her to take a supportive stance towards the Rohingya, it is the right thing to do.”¹⁰⁶

Conditions in IDP Camps

By October 2012 there were about 75,000 displaced persons, mostly Rohingya, living in 40 camps and temporary locations in the towns of Sittwe and Kyaultaw in Rakhine State. Aid workers complained that conditions in these camps did not conform to international standards in regard to food aid, nutrition, health, water and sanitation, and emergency shelter provision.¹⁰⁷

The October clashes forced an additional 36,000 people to leave their homes and seek shelter in these camps. In February 2013 Medecins Sans Frontieres described conditions for the residents as:

“Camp residents have many critical medical needs. Skin infections, worms, chronic coughing and diarrhea are the most common ailments that MSF teams have encountered in more than 10,000 medical consultations in the camps since October. Malnutrition rates vary, but MSF has found alarming numbers of severe acutely malnourished children in several camps. Although clean water is often available in sufficient quantities, some of the displaced are denied access to it. Pregnant women are also denied access to medical care.”¹⁰⁸

The Democratic Voice of Burma gives us an even bleaker view of camp conditions:

“‘What most of the world is not aware of are the refugees that are not living in [registered] camps,’ said

¹⁰⁵ The Independent (20 August 2012) Burma's Rohingya Muslims: Aung San Suu Kyi's blind spot

¹⁰⁶ *ibid*

¹⁰⁷ IRIN News (25 October 2012) UN calls for urgent action on Rakhine

¹⁰⁸ Medecins Sans Frontieres (7 February 2013) Myanmar: Violence and Intimidation Leave Tens of Thousands Without Medical Care

Oddny Gumaer from Partners Relief and Development. ‘And those people are living in conditions that are so bad that I'm sure if the international community doesn't do something very soon they are going to die.’ She told DVB that she was ‘overwhelmed’ by the conditions in some of the areas she visited, which she described as akin to ‘concentration camps’. ‘If they are lucky they have a tarp to cover them, many of them have stitched together old rice sacks. There are no toilets, no sanitation, doctors, and no access to hospitals. I saw babies that were so malnourished and children with bloated stomachs and mothers that couldn't feed their babies because they didn't have any milk.’¹⁰⁹

Following visits to all the major IDP camps in Sittwe Human Rights Watch announced in March 2013 that:

“Several camps housing Rohingya are located in paddy fields and lowland areas that face heavy flooding during the rainy season, which will begin in May, yet the authorities have not taken serious steps to move them to higher ground. Humanitarian organizations in Arakan State are concerned that heavy rains will overflow already inadequate and overused latrines, spreading otherwise preventable waterborne diseases throughout the displaced population, whose health has already been weakened by inadequate food and medical care. In some sites visited by Human Rights Watch, a handful of latrines were being shared by several thousand displaced Rohingya.”¹¹⁰

Death at Sea

Conditions in Myanmar have become so unbearable for many Rohingya that they are prepared to take desperate risks to find a better life in other countries. This often involves an extremely hazardous voyage across the Indian Ocean in small boats. The number of Rohingya driven to make the frequently ill-fated attempt is chronicled in a Washington Post article which states:

“Although precise figures are difficult to come by, Rohingya community leaders and business managers involved in the exodus say the number of boat migrants has climbed to several thousand each month, with two to three wooden vessels leaving area shores each night, at times loaded to almost twice their capacity.”¹¹¹

¹⁰⁹ Democratic Voice of Burma (5 February 2013) Thousands of displaced Rohingya still receive ‘no aid’

¹¹⁰ Human Rights Watch (26 March 2013) Burma: Rohingya Muslims Face Humanitarian Crisis

¹¹¹ The Washington Post (11 February 2013) Rohingya Muslims flee Burma by boat after sectarian violence

Referring to the dangers faced by these voyagers a spokesman for the UN High Commissioner for Refugees said:

"Most are men, but there are also increasing reports of women and children on these often rickety boats making the journey southwards. We estimate that of the 13,000 people who left on smugglers' boats in 2012, close to 500 died at sea when their boats broke down or capsized."¹¹²

In February 2013 a particularly harrowing tale was told by Rohingya rescued from a sinking ship, which BBC News related as follows:

"The survivors have claimed that there were 98 others on board the vessel with them when they set sail two months ago. They allegedly died during the journey and their bodies were thrown overboard. 'They said they had carried food and water for only one month and they had been in the sea for two months after the ship engine stalled,' police spokesman Prishantha Jayakody told the Reuters news agency. 'Their captain and 97 others have died due to dehydration and starvation,' he said."¹¹³

Conclusion

A number of solutions to the Rohingya crisis have been recommended by various commentators, some of which would be regarded as unsatisfactory from a human rights viewpoint.

Myanmar's president Thein Sein has suggested that the solution to the Rohingya problem is deportation, saying that:

"We will send them away if any third country would accept them"¹¹⁴

The Rohingya might prefer the solution proposed by UNHCR's Asia spokeswoman Kitty McKinsey, who said:

"Basically Myanmar does not consider these 735,000 Muslims in northern Rakhine state to be their citizens and we think the solution is for them to get citizenship in Myanmar."¹¹⁵

¹¹² UN High Commissioner for Refugees (22 February 2013) UNHCR urges action to prevent boatpeople tragedy in Bay of Bengal

¹¹³ BBC News (19 February 2013) Burmese rescued off Sri Lanka 'threw dead into sea'

¹¹⁴ Agence France Presse (12 July 2012) Myanmar: Myanmar moots camps or deportation for Rohingyas

¹¹⁵ *ibid*

Human Rights Watch recommends that:

"The government should quickly amend discriminatory provisions in the 1982 Citizenship Law so that Rohingya are treated in the same way as members of the eight other ethnic groups named in the citizenship law, as well as the unnamed ethnic groups still protected under the law and who are treated as citizens. All other discriminatory laws, policies, and practices should be revised or repealed."¹¹⁶

Several experts have argued that the recent strife in Myanmar is not simply due to religious differences. Nyunt Maung Shein, president of Burma's Islamic Religious Affairs Council has said:

"It's more about politics. Actually it is not due to a crisis of religion... It is a political play, not due to the discrimination and religion,"¹¹⁷

Former Indonesian Vice President Jusuf Kalla said:

"Rohingya is not only a religious problem. Politically, historically, culture, economics, and a religious problem. It is complex."¹¹⁸

All documents referred to in this article are available on request from the Refugee Documentation Centre.



¹¹⁶ Human Rights Watch (1 August 2012) "The Government Could Have Stopped This" – Sectarian Violence and Ensuing Abuses in Burma's Arakan State

¹¹⁷ Voice of America News (28 February 2013) Rohingya Refugees Stir Debate on Rising Sectarian Violence

¹¹⁸ *ibid*

Examining the concept of discrimination within the asylum law arena



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Refugee Legal Service

The principle of non-discrimination is a central tenet of refugee law. It is referred to in the introduction of the 1951 Convention relating to the Status of Refugees. This convention together with the Protocol relating to the Status of Refugees adopted in 1967 form the cornerstone of today's international regime of refugee protection.¹²⁰

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a specific clause prohibiting discrimination in the enjoyment of rights set out in the Convention.¹²¹

The Charter of Fundamental Rights of the European Union at Article 18 re-iterates that the 1951 Geneva Convention underpins the right to asylum referred to therein.¹²²

While the EU may provide more extensive protection than that set out in the Charter, in the absence of such protection the Charter rights are generally considered to be co-extensive with those in the Convention.¹²³

¹¹⁹ Any views expressed are the author's own.

¹²⁰ 189 U.N.T.S. 2545, entered into force on April 22, 1954.

¹²¹ Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), is entitled 'Prohibition of discrimination', and provides as follows:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

¹²² Article 18 Right to asylum: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')."

¹²³ R (Zagorski) v Secretary of State for Business, Innovation & Skills [2010] EWHC 3110 Admin

Article 21 of the Charter expressly prohibits discrimination.¹²⁴

Article 9 of the relevant **Council Directive 29 April 2004 on minimum standards**¹²⁵ which is in Chapter III of the Directive and is entitled 'Qualification for being a Refugee', defines acts of persecution in paragraphs 1 and 2 as follows:

"1. Acts of persecution within the meaning of article 1A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or

(b) be an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

(a) acts of physical or mental violence ...;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;..."

The European Communities (Eligibility for Protection) Regulations 2006 transpose the Qualification Directive (2004/83/EC).

In Irish domestic law, the Refugee Act, 1996 (as amended) gives effect to the 1951 Convention and defines a refugee as a person who, "owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his

¹²⁴ Article 21 Non-discrimination: "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

¹²⁵ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted *Official Journal L 304 , 30/09/2004 P. 0012 - 0023*

or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country...¹²⁶

Persecution and discrimination

It is clear that not every discriminatory act will automatically result in a finding that persecution is likely to take place if a person returns to their country of origin. In order to constitute persecution, any anticipated ill-treatment must attain a certain degree of severity. Persecution itself has no legal definition. The concept of what constitutes persecution does not lend itself to precise analysis and as Ryan J. noted in *V. v. Refugee Appeals Tribunal* [2011] IEHC 262,

“at para. 51 of the UNHCR Handbook it is observed:

‘There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success.’ ”

While there is general agreement that treatment must attain a certain degree of severity to constitute persecution, there is not any precise measurement of this threshold that must be reached.

The architects of the Geneva Convention refer specifically to the Universal Declaration of Human Rights in the preamble. This would indicate that the drafters wanted the refugee definition to be understood in the context of human rights principles. Furthermore, the fact that the non-discrimination principle is specifically enunciated in the introduction to the Convention and adopting a purposive interpretation of the Convention the finding by Lord Steyn in the UK case of *Shah* that ‘counteracting discrimination ... was a fundamental purpose of the Convention’¹²⁷ is not surprising.

The UNHCR Handbook, although not a legal text does give guidance as to what may constitute persecution:

‘... it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human

¹²⁶ Section 2 of the Refugee Act, 1996 (as amended)

¹²⁷ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, available at: <http://www.unhcr.org/refworld/docid/3dec8abe4.html>

*rights – for the same reasons – would also constitute persecution’.*¹²⁸

Furthermore, the UNHCR Guidelines on Discrimination are useful for decision makers in providing guidance as to what constitutes discrimination.

The relevant paragraphs are paragraphs 53 through 55. They provide as follows:

“53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on ‘cumulative grounds’. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.”

¹²⁸ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status: UN doc.HCR/IP/r/Eng/REV.1,1979 (re-edited 1992), para. 51

Clearly, any discrimination founding an application for refugee status must potentially result in serious harm. With regard to such forms of discrimination the UK House of Lords decision of Shah¹²⁹ is instructive.

Lord Hoffman in the judgement echoes the view that the "anti-discrimination approach" can supply a clear basis for the enumerated convention grounds:

*"In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect. The obvious examples, based on the experience of the persecutions in Europe which would have been in the minds of the delegates in 1951, were race, religion, nationality and political opinion. But the inclusion of "particular social group" recognised that there might be different criteria for discrimination, in pari materiae with discrimination on the other grounds, which would be equally offensive to principles of human rights. It is plausibly suggested that the delegates may have had in mind persecutions in Communist countries of people who were stigmatised as members of the bourgeoisie. But the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention."*¹³⁰

With regard to causation, Lord Hoffman stated as follows:

"Answers to questions about causation will often differ according to the context in which the question is asked. (See Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd. [1998] 2 W.L.R. 350). Suppose oneself in Germany in 1935. There is discrimination against Jews in general, but not all Jews are persecuted. Those who conform to the discriminatory laws, wear yellow stars out of doors and so forth can go about their ordinary business. But those who contravene the racial laws are persecuted.

*Are they being persecuted on grounds of race? In my opinion, they plainly are. It is therefore a fallacy to say that because not all members of a class are being persecuted, it follows that persecution of a few cannot be on grounds of membership of that class. Or to come nearer to the facts of the present case, suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew."*¹³¹

It is clear from the speeches of Lord Steyn and Lord Hope in Shah and Islam that women are not particular social groups in all societies. However, women were considered in that case particular social groups in Pakistan because of the societal and institutionalised discrimination against them which was sanctioned or condoned by the state.

Discrimination in Irish case-law

A number of Irish decisions have addressed discrimination as it arises in asylum claims.

In the decision of Gilligan J. in Rostas v. Refugee Appeals Tribunal,¹³² reference was made to evidence of discrimination against the Roma community in Romania. The applicant, in that instance had suffered serious racially motivated attacks from non-state actors. Gilligan J., having regard to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, in particular paragraph 51, 53, 54 and 55 held that a fear of persecution may arise from "the cumulative effects of various measures of

¹³¹ Shah, above n.127 at p.18

¹³² Rostas v. Refugee Appeals Tribunal Gilligan J.: Unreported, High Court., 31st July, 2003

¹²⁹ above note 127.

¹³⁰ Shah, above n.127 at p.15

discrimination where they may have seriously prejudicial consequences.”

Gilligan J. employed the Shah test: Persecution = serious harm + the failure of state protection.

Interestingly, Gilligan J. went on to state that: *“it appears to be an arguable question whether there may be a reasonable possibility of a fear of persecution for a convention reason on cumulative grounds , including discrimination in regards to employment.”*

The acknowledgement that discrimination in the employment arena can in certain circumstances amount to persecution reflects the commitment to the value of the right to work as set out in the International Covenant on Economic, Social and Cultural Rights.

In the High Court decision *V. & Anor -v- Refugee Appeals Tribunal & Ors* [2011] IEHC 262 (01 July 2011), Ryan J. set out and applied paragraphs 53, 54 and 55 of the UNHCR Guidelines.¹³³

He also cited Article 9 of the Qualification Directive.¹³⁴ In finding that the Tribunal had applied the correct legal principles, he noted that it was a question of degree whether discrimination amounted to persecution.

The court stated:

“It is clear from these principles that a measure of discretion will inevitably lie with the decision maker – in this case the Tribunal – to determine whether certain discriminatory measures, taken cumulatively, amount to persecution in any given case. It is not possible to identify when a precise threshold has been reached so that the discrimination is of such a degree that it constitutes persecution. It should also be borne in mind that persecution itself can be an uncertain concept. At para. 51 of the UNHCR Handbook it is observed: “There is no universally accepted definition of ‘persecution’, and various attempts to formulate such a definition have met with little success.”

It is true of course that decisions on the facts are to be made by the Tribunal member hearing the application. But that is not the issue here. The question is whether the evidence of discrimination contained in the materials accepted by the Tribunal actually constituted persecution as a matter of law. On the basis of the evidence and country of origin information available to her, I do not think the Tribunal member erred in law in reaching the conclusion that she did. Under article 9

of the 2006 Regulations, there must be an accumulation of measures that is sufficiently severe as to affect an individual in a manner that is at least comparable to a severe violation of basic human rights. In other words, it is a question of degree, and the Tribunal member clearly acknowledged this when she stated that “discrimination may amount to persecution if it has effects of a substantially prejudicial nature”. I do not think that the case that was made to the Tribunal member was so strong as to leave open only one possible conclusion, namely, that the discrimination at issue was such as to constitute persecution. There may be cases where a Tribunal member disregards flagrantly prejudicial instances of discrimination that on any objective and reasonable analysis must amount to persecution but I do not think that this is such a case.”

The court upheld the finding of the tribunal that while the applicants a husband and wife who were an ethnic Serb and Croat respectively had suffered discrimination in Croatia, that given the improving situation in Croatia, a fear of persecution in the future was not well-founded.

The decision of Cooke J. in *MST v. Refugee Appeal Tribunal* [2009] IEHC 529 also has as its background contemporary events in the former Yugoslavia. In *MST* the issue was whether the treatment of a mother and her daughter, two ethnic Serbs, in Croatia amounted to a form of persecution. The evidence was that their house had been attacked in an ethnically motivated incident and the child had suffered bullying and taunting while at school.

Cooke J. nevertheless rejected the argument that this amounted to persecution:-

“Having regard to the case law as to the essential nature of “inhuman or degrading treatment” for this purpose, the Court is satisfied that this conclusion, as made on that limited basis by the Minister could not be upset as being unsound or unlawful. While the attacks on the house and window breaking, the expressions of racial hatred, the bullying of J. in school and the attack upon her which broke her nose, are all undoubtedly frightening, stressful, painful and ugly, it could not, in the Court’s judgment, be said that they are such as amount to inhuman or degrading treatment on the basis of their essential character, duration or level of severity.”

Both cases illustrate how sporadic events of discrimination and ill-treatment can fall short of persecution when assessed in the context of refugee law principles. Significantly, neither case dealt with the role of the State authorities in relation to such

¹³³ Above, n.128

¹³⁴ Above, n.125

discrimination and it would appear that, in both cases, the discrimination complained of originated from non-state actors.

In the case of *S. v Refugee Appeals Tribunal* [2010] IEHC 138 (20 January 2010), the court considered whether discrimination suffered by HIV sufferers in Nigeria constituted persecution as a matter of law.

" It is not the law that signatories to the Geneva Convention relating to the Status of Refugees must give refuge to applicants who assert stigmatisation because they are living with HIV / AIDS. Neither is it the law that any applicant who asserts discrimination per se is entitled to refugee protection. The discrimination or stigmatisation suffered or feared must amount to a severe violation of human rights such as cruel, inhuman or degrading treatment before obligations under the Refugee Convention arise. It would impose an unreasonable or impossible burden on the Nigerian government or indeed any other government if they were expected to have in place an effective system to prevent and punish those who avoid social contact with persons with HIV / AIDS or who make moral judgments or have negative attitudes to the condition."

The court noted that the applicant did not provide any objective evidence to substantiate her claim that she would suffer a persecutory denial of medical treatment in Nigeria nor did she specify on what persecutory basis the said denial would occur (i.e. whether by reason of her status as a person living with HIV, a woman, a single woman or a single woman who is HIV positive).¹³⁵

With regard to whether non- provision of health care could constitute persecution the court cited with approval the dicta of Clarke J. in *S. (E. M.) v. Minister for Justice, Equality and Law Reform* [2004] IEHC 398 (21 December 2004):

"[...]the fact that a person may be subjected to a lower level of care in a different country does not, of itself, amount to discrimination. However that is not to

¹³⁵ With regard to the sharing of the burden of proof, see *A.O. v. The Refugee Appeals Tribunal and the Minister for Justice Equality and Law Reform* (High Court 26th May, 2004) per Peart J where he states "It is beyond any doubt that she has been diagnosed as HIV positive, and it therefore became a possibility once she articulated this in the limited way she could, that there might be discrimination against the group of HIV positive sufferers, and that the sharing of the burden of proof then kicked in, so to speak in the sense that it then became necessary to pass on to a further stage of investigation of the application, perhaps by obtaining any available country of origin information about the condition or plight of HIV positive sufferers in Nigeria. It, at the least, merited investigation. She might as a result be part of a particular social group exposed to discrimination in Nigeria."

say that the standard of health care provided in such country might not be a matter which might lead, in an appropriate case, to a conclusion that there was a degree of discrimination against a social group such that it amounted to a sufficient level of discrimination to amount to persecution. Where there is, therefore, an inappropriately low level of health care given within that country to a group who form a social group for the purposes of refugee law and where, having regard to the level of health care provided within that country, the treatment of that group from a health perspective may be regarded as discriminatory to a significant degree, it seems to me to be arguable that same amounts to a sufficient level of discrimination to give rise to a claim for persecution."

Discrimination and access to education

In *D. (a minor) -v- Refugee Appeals Tribunal & Anor* [2011] IEHC 431 (10 November 2011), Hogan J. considered the issue of discrimination against Roma children when attempting to access primary education in Serbia.¹³⁶ The court held that the right to education (more particularly the right to basic education) is a fundamental right and that this right is reflected in Article 42 of the Constitution, Article 2 of the First Protocol of the ECHR and Article 14 of the EU Charter of Fundamental Rights. It is also reflected in international agreements, such as Article 28 of the UN Convention on the Rights of the Child.

It was acknowledged, as a matter of fact, by the Tribunal in the first instance that Roma children experienced significant discrimination in Serbia in accessing education.

The question then arose as to whether official indifference by the State to the entitlement of a member of a disadvantaged group to secure even a basic education can amount to persecution for the purposes of the Convention.

At first instance, the Tribunal found that such discrimination did not amount "to the denial of human dignity in any key way." However, Hogan J. found that the right to education is a fundamental right being denied to the applicant and likely to be denied in the future not because of lack of resources, but because of official indifference, intolerance and hostility. He examined the concept of persecution as follows:

¹³⁶ The applicant's parents were of Ashkali ethnicity but were regarded as Roma in Serbia.

“In his classic textbook, The Law of Refugee Status (1991) Professor Hathaway defines persecution (at page 112) as the:

“sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community. The types of harm to be protected against include the breach of any right within the first category, a discrimination or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources.”

It is significant that Hogan J. distinguished between those cases that concerned authorities who did not have the fiscal ability to respond (G.V. & I.V v Refugee Appeals Tribunal [2011] IEHC 262 and MST v. Refugee Appeal Tribunal [2009] IEHC 529) and the instant case, where the State authorities themselves engaged in acts of discrimination towards Roma children.

It was noted that when attending school, Roma children were often sent to the back of the class or educated in what amounted to segregated classrooms. Further, a disproportionate number of Roma children were transferred to special schools, designed for children with special needs and which were unsuitable for the majority of Roma children.

The judgment is significant, in that, while Gilligan J. in *Rostas v Refugee Appeals Tribunal* had raised the possibility of it being an arguable question that discrimination experienced in attempting to gain employment could constitute persecution¹³⁷, here Hogan J. provides a robust endorsement of the so-called “third category” as enunciated by Hathaway.

Equally, it is clear from the judgment that while an absolute lack of resources could ground a defence to states not implementing rights as set out in the International Covenant on Economic, Social and Cultural Rights¹³⁸, no such defence is available where States act in a discriminatory manner towards particular groups. Nor is ignorance a defence. In determining what constitutes discrimination when assessing the actions of authorities ‘official indifference’ is placed within the same category as intolerance and hostility.

Summary

In summary, the following points should be taken into consideration when addressing discrimination in the context of an asylum claim:

1. The principle of non-discrimination is a fundamental one and underlines the provisions of the Geneva Convention.
2. To constitute persecution discrimination must result in substantial hardship to an individual.
3. Isolated acts of discrimination will not usually constitute persecution but such acts should be viewed cumulatively and in the context of relevant State Protection.
4. The UNHCR guidelines on discrimination in particular, articles 53 through to article 55, although not a legal text, is a useful guide in establishing whether discrimination amounts to persecution for the purposes of the Convention.
5. When assessing State Protection in the context of rights contained in the International Covenant on Economic Social and Cultural Rights, State authorities are obliged to protect those rights to the best of their fiscal ability and cannot exclude any minority from the enjoyment of those rights. The deprivation of certain of those rights can, at an extreme level, be tantamount to the deprivation of life or cruel, inhuman or degrading treatment and thus constitute persecution.



¹³⁷ Above at n.132

¹³⁸ U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force January 3, 1976.