Untold Stories: Gender-Related Persecution and Asylum in South Africa

Lindsay M. Harris
University of California, Berkeley Law School

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UNTOLD STORIES: GENDER-RELATED PERSECUTION AND ASYLUM IN SOUTH AFRICA

Lindsay M. Harris*

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* Lindsay M. Harris, J.D. 2009, University of California, Berkeley Law School (Boalt Hall). Lindsay’s experience with gender-related aspects of asylum includes working with the Center for Gender and Refugee Studies at the University of California, Hastings College of Law, the East Bay Community Law Center, the University of Witwatersrand’s Forced Migration Studies Program, and Lawyers for Human Rights in South Africa. In law school, she coordinated the California Asylum Representation Clinic in conjunction with the East Bay Sanctuary Covenant at Berkeley Law School. She will clerk for the Honorable Harry Pregerson of the Ninth Circuit Court of Appeals in 2009–10. Her research was made possible by the Berkeley Human Rights Center Fellowship, the American Society of International Law’s Arthur C. Helton Fellowship, and the Boalt Hall Women’s Association Herma Hill Kay Fellowship. Lindsay also wishes to thank Kate Jastram, for her endless support and feedback on this Article; Rachel Shigekane and the Berkeley Human Rights Center; and her collaborators in South Africa for their insight and assistance.
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INTRODUCTION

South Africa receives more asylum seekers than any other country in the world. United Nations High Commissioner for Refugees António Guterres proclaimed, "If you look at the policy and legal statutes of South Africa, refugees enjoy one of the most advanced and progressive systems of protection in the world today." Increasing numbers of women seek South Africa's protection. In 2006, 20.2% of asylum seekers were women; a significant increase from previous years. Given South Africa's prominence in the region, its handling of female asylees and gender-related persecution claims influences the adjudication of these claims regionally and even worldwide.


2. Rulashe, supra note 1.


South Africa’s Refugees Act (“the Act”) entered into force seven years ago and is hailed as among the most progressive pieces of refugee legislation in the world. The Act, however, has met with serious implementation issues on many levels, and revisions to it are currently under scrutiny. This Article focuses on the adjudication of gender-related persecution claims in South Africa, by revealing the results of a national study on these claims. The following statement by a Ugandan asylum seeker introduces some of these implementation issues.

I decided not to tell anyone [what really happened to me] because it is a shame and it is hurting, and I thought maybe it is not necessary to mention. The only question [I was asked] was why I left my country so I just said the things that I was comfortable with and I didn’t know where those information are going to. The hardest thing was when I was interviewing to talk about my whole story [the rape] and what happened to me. Just talking about it, that it my hardest thing. I could do anything, even if waiting in the queue, the only thing is talking about it. You can go to officials and they give you that day to come and then you get there to the front of the queue and they say come back tomorrow or another day, but that is nothing.

This Article explains the particular difficulties that female asylum seekers and survivors of gender-related persecution face, reaffirming the need for the practical and sensitive application of international and domestic gender guidelines. Extensive research into client files and interviews with key decision makers prove that, despite scholarship suggesting that women may be advantaged in asylum proceedings, a focus

7. For a discussion of the more general challenges facing female migrants and asylum seekers in South Africa, see Kate Lefko-Everett, Voices from the Margins: Migrant Women’s Experiences in Southern Africa (Jonathan Crush ed., 2007); see also Appendix II.
9. For example, Thomas Spijkerboer argues that despite the “widespread and virtually uncontested idea that women are at a disadvantage during the asylum procedures,” women are actually more successful in their asylum claims than men. Thomas Spijkerboer, Gender and Refugee Status 18 (1994). In fact, research indicates that a disproportionate number of women are granted refugee status when applying for asylum in developed countries. Id. at 17–18. Furthermore, Jacqueline Bhabha contends that women are far “from being disadvantaged, therefore, it is suggested that [women] are privileged beneficiaries of ‘victimology,’ a benign approach to victims of abuse.” Jacqueline Bhabha, Demography and Rights: Women, Children and Access to
on gender is still needed in the South African context. While there are undoubtedly problematic elements of the 1998 Refugees Act warranting its revision, the addition of gender as an additional category under the refugee definition, as proposed by the recent Refugees Amendment

Asylum, 16 Int’l J. Refugee L. 227, 231 (2004). Perhaps those adjudicating asylum claims believe women are more likely to be fleeing genuine persecution, rather than solely poor economic conditions.

Women are also perceived as less threatening in terms of the potential for criminal activity and displacement of the local labor market. Spijkerboer, supra, at 25. While helpful in gaining an initial grant of asylum, the portrayal of women as victims may actually undermine their eventual success in their new surroundings and may lead to a larger phenomenon of misunderstanding. Spijkerboer argues that presenting the clients as “defenceless women may help them gain a residence permit; it may also perpetuate a racist myth and thereby work against a female refugee once she has a residence right.” Id. at 7. Susan Akram agrees. In her study of asylum claims by Muslim women in the United States, she argues that reducing the asylum claim to a stereotypical portrayal of the position of women in Muslim cultures risks denying “many individuals, especially women, human rights protection to which they are legitimately entitled.” Susan Mussarat Akram, Orientalism Revisited in Asylum and Refugee Claims, 12 Int’l J. Refugee L. 7, 9 (2000). Akram argues that the way in which an asylum claim is presented can undermine the claim, because the extreme stereotypes are easily disproved by government research and expert testimony, harming the applicant’s credibility. Id. at 10. Such “monolithic portrayals of Islam in refugee and asylum claims are not simply incorrect . . . they silence the voice of the refugee him- or herself.” Id. at 18. Ultimately painting such an extreme picture of persecution can undermine future genuine claims of persecution that do not fit the articulated stereotype. Id. at 19.

Women also face obstacles in the earlier stages of the migration process. Spijkerboer, supra, at 17. Most women may be unable to flee their country of origin due to reduced mobility caused by multiple factors such as a lack of resources or dependence on them by children or family members. Jacqueline Bhabha, Border Rights and Rites: Generalizations, Stereotypes and Gendered Migration, in WOMEN AND IMMIGRATION LAW: NEW VARIATIONS ON CLASSICAL FEMINIST THEMES 15, (Sarah Van Walsum & Thomas Spijkerboer eds., 2006). Therefore, it may be more useful to explore the factors affecting women earlier in the process, what shapes their decision and ability to leave, and their journey to South Africa. Unfortunately, as Spijkerboer acknowledges, there is a general lack of data pertaining to gender and asylum in Western countries. Spijkerboer, supra, at 17. While additional research on motivations for and barriers to female migration must be undertaken, an examination of gender-based asylum claims in South Africa is a crucial piece of the puzzle of gender and forced migration. The findings in this Article show that women and survivors of gender-related persecution remain disadvantaged in the South African refugee status determination process.

This Article focuses solely on the addition of gender as a sixth ground for asylum under the proposed Amendments to the Refugees Act. Other changes include dismantling the Standing Committee (“SC”) and the Refugee Appeal Board (“RAB”) and providing explicitly for unaccompanied minors. While these changes are not analyzed in this Article, they are largely warranted; the current Refugees Act is by no means perfect.
Bill, is not a solution to the hardships faced by female asylum seekers and survivors of gender-related persecution navigating the South African system.

Section I of this Article explains South Africa's legal and procedural framework for refugees, and outlines how the system functions in practice. This section also discusses the Refugees Act Amendment Bill. Section II provides background on the development of domestic and international guidelines for the adjudication of gendered asylum claims. Section III reports findings from interviews with South African officials on gender-related persecution issues. Part D of Section III specifically highlights the challenges and inadequacies in addressing claims uncovered by interviews with survivors of gender-related persecution, and provides an extensive review of asylum applicant files at national legal service providers.

Finally, in the conclusion, I make a number of recommendations that would help to protect the interests of this population. The solution for the problems revealed in this research will not be created through additional or refined legislation, but in consistent and nuanced implementation of the United Nations High Commissioner for Refugees ("UNHCR") and South African Gender Guidelines.

I. SOUTH AFRICAN REFUGEE LAW: LEGAL AND PROCEDURAL FRAMEWORK

A. The System: International and Domestic Refugee Law

South Africa's refugee system is shaped by international and regional standards, which are implemented by domestic legislation. The relatively progressive legal framework in place stands in sharp contrast to the reality facing asylum seekers and refugees in South Africa.

All legislation pertaining to refugees and asylum seekers must be framed by the South African Constitution, hailed as "one of the most

11. See Refugees Amendment Bill, 2008, Bill 11B-2008 s. 4(a) (GA). The Refugees Amendment Act of 2008 was actually passed in the final stages of editing this Article. Refugees Amendment Act No. 33 of 2008. Section 4 of the Amendment Act adds "gender" as a ground for asylum to section 3 of the original Refugees Act. The findings of this study remain relevant as I argue that the addition of gender as a ground for asylum (alongside race, religion, nationality, political opinion, tribe, and membership in a particular social group) will not solve the problems presented in sections III. C and III. D. of this Article.

12. For a complete list of the acronyms used in this Article, see Appendix III.

progressive in the world and enjoy[ing] high acclaim internationally."\textsuperscript{14}

The 1996 Constitution guarantees fundamental rights to all individuals within the borders of South Africa, regardless of citizenship.\textsuperscript{15} Therefore, refugees and asylum seekers are entitled to rights enjoyed by citizens, such as human dignity,\textsuperscript{16} freedom and security of person,\textsuperscript{17} and access to housing,\textsuperscript{18} social assistance and health care,\textsuperscript{19} among other rights.\textsuperscript{20} Since 2003, asylum seekers have enjoyed the right to work and study while their asylum claims are pending.\textsuperscript{21}

Following the dismantling of the apartheid system in 1994, South Africa joined the international refugee regime.\textsuperscript{22} In order to address the new flow of asylum seekers into the country, the South African Parliament passed the Refugees Act of 1998. The Act incorporated article 1 of the UN Refugee Convention's definition of a refugee.\textsuperscript{23} Under the Refugee Convention, a refugee is defined as an individual with a "[W]ell-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . ."\textsuperscript{24}


\textsuperscript{16} See S. AFR. CONST. § 10.

\textsuperscript{17} See id. § 12.

\textsuperscript{18} See id. § 26.

\textsuperscript{19} See id. § 27.

\textsuperscript{20} See id. §§ 9-18, 21, 23-35.

\textsuperscript{21} Minister of Home Affairs & Others v Watchenuka & Another 2004 (4) SA 326 (SCA) (S. Afr.).


\textsuperscript{23} Compare Refugees Act 130 of 1998 s. 3(a), with U.N. Refugee Convention, supra note 22, at art. 1 A (2).

\textsuperscript{24} U.N. Refugee Convention, supra note 22, at art. 1 A (2).
The Act also incorporated the 1969 Organization of African Unity's ("OAU") Convention Regarding the Specific Aspects of Refugee Problems. Under the OAU Convention, a person is awarded refugee status if he or she:

owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence... \(^\text{26}\)

Significantly, the OAU definition allows those who are not specifically persecuted as individuals to claim asylum when fleeing generalized violence.

In July 1996, South Africa ratified the African Charter on Human and People's Rights, which guarantees the rights of every person, "when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.\(^\text{28}\)" While the African Charter grants individuals the right to seek asylum in another country, this right is subject to the laws of the country in which the individual seeks asylum. Accordingly, an examination of South African law is necessary to understand the difficulties that individuals face seeking asylum in South Africa.\(^\text{29}\)


\(^{26}\) OAU Refugee Convention, supra note 22, art. 1(2).


\(^{29}\) South Africa has signed other international agreements such as the Universal Declaration of Human Rights, which states, "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 14, § 1, U.N. Doc A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. The UDHR is non-binding, but certain provisions have attained the status of customary international law. Robert F. Gorman, Historical Dictionary of Refugee and Disaster Relief Organizations 48, 124 (1994) (contending that although the UDHR is not legally binding, the UDHR has established human rights norms that have attained customary international law status). Under section 6 of the South African Refugees Act, the Act must be interpreted with due regard to the
The Refugees Act creates the basic framework for the South African refugee system. An explanatory flow chart is included to facilitate understanding of the path of an asylum application from entry to final status determination.

**Diagram 1: An Overview of the South African Asylum System**

1. Asylum seeker enters South Africa
2. Within 14 days...
   - Refugee Reception Office
   - Screening Interview: issued
   - Section 22 Permit
3. Interview with Refugee Status Determination Officer
   - Approval: Issued Refugee Identification Document
   - Denial as "untounded"
4. Refugee Appeal Board
   - Overturn
   - Confirm denial
   - Appeal to South African High Court
5. Denial as "manifestly unfounded abusive or fraudulent."
6. Standing Committee for Refugee Affairs
   - Confirm
   - Refer back to RSDO

The Act allocates responsibility for the adjudication of asylum claims to the Department of Home Affairs ("DHA")\(^3^1\). The Act requires asylum seekers to either declare their intention to seek asylum at the border/point of entry, or report to one of the country's five Refugee Reception Offices ("RRO") within fourteen days.\(^3^2\) Once an asylum seeker

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UDHR and "any other relevant convention or international agreement to which the Republic is or becomes a party."

30. This chart and section discusses the asylum procedures in South Africa prior to the passing of the Refugee Act Amendment Bill, *supra* note 11.


32. Refugee Regulations R366 of 6 April 2000 s. 2(2), Vol. 418, No. 21075, under the Refugees Act 130 of 1998 [hereinafter Refugee Regulations], *available at*
reports to an RRO, they are issued a "Section 22 permit." This permit must be renewed every thirty days until a decision is reached on the asylum seeker's claim.

After a permit has been issued, applicants undergo a brief initial screening interview, followed by an in depth assessment of their claim by a Refugee Status Determination Officer ("RSDO"). If the RSDO grants the applicant's claim, the applicant will be issued a refugee identification document under Section 30 of the Refugees Act. The identification document gives them full legal protection under the Constitution and the ability to apply for an immigration permit after five years, after which the Standing Committee may grant them refugee status indefinitely.

If the RSDO rejects the claim, he has two options. He can reject the claim as "unfounded," or as "manifestly unfounded, abusive or fraudulent." If the RSDO rejects the claim as unfounded, the applicant can appeal in writing to the Refugee Appeal Board ("RAB"). The RAB is a quasi-independent body within the DHA, currently composed of five full-time members serving five year terms, that reviews appeals de novo. All members are currently legally trained, although this is not a legal requirement. The RAB travels to the various RROs throughout the nation to hear appeals. Generally only one Board member hears the case, unless it is deemed to be of great importance. The appellant


33. Refugees Act s. 22; Refugee Regulations s. 7.
35. See id.
36. Refugees Act s. 24; Refugee Regulations s. 10.
37. Refugee Regulations s. 27.
38. Refugees Act s. 1(i) defines "abusive," s. 1(xi) defines "fraudulent" and s. 1(xii) defines "manifestly unfounded" as "an application for asylum made on grounds other than those on which such an application may be made under this Act."
40. Refugees Act s. 16.
41. Refugee Appeal Board (S. Afr.), Practice Note 1/06 s. 3.1 (July 1, 2006) (on file with author) ("All appeals before the Board proceed by way of hearing (either by way of interview or on the papers) de novo, and all issues of law, fact and credibility are at large.").
42. Legal training is, however, required under the Refugees Amendment Bill for the Chairperson of the new Refugee Appeals Authority, superceding the RAB and SC, under Section 8B of the Bill. Refugees Amendment Act No. 33 of 2008.
almost always appears before the RAB, generally without a legal representative and sometimes without much-needed interpretation. If the RAB also denies the claim, the applicant may appeal as of right to the High Court, within South Africa's federal court system.

If the RSDO rejects the claim as "manifestly unfounded (failing to fall within reasons for asylum granted by the Refugees Act), abusive or fraudulent," the case is then referred to the Standing Committee for Refugee Affairs ("SC"), a three member body with one full-time Chairperson sitting in Pretoria. The SC can affirm the RSDO's decision or refer it back to the officer for closer scrutiny. The SC does not generally take oral testimony from the appellant, basing their decision entirely on the initial interview record provided by the RSDO.

During 2007, the South African government proposed amendments to the 1998 Refugees Act. These changes include dismantling the SC, ensuring that the system protects unaccompanied minors, as well as numerous other additions and adjustments. The government sought input from the refugee sector and academic community, but the bill has yet to be passed in Parliament. Most relevant to this Article, the proposed bill adds gender as an additional ground for asylum alongside race, nationality, religion, political opinion and membership in a particular social group. The legislative history reveals no explanation for this proposed change. Significantly, South Africa would be the first country in the world to add any ground to the refugee definition. This Article examines the current state of gender-related asylum claims in South Africa to assess whether such a change would be beneficial. The rationale behind the addition of gender as a sixth ground is likely the assumption that this would facilitate easy recognition and adjudication

44. RAB members estimate appellants have legal representation ten percent of the time. Id.
45. The SC and RAB would be dismantled, which would result in the creation of the Refugee Appeals Authority. Refugees Amendment Bill, supra note 11, ss. 8(a), 32.
of gender-related claims by decision-makers within South Africa. Generally gender-related claims fall under the membership in particular social group ground, where establishing the requisite nexus to the ground that the persecution was "by reason of" the membership in the proposed particular social group is often difficult.\footnote{47}

\textit{C. Implementation of the Law: The Reality}

While South Africa's legislative framework is not perfect, the true challenges lie in consistent implementation of the progressive provisions of the Refugees Act. The main problems asylum seekers face are difficulties accessing the South African asylum system and extensive delays in processing times due to a backlog of cases. While there is no clear explanation for these problems, they are likely rooted in South Africa's shortage of resources combined with its lack of political will for reform due to high levels of xenophobia within the country.

Although the Refugee Regulations stipulate that an asylum claim be adjudicated within 180 days of the applicant's date of entry into South Africa,\footnote{48} in reality many claims languish for years at the DHA.\footnote{49} In July 2006, the Minister of Home Affairs officially launched the Refugee Backlog Project to address the growing numbers of pending asylum applications.\footnote{50} Through the project, the DHA established four temporary offices to process claims dating as far back as 1994. While some progress has been made under this system, thousands of asylum seekers still live in limbo, awaiting their decisions for years.\footnote{51}

\begin{footnotes}
\item[47] See Refugees Act 130 of 1998 s. 3.
\item[48] Refugee Regulations s. 3(1).
\item[50] \url{http://www.home-affairs.gov.za/refugee_project.asp} (last visited Mar. 23, 2009).
\item[51] "Of the 53,361 new applications received by the DHA in 2006, approximately 5,000 (less than 10\%) were effectively processed during the year . . . limited capacity and poor administration have contributed an additional 48,019 cases to a backlog that already numbers over 80,000." CoRMSA Report 2007, \textit{supra} note 3, at 4. The 2008 CoRMSA Report asserts that the total backlog is more than 89,000 cases. \textit{See} CoRMSA Report 2008, \textit{supra} note 1, at 17. The numbers vary; UNHCR's 2006 Statistical Yearbook found that the largest number of undecided asylum cases in first instance and on appeal worldwide was reported by South Africa, with 131,000 undecided cases. \textit{Population Levels and Trends,} 2006 UNHCR Stat. Y.B. at 30.
\end{footnotes}
The backlog is due in part to the overwhelming number of asylum claims filed each year in conjunction with a lack of efficiency and a dearth of expertise at the DHA. The DHA's lack of resources, however, is compounded by the astounding level of xenophobia directed at asylum seekers, refugees and foreigners in South Africa. Most dangerously, this xenophobia has manifested in a number of violent attacks. Foreigners in South Africa also suffer discrimination at the hands of the police and authorities—there is a high level of harassment, extortion and mistreatment by both the South African Police Force and the various local metropolitan police departments. Additionally, the police have been accused of standing by, or even facilitating, local attacks on foreigners. Not only does this behavior aggravate problems in the asylum system, it violates the South African Constitution and numerous international treaty commitments.

Responding to rising levels of xenophobia particularly targeting migrants and refugees in South Africa, in 1998 the South African government launched its "Roll Back Xenophobia Campaign." In light of the recent violence in South Africa, the Campaign has had little impact.

52. For a general discussion of the xenophobia experienced by migrant women in South Africa in particular, see Lefko-Everett, supra note 7.


55. Vigneswaran & Misago, supra note 53.


on anti-immigrant sentiment. While every asylum seeker or refugee within South Africa's borders faces potential discrimination and xenophobia, female asylum seekers are arguably more vulnerable due to their status as women, despite the development of international norms intended to protect these women.

II. GUIDELINES ADDRESSING GENDER-RELATED PERSECUTION CLAIMS

The past few decades have seen a global movement to secure the human rights of women. One focus of this movement has been to ensure that the right to claim asylum is meaningful and effective for female asylum seekers fleeing persecution and both men and women escaping gender-based persecution. Gender-based or gender-related persecution is characterized as follows:

[G]ender-based persecution flows not from the victim's biological sex but, rather, from the power relations that characterize relations between men and women. Gender-related persecution guidelines must be based on hierarchies of social roles—roles that exist in societies around the world—and not on the biological sex of the claimants.

Heaven Crawley defines gender-related persecution of women as "the experiences of women who are persecuted because they are women, i.e. because of their identity and status as women." By contrast, Crawley defines gender-specific persecution of women as "forms of serious harm, which are specific to women." It is important to acknowledge here that men are also survivors of gender-based persecution, be it persecution based on sexual orientation or persecution involving sexual violence. In this Article, gender-related persecution and gender-based persecution or violence refers to persecution on the basis of the individual male or female's gendered identity. Still, while "[g]ender-related claims may be brought by either men or women, . . . due to particular types of persecution, [such claims] are more commonly brought by women."

59. See Lefko-Everett, supra note 7, at 68-70.
62. Id.
63. UNHCR, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to
Since the 1980s, various governments and organizations have strived to create guidelines addressing the adjudication of gender-related and women's asylum claims. An exploration of gender-related persecution claims in South Africa therefore warrants a discussion of i) the production of these gender guidelines by international bodies and in other asylum-receiving countries, and ii) South Africa’s framework for assessing gender-related persecution claims.

A. The Development of International Guidelines for Gender-Related Persecution Claims

At the international level, since the 1980s, the UNHCR and national governments alike have taken steps to recognize gender-related persecution. The Executive Committee of the UNHCR, for example, issued a statement concluding that states should be free to “adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1A(2) of the 1951 UN Refugee Convention.”

Later, in 1991, the UNHCR issued the “Guidelines on the Protection of Refugee Women,” generally addressing the problems refugee women face, but with some focus on the recognition of gender-related persecution claims and suggested interview techniques for the adjudication of such asylum claims.

The first national guidelines on gender-related persecution claims were published by Canada’s Immigration and Refugee Board in 1993.
A number of other nations, including the United States, Australia and the United Kingdom followed the Canadian example, issuing their own gender guidelines. Following the promulgation of individual country guidelines, the UNHCR in 2002 issued its own Guidelines on International Protection: Gender-related Persecution. These Guidelines address the required legal standard for "well founded fear" of persecution and the required nexus between the harm experienced and the grounds, with gender-related persecution in mind. The UNHCR Guidelines also set out procedural standards for the asylum process. In January 2008, the UNHCR issued the Handbook for the Protection of Women and Girls, replacing the 1991 guidelines and reflecting years of international concern over the rights of female refugees and asylum seekers. The 2008 Handbook generally addresses Women and Girls within the International Refugee System, while the 2002 Gender Guidelines remain the most authoritative source to guide the interpretation of gender-related persecution claims.

affords decision-makers independence, but they must, nonetheless, apply the Guidelines unless there are compelling reasons to depart from them. In this way, the Guidelines are considered to ‘act as a tool of persuasive reference.’” LaViolette, supra note 60, at 177 (internal citation omitted).


69. AUSTL. DEP’T OF IMMIGRATION & MULTICULTURAL AFFAIRS, REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS (July, 1996).


71. This is still an evolving area in the adjudication of asylum claims internationally. In 2007, Norway proposed a new Aliens Law, which characterized sexual violence and gender-specific acts as persecution. Norway also announced that new gender guidelines were going to be created. Cecilia M. Bailliet, Examining Sexual Violence Within the Military in the Context of Eritrean Asylum Claims Presented in Norway, 19 INT’L J. REFUGEE L. 471, 510 (2007).

72. See UNHCR Gender Guidelines, supra note 63.

73. Id. For a detailed discussion of the asylum definition and elements such as “well-founded fear,” and the causal link between persecution and the grounds for asylum, see Rodger Haines, Gender-Related Persecution, in Refugee Protection in International Law (Erika Feller et al. eds., 2003), available at http://www.unhcr.org/publ/PUBL/419cc6ad7.pdf.

74. Though the guidelines were finalized in January, 2008, they were not available to anyone outside the UNHCR until March, 2008.

While the UNHCR Gender Guidelines (2002) are not technically binding, as a party to the Refugee Convention, South Africa should take them into consideration.76 Although South Africa has not formally adopted the UNHCR Gender Guidelines, it is a signatory to numerous international treaties protecting the rights of women, including most saliently the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).77 Furthermore, within the country, the Consortium for Refugees and Migrants in South Africa,78 a South African network of non-governmental organizations operating to promote the rights and welfare of refugees, asylum seekers and migrants living in South Africa, has published suggested gender guidelines for asylum determination.79 While the government is not bound by these guidelines, South Africa's 1998 Refugees Act includes "gender" as an enumerated category under the definition of social group, alongside "group[s] of persons of particular . . . sexual orientation, disability, class or caste."80 The statutory recognition of gender as an enumerated category gives it legally binding status, meaning that decision-makers must consider gender as a particular social group under the Refugees Act.

76. Article 35 of the Refugee Convention requires national governments to cooperate with the UNHCR. U.N. Refugee Convention, supra note 22, at art. 35.


79. NAHLA VALJI & LEE ANNE DE LA HUNT, NAT'L CONSORTIUM ON REFUGEE AFFAIRS, NATIONAL GENDER GUIDELINES FOR ASYLUM DETERMINATION (1999) [hereinafter SOUTH AFRICAN GENDER GUIDELINES].

80. Refugees Act 130 of 1998 s. 1(xxi).
In 2007 I undertook a national study with the goal of understanding gender-related persecution claims in the South African system. Given that South Africa is not bound by the NGO generated South African Gender Guidelines, an additional goal of this study was to assess the level of voluntary compliance with these guidelines and the international standards discussed in Section II. This study also sought to enlarge the body of knowledge on women’s claims in South Africa more generally, a topic on which information is scarce. This study reveals that women asylum seekers in South Africa, even when ultimately granted refugee status, continue to face steep obstacles to fair and considerate adjudication of their claims. Furthermore, gender-based persecution claims, whether brought by men or women, are inconsistently decided at all levels of adjudication. These difficulties are compounded by the hardships all asylum seekers face in South Africa, including deficiencies in access to the refugee system, lack of interpretation, privacy and confidentiality issues at interviews, as well as overwhelming xenophobia and anti-immigrant sentiment. The methodology used in the study and the results are discussed in the following sections.

A. Methodology

In an attempt to understand how gender-related persecution claims are addressed in the South African context, I conducted original research as a visiting fellow under the auspices of the Forced Migration Studies Program ("FMSP") and Lawyers for Human Rights ("LHR"). The study had three main parts, 1) interviewing decision-makers within the South African asylum system, 2) reviewing legal files within South Africa and 3) follow up interviews with individual survivors of gender-related persecution, identified during the file review, who had filed for asylum in South Africa.

81. Based in Johannesburg at the University of Witwatersrand, FMSP is an “internationally engaged; Africa-oriented; and Africa-based centre of excellence for research and teaching that helps shape global discourse on migration aid and social transformation.” See University of the Witwatersrand, Forced Migration Studies Programme, http://migration.org.za (last visited Mar. 23, 2009).

This methodology highlights the difficulties of performing research within the South African refugee sector, particularly as to women's and gender-based claims. Specifically, the DHA does not keep records according to the gender of asylum seekers, and in general information, even if available, is difficult to access. An obvious shortcoming of the study is the small sample size, which captured only those clients who had sought legal representation, certainly a minority of the asylum seeker and refugee population. Additionally, legal client files rarely contain the initial grounds for asylum, and as such, some survivors of gender-based persecution surely went undetected. Many client files deal with more pragmatic, yet critical issues such as access to the asylum system, employment, education, a bank account and healthcare. Consequently, many survivors of gender-based persecution do not reveal their experiences to their lawyers.

As one component of the study, I conducted interviews with key South African decision-makers, including members the RAB and the Chairperson of the SC. I interviewed all five RAB members collectively concerning procedural matters and their thoughts on and experiences with various gender-related persecution claims. I interviewed the only full time member of the SC, the Chairperson, on his experience with gender-related claims. Unfortunately neither entity maintain statistics by gender, making it difficult to ascertain how many female cases are upheld, denied or set aside, let alone the grounds upon which those claims are based. Findings from the interviews with both the RAB and the SC will be discussed here, as well as the results from the file review.

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83. Even at the RAB level, board members estimated that a minority of asylum seekers, perhaps ten percent at the most, have attained legal representation for their appeal hearing. Far fewer asylum seekers, if any, have legal representation at the initial refugee status determination stage. Interview with Refugee Appeal Board, supra note 43.

84. In terms of gaining information on gender-related persecution, the most useful files were those where the legal clinic represented the client in their appeal hearing. These files contained the heads of argument, a rejection letter from the DHA, and a refugee status determination interview transcript conducted by the lawyers addressing the grounds for asylum. It is for this reason that the highest numbers of follow-up interviews were conducted at the University of Cape Town. Despite seeing a lower number of clients, UCT seems to represent a higher percentage and number of their clients on appeal. Almost all of the files at UCT contained detailed information on the client's refugee claim, whereas such files were rare (estimated at 15% of all files) at the LHR offices in Durban, Johannesburg, Pretoria and Port Elizabeth.

85. See supra Part I.B for a discussion on the South African asylum system, including the RAB and the SC.
B. Overview

The RAB has been affected by the DHA's Backlog Project and consequently experiences its own backlog of decisions. During the course of this study, the RAB shared its unpublished statistics on appeals heard and decisions issued during 2006. Unfortunately none of the data maintained by the RAB is disaggregated by gender.

TABLE 1

| Appeals heard during the period of Jan–Dec 2006: | 2,545 |
| Decisions issued during the period of Jan–Dec 2006: | 902 |
| The 902 decisions consist of: | |
| Appeals upheld (approved) | 57 |
| Appeals denied | 791 |
| Appeals referred back to the Refugee Status Determination Officer | 54 |

These statistics show that only 6.3% (57/902) of appeals were upheld in 2006. This highlights the importance of the initial refugee status determination process, which will be discussed at greater length later in Section III. The RAB does not routinely publish their decisions due to limitations and frustrations in the actual process of posting the decisions on the Internet. This makes analysis of RAB decisions difficult, and as such, this research represents information only from those cases made available through the RAB, or via my review of client files. This analysis is necessarily constrained due to the lack of consistently available information.

C. Results by Category of Gender-Related Persecution

Despite South Africa's progressive legislation concerning membership in a particular social group, and gender in particular, inconsistent implementation of the legislation limits its impact. This section presents findings from the above-described interviews with the RAB, the SC, and the file review. I will address the obstacles to implementation currently hampering sensitive and nuanced adjudication of gender-related asylum claims.

86. This includes appeals that were cancelled (one), withdrawn (three), dismissed (487) and miscellaneous decisions (twenty).
87. Interview with Refugee Appeal Board, supra note 43.
The study revealed six main categories of gender-related persecution asylum claims that the South African adjudicators fail to consistently address. These categories include: 1) domestic violence, 2) forced marriage, 3) Female Genital Cutting, 4) forced sterilization, 5) rape and sexual violence, and 6) persecution on the basis of sexual orientation.

1. Domestic Violence as Persecution

"Domestic violence is the leading cause of female injury in almost every country in the world." Nonetheless, in the South African asylum system, no initial determination or RAB holding has recognized domestic violence as persecution. Interviews with the RAB and with the SC revealed somewhat opposing views as to whether domestic violence should be recognized as grounds for asylum.

The RAB indicated openness to granting asylum based on domestic violence, but stressed the requirement of medical documentation of the abuse, as well as evidence that the state was unwilling or unable to intervene to stop persecution by the non-state actor. Conversely, the Chairperson of the SC expressed the view that domestic violence would not meet the definition of persecution. In the interview, the Chairperson drew a sharp distinction between women fleeing Female Genital Cutting ("FGC"), overwhelmingly recognized as legitimate persecution under the refugee definition, and those fleeing domestic violence. Specifically, the SC indicated that it had difficulty setting aside RSDO denials of asylum claims based on domestic abuse. In its view, women beaten by their partners do not fall into a particular social group; the SC


89. Interview with Refugee Appeal Board, supra note 43.

90. I follow the Center for Gender and Refugee Studies at UC Hastings in referring to the practice as "female genital cutting," rather than "circumcision" or "mutilation."

91. Following the leading U.S. case on FGC, In re Fauziya Kasinga, 21 I. & N. Dec. 357 (1996) (granting asylum to a Togolese woman based on fear of future FGC), it is well accepted in the asylum law world that the practice of FGC is persecution. See Lisa Frydman & Kim Thuy Seelinger, Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence, 13 BENDER'S IMMIGR. BULL. 1 (2008) (discussing U.S. jurisprudence following the Kasinga case).

therefore considers these claims manifestly unfounded. When asked to distinguish between FGC and domestic violence claims, the Chairperson explained his view that active and successful state intervention is required to prevent FGC, but state assistance is not required to prevent domestic violence. In the Chairperson's view, FGC and domestic violence are very separate issues.

The study revealed that the RSDOs tend to share the Chairperson's skeptical approach to domestic violence claims. Specifically, the files reviewed showed that all clients fleeing domestic violence were denied asylum. While it is possible that some domestic violence cases have been granted in the past, the lack of record-keeping within DHA makes this impossible to ascertain.

At the time of this research, the RAB had yet to grant any domestic violence cases, but a few clients still awaited a decision. One Ethiopian client first fled from her home in Ethiopia to the United Arab Emirates to escape her husband's severe abuse. When he then followed her to the United Arab Emirates, she fled to South Africa. Her asylum claim, based on domestic abuse, was rejected in the first instance, and she is still waiting for an RAB decision.

South Africa, much like the United States, seems reluctant to recognize domestic violence as grounds for asylum, perhaps due to a fear of the "floodgates" opening and all women experiencing domestic abuse streaming into South Africa.

93. The Chairperson explained that FGC is seen as "more of a cultural thing." Id.
95. The United States is similarly undecided on the issue of domestic violence as persecution and grounds for asylum. In re R-A- 22 I. & N. Dec. 906 (2001) has been working its way through the asylum system since 1996. Most recently, Attorney General Mukasey certified Matter of R-A-, and issued a decision ordering the BIA to reconsider the case, removing the requirement that the BIA await the issuance of proposed regulations. As of October 2008, a decision is pending on remand with the Board of Immigration Appeals. The BIA sent the case back to the Immigration Judge, who asked the parties for briefing on the "social visibility" of R-A-'s proposed social group. Rodi Alvarado, the applicant, is a Guatemalan woman who fled the extreme domestic abuse of her husband. She repeatedly sought help from the police in Guatemala with no success, eventually fleeing to the US for safety and applied for asylum. Her case is complicated procedurally, but has essentially been pending for more than ten years. See generally Ctr. for Gender & Refugee Studies, Documents and Information of Rodi Alvarado's Claim for Asylum in the U.S., http://cgrs.uchastings.edu/campaigns/alvarado.php (last visited Mar. 23, 2009).
2. Forced Marriage as Persecution

Although South Africa has ratified CEDAW, which states that a woman has the "[r]ight freely to choose a spouse and enter into marriage only with free and full consent . . . ," this study revealed a general lack of recognition of forced marriage claims within the South African asylum system. In August 2007, however, following my interview with the RAB, they shared with me a decision granting the asylum based on a forced marriage.97

The appellant was a Cameroonian woman sold into marriage with an older man at the age of fourteen, after her parents passed away. Her husband and his other wives abused the appellant for several years, prompting her to flee to South Africa. The appellant approached the Cameroonian police on several occasions, but they refused to intervene. In this presumably landmark decision (the RAB could recall no other cases of forced marriage being granted), counsel for the appellant (Legal Resources Center in Cape Town) argued that the appellant was a member of a particular social group:

[w]omen forced to marry in exchange for bride price and who are subjected to severe and prolonged physical abuse at the hands of their husbands and who are unable to seek protection from the State because they are customarily considered the property of their husbands.98

Utilizing information from the U.S. State Department country report specifically addressing the position of women in Cameroon, the RAB decision concludes, "It is accepted that the appellant falls within this category i.e. she is a woman and as a group they are unprotected by the state in Cameroon."99

96. CEDAW, supra note 77, at art. 16(1)(b).
97. In re Jane Doe (Cameroon), CTR/008138/04 (RAB at Capetown Aug. 18, 2007) (on file with the author). The name of the appellant is withheld here for privacy purposes. It is possible my interview with the RAB had an impact on its understanding of gender based claims and this decision reflects their willingness to consider claims based on forced marriage as persecution.
98. Id. at ¶ 15.
99. Id. at ¶ 17. Interestingly, the Eighth Circuit Court of Appeals recently recognized "Cameroonian widows" as a particular social group for the purposes of asylum. Cameroonian widows include those applicants who feared harm from her former husband's relatives, including forced marriage to his brother. Ngengwe v. Mukasey, 543 F.3d 1029, 1034–35 (8th Cir. 2008). In the United States, however, "[t]he question of whether forced marriage constitutes persecution is an open issue." Id. at 1036.
The process for the appellant was not seamless, however, as she arrived in South Africa in 1997 and attained legal status only after ten years of navigating the asylum system. Furthermore, this successful Cameroonian claim may be limited to its facts.

Notably, the decision emphasizes the appellant’s unsuccessful attempts to seek protection from the Cameroonian police.\textsuperscript{100} Refugee law requires that the government in the applicant’s country of origin be either unwilling or unable to protect the asylum seeker.\textsuperscript{101} In several of the forced marriage cases encountered in this study, the women involved never sought assistance from state officials, as they knew that the police would refuse to intervene. It remains to be seen whether the RAB or any other decision-makers in South Africa will recognize the state’s unwillingness to protect the applicant where the applicant has not sought police assistance. Additionally, the Cameroonian case granted involved physical abuse within the forced marriage, plus the marriage had already occurred, so the past persecution experienced by the applicant was relatively clear. While a positive grant of asylum on a forced marriage claim represents a step forward in South African asylum law, an asylum claim where the marriage had not yet occurred or where there was no anticipated physical violence may still be denied.\textsuperscript{102}

Besides the Cameroonian RAB case, this research revealed several rejections of forced marriage claims in the first instance.\textsuperscript{103} The SC occasionally encounters forced marriage claims, but unless they are coupled with a fear of FGC, then the initial RSDO rejection as “manifestly unfounded” “would almost invariably be confirmed.”\textsuperscript{104} This reflects the seemingly tougher stance the SC adopts as compared with the RAB in reference to both forced marriage and domestic violence claims. This heightened skepticism is likely warranted, however, as the SC receives claims rejected as manifestly unfounded (where the RSDO determined that there was no foundation under the Refugees Act for the claim),

\begin{itemize}
  \item \textsuperscript{100} \textit{Id.} at ¶ 7.
  \item \textsuperscript{101} See U.N. Refugee Convention, \textit{supra} note 22.
  \item \textsuperscript{102} Although not all forced marriages will be physically abusive, if there are conjugal relations within marriage against the woman’s will, this would clearly be persecution for the purposes of asylum.
  \item \textsuperscript{103} For example, one Cameroonian woman, interviewed in Cape Town, is awaiting a decision from the RAB on her forced marriage claim. See interview with Cameroonian Woman, in Cape Town, S. Afr. (July 19, 2007).
  \item \textsuperscript{104} Interview with Chairperson of the Standing Comm., \textit{supra} note 92.
\end{itemize}
abusive or fraudulent, whereas the RAB receives claims that were simply denied.\footnote{105}

3. Female Genital Cutting as Persecution

According to the RAB and the SC, fear of, or past, FGC qualifies as persecution and makes one eligible for asylum in South Africa. While the RAB could not cite any specific decisions they had issued on FGC, they expressed familiarity with the issue. There has been considerable international attention focused on the issue of FGC, and perhaps because of this the RAB take a more liberal approach to asylum cases based on FGC. Interestingly, each RAB member had read or were in the process of reading Fauziya Kassindja’s book \textit{Do They Hear You When You Cry}, detailing a Togolese asylum seeker’s harrowing experiences in the U.S. asylum system.\footnote{106} Of the 678 female client files reviewed, none mentioned FGC as a reason for seeking asylum. Given the intensely private nature of this issue, it is likely that FGC survivors fabricated other stories, or neglected to mention their fear of circumcision at any stage in the process. The lack of FGC cases encountered in this study at any level in the South African asylum system may signal that RSDOs grant FGC cases more frequently, so the women do not need legal assistance on appeal and are thus less likely to come into contact with a legal service provider. Because the source of information for this study was legal files, the lack of FGC cases encountered likely does not mean that asylum applications are not filed based on FGC or that they are not granted.

According to the Chairperson of the SC, FGC remains the most common gender-related persecution issue before the SC. The SC is sensitive to the issue of FGC and often will direct an RSDO who has rejected a claim involving FGC to consider the case more fully.\footnote{107} The SC views FGC as a cultural practice and would almost “invariably say that genital female mutilation is a ground.”\footnote{108} Interestingly, the international attention given to the issue may have led to a higher acceptance in

\footnote{105. It is likely that the Standing Committee does receive much weaker claims, and would therefore likely view the cases before it with more skepticism. \textit{See supra} Section I.B, discussing the RAB and the SC.}

\footnote{106. \textsc{Fauziya Kassindja & Layli Miller Bashir}, \textit{Do They Hear You When You Cry} (1999). Fauziya Kassindja is a Togolese woman who was granted asylum in the United States. in 1996 on the basis of her fear of FGC. The case is referred to as “Kasinga” and drew attention from advocates and activists across the United States. \textit{See} sources cited \textit{supra} note 91. Following her asylum grant, Ms. Kassindja wrote a book on her experiences of the process.}

\footnote{107. Interview with Chairperson of Standing Comm., supra note 104.}

\footnote{108. \textit{Id.}}
South Africa of FGC as persecution within the meaning of the refugee definition, than other equally worthy forms of persecution.109

4. Forced Sterilization as Persecution

Forced sterilization has not yet been recognized in South Africa as grounds for asylum. One forced sterilization case has progressed through the South African courts. LHR represents a Chinese couple living in South Africa with four children, arguing that if the couple returned to China, they would face persecution including economic sanctions, difficulty finding employment, and potentially forced sterilization.110 Both the RSDO and the RAB rejected the claim. LHR launched an application for judicial review of the RAB decision at the Pretoria High Court, which was dismissed in November 2006. An application for leave to appeal directly to the Constitutional Court is now pending.

The only other forced sterilization case encountered in this research was a Ghanaian male. The client lodged an asylum claim based on his fear of being made a chief in his village and subsequently sterilized.111 His claim was rejected at the initial status determination level, and he awaits his RAB decision.112

5. Rape as Persecution

South Africa has signed a number of international agreements and treaties recognizing rape as a form of torture, including CEDAW, the Convention Against Torture,113 and the Rome Statute of the International Criminal Court.114 However, recognition of rape as a form of persecution is inconsistent within the South African refugee system.

109. See supra notes 91–93 and accompanying text.
111. Interview with Ghanaian man, in Cape Town, S. Afr. (July 20, 2007). According to the client, in his culture it is impermissible for a Chief to have children.
112. Id.
While very extreme cases of rape are often recognized, some seemingly obvious cases of rape-as-persecution are not granted. For example, a Rwandan woman, having been repeatedly gang-raped by the Interahamwe, and subsequently rejected by her community, was awarded refugee status. Conversely, a Zimbabwean woman, the daughter of a national politician, was repeatedly tortured and raped to secure her involvement in the military, but was declined refugee status. Similarly, a female politician from Lesotho, who had been held for three nights and repeatedly raped in an attempt to force her disclosure of political information, was also declined refugee status.

This research uncovered many cases of women fleeing rape, where the act of rape had not actually occurred. The RSDO decisions rejecting these claims are often disturbing. For example, one decision states, "there can be no well founded fear of persecution that can be established from the fact that the rebels were raping girls. Rape is a crime that appears to be rampant [sic] all over the world." Such decisions undermine international recognition that rape is a form of torture and not merely a personal offense.

Asylum seekers appealing claims involving rape also face difficulties at the RAB. One appellant was raped by police in Rwanda due to both her own political activities and an imputed political opinion by association with her adopted father, a prominent critic of the current Rwandan

118. RSDOs are required to issue a written rejection for each unsuccessful claim made at an RRO. See Refugees Act 130 of 1998 s. 24(4)(9).
120. In 1998 the International Criminal Tribunal for Rwanda (ICTR) found Akayesu criminally responsible under Article 3(g) of the ICTR statute, which specifically identifies rape as a crime against humanity if the rape was "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 8, 696 (Sept. 2, 1998); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 1, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994), available at http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf (last visited Mar. 23, 2009).

The International Criminal Tribunal for Yugoslavia (ICTY) found that rape perpetrated by, at the instigation of, or with the acquiescence of a state agent would almost always be classified as torture. See Prosecutor v. Delalic, Mucic, Delic & Landzo, Case No. IT-96-21-T; Judgment, ¶ 495 (Nov. 16, 1998). These findings are certainly not one endorsed by several South African RSDO decisions encountered during the course of this research.
government living in exile. The RAB refused to recognize her rape by state agents as an indication of the state’s unwillingness to protect her, and concluded that Rwanda was both willing and able to protect the appellant’s rights. The decision cited evidence that the families of opposition members were not targeted, failing to note that such persecution would not be reported to the authorities, who were themselves the perpetrators of the rape.

According to a study conducted by the Johannesburg-based Zimbabwe Torture Victims/Survivors Project (“ZTVP”) released in December 2006, only 2% of 102 Zimbabwean women being treated in Johannesburg as survivors of torture had received refugee status, and only 36% had been issued a Section 22 permit. The findings from the ZTVP study highlight the difficulties of access to RROs, but may also indicate a lack of recognition of gender based violence, as 15% of the women overall had been raped and all had experienced torture in one form or another. Additionally, the ZTVP study suggests that there may be problems recognizing not only sexual violence, but other forms of torture and violence against women as grounds for asylum.

6. Persecution on the Basis of Sexual Orientation

South Africa has a well-publicized commitment to gay and lesbian rights, enshrined in its Constitution. Freedom of expression is also a right protected under the Constitution and numerous international treaties and agreements to which South Africa is a party. The country is a logical choice as a place of refuge for those fleeing persecution based on their sexual orientation in Africa and elsewhere. Sexual orientation, like gender, is also specified under the definition of “social group” in the Refugees Act. However, South Africa has yet to publicly grant refugee

121. Interview with Rwandan Woman, in Durban, S. Afr. (July 11, 2007).
123. Id.
125. Id. at 5.
126. See id. at 13–14.
127. S. AFR. CONST 1996 § 9(3) (specifying that the state may not unfairly discriminate against anyone on various grounds, including sexual orientation).
128. UDHR, supra note 29, art. 19; S. AFR. CONST. 1996 § 16.
129. Refugees Act 130 of 1998 s. 1(xx).
status based on such persecution. Disturbingly, my research reveals evidence of homophobia and a lack of understanding of gay asylum seekers within the asylum system. Evidence to support this assertion is gleaned from i) an interview with and a decision published by the RAB, ii) a review of client files where the client claimed persecution based on homosexuality, and iii) an interview with a gay Tanzanian applicant rejected at the initial determination stage and waiting for his appeal.

The RAB has decided only one case to date involving persecution based on sexual orientation. This case, one of the two published decisions available on the DHA website, involved a gay man claiming persecution in Nigeria. The decision was considered significant, so two RAB members heard the case. Although the Board eventually found that credibility issues were not material to the case and gave the appellant the benefit of the doubt as to credibility, the appellant’s credibility played a role in the decision:

"The Board found it strange that he [the appellant] failed to mention this fear [of persecution on the basis of sexual orientation] at his initial hearing. He alleged that he was not aware that being persecuted on the basis of sexual orientation was a ground for seeking asylum. He also mentioned that through research he had learned that South Africa had “most progressive policies towards gays and lesbian in Africa.” Surely his “research” would have indicated that persecution because of homosexuality would be a ground for seeking asylum in South Africa."

The RAB assumed that an applicant’s knowledge of South Africa’s progressive attitude towards sexual orientation would equate to specific knowledge that homosexuals are identified as a particular social group for purposes of asylum. This speculative reasoning is problematic given

130. There is no case law on the topic and the SC has not encountered any cases on the basis of persecution for one’s sexual orientation, so had no experience with such claims. Interview with Chairperson of Standing Comm., supra note 92.
131. Nigerian Nat’l v. Dep’t of Home Affairs, R.A.B. 4 (May 13, 2002) (appellant name and case number redacted), available at: http://www.home-affairs.gov.za/raab.asp (last visited Mar. 23, 2009). However during the interview the RAB members admitted that they had another case involving persecution based on sexual orientation pending and that they had not yet made a decision as they were unsure what to do with such cases. The RAB was scheduled to hear the case of one participant interviewed in this study who applied on the basis of persecution based on sexual orientation in December 2008. Interview with Refugee Appeal Board, supra note 43.
that there is no prior case history on homosexuality as a particular social group in South Africa; the appellant could not have known that persecution on the basis of membership in a particular social group characterized by sexual orientation was a valid ground for asylum. The Board determined that homosexuals can be a particular social group, relying on authority from the United States and the United Kingdom. However, the Board then found that the burden was on the appellant to prove, by means other than his own testimony, that draconian laws regarding homosexuality are actually enforced: "Harsh and hostile laws without any record of practical enforcement does not amount to persecution." The appellant failed to meet this burden, citing the expense of conducting such research. The RAB cited studies detailing that the anti-homosexuality laws are rarely enforced and claims that gay culture is "thiving in Lagos." The Board asserted, "there is no known case of any Nigerian, within Nigeria in her history, who has been prosecuted as a result of his sexual orientation." Furthermore, the Board argues that, given the lack of success the police and courts have experienced in prosecuting the Nigerian anti-homosexuality law, the appellant did not need to fear persecution.

Finally, the Board noted that every individual has the right to privacy and sexual preference, but argued, "such rights are not absolute. In the interest of society there are always checks and balances." According to the RAB, the Refugee Convention did not intend to "provide international protection for groups of homosexuals who consider that they are discriminated against if they make public the fact that they are homosexual." Therefore, the Board essentially condoned the persecution of gays if they have the audacity to be open about their sexual orientation. It is a well-established principle of asylum law that a refugee should not have to hide his or her religion or political opinion in order

137. Nigerian Nat'l, R.A.B. at 21. As part of their support for the thriving gay culture in Lagos the Board asserts that "[a] recent study of Kano and Kirikiri, Lagos maximum security prisons[,] showed that out of every 200 men, 30 confessed to having had sexual relations and about 20 in the latter." Id.
138. Nigerian Nat'l, R.A.B. at 25 (relying on information from the Nigerian Information Service Centre (Southern African Zone)).
141. Nigerian Nat'l, R.A.B. at 33 (citing U.K. case where homosexual from Romania was denied asylum).
to escape persecution. Likewise, a refugee should not be required to mask his or her sexual orientation.

Unfortunately this RAB decision is comparatively progressive when read alongside decisions issued by RSDOs, the initial decision-makers in the South African system. For example, one RSDO decision denying asylum to a gay man from Kenya fleeing persecution by members of his family and his village concludes, “there are no reasonable grounds to believe that the applicant would, if returned, face persecution for a convention reason, i.e. due to his race, religion, nationality and membership of a particular social group or political opinion.” However, the decision entirely failed to examine relevant Kenyan legislation on homosexuality or the rights and experiences of gay Kenyans. The RSDO also neglected to consider the possibility that while the applicant’s parents may have driven him from Kenya, the government may have been unwilling or unable to prevent his persecution by non-state actors. The decision-maker then presumably pasted in a final paragraph completely unrelated to the applicant’s claim:

In terms of the ethnic clashes, Inter-communal clashes compounded by political contentions have triggered a pattern of violence and insecurity among pastoral communities. Clashes in the country have taken place mainly in the north and northeast, triggered by, among others, competition for water and pasture resources among pastoral communities.

This indicates a training deficit not only on issues of gender sensitivity, but also potentially a failure to access resources, unavailability of information on country conditions, and a general lack of careful consideration by the RSDO. This decision, and others like it, suggests that the DHA’s country reports are perhaps out of date and lack information pertaining to gender-related persecution.

142. Case law to demonstrate this point is extensive, but for one example see Zhang v. Ashcroft, 388 F.3d 713, 719 (9th Cir. 2004) (“[T]o require [petitioner] to practice his beliefs in secret is contrary to our basic principles of religious freedom and the protection of religious refugees.”).
144. Id.
145. Id. at 3.
146. A meeting with a legal adviser to the DHA in Pretoria in June 2007 also suggests that these country reports are not updated regularly. The reports are unavailable to the public or practitioners working in the refugee sector. The South African Gender Guidelines suggest maintaining updated information on country conditions as they pertain to gender issues at Home Affairs including the position of women before the
Asylum seekers encounter additional problems during the refugee status determination interviews. One Tanzanian male interviewed sought asylum on the basis of persecution for his sexual orientation. His interview lasted only three to four minutes. He reported the following:

The last thing he [the RSDO] said was "you don't look like a gay" and then he said "Ok, it's finished now" then he gave me a rejection later and said that I had thirty days to leave the country. He wasn't good to me . . . he wasn't appear to me like friendly, first of all it was like he's rushing to somewhere else. He was just reading the paper, when I speak he then just look at the paper. It seems like maybe he was not comfortable with me.  

This participant’s experience reveals that some RSDOs may need additional training on gender-sensitivity issues. The reactions of RAB members themselves to questions posed by my research interview also suggested a lack of sensitivity and understanding of sexual orientation and transgender issues in particular.  

While South Africa's RSDOs, the RAB, and the SC do recognize some forms of gender-based persecution—particularly rape as persecution, and potentially FGC—this recognition is inconsistent. Other claims, resting on sexual orientation, domestic violence, and forced sterilization, are rarely, if ever, granted. The decisions made on specific forms of gender-based persecution are important, but equally critical are the initial status determination interviews and the procedural hurdles asylum seekers face in navigating that process, discussed in the next section.

D. Client File Review and Refugee Status Determination Interviews

This section will present the experiences of asylum seekers gleaned from this study, focusing on survivors of gender-related persecution, in the South African asylum system. I undertook a study of 4,761 client
files at legal service providers for refugees and asylum seekers throughout South Africa. From June to August 2007, I reviewed each file dated between January 2006 and June 2007, and recorded the gender and country of origin of the client. If the client was female, I noted any grounds for asylum recorded in the file.

Regardless of the client’s sex, if any information in the client file suggested that the asylum claim was gender-related, the relevant legal service provider contacted the client to obtain consent to a confidential, voluntary interview concerning their experience with the South African asylum process. I personally interviewed twenty-one clients, including three men and eighteen women. Clearly this small sample size means that generalizations to the larger refugee population are constrained, but this study provides a springboard for further analysis and exploration of these issues.

The greatest number of files were reviewed at the Durban Lawyers for Human Rights office (33.8%), followed by Pretoria LHR (22.3%), Port Elizabeth LHR (22.1%), Johannesburg LHR (14.2%), and University of Cape Town Refugee Clinic (7.55%). A basic overview of both the male and female client files will be provided as well as the major issues.

149. Client files were created by LHR and University of Cape Town’s Refugee Clinic lawyers. These files generally contained at bare minimum an intake form, detailing the client’s name, country of origin, and a brief explanation of the grounds for asylum. Often files contained additional materials, such as a transcript of a refugee status determination interview (conducted by the lawyers to determine eligibility for asylum or resettlement), a copy of the heads of argument for an appeal (similar to a legal brief), and various correspondences. Most clients were not seeking help with their asylum claim, but assistance accessing the Refugee Reception Office, or with overcoming barriers to employment or education within South Africa.

150. The legal service providers included the University of Cape Town Legal Aid Clinic and the LHR offices in Johannesburg, Durban, Pretoria and Port Elizabeth. The LHR Port Elizabeth office no longer participates in the Refugee Rights Project, but these files were accessed at their storage location in Pretoria.

151. The date reflected the most recent contact with the client, so it is likely that many of the files were opened prior to 2006.

152. Verbal informed consent was obtained from the clients. Clients assured that they understood there would be no benefit other than the monetary compensation of forty South African Rand (ZAR) towards their transportation costs. Clients understood that they could stop the interview at any time and that their identity would be kept private and confidential.

153. The clients’ lawyers were not present at the interviews. Most interviews were conducted by the author in English, although two were conducted by the author in French, two with Swahili interpreters, and one with a Somali interpreter. The interviews lasted between thirty and seventy-five minutes. The interviews were conducted at the appropriate legal service provider’s office with the exception of one interview, which occurred at night in a coffee shop. Findings from these interviews will be analyzed in Section III.D.
highlighted by the interviews conducted with clients who had experienced gender-based persecution.

1. Female Client Files

A total of 678 female client files were examined from twenty-five countries of origin with the majority of clients originating from Democratic Republic of Congo (DRC) (30.3%), Somalia (27.2%), Zimbabwe (11.1%), Burundi (9.6%), and Rwanda (6.4%). Interestingly, the number of female files for 2006–07 found in Pretoria was the highest in terms of the percentage of total cases for each office (26.3%), followed by Johannesburg (19.3%), Durban (11.9%), Cape Town (10.91%), and finally Port Elizabeth (9.33%). The highest number of women approaching the offices for legal assistance was in Pretoria again (256 women), and the lowest in Cape Town (thirty-six). Of course, this reveals nothing about the female asylum seeker/refugee population in general as it only represents the number of women seeking legal assistance at those offices. It is perhaps noteworthy, however, that the percentage of female clients at the legal services offices dwindles the further into South Africa one travels (i.e., Pretoria is probably closest to most borders while Port Elizabeth and Cape Town are furthest away). This may reflect the difficulties women face with internal transit in South Africa, or perhaps the availability of services or employment in the various cities. Further research would be required to explore these hypotheses.

I coded the female files initially according to the five grounds for asylum detailed by the Refugee Convention and Refugees Act (race, religion, nationality, political opinion, and membership in a particular social group) to contribute to an understanding of female asylum claims as a whole, a subject on which there is little existing data. Some of the legal files I reviewed contained detailed information on the client’s asylum claim, while others simply stated “war” or “tribal conflict” as the reason for flight. To gain an enhanced understanding of women’s grounds for asylum, I spliced certain categories further, especially where separation yielded interesting results. For example, women seeking asylum on the basis of their own political opinion were separated from those seeking asylum based on an imputed political opinion. The

154. Political opinion includes women directly involved in politics and persecuted for such participation, as well as students persecuted as leaders or protestors, and teachers in Zimbabwe, regardless of their status as members of the Movement for Democratic Change (MDC). Imputed political opinion includes women who fled persecution due to their husband or other family member’s political or military affiliations. In all but one of the seventy-three cases the family member whose opinion was imputed to
breakdown by grounds for asylum, excluding those files where there were no details on the grounds of asylum, or there was no refugee claim, is as follows:

<table>
<thead>
<tr>
<th>Grounds for Asylum</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender-related Persecution</td>
<td>11.9%</td>
</tr>
<tr>
<td>Political Opinion</td>
<td>19.3%</td>
</tr>
<tr>
<td>Imputed Political Opinion</td>
<td>15.3%</td>
</tr>
<tr>
<td>Religion</td>
<td>1.1%</td>
</tr>
<tr>
<td>Ethnicity</td>
<td>4.5%</td>
</tr>
<tr>
<td>Tribal Conflict</td>
<td>4.0%</td>
</tr>
<tr>
<td>War/Violence</td>
<td>21.4%</td>
</tr>
</tbody>
</table>

The female was a male. In this one case a woman was persecuted due to her mother's membership in the political opposition group, the MDC, in Zimbabwe.

155. No detail on the grounds indicates that the file contained nothing pertaining to the actual reasons for flight. Often these were files of women experiencing problems in South Africa accessing services, securing employment, or seeking protection.

156. No refugee claim addresses straightforward cases where there was enough information to understand that the woman did not actually come to South Africa under any of the reasons falling under the Refugee Convention or the OAU definition. These cases include client files indicating that the woman entered South Africa solely for educational or work purposes, or in transit to another country.

157. Religion and Ethnicity are self-explanatory categories, although Ethnicity was used instead of Tribal Conflict where the persecution was specifically directed at the individual for her ethnicity, i.e., a Tutsi/Hutu woman in Burundi or an Eritrean/Ethiopian in Ethiopia.

158. Tribal Conflict includes cases where the file specifically indicated that the woman fled due to warring "tribes" in her country of origin. Individuals in this category were generally Somali women.

159. War/Violence includes cases where women claimed to have fled chaos, violence, war and insecurity, or "rebels." This category also includes cases where family members were killed with no information in the file concerning the motivations behind their murders.
Gender-related persecution includes the following: domestic violence (0.26% of overall cases, one case), forced marriage (1.58%, six cases), sexual harassment (0.26%, one case), rape (including rape used as tool of persecution on the basis of political position or ethnicity, 4.75%, eighteen cases), fear of rape/attempted rape (3.17%, twelve cases), and human trafficking (for purposes of commercial or sexual exploitation, 1.32%, five cases).

Although only 11.9% of female claims involved gender-related persecution, a large number of the files did not specify why asylum was sought (274/678). Furthermore, many files listed simply “war,” “violence” or “insecurity,” without a detailed description of the events that transpired (96/678). Many of these clients may have experienced gender-related persecution, yet were unwilling to communicate their story

160. The Economic/Family/Health Issues category includes women whose files indicate that they left their country of origin to seek a better life, education or better medical care. This category may be overestimated as the details on these files were often derived solely from the RSDO rejection letter finding the women to be economic migrants.

A thorough reading of case files revealed that, in some instances, miscommunication led to a misunderstanding of the asylum claim, and resulted in the assumption that the client was not a legitimate refugee. In Durban, for example, three Somali files contained RSDO decisions determining that the women were economic migrants, not refugees. The basis for this determination was that when asked the question “why are you applying for refugee status,” the women responded that they wished to access medical services, employment and education for themselves and their children. While this may in fact be the case, the other contents of the files indicated that the women had fled “fighting between two tribes” in Somalia. Therefore, it is plausible that the three Somali women were genuine asylum seekers in the very least under the OAU definition. *See* OAU Refugee Convention, *supra* note 25.

However, when asked why they were applying for asylum status, these women responded to that precise question rather than explaining all of the reasons surrounding their actual flight from Somalia. This cross-cultural misunderstanding seems to be pervasive throughout the entire asylum process and is exacerbated by the lack of adequate and appropriate translation.

161. This category includes membership in a particular social group unrelated to gender. For example, one of the two women based her asylum claim on being a member of a group of workers at a foreign exchange bureau accused of illegally trading currency. The second woman alleged persecution by the vice president of Uganda due to her husband’s affair with the vice president. Her claim is therefore partially based on gender and partially on political opinion.

162. The details in these files were insufficient for in-depth analysis on trafficking as persecution or membership in a particular social group of trafficking victims as a ground for asylum.
or did not find this disclosure necessary in order to access basic legal services. Additionally, the 22.7% of women who fled their country for economic, health or family reasons also may have experienced gender-specific or gender-related persecution. This category included clients fleeing Operation Murambatsvina or Operation "Restore Order" in Zimbabwe where over 70,000 were displaced from their homes following Mugabe's campaign to forcibly clear slum areas in the country.163 Even where it seems that a woman fled her country due to economic reasons, a closer examination of the grounds for asylum may reveal gender based violence. For example, a report by Action Aid on Operation Murambatsvina indicated that sexual violence was on the rise in Zimbabwe, with rape increasing to 8–11% and sexual abuse increasing to as high as 12–30% of the participants interviewed.164 Therefore, a far higher number of women from Zimbabwe and other countries may flee gender-based violence, yet their legal files in South Africa do not reflect these stories.

Furthermore, it is possible that women experiencing persecution on more traditionally accepted grounds, such as on the basis of their own or imputed political opinion or their ethnicity, may have also experienced rape or sexual violence as a tool of persecution and chose not to disclose these details to their lawyers. Other studies suggest that these levels of gender-specific persecution, in particular rape, are gross underestimates. For example, a 2001 study conducted by the Centre for the Study of Violence and Reconciliation (CSVR), found that 15% of refugee girls age ten to fourteen, 13% of women age fifteen to nineteen, and 23% age twenty to twenty-four had been raped.165 The CSVR study also revealed that 4% of male refugees age fifteen to nineteen and 6% between age twenty and twenty-four had been raped. The statistics from the CSVR study suggest a higher level of gender-based violence among the South African refugee and asylum seeker population when participants are specifically questioned on the topic.

165. BAA ABRAHAMS & HELEN HAJJYANNIS, CSVR, A BASELINE STUDY TO DETERMINE LEVELS OF KNOWLEDGE, ATTITUDES AND PRACTICES IN RELATION TO REPRODUCTIVE HEALTH AMONG MALE AND FEMALE REFUGEES AGED BETWEEN 10 AND 24 YEARS, LIVING IN GAUTENG PROVINCE, SOUTH AFRICA (2001) available at http://www.csvr.org.za/wits/papers/papunhr.htm (last visited Mar. 23, 2009). This study was based on a sample size of 163 refugee women and 214 men. Id.
2. Male Client Files

A total of 3,693 male client files were examined from forty-eight countries of origin. The majority of clients were from DRC (29%), Somalia (23%), Burundi (11%), Zimbabwe (9%), and Ethiopia (5%). Male cases pertaining to gender-related persecution were rare. There were only three files indicating that the male client had experienced rape or sexual abuse, two indicating forced marriage and/or sterilization, and three indicating persecution on the basis of sexual orientation. Finally, one man was forced by rebel soldiers to have sexual intercourse with his sister, totaling nine male cases loosely involving gender-related persecution. A further eight client files indicated that the basis of the man's claim was at least partially due to the rape of his wife or other family member (generally his sister) by another man.

3. Research Findings on Refugee Status Determination Interviews

A total of fifty-two client files (forty-three female, nine male) indicated some form of gender-related persecution. I attempted to contact all fifty-two individuals, but many were unreachable due to outdated contact information, and a few had been resettled in third countries, or repatriated to their country of origin. Two refused to be interviewed. I interviewed a total of eighteen women and three men who had experienced some form of gender-related persecution. Nine interviews (40%) were conducted in Cape Town, seven (32%) in Durban, and three (14%) each in Johannesburg and Pretoria. Interview participants originated from ten different African countries: The majority came from the DRC (six), with the remainder from Rwanda (three) and two each

166. One case involved a Ghanaian man who wanted to escape being made a chief and sterilized. The other was a Chinese case involving the one-child policy and forced sterilization. See discussion, supra Part III.C.4.


168. Loosely connected to gender-related persecution, a Ghanaian man was accused of trafficking his wife to Nigeria and so fled his country of origin, while a Kenyan man sought asylum on the basis of alleged government persecution of members of the Mungiki sect. The Mungiki sect is known for forcibly circumcising women and stripping women wearing trousers and miniskirts in public, among other practices. For a description on the Mungiki sect, see Gray Phombeah, Profile: Kenya's Secretive Mungiki Sect, BBC NEWS ONLINE, Feb. 11, 2003, http://news.bbc.co.uk/2/hi/africa/2745421.stm (last visited Mar. 23, 2009)

169. No interviews took place in Port Elizabeth as none of the files indicated that gender-related persecution was a factor.
from Burundi, Cameroon, Ghana and Somalia, and one each from Kenya, Ethiopia, Tanzania and Uganda. Research questions focused on participants’ experiences with Refugee Status Determination interviews ("RSDs") and with the RAB, if relevant. The client interviews revealed three major areas of concern in gender-related asylum claims: 1) translation issues, 2) issues involving the RSDOs, and 3) privacy and confidentiality concerns and a lack of referrals to service providers.

a. Translation Issues

My research revealed a lack of adequate interpretation services used in conjunction with RSDs at the RROs. While there were applicants who did not require interpreters and were comfortable speaking English, most applicants needed someone who spoke their native language to communicate on their behalf. In cases where the applicant has experienced gender-related persecution, the gender of both interviewer and interpreter can have a salient impact on the applicant’s ability to communicate his or her story.

Figure 1: Identity of the Interpreter for the First Refugee Status Determination Interview

![Pie chart showing the percentage of different types of interpreters used in RSD interviews.](chart)

170. See Gender and Asylum: Interview Schedule for Refugee/Asylee Participants, infra Appendix I.
Regulations pursuant to the Refugees Act provide for government-funded interpreters at all stages of the asylum process "[w]here practicable and necessary." In the present study, the majority of participants (80%) felt that they needed translation services. Only 20% of applicants stated that they did not need a translator during their first interview, 20% felt they needed translation services but were not provided them, and 40% were provided a male interpreter or found someone male to interpret for them at the RRO. None of the participants were provided a female interpreter for either interview, reflecting a lack of female interpreters provided by DHA or available in the vicinity of the RROs. Results from the second interview display a similar pattern, with 60% lacking any interpretation and only 10% finding a (male) interpreter at the RRO. The second interview is the applicant's final and most substantive opportunity in the initial process to make representations determining her refugee status. Therefore, the lack of interpretation at this stage is particularly troubling.

**Figure 2: Identity of the Interpreter at Second Refugee Status Determination Interview**

Many women commented on problems arising from a lack of any or adequate interpretation. Similarly, several women expressed discomfort with communicating their experiences of gender-related persecution to an unfamiliar male interpreter. Women, particularly those who were victims of rape, often felt so uncomfortable with a male interpreter or

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interviewer that they were unable to tell their stories. Therefore, the presence of a male interpreter or interviewer often meant that the women's stories, especially those involving rape, went untold. Several women interviewed explained that they neglected to tell their story because they were uncomfortable communicating their experiences to a man. One woman's interpreter explained:

She [the asylum seeker] doesn't really feel comfortable because some of the issues that she went through were painful, it's not easy to have explained that, she was afraid he [the interpreter] might report the story to someone else . . . She would prefer a woman because all those people, the soldiers who were raping her, it was not just one, but again and again, so she needed someone who would understand these women's issues.172

One Rwandan woman, who had been repeatedly raped during the genocide by Hutu militia, explained that when she arrived at Home Affairs for her asylum interview, she was assigned a male Hutu interpreter. Directly addressing problems like these, the South African Gender Guidelines specify that the "interpreter should not come from a group hostile to the woman."173 Understandably, the Rwandan Tutsi discussed above felt uncomfortable disclosing the details of her multiple rapes by Hutu men to the Hutu interpreter:

Many times when you arrive here in South Africa you don't speak English, so you go to Home Affairs and they call for someone [an interpreter] to speak your language. Sometimes the person who comes is a Hutu and you are a Tutsi, so this person puts in their mind what your story is and then go outside and tell everybody.174

This example is indicative of a more general pattern; of seventeen women interviewed by RSDOs, nine did not disclose any details of their gender-related persecution. Of the eight who disclosed their true stories, only one had been raped, while the others were fleeing attempted rape or imminent forced marriage. The women who told their complete stories were generally those who had not experienced a high level of

172. Interview with DRC woman, in Cape Town, S. Afr. (July 20, 2007). This quote is in the third person as the interpreter presented the client's answers in this manner. Ironically this woman explained to me her problems with a male interpreter at her interview through her husband, as interpreter in our interview.
173. SOUTH AFRICAN GENDER GUIDELINES, supra note 79, at 11.
physical abuse. The one woman who did disclose that she had been raped did not feel that the interpreter communicated the story effectively to the RSDO. When questioned about their experiences with interpreters, many other women felt similarly frustrated:

In the first interview the man [interviewer] found a stranger, but he didn’t translate everything that I said, that was my problem. You have to speak to a person with whom you have no confidence. Also there is the interpreter who you don’t know and it’s hard to speak to that person also. And the man who was translating for me did not translate exactly what I said. You need someone in whom you have confidence to do that job for you.175

Female participants indicated that they would have been more comfortable speaking with a female interviewer and a female interpreter, but none of the women were given such an option. When asked why she did not explain that she had been raped, one Ethiopian participant explained:

You know that women like to hide. For anybody, I didn’t tell that [about my rape]. The first time I told was for [the lawyer], and after I told her I got free. For the home affairs I changed my case, I told them some other story. If I tell this, this [my true] story then maybe it will be in my file. First one [at the first interview] I told them I was with the politics, the second interview I told them I was born from Ethiopia and Eritrea, mixed blood, but I choose this one because I don’t want to talk about my real story. I decided I just couldn’t. Even for [the Lawyers for Human Rights lawyer] I don’t want to tell, but then, when she asked me some questions, she was so nice. At first it was easier as she was a woman, and second how she was talking to me, you know, like some women do, like she understand me.176

While experiences of gender-related persecution are extremely difficult to communicate, when women were given the opportunity to confide in a female lawyer, who they felt understood and sympathized with their experiences, many were able to do so:

175. Interview with DRC woman, in Cape Town, S. Afr. (July 20, 2007).
I only told my whole story starting from [the legal counselor at UCT who helped client with her appeal] I go from my heart, that's where I say everything. I just told [the Refugee Status Determination Officer] there was war in Somalia and life was hard for me there. [In the first interview] after she called that man [an interpreter] I said to myself, OK, I have to hide something. In the second interview I didn't want an interpreter, I told him [the interviewer] more, that someone want to rape me, I didn't tell him like I told [the legal counselor at UCT], but I did tell him more than the first lady.\(^{177}\)

The fact that the Somali woman quoted above—and others like her—were eventually able to disclose their true reasons for claiming asylum to a female lawyer indicates that the difficult process of disclosing experiences of gender-related persecution is facilitated when appropriate provisions are in place. This includes creating a comfortable environment for the woman to disclose her story and providing both female interpreters and RSDOs. The current absence of adequate and/or female interpreters and lack a choice of the gender of both the interpreter and interviewer directly contradicts the UNHCR Gender Guidelines providing that “[c]laimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves, and they should be provided automatically for women claimants.”\(^{178}\) Obviously, the fact that some women were not able to choose the gender of their interpreter or interviewer reveals a tension between the Guidelines and what actually happens.

Difficulties communicating experiences of gender-related persecution are not limited to female applicants. Men who have endured sexual violence find it difficult to convey their experiences to other men: “That was a tough time for me [telling his story to another man], I was feeling like I'm not in this world again.”\(^{179}\) Additional research is needed to understand the needs of male victims of sexual violence, but ensuring a choice of a male or female interpreter and interviewer, adequately trained in addressing these issues, is a critical first step.

A neutral interpreter who is not associated with the applicant may be essential. For example, a Rwandan woman attended her first refugee

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177. Interview with Somali woman, in Cape Town, S. Afr. (July 2007).
178. UNHCR Gender Guidelines, supra note 63, 36(iii). The South African Gender Guidelines similarly stress that the “most vital provision that must be made for assessing gender-persecution claims is the use of female interpreters and interviewers.” SOUTH AFRICAN GENDER GUIDELINES, supra note 79, at 10.
179. Interview with DRC male, in Pretoria, S. Afr. (June 2007).
status determination interview with the wife of one of her abusive husband’s friends acting as the interpreter:

That time when I was speaking to them I didn’t have anything; it was like my mind went off. I didn’t want to talk so many things, I had so many things in my heart and if I was going to speak then everybody would listen. I didn’t trust the interpreter, she came with me to Home Affairs, but I didn’t trust her, she’s from my country and I don’t want her to know those things.180

While inappropriate interpreters can cause endless problems in communication and often-insurmountable obstacles to adequate disclosure, the complete lack of an interpreter can be similarly damaging. One Cameroonian woman explained:

I couldn’t tell something so terrible, something which had caused me so much pain and suffering to a stranger. I don’t think they would have understood me anyway. When you have suffered so much it’s hard to explain that in English to somebody who doesn’t understand your language.181

Though the Refugees Act regulations require adequate interpretation services, many applicants are forced to go without interpreters, or to use inadequate ones; there are currently no mechanisms in place to ensure asylum seekers get the services they require. The RRO in Johannesburg launched a pilot program using interpreters by phone, but information on the implementation and success of this program is scarce. Lack of interpretation poses a problem for all asylum seekers in South Africa, not only those fleeing gender-related persecution. However, sensitive and competent interpreters are absolutely essential to ensuring a fair understanding and adjudication of gender-based claims.

b. Difficulties with Disclosure

Even when an appropriate interpreter is used, there are still problems communicating details of such persecution to anyone. Women repeatedly articulated feelings of shame following their gender-related persecution: “I was hiding because of the things I went through, the

shame because if I tell these people these things, what will they think of me? I continued to keep it in my heart." Several women also expressed a distrust of officials and a reluctance to share their story. Others failed to realize that such disclosure was necessary to obtain refugee status.

It took time for me to be counseled, healed and begin trusting anyone and understand the rights to safety in my country of refuge. I always thought someday if I discussed who I was and what I had experienced in Zimbabwe the South African government would organize for my arrest and deportation.\[183\]

Some participants explained that they did not disclose details of their gender-related persecution because they were not asked questions to elicit such information. One woman explained that all she felt she could do was answer questions: "I didn't tell them because at that time I was confused, my mind was not normal and sometimes when I would speak I would see those things again as if they were happening. They just asked me questions and I answered them."\[184\]

Often the applicants did not understand the importance of disclosing details of their persecution. These women felt that if they were not asked questions specifically on the topic, they did not have to talk about those issues:

The questions they were asking me is like I don't need to answer. I didn't tell them about the rapes, only my husband knew. I didn't tell anyone at Home Affairs. I just told them about the children with the Hutu people, how the soldiers were harassing me when I was in Rwanda, but nothing about the rapes.\[185\]

The lack of disclosure of relevant details indicates a need to ensure adequate training for RSDOs in dealing with sensitive topics, enabling them to pose questions in an appropriate manner to ascertain an applicant's true reasons for flight from their country of origin.

When asked what the most difficult aspect of her life in South Africa was, a Ugandan woman, who experienced severe abuse at the hands of the Lords' Resistance Army, said:

\[182\] Interview with Rwandan woman, in Johannesburg, S. Afr. (June 2007).
\[183\] Zimbabwean woman, University of Cape Town client file. No date available.
\[184\] Interview with DRC woman, in Pretoria, S. Afr. (June 2007).
\[185\] Interview with Rwandan woman, supra note 182.
I decided not to tell anyone because it is a shame and it is hurting, and I thought maybe it is not necessary to mention. The only question was why I left my country, so I just said the things that I was comfortable with and I didn’t know where those information are going to.\textsuperscript{186}

The Ugandan woman’s testimony above shows some of the many complications impeding disclosure by victims of gender-related persecution, including shame, trauma, fear that confidentiality would be violated, and ignorance as to what information was relevant to an asylum claim. In fact, when asked what was the most difficult aspect of her life since arriving in South Africa, this woman responded:

The hardest thing was when I was interviewing to talk about my whole story [the rape] and what happened to me. Just talking about it, that it my hardest thing. I could do anything, even if waiting in the queue, the only thing is talking about it. You can go to officials and they give you that day to come and then you get there to the front of the queue and they say come back tomorrow or another day, but that is nothing.\textsuperscript{187}

In a country where refugees face xenophobia, high unemployment, limited access to healthcare, and financial insecurity (among many other concerns),\textsuperscript{188} this woman’s feeling that telling her story was the most difficult aspect of her life in South Africa cannot be taken lightly.

c. Gender of the Refugee Status Determination Officer

Logically, the gender of the RSDO plays a determinative role in creating a comfortable environment for survivors of gender-related persecution to disclose their experiences. Of the twenty-one participants interviewed, the majority (57\%) reported that the RSDO at their first interview was male, while 33\% were interviewed by a female officer.\textsuperscript{189} When queried about the gender of the RSDO in the second interview, the majority (57\%) again reported speaking to a male RSDO, 24\% reported a female officer, and the remaining participants either did not have a second interview or could not recall the officer’s gender. None of

\textsuperscript{186} Interview with Ugandan woman, \textit{supra} note 8.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} See CoRMSA \textit{Report} 2008, \textit{supra} note 1, at 38–57.
\textsuperscript{189} One participant had not yet been interviewed and the other could not recall the gender of the RSDO.
the participants were given any choice as to the gender of the officer conducting the interview. This lack of choice is a particular problem for the second interview because, as one woman disclosed, “In the first interview I was fine because I was just telling briefly something, not what was in my heart, but the second interviewer wanted everything, but I also couldn’t mention it because he was a man, but he tried to give me some time.”

Even if an RSDO of the appropriate gender is designated to hear a case, it is important to remember that there may still be difficulties due to cultural differences or lack of training. One woman reported her challenging experience interviewing with a South African Xhosa officer:

I can’t really say that he [the RSDO] understood because most of the time he would be speaking Xhosa, he speaks English but he was switching to English and Xhosa, and it makes me confused also. Even me I was scared because in my country, because before you sit with that elder you must show respect, even if he’s only one day older. In most cases in my country the cops will just come and grab you. I was so scared even when I get there [to Home Affairs] because there are cops and when I came here I thought it was the same like that in my country where they don’t ask any questions and they just take you [to the police station].

The lack of adequately trained male and female officers poses problems for asylum seekers fleeing gender-related persecution and other traumatic forms of persecution. These difficulties are compounded by the lack of privacy and confidentiality in the interviews.

d. Privacy, Confidentiality and Referral to Service Providers

The Refugees Act itself recognizes the importance of confidentiality in the asylum setting in Section 21(5): “The confidentiality of asylum applications and the information contained therein must be ensured at all times.” While 57% of interview participants reported that at least one of their two interviews took place in a private room, 38% did not have a private location for either interview. Considering the sensitive nature of most asylum claims, particularly those based on gender-related

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190. Interview with Ugandan woman, supra note 8.
191. Interview with Cameroonian woman, supra note 103.
192. Refugees Act 130 of 1998 s. 21(5).
persecution, a lack of privacy poses an obvious threat to meaningful communication. One Burundian woman explains that while she had intended to disclose her true reasons for flight, upon realizing the interview room was not private she decided against disclosure:

I knew that I was going to explain about the rape [when I got to home affairs] but by the time I got in [to the interview] I realized that it wasn't a private place and everybody spoke the same language so they could hear me. It's like a reception for both interviews, it's not private.\(^{193}\)

Even when a private location is secured, some interview participants reported interruptions by phone calls or other staff entering the interview room.

Yes, sometimes the phone rings. People from home affairs they don't take it seriously, honestly speaking, they think you are just to fill up what they are doing with their day. If the phone rings they just pick it up. You just go and spend your whole day at home affairs, even if maybe you have work you in the afternoon you just have to stay there the whole day long.\(^{194}\)

Confidentiality was also an issue raised by these interviews; only one participant reported being assured that the contents of the interview would remain confidential. One participant had not yet been interviewed and one could not recall whether they were given assurance of confidentiality, but 85% of participants reported that they were not informed that their details would be kept private. Some participants feared that their experiences would be recorded and made available to the local community or to persecutors in their country of origin. Participants were unsure of the purpose of the asylum interview, likely adding to their apprehension and reluctance to share the details of their persecution. Only five of the twenty-one participants reported that the Refugee Status Determination Officer introduced him-/herself, and only four reported that the purpose of the interview was explained to them. In fact, 76% of participants reported that they were never informed as to the purpose of the interview, the questions asked, or the entire asylum process. When asked how the DHA could make it easier for her to communicate her experiences, one Ugandan woman living in Cape Town responded:

\(^{193}\) Interview with Burundian woman, in Durban, S. Afr. (July 10, 2007).
\(^{194}\) Interview with Rwandan woman, in Cape Town, S. Afr. (July 20, 2007).
They just have to explain what this information is going to do for us and how important it is and how we are supposed to say every single detail that happened. I thought that telling that thing that happened to me was so hard to mention so I thought just leave it aside and say other things. Just explanation [is what they need to give].¹⁹⁵

Just as a more substantial explanation would facilitate the interview, referrals to service providers would ameliorate conditions for asylum seekers throughout the process. Logically survivors of gender-based violence may need mental health services. Further, new arrivals will almost always lack financial stability and may be in poor health. Asylum seekers' socio-economic instability and mental health challenges are compounded by South Africa's xenophobic environment.¹⁹⁶ Sadly, only two participants were given referrals following their interviews to outside service providers. These were both referrals to legal services for an appeal after their claim had been rejected. None of the twenty-one participants, each of whom had experienced some form, or fear of, gender-based violence, were given referrals to mental health practitioners or trauma counselors as is recommended by the UNHCR Gender Guidelines.¹⁹⁷

Although many participants could not recall the length of their status determination interviews, only one reported the interview itself lasting more than thirty minutes.¹⁹⁸ Given the time necessary to establish trust, as acknowledged by the UNHCR Gender Guidelines, the duration of the majority of interviews was inadequate.¹⁹⁹ Several participants expressed the view that the interviewers seemed very busy and did not appear to have much time to talk to them. One Ghanaian woman claimed, "the interviewer was in a hurry, he doesn't have time."²⁰⁰ The lack of an assurance of confidentiality, of privacy, and an explanation of

¹⁹⁵. Interview with Ugandan woman, supra note 8.
¹⁹⁶. See generally Lefko-Everett, supra note 7 (examining challenges refugee women face in South Africa).
¹⁹⁷. "Mechanisms for referral to psycho-social counseling and other support services should be made available where necessary." UNHCR Gender Guidelines, supra note 63, ¶ 36(xii).
¹⁹⁸. It is important to note that this is the time spent with the RSDO and not at all reflective of the time the asylum seeker spent at the Department of Home Affairs waiting for their interview.
¹⁹⁹. "Particularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and obtain all necessary information." UNHCR Gender Guidelines, supra note 63, at ¶ 36(viii).
the asylum process directly contradicts the UNHCR Gender Guidelines, which state:

The interviewer should take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview. The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family.\footnote{201}{UNHCR Gender Guidelines, supra note 63 ¶ 36(v). The South African Gender Guidelines also stress the importance of beginning the interview with a “by providing any relevant information about the determination process to the claimant.” SOUTH AFRICAN GENDER GUIDELINES, supra note 79, at 11.}

The lack of procedural safeguards in the initial status determination interviews and inadequate exploration of the claim prejudices the applicant’s claim and makes a denial more likely. Denied applicants have the opportunity to appeal to the Refugee Appeal Board, where they may face similar procedural hurdles.

4. Refugee Appeal Board: Procedural Issues

Twelve of the twenty-one clients interviewed had presented an appeal to a RAB member. Male board members heard both of the male appeals. The RAB claims to make an effort to designate the sole female board member to hear any cases involving “FGM . . . or one where rape is a very prominent feature of the case.”\footnote{202}{Interview with RAB, supra note 43.} Of the ten female participants interviewed, the female board member heard four of the appeals, while the remaining six women presented an appeal to a male RAB member. The appeal hearings were generally lengthier than the initial interviews; most participants reported that the appeal hearing lasted between forty-five minutes to one hour. Many clients reported the RAB members to be sympathetic and “nice.” These clients patiently await the outcome of their appeals.

Conclusion

Overall, South Africa has some of the most progressive laws in the world, and refugee rights are no exception. However, in the decades after its inception, the Refugees Act has been subject to widespread criticism.
One challenge has been addressing the treatment of women and survivors of gender-related persecution.203 The problems faced by these asylum seekers in South Africa re-affirm the need for the practical application of international and domestic gender guidelines and sensitivity in addressing such cases. Some specific recommendations for the South African Department of Home Affairs are outlined below.

Moving forward, it is critical that all victims of gender-based violence, whether male or female, receive the special attention and considerations outlined in the guidelines. Furthermore, actors at all levels within the system must maintain better records on cases involving gender-related persecution, from the Refugee Reception Offices to the Refugee Appeal Board and Standing Committee. Specifically, this research indicates a need to ensure adequate interpretation and well-trained Refugee Status Determination Officers and other decision-makers of both sexes within the system. The DHA should work with the UNHCR and with South African civil society to develop and maintain high levels of training on gender-based asylum claims.

This study reveals a lack of disclosure of gender-related claims. Consequently, the DHA must strive to create conditions conducive to disclosure for survivors of gender-based violence. Given the lack of disclosure of gender-persecution evidenced by this research, alternate means of providing testimony should be explored and piloted. For example, the South African Gender Guidelines suggest “presenting testimony by means of affidavits, videotapes, or to a hearing officer specifically trained to deal with violence against women.”204 One potential modification is to revise the refugee intake form so that the questions more successfully elicit accounts of gender-related persecution. Furthermore, asylum seekers should be provided the conditions for private disclosure and assured that their details will be confidential. Finally, referrals to outside service providers, particularly those specializing in mental health, should be given as appropriate.205

While there are problematic elements of the current Refugees Act justifying its revision, the addition of gender as an additional category under the refugee definition is not a high-priority solution to the hard-

203. This Article focuses on the problems faced by women and survivors of gender-related persecution in the adjudication of their asylum claims within South Africa and does not explore the numerous issues these individuals confront outside of the asylum process, including during their transit to, and upon arrival in, South Africa. These issues are briefly outlined in Appendix II, infra.

204. See SOUTH AFRI CAN GENDER GUIDELINES, supra note 79, at 11.

205. For more extensive, although not identical, recommendations drawn from this study, see CoRMSA Report 2008, supra note 1 at 60–61. One of CoRMSA’s recommendations is to add gender as a sixth ground under the Refugees Act.
ships faced by female asylum seekers and survivors of gender-related persecution within South Africa. This problem requires a more comprehensive approach, focused on implementing the South African and UNHCR gender guidelines. Adequate resources should be allocated and training provided such that decision-makers can observe procedural requirements—especially with respect to translation, provision of female asylum officers, privacy, confidentiality, and careful consideration of these claims. The guideline provisions themselves should be examined in detail, and non-profit organizations and academic centers, in cooperation with DHA, should undertake additional empirical research. This research should inform South Africa's creation of sensitive and fair methods to address the asylum claims of survivors of gender-related persecution, both male and female. The DHA should use the existing guidelines produced by CoRMSA to generate their own guidelines on gender claims, in line with other asylum-receiving countries. Rather than adding to the existing legislation and definitions, enhanced implementation and nuanced, progressive interpretation of existing legislation should be first on the agenda for reform in addressing gender-related persecution claims in South Africa.

206. Given that two parliamentary committees have approved the current form of the Refugees Amendment Bill, including the addition of gender as an additional ground for asylum, see supra note 36, it is likely Parliament will adopt the Bill with this provision in its current form, including the addition of gender as a sixth ground for asylum. If this is the case, then South African asylum lawyers should pay careful attention to the effects of this provision on asylum claims by men and women fleeing gender-related persecution. Reference should be made to the arguments against adding gender as a sixth category in other jurisdictions in order to ensure that this legislative change does not adversely affect claims by women, or other asylum claims. See Haines, supra note 73, at 326–27, 350.

207. See discussion supra Section II.A.
Appendix I
Gender and Asylum

Interview Schedule for Refugee/Asylee Participants

• Which language would you prefer to speak in?
• Consent for tape recorder?
• Where are you from?
• When did you arrive here in South Africa?
• Do you have any family here with you? A husband? Any children?

The Asylum claim:

• Why did you leave your country?
• Why did you choose to come to South Africa?
• Were you involved in politics in your country?
• (If there is a husband) Was your husband involved in politics?
• Are you religious?
• Who was persecuting you? What happened to you?
• Were you ever raped?
• Were you ever a victim of domestic violence?
• Figure out if the case has anything to do with genital surgeries/FGM?
• How did you know that you could make an asylum claim in South Africa?
• Were you aware that you could make a claim based on (xxxx—i.e. gender-related persecution)?
• How did you become aware that you could make a claim on (xxxx—gender-related persecution)?
• How did officials in your home country respond to your experience? (police, govt, etc)
• How did your community respond to your experience?
• How did you feel about making a claim/talking about your gender-related persecution?
• If you did not make a claim based on the gender-related persecution, why did you decide not to?
QUESTIONS ABOUT THE ASYLUM PROCESS:

- To which office did you go to apply for asylum?
- Have you had any appointments or interviews at the reception office? How many interviews have you had?
- Did you seek any type of legal or para-legal advice? If yes, who was the legal advisor, how did you find him/her and what did the legal advisor suggest you do?
- Have you stayed at any shelters, or been assisted by any community organizations/NGOs/UN agencies? (Details of those)

QUESTIONS FOR PARTICIPANTS ON THE RSD INTERVIEW:

- Were you interviewed separately from your husband? Male relative?
- Were you given information about the status determination process, access to it, and legal advice in a manner and language that you understood?
- Who told you this information?
- Did a man or a woman interview you? Were you given the choice?
- Did you have an interpreter?
- Did you feel safe in the interview room?
- Was it a private place?
- Did the interviewer introduce his/herself?
- Did they explain the role of each person present and the purpose of the interview?
- Were you told that the information you shared would be confidential?
- How did the interviewer behave during the interview?
- How was their tone of voice? Gestures, etc?
- How did they ask you questions? What kinds of questions did they ask?
- Did they interrupt your sentences?
- Were there any interruptions during the interview?
- Did the interviewer stop the interview when you cried or needed some time to yourself?
• Did you feel like the interviewer was sympathetic about what you have been through?
• Did you tell the interviewer about your [rape/domestic abuse/issues involving genital surgeries/ forced marriage/etc]? If so, what was their reaction?
• If rejected, do you have your rejection letter? Would you mind sharing this with us?
• Did the RSDO refer you to any outside services – counseling, medical, etc?
• How long do you think the interview took in total?
• Is there anything else about how the officer handled your interview that you would like to share with us?
• What happened in this interview? (I.e. ascertain whether they were granted, denied, or if the decision is pending?)
• (If they were denied) did you know that you could appeal?

Appeal Board Hearing:
• Did you appeal? Why or why not?
• If they appealed, did they get legal representation for the appeal?
• What happened at the appeal level? (I.e. do they have a decision?)
• If they went to the Refugee Appeal Board ask them what happened there:
• Did you have a chance to speak at the appeal hearing?
• How many people were there?
• Did they ask you about your gender-related persecution (if any)?
• Were they male or female?
• How did you feel that it went? Did they ask questions in a sympathetic manner?
• How long do you think the hearing was?

Final Question:
• What do you think is the most difficult thing about applying for asylum in South Africa?
APPENDIX II
ADDITIONAL ISSUES FACING FEMALE ASYLUM SEEKERS AND REFUGEES IN TRANSIT TO, AND WITHIN SOUTH AFRICA

This appendix briefly highlights some of the issues outside of the scope of this Article, including violence experienced by women en route to South Africa, or once within South African borders. This appendix is by no means a complete overview of these issues, but notes when they became apparent during the course of this research.

According to a report released by the Forced Migration Studies Programme at the University of Witwatersrand in September 2007, violent smugglers known as the “maguma guma” transport Zimbabweans across the border into South Africa, allegedly perpetrating sexual violence against the women they smuggle. Further, female migrants entering the country commonly report sexual exploitation and abuse by guides and government officials. Of the female client files reviewed during the course of this research, three files revealed that women were raped in transit to South Africa. Another revealed that a woman was seeking legal assistance due to unwanted sexual advances from an immigration official.

Gender-based violence continues within South African borders. Of the female files reviewed, seven files indicated that the women were experiencing domestic violence in South Africa. In four of these cases, the domestic violence was so extreme that the women were seeking resettlement to another country to escape the abuse. Several women reported difficulties accessing healthcare in South Africa. One Somali woman shared her experience seeking help at a hospital, where she suffered embarrassment and discrimination due to her circumcision:

The hardest thing was to go to hospital and to open my legs for those nurses, because I have been circumcised and then they [the nurses] all call each other and tell each other to come, and they crowd around me and look at my scars, they

209. LEFKO-EVERETT, supra note 7, at 31–33. For a general discussion of gendered challenges facing females migrating to South Africa, see id. at 70–75.
say "come and see her vagina" "maybe she got accident of something. Even now I've got pain because she didn't stitch me nicely but I don't want to go there [to the hospital].\textsuperscript{211}

Unfortunately these numbers are likely gross underestimates of the domestic violence, sexual violence, and harassment experienced by asylum seekers and refugees en route to and within South Africa. Clients are unlikely to disclose their entire personal histories to their lawyer unless such disclosure is necessary to obtaining the appropriate assistance. More comprehensive research on these topics would have to be conducted using other information channels and means of assessing the existing problems. This anecdotal evidence merely substantiates the larger body of literature on sexual violence and refugees in South Africa.\textsuperscript{212}

\textsuperscript{211} Interview with Somali woman, \textit{supra} note 177. For a detailed discussion of the treatment of foreign women in South African hospitals, see \textsc{Lefko-Everett}, \textit{supra} note 7, at 53–58.

Appendix III

Acronyms

CRMSA  Consortium on Refugee and Migrants in South Africa (formerly NCRA)
CSVVR  Centre for the Study of Violence and Reconciliation
DHA    Department of Home Affairs
DRC    Democratic Republic of the Congo
FGC    Female Genital Cutting
FMSP   Forced Migration Studies Program
LHR    Lawyers for Human Rights
ICTR   International Criminal Tribunal for Rwanda
ICTY   International Criminal Tribunal for the former Yugoslavia
MDC    Movement for Democratic Change (Zimbabwean political party)
NCRA   National Consortium on Refugee Affairs (now CRMSA)
OAU    Organization of African Unity
RAB    Refugee Appeal Board
RRO    Refugee Reception Office
RSDO   Refugee Status Determination Officer
SAPF   South African Police Force
SC     Standing Committee for Refugee Affairs
UCT    University of Cape Town Legal Aid Clinic
UDHR   Universal Declaration of Human Rights
UNHCR  United Nations High Commissioner for Refugees
ZTVP   Zimbabwe Torture Victims/Survivors Project