

International Refugee Rights Initiative



Refugee Rights News

Volume 5, Issue 3

May 2009

In this issue:

SPOTLIGHT

The ICC Rejects Transfer of LRA Case to Uganda: What are the Implications?

ACTION AND ADVOCACY

African NGOs Speak Out on International Justice

FEATURES AND ANALYSIS

Still in Search of Justice: Ten Years since the Disappearances of Over 350 in Republic of Congo

LAW AND POLICY DEVELOPMENTS

South Africa Finally Attempts to Help Zimbabwe Migrants

PUBLICATIONS

SPOTLIGHT

The ICC Rejects Transfer of LRA Case to Uganda: What are the implications?

A Conversation with Moses Chrispus Okello

On 10 March 2009, the International Criminal Court (ICC) ruled that the Court's case against Ugandan rebel leader Joseph Kony and his commanders should continue before the ICC, despite arguments that Uganda should be allowed to prosecute the case using transitional justice mechanisms that it has been developing. This decision has been criticised in Uganda as premature and as damaging to ongoing efforts to develop a comprehensive transitional justice process.

The ICC Ruling

The Court's decision on admissibility referred to Article 17 of the Rome Statute, which provides that a case should not continue before the ICC when it is being investigated or prosecuted by a state with jurisdiction. Further to an agreement reached during the Juba peace talks, the stalled peace process established to put an end to the Lord's Resistance Army's 21-year insurgency in northern Uganda, the government of Uganda is in the process of establishing domestic justice mechanisms to address crimes committed during the conflict. These include a number of complementary measures from adapting traditional justice to formal prosecutions for war crimes by a Special Division of Uganda's High Court.

On 10 March 2009, the Pre-Trial Chamber II (PTC II) of the ICC decided to examine the matter of its own initiative, using its powers under Article 19(1) of the Rome Statute, and address whether the new domestic mechanisms were sufficient to divest the ICC of jurisdiction. In its decision to retain jurisdiction, PTC II stated that pending the adoption of all relevant legal texts and the practical implementation of the agreement reached at Juba, the scenario against which the admissibility of the case has to be measured remained the same as that at the time the warrants were issued: one of "total inaction" on the part of governmental authorities. Accordingly, PTC II found no reason to review the positive admissibility determination made prior to the issuance of the warrants. It is important to note, however, that another

challenge to admissibility may be lodged at a later date by the Ugandan government or by any of the accused.

"Give Them Time"

Moses Chrispus Okello, the head of the Refugee Law Project's Research and Advocacy Unit and a prominent expert on transitional justice in Uganda, disagrees with PTC II. More specifically, he believes its determination was premature and failed to consider the breadth of the situation in Uganda.

The Juba agreement provides that a special division of the High Court of Uganda will try those suspected of international crimes. The Special Division of the High Court, however, is but one of a range of transitional justice mechanisms the government of Uganda's Justice, Law and Order Sector (JLOS) – the inter-ministerial working group charged with transitional justice in Uganda – has been working to establish since the February 2008 signing of the Juba agreement.

Okello, who has been collaborating with JLOS, explains that in addition to the Special Division of the High Court, JLOS is debating the contours of a truth and reconciliation process for Uganda (the statute of which Okello took the lead in drafting), traditional justice mechanisms, and an "integrated systems" sub-committee, the role of which will be to synchronise the work of these mechanisms.

Since he started working with JLOS when it was established a year ago, Okello feels that the working group has made significant progress. After many months of study, deliberation and planning, including missions to Liberia and South Africa to gain an understanding of those countries' experiences of transitional justice, Okello feels that JLOS working group members are now "asking the right questions". "When I started working with JLOS a year ago, they were asking questions like 'what is a war crime?' but now they are thinking about things like the retroactive application of the law."

Okello wonders why PTC II rushed to address the admissibility question without giving Uganda time to build the capacity of its transitional justice institutions. On the whole, Okello worries that the Court's narrow view, and failure to acknowledge the significant progress he has witnessed, may undermine JLOS's progress to date.

Whose Justice?

Okello also notes that PTC II's decision focused almost exclusively on the Special Division of the High Court, despite the fact that it is only one of a menu of transitional justice options being developed in Uganda. This has caused Okello to become concerned about what he calls the ICC's "one-way street" or "top-down approach" to complementarity.

When making admissibility determinations, the Court is guided specifically by Articles 17(2) and 17(3) of the Rome Statute, which lay out general guidelines for assessing national proceedings, but more generally by Article 21, which describes the law applicable at the ICC. In addition to applying the Rome Statute, the Elements of Crimes document and the Court's Rules of Procedure and Evidence, the ICC applies "applicable treaties and the principles and rules of international law". Okello worries about the kind of assessment of "principles of international law" made by the PTC II in its interpretation of the Statute and its application to Uganda, where retributive concepts of justice may be less relevant than restorative ones.

"The conditions under the Rome Statute that must be met for a domestic process to divest the ICC of jurisdiction are evidence of a disregard for other ways of doing things," Okello explains. According to Okello, people in Uganda are more concerned with reparations than retribution. He illustrates his point with

an example: if a family breadwinner is murdered in Uganda, in most cases the lives of those left behind will become more difficult not just because of the grief caused by the loss of a loved one, but also because the family's livelihood will have been negatively affected. The family is more likely to see justice as having been done if they are compensated for their lost income than if the perpetrator is sent to prison. Such socioeconomic dimensions of justice have so far been ignored by so-called international criminal law. This is Okello's "one way street of international justice".

The Way Forward

The solution, according to Okello, would be the creation of a mechanism that allows diverse conceptions of justice, such as those prevalent in Uganda, to influence the system of international criminal justice, rather than the unidirectional influence of traditional international criminal law that currently prevails. A first step towards the creation of such mechanisms would be to develop new conceptions of justice that consider victims' subjective experiences of violation. Okello acknowledges, however, that this will be difficult, especially because the Western legal systems on which "international" criminal law is based are predicated on the application of broad general principles to specific factual scenarios. Okello's proposition involves turning this system on its head and starting with victims' particular situations – essentially a shift away from an objective towards a subjective conception of justice. Okello does not know whether this shift is realistic. What is clear, he says, is that so far, international criminal justice is philosophically underdeveloped, yet it operates in a patronising fashion.

ACTION AND ADVOCACY

African NGOs Speak Out on International Justice

Recently, there have been growing indications that support for international justice in Africa is waning. Concerns about the use of universal jurisdiction in Europe and about the lack of political sensitivity of the International Criminal Court (ICC), have been building. Since the announcement that the ICC was pursuing a case against Sudanese President Omar Al Bashir in July 2008, these voices have been heard increasingly loudly.

There have been suggestions that an African court could alternatively, and perhaps more effectively, address the need for justice. Since the African Union (AU) summit in January and February, the AU has officially resolved to explore the possibility of the African Court on Human and People's Rights hearing criminal cases and to convene a meeting to discuss the work of the ICC in Africa.

In this context, advocates seeking effective justice mechanisms have increasingly looked to target African Union member states to uphold their commitments, including through the 45th Ordinary Session of the African Commission on Human and People's Rights (ACHPR) in May, the Ministerial Meeting on the ICC and the African Union Summit of Heads of State and Government on 24 June-3 July, African NGOs.

Advocacy at the ACHPR

For two weeks beginning 13 May 2009, the 45th Ordinary Session of the African Commission on Human and People's Rights (ACHPR) united African Union member states in the Gambia under the theme of human rights. In the days leading to the event, prominent African civil society organisations met in Banjul.

The participating NGOs adopted a resolution on international justice in Africa on 10 May, including recommendations directed to the ACHPR itself. The "Resolution on Strengthening International Justice in

Africa" called on AU member states to take concrete steps to end impunity for the crime of genocide, crimes against humanity and war crimes and asked the ACHPR to "[u]rge the member states of the African Union that have not yet done so to ratify the Rome Statute and to ensure its effective implementation at the national level." The Rome Statute of International Criminal Court (Rome Statute) is the treaty which established the ICC.

On 10 May, Crisis Action, Human Rights Watch, International Federation for Human Rights (FIDH) and the Darfur Consortium met with the President of the ACHPR, Ms. Sanji Mmasenono Monageng of Botswana, to inform her about the resolution and ask for her support. According to Darfur Consortium West Africa Focal Point, Djibril Balde, Ms. Monageng, who is now a judge at the ICC, was supportive of the resolution but expressed concern over rumours that the 30 AU member states of the Rome Statute might withdraw.

FIDH, Darfur Consortium and the African Centre for Democracy and Human Rights Studies organised an event titled "International Justice and Africa" on 15 May 2009. Former Gambian Minister of Justice Ms. Fatou Bensouda, currently the Deputy Prosecutor of the International Criminal Court, was among the panellists, as was Amir Suleiman of the Khartoum Centre for Human Rights and Environmental Development.

In her presentation, Ms. Bensouda stated that Africa had played a crucial role in the creation of ICC with 47 African states were present for the drafting of the Rome Statute in 1998. Of these 47 African countries, the large majority voted in favour of adopting the Rome Statute and establishing the ICC. Currently, 30 African states are party to the Rome Statute and an additional 13 are signatories.

Addressing concerns that the ICC was violating sovereignty, Ms. Bensouda noted that the ICC as an international justice system was created to be complementary, and that national systems should take up the primary responsibility of investigating and prosecuting war crimes, genocide and crimes against humanity. The ICC would only initiate proceedings when national systems are unwilling or unable to handle a case. She noted that, along with the ICC's limited mandate, the Court had limited capacity to proceed with investigations and trials. As a result, the court requires the full cooperation of states parties as indicated in Part 9 of the Rome Statute which details requirements for international cooperation and judicial assistance.

Ms. Bensouda vowed the ICC would continue the fight against impunity and work to end the occurrence of war crimes, crimes against humanity and genocide.

Gathering International Justice Advocates

While advocates gathered in Banjul tried to push the Commission to take a stand supportive of justice, a number of NGO gatherings sought to coordinate and empower African advocates supportive of international justice. On 11 May, the Institute for Security Studies (ISS) hosted a meeting of representatives of African civil society organisations in Cape Town. The participants at that meeting acknowledged serious concerns about the functioning of the Court. They noted objections "expressed by various African leaders that Africa appears not to be treated as an equal participant in the application of international criminal justice"; however, the 39 signatories to the statement called for constructive engagement and "urge[d] the 30 African States Parties to use their powerful position on the ICC's Assembly of States Parties to constructively address the concerns about the Court".

The representatives gathered in Cape Town also called on African states to take steps to promote justice and facilitate the "development of domestic, regional and international criminal justice mechanisms and capacity to respond to international crimes".

In late May, the Coalition for the International Criminal Court (CICC) brought together another group of advocates for its African Strategy Meeting in Kampala. 24 African NGOs participated. Recognising the resolution from the NGO Forum, the group urged African states parties to “[c]ommit to respect the principles established under the Rome Statute and not to take any steps that could undermine the functioning of the Court”.

In addition to making recommendations to African states, the CICC called upon the ICC to improve its outreach campaigns to elected officials, civil society and the public in Africa.

On 6 June, the International Refugee Rights Initiative joined together a number of legal experts to consider the possible role for African regional and sub regional mechanisms in contributing to the cause of accountability for serious crimes in Darfur and elsewhere on the continent. The session sought to address the appropriate role for these institutions in the context of the contention often made at a political level within the African Union and among African states that African mechanisms might more appropriately address questions of justice on the continent.

The session issued a public letter to the meeting convened by the AU on 8-9 June, acknowledging the difficulties facing the ICC's operations in Africa, but urging states parties to engage with the appropriate mechanisms within the framework of the Rome Statute to improve the court's performance in Africa. In particular, the letter noted that states had both a responsibility and an entitlement to participate "in debate and decision-making within the relevant Bureaux and organs of the ICC Assembly of State Parties". The letter also noted that the ICC review conference, slated to take place in Kampala in 2010, would offer an important forum for stock taking and possible reform of the ICC. The letter also noted the need to strengthen regional and sub-regional mechanisms. (The full letter is available [here](#))

African Voices in the Media

The decision to issue a warrant of arrest for the Sudanese President Omar Al Bashir sparked a strong debate in Africa regarding the appropriateness of the ICC's action (see "[The Reaction to the Arrest Warrant Against Sudanese President Al-Bashir](#)" in *Refugee Rights News*, Volume 5, Issue 2, April 2008). The debate has continued in the run up to the 8-9 June AU meeting.

In *Jeune Afrique*, Nobel Prize winners Dr. Wangari Muta Maathai, Wole Soyinka and Archbishop Desmond Tutu wrote in support of the ICC: “[w]e are convinced that the ICC is an effective vehicle towards achieving justice on a global level...The victims of every nation deserve access to justice, and the ICC provides a forum for those who have nowhere else to turn.” Lucile Mazangue, a member of the Association of Female Lawyers of the Central African Republic, writing for AllAfrica, noted that critics of the ICC should work with it in order to promote justice for victims of mass crimes: “[i]nstead of trying to weaken the court, they should proudly support its mission, building its strength to a point at which nations refusing to subscribe to its jurisdiction will be under pressure to join.”

The Way Forward

There were fears that the AU's meeting, held on 8-9 June, to assess the ICC's work in Africa might become a venue for the withdrawal of some of the 30 African states parties from the Rome Statute, the ICC's establishing treaty. Withdrawal, although it would not take practical effect for a year, would undermine the ICC politically and call its future into question. This threat, however, did not materialize at the session, where states expressed concern about the ICC's move against Bashir, but supported a one year deferral, rather than rejection of the ICC as a whole.

These are trying times for international justice mechanisms, particularly the ICC. As African civil society organizations and African media continue to call for accountability for unspeakable crimes, political figures will be forced to listen and develop mechanisms to promote justice.

FEATURES AND ANALYSIS

Still in Search of Justice: Ten Years since the Disappearances of Over 350 in Republic of Congo

"The disappeared of the beach" is the term used to describe the over 350 people who disappeared ten years ago, between April and November of 1999, at the end of the civil war in the Republic of Congo (RoC). The group was comprised of refugees returning from neighbouring Democratic Republic of Congo and internally displaced persons who were returning from the Pool, a region south of Brazzaville. Although the UN High Commissioner for Refugees (UNHCR) and the Republic of Congo government had guaranteed safe passage through a humanitarian corridor, upon arrival at the Brazzaville river port (known as the "beach"), many simply disappeared.

Rights groups accuse the government of transporting many of this group to secret locations, supposed "transit points" for their relocation. Most of the disappeared were young men who it is believed were arrested by President Sassou Nguesso's authorities on suspicion of being supporters of a militia known as the Ninja, private mercenaries used by some political parties in the 1990s. Ten years later, no one has been convicted of any offence linked to these disappearances. On 30 May 2009, a memorial mass was organised in Brazzaville, according to activist group Front for Peace and the Defence of Democracy in the Congo. Roger Bouka Owoko, Executive Director of the Congolese Observatory of Human Rights (OCDH), who has pursued justice for the victims in French courts said, "We demand now, ten years after, that the truth on this matter be revealed to determine the seriousness of what has happened, to establish responsibility, to punish the perpetrators and most importantly to repair the damage to hundreds of families."

Seeking Justice in Congo

At the end of 2001, fearing the disappearances would go unpunished, a group of relatives of the victims formed the Collective of Relatives of the Disappeared of the Beach and demanded prosecution of the Congolese generals they suspected of being responsible. Six months later, an investigation into the incident was opened in the Congolese justice system in the Criminal Court of Brazzaville, and finally in 2005 the trials of 15 security officials on charges of genocide, war crimes and crimes against humanity relating to 85 of the 353 individuals who disappeared began. The court found the state civilly liable and ordered the state to pay compensation to victims' families but acquitted all of the accused on criminal charges.

Seeking Justice through Universal Jurisdiction

Separate legal proceedings were also started in 2001 in France on the basis of the principle of universal jurisdiction, a concept which allows any state to exercise jurisdiction over any individual who commits certain heinous and widely condemned offences, even where there may be little direct link between the country and the alleged crime. The traditional rationale for universal jurisdiction is that certain prohibited acts are of such serious concern to the international community as a whole that the potential for prosecution must be universal.

France is bound by the 1984 Convention against Torture (CAT), which it ratified in 1987 and incorporated into its domestic criminal code in 1994 and which includes this concept. France's domestic criminal code therefore requires the prosecution or extradition of any person alleged to have committed torture and who is found on French territory. Under CAT, the term torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at instigation of or with consent or acquiescence of a public official or other person acting in official capacity". In an interview with Toucan Radio, one of only two survivors of the killings said that when he was shot by RoC officials, the bullet entered under his ear and exited through his mouth, ripping out his gums. He fell under the other bodies and managed to escape, eventually making his way to France.

Following advocacy by the International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) and OCDH, French authorities sought indictments for President Nguesso of RoC, Minister of the Interior Pierre Oba, Inspector General of the Congolese Armed Forces Norbert Dabira, Presidential Guard Commander Blaise Adoua and Police Chief Jean-Francois Ndengue in 2001. The Republic of Congo government asked the International Court of Justice (ICJ) for a provisional measure to halt France's investigations into the Brazzaville Beach case on the basis that the French legal proceedings would cause "irreparable prejudice" to Congo's image and damage relations between France and the RoC, but the ICJ rejected the country's request in June 2003. The French legal proceedings continued and two Congolese officials were indicted, Ndengue and Dabira. Ndengue was arrested during his visit to Paris on 1 April 2004 but was released from prison in the middle of the night of 3 April 2004. The Court of Appeals had ruled that an investigation into Ndengue was invalid and that he was entitled to release from prison on the basis that he held a valid diplomatic passport and was on an official visit. On 23 May 2003, Dabira was also arrested during a visit to France and later failed to appear before a judge in September 2002 and subsequently remained in Brazzaville, despite the French indictment and an international warrant for his arrest.

However, in January 2007, the Paris Court of Cassation, the criminal chamber of the French Supreme Court, decided to overturn the decision of the Court of Appeals cancelling the Brazzaville Beach case and ruled that the French courts did in fact have jurisdiction as a result of Ndengue's residence in France. The appeal against the Court of Appeal decision in the Ndengue case had been advanced by the OCDH and the Collective of the Families of the Disappeared of the Beach. As a result, the two groups were accused by the Republic of Congo government of engaging in subversive activities with the aim of destabilising the state. Marcel Touanga, a human rights defender and father of one of the disappeared, currently living in exile in France, is head of the Collective of Relatives of the Disappeared of the Beach and became the target of surveillance and threatening phone calls. On 10 January 2007, President Nguesso publically threatened the OCDH and the victims' families with reprisal on national television. In November 2007, the government banned a demonstration planned by human rights groups to bring attention to the missing of Brazzaville Beach during the 42nd Session of the African Commission on Human and Peoples' Rights in spite of prior approval for the march.

In April 2008, the Court of Cassation in France rejected further appeals raised by the defence for the Congolese officials and confirmed that the French court has jurisdiction to prosecute the crimes as a result of the application of the Convention against Torture and the French Code of Criminal Procedure, which allows the prosecution of any person suspected of torture if he or she is in French territory. The Court confirmed that the prosecution's indictment had been properly executed despite Ndengue's assertions that he was entitled to diplomatic immunity at the time he was arrested in France. The Court ruled that Ndengue was not on an official diplomatic mission at the time he was arrested. The defence also raised the argument

of *res judicata*, noting that the defendants had already been tried and acquitted during the 2005 Brazzaville trial, an argument that the Court of Cassation also rejected. As a result, a new investigative judge has taken over and the trials may continue, but because the accused officials remain in Congo and are unlikely to set foot in France again, it remains to be seen if any of the defendants will be forced to expose themselves to the jurisdiction of the French courts again. "Right now, it's a waiting game," a lawyer from FIDH said.

These developments are unfolding during a larger debate in the AU about universal jurisdiction. Following the AU's June 2008 decision made in Sharm el-Sheikh, Egypt that the principle of universal jurisdiction needed to be thoroughly discussed at the UN Security Council and General Assembly levels, the AU and EU formed a Joint Expert Group of Legal Experts to draft a report clarifying the AU and EU understandings of the principle of universal jurisdiction. Further, during a ministerial meeting in Rwanda, 3-4 November 2008 for ministers of justice and attorneys general of AU member states, the ministerial conference emphasised that there was a need to follow closely future developments about the "abusive application of universal jurisdiction". The conference concluded that cases of individual judges in non-African states applying domestic law should be examined separately but in tandem with those of the International Criminal Court (ICC) and that Africa should strengthen its own international justice mechanisms, such as the African Commission on Human and Peoples' Rights. In February 2009, the AU Heads of State and Government stated that the warrant of arrest executed against Rose Kabuye, Chief of Protocol to the President of Rwanda in Germany was "creating tension between the AU and the EU".

The arguments against the use of universal jurisdiction are manifold: universal jurisdiction may be at odds with national reconciliation procedures set up by new democratic governments that are dealing with their countries' authoritarian pasts; judges everywhere would be in a position to make extradition requests without warning to the accused and perhaps without regard to policies that the accused's home country may already have in place for dealing with charges; universal jurisdiction would also project some elements of conflict into various national courts by allowing the pursuit of adversaries through extradition requests. Despite these concerns, the realities of structural incapacities, show trials which sidestep victims' or defendants' rights and fear by courts and prosecutors in trying government officials can create significant barriers in the search for justice. For now, the families of the victims of the disappeared of the beach are looking to the prosecutions in France as the only avenue for criminal convictions.

LAW AND POLICY DEVELOPMENTS

South Africa Attempts to Help Zimbabwe Migrants through New Permit System

"[The new permit is] a clear turning point in South Africa, which up until now has had a line that there is no problem in Zimbabwe." - Gerry Simpson, a refugee researcher with HRW

Over a million Zimbabweans currently residing in South Africa have finally been granted a respite from their constantly insecure status in South Africa. On 3 April, the government of South Africa announced that it would drop its visa requirements for Zimbabweans and, more importantly, grant temporary six month work permits to Zimbabweans living in the country. A month later, on 1 May, South Africa's immigration minister, Nosiviwe Mapisa-Nqakulu, along with her two Zimbabwean counterparts, announced that the new visitor permits and visa policy would come into effect immediately, but that the guaranteed time of stay would be 90 days, rather than the promised six months. These "special dispensation permits" will legalise the stay of Zimbabweans and give them work rights and access to basic healthcare and education. Despite the shortening of the "visiting" period, this policy change represents a long overdue and much needed overhaul.

The Zimbabwean Migration and Earlier Responses

For years, millions of Zimbabweans have migrated to Africa's most prosperous economy. They have fled from political violence, mass forced evictions, and poverty resulting from Zimbabwe's political and financial collapse. Some sought protection from persecution, others economic opportunity. Before the recent policy shift, these migrants were plunged into an environment filled with uncertainty once across the border.

South Africa's response to this influx and the enormous burden that accompanied it – with up to 8,000 people applying for asylum per day – included large scale enforcement actions, particularly deportations, and a path of quiet diplomacy in response to the crisis which is pushing immigrants and asylum seekers into South Africa. Illegal Zimbabweans, many willing to work for less than the minimum wage, also became targets of resentment within South Africa.

The South African government failed to proactively address the situation, establishing no particular measures for Zimbabweans. Hundreds of thousands were deported, justified by the contention that Zimbabweans were all economic immigrants, rather than persons in need of protection.

There seems, however, now to be a shift to asking "what can the government do to help these desperate migrants" from "how can we get rid of this economic and social nuisance". Deputy Home Affairs Minister Malusi Gigaba's statement that migration patterns between South Africa and Zimbabwe "have probably changed permanently", exhibits a significant change in approach. This acknowledgment is a first promising step in addressing the needs of Zimbabweans.

The New Plan

According to the new government policy, work permits, as previously mentioned, will last for three months with the possibility of an extension if conditions in Zimbabwe do not improve. In essence, these permits will regularise the stay of Zimbabweans, temporarily granting them the right to remain and to work with the same workplace rights as South Africans.

The new policy also drops previous visa requirements. Prior to this, Zimbabweans had to apply for a visa to enter South Africa legally, and were often asked to provide large sums of money. The cost associated with acquiring a visa placed serious constraints on Zimbabweans and hindered trade with South Africa by preventing traders from crossing the border. Fortunately, the shift in policy respects the Southern African Development Community's (SADC) protocol on the free movement of goods and people. Now Angola, DRC, and Tanzania are the only remaining SADC countries whose nationals still need visas to travel to South Africa, and these restrictions are also under review.

Welcoming the New Policy

Upon implementation, the temporary working status granted by the permits is expected to have four main benefits: 1) protecting Zimbabweans against exploitation and violence; 2) allowing Zimbabweans to be more independent and economically productive; 3) permitting South Africans and Zimbabweans to compete more fairly for jobs by eliminating the incentives for Zimbabweans to work for less than minimum wage; and 4) relieving South Africa's overtaxed asylum system.

Another important aspect of the new policy is that Zimbabwean migrants will now be able to travel back and forth across the border easily, enabling them to bring remittances and food back to their relatives in Zimbabwe.

The decision to allow Zimbabweans to work was met with praise by the activist community. International NGOs, such as Human Rights Watch, and local human rights activists applauded the move. Gerry Simpson, a refugee researcher at Human Rights Watch, proclaimed, "After years of fleeing persecution and economic meltdown, well over a million Zimbabweans in South Africa will finally get the protection they deserve." ([South Africa: Permits Will Make Zimbabweans Safer](#). Human Rights Watch, 3 April 2009)

Arnold Tsunga, a prominent Zimbabwean activist, welcomed the declarations, stating that "if implemented and well applied, we can expect that these measures will contribute to curb the human rights violations perpetrated against migrants, in particular against undocumented ones." ([South Africa Could Grant a 6 Months Work Permit to Zimbabweans](#). FIDH, 15 April 2009) Aside from the mass deportations and rights violations which Tsunga hopes this policy will end, some feel that xenophobic attitudes of the public might also begin to subside. Removing the "stigma of illegitimacy" from Zimbabweans and making it clear that they are not necessarily criminals or stealing jobs could ease tensions. As Bishop Paul Verryn of Johannesburg's Central Methodist Church – a place, which provides sanctuary for Zimbabweans fleeing violence and joblessness -- says "[a]nything that begins to say to South Africans they [Zimbabweans] are legitimate, the better."

Others argue the permits will be economically beneficial. The advantage to Zimbabweans is obvious: the permits enable these migrants to legally work and earn a living. On the South African side there are also advantages. Zimbabwe is a market for South African products and an inflow of capital may stimulate demand in addition to South African businesses being able to benefit from the skills of Zimbabwean workers.

Challenges Ahead

Despite the evident benefits, there are still many clear difficulties with the plan. One of the biggest concerns is the logistics of implementing the policy. It is not clear that the Department of Home Affairs, or the other government departments that must play their part, have the capacity to document and issue permits to the hundreds of thousands of Zimbabweans in South Africa. Immigration Minister Mapisa-Nqakulu admitted that while the new regulations have been put into effect, bureaucratic hurdles could slow implementation.

Further, Zimbabweans will also be required to prove their nationality in order to access permits. According to an article by Integrated Regional Information Networks (IRIN), current methods used to determine someone's country of origin include "proficiency in the languages spoken there, and testing specific local knowledge of the regions people claim to come from". Although possibly effective, these criteria can be ambiguous and may not be a good indicator of national origin, opening the door for the inappropriate deportations. There is a continuing policy of arresting and deporting anyone who does not have an immigration or asylum permit or cannot prove their nationality. Difficulties in implementing the scheme may still leave many Zimbabweans vulnerable. Human Rights Watch has reported that since the announcement of the permit policy on 3 April, police have continued to detain and deport Zimbabweans. On 16 April, for example, police drove a group of Zimbabweans previously detained in Musina to the border, despite the refusal of border officials to issue them exit documents. Without the proper documents to prove their nationality, the Zimbabweans were denied entry into their home country and were forced back into imprisonment. It is unclear whether these police ignored government orders or were just entirely unaware of the policy change. ([South Africa: Stop Deporting Zimbabweans](#). Human Rights Watch, 30 April 2009).

Furthermore, there are speculations about the timing, in the context of the changing administration in South Africa. "We're a little bemused by the timing of it," said Loren Landau, director of the Forced Migration Studies Programme at the University of the Witwatersrand. "In some ways seems like exactly the wrong time ... [but] my guess is that the minister wants some kind of legacy around this issue".

A final concern is possibility that the policy will increase the number of Zimbabweans crossing the border. Jacob Matakanye, CEO of the Musina Legal Advice Centre, recognises this problem: "the special permits will see people coming, knowing that they will not be pushed back home, and there will be a problem in Musina, as greater numbers will come across, and where are they going to stay? There is no shelter." There is certainly concern that the overcrowding and increased competition that might result from the attraction of the permits could create tensions among the local populations and spark xenophobic feelings.

Despite these criticisms and potential problems, however, the new policy is a distinct change from the status quo and evidence of a substantial shift in the country's stance. A whole population will finally be protected under the law and given the opportunity to be legally employed. Instead of fleeing a crisis only to encounter new hardships, Zimbabweans may finally find safe haven in South Africa. The next step, and perhaps the most important, is for the South African government to take collective action among its departments and successfully implement the permit system.

Publications	
Adam, Adam Hussein. " Kenyan Nubians: Standing up to Statelessness ," Forced Migration Review, Issue 32, April 2009.	Lindley, Anna. " Leaving Mogadishu: Researching the Causes of Displacement, 2007-2008 ," Refugee Studies Centre, Summer 2009.
Darfur Consortium. " One Month on in Darfur and Sudan: The Expulsion and Suspension of International and National Humanitarian and Human Rights Organisations ," April 2009.	Manly, Mark and Santhosh Persaud. " UNHCR and Responses to Statelessness ." Forced Migration Review, Issue 32, April 2009.
Forced Migration Studies Programme. " National survey of the refugee reception and status determination system in South Africa ," February 2009.	Misago, Jean Pierre. Forced Migration Studies Programme. " Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa ," International Organization for Migration, February 2009.
Consortium for Refugees and Migrants in South Africa. " Report to the Government of the Republic of South Africa on the Humanitarian Crisis in Musina ," February, 2009.	Southwick, Katherine. " Ethiopia-Eritrea: statelessness and state succession ." Forced Migration Review, Issue 32, April 2009.
International Crisis Group. " Congo: Five Priorities for a Peace Building Strategy ," 11 May 2009.	Young, Helen and Daniel Maxwell. " Targeting in Complex Emergencies -- Darfur Case Study ," Feinstein International Center, April 2009.

Christopher Lindahl and Michael O'Keefe, interns, and Soo-Ryun Kwon, a fellow based in the Kampala office, contributed to this newsletter. The publications section was also compiled by Michael O'Keefe.

Refugee Rights News is a publication of the International Refugee Rights Initiative (IRRI).

To subscribe to or unsubscribe from *Refugee Rights News*, please e-mail info@refugee-rights.org.