

RESETTLEMENT: AN OPTION FOR PROTESTING REFUGEES AND ASYLUM SEEKERS IN CAPE TOWN AND PRETORIA?

A Human-Rights-based Analysis

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Abstract

Since early October 2019, two groups of refugees and asylum seekers have simultaneously staged sit-in protests at UNHCR's (United Nations High Commissioner for Refugees) offices in Cape Town and Pretoria. They demanded to be resettled out of South Africa, for safety reasons. More than six months later, the situation has led to an unresolved impasse. This paper sought to examine the prospects of success for the protesters, in view of UNHCR's policy for resettlement. The report is mainly based on desktop research. It draws much on UNHCR's policy on refugee resettlement, and a number of media reports on the situation. Insight was also gained from UNHCR's Head of Field Office in Cape Town, and a meeting with representatives of the protesters and UNHCR and other stakeholders on 11 November 2020. The paper argues that despite the validity of the protesters' grievances, a different approach to the problem should have been considered.

Introduction

Post-apartheid South Africa has been commended for its role in conflict resolution and peace building on the African continent. This role has been most noticeable in Sudan, Burundi, the Democratic Republic of Congo (DRC), Lesotho and Zimbabwe. Such actions can be seen as a noble contribution to African solidarity. However, it can also be interpreted as a strategic position, as echoed in Besharati's¹ words: "Now there is a realisation that we should be more strategic. South Africa's involvement in conflict zones is clearly pragmatic: if you don't intervene, you risk having more refugees flocking to South Africa." Beyond the anti-refugee rhetoric displayed in this statement, one has to see the bigger picture of an Africa without refugees, at least for the category of those seeking protection due to armed conflicts. Moreover, South African position is also in line with the policy objective² of assisting countries in conflicts, especially on the African continent, to have an environment conducive to political socio-economic stability so that refugees can go back and contribute to the development of their countries. Therefore, the vision is to encourage voluntary repatriation as a durable solution to the refugee situation.

Furthermore, democratic South Africa is hailed for its "progressive and liberal refugee protection frameworks in Africa"³. This is in fulfilment of its obligations since the country is signatory of the 1951 UN Convention and its 1967 Protocol, and the 1969 OAU Refugee Convention. Its commitment to refugee protection took a step further in its adoption of the Refugees' Act of 1998.

As far as South African refugee policy is concerned, the government has been praised in particular for the non-encampment principle and free movement, topped with rights to study and work. Furthermore, the application of the principle of 'inclusion before exclusion' whereby no migrant is discriminated against when he/she claims asylum, and has an opportunity to seek judicial review when his/her claim is rejected, is another thumbs up. This has made South Africa an ideal country of asylum for many people, on the African continent and beyond, at the same time resulting in a compromised refugee protection.

The aim of this paper is to establish a link between the deterioration of refugee protection and the protests by refugees and asylum seekers in Cape Town and Pretoria, asking UNHCR to resettle them out of South Africa. The paper argues that despite the challenges in the refugee protection in South Africa, protesters could have handled their grievances differently. After the introduction, the paper starts by discussing the right to asylum, followed by an attempt to understand 'resettlement' in the refugee context. The next parts of the paper discuss who is considered for resettlement, group resettlement, and refugee protection in South Africa. This is followed by an exploration of local integration as a durable solution in South Africa, the refugee protests, and a discussion as to whether the protests can be understood as an explosion of an untenable situation. The next part looks into attempts to resolve the impasse. The paper ends with a conclusion and some recommendations.

The right to seek asylum

All over the world, people are forced to leave their home countries or places of residence and seek asylum in other countries because of persecution, serious violation of human rights, and armed conflicts. International law recognises the right to seek asylum as it stems from the Universal Declaration of Human Rights⁴. Protection needs are at the core of the refugee regime. Therefore, states signatory to international refugee legal instruments accept the responsibility to provide international protection to people who need it. In principle, the granting of asylum is temporary. On the other hand, resettlement is one of three durable solutions that UNHCR considers as a durable solution to the refugee situation, aside voluntary repatriation and integration in the host country.

Understanding resettlement

The UNHCR Resettlement Handbook⁵ defines resettlement as

...the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them - as refugees – with permanent residence status. The status provided ensures protection against *refoulement* [forced return to a country or territory where a person's life is at risk] and provides a resettled refugee with and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalised citizen of the resettlement country.

The above definition ascribes three functions to resettlement: a tool for international protection, an expression of international solidarity and a durable solution to the plight of a refugee.

Resettlement as a tool for international protection

As mentioned earlier, protection needs constitute the basis for asylum seeking. Resettlement carries with it that function, and may be the only means to “preserve fundamental human rights and to guarantee protection when refugees are faced with threats which seriously jeopardise their continued stay in a country of refuge”⁶. Hence, the need to be transferred to a third country.

Resettlement as an expression of international solidarity

Another important element in the aforementioned definition of ‘resettlement’ is the condition that another State agrees to take the refugees under consideration. This implies international solidarity whereby protection responsibility is shared among countries. However, there are a number of underlying challenges. Firstly, there is no binding obligation by States to take refugees for resettlement purposes. In other words, resettlement is not a right, and it is dependent upon several factors, including quota availability and arbitrary admission criteria in the best interests of the resettlement countries.

The second challenge lies in the different interpretations of the term “refugee”. In fact, Nakashiba⁷ speaks of various categories of refugees. There are those who fit in the twofold definition of a “refugee”, according to the 1951 UN Convention⁸, that is, a person who needs protection as a result of being outside the country of his nationality and has a well-founded fear of persecution based on race, religion, nationality, membership of a particular group or political opinion, OR is a stateless person who is outside the country of his former habitual residence.

Besides the gendered limitation of such a definition, it may lend to interpretation that it only covers people needing protection due to well-founded fear of persecution, are living outside their home country, and stateless people who are outside the country of their normal habitual residence.

UNHCR broadens the 1951 UN Convention, to include refugees recognised by regional refugee legal instruments, such as those affected by armed conflicts, serious violation of human rights or events that have seriously disrupted public order. For some resettlement countries, refugees recognised under the 1951 UN Convention are primarily considered for resettlement. This creates a kind of refugee hierarchy whereby some types of refugees become more deserving than others from the resettling countries’ perspectives. As Nakashiba⁹ remarks, some applicants identified by UNHCR to have compelling resettlement needs may be declined because they do not meet admission criteria for the resettlement country.

A third challenge is the rapid increase of the number of refugees in recent years. According to UNHCR¹⁰, refugees under its mandate were estimated at 14,4 million by the end of 2014, with an increase of more than 23% from 2013. In parallel, an increase in resettlement needs was recorded¹¹, from 691,000 in 2014 up to 1,19 million in late 2017. Of those refugees in 2017, only 65,109 were resettled. Furthermore, a global decline in resettlement admissions has been observed, with a drop of up to 54% in 2017, and in the US in particular, under the Trump Administration. Moreover,

according to UNHCR Resettlement Data¹², while 126, 291 refugees were resettled in 2016, only 63, 726 were admitted for resettlement in 2019.

Resettlement as a durable solution

First and foremost, before considering resettlement as a durable solution to the refugee situation, the other durable solutions are assessed, and resettlement identified as the most appropriate. Resettlement as a durable solution implies the prospect of offering resettled persons full integration in their new communities. Therefore, their refugee status should be able to progressively change to permanent resident, and eventually naturalized citizen, with equal rights.

After discussing the three functions of resettlement, it is equally important to look into another element of the definition: the selection of people to resettle.

Who is considered for resettlement?

Having a refugee status is a precondition, but as mentioned earlier, the needs for resettlement far outstrip the placements. Therefore, one important task for UNHCR consists of assessing refugees who do not meet protection needs in their host countries, plus others with specific needs, and to set priorities. There are three levels of priority: emergency, urgent, and normal, with the majority of cases falling under 'normal', that is, not requiring expedited processing. It can take up to twelve months from submission time to refugees' departures to resettlement countries.

In order to enhance effectiveness in identifying most at-risk refugees, UNHCR developed the Heightened Risk Identification Tool (HRIT) in 2008, whereby both individual and community-based participatory assessments are conducted. HRIT¹³ resettlement criteria identified the following most at risk categories:

- Legal and/or Physical Protection Needs of the refugee in the country of refuge (including a threat to *refoulement*)
- Survivors of torture and/or Violence where repatriation or the conditions of asylum could result in further traumatisation and/or heightened risk or where appropriate treatment is not available
- Medical needs: in particular life-saving treatment that is unavailable in the country of refuge
- Women and girls at risk, who have protection problems particular to their gender
- Family reunification, when resettlement is the only means to reunite refugee family members who, owing to refugee flight or displacement, are separated by borders or continents
- Children and Adolescents at risk, where a best interests determination supports resettlement
- Lack of foreseeable Alternative Durable Solutions, which generally is relevant when other solutions are not feasible in the foreseeable future when resettlement can be used strategically, and when it can open possibilities for comprehensive solutions.

Group resettlement

UNHCR may identify a specific group of refugees in need of resettlement, mainly based on their protracted refugee situation, such as living in refugee camps over a protracted period, thus making self-reliance difficult or impossible. Group resettlement requires the use of different and/or slightly different methodologies with respect to local circumstances, the complexity of cases and the resettlement countries. However, even when group resettlement is considered, UNHCR applies resettlement criteria and procedures for accountability sake in identifying and processing individual

resettlement cases. As an example, instead of requiring the individual Resettlement Registration Forms (RRFs), the standardised abridged RRFs are used in group resettlements.

Refugee protection in South Africa

In 2007, former UNHCR Chief, Antonio Guterres praised South Africa as being “one of the most advanced and progressive systems of protection in the world.”¹⁴ On the other hand, recent critics have pointed to the regressive direction that South Africa has taken recently, especially after 2015¹⁵. This change stems from the trend to align refugee policy with immigration policy.

South Africa has been following the inclusion principle in the asylum-seeking system, and has now realised that it is problematic. It admits that this inclusive system does not maximise the protection and assistance that some asylum applicants require¹⁶. This is just an understatement, if one considers all the damage that it does to the protection of refugees in South Africa. Indeed, as Mfubu¹⁷ puts it, the refugee regime is characterised by huge backlogs, coupled with lack of human capacity and corruption.

The inclusion principle itself is noble, and it is rooted in the South African Constitution democratic values. The problem lies in finding effective ways to make it work. The 2017 Refugee Amendment Act, effective from 1st January 2020, received many critics for being restrictive and even regressive, instead of maintaining a progressive status as before. Indeed, among others, it removes the automatic rights to work and study for asylum-seekers in processing centres and confines them at the borders where those with their refugee status determination under process will be waiting. Such intention to open asylum seeker processing centres at South African borders may be viewed as one of the motives behind the closures of some Refugee Reception Offices, such as the one in Cape Town and Port Elizabeth, and the reluctance to reopen them, despite court orders instructing DHA to do so. Indeed, the Port Elizabeth office closed in 2011 only reopened in 2018, three years after missing the court deadline whereas the Cape Town office that closed in 2012, is still missing the court deadline to reopen by 31 March 2018.

Furthermore, criteria for refugee status exclusion, as well as refugee status withdrawal were expanded, among other things. Paradoxically, in so doing, South Africa hopes to increase refugee protection, and an increased multi-stakeholders' collaboration to provide assistance needed by asylum-seekers. UNHCR, listed among the potential stakeholders to offer help, has indicated that they will not be able to assist¹⁸. One can already imagine the fate of those who will be deprived of their rights to work and study while awaiting the outcome of refugee determination status, especially if nothing has been put in place to fast track the process.

Local integration as a refugee durable solution in South Africa

Local integration is a process whereby refugees progressively acquire rights similar to those of the citizens of the host countries. The 1951 UN Convention's framework provides a strong basis on which refugees can gradually gain a range of rights including the right to health care and freedom of movement, as well as rights leading to self-reliance such as right to education and access to labour market.

According to UNHCR Resettlement Handbook¹⁹, local integration happens on three interrelated levels: legal, economic and socio-cultural.

The legal aspect

In South Africa, refugee policies and laws have not always been in tune with practice. As an example, van Lennep²⁰ remarks that litigation is one of the key sources of refugee support, and translates discrepancies between the rights enshrined in the South African Constitution and actions of

Department of Home Affairs (DHA) and its officials. With regards to documentation, South Africa has increasingly denied refugees the right to administrative justice, and eroded the right to seek asylum, with up to 95% rejection rate. The rejected cases go through an endless process of reviews, which can take up to 15 years or more. Such a long waiting time becomes a hindrance to accessing basic services such as health care, education, and employment opportunities for asylum seekers. Furthermore, refugees may wait more than ten years before they can secure certification from the Standing Committee for Refugee Affairs, allowing them to apply for permanent residence. At times, along the way, they are told that their applications were lost. Then, they have to start afresh.

In a meeting held in June 2019 between the Human Rights Media Centre (HRMC) and the Chairperson of the Refugee Appeal Board (now, Refugee Appeal Authority), Mr Nigel Holmes, the latter said that an expert from UNHCR Canada had arrived in South Africa to assist government in addressing backlog – estimated at 150,000 cases - in the refugee appeal system. He said that it could take up to **five** years for the project to come to completion.

The economic aspect

Without proper documentation, refugees find fewer work opportunities, and often find themselves in the informal sector, where the likelihood of falling prey to exploitative practices by employers is high. In many instances, banking also becomes problematic.

The socio-cultural aspect

Recurrent xenophobic violence in South Africa is a clear indicator that refugee social integration remains a dream for many. Since 2008 where many refugees **and asylum seekers** experienced xenophobic attacks, and where more than 60 people lost their lives, including South Africans, there have been instances of ongoing xenophobia year on year, up to 2019. A recent report by Amnesty International South Africa²¹ documents how people in leadership positions often incite xenophobia, and at the same time deny to call it by that name, preferring to replace it by ‘criminal acts’.

The refugee protests

On 8 October 2019, two groups of refugees and asylum seekers simultaneously staged sit-in protests, at UNHCR’s offices in Cape Town and Pretoria. One of the placards in Pretoria reads²²: XENOPHOBIA. WE ARE REFUGEES IN SOUTH AFRICA TIRED OF BEING ABUSED, KILLED. WE ARE HERE TO DEMAND ASSISTANCE FROM UNHCR. As it transpired, it was not *any* assistance they wanted; it was resettlement.

In a telephonic interview with Ms Miranda Gaanderse, Head of Field Office at UNHCR in Cape Town on 20 April 2020, she said that Ms Aline Bukuru, one of the leaders of the protesting refugees, had requested a meeting with her, five or six days before the protests. In their conversation, Ms Bukuru had raised issues that refugees and asylum seekers were facing, including: access to documentation, difficulties in renewing documents, especially with some Refugee Reception Offices closing their doors, thus leading to travelling long distances to renew their documents in different provinces, registering children, discrimination in accessing health care, xenophobia and security issues. Ms Bukuru added that refugees and asylum seekers wanted resettlement because of those issues. Ms Gaanderse explained that UNHCR was not in a position to resettle a group, because there are due processes and procedures to follow, few resettlement countries, as well as integrity protocols to adhere to to avoid fraud and scams. Ms Bukuru gave the impression that she understood these explanations given to her. Nonetheless, protests followed a few days later. One media report refers to a letter from the Women and Children at Concern - an organisation led by Mr J.P. Balous who is another refugee leader - addressed to UNHCR in Pretoria, imploring “to resettle asylum seekers and refugees to another country because of xenophobic attacks in South Africa.”²³

In Cape Town, protesters occupied public space outside UNHCR's office before being forcibly evicted, after the landlord of the building and surrounding residents and business people lodged complaints in court. After being evicted, they were welcomed inside the Central Methodist Church next to the Greenmarket Square. They later had disagreements among themselves and split into two groups, one staying inside the church, and the other one outside of it. The group staying outside the church was later evicted for contravening the city by-laws. They then dispersed in the surroundings. With the lockdown imposed in South Africa following COVID-19 pandemic, both groups had to be relocated, the one inside in a shelter in Bellville, and the dispersed group in a big makeshift tent on Wingfield Military Base.

In Pretoria, protesters who had been sleeping outside UNHR's office were also evicted, but the men jumped over the fence, wanting to occupy the UNHCR's parking space inside. They were detained for trespassing, while the women and children were moved to a temporary shelter outside Lindela Repatriation Centre, 75 kilometres from Pretoria.

The situation has led to numerous meetings with UNHCR, DHA, and the Department of Social Development, religious leaders and many stakeholders, and sometimes representatives of the refugee communities in protests in an attempt to resolve the problem. Up to now, a solution is still lacking. UNHCR has insisted that group resettlement is impossible in this particular situation. Ms Gaanderse said that apart from the fact that group resettlement is highly unlikely for refugees in South Africa because of its good refugee policies, UNHCR does not consider resettlement for protesting refugees.

Protests: An explosion of an untenable situation, or something else?

There is evidence that refugee protection has been deteriorating in South Africa, especially when one considers long delays in accessing documentation, the corruption involved, and recurrent instances of xenophobic violence. Based on this predicament, the protesting action can be interpreted as an explosion of an untenable situation, whereby refugees in South Africa find themselves denied fundamental basic rights, and unable to lead sustainable lives. It can be understood in the context that 'desperate times call for desperate actions'.

However, the decision to stage sit-in protests at UNHCR's offices was very risky. Indeed, protesters had to end their livelihoods, prevent their children from attending schools, and spend six months in an unproductive life, let alone illegally occupying public spaces. They were not open to dialogue, despite the clear message delivered to them regarding the process and limits of refugee resettlement. Furthermore, some turned aggressive and physically assaulted mediators, including Mr Chris Nissen of the South African Human Rights Commission – Cape Town office – and other church leaders in Cape Town. And as it transpired, media reports²⁴ that they were 'lured into protests' by their leaders were confirmed by Ms Gaanderse, who said that the leaders were blocking UNHCR officials from accessing the protesters to deliver information on resettlement, preferring to give them incorrect information, in the effort to keep up their resettlement hope. It also transpired that instances of fraud happened behind the scenes, involving those leaders, who were extorting money from the protesters for their mediatory role, and also demanding sexual favours. It would have been more helpful for the most vulnerable among the protesters to approach UNHCR individually to allow the agency to assess their cases, thus allowing due process of resettlement to take its course, instead of joining a group of protesters.

Resolving the impasse

One question remains: what will happen to the protesters at the end Coronavirus lockdown? UNHCR and DHA agree that integration into communities is the only solution. UNHCR is ready to provide

assistance with reasonable rentals for two months to help protesters return to where they were living before, or in different places if need be. As for those who are unwilling to integrate, DHA²⁵ is considering deportation back to their home countries. Ms Gaanderse said that UNHCR disagrees with DHA on deportation because it goes against the principle of *non-refoulement* supported by international refugee law.

Conclusion and recommendations

In this paper, the right to asylum was discussed as a way to support the need for international refugee protection. Then, the next discussion sought to understand resettlement by looking into its three functions: a tool for international protection, an expression of international solidarity and a durable solution to the plight of refugees. The aim was to clarify the role of UNHCR as a facilitator in the process of resettlement, and that the final decision lies with the resettlement countries, depending on a number of criteria, such as quota availability regarding admissions, and specific laws and regulations of the country in particular. Then, the paper set out to discuss resettlement as a process that follows procedures, especially when it comes to identifying people to resettle. An exploration of group resettlement followed, showing that it lies within UNHCR's responsibility to identify a group of refugees to resettle, often based on protracted refugee situations. Even with group resettlement, there is due process to be followed. The paper also outlined refugee protection in South Africa, and pointed out that policies and legal frameworks related to refugee protection exist, but that implementation is lacking, and that the direction points to restricting refugee rights. An exploration of local integration as a durable solution shows that its three interrelated aspects: legal, economic and socio-cultural have many challenges, and that xenophobia has become endemic in South Africa. A discussion followed, as to whether the protests can be interpreted as an untenable situation or something else. Despite the validity of the protesters' grievances, a constructive way of addressing issues should have been considered. Protests involve negotiations, but in this case, the protesters categorically refused dialogue. The paper ended looking at a way of resolving the impasse. There is agreement between UNHCR and DHA that integration is the only solution, and UNHCR is ready to assist. However, there is disagreement on how to deal with those who might not be willing to integrate. DHA says they may be deported, while UNHCR is against this solution as deportation of refugees goes against refugee international law.

Some recommendations

- Rigorous and transparent monitoring and evaluation systems within DHA needs to be put in place to ensure that the protection of asylum seekers and refugees in South Africa adheres to legal standards. The direction from progressive refugee policy to restrictive, and even regressive, needs to be urgently addressed.
- UNHCR must liaise with government and non-governmental partners, especially those working closely with refugees, to convey a coherent and clear message about refugee resettlement, its process and its limitations. Innovative methods of communication with refugee community leaders and their followers, such as leaflets in multi-languages, is also important to assist in getting their message across.
- NGOs and NPOs should build a strong network and assist in designing and delivering programmes that promote social cohesion, especially at grassroots level.

- All South Africans citizens, but especially national, provincial and local leaders, must avoid hate speech as it ignites xenophobic violence, besides that hate speech is unlawful. Justice also needs to be pursued to punish instigators. Furthermore, leaders' discourse about refugees and asylum seekers being a problem and threat needs to be counterbalanced, considering the fact that they bring with them skills that can contribute positively to building South Africa. Another point worth mentioning is that South African government needs to radically increase its efforts to alleviate poverty, since fighting over scarce resources has been cited as one of the main causes of conflicts between South Africans and non-nationals.
- All members of the refugee community must avoid putting themselves and family in potentially dangerous situations without thorough facts, despite feelings of desperation. Build bridges with the stakeholders to ensure you understand the processes and procedures on refugee resettlement. Some actions can destroy those bridges and may be counter productive and harmful.

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