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To Be Out and In:  
Influencing factors in the recognition of SOGI-based asylum claims  
in South Africa and Kenya

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## ABSTRACT

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This thesis examines the relationship and influence of domestic law and culture on the recognition, respect, and adherence of international refugee law as it pertains to sexual orientation and gender based asylum claims in Sub-Saharan Africa. Using South Africa and Kenya as comparative case studies, the paper explores different factors that have contributed to a discovered *lack* of influence of policy and culture in the practice of refugee status determination, as domestic interests, bureaucratic structure and decision making, and international affairs and involvement. The purpose of the study is to better understand the fulfillment of sexual orientation and gender based claims within the context of differing legal contexts but similar cultural ones given the unacceptance of sexual and gender non-conforming individuals throughout African culture. By examining these contexts, the goal of the study was to ascertain what factors contribute to these differences so as best practices and strategies can be used and advocated for moving forward.

## Table of Contents

List of Tables .....	iii
List of Acronyms .....	iv
Acknowledgements.....	v
Dedication.....	vi
1. Introduction.....	1
2. Review of Literature .....	4
2.1 International Frameworks .....	5
2.2 Country Backgrounds .....	8
2.2.1 South Africa.....	8
Development of the Refugee Regime.....	10
Cultural Attitudes.....	12
Towards Asylum seekers .....	12
LGBTI people .....	14
2.2.2 Kenya.....	15
Legal Obligations.....	15
Cultural Attitudes.....	17
Towards Asylum Seekers and Refugees .....	17
Towards LGBTI people. ....	19
2.2.3 LGBTI Asylum Claims in Current Literature .....	24
3. Methodology and Research Design .....	26
3.1 Case Study Selection.....	26
3.2 NGO Participation.....	27
4. Reporting of Results .....	29
4.1 Discussion .....	33
4.1.1 National Interest .....	33
4.1.2 International Involvement.....	44
Refugee Status Determination .....	44
Resettlement.....	47
Programming.....	49
4.1.3 International Affairs: Policy, Aid, and Reputation.....	51
4.1.4 Observations on the Role and Influence of Culture .....	57

4.2 Implications of Findings.....	61
5. Conclusion .....	63
5.1 Review of Findings .....	63
5.2 Implications and Limitations.....	68
5.3 Future Research Recommendations .....	71
Bibliography .....	73
Appendix A: Public Sector Participants .....	81

List of Tables

Table 1: Rights and access to public services of asylum seekers and refugees ..... 37

## List of Acronyms

<i>ACMS</i>	African Centre for Migration and Society
<i>ACPHR</i>	African Convention on Peoples and Human Rights
<i>BRICS</i>	Brazil, Russia, India, China, and South Africa
<i>CAT</i>	Convention Against Torture
<i>CWS</i>	Church World Service
<i>DHA</i>	Department of Home Affairs
<i>DRA</i>	Department of Refugee Affairs
<i>DRC</i>	Danish Refugee Council
<i>GALCK</i>	Gay and Lesbian Coalition of Kenya
<i>HIAS</i>	Hebrew International Aid Service
<i>HRW</i>	Human Rights Watch
<i>ICC</i>	International Criminal Court
<i>ICCPR</i>	International Convention on Civil and Political Rights
<i>ICESCR</i>	International Convention on Economic, Social, and Cultural Rights
<i>INGO</i>	International Non-Governmental Organization
<i>LGBTI</i>	Lesbian, gay, bisexual, trans, and intersex
<i>NGO</i>	Non-Governmental Organization
<i>OAU</i>	Organization of African Unity
<i>RSC Africa</i>	Resettlement Support Center for Africa
<i>RSD</i>	Refugee Status Determination Process
<i>RSDO</i>	Refugee Status Determination Officer
<i>SAPS</i>	South African Police Service
<i>SOGI</i>	Sexual Orientation and Gender Identity
<i>UDHR</i>	Universal Declaration of Human Rights
<i>UNHCR</i>	United Nations High Commissioner for Refugees

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## Dedication

For those who have the courage to push through the doubt and uncertainty of their circumstances.

## 1. Introduction

Although the movement for non-discrimination on the basis of one's sexual orientation and gender identity (SOGI) has steadily gained support and recognition in Western countries, its traction has struggled throughout the developing world. National policies and cultural dialogs have, instead, been focused on maintaining heterosexual relationships, othering those identifying as lesbian, gay, bisexual, trans, or intersex (LGBTI<sup>1</sup>), or outside of the gender binary, by creating or upholding discriminatory policies to police bodies and private acts in the name of culture. The rise of the SOGI movement, its acceptance, mainstreaming, and additional attention have been pitted against an equally strong backlash creating an environment in which "global" rights, norms, and culture, are at odds with more localized constructs and conditions; where the acceptance and right to "be out" has never been more recognized, but has subsequently been more punished. Sexual orientation and gender identity minorities wishing to freely express and perform these facets of themselves are often targeted by their families, local communities, and law enforcement facing verbal harassment and physical violence to an extent that they no longer feel safe in their homes and seek safety elsewhere. Some of these people end up crossing international borders in hopes of finding community, safety, and acceptance as a refugee, persecuted on the basis of their sexual orientation or gender identity.

In the developing world, however, it is often not practical or possible to make it to a country that is willing to respect and protect these rights, with the closest "safe" country still harboring its own prejudice against LGBTI people. How then do refugee hosting countries respect, protect, and fulfill the rights of these asylum seekers that their own domestic law, policy, or culture do not protect? This paper seeks to analyze and understand the different approaches

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<sup>1</sup> This paper uses the acronym LGBTI, which is the preferred and most prevalently used within case study states, and is meant to establish continuity and consistency with current dialogs and understandings.

and manifestations of the refugee regime in Sub-Saharan Africa, using South Africa and Kenya as its comparative case studies. Both countries are magnets in their respective regions, hosting large amounts of asylum seekers and refugees from around the continent, but have different cultural attitudes, perspectives, and policies towards the LGBTI community. South Africa is largely regarded as a bastion of human rights standards in Africa, with its progressive Constitution, jurisprudence, and rights recognition, expressly prohibiting discrimination on the basis of sex, gender, and sexual orientation, though cultural stigmas against SOGI minorities remain a large problem. Kenya, on the other hand, has enshrined international human rights principles in its Constitution, but still finds its penal code and cultural prejudices at odds with non-discrimination towards the LGBTI community.

Despite of the differing status of LGBTI rights recognition within domestic law, policy, and culture, the practices of each country is counter-intuitive to what observers would assume. South Africa's gap in policy and practice fails to protect and recognize LGBTI asylum seekers, in spite of the legal rights recognized, whereas Kenya's discordant policies have not lead to conflicting international rights practices. Why is it that the Kenyan and South African refugee regimes have developed different approaches to upholding their international rights and protection obligations towards LGBTI asylum seekers and refugees, irrespective of their own domestic law and culture?

In order to answer these questions, this paper first establishes and reviews the current literature and international frameworks which are in place that govern refugee law and policy. This growing body of documents spans not only legally binding instruments such as the Convention on the Status of Refugees (1951) and its Optional Protocol (1967), to recommendation and best practice standards such as the Yogyakarta Principles and UNHCR

Guidelines, but also includes the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969). From the international and regional treaties, the discussion will then address both South Africa and Kenya, separately, addressing their respective international obligations, human rights policy frameworks, bureaucratic organization with respect to the refugee regime, and cultural attitudes towards both asylum seekers, refugees, and the LGBTI communities.

Once the parameters and current situations have been expanded upon, the discussion will then dive into research design and methodology, analysis and reporting, and discussion of those results. This discussion will compare the development of each country's respective refugee regime, using existing scholarship to examine the four factors that explain and solve this unanticipated puzzle surrounding the intersection of domestic law and culture with international rights obligations: national interests for both countries with respect to immigration, economy, and international relations, involvement and aid, noting how each element has contributed to the current views, mandates, and status of the refugee regime. The final part of discussion will examine the question of culture and national identity and its role in the recognition of LGBTI asylum claims, explaining how domestic law and culture have ultimately been eclipsed by other state interests with respect to incorporating LGBTI refugees into the fabric of society and local communities. The implications of the argument will then be discussed, addressing how this changes current understanding as well as future conversations and advocacy actions may look in light of them.

## **2. Review of Literature**

The status and experiences of LGBTI refugees is one that has been under-researched and discussed within Refugee Affairs, owing in part to its relative “newness” to both the refugee regime and international rights discussions. The research that has been conducted has focused on refugee reception in Europe, which is understandable given that the region is generally more open, progressive, and welcoming of diverse sexual and gender identities within their own countries. This geographical bias, however, has skewed the international discussion and understanding of these rights. Many of the people that seek asylum in Europe on the basis of their sexual orientation or gender identity have the financial means to travel, as well as the knowledge of their international human rights, which is to their benefit when lodging their application. By focusing on these asylum seekers and refugees, however, actors in international refugee affairs minimize the experiences of sexual and gender non-conforming people, leaving them largely outside their purview, contrary to the increasing emphasis on this population in other areas of human rights work. As such, the experiences of asylum seekers in Sub-Saharan Africa are infrequently discussed or examined in current literature beyond a generalized discussion about changing hearts, minds, and policies towards LGBTI people. In order to examine and understand the current contexts and discussions, several different elements must be pieced together in order to portray and interpret the difficult contexts and spaces in which LGBTI asylum seekers find themselves in. These factors are the international frameworks for the refugee regime as well as sexual orientation and gender identity, the legal obligations, reception of asylum seekers, cultural attitudes towards LGBTI people, and the development of the refugee regime and its bureaucratic culture in both South Africa and Kenya. Once country contexts are better understood holistically, the synthesis will lead into the case study and analysis of the research question.

## 2.1 International Frameworks

The normative framework and concept of rights based upon sexual orientation and gender identity (SOGI) have grown significantly in the past decade. The Yogyakarta Principles (2007) set a framework which placed SOGI rights within the pre-established rights framework, drawing upon principles of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The Principles reaffirm that states have positive obligations to prevent discrimination against its citizens and individuals on the basis of their sexual orientation or gender identity, including in education, work, health, private life, and also the right to seek asylum. It also distinguishes between sexual orientation and gender identity, whose respective definitions will be used throughout this paper given the Yogyakarta Principles' role in the international SOGI movement. "Sexual orientation" refers to a person's emotional, affectional, and/or sexual attraction and relations with another individual of a different, same, or multiple genders. "Gender identity" is an individual's internal feeling, experience, and expression of gender, which may or may not correspond with their biological sex assigned at birth.<sup>2</sup>

Following the Yogyakarta Principles, the United Nations High Commissioner for Refugees (UNHCR) issued its first set of guiding principles for asylum claims on the basis of sexual orientation and gender identity in 2008, and updated again in 2012. The guiding principles are clear in noting that although claims to SOGI were not included in the Convention on the Status of Refugees (1951) and the Optional Protocol of 1967, a growing number of countries'

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<sup>2</sup> UNHCR 2016. "Refworld | Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity." *Refworld*. Accessed March 26. <http://www.refworld.org/docid/48244e602.html>.

refugee law jurisprudence have deemed these traits as immutable and fundamental to a person. UNHCR's guiding documents acknowledges that the transgression of traditional gender norms, in terms of self-expression, societal roles, and sexual partners is a basis on which an individual can fear persecutory harm on the basis of their actual or perceived sexual orientation or gender identity.<sup>3</sup> As the "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity" (2008) explains, patterns of harassment and discrimination can amount to a level that reaches persecution, whether it be on the basis of threats to one's physical security, or the psychological and personal feelings of the applicant. While threats to physical security and sexual violence are more easily understood with regards to the 1951 Convention, the repeated denial or lack of access to services such as education, health, and legal remedies may not be persecution themselves, the cumulative experience may amount to fear and insecurity for an individual's future existence that can be determined as amounting to it.<sup>4</sup> Concealing one's SOGI can also amount to persecution if public identification as a non-conforming SOGI minority may bring severe consequences such as criminal penalties or employment dismissal. As the Yogyakarta Principles detail,

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.<sup>5</sup>

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<sup>3</sup> "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." 2008. [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/UNHCR\\_Guidelines\\_Sexual\\_Orientation.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/UNHCR_Guidelines_Sexual_Orientation.pdf).

<sup>4</sup> UNHCR Guidance Note (2008), pages 7-8

<sup>5</sup> Yogyakarta Principles #19

For LGBTI individuals in sub-Saharan Africa, there are few legal protections that protect them from these types of discrimination, due to the high levels of cultural stigmas that remain, but also by remaining or implementing sections of the penal code that criminalize homosexual activity. National recognition of LGBTI rights varies, but a growing number of states have begun to develop jurisprudence around SOGI asylum claims, or by addressing LGBT rights specifically within other national policy documents.

The OAU Convention Governing Specific Aspects of Refugee Problems in Africa (1969) (“OAU Refugee Convention”) is significant in that it adds and expands on the definition and construction of refugee. Article 1(2) reads,

The term "refugee" shall also apply to every person who, 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 in order to seek refuge in another place outside his country of origin or nationality.<sup>6</sup>

The expansion of the legal construction of who is entitled to refugee status via the OAU definition particularly relevant to asylum seekers lodging a claim based on their sexual orientation or gender identity as it provides more breadth of coverage, but also removes the necessary qualification of lodging a claim solely based upon persecution on nexus grounds (race, religion, nationality, political opinion, or membership of a particular social group). By removing the requirement for persecution, it lowers the burden of proof required by an individual to successfully place an application for refugee status, which is significant to the LGBTI claims as the discrimination or threats they receive at home are more easily understood in the contexts

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<sup>6</sup> OAU Convention Governing Specific Aspects of Refugee Problems in Africa. 1969. [http://www.achpr.org/files/instruments/refugee-convention/achpr\\_instr\\_conv\\_refug\\_eng.pdf](http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf).



where criminalization does not explicitly exist, and where the state fails to protect and fulfill the recognition of their rights.

## 2.2 Country Backgrounds

### 2.2.1 South Africa

*Legal Obligations.* Like many nation states today, South Africa has signed and ratified the major international rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the 1951 Refugee Convention, and its Optional Protocol (1967). South Africa's extensive international obligations also includes its ratification and participation in the African Union and its regional treaties such as the African Charter on Human and People's Rights (ACHPR) and the OAU Convention on the Status of Refugees. South Africa has largely incorporated these international rights standards into their domestic frameworks, both constitutionally as well as through its national legislation.

The South African Constitution is heralded as one of the most progressive in the world, with its explicit mentions of egalitarian non-discrimination measures. Among these provisions, the constitution prohibits discrimination on the basis of sex, and acknowledges that past inequalities require more attention, and establishes the need for affirmative action policies in order to promote equality between sexes in some cases. These measures of non-discrimination are found throughout the Constitution, but is most notably in Section 9, excerpted below;

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law (...)
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, *gender, sex*, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, *culture*, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone

on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. (Constitution of the Republic of South Africa, Section 9, emphasis author's own).<sup>7</sup>

The words emphasized under Section 9 are particularly relevant to the refugee context, as these protections are available and theoretically extend beyond just the citizens of South Africa under the Refugees Act. National jurisprudence has been more reactionary in reaffirming non-discrimination on these grounds as it pertains to LGBTI people, but the national policies' understanding of the different forms of discrimination that may occur against on the basis of their sexual orientation or gender identity and expression is of significance in the refugee context, as the UNHCR guidelines address the disparities that occur if asylum law is read in its traditional form, and encourages more a more progressive understanding of persecution, as mentioned above.

South Africa's Refugees Act (1998) is an impressive piece of legislation which grants generous rights to asylum seekers and refugees, placing it amongst one of the most progressive regimes globally. The Act goes beyond both the Refugee Convention of 1951 and the Convention Governing the Specific Aspects of the Refugee Problems in Africa (1969) in terms of its protections. Administered by the Department of Home Affairs (DHA),<sup>8</sup> the Refugees Act and its subsequent regulations uphold the country's principles of equal protection of law and non-discrimination, as well as respecting the individual's right to a life of dignity. Several other provisions that contribute to the acts' progressiveness are granting the right to work, access to

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<sup>7</sup>The Constitution of the Republic of South Africa. n.d.  
<http://www.gov.za/DOCUMENTS/CONSTITUTION/CONSTITUTION-REPUBLIC-SOUTH-AFRICA-1996-1>.

<sup>8</sup> Colloquially referred to as "Home Affairs," or "DHA," both of which are used interchangeably throughout this paper.

education, and public health services while they remain in the country with a valid asylum seeker or refugee permit. The non-encampment, urban-integration based policies have led to an influx of mixed migration and overwhelmed the Refugee Status Determination process. Under the Refugees Act, Home Affairs is responsible for handling the registration and application, documentation, and status determination process for all asylum seekers and refugees. In addition to overseeing refugee affairs, DHA is in charge of other immigration functions, such as work permits and study visas, but also issues passports, birth certificates, marriage licenses, and other documents chronically one's individual legal status within the country. The wide scope of their mandate has caused the refugee regime to be lumped under the umbrella of immigration within the bureaucratic structure, though the two systems remain separately tracked and adjudicated.

*Development of the Refugee Regime.* Post-Apartheid South Africa has an interesting understanding towards refugees owing to its long-standing role as a refugee and migrant working host country, but also due to the exile anti-Apartheid activists during the struggle for a democratic country. Prior to 1993, considered the official end of Apartheid, South Africa was host to a significant number of Portuguese-Angolan and Mozambican refugees, which the state was willing to accept and grant rights to, but was less receptive towards those respective countries' black populations. The transition government, however, signed an agreement with the UNHCR establishing its commitment to the principles set forth in the relevant, existing international treaties, establishing a right to asylum and status determination procedures, and formally ratified the 1951 Convention and its Optional Protocol as well as the OAU Convention in January of 1996. The Refugees Act of 1998 further codifies the obligations and procedures the state has, but the process of Refugee Status Determination (RSD) and legal recognition has plagued the South African refugee regime since its inception. The interview and appeals process,

while improving in transparency by providing written feedback on unsuccessful asylum claims, has been slow moving and backlogged with the arrival of large, unanticipated numbers of applicants.<sup>9</sup> The refugee regime has always been administered by the Department of Home Affairs, and has, perhaps, been plagued by an inherited xenophobic policy orientation, which was part of the regime's first joint program with the UNHCR to repatriate (and deport) Mozambican refugees.<sup>10</sup>

Financially, the budgets and expenditures by the Department of Home Affairs show that the refugee regime receives very little in order to carry out its mandate of refugee status determinations or provide any other social services. For the 2015/2016 reporting period, the Department of Home Affairs had a total operating budget of ZAR 7.3 billion (roughly \$73 million USD), with 68.7 million (\$6.8 million USD) being dedicated to the asylum seeker sub-program.<sup>11</sup> In 2015 UNHCR South Africa reported 331,500 total asylum seekers and refugees within South Africa, which equates to roughly 207 ZAR (\$25 USD) per person spent by the Department of Home Affairs. The Department of Home Affairs' funding for the status determination process alone is minimal, owing to the administrative and operating costs it must incur, so its lack of capacity and ability to provide assistance is, understandably, non-existent. International assistance is also slim, as the same supporting document from the UNHCR notes a budget of \$27.3 million USD, or \$82 USD average person, though not all asylum seekers in

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<sup>9</sup> Handmaker, Jeff, Lee Ann de la Hunt, and Jonathan Klaaren. 2008. *Advancing Refugee Protection in South Africa*. New York: Berghahn Books.

<sup>10</sup> South African History Online (SAHO). 2011. "Land, Labour and Apartheid." Text. May 6. <http://www.sahistory.org.za/article/land-labour-and-apartheid>.

<sup>11</sup> "Report of the Portfolio Committee on Home Affairs on the Annual Performance Plan and Budget Vote 5 of the Department of Home Affairs." 2016. <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160419pchomereport.pdf>.

South Africa were able to access or use these services. While the UNHCR does provide nearly four times greater, the importance of responsibility sharing could not be more evident, as there is a lack of quality programming available through either domestic or foreign aid for asylum seekers in the country.

### *Cultural Attitudes*

*Towards Asylum seekers.* Attitudes and reception of foreigners have changed over the last quarter-century. Under the Apartheid regime, South Africa issued temporary work visas to nationals from neighboring countries for the purpose of mining and seasonal agricultural employment.<sup>12</sup> Many of these workers, who came from neighboring countries overstayed their visas, or never left, which created a culture and expectation of job opportunities for migrant workers. However, with new regulations, the Immigration Act (2002) made it more difficult for foreign workers to seek and obtain the necessary employment visa and right to work within the Republic. Cross-border migration for reasons of family and friends, employment and livelihoods, opportunities and rights, have long drawn Africans from community through country, but their presence within South Africa experienced a change in perception amongst the black South African communities. As Reitzes explains,

The phenomenon is not new, although it may be increasing. What is novel is its implications for a recently enfranchised black majority in South Africa, who now regard foreigners – previously perceived by some as allies in a regional struggle against apartheid – as potential new enemies and threats to their recently granted civil and political rights and the expectations of socio-economic entitlements.<sup>13</sup>

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<sup>12</sup> Crush, Jonathan. 2008. "South Africa: Policy in the Face of Xenophobia." Migrationpolicy.org. July 28. <http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia>.

<sup>13</sup> Maxine Reitzes, "Introduction" in *Migrants, Citizens, and the State in Southern Africa*. ed. Jim Whitman 2000. (New York: St. Martin's Press), page 62

These attitudes and beliefs have led to government departments adopting policies to restrict immigration and crack down on unregularized migrants, one of them being the Department of Home Affairs.<sup>14</sup>

At the same time Parliament was looking to close loopholes in the Immigration regime, the Courts of South Africa were opening ones in the refugee one. Court cases in the early 2000s reaffirmed the rights and best practices of the international community, reaffirming its country's non-encampment policy and extending an array of rights to asylum seekers and refugees. The right to work, however, has proven to be a constant source of tension within South African society.

With the increasing numbers of asylum seekers, public opinion started to question migrants' legitimacy as refugees. Negative media coverage as well as referring to migrants as 'bogus asylum seekers' or 'economic refugees' have created strong social tensions between immigrants and South Africans.<sup>15</sup> (Saleh, 2015).

These tensions contribute in day-to-day discrimination, making local integration and reception difficult for asylum seekers and refugees, who are likely to face harassment and discrimination within their local host communities, but also on a more structural level. Asylum seekers are frequently and repeatedly denied access to the governmental services they are entitled to, whether it be education or health, and are further disadvantaged by xenophobic attitudes and the culture of corruption within the South African Police Service (SAPS) and legal aid, making it difficult to seek remedies for the discrimination they face.

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<sup>14</sup> Reitzes, *Introduction*, page 63.

<sup>15</sup> Saleh, Ibrahim. 2015. "Is It Really Xenophobia in South Africa or an Intentional Act of Prejudice?" <http://reference.sabinet.co.za/document/EJC184119>.

The past decade has brought about several waves of xenophobic attacks throughout South Africa in the past decade with flare-ups occurring in 2008, 2011, and 2015-2016, most of which has disproportionately affected asylum seekers and refugees. The South African government has refused to characterize these acts of violence as xenophobic, nor have they condemned them, only contributing to the hostile attitudes towards foreigners. Even those communities who are racially, ethnically, and culturally similar face stigmatization due to their nationality, which is only further exacerbated by identifying as a LGBTI, conflating two marginalized statuses.

*LGBTI people.* Colloquially, the Equality Clause of the Bill of Rights (Chapter 2, Section 9, part 3), is known as the “gay rights clause” because it prohibits discrimination on the basis of, amongst other things, sexual orientation.<sup>16</sup> It was the first country to enshrine this principle in its constitution, though its inclusion was seemingly unintentional and seen as part of the larger political agenda aimed at establishing an egalitarian society to right the discrimination and wrongs of Apartheid. As Jacklyn Cock observed,

The inclusion of the gay rights clause in the final post-apartheid Constitution was largely due to the ability of a male-dominated gay rights movement to form strategic alliances with the anti-apartheid struggle, to mobilise the master narrative of equality and non-discrimination and to lobby effectively during the constitution-making process (...) the unity of the gay rights movement as a powerful, collective actor should not be overemphasized.<sup>17</sup>

She further notes that the gay rights movement in the South African context was far from intersectional; it was divided by race, gender, class, and even ideology. In spite of the inclusion of non-discrimination on the basis of sexual orientation, same-sex marriage was not legalized

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<sup>16</sup> Hoad, Neville, Karen Martin, and Graeme Reid, eds. 2005. *Sex and Politics in South Africa*. Cape Town: Double Storey.

<sup>17</sup> Jacklyn Cock, “*Engendering gay and lesbian rights: The Equality Clause in the South African Constitution*” in *Sex and Politics in South Africa*, ed. Hoad et. al, (Cape Town: Double Storey, 2005), page 189.

until the passage of the Civil Unions Act (2006). Prior to that, anti-sodomy measures were legally overturned by the Constitutional Court in 1998, the principle of non-discrimination was further codified in the Employment Equity Act of 1998, and same-sex partners were granted the legal right to adopt children. From a legal standpoint, South Africa has set a strong precedent, and been a model for progressive, egalitarian legal protections, but much of it has been based on and achieved along racial and class lines.<sup>18</sup>

The South African LGBT rights movement and cultural acceptance of SOGI minorities has been observed and criticized for being a largely “white” issue, due to the legacy of colonialism and the role of white supremacy and Apartheid thereafter. Under Apartheid, the South African government actively opposed African cultural constructions<sup>19</sup> and promoted “civilized” Western values, which included anti-sodomy laws and therefore the policing of sexual activity. The struggle for social acceptance and pervasiveness of homophobia in modern South African culture, however, is not limited by race or class. Paradoxically, violence and homophobic attacks, both of verbal and physical nature, have increased in the democratic, post-Apartheid South Africa as the visibility of these groups has increased.

### 2.2.2 Kenya

*Legal Obligations.* Under the new Kenyan Constitution, certain fundamental civil and political rights are granted to its citizens: life, equality, freedom from discrimination, freedom of expression, and human dignity. The Constitution also incorporates the various international treaties to which the state is party to such as the Covenant on Civil and Political Rights (ICCPR), the Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention Against Torture

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<sup>18</sup> Jacklyn Cock, “*Engendering gay and lesbian rights*,” page 197.

<sup>19</sup> Epprecht, M. 2005. “‘Hidden’ Histories of African Homosexualities.” *Canadian Woman Studies* 24 (2/3): 138–44.



(CAT), and the African Charter on Human and People’s Rights (ACHPR). By incorporating these international documents into the Constitution, Kenya’s human rights principles are quite progressive as international human rights norms are codified and recognized in the domestic framework.<sup>20</sup> As logic would follow, this would indicate that measures protecting rights based on sexual orientation, while not outlined as a protected class in the Constitution, are part of the domestic rights recognition, as the various statements and views expressed within the UN system are that LGBTI people should be able to realize the rights afforded to them irrespective of their sexual orientation or gender identity. Unfortunately, this is not the case, as Kenya’s Penal Code still retains measures against same-sex activity, which is a felony subject to imprisonment of up to fourteen years.<sup>21</sup>

As Finerty argues in her note, the Kenyan Penal Code and Anti-Sodomy laws are in violation of the human rights principles set forth in the Constitution and the Bill of Rights, which prohibits discrimination “on any grounds” (emphasis my own). Finerty sees this as an all-encompassing provision, which should include sexual orientation and its protections non-derogative given its context in law and society;

A right or fundamental freedom in the Bill of Rights can only be limited under the new Constitution to ‘the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors...’ (...) The new Constitution also creates fundamental freedoms that cannot be limited regardless of any other provision in the constitution.<sup>22</sup>

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<sup>20</sup> Finerty, Courtney E. 2012. “Being Gay in Kenya: The Implications of Kenya’s New Constitution for Its Anti-Sodomy Laws.” *Cornell International Law Journal* 45 (2): 431–59.

<sup>21</sup> Government of Kenya. 1970. Kenyan Penal Code. <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2063>.

<sup>22</sup> Finerty, “Being Gay in Kenya,” page 449.

Coupled with the positive obligations Kenya has in respecting, protecting, and fulfilling its citizen's human rights, the need for protectionary and anti-discrimination measures for such a vulnerable group would seem necessary, though as detailed below, prevailing cultural values prevent a change in law to bring the Kenyan Penal Code into compliance with international human rights standards, and subsequently its own Constitution. Various actors involved in the LGBTI community are additionally apt to note that in a practical sense, the penal code is not enforceable as it requires law enforcement to find someone engaging in same-sex relations. Another caveat that complicates the legal framework around the rights of LGBTI individuals, is that upon the ratification of the new Kenyan Constitution, there was a provision that established a timeframe for pre-existing national law to align itself with the new rights frameworks. At the time of interview (June 2016), the national legislature had still not reformed this specific provision of the Penal Code with the mandated deadline to do so approaching within the coming months.<sup>23</sup> Several NGO actors noted that there were several initiatives were moving forward to challenge the Penal Code in the judiciary as well as the legislature, and were optimistic about the timeframe and anticipated outcome of the measures.<sup>24</sup>

### *Cultural Attitudes*

*Towards Asylum Seekers and Refugees.* Similarly, to South Africa, Kenya has also faced increasing xenophobic rhetoric in the past decade. Most of this has dealt with the hundreds of thousands of Somalis residing in Dadaab Refugee Camp and urban refugees based in the Eastleigh neighborhood of Nairobi, nicknamed "Little Mogadishu." There is a large perception

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<sup>23</sup> Jourdan, David. 2016. Interview with David Jourdan, Norwegian First Secretary to Kenya, on the SOGIE Forum in Kenya Interview by Marijke Kremin.

<sup>24</sup> Ghoshal, Neela. 2016. Interview with Neela Ghoshal, LGBT Senior Researcher at Human Rights Watch (HRW) Interview by Marijke Kremin. And "Interview with David Jourdan."

amongst Kenyans that Al-Shabaab is organizing and coordinating their attacks in Kenya out of the refugee camps, which has led to a distrust and change in heart of the Kenyan people and government about their international obligations as a refugee host. Not only has the radicalization of Islam and increasing threat of Al-Shabaab made Kenya less receptive to Somalis in Dadaab, but the mixed perceptions towards the urban refugees has placed them in a double-bind. On one side, Kenyans feel threatened by the extensive labor and trade networks that the Somalis in Eastleigh have established, creating the perception that refugees are building business that are undercutting Kenyan entrepreneurial enterprises and squeezing them out, making it more difficult for nationals to find work opportunities. On the other hand, refugees are seen as a drain on Kenyan resources and are an economical burden.<sup>25</sup> Although scholars in labor migration, have found that migrant workers benefit the host country economy, and as Campbell's article argues, Somali refugees in Nairobi are self-sufficient, she asserts that not only is it convenient to cast the blame on urban refugees, but is beneficial to the policy objectives of the Kenyan government,

The Government, due to its lack of involvement in refugee affairs, has no effective ways to stop refugees from leaving the camps, as long as refugees have the necessary transportation money and the extra needed to pay police bribes along the way. Once refugees reach Nairobi, they easily slip into the refugee communities undetected (...) refugees are so well integrated into the social, political, and economic fabric of Nairobi that it is not in the best interests of the Government to remove them. Keeping urban refugees in a state of legal limbo benefits the government, which uses them as a scapegoat for a wide variety of social and economic ills plaguing the city.<sup>26</sup>

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<sup>25</sup> Campbell, Elizabeth H. 2006. "Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration." *Journal of Refugee Studies* 19 (3): 396–413. doi:10.1093/jrs/fel011.

<sup>26</sup> Campbell, "Urban Refugees in Nairobi," page 401.

These sentiments are exacerbated by the fact that refugees do not technically have the legal right to work in Kenya, nor are they permitted to reside outside designated camp areas.

In the past several decades, Kenya has been overwhelmed with various refugee populations due to the ongoing instability in the region. Somalis began pouring in in the early 1990s, and the numbers have increased due to the protracted conflict, the draught in recent years, as well as the aforementioned rise of radical Islam. Other populations of concern currently include a surging number of South Sudanese due to the Sudanese Civil War and South Sudanese Civil War, but also Eritreans, Ethiopians, Ugandans, Congolese (DRC), Burundians, and Rwandans, with numbers vacillating based upon the stability of their home countries. Kenya has traditionally been one of the top refugee hosting countries in the world, owing to both the regional instability in the Great Lakes and the Horn of Africa, but also its relatively friendly reception of them.

*Towards LGBTI people.* Culturally, Kenya remains unaccepting of homosexuality, and recent estimates provide that 90% of Kenyans believe that it should not be accepted.<sup>27</sup> This overwhelming percentage of the population is an indication of how difficult sexual and gender non-conforming people find their lives in Kenya. Due to the criminalization of homosexuality in Kenya, LGBT individuals are unable to seek protection from harassment and physical violence from authorities, as it would mean admitting their sexual orientation and subjecting themselves to negative legal repercussions, but also because police are just as likely to be perpetrators or participants in these acts.

Police play an ambiguous role. In some cases, they have protected LGBT people from mob violence—a role that is recognized and appreciated by LGBT activists

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<sup>27</sup> Pew Research Center. 2013. “The Global Divide on Homosexuality.” <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>.

on the coast—but they have not brought the perpetrators of violence to book. In other cases, they have outright failed in their responsibility to protect: refusing assistance to victims because of their presumed gender identity or sexual orientation, conducting arbitrary arrests, or even perpetrating violence themselves. The criminalization of same-sex conduct renders LGBT people vulnerable to violence at the hands of ordinary citizens as well as law enforcement officials (...) Many LGBT victims of violence believe they have no recourse, and that the police are just as likely to persecute them as to protect them.<sup>28</sup>

The development of attitudes towards homosexuals in Sub-Saharan Africa is outlined by Epprecht, who notes the interesting trajectory that most African nations faced that in the wake of their independence, policing sexuality was low on the list of priorities by African leaders, and left virtually untouched.<sup>29</sup> The lack of attention towards sodomy laws and body policing in the post-colonial era created the invisibility of sexual and gender nonconforming people within Kenyan society. The increasing prevalence and importation of the Western gay rights movement has arguably had a negative impact on the construction, performance, and recognition of these identities. Now that the country has stabilized politically and begun to look more towards how it shapes its identity and culture, sodomy laws and homosexuality are once again reentering the picture.

The arrival of the international LGBTI movement has created a hostile situation for people that identify outside the gender binary; in order to seek the recognition of their legal rights they must adopt and comply with a more universal, Western framework.<sup>30</sup> This includes

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<sup>28</sup> Human Rights Watch, and PEMA Kenya. 2015. *The Issue Is Violence*. <https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast>.

<sup>29</sup> Epprecht, M. 2005. "'Hidden' Histories of African Homosexualities." *Canadian Woman Studies* 24 (2/3): 138–44.

<sup>30</sup> Njogu, Kimani. 2008. *Culture, Performance and Identity. Paths of Communication in Kenya*. Nairobi, KEN: Twaweza Communications. <http://site.ebrary.com/lib/alltitles/docDetail.action?docID=10463132>.

certain expectations of homosexuality, gender and identity performance, which has made them more publicly visible and subject to physical harm and violence, perpetuating a cycle of needing to continue complying with these roles to be recognized as part of the community. The Gay and Lesbian Coalition of Kenya (GALCK), one of the main advocacy organizations, undertook activities and continued to embrace a Western-based line of work, which was likely undertaken to the to appease Western-based funders and donors. This brought the gay and lesbian community out in a way that mimicked the dialogs and cultures of the donors rather than embracing the relevant domestic contexts. This “outing” and changing performance of sexual identity and gender expression inevitably increased the visibility of SOGI minorities, making them easier targets for homophobic harassment and violence at the hands of their local communities and police.<sup>31</sup>

In spite of some of these problems surrounding performance and identity, many advocates note that attitudes differ amongst urban and rural areas. In Nairobi, where the vast majority of LGBTI refugees reside, there is a general “live and let live” attitude towards the LGBTI community.<sup>32</sup> While homosexuality is still largely unaccepted for cultural and religious reasons, people are less likely to be overtly hostile or unwelcoming, but it was stressed that Kenya still largely remains unsafe for LBGTI individuals.<sup>33</sup>

*Development of the Refugee Regime.* Kenya’s present day policies, responses, and sentiment towards refugee situations originated during the struggle for independence and post-colonial

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<sup>31</sup> Justus, Kawira Doris. 2016. Interview with Doris Justus, Protection Program Manager at HIAS Kenya Interview by Marijke Kremin. And “Interview with Neela Ghoshal.”

<sup>32</sup> “Interview with Neela Ghoshal.”

<sup>33</sup> “Interview with Neela Ghoshal.”

political turbulence. After its independence, the Government of Kenya established a secretariat for the documentation, registration, and settlement of refugees.<sup>34</sup> Refugee Affairs was initially housed under the Ministry of Home Affairs, but owing to the establishment of a new government, constitution, and bureaucratic structure, the Secretariat was moved to the Ministry of State for Immigration and Registration of Persons, now known as the Interior and Coordination of National Government and was renamed the Department of Refugee Affairs (DRA). In 2016, the Kenyan government disbanded the DRA and halted all refugee status determination and registration procedures. In May of 2016 the Government of Kenya also announced the closure of Dadaab Refugee Camp, with the intention of repatriating all of its Somali residents, a move largely criticized by the UNHCR and international community.

As LGBTI refugees arrived and were processed under the Department of Refugee Affairs and its related legislation, the role and mandate of the Refugees Act (2006) are relevant to the situation at hand, though its legal status is in flux. The Refugees Act charges the DRA with several important mandates which require it to;

1. Coordinate all measures necessary to promote the welfare and protection of refugees in Kenya
2. Formulate policies on refugee matters in accordance with the international conventions and refugee Act 2006
3. Ensure in liaison with UN agencies and other institutions, the provision of adequate facilities and services for protection, reception and care of refugees within Kenya
4. Register all asylum seekers and refugees in Kenya and maintain a register for reference
5. Issue identity cards and travel documents to refugee
6. Manage refugee camps and other related facilities
7. Promote the welfare of refugees and the host communities

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<sup>34</sup> Government of Kenya Department of Refugee Affairs. 2016. "Department of Refugee Affairs." Department of Refugee Affairs. Accessed October 25. <http://www.refugeeaffairs.go.ke>.

8. In collaboration with development partners, initiate projects that promote peaceful and harmonious co-existence between refugees and the host communities
9. Solicit for funds for refugees assistance programs which have a positive impact on host communities
10. Ensure that refugees' economic and productive activities do not have a negative impact on the host communities, natural resources and the environment
11. Ensure sustainable use of resources in the designated refugee hosting areas.<sup>35</sup>

As the vast majority of LGBTI reside as urban refugees in Nairobi, the Government of Kenya has largely relied upon NGOs and the UNHCR to administer and provide welfare, social, and economic assistance and services. Even with respect to its camps, it is questionable at how well the Government fulfills its designated mandate, as it heavily leans upon the UNHCR and international donorship and aid to administer its services, as well as its success and achieving sustainable economic, social, and natural resource integration of the refugee population. The UNHCR, the World Food Program (WFP), and its partners had raised \$240 million USD for 594,000 refugees<sup>36</sup> in 2015, just over \$400 USD per person. Compared to South Africa, Kenya and its partners are in a much better place financially to assist with the administration of services to refugees, and it should be noted that for the 2015/2016 Fiscal Year, the Government of Kenya allocated only 133,000,000 KShs (\$1.28 million) for its combined Refugee Affairs Department and Field Services budget.<sup>37</sup> The lack of resources provided by the government emphasizes the necessity and importance of responsibility sharing and involvement of the international

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<sup>35</sup> Government of Kenya Department of Refugee Affairs

<sup>36</sup> UNHCR Kenya. 2016. "Kenya Comprehensive Refugee Programme 2016." <https://data.unhcr.org/SouthSudan/download.php?id=2739>.

<sup>37</sup> Government of Kenya National Treasury. 2017. "2015/2016 Estimates of Recurrent Expenditure for the Government of Kenya for the Year Ending 30th June 2016." Accessed January 11. <http://www.treasury.go.ke/component/jdownloads/send/20-budget/221-recurrent-budget-2015-2016.html>.



community. This relationship with this financial reliance was seen with funding decreases, specifically through the WFP, which lead to a cut in rations and increased emphasis on voluntary repatriation of Somali refugees, and later the decision to close Dadaab camp, in an effort to sustain programs and livelihoods.

### 2.2.3 LGBTI Asylum Claims in Current Literature

In spite of these international, regional, and domestic frameworks researchers in Europe have found that procedural problems still exist in SOGI refugee claims.<sup>38</sup> The article identified problems SOGI applicants incurred; for example, in the fair credibility assessment: external recognition of persecution of LGBT individuals in the host country, internal credibility relating to the experience of the individual, and operational credibility which pertains to the interaction between applicant and interviewer. “Procedural Problems in LGBT Asylum Cases” provides an interesting analysis of how interviewers assess “good faith” as there is no common established practice for assessing SOGI claims across Europe, a phenomenon which likely holds true globally, and theoretically seems like a plausible, and potentially threatening barrier to recognition that is likely to be exacerbated in Sub-Saharan Africa where there is less acceptance, recognition, and understanding of sexual and gender non-conforming individuals. Similarly, “Gender and cultural silences in the political asylum process” provides an additional point of reference to measure and understand the burden of proof sexual and gender minorities face in their interviews.<sup>39</sup>

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<sup>38</sup> Jakuleviciene, Lyra, Laurynas Bieksa, and Egle Samuchovaite. 2012. “Procedural Problems in LGBT Asylum Cases.” *Jurisprudencija* 19 (1): n/a.

<sup>39</sup> Shuman, Amy, and Carol Bohmer. 2014. “Gender and Cultural Silences in the Political Asylum Process.” *Sexualities* 17 (8): 939–57. doi:10.1177/1363460714552262.

Satvinder Juss has also written on the ways in which SOGI claims have added an additional layer of complication with respect to politics and sexuality.<sup>40</sup> Multiple conflating factors, such as perpetuating the superiority of Western human rights standards and cultural performance, including stereotyping of one's sexual or gender identity<sup>41</sup> are particularly relevant to South Africa and Kenya as former British colonies. Juss' article is based on case studies conducted in the UK, and recognizes the impact and legacy of the Commonwealth's anti-sodomy laws that have influenced legal and cultural dialogs which still remain in play throughout of much of Sub-Saharan and Anglophone Africa. "The queer time of death: Temporality, geopolitics, and refugee rights" also highlights the legal tensions and cultural risks that exist in countries of asylum where sexual and gender non-conforming people are stigmatized, but still receive LGBT refugee claims.<sup>42</sup> This is particularly relevant to the Kenyan refugee context, and the extent to which the state fulfills its protectionary obligations under the Refugee Convention.

Overall, most studies of individual refugee status determination procedures have taken place in developed countries,<sup>43</sup> which is why this projects seeks to develop the body of literature that seeks to address and understand refugee regimes in Sub-Saharan Africa, but also SOGI rights, as well as the respect for international human rights obligations more generally.

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<sup>40</sup> Juss, Satvinder. 2015. "Sexual Orientation and the Sexualisation of Refugee Law." *International Journal on Minority and Group Rights* 22 (1): 128–53. doi:10.1163/15718115-02201005.

<sup>41</sup> Juss, "Sexual Orientation and the Sexualisation of Refugee Law," page 131.

<sup>42</sup> Shaksari, Sima. 2014. "The Queer Time of Death: Temporality, Geopolitics, and Refugee Rights." *Sexualities* 17 (8): 998–1015. doi:10.1177/1363460714552261.

<sup>43</sup> Fontaine, Pierre-Michel. 2006. "Crises, Challenges and Response The Governance of the Refugee Problem in Africa: A Research Agenda." *Refugee Survey Quarterly* 25 (4): 67–84. doi:10.1093/rsq/hdi0171.

### **3. Methodology and Research Design**

#### **3.1 Case Study Selection**

Due to the focus on LGBTI asylum seekers and refugees in Sub-Saharan Africa, the case selection was made with a few factors in mind. First, that refugee status determination interviews were undertaken, and that refugees were not automatically granted *prima facie*, or “automatic,” status on the basis of their country of origin. This led to searching for host countries with either an integration-based asylum regime, or that had known communities of urban-refugees, as many camps in the region are constructed in response to large-scale civil disturbance and are more humanitarian based. Another reason factor contributing to the focus on urban refugees was an assumption that LGBTI asylum seekers and refugees are more likely to move to urban centers, where they are more likely to find anonymity, a LGBTI community, economic opportunity, as well as minimizing contact with their home-country culture that may hold similar beliefs, attitudes, and actions that caused their flight in the first place. Furthermore, refugee camps are generally unsafe environments, with problems of violence, especially sexual violence being well documented. Identifying as LGBTI or being perceived as such, puts this particular group of asylum seekers at risk, exposing themselves to greater threats against their personal safety owing to the physical or sexual violence they might experience for their non-conforming sexual orientation and gender identity. An additional consideration is that *prima facie* status determinations and safety concerns would make it more difficult for individuals to identify as LGBTI, to and by NGO workers, for fear of being “outed.”

Another contributing factor to the decision was based upon access; both in terms of the access that asylum seekers had to legal aid and assistance organizations, but also the openness, reach, and experience of the NGOs. Established organizations were also more likely to provide a more comprehensive picture of the status determination process, understanding both the policy

and practice. Not only would they be able to identify and speak to the strengths and weaknesses of their respective regimes, but provide narratives and opinions through which comparison and analysis with respect to international frameworks could be made. Owing to these factors, the project grew to center on South Africa and Kenya.

South Africa provided an interesting case, as it is seen as being more welcoming than other sub-Saharan countries due to its legal recognition of gay marriage and anti-discrimination constitutional provisions, legislation, and jurisprudence. Coupled with its urban refugee policies, the country was well-poised to be a destination for LBGTI individuals. In spite of its progressive policies, acceptance of asylum seekers and LBGTI individuals, especially among the black-African cultures, as enumerated upon above, creates an environment that is still unsafe and unwelcoming. Kenya, and Nairobi specifically, are a magnet for the Great Lakes and Horn regions as an economic hub. The size, diversity, and presence of a large international community in the city create a cosmopolitan atmosphere that would allow LBGTI individuals to conceal their identity and increase the likelihood of finding community. Kenya also borders Uganda, which over the past five years, has become increasingly hostile and vocal against LBGTI individuals, including their famed “kill the gays” bill, which has caused large amounts of Ugandans to seek asylum in Nairobi.

### 3.2 NGO Participation

Through familiarity and assistance of previous connections in the field, this study relied upon a snowball method to order to establish contact with local NGOs in their respective countries. NGOs whose work includes legal aid for the RSD process was particular of interest, but interviews were also conducted with organizations that provide humanitarian assistance, work with the local LGBT community, as well as resettlement organizations and the UNHCR,

where applicable and relevant<sup>44</sup>. Interviews were conducted either in person, or through a skype call at a location of the interviewees choice. The semi-structured interviews included, but were not limited to, questions on their organization's understandings of government policy, government practice, international standards, and local culture. Interviews were transcribed, and reviewed to highlight and emphasize recurring and important statements and phenomenon.

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<sup>44</sup> A full list of organizations is included in the appendix.

#### 4. Reporting of Results

During interviews with actors in both South Africa and Kenya, however, the burden of proof, acceptance of LGBTI individuals, and existing beliefs and rhetoric against LGBTI proved to be a non-issue for legal advocates in both countries. With the original intention of examining the intersection of domestic law and culture with respect to each country's international and human rights obligations, the apparent *lack* of influence became the more interesting phenomenon to examine. In order to be able to argue for the effect of culture, there was an assumption that the country already;

1. A public, legal position on the rights of LGBTI individuals, whether they be aspirational or practical,
2. Contrasting and prevailing public opinion,
3. Adjudications provided by civil service agents that could potentially allow for personal beliefs to interfere with the RSD process, and;
4. Had a developed set of RSD practices and procedures.

While these elements exist more or less in both South Africa and Kenya, there are caveats and underlying factors that, I will argue, unexpectedly complicated and negated the extent to which domestic law and culture influences the outcomes of sexual orientation and gender identity based refugee status determinations. Those factors are;

1. National interest
2. Bureaucratic structure and decision making
3. International involvement in
  - a. Refugee Status Determination
  - b. Resettlement
  - c. Programming
4. International Affairs
  - a. Relationship to the international community
  - b. Economic aid

During interviews with NGO workers and advocates within their respective countries echoed one another with similar interpretations, opinions, and experiences with asylum seekers, the LGBTI community, and government officials. Comments that arose out of the South African context focused mainly on the ineffectiveness of Home Affairs and the asylum regime as a whole. While the asylum system was designed with good intentions and best practices in mind, it was also not designed to cope with the large numbers of asylum seekers that have arrived in the country. Advocates and actors commented on the general approach of Home Affairs in which,

The system is so broken that you can't even really talk about it in terms of 'how are gender claims treated versus LGBTI claims versus other types of claims,' [as] there's just a general approach [by DHA that] people entering the system are not legitimate asylum seekers, they're just abusing the system and we need to keep them out, and the decision making process sort of follows along that line and I don't think it makes a huge difference in what type of claim the person is presenting.<sup>45</sup>

ACMS researchers voiced their opinion that there are in fact cultural biases and stigmas that likely come through in the RSD interviews, but that the day-to-day reality, processing time constraints, and even directives encouraging application rejections due to the belief that “99% of people entering the asylum system are economic migrants,”<sup>46</sup> Home Affairs has a prevailing interest of limiting the number of unfounded migrants due to both economic fears and xenophobic culturally held beliefs. A significant finding that came through in the interviews was the lack of engagement RSDOs had with not just the adjudication process in general, but the lack of attention and urgency to address the needs of vulnerable groups, LGBTI claims included, in spite of the expedited and priority status given to this population in other refugee hosting

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<sup>45</sup> Amit, Roni. 2016. Interview with Roni Amit, Senior Researcher at the African Centre for Migration and Society (ACMS) at Witwatersrand University Interview by Marijke Kremin.

<sup>46</sup> “Interview with Roni Amit.”

countries. The lack of relationship and engagement between Home Affairs and organizations like the UNHCR, academic institutions, such as the ACMS, and NGOs, like the Scalibrini Centre is also notable, as the South African Government has largely ignored consultation and input from these organizations, whereas the UNHCR and host countries' respective institutions, where applicable, are typically more robust. These relationships have a significant impact on the refugee regime in South Africa on a domestic, legal protection basis, programming work, and its international relationships and foreign policy decisions as well. South Africa simultaneously works to remain a bastion of human rights excellence, but has increasingly aligned itself with regional allies, citing differences in desired actions and outcomes, and pulled away from its partnerships with Western nations by joining BRICS.

Comments born out of the Kenyan context, however, had a much different tone; in spite of the problems that Kenya has incurred in the past, both with respect to its refugee and general human rights obligations, and the current tension it faces with the remaining portion of the penal code that criminalizes homosexual behaviors, actors in both the refugee and LGBTI communities saw the government to be working towards complying with international rights norms. The different organizations were appreciative of the government's response to advocacy and involvement from both local and international organizations, most likely due to the recognition of limited existing capacity-based factors. Refugee organizations such as HIAS (Hebrew International Aid Service), the Danish Refugee Council (DRC), and the UNHCR noted the high levels of consultation and involvement that they had with the government, with the latter having consulted the Department of Refugee Affairs on proper RSD procedures and the application of refugee law, and HIAS and the DRC spoke about their work on livelihood programming and assistance. In spite of the different consultative roles and relationships the different refugee



organizations had with the DRA, all were confident to report that they believed the Kenyan government was fulfilling their international rights obligations. The Kenyan government actually worked with the UNHCR in establishing its RSD process, initially having it be conducted through the agency before transitioning it to the Department of Refugee Affairs, which effectively established a well-functioning system, even if backlogged, to adjudicate asylum claims in line with best international practices<sup>47</sup>. This strong link between the government, and particularly with UNHCR and HIAS who provide the majority of assistance to LGBTI asylum seekers and refugees, was notable, given the poor relations the South African government has with NGOs, but also because of the receptiveness to involvement of the international community. Another striking contrast, which stood out was that the Kenyan government permitted LGBTI refugees to reside outside of camps, but still limited their rights to employment and education, leaving a gap in assistance NGOs sought to fill. The social and economic situation of LGBTI refugees in Nairobi and their reliance on international aid and assistance mirror the similar need and reliance the Kenyan government has on the international communities within its refugee camps<sup>48</sup>. This reliance on the international community is also what allows for Kenya to maintain a refugee regime that is fairly a-political allowing the government to host large amounts of people due to the amount of aid needed that they cannot

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<sup>47</sup> De Lacoudraye Harter, Alizée. 2016. Interview with Alizée De Lacoudraye Harter, Associate Protection Officer UNHCR Kenya Interview by Marijke Kremin.

<sup>48</sup> Rawlence, Ben. 2016. *City of Thorns: Nine Lives in the World's Largest Refugee Camp*. New York: Picador. This reliance on international aid and programming is chronicled in depth in Rawlence's *City of Thorns*, in which he writes about the daily lives of several of its Somali inhabitants and well as explaining the economic, social, and political innerworkings of the camp from the informal markets that have been established for the provision of extra goods, the links between Kenyan security forces, and its dependence on an underfunded international organization to manage it all.

provide themselves.<sup>49</sup> Without the onus of the maintenance of the camps, the government is able to balance its regional relations without openly rebuking the international community or its obligations to it, thus creating an ideal outcome for the country as it benefits in both culture, obligations, and international relations.

#### 4.1 Discussion

There are several factors which may contribute to the difference in approaches that South Africa and Kenya have taken with respect to their international rights and protection obligations towards LGBTI asylum seekers and refugees. As this paper will argue, these variances can be contributed to a conflation of national interests as it concerns immigration, the economy, rights and services granted to recognized refugees, the country's relationship with the UNHCR, international NGOs, and foreign governments. Within each the respective regimes were allowed to develop in such a way that isolated the refugee regime from the influence of culture and "strategic culture."<sup>50</sup>

##### 4.1.1 National Interest

The presence of asylum seekers and refugees within any country poses questions of sovereignty, both politically and culturally. In chronicling the development of the refugee regime internationally, James Hathaway notes that Kohn's observations on nationalism are very much present as it pertains to a country's acceptance of asylum seekers. The modern state acts in a way that seeks to develop a common cultural consciousness, which all migrants from different

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<sup>49</sup> Betts, Alexander. 2013. *Survival Migration* [electronic Resource]: Failed Governance and the Crisis of Displacement. Ithaca, NY: Cornell University Press.

<sup>50</sup> Here, "strategic culture" refers to ways in which a nation state seeks to develop and carry out a national identity by developing a set of values and practices which are commonly accepted and prevalent.

countries and cultures threaten.<sup>51</sup> These concerns over culture lead nation states to view immigration policy as a tool to exercise control over who was able to be admitted and remain within their territory, and created the exclusion of those whose backgrounds differed from the prevailing culture of the state.<sup>52</sup> The concerns over national well-being not only include the creation of culture, but promoting the national economy and the opportunities and quality of life a state has for its own citizens.<sup>53</sup> In this respect, immigration came to be viewed in a way that was less of what a state could do to provide protection, but for what the immigrant could provide for the country.<sup>54</sup>

These factors are very much at play in South Africa, through which the Department of Home Affairs administers both mobility regimes under the general umbrella of immigration; one that addresses visas (work, student, spousal, and otherwise), but also the refugee regime. As such, the same individuals who are working to protect national interests by creating and implementing the same policies aimed at minimizing external job competition and safeguarding South African culture, are also developing the regulations that align the country with their protection responsibilities.<sup>55</sup> These conflicting goals has resulted in a refugee regime that serves

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<sup>51</sup> Hathaway, James C. 1990. "A Reconsideration of the Underlying Premise of Refugee Law." *Harvard International Law Journal* 31: 129–84.

<sup>52</sup> Hathaway uses Fowler's "Developing Jurisdiction of the United Nations High Commissioner for Refugees" (1974) in order to illustrate and support his point about how countries exercise their immigration regimes as a method of restricting entrance to individuals whose identity and culture is dissimilar from the ideal national culture. In this way, the ideal of strategic culture is linked to immigration policy.

<sup>53</sup> Kohn, Hans. 1965. *Nationalism, Its Meaning and History*. Anvil Original; 8. New York: Van Nostrand. <https://catalog.hathitrust.org/Record/004427676>.

<sup>54</sup> Krenz, Frank E. 1966. "The Refugee as a Subject of International Law." *The International and Comparative Law Quarterly* 15 (1): 90–116.

<sup>55</sup> Allison's *Essence of Decision* again provides valuable insight into the bureaucratic identity, organization, and model for the Department of Home Affairs. In contrast to the Kenyan structure, which has separated the refugee and immigration regimes, allowing for each entity to function and carry-out its mandate through separate decision-making processes and funds, South Africa has not created a separate department to do so. While the refugee regime

the interest of national identity and economy, which comes at the expense of failing to meet international obligations. The African Center for Migration and Society (ACMS) at the University of Witwatersrand has observed this tension noting,

In terms of immigration policy and what [Home Affairs] want[s] to achieve through their policy; it's very different from what the law requires them to do because they want to control and keep people out, and the law is requiring them to let people in (...) Home Affairs doesn't acknowledge there's a problem in the status determination process because the [status determination process] is serving their interests: which is rejecting everyone and keeping them out of the asylum system, so they don't have any interest in proving it.<sup>56</sup>

In Kenya, the Department of Refugee Affairs, whose establishment was technically disbanded in May 2016, remained a separate entity from the rest of the immigration regime. Though under the Ministry of the Interior and Coordination of National Government, the Immigration and Refugee regimes remained disparate entities, separating the decision-making responsibilities and priorities. While this is a small distinction and differentiation, this separation is likely to have had substantial benefits in the development of the refugee regime. Without having to engage with dialogs balancing both mobility regimes, the DRA was solely focused on Kenya's

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does have its own budgetary line, the politics of immigration are evident. As such, the South African model acts more in line with the Governmental (Bureaucratic) Politics paradigm, discussed in Model III. The decisions are more of a results compromise over the political nature of immigration and economic interests as a whole, owing to the belief in the Department of Home Affairs that the vast majority of asylum seekers are actually economic migrants, which has a heavier influence on the domestic decision making process, as the DHA is focused on *home* affairs versus *international* ones, which inhibits the full recognition and realization of its international rights obligations (Allison, page 162). This is not to say that the Department of Home Affairs' actions and identity are limited only to politics, as its decision-making process does need to follow standard operating procedures, as chronicled in the problematic processing of refugee claims, which has deteriorated the Department's understanding of its protection obligations through its continued under-capacity organizational capabilities (Allison, page 68), *see Roni Amit quote*. This sentiment was echoed by the Scalibrini Centre of Cape Town, who noted "that the constant high-level statements from DHA about economic migrants abusing the system reinforces rejections at the RSD level."

Allison, Graham T. 1999. *Essence of Decision: Explaining the Cuban Missile Crisis*. New York: Longman.  
Johnson, Corey. 2017. "Email Interview with Corey Johnson, Advocacy Officer at the Scalibrini Centre of Cape Town," January 4.

<sup>56</sup> "Interview with Roni Amit."

obligations under the relevant international conventions and its own national legislation<sup>57</sup>. For the Department of Refugee Affairs, its interest and mandate was to keep government policy and practice in alignment with human rights, which limited interference regarding economic, political, and socio-cultural concerns. While the rights Kenya grants to its asylum seekers and refugees are not in full compliance with the 1951 Refugee Convention, the policy implementation is less complex.<sup>58</sup>

Economic interests have also played a part of how each country's respective refugee regime developed. As previously discussed, South Africa and Kenya's regimes grant differing rights with respect to asylum seekers and refugees within their territory. South Africa offers a progressive protection of rights, which entitle holders of valid asylum seeker or refugee permits to legally obtain work, whereas Kenya's policy prohibits employment in the formal economy. In South Africa, there is more than just job competition which has prevented the development of a well-functioning refugee regime. Under the Refugees Act and international obligations, South Africa also provides access to public education, health services, and even welfare benefits to

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<sup>57</sup> In this case, the Ministry of the Interior has developed a bureaucratic organization and identity in which, arguably, supports factored problem solving, as depicted in Allison's second model on Organizational Process, and factored problem solving. In Kenya, the structure of the Ministry indicates that the mobility regimes are considered to be separate problems, distinct from one another. This has not only created separate government departments, but has acknowledged that each issue should be addressed separately, one as a matter of state sovereignty and interests as it pertains to the immigration regime, and another based upon international human rights obligations as shown with the Department of Refugee Affairs. Each Department deals specifically and only with its respective regime allowing for maximum adherence to both questions. (Allison, *Essence of Decision*).

<sup>58</sup> This does not take into account the increasing securitization concerns and eventual disbandment of the DRA and announced closure of Dadaab Refugee Camp. These considerations were highly political, and were largely focused on the Somali refugee population. While this is a substantial number of refugees, and without DRA's existence to recognize newcomers, there are some problematic elements, Kakuma, and smaller refugee camps as well as the LGBTI refugee situations are otherwise unaffected, due to the support of international organizations and donors, a topic that is addressed later on in the paper.

recognized refugees.<sup>59</sup> In this respect, asylum seekers and refugees are further seen as free-riders of the state by accessing already overwhelmed public services. The cost of permitting their entry and continued presence in the country is done so by requiring more teachers, nurses, doctors, supplies, buildings, the list goes on, simply by needing to accommodate more people. This has caused the local population and government actors to move to restrict the ability of asylum seekers and refugees to access these services, but also the number of people that can do so through rejecting asylum claims in an attempt to remove people from the protection of the regime. These factors have increased the skepticism of Home Affairs officials, which have contributed to the high level of rejection of asylum claims.

**Table 1: Rights and access to public services of asylum seekers and refugees**

	South Africa	Kenya
<b>Right to Work</b>	Yes	No
<b>Right to Education</b>	Yes	No
<b>Right to Health</b>	Yes	No
<b>Freedom of Movement</b>	Yes	No <sup>60</sup>
<b>Welfare benefits and social services</b>	Yes – Recognized Refugees Only	No
<b>Food Rations</b>	No	Yes

In Kenya, the Department of Refugee Affairs is mandated to operate and fund its refugee camps, but it largely relies upon the international community, namely the UNHCR and its donor

<sup>59</sup> Government of the Republic of South Africa. 1998. Refugees Act (1998). [http://www.saflii.org/za/legis/consol\\_act/ra199899/](http://www.saflii.org/za/legis/consol_act/ra199899/). Art. 27(g)

<sup>60</sup> There are limited cases in which refugees are permitted to reside, study, and work outside of the camps (Rawlence, *City of Thorns*).

countries to provide humanitarian services. The reliance upon the international community, rather than the Kenyan government to operate the camps is well-chronicled amongst human rights and humanitarian actors, and has even seeped into mainstream refugee policy dialogs with Rawlence's *City of Thorns* and discussions around Dadaab closure. Aside from the securitization concerns articulated by the government of Kenya, the financial stress of keeping Dadaab open has been a major part of the discussion. A noted refugee scholar has even gone so far as to suggest that Kenya will do anything if you pay them to. As such, the UNHCR was responsible for much of the cost of Dadaab, which made Kenya more willing to accept its continued presence. However, due to the decreasing aid and attention on the Kenyan camps, the financial obligations of the government have politicized the refugee regime even more. The continued willingness of Kenya to uphold the international refugee regime due to the support of the international community, is evidence of the success and necessity of responsibility sharing.<sup>61</sup> Had it not been for the willingness of the international community at the time of the refugee regime development to help create an environment that allowed Kenya's regime to maintain the traditional camp structure versus the development of an integrated policy like South Africa's, due to the relative strength of its economy at the time and with respect to the numbers of refugees it needed to accommodate. Only recently due to aid and development projects from the international community has Kenya come to be considered a middle-income economy, though poverty, poor public services, and respect for human rights and their fulfillment still leave much to be desired. As such, it needed more assistance in supporting the large number of refugees it

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<sup>61</sup> This idea of cross-issue persuasion is one explored by Betts in his work "Protection by Persuasion" which notes that Northern States do not typically involve themselves in many of these protection issues unless they have a vested national interest to do so. The ideational, and thereby material support, for humanitarian aid is closely linked to the West's ideological opposition to radical Islam and terrorist affiliated groups, is crucial to the continued adherence of Kenya's hosting responsibilities.

attracted as a relatively stable country within the region. Further emphasizing the need for responsibility sharing within the international community is Kenya's decision to close Dadaab refugee camp in the late spring of 2016; which was attributed to securitization, but as Rawlence described in *City of Thorns*, was due in part due to the underfunding, capacity, and involvement of security and police forces, which could arguably be attributed to the shifting attention and aid to other humanitarian emergencies.

Another large and contributing factor to the development of the current refugee regime, in particular with respect to the processing of LGBTI asylum claims, and its relationship to national interest lies within the differing RSD practices and assistance offered as a result of it. In South Africa, advocates and actors have noted that the RSD process is laden with seemingly small barriers that result in significant outcomes. The Department of Home Affairs and Refugee Status Determination Officers (RSDOs) are not, and do not, provide translation services in status determination interviews. Asylum seekers are allowed to bring an interpreter of their own, but they are usually friends and acquaintances from their country of origin culture group and not professionally trained. This causes not only problems in the presentation of the claims around past experiences and persecution, but also puts the applicant at risk for ostracization and harassment from their networks within South Africa due to a continued lack of ongoing cultural acceptance of sexual orientation and gender identity minorities.<sup>62</sup> Interviews are also conducted in office spaces which are not private, which also places a threat to their anonymity and risk of being overheard, which poses a similar threat to the asylum seeker as the translation barrier.<sup>63</sup>

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<sup>62</sup> Kizitos Charloz Okisai. 2015. "Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection under South African Law." University of Pretoria. [http://repository.up.ac.za/dspace/bitstream/handle/2263/46231/Okisai\\_Sexual\\_2015.pdf?sequence=1&isAllowed=y](http://repository.up.ac.za/dspace/bitstream/handle/2263/46231/Okisai_Sexual_2015.pdf?sequence=1&isAllowed=y).

<sup>63</sup> "Email Interview with Corey Johnson."



Lack of privacy is also manifested in being verbally harassed by officials in queues and waiting areas.<sup>64</sup> There is also a general knowledge of the prejudice against the various marginalized groups (asylum seekers and foreigners in general, and the LGBT community, which is still drawn along class and racial lines<sup>65</sup>), which heightens the risk and fear for lodging an asylum claim on the basis of one's sexual orientation or gender identity.

For those applicants who do disclose their sexual orientation or gender identity as the cause for their flight from their country of origin, they are also likely to face harassment and poor treatment from Home Affairs Officials, even when the law is properly applied. Okisai presents two different accounts, in his work; the first being a gay Ugandan man who faced derogatory remarks and humiliation at the hands of his RSDO and a secondary officer, but was eventually granted status, and another, a gay man from the DRC who paid bribes in order to receive his status.<sup>66</sup> The exploitation, both financial and with respect to human dignity are arguably part of the culture at the Department of Home Affairs, and throughout much of South Africa in general. For those asylum seekers that openly acknowledge their sexual orientation or gender identity as the reason for their application, there is not enough hard evidence to attribute these practices to cultural attitudes and stigmas propagated against LGBTI peoples, as much as it is the officials at the Department of Home Affairs taking advantage of the vulnerable positions asylum seekers are

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<sup>64</sup> Okisai, "Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection under South African Law," page 35.

<sup>65</sup> Dan Littauer, "Is South Africa Failing LGBT Asylum Seekers?," Pink News, June 1, 2012, <http://www.pinknews.co.uk/2012/06/01/feature-is-south-africa-failing-gay-asylum-seekers/>.

<sup>66</sup> Okisai, "Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection under South African Law," pages 29-30,

in and participating more broadly in the culture of corruption. Irrespective of the reason, culture, actions, and behavior are in one way or another taking precedent for the RSDOs.

Procedural problems that may also occur in the asylum seeking process, are also related to the standard of proof and “performance” aspects of the applicants’ sexual orientation or gender identity and its expression. In spite of UNHCR guidelines and best practices encouraging status determination officers to remain nonjudgmental and objective,<sup>67</sup> developing practices and sensitivity trainings have also called for restraint in asking questions around sexual acts and other manifestations of their personal identity and preferences (such as frequenting gay clubs, cross dressing in public, public displays of affection, adopting “femme” or “butch” mannerisms, etc.) many of these performances rely on stereotypical or preconceived constructs related to their identity. Not only are these questions highly invasive and sensitive in nature, but requiring them is also difficult as asylum seekers may not “act gay” or have engaged in any sort of activities that would “out” them. This concept, while examined in “Procedural Problems in LGBTI Asylum Cases,” was chronicled throughout the UK, Europe, and also by Okisai in South Africa. The increased requirements for burden of proof not only flouts with question of proper procedure, relating to objectivity, but also that it fails to acknowledge the risks involved with identity expression at home, which may be the reason for concealment and flight.<sup>68</sup>

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<sup>67</sup> UNHCR. 2013. “Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation And/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention And/or Its 1967 Protocol Relating to the Status of Refugees.” United Nations High Commissioner for Refugees. <http://www.unhcr.org/50ae466f9.pdf>.

<sup>68</sup> UNHCR, “Guidelines for International Protection No. 9,” 2013.

Due to backlog of claims adjudications, Home Affairs officials are not given adequate time to hear and consider each case before them<sup>69</sup>. This leads to short interviews, long waits, and poorly reasoned status determinations in order to move all refugees through the adjudication process. A study conducted by the African Centre for Migration and Society (ACMS) at the University of Witwatersrand in Johannesburg, found that RSDOs employed tactics of moving bars of establishing persecution as generally accepted and interpreted in international refugee law.<sup>70</sup> This method, also includes an unwillingness to follow domestic law by failing to provide the applicant with written reasons for their rejection.<sup>71</sup> Additionally, Amit, in her review of status determination rejections found that Home Affairs officials were unlikely to consider future risk of harm and persecution, given home country conditions, which, is often times very relevant to LGBTI individuals who may not have experienced threats to their security, but may do so upon return if their status is known.<sup>72</sup> These inconsistencies in the application of refugee law saw RSDOs openly noncomplying with domestic policy by not providing written reasons of rejection, requiring iron-clad claims that properly recognized past persecution, political or group affiliation, or establishing well-founded fear that prevented asylum applications from receiving refugee status irrespective of the nature of the claim. It is not unreasonable to assume that these

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<sup>69</sup> “Interview with Roni Amit.”

<sup>70</sup> Roni Amit, “No Refuge: Flawed Status Determination and the Failures of South Africa’s Refugee System to Provide Protection,” *International Journal of Refugee Law* 23, no. 3 (October 1, 2011): 458–88, doi:10.1093/ijrl/eer015.

<sup>71</sup> Okisai, “Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection under South African Law,” page 31. In this particular case, the asylum seeker was an openly gay Nigerian man, whose interview included five interviewers, as opposed to one. Upon recounting his experiences at home and reasons for flight, he was initially told that he “did not look like a gay” and received a manifestly unfounded rejection.

<sup>72</sup> Both Amit “No Refuge,” and Okisai “Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection under South African Law,” both acknowledge and address this point throughout their work.

barriers to entry, while plaguing all asylum seekers in South Africa, are present at similar levels when considering LGBTI cases.

In conjunction with South Africa's local integration policies, LGBTI applicants are disadvantaged in several ways. Firstly, that unlike other refugee hosting countries, South Africa does not currently offer any sort of expedited track for vulnerable groups or individuals, nor do many recognized refugees get resettled to a third country. The non-discrimination and progressive policies make South Africa a "safe" host country that respects the human rights and protection obligations that it has undertaken, irrespective of the daily cultural realities LGBTI individuals and asylum seekers face. As such, the international community has created a situation which offers South Africa little incentive to prioritize and recognize the potential harm of sexual orientation and gender identity minorities if they are to remain in South Africa accessing public services and rights which, as previously discussed, threaten local ideas of culture and play into xenophobic discourses. This, combined with the "incredible difficulty administering and managing its asylum system in general, (...) the more specific issues of special vulnerabilities are not on [Home Affairs'] immediate radar in terms of policy"<sup>73</sup> leaves NGOs limited opportunities to engage meaningfully in legal protection and makes livelihood programming difficult as well. If asylum seekers and refugees are to assimilate into South African society, NGOs cannot do much beyond provide job seeking services, English classes, and reassure employers of valid permit holders' rights to employment, education, and health.

On the other hand, while LGBTI refugees in Kenya face more challenges around daily protection needs and livelihood opportunities, they have a more favorable legal environment.

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<sup>73</sup> "Email Interview with Corey Johnson."

While the Government of Kenya does not provide urban LGBTI refugees with any social assistance, NGOs have stepped in to fill the livelihood gaps, making Nairobi a continuing magnet for those seeking asylum. Due to the international attention, condemnation, and response to Uganda's anti-homosexuality policies, LGBTI assistance programs have been developed to assess needs, vulnerability, and even provide livelihood assistance. The pull-factor has created a small LGBTI refugee community in Nairobi, which has, due to their cultural visibility and assumptions based on nationality been subjected to harassment and limited opportunities. These continued vulnerabilities, in conjunction with the practice of treating LGBTI claims with expedited status, has increased the rate at which LGBTI persons receive recognition and resettlement.<sup>74</sup> The well-developed programming and priority in resettlement has made the Kenyan government more receptive in the legal recognition of sexual orientation and gender-based asylum claims, knowing that whomever is granted status will likely not remain in the country for more than a year and a half and is not likely to present any of the typical "threats" to the economy.

#### 4.1.2 International Involvement

*Refugee Status Determination.* The role of international involvement, both through the UN system, foreign governments, as well as through private humanitarian actors is a critical and influential factor to consider when examining human rights conditions for sexual orientation and

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<sup>74</sup> These pull factors, readiness, and capacity of NGOs to support LGBTI refugees in Kenya and through the resettlement process raise interesting questions about the underlying motives of the Kenyan government. How much of this adherence is actual support for refugees versus LGBTI people in general? Subsequently, is there a growing cultural acceptance and desire to continue these protections, versus granting refugee status being based upon economic incentives that arguably perpetuate these actions? The cause and effect nature of the recognition of these claims and positive support of the government and NGOs to move LGBTI refugees through the pipeline and into third country resettlement are beyond the scope of this paper, but remain as a suggestion for further research, especially as it pertains to addressing the needs of continuing at-risk populations, and the importance of responsibility sharing in the international refugee regime.

gender identity minorities. The LGBTI movement is one that is regarded among most African countries as “Western” and “white.”<sup>75</sup> As this paper previously discussed, cultural acceptance of deviant or non-binary sexual orientation, gender identity, and its expression is uncommon and can result in discriminatory behaviors. The prevailing stigmas and risk of harm that LGBTI advocacy groups and communities face is an inherent barrier to entry in the cultural space, and the involvement of the international community was noted by actors on the ground<sup>76</sup>. There is, however, quite a difference in the role that the international community plays in each country with respect to aid and programing, but also with how the host country’s foreign affairs policy and its interaction and participation within the UN system.

One primary distinction which could be seen to have a significant impact on the reception of LGBTI asylum seekers is the involvement of the UNHCR and its country office(s) in the refugee status determination process. The new, democratic South Africa developed and implemented its refugee regime in line with international rights standards and practices, taking a similar progressive view towards rights protection and fulfillment, with a keen awareness of the importance of refugee protection owing to the numbers of ANC and anti-Apartheid activists that sought asylum outside the country<sup>77</sup>. While the UNHCR has program presence in the country, it has never been involved in the RSD process, and its assistance and expertise been minimally used by the government itself. This is not to say that the South African Government has ignored

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<sup>75</sup> Epprecht, “Hidden Histories of African Homosexualities,” page 131

<sup>76</sup> “Interview with Neela Ghoshal,” “Interview with David Jourdan,” Interview with Doris Justus.”

<sup>77</sup> Crush, Jonathan. 2008. “South Africa: Policy in the Face of Xenophobia.” Migrationpolicy.org.

the presence of the UNHCR, but that it has never sought an official partnership or consultative relationship with its country offices.

The problem is that Home Affairs doesn't want to interact, because Home Affairs doesn't think it's a problem. Home Affairs doesn't acknowledge there's a problem in the status determination process because the process of it is serving their interests, which is rejecting everyone and keeping them out of the asylum system, so they don't have any interest in proving it (...) There is a separate training department, and they have been more willing to work with NGOs and they worked with my colleague (...) that doesn't change the larger structural conditions under which status determinations are taking place. So even though they get trained, and even though the Status Determination Officers say, "we know we're doing this wrong, we don't want to do it this way, but this is what we're forced to do."<sup>78</sup>

So, although Home Affairs has adopted and incorporated UNHCR guidelines, given its RSDOs handbooks and trainings, the gap between policy and practice is again at the core of the problem. As AMCS researcher, Roni Amit noted, "the day-to-day reality is that the Status Determination Officers can't actually employ any of the things they may have gotten from the training[s], because the system is just not set up in a way to let them do that."<sup>79</sup> As such, most trainings are done at the request of NGOs and researchers advocating for better practices, versus by Home Affairs looking to improve its processes, for example. Home Affairs' receptiveness to outside assistance from the UNHCR illustrates a key component in its regard for sexual

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<sup>78</sup> "Interview with Roni Amit."

<sup>79</sup> "Interview with Roni Amit." In this particular case, Amit is referring to the significant backlog and time constraints RSDOs have. In her interview, Amit stressed that time constraints and pressures arrive both in terms of how much time each applicant receives in their interviews, but also in a case's review and determination. The backlog has created a lengthy determination timeline, which often leaves asylum seekers awaiting interviews and decisions for periods of up to, and over, a year, far beyond the legally mandated three months. Home Affairs' perspective of the vast majority of applicants to be economic migrants abusing the privileges of the regime and removing economic migrants from the country has manifested itself in high levels of rejection in order to eliminate backlogs and number of people accessing these rights. Furthermore, RSDOs are required to provide more thorough and lengthy explanations of *why* refugee status is being granted, versus rejected. As such, the high volume of work and time constraints on officials create an incentive and environment in which it is easier to reject versus accept a refugee claim.

orientation and gender identity based claims; not only has Home Affairs shown no interest to bring itself into compliance with best practices in adjudicating and protecting LGBTI individuals, but the UNHCR has also been given little opportunity to meaningfully engage in this important portion of the refugee regime.

Unlike South Africa, Kenya has had a successful working relationship with, and reliance upon the UNHCR. The RSD process in Kenya was initially conducted by the UNHCR, who then trained Kenyan officials working with them in conjunction before transferring the adjudication process over to the Department of Refugee Affairs completely.<sup>80</sup> For Kenya, the RSD process was developed at a time of high levels of international involvement and aid, which made the dedication to refugee affairs much less political, as fewer of the country's limited resources were being used. UNHCR involvement in the development, training, and oversight of the application process also ensured that decisions were taken with respect to international rights and best practices. While it no longer administers status determinations, the UNHCR is heavily involved with LGBTI protection in Kenya due to the high numbers of arrivals as well as the previously discussed difficulties the group experiences with integrating into their local communities and maintaining self-sufficiency without the right to work. The UNHCR's influence and role in the decision-making process in Kenya is notable, and is also absent from the South African regime.

*Resettlement.* After Refugee Status Determination, has taken place and been granted, resettlement becomes a viable durable solution for many LGBTI refugees. Resettlement eligibility and selection is usually determined based upon the needs and vulnerability of the individual(s) in question. For refugees in South Africa, resettlement rarely occurs, even for

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<sup>80</sup> "Interview with Alizée De Lacoudraye Harter."



LGBTI cases, “annually there [are] somewhere between 1,000 to 1,500 refugees resettled out of South Africa. [Though] I’m not aware if there is any way to determine the number of those who have LGBTI-related claims. Of our own caseload at the SCCT, I can think of one LGBTI individual who was resettled recently.”<sup>81</sup> The experiences of the Advocacy program at the Scalibrini Centre stress the infrequency of resettlement as well as the lack of access and advocacy opportunities they have for their clients. The progressive laws, protections, and services granted to recognized refugees is on par with citizens’ in most cases, which, ironically makes it more difficult for refugees to justify or prove continued threat to personal security in spite of the protection concerns they have on a daily basis as it pertains to access to legal remedies and other forms discrimination while trying to access public services or in the workplace. As such, refugees remain in the country due to the perceived “safe” status of the country. This cycle perpetuates itself with LGBTI refugees not being resettled, Home Affairs has less of an incentive to admit them and “weigh down” public services with more participants or “disrupt” the cultural identity and fabric of local communities.

For LGBTI refugees in Kenya, the probability of third country resettlement is almost guaranteed, which is likely the result of several factors. First, that more international NGOs are engaged with the LGBTI and refugee populations in Kenya owing to the problematic treatment and protection of both groups of individuals within the country. The expedited processing recognition and known vulnerabilities of LGBTI by the Kenyan government in conjunction with UNHCR practices place them higher on the list. Second, that Nairobi hosts large refugee and resettlement organizations, the latter of which are affiliated with the governments of their home countries. For example, the US Refugee Resettlement Program’s implementing partner for

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<sup>81</sup> “Email Interview with Corey Johnson.”

Africa, Church World Service (CWS), is headquartered in Nairobi. In spite of the Resettlement Support Center for Africa (RSC Africa) working throughout the continent, the proximity and familiarity with the unfavorable local conditions and the strong presence of UNHCR Kenya (also based in Nairobi) is a likely influence upon the candidacy and acceptance into the program for LGBTI individuals. Residence in and around Nairobi and the proximity to resettlement organization offices also ensures timely resettlement as it is easier to process and complete the necessary procedures such as secondary interviews, medical examinations, and background checks prior to departure. So, while LGBTI refugees in Kenya see more tangible, favorable legal recognition and protection through international protection obligations the state has, and the engagement of NGO actors, it is easier to be resettled out of Kenya as a sexual and gender minority than it is in South Africa.

*Programming.* A discussion of international involvement in the refugee regime would not be complete without mentioning and examining the various levels and types of programming that have been implemented in order to assist asylum seekers and refugees. As previously discussed, South Africa's urban integration policy allows valid permit holders to access public services, which means the government itself does very little to specifically target and provide for the successful inclusion of refugees through monetary or resource allocation and support. This inclusivity largely limits the amount of aid work that NGOs are able to justifiably and sustainably implement, even if access is frequently limited or denied. South African NGO, the Scalibrini Centre of Cape Town, notes that of international involvement, "[the] UNHCR seems most involved with DHA and also of course funds numerous NGOs around the country to assist asylum seekers and refugees [in social service and livelihoods access]. UNHCR also on occasion briefs Parliament and puts in submissions on draft policy and legislation, although not

consistently.”<sup>82</sup> A large part of advocacy work is done by South African NGOs and is aimed at increasing inclusivity and access to the services asylum seekers and refugees are entitled to, versus supporting best practices in the RSD process and policy-making spheres, or large-scale goods provisions as would be done in a refugee camp.

The lack of space for humanitarian aid has made the South African programming more open, however, to development work. Employment and livelihoods opportunities are focused on education (such as English language classes) or skills training and certification recognition, as the assumption for all refugee populations is a long-term stay and host country integration. It is interesting to note, as well, that the international community is less involved in refugee affairs in South Africa with work being done with the LGBTI community. Perhaps it is this lower level of involvement, and arguably interest, by foreign governments and donors to engage in any campaign for the respect and fulfillment of rights on the basis of sexual orientation and gender identity. Without outside pressure from the international community, South Africa has little incentive to work on the progressive realization of these rights, when they have little incentive to do so, having the legal mechanisms “in place,” and maintaining their cultural status quo.<sup>83</sup>

For Kenya, programming focuses mainly on humanitarian and livelihood aid given the encampment policy and lack of formal employment opportunities. For LGBTI refugees residing in urban areas, not only is there no right to employment, but there is no access to public services such as health and education. This makes their situation particularly problematic and perilous,

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<sup>82</sup> “Email Interview with Corey Johnson.”

<sup>83</sup> Risse-Kappen, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. 2013. *The Persistent Power of Human Rights: From Commitment to Compliance*. Cambridge Studies in International Relations 126. Cambridge: Cambridge University Press.

which is why international NGOs engaging in the field have established basic assistance programs. From 2014 until June 2016, HIAS Kenya was able to provide LGBTI refugees a monthly stipend of 6000 Ksh per month (roughly \$60 USD) a modest amount, which was able to cover basic living expenses (rent, food, basic personal necessities) in Nairobi. The government had little incentive to provide for these refugees residing outside of formal camps, where they, in theory, already provide needed assistance and services. The situation was likely exacerbated by the willingness of the international community to respond to the inflammatory remarks and actions of the Ugandan government, and wanted to demonstrate a commitment to non-discrimination and equality on the basis of sexual orientation and gender identity. The attention and condemnation surrounding the “Kill the Gays” bill created a situation in which the international community felt a moral obligation to respond and assist, thereby eliminating any need or incentive for the Kenyan government to provide or develop its own programming as mandate and responsibilities of the Department of Refugee Affairs requires.

#### 4.1.3 International Affairs: Policy, Aid, and Reputation

Another factor, which has been tangentially related or underlying in most of the situations above, is each country’s foreign affairs. The ways in which each government interacts on the world’s stage, both in international fora and bilateral relations, in addition to the way in which it seeks to present itself has an impact on its refugee regime, its development, and its treatment of LGBTI asylum claims. Over the past few decades South Africa as worked to improve its standing within the international community, yet began to pull away from Western politics and moved to strengthen its ties to other African nations. There are two notable instances which

illustrate this point; first, its official withdrawal from the International Criminal Court (ICC) in October 2016, and its increasing participation in the BRICS<sup>84</sup> block.

In withdrawing from the ICC, South Africa's Foreign Minister Maite Nkoana-Mashabane, cited an incompatibility between its own policies, such as diplomatic immunity, for peacefully resolving conflicts, and the outcomes of the ICC.<sup>85</sup> Over the previous years President Jacob Zuma and his cabinet became increasingly vocal about the actions of the court, which they allege are discriminatory against African nations.<sup>86</sup> One of the most prominent example was Sudanese President Omar Al-Bashir's visit to Johannesburg in 2015, during which the ICC requested Bashir's arrest. South Africa ignored the request citing a resulting regime change in Sudan should they have done so, an outcome, they claimed, that was contrary to its ultimate goal of achieving peace and the conflict's resolution.<sup>87</sup> By refusing to arrest and extradite Bashir to the ICC, South Africa symbolically allied itself with the leaders of other African countries, rather than with the international community as a whole. Other actions that South Africa has taken are also example of aligning itself with the African heads of state, such as its refusal to condemn Zimbabwean President Robert Mugabe's long tenure in office in spite of evidence of election

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<sup>84</sup> BRICS is an economic alliance comprised of up-and-coming economies in countries that are typically considered "developing"; its members are Brazil, Russia, India, China, and South Africa.

<sup>85</sup> Nichols, Michelle. 2017. "SA Begins Process to Withdraw from International Criminal Court." The M&G Online. Accessed January 19. <http://mg.co.za/article/2016-10-21-south-africa-begins-process-to-withdraw-from-the-icc/>.

<sup>86</sup> BBC. 2016. "South Africa to Withdraw from War Crimes Court," October 21. [http://www.bbc.com/news/world-africa-37724724?ocid=global\\_bbccom\\_email\\_21102016\\_top+news+stories](http://www.bbc.com/news/world-africa-37724724?ocid=global_bbccom_email_21102016_top+news+stories).

<sup>87</sup> Nichols, "SA Begins Process to Withdraw from the International Criminal Court," 21 October 2016.

rigging, voter intimidation, detention of political opponents, and well-documented fraud and corruption. President Zuma instead publicly supported and allied himself with Mugabe.<sup>88</sup>

South Africa's participation in BRICS, has also impacted its political and economic ties with other nations. By aligning itself economically, and subsequently politically, with Russia and China, seen by most of Europe, the US, Canada, Australia, and New Zealand as the antagonists of the UN, South Africa has moved out from under the shadow of obligation and alliance towards Western nations that helped push for the end of Apartheid. The increasing dissent with international rights frameworks is cloaked as sovereignty and the importance of domestic policy in these debates, which, as discussed in the first section is frequently a site of tension in human rights and refugee regime debates. These two factors illustrate the decreasing amicability between South Africa and the Western world as it continues to build its African alliances. Both sovereignty and international relations are contributors to the restriction of access to asylum in South Africa. It is politically contentious to accept claims of persecution by an applicant, as doing so could be interpreted as a political statement against the government of their country of origin. As South Africa strengthens its relationships throughout the continent, it also strengthens the political motivation to reject asylum claims. Xenophobia and employment concerns are a component of this, but the Zimbabwean Dispensation Project (ZDP) is a prime example of how South Africa sought more politically palatable solutions.<sup>89</sup> Following the 2008 election a massive flow of Zimbabweans arrived in South Africa claiming asylum. Keeping in line with Home Affairs' interest to limit the number of foreigners immigrating to the country and the belief that

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<sup>88</sup> Saul, Heather. 2013. "South African President Jacob Zuma Congratulates Robert Mugabe on His." The Independent. August 4. <http://www.independent.co.uk/news/world/africa/south-african-president-jacob-zuma-congratulates-robert-mugabe-on-his-landslide-victory-in-zimbabwe-8745168.html>.

<sup>89</sup> Betts, "Survival Migration," 2013.

most applicants are actually economic migrants, and to prevent an even larger backlog, Home Affairs created and encouraged Zimbabweans to apply for a special work permit.<sup>90</sup> If DHA had begun to grant refugee status to Zimbabweans, it would have been public acknowledgment that business was not as usual in its neighboring country.

The prioritization and recognition of LGBTI asylum claims would have several negative impacts on the international relations of South Africa. First, it would likely create a similar pull factor phenomenon as it did in Kenya, though not on quite as large a scale. The consequences of this would be South Africa's acknowledgment of the unwillingness and inability of states to protect their citizens from harm on the basis of sexual orientation or gender identity, irrespective of current national policy, but it would also expose South Africa's failure to do so as well. The possibility of straining its relations within the African Union and bringing unwanted attention onto its own protection gaps, presents a political risk as it works to position itself as a leader on the continent. There is also limited opportunity to receive any benefits or incentives for the country to bring its practices into line with international rights standards, as its increasing distance from Western, donor countries would likely only result in "naming and shaming." In spite of its growing distance and dissent from Western countries, South Africa still perceives and prides itself on having a commitment to and respect for human rights and does promote those values on the international stage in order to maintain good standing and influence when possible.

Kenya's international affairs also present an interesting relationship and interaction with its refugee regime. It's relationship with the international community is an interesting one, balancing remaining in its good graces and also push back as it pertains to their own interests.

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<sup>90</sup> Betts, "Survival Migration," 2013.

Though its tactics are not unheard of, as most countries are likely to do so, Kenya still receives a significant amount of international aid in spite of its less-than-stellar track record. Similar to South Africa, Kenya has come to be a vocal critic of the International Criminal Court after it charged President Uhuru Kenyatta and Deputy President William Ruto with crimes against humanity following the 2008 election.<sup>91</sup> Though the case collapsed due to a lack of evidence, Kenya has remained a vocal and harsh critic of the court. Interestingly enough, in spite of the criticism that it levels against the ICC for being biased against African nations, Kenya still largely fulfills its obligations under the Refugee Convention. While granting refugee status and protection can be considered political, Kenya has managed to walk the fine line between African identity and interests as well as respecting international conventions.

A possible explanation for this general policy is likely aided by the expanded definition of refugee in the OAU Refugee Convention, which allows for recognition as a refugee due to instability, and threats to peace, security, and public order. The significant majority of Kenya's refugees come from its neighboring, war-torn countries: South Sudan and Somalia, which are in the midst of civil war and constant, continued chaos, respectively. Assisting these refugees, half of whom are women and children, as their displacement is related to conflict rather than direct and targeted, political persecution.<sup>92</sup> The refugee emergencies and mass displacement also attract the attention and assistance of the international community with the UNHCR and humanitarian aid organizations setting up and running the camps and programming, requiring minimal effort from the Kenyan government. The high level of involvement from the international community

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<sup>91</sup> BBC News. 2010. "Kenya Election Violence: ICC Names Suspects," December 15, sec. Africa. <http://www.bbc.com/news/world-africa-11996652>.

<sup>92</sup> Betts, "Survival Migration," 2013.



towards the refugee situation at large likely benefits and flows into the treatment of LGBTI refugees. With the international mechanisms already established and well-functioning, Kenya is likely able to channel any of the potential political tensions onto the priorities and goals of the international community, versus any sort of objective of its own. The continued existence of cultural inadmissibility and persistence of the penal code's anti-homosexuality provisions are also likely to cushion any regional criticisms against the refugee regime or political undertones.

Kenya has less of an international reputation to protect than South Africa, owing to the recent turbulence related to its 2008 election and the problematic and persistent lack of progressive realization, commitment to, and fulfillment of its human rights obligations. As such, flaws, missteps, and inadmissible behaviors are less surprising and a likely part of the reason Kenya continues to remain the recipient of vast amounts of foreign aid. The Government is able to publicly pronounce and aspire to its human rights obligations, but refrains from the boastful and self-serving dialog that is more common for South Africa. The continuing evolution of Kenyan legal frameworks, with the ratification of its new constitution to include international rights frameworks, and the ongoing mission to bring its domestic law into full compliance with it leave more wiggle-room and tolerance than South Africa, whose policies are fully established. The involvement and partnership between international and domestic actors is also much stronger than it is in South Africa. There is continued push from Kenyan LGBTI organizations to challenge the provisions of the penal code, to sensitize local communities around LGBTI issues, and to undertake other legal advocacy measures such as litigation and publishing reports highlighting the persistent protection problems faced by the community, which results in constant engagement in the issue.

Both the need to appease its international funders and their programs, and the more robust activism pushing for improvement on the rights of LGBTI and refugee communities are linked to the national economy. As discussed, Kenya still largely relies upon international investment, aid, and development projects to spur its economy. As a result, certain concessions may need to be made to maintain these good relations, which is certainly evidenced by the status of the refugee regime as it pertains to LGBTI asylum claims.<sup>93</sup> The large influx of Ugandans and LGBTI people from other African countries overwhelmed the Department of Refugee Affairs' abilities, which resulted in the high level of involvement of the UNHCR and International Non-Governmental Organizations (INGOs) to fill the livelihood gaps, eliminating any burden under its international obligations. By permitting external actors to be involved and largely oversee all aspects of the refugee regime pertaining to LGBTI people, with the exception of the formal legal recognition of refugee status, Kenya is able to remain in the good graces of the Western and international community without any financial expenditure or publicly proclaimed policy on the issue. The mitigation of potential political undertones in the RSD process, which is discussed earlier in the paper, reinforces the benefit and necessity of responsibility sharing in the refugee regime.

#### 4.1.4 Observations on the Role and Influence of Culture

In the primary stages of research the idea of culture and its intersection with domestic law and culture seemed to be a sticking point with how each country would theoretically view and fulfil its international obligations, that cultural norms and domestic policy would take precedence over the refugee regime. While state sovereignty is certainly part of the overall equation, culture

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<sup>93</sup> This question, which is expanded upon in a previous footnote, while interesting, is beyond the scope of this paper and whose question would best be addressed in further research.

and strategic culture is relatively absent. Both South Africa and Kenya have established bureaucratic systems that have removed the influence and impact of culture on asylum.

South Africa's prevailing national interest is promoting economic growth and livelihood opportunities and services for its own citizens, so the Department of Home Affairs has an interest to reject asylum seekers based on the popular belief that applicants are economic migrants seeking employment and social services versus being true refugees. The Department of Home Affairs' duties to regulate both the immigration and refugee regimes perpetuates policies which are xenophobic and try to limit the number of foreigners who are able to access rights and services within the Republic. As such, the Department fails to give adequate consideration to all asylum seekers, a problem that has a significant impact on a particularly vulnerable group. The implementation and bureaucratic structure of mobility regimes are concerned more with the economic and xenophobic concerns,<sup>94</sup> as opposed to cultural threats and identity by admitting LGBTI people into local communities.

Domestic law and culture also plays an insignificant role in the Kenyan regime's reception of LGBTI refugees due to the role of the international community has played in assisting them. The international recognition of the plight of LGBTI refugees has resulted in robust aid and protection programs and mechanisms that quickly move this group through the asylum and resettlement process, making their length of stay in Kenya relatively short.<sup>95</sup> With an almost guaranteed prospect of resettlement, LGBTI asylum seekers have no incentive to work to integrate successfully into their host communities, nor is there much opportunity for them to

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<sup>94</sup> "Interview with Roni Amit."

<sup>95</sup> "Interview with Alizée De Lacoudraye Harter," and "Interview with Doris Justus."

establish a permanent community in Nairobi beyond the loose networks that are established to provide mutual support while they wait for eventual resettlement. Kenya's consistently large refugee population's needs significantly outweigh what the country is able to provide and allocate to successfully run a regime that provides for the full rights granted by the 1951 Convention. This has, to its benefit, resulted in substantial assistance from the international community and attracting much needed funding that makes accepting these short-staying refugees more palatable.

It is interesting to note as well that notions of culture with respect to the popular and prevalent notion of sexual and gender non-conformity as "un-African" was only an issue amongst the local communities rather than appearing in RSD outcomes. This challenges the notion that a respect and need for culture to be maintained in order to have state sovereignty. Kenya's refugee regime is supported by this notion, demonstrating that a country can still comply with its rights obligations, as it pertains to protection, but also that a well-functioning refugee regime actually respects prevailing cultural interests more. Kenya, due to its international relations and economic interests is more willing to accept and acknowledge problematic points and situations (as defined by the international community) within its country knowing that it will ultimately result in a better outcome for themselves, whether it is aid, the economy, or immigration. For the LGBTI refugee situation, this means that the government, in conjunction with the support of international and domestic organizations, knows that its culture and communities are unaccepting of sexual orientation and gender identity minorities, and thereby makes local integration a less-viable durable solution for this particular population, making

(quick) resettlement the only remaining path due to the *non-refoulement*<sup>96</sup> provisions in the Refugee Convention and customary international law. By owning up to its cultural environment within the international rights framework, rather than rejecting those norms on the basis of “culture,” Kenya is actually doing a better job at protecting its own values at the same time. This situation minimizes the importance of culture and the discrimination against LGBTI asylum seekers.

Contrast this to South Africa’s approach to asylum and refugee status determination procedures in which, the Department of Home Affairs has adopted an approach whereby in failing to acknowledge a problem, they hope it does not become a larger one, or it disappears. Home Affairs places much more importance on the role of a broadly interpreted definition of culture, both economic and social. The logic behind the policy and practice on such a broad level preclude LGBTI asylum seekers and refugees from seeing any sort of larger stigmatization. Masking its policy, practice, and protection gaps encourages a perpetuation of the cycle, since there is no will or incentive to change. This downward spiral of sorts further engages communities and government officials alike in discourses that other asylum seekers at large, which minimizes the cultural impact of LGBTI discrimination. As there is no acknowledged problem, the international community has very little incentive to truly invest in the improvement of the system, whether it be to increase its functionality or to better serve the individuals who access it, the prevailing public opinions actually undermine the cultural identity that the country is working to create.

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<sup>96</sup> Non-refoulement is the principle of international customary law and the refugee regime which forbids the forcible return of an asylum seeker or refugee to their country of origin if they are at risk for persecution. The principle is states in Article 33(1) of the Refugee Convention of 1951.

## 4.2 Implications of Findings

Upon analysis and consideration of the resulting refugee regime practices of South Africa and Kenya, what matters more in the adjudication of and respect for LGBTI refugee claims is not domestic law and culture, nor is it related to a level of respect for a country's international rights obligations, but rather serving its own economic interests in that process. The difference in relationships with the international community and the amount of aid that can be put towards the project makes a tangible difference in how willing states are to fulfill their obligations and in their treatment of LGBTI refugees. From a human rights perspective, this realization, that the spiral model<sup>97</sup> only really has so much affect, and that monetary incentives are more effective in affecting a change in policy and practice, is disappointing. Too often international actors are hoping to uphold and use international rights obligations without giving more consideration beyond the naming-and-shaming tactics that are so commonplace nowadays they lack backbone or due consideration, but the case studies of Kenya and South Africa indicate that in regards to the recognition of LGBTI refugees, or other culturally different populations, offering economic incentive and programming assistance, rather than asking the hosting country to rely on its own resources, proves to be a more effective method of driving change. Keeping this finding in mind, the international community will be better able to develop programming and advocacy strategies that maximize the likelihood of a host state's acceptance and commitment to LGBTI refugee protection, but also to reaffirm human rights principles for people irrespective of their host country's popularly held beliefs and culture.

With respect to prevailing notions of culture and strategic objectives to counter perspectives and beliefs that are problematic to the recognition of human rights, this paper

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<sup>97</sup> Risse-Kappen, Ropp, Sikkink, "The Persistent Power of Human Rights."

suggests that lobbying governments and local communities for a change in perspective might be relatively futile and that instead efforts should be concentrated on developing and funding systems that are in line with international rights norms and objectives. This course of action would enable all parties to find solutions that are most beneficial to respecting international norms and frameworks as a state, strategic host country culture, as well as the rights of asylum seekers and refugees.

## **5. Conclusion**

### **5.1 Review of Findings**

At first glance, it would be a reasonable assumption that the different domestic legal policies South Africa and Kenya would be reflected in the reception of LGBTI refugees and in the refugee status determination processes; that positive, progressive legal protections would result in recognition of sexual orientation and gender based asylum claims, and criminal code provisions and cultural stigmas would lead to an unfavorable environment. This, however, was surprisingly not the case upon further examination of the existing contexts in South Africa and Kenya, that the reality and manifestations of the refugee regime had very little to do with a bias against LGBTI people, and more so due to the attitudes of the bureaucracies administering the regime and the involvement of the international community. The differing legal practices of South Africa and Kenya are due to the conflation of multiple national policy goals: of their immigration system, its practices, and its relationship to the refugee regime; regime granting access formal employment and job markets; but also keeping in mind the realities of funding needed to fulfill the rights their domestic policy grants refugees. These elements are further informed and developed with respect to each country's relationship within the international system as it relates to their involvement with the UN system, specifically UNHCR, and finally the reputation they are looking at cultivating. Combined, these four factors influence and coalesce to develop a situation that is seemingly counter-intuitive to observers.

Unfortunately, both nations' policy decisions are motivated by economic and political goals versus a respect for human dignity and international human rights law. South Africa, in spite of its high unemployment rate, maintains one of the best economies on the continent, and has, for the past two centuries, been a champion of international human rights because of its progressive protections and policies. It is ultimately these policies and lack international



development aid to support the refugee regime that have backed South Africa and the Department of Home Affairs into operating a non-functioning, failing refugee regime. There are several factors that have disincentivized a system through which the rights of LGBTI refugees, and asylum seekers in general, are respected. First, that the South African refugee regime is one of the few that recognizes the rights of refugees as enumerated in the 1951 Convention but extends a large amount of them to asylum seekers as well. This includes the right to freedom of movement, or non-encampment policy, the right to work, the right to education, the right to health services, and participation in the welfare system for recognized refugees, which has been criticized for spreading the country's limited resources more thinly as people are locally assimilated versus being limited to a camp where they are provided humanitarian aid and are unable to enter formal employment. These differences in services to asylum seekers and refugees also impact the service, assistance, and capabilities of NGOs working within the field, focusing mainly on nondiscrimination and access to state services, where there is an immediate need of assistance, versus trying to change and advocate within the tight space of RSD though the procedural problems and legal failures are well-known and documented.

Second, on the international affairs side, South Africa has recently been moving further away from its relationship with the West both politically and economically prioritizing its regional alliances and BRICS ties. More so in recent years, the tone and tenor of South Africa's relationship with the international community has moved towards being more African-centric, publicly aligning with controversial heads of State such as Robert Mugabe of Zimbabwe, or failing to extradite Bashir to the ICC. These ties also make granting refugee status to individuals on the basis of persecution on the basis of their sexual orientation or gender identity could be seen as a political move, in spite of domestic policies that support the decision, and may be

against foreign policy aims in developing political and cultural unity across the continent. As a result of the changing alliances and priorities, the aid South Africa does receive on the programming side is geared towards development projects rather than direct financial aid and assistance. Though it still relies upon development aid and international investment in order to expand industry, South Africa prioritizes sovereignty when it comes to human rights and national policy. The government, understandably, would want this assistance to be focused on developing its rural areas, educational systems, and industries for its own citizens, but the refugee regime allows asylum seekers and refugees equal access to most forms of employment. Aid conditionality coupled with xenophobic rhetoric has created an environment where many see asylum seekers and refugees as economic migrants “taking” jobs or posing a direct threat to South Africans. Their public statements on their respect for human rights and the relative prosperity of South Africa also makes it more difficult for recognized refugees to be resettled out of the country, as UNHCR and resettlement countries see less vulnerabilities and threats to those granted asylum there. As such, the Department of Home Affairs has little incentive to strengthen its relationship with the UNHCR, where there is little possibility of receiving more money for expanding the capacity of the RSD system, legal services, or even earmarked funding for the social programs asylum seekers and refugees are entitled to, to help support their livelihoods and integration. Even for LGBTI and other particularly vulnerable groups that have legitimate claims to international protection, they are still seen as burdens upon government services and face xenophobic backlash in their new communities and discrimination in obtaining employment, thus perpetuating the vicious circle and relationship between prejudices, employment, self-sufficiency, and social service access. Without incentives or engagement with the international

community on the issue, the DHA has an interest to reject claims even tied to economic migration.

For Kenya, the structure of its refugee regime limits the ability of asylum seekers and refugees to enter and assimilate into the country's culture and society. Most notably, Kenya's national policy requires refugees to reside in designated camp areas, which has led to the creation of the vast, expansive, and enduring camps, such as Dadaab and Kakuma, that the world now associates with refugees. This significant difference in approaches towards its hosting responsibilities from South Africa has, caused the international community to react and assist in different ways. Due to its encampment policy, Kenya receives a large amount of international aid to fund its refugee regime which offers refugees no right to work in the formal sector, even once granted refugee status, minimalizing rhetoric surrounding job competition and economic migration around refugees, but also prevents the assimilation into state services and benefits systems. Kenya does not have to worry about stretching its resources to provide for refugees in addition to its own citizens.

The Kenyan government does not provide its refugees with the right to work, access social services, nor do much to assist in terms of humanitarian aid; camps and their funding is handled by the UNHCR, other international actors, and NGOs to provide services such as WaSH (water, sanitation, and health), medical, education, protection, and shelter. Compared to South Africa, Kenya does little in terms of following and providing for the rights of refugees as enumerated in the 1951 Convention and its Optional Protocol. The continued presence and assistance from the international community, whether it be the UNHCR or NGOs, have offered little incentive for Kenya to adopt changes in policy and practice that are more in line with recognized best practices as it pertains to human rights. The involvement of the international

community also gives the government little incentive to move away from its current encampment policy, as confining refugees to certain areas and prohibiting their access to employment and livelihood opportunities is more beneficial to the economic and cultural fabric of society by limiting job competition, access to social services, and xenophobic rhetoric.

The logic and reasoning behind Kenya's government policies with respect to refugees is understandable. As a host to large numbers of asylum seekers and refugees due to the continued instability in Somalia and the Horn of Africa, the Sudan, as well as the Great Lakes, it is understandable that the national government was weary of contracting itself to provide rights and aid to large amounts of refugees, when it is continuously seeking aid to provide for its own citizens. This separation of obligation towards its own citizens and refugees is also maintained through the creation of a separate and distinct bureaucratic department to deal with Refugee Affairs. By separating the refugee regime from its immigration system, Kenya not only prevents the interference of rights obligations it has between different types of migrants, but also from the political and economic interests of the state with the international protection obligations it actually does uphold. Maintaining a separate government entity has allowed Kenya to quickly recognize refugee status for sexual orientation and gender identity minorities without political interference, relying upon its relationship with the UNHCR, including RSD trainings and the strong resettlement priority of LGBTI individuals, which ensures that asylum seekers move quickly through the system, and therefore, out of the country.

In light of the pushback against recognizing LGBTI rights in Sub-Saharan Africa, it is noteworthy that little of this discourse has found its way into the public discourse around refugees, immigration, and national identity and culture. Both Kenya and South Africa have allowed other state interests to coopt culture in these discussions, with respect to its direct

decision making, focusing more on its relationship with the international community, donors, and the economy. Due to the perceived economic threats, the South African people and the Department of Home Affairs view asylum seekers and refugees as a whole as burdens on the social system, the question of cultural acceptability has not found its way into the determination of refugee status for LGBTI individuals. For South Africa, the question is not so much one of state interest in building its national identity as either LGBTI-friendly, or opposed, so much as it is a result of xenophobia and large numbers of economic migrants abusing the refugee regime. The insistence of the pervasiveness of human rights and respect for them throughout public statements made by the government has negated the interest and involvement of the international community, thus exacerbating needs gaps and backlogs, perpetuating negative cultural attitudes and responses. The interest of strategic culture, nation building, and state interest, however, panned out differently for Kenya. Its encampment policy and structure prevent the assimilation of refugees into the fabric of society, and its robust resettlement program, with an emphasis on expedited resettlement for LGBTI means that the government and local communities are not as concerned with the lasting cultural impact of recognizing people as refugees on the basis of their sexual orientation or gender identity. As a result, of this comparison between South Africa and Kenya, it seems plausible that international involvement, participation, and perception matter much more when it comes to respecting the rights of LGBTI refugees as opposed to adherence of domestic law and policy.

## 5.2 Implications and Limitations

This paper suggests and indicates that regular naming-and-shaming tactics and other critiques and condemnation may do little in influencing states to comply with international protection responsibilities. The more important element, it seems, is the underlying economic and cultural interests, namely that with the financial support of the international community to

provide protection and livelihood services rather than placing that onus on the host country, a state is more likely to comply with norms and standards, even if they conflict with domestic law and culture if they are able to derive some benefit from it. Keeping this in mind, international organizations and donors will be better able to develop programming and strategies that will incentivize an acceptance and commitment to the protection and recognition of LGBTI refugees.

Responsibility sharing in the international refugee regime is, as this paper demonstrates, is important not only in refugee emergencies or mass movements, but also to ensure the general respect for international human rights, protection norms, and other legal obligations host countries have towards asylum seekers and refugees within their jurisdiction. South Africa, which receives very little foreign aid or attention towards its treatment of asylum seekers, refugees, and the general LGBTI population, has little incentive to change its practices which inhibit the recognition of LGBTI refugees by letting cultural prejudices to be masked by administrative and bureaucratic barriers. As Kenya has demonstrated, states are more likely to respond to being offered a carrot, than it is to be chastised by a stick, and it is likely that other refugee hosting communities will take similar approaches when granting refugee status on the basis of sexual orientation and gender identity, irrespective of cultural acceptability when responsibility sharing and other remedies are available to make the situation more palatable for the first country of asylum.

As it stands, the UNHCR and national governments do not keep disaggregated data on the number of LGBTI asylum claims filed per annum, nor do they track how successful these applications are, with success referring to the recognition of and granting refugee status. While the UNHCR and other legal aid agencies in Nairobi were reporting no known rejections based upon credibility merits of the case, the numbers of people assisted were estimated. Due to the

pull factors of resettlement and livelihood assistance in Kenya, actors had reported increased incidents of recruiting false applicants and possible trafficking from Uganda to collect the living stipend that HIAS once offered, or for the opportunity to be resettled. With the end of HIAS' financial stipend, it was unclear to the NGOs how these arrival numbers would change. This possible abuse of the refugee regime in LGBTI claims, is only one factor that contributes to the limitation and availability of quantitative data. Accurately capturing data from asylum seeker demographics in South Africa is also particularly challenging, as RSDOs and Home Affairs practices often leave applicants without full knowledge of their rights and misdirect questions in status determination interviews in order to “catch” economic migrants who are abusing the system, and inclusive qualitative data of accounts of LGBTI applicants and their written rejection feedback is nonexistent given the system backlogs<sup>98</sup>. Porous borders, high levels of mixed migration, and documentation requirements are also varied, in flux, and not often adhered to, which also negates the necessity or masks the need for formal refugee protection. As a result, it is difficult to capture, by any sort of means the respect for LGBTI asylum seekers and the respect for international law and norms, which is why this project had to rely on the qualitative data and experiences of NGOs and their engagement with LGBTI asylum seekers and government agencies. The oft present bias of human subjects, even when individuals were speaking in their official capacity and from the perspective of their respective organizations, was accounted for through the semi-structured nature of the interview in order maintain as much objectivity as possible. The study was also conducted during a time of reform and structuring; South Africa was amending the Refugees Act and Kenya had disbanded the DRA, both of these events

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<sup>98</sup> “Interview with Roni Amit.”

contributed to significant evaluation, critique, and the uncertainty left actors uncertain to comment on the current status and future of their respective regimes.

### 5.3 Future Research Recommendations

In order to better understand the recognition of LGBTI asylum claims in Sub-Saharan Africa, the continued attention and tracking of South African status determination outcomes. As RSDOs begin to finally issue decisions on more LGBTI cases that are initially denied and eligible for review, a body of qualitative data will begin to exist, both written and through the testimonies and experiences of those people who seek assistance from NGOs. This will expose what gaps exist in the interpretation and application of international rights and norms as it relates to domestic law and possible cultural influences.

As the South African context is developed, another important study to be conducted regards the pull factors, readiness, and capacity of NGOs and the national governments to support LGBTI refugees. By examining how much of this adherence can be attributed growing support and cultural acceptance for refugees and/or LGBTI people in general? Or if international rights obligations are being met because of economic incentives that perpetuate these actions. The cause and effect nature of the recognition of these claims and positive support of the government and NGOs to move LGBTI refugees through the pipeline and provide adequate domestic protections and support, or into third country resettlement are beyond the scope of this paper, but remain especially as it pertains to addressing the needs of continuing at-risk populations, and the importance of responsibility sharing in the international refugee regime.

It should also be noted that Kenya and South Africa are unique in that they hold large refugee populations, have enshrined international rights into their domestic law, and conduct their own status determinations. Other countries in Sub-Saharan Africa host far smaller



populations and have not necessarily developed as robust of a regime to either adjudicate claims or be seen as favorable and welcoming destinations for LGBTI people. By monitoring the continued development of South Africa's regime, the lessons learned, and strategies for the inclusion of LGBTI asylum seekers will inevitably have influence on smaller operations by either leading by example, or proving to be an example of the failures of the international mobility regime with respect to its intersecting human rights obligations.

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## Appendix A: Public Sector Participants

Church World Service – Resettlement Support Center Africa

Danish Refugee Council (Kenya)

HIAS Kenya

Human Rights Watch (Nairobi, Kenya)

Norwegian Embassy to Kenya

Scalibrini Center of Cape Town

UNHCR Kenya

University of Witwatersrand – African Centre for Migration and Society