

## Refugee Law, Agency and Credibility in Refugee Status Determination in Nairobi, Kenya

### Abstract

This article critiques the positivist position, which separates the law from politics. It argues that implementation of refugee law is mediated by factors that straddle the law/politics binary. Based on a case study in Nairobi, Kenya, the article discusses the inherently political nature of ›refugeeness‹ and susceptibility of refugee law to power, assumptions and images that underpin credibility assessment in Refugee Status Determination (RSD). It analyses history, experience, memory and precedence in RSD and shows that these have varying rather than automatic and predictable outcomes. The article also critiques customary depiction of refugee applicants as victims or disempowered objects of charity at the mercy of RSD officials. Drawing on empirical data, it suggests that refugee applicants are not docile and helpless bodies lacking the capacity to influence decisions that affect them. On the contrary, they contest unfavourable RSD decisions and utilise available resources in order to influence outcomes of the process. The article shows how the contestation between RSD officials and refugee applicants invests the truth with an instrumental rather than moral value in the quest for positive decisions for applications.

**Keywords:** refugee law, politics, refugee status determination, credibility, agency

### Flüchtlingsrecht, Agency und Glaubwürdigkeit bei der Bestimmung des Flüchtlingsstatus in Nairobi, Kenia

### Zusammenfassung

Dieser Beitrag adressiert kritisch die positivistische Position, die zwischen Recht und Politik unterscheidet. Er argumentiert, dass bei der Umsetzung von Flüchtlingsrecht Faktoren wirksam werden, die über eine reine Binarität von Recht und Politik hinausgehen. Basierend auf einer Fallstudie in Nairobi, Kenia, diskutiert der Beitrag die inhärent politische Natur des ›Flüchtling-seins‹ und die Einflussnahme auf das Flüchtlingsrecht durch politische Einflussnahme, Voran-

nahmen und Bilder, welche die Glaubwürdigkeitsbewertung in der Statusbestimmung untermauern. Er analysiert Geschichte, Erfahrung, Gedächtnis und Präzedenzfälle in der Statusbestimmung und zeigt, dass diese eher zu vielfältigen als zu eindeutigen oder vorhersehbaren Ergebnissen führen. Der Artikel kritisiert auch die übliche Darstellung von Asylsuchenden als Opfer oder entmachtete Hilfsbedürftige, die Entscheidungstragenden ausgeliefert sind. Auf empirischer Grundlage wird gezeigt, dass Asylsuchende keine gefügigen und hilflosen Objekte sind, die Entscheidungen nicht beeinflussen können. Im Gegenteil wehren sie sich gegen ungünstige Entscheidungen der Statusbestimmung und nutzen verfügbare Ressourcen, um Ergebnisse des Prozesses zu beeinflussen. Der Beitrag zeigt, wie Wahrheit in der Aushandlung zwischen Entscheidungstragenden und Asylsuchenden um eine positive Entscheidung des Gesuchs einen eher instrumentellen als moralischen Wert erhält.

**Schlagworte:** Flüchtlingsrecht, Politik, Statusbestimmung, Glaubwürdigkeit, Agency

## 1. Introduction

This article focuses on implementation of international refugee law in the context of Refugee Status Determination (RSD) based on a case study in Nairobi, Kenya. Although refugees' experiences in Kenya are well-researched (see Verdirame 1999; Verdirame and Harrell-Bond 2005; Human Rights Watch 2009, 2013), the dynamics of the RSD process in the interface between RSD officials and refugee applicants in Nairobi has received limited scholarly attention. The article refers to the interaction between RSD officials and refugee applicants as interface because it is characterised by »multiple voices and contested realities« (Long 2001: 50) that create potential for interpretations of refugee law that are unanticipated in the legal documents on refugee hosting.

Drawing from qualitative research with refugee applicants, refugees and RSD officials in Nairobi conducted from 2006 to 2007 and follow-up research in 2012 and 2016, this article criticises the law/politics binary. It draws on Michel Foucault's (1980) work in its argument that application of refugee law as observed in Nairobi, Kenya is shaped by the politics of truth and knowledge playing out between RSD officials and refugee applicants. The article borrows from Sally Falk Moore's (2000) work in its discussion of how legal abstractions are mediated by individual interpretation, history, experience, memory and precedence, all of which influence credibility assessment of refugee narratives. This mediation subordinates refugee applicants' lived experiences to the typical and anticipated. Yet,

this subordination does not necessarily mean that refugee applicants are incapable of influencing the RSD process in order to ensure that it produces favourable outcomes for their applications.

The article criticises depiction of refugees as helpless victims with limited capacity, if any, to influence decisions in RSD. It highlights refugee agency or the »capacity to process social experience and to devise ways of coping with life, even under the most extreme forms of coercion« (Long 2001: 16) or »the capability to make a difference« (Giddens 1984: 14). The article argues that individual interpretation of the law, reference to history, experience, memory and precedence are not the monopoly of RSD officials. Rather, they are also characteristic of refugee applicants' contestation of unfavourable decisions. It is in this contestation that refugee applicants' capacity to subvert regimes of truth and knowledge without necessarily dismantling the power structures that reinforce them is demonstrated.

## 2. Research Methods

The article is based on research conducted in Nairobi, Kenya from 2006 to 2007 and further research in 2012 and 2016. The research involved refugees from eight countries in East and Central Africa namely Burundi, Democratic Republic of Congo (DRC), Eritrea, Ethiopia, Rwanda, Somalia, South Sudan and Uganda. It also included the United Nations High Commissioner for Refugees (UNHCR), Non-Governmental Organisations (NGOs) that work with refugees and the government Department of Refugee Affairs (DRA). I conducted ethnographic research, which provided me with adequate time to establish rapport with refugees and this was important considering refugees' security concerns and how it takes time for them to trust strangers. In addition to purposive sampling, which targeted refugees residing in Nairobi, I used snowball sampling, which connected me to more refugees through my initial contacts whom I accessed through the Jesuit Refugee Service (JRS).

Data were mainly obtained through participant observation, interviews and focus group discussions, which I identified as the appropriate methods for the research questions that addressed refugees' experiences in Nairobi. Ten structured interviews were conducted with officials from the UNHCR, refugee-oriented organisations and the DRA. The structured nature of the questions was due to the officials' tight schedules. Out of the ten, six participants were directly involved in RSD and from the UNHCR, one was from the DRA while the other three worked

in organisations that provided legal aid and psychosocial support during and after RSD. Participant observation, forty semi-structured and eight unstructured interviews were used to obtain data from 30 refugee women and 18 men. Seven focus group discussions were conducted. The first two groups were with Sudanese women and had seven and five participants respectively. Women in the first group were aged between 19 and 56 with one outlier being a woman who was in her 70s while women in the second group were between 30 and 45 years. The third focus group discussion was with five women from the Great Lakes region in the 25–56 age range. The fourth group was made up of ten Somali women whose ages ranged from 23 to 60 years. The fifth group had six men from the Great Lakes Region in the 22–28 age bracket. The sixth group was with another six men from the Great Lakes Region whose ages were between 30 and 55. The last group had three men from South Sudan in their early twenties. All the interviews were conducted in English by this writer. The two focus group discussions with men from the Great Lakes region were conducted in French with the assistance of a translator fluent in both English and French. Across the different periods during which the research was conducted, responses have largely remained consistent except for Burundians who fled violence that erupted in 2015. However, the majority of Burundians fled to Tanzania, Rwanda, the DRC and Uganda. The consistency is attributable to the fact that the situations in both Kenya and the other seven countries of origin have not radically altered.

### 3. Refugee Law and the Politics of ›Refugeeness‹

The 1951 Geneva Convention Relating to the Status of Refugees (Geneva Refugee Convention), the 1967 Protocol and the 1969 Organisation of African Unity (OAU) now African Union (AU) Convention Governing the Specific Aspects of Refugee Problems in Africa (AU Refugee Convention) include in their provisions articles on reception of asylum seekers, host countries' obligations and the fundamental principle of *non-refoulement*, which prohibits forced removal of refugees from the host country. These Conventions also enshrine refugees' rights and their obligations to the country of asylum. Kenya's Refugee Act of 2006 adopts the Geneva Convention's definition of a refugee emphasising »well-founded fear of persecution«<sup>1</sup> as the ground for flight and the AU Convention's definition, which highlights flight due to »external aggression, occupation, for-

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1 Geneva Refugee Convention 1951, Article 1.A.2.

eign domination or events seriously disturbing public order«<sup>2</sup>. These were salient issues during Africa's anti-colonial struggles and »events seriously disturbing public order« remain a challenge in post-independence Africa and they continue to generate huge numbers of refugees fleeing civil wars. Kenya's Refugee Act provides a national framework aimed at operationalising the Geneva and AU Refugee Conventions' provisions on reception of asylum seekers and refugee's rights. It also identifies government ministries and departments that play a role in this operationalisation and their specific responsibilities in refugee affairs. Operationalisation of the two Conventions also takes into consideration national concerns, which are encapsulated in clauses that relate to refugees and national security and explain the circumstances, under which disqualification, withdrawal, cessation and expulsion of refugees occur.

The Geneva and AU Refugee Conventions' definitions of refugees are innately connected to political phenomena. The paradox is that they simultaneously state that refugee hosting is humanitarian, social and apolitical. The wording of the Conventions implies that the social and humanitarian is inherently apolitical and if not, the political can be filtered out of it (Jaji 2009; Malkki 1997). Accordingly, humanitarian assistance premised on this positivist approach to refugee law leaches out the histories and the politics intrinsic in refugee circumstances, thus extracting applicants from their specific socio-cultural and political backgrounds and homogenising the refugee category (Malkki 1997). The UNHCR whose mandate is ostensibly apolitical claims that its status determination criteria are objective and therefore reflective of the positivist tradition, which separates law from politics (Chimni 1998). The positivist tradition »views international law as an abstract system of rules which can be identified, objectively interpreted and enforced with the domain outside the system of rules being designated as politics« (Chimni 1998: 352). It explicitly suggests the possibility of extracting the law from the extra-legal in the broader environment within which it operates and, in the context of international law, implementing it in ways that insulate it from specific socio-cultural and political contexts.

Is this law/politics binary sustainable with particular reference to international refugee law and its application to refugees who are a political phenomenon in terms of the Geneva and AU Refugee Conventions' definitions? Harrell-Bond (1986: 17) dismisses the notion that humanitarianism can be separated from politics as a »myth« that »prevents an examination of the effects of local, national and international politics on refugee policy«. Behrman (2014: 14) aptly observes

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2 AU Refugee Convention 1969, Article 1.2.

that »[f]or refugees who cannot be understood without the language of politics, the law does especial violence.« He attributes this to the law's inability to »loosen its bounds of legal definitions, procedure, and subjectivity« (Behrman 2014: 15).

#### 4. Refugee Status Determination and Credibility

An important aspect of the implementation of refugee law is RSD. Various scholars have criticised objectivity in the RSD process. For example, Shandy (2007: 53) argues that »conceptualisation of ›refugeeness‹ as some objective, black-and-white state devoid of gray areas is erroneous«. Similarly, Chimni (2004: 62) observes that »objectivism is sustained on the mistaken view that there are facts out there waiting to be discovered in order to arrive at a just decision with respect to denial or termination of protection«. Notwithstanding the indistinct line between law and politics, RSD officials' decision-making is underpinned by an ontological model premised on truth/falsehood, knowledge/emotion, political/apolitical and objective/subjective dichotomies. This bifurcation of reality subjects refugee applicants' narratives to a presumably neutral and objective process of testing and proving information as ›facts‹. Refugee applicants' subjective, involved and emotional ›anecdotes‹ are weighed against institutionalised ›either/or‹ rather than ›both/and‹ criteria with refugee status being granted to »one who conforms to institutional requirements« (Zetter 1991: 51) as opposed to one whose ›anecdote‹ is judged implausible.

The most contentious issue between RSD officials and refugee applicants relates to reasons for denial of refugee status. The most prominent reason mentioned in the ›UNHCR Notification of Negative RSO [Regional Support Office] Decision‹ commonly referred to as Rejection Letter in refugee parlance is lack of credibility. The negative decision is based on narratives failing to conform to generally known facts about the country of origin, lacking internal and external consistency or being contradictory, all of which translate into lack of credibility (Gibb/Good 2013; Gorlick 2003). Credibility denotes plausibility and consistency between applicant's claims and independent evidence or Country of Origin Information (COI), which influences RSD officials' confidence in the truthfulness of the evidence provided by the applicant (Coffey 2003). Even in instances where the principle of the ›benefit of the doubt‹, which takes the applicant at their word in the absence of contrary evidence, is applied, its application is still connected to credibility of the narrative (Gorlick 2003).

Credibility criteria are particularly contentious in the interface between RSD officials and refugee applicants from Ethiopia and the Great Lakes region countries of Rwanda, DRC and Uganda. Burundians were also in the same situation during the first phase of the research but their circumstances in relation to refugee status have since changed as a result of their country's descent into violence following President Pierre Nkurunziza's third term bid in 2015. Persecution and killing of those opposed to this bid have created an environment of general insecurity warranting flight. Somalis have been accepted for decades as *prima facie* refugees due to the protracted violent conflict in their country but, as this article shows, Kenya's entanglement with Somali politics and al Shabaab, the Somali militant group, has seen Somalis' *prima facie* status facing resistance. Contention over credibility was not as pronounced among South Sudanese who are considered as *prima facie* refugees and the few Eritreans who participated in the research. Credibility assessment entails RSD officials applying credibility criteria, which they use to distinguish between true and false narratives and determine which narratives they accept as the truth. Credibility criteria involve »techniques and procedures accorded value in the acquisition of truth [in relation to] the status of those who are charged with saying what counts as true« (Foucault 1980: 131). The truth is thus restricted to those narratives that fit into »a system of ordered procedures for production, regulation, distribution, circulation and operation of statements« (Foucault 1980: 133). This creates a refugee regime that is »intertwined with regimes of power, knowledge and truth« (Jaji 2009: 129; see also Harrell-Bond 1986; Malkki 1997). Foucault (1980: 121) locates the problem of these regimes in »the politics of the scientific statement« or how power influences the production of knowledge and truth. Foucault (1980: 131) notes that »truth isn't outside power or lacking power« and, in an interface characterised by power relations in which RSD officials make the decision on applications for refugee status, the truth that counts is what is seen from the vantage point of the officials. The latter's exercise of power »perpetually creates knowledge and, conversely, knowledge constantly induces effects of power« (Foucault 1980: 52).

Credibility assessment relies not only on applicants' narratives but also on precedence, which is intertwined with memory, history and experience. Reference to precedence or previous cases perceived to be of a similar nature leads to profiling. Precedence and profiling in RSD are mutually sustaining in the sense that profiling is buttressed by citation of precedence and, in the process, the latter concurrently entrenches profiling. Precedence justifies and reinforces premising of judgements or decisions in credibility assessments on stereotypes. As such, the relevance of precedence to credibility lies in how past cases are used to determine

plausibility of present cases deemed to be in the same category. While precedence is an integral part of law, it reduces refugee law to an abstract and distant referral point vaguely connected to the specific cases where it is based on stereotypes. The latter intrinsically silence individual stories and conceal individual visibility under group visibility. Profiling or stereotyping and classification of individuals into what Shamir (2005: 197) refers to as »suspect categories« are closely linked to treatment of populations in specific situations as the »known«. In her study of foreign visitors to the US, Gilboy (2005) notes that categorisation of foreign nationals as immigrants and non-immigrants leads to officials exercising less discretion in handling procedures. Likewise, precedence, which entails inference of the truth from past cases, regarded as similar to present cases under assessment results in refugee applicants being readily constituted as the »object of knowledge and control« (Malkki 1995: 57; 1997). For instance, refugee applicants fleeing violent conflict may be asked to provide physical evidence that includes medical doctors' letters as proof that they experienced violence or traumatic events and that their lives are indeed in danger in the countries of origin. If earlier applicants from the same countries were able to present this evidence, it becomes difficult for later applicants who make the same claim but fail to present the anticipated evidence. In this context, physical or corporeal evidence to sustain claims to refugee status carries more weight than the verbal account that it silences (Malkki 1997). »The body or external, visible wounds are considered as providing an objective, credible storyline than the verbal narrative expressing internal, invisible wounds« (Jaji 2009: 134).

Noting the Geneva Refugee Convention's definition, do refugee applicants have to experience persecution first in order for their fear of persecution to be »well-founded«? While credibility is associated with narratives that conform to precedence and expected norms, these norms are insufficient where refugee applicants have gone through exceptional and unimaginable experiences (Herlihy et al. 2010) or applicants whose experiences deviate from the typical narratives and experiences of the group to which they are confined (Smith-Khan 2017).

A corollary of power in credibility assessment is a binary between knowledge and emotion, which dismisses emotionally-tinted proof as deceptive. Peter<sup>3</sup>, an RSD official stated that refugees were prone to exaggeration and he illustrated this description by referring to displays of emotion like crying. Michael<sup>4</sup>, another

3 Interviewed on 15.3.2012 in Nairobi. Information, which may reveal the true identities of officials, is not provided except where permission was explicitly granted. All names used in this article are pseudonyms.

4 Interviewed on 20.7.2016 in Nairobi.

RSD official highlighted misrepresentation of facts combined with displays of emotions such as sadness. Many years of experience working with refugees appear to have insulated officials from emotions thus, reinforcing the fact/emotion dichotomy. The chairperson of the Africa Refugee Programme (ARP), a community-based organisation, which provides support to refugee applicants and refugees from the Great Lakes region, explained that his close-to-two-decades experience working with refugees had left him immune to his own emotions and those of the refugees even when they cried. He declared during the interview,

»[W]e judge according to the experience we have in the field. Emotions and everything else will collapse and we take our time to check. I have been working in the field of refugees for fifteen years. I don't work on emotions; I take my time and can tell when the other person is lying.«<sup>5</sup>

The above quotation shows systematic use of institutional and individual history and memory as well as experience in humanitarian work to create a specific regime of knowledge and the truth to which applicants' narratives are expected to conform if they are to be considered authentic and credible. Similarly, Jane, a UNHCR official, invoked experience, history and memory of working with refugees thus,

»We also have cases of cheating. Some come and say I have been raped even when it's consensual sex because they want to be paid or to go for resettlement in a third country. For them, going to a third country is like going to heaven yet there are some who have come back because life there was just difficult for them. We also have those who come with security claims saying: ›There are people following me from home who would want to kill me.‹ But we tell them to follow the right procedures. We ask them, ›Have you reported to the police?‹ Some come with claims of destitution to get money. So, if we assist them here it doesn't end there; they go to all the other organisations with the same problem to get more money. It's a way of survival. We have children who come to say they have lost their parents but sometimes it is the same parents who come with them and leave them at the UNHCR gate.«<sup>6</sup>

History, experience and memory presumably help filter out RSD officials' emotions from their interface with refugee applicants. They also produce a specific discourse and, as Foucault (1980: 118) explains, »effects of the truth are produced within discourses which themselves are neither true nor false«. The truth is not to be understood as »the ensemble of truths which are to be discovered and accepted« but rather »the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true« (Foucault

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5 Interviewed on 7.1.2007 in Nairobi.

6 Interviewed on 10.11.2006 in Nairobi.

1980 132). *The true or credible narrative is one that not only conforms to predetermined criteria for status determination but also one which transcends refugee applicants' emotions, which are dismissed as deceptive, notwithstanding that applicants' narratives relay personal and usually traumatic experiences. Applicants' emotions are a double-edged sword as their absence can also result in dismissal of the story as fabrication. This happens where refugee applicants relate painful experiences without breaking down. As RSD officials dismiss applicants' emotions, the role of their own emotions is not addressed because of the assumption that they operate from an objective position, which rises above emotions as clearly shown by the ARP chairperson quoted above.*

However, refugee applicants contest the presumed absence of emotion and subjectivity from RSD officials' assessments and decisions. They connect history, experience and memory on the one hand with emotion and subjectivity on the other hand in cases involving stereotypes or profiling, by which refugee applicants are immersed into categories such as nationality, ethnicity, religion or gender and judged based on prior experience with and perception of their identity category rather than uniqueness of individual experiences. Etienne<sup>7</sup>, a 25-year-old Congolese man illustrated this with an event shortly after reaching Kenya, where he went straight to the UNHCR office and arrived at the same time as two women. He related that the officials who attended to them decided to find accommodation for the women but asked him to go and find somewhere to sleep and come back the following day. He explained that he did not have anywhere to go for the night but was told that he was a man and he would find a solution by himself. Men from the Great Lakes region concurred in a focus group discussion with the view that the UNHCR was partial to women and argued that this partiality was not based on objective assessment because men also faced security problems, which is the reason why they fled their countries of origin. Interestingly, one man noted that this decision was normal and logical when considered in terms of women's vulnerability to sexual and gender-based violence and the other group members concurred and situated this decision in a broader cultural context in which women are expected to seek protection from others while men are expected to protect themselves.

Nevertheless, it is important to note that precedence, history, experience and memory are invoked not only to reject refugee applicants but also in decisions to grant refugee status. This happens where atypical narratives are judged plausible because of past experience with them in cases that were given favourable deci-

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<sup>7</sup> Interviewed on 12.2.2007 in Nairobi.

sions. Reference to precedence, history, experience and memory do not play an automatic function, which results in the non-conforming individual narrative being summarily discarded. Rather, in the same way that individual applicant cases can deviate from precedence, history, experience and memory, RSD officials can also return judgements that are not influenced by prior cases and decisions. As such, precedence, history, experience and memory are mediated by RSD officials' personal interpretation of the specific cases before them and this personal interpretation is not divorced from emotion, subjectivity and culture as shown by Etienne's experience above. This creates a situation in which the law intersects with the optional and discretionary (Moore 2000), which challenges stability of the truth and its detachment from the extra-legal or that which is beyond the domain of the law. Decisions to accept or reject applicants are not necessarily based on consensus on some objective criteria for credibility but on individual decision makers' notions of justice (Behrman 2014). Inconsistencies are also attributable to cross-cultural communication between individual RSD officials and refugee applicants, which can lead to misinterpretation of verbal and non-verbal communication and return of unfavourable decisions (Coffey 2003). Smith-Khan (2017: 403) criticises assumption of objectivity and neutrality on the part of decision makers in RSD thus,

»[W]hile subjectivity is possible, there is no reference to the deterministic effects of decision makers belonging to a particular cultural group, and their inability to divorce themselves from this during their decision making. Instead, the instructions imply that, with conscientious effort, decision makers can be objective – touched by all the factors that may affect applicants. This supports the hierarchical construction of decision makers and applicants as different types of people: the latter affected by, and inextricably tied to, their social and cultural difference, the former representing a normal or neutral way of being and thinking.«

This distancing of RSD officials from the influence of culture fosters power relations obtaining between them and refugee applicants because it portrays their decisions as rising above the personal and partial. It also reinforces the role of the burden of proof which challenges refugee applicants' narratives without correspondingly challenging the premise upon which RSD officials' incredulity and decisions are based.

## 5. The Paradoxes of RSD

RSD, which is presumably apolitical from a positivist perspective, is premised on reference to political and religious frameworks (Behrman 2014). Refugee applicants are generated by political crises and situate their quest for refugee status in

their »inescapably political and historical assessments of their predicaments and their futures [...]« (Malkki 1997: 225). RSD addresses reasons for flight which are predominantly political in nature and simultaneously claims to be apolitical. Ironically, it is in the exclusion of the political inherent to »refugeeness« that RSD and refugee law lose neutrality and become themselves political. According to Jane, the UNHCR<sup>8</sup> undertakes fact-finding missions to refugees' countries of origin intended to establish and determine whether the political situation provides genuine reasons to grant refugee status. COI yielded by these missions, country reports and media coverage is given much weight and used as the main criterion to determine whether refugee applicants deserve refugee status or not. Jane stated that the UNHCR also considers »what their governments and embassies are saying«.<sup>9</sup> The essential contradiction in the separation of RSD and politics is that de-politicisation of refugee applicants co-exists with RSD officials' evocation of countries of origin's politics and political pronouncements to determine refugee status. Various humanitarian organisations dismiss refugees' views as political (Inhetween 2006) and endeavour to de-politicise and de-historicise the refugee category (Malkki 1995: 1997). De-politicisation of refugees creates a baffling contradiction in which the intrinsically political is expected to be apolitical. This is the source of conflicting reference points between RSD officials and refugee applicants who argue that there is inconsistency between political rhetoric and practice in countries of origin. Joy<sup>10</sup>, a 35-year-old Burundian woman observed that countries of origin governments were the very reason why refugee applicants fled their countries. To her, paying attention to these governments' pronouncements on human rights, peace and security in order to determine refugee status was a contradiction in terms.

Kingston (2017) discusses the discrepancy between invocation of the cessation clause for Rwandan refugees at a time when citizens are experiencing violation of human rights and use of laws against hate speech to stifle political criticism and

8 In 1991, the Kenyan government passed refugee status determination over to the UNHCR (Verdirame 1999; Juma/Kagwanja 2003; Verdirame/Harrell-Bond 2005; Wagacha/Guiney 2008). This arrangement saw the UNHCR play contradictory roles of protecting refugees and deciding who would be included or excluded from this protection which created a situation Verdirame (1999) equates to that of the prosecutor being the defence lawyer for the accused. The Kenyan government, through the Department of Refugee Affairs which falls under the Ministry of Immigration and Registration of Persons, assumed responsibility for refugee status determination with enactment of the country's Refugee Act in 2006. However, the DRA is yet to fully take over refugee status determination which continues to be a shared responsibility with the UNHCR.

9 Interviewed on 10.11.2006 in Nairobi.

10 Interviewed on 5.2.2007 in Nairobi.

legitimate dissent in Rwanda. Amit (2011) argues that peace talks or pronouncements of peace do not always reflect the situation on the ground and stresses the difference between pledging to engender peace and practising it. Most of the refugee applicants who participated in the research attributed denial of refugee status to politics. The term ›politics‹ in interviews and focus group discussions with refugee applicants relates to the view that RSD officials lack impartiality and make politically motivated decisions. Explanation of ›rejection‹ in terms of politics cut across nationality. While a few refugee applicants attributed their ›rejection‹ to RSD officials' »ignorance« or lack of understanding of the political situation obtaining in the country of origin, the majority of refugee applicants claimed that RSD officials who had handled their cases and ›rejected‹ them were biased towards the countries of origin especially in cases where the countries of origin denied that civilians' lives were in danger. A pertinent example is the Ethiopian government's recent claim that Ethiopia's National Defence Forces had killed nine civilians in March 2018 by mistake while the people who fled the violence to Kenya disputed the claim and refused to return to their country when the Ethiopian government asked them to do so (see The Citizen 2018).

There was a counter argument to and mistrust of COI, which refugee applicants saw as obscuring their particular experiences especially for applicants who fled individualised persecution resulting from, for instance, criticising the government. For example, John<sup>11</sup>, a 45-year-old Ugandan journalist fled persecution because his articles were critical of the government. Meles<sup>12</sup>, a 36-year-old man from Ethiopia had also fled arrest for criticising the government. There was consensus among refugee applicants that peace cannot be observed from outside but must be experienced by citizens. Thus, UNHCR officials would not understand the political situation in the countries of origin through what they heard or read but by paying attention to what ordinary citizens experienced in their everyday lives. Refugee applicants thus considered COI as providing, in the words of Coffey (2003: 393), »spurious objectivity« to decisions on applicants' claims. Although the burden of proof or the obligation to prove truthfulness of a refugee claim lies with the applicant, many refugee applicants are unable to corroborate their claims and refute independent evidence based on COI (Coffey 2003). This was the case in particular for refugee applicants whose narratives were deemed inconsistent with COI. These applicants include John and Meles both of whom were denied refugee status because their stories were deemed inconsistent with generally

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11 Interviewed on 10.10.2006 and on 17.3.2012 in Nairobi.

12 Interviewed on 14.1.2007 and 16.7.2016 in Nairobi.

known facts. Similarly, Mara<sup>13</sup>, a 60-year-old Ethiopian woman related that her politically active husband was killed by government agents. In the confusion of flight, she lost her two daughters and by the third phase of the research in July 2016, she still did not know where they were or whether they were still alive. Her story was dismissed for lacking credibility and she expressed her frustration with denial of refugee status thus, »I pray that God punishes the people at UNHCR!«<sup>14</sup> Zara<sup>15</sup>, another Ethiopian woman aged 65 and her family were also denied refugee status because her story that her life was in danger was judged implausible. Around the first phase of the research (2006–2007), her husband had travelled to Kenya's port city of Mombasa but he had not been heard from again. He was presumed dead although Zara did not know what happened to him. In the follow-up research in 2012 and 2016, I looked for Zara and her daughters but I could not locate them.

The paradox of RSD is imbedded in the fluid, subjective and political nature of ›facts‹. An interesting case is that of Rwandan refugees whose status is the subject of contention and controversy relating to association of their flight and reluctance to repatriate to participation in the 1994 genocide. When Rwandan refugee applicants are granted refugee status, they see this as humanitarian and reflective of the truth. Conversely, the Rwandan government views decisions that grant Rwandan applicants refugee status as »political« and based on applicants' falsehoods. The Rwandan government has constantly asked the UNHCR since 2002 to declare a general cessation of refugee status for Rwandan refugees and lobbied host countries to invoke the cessation clause of the Geneva Refugee Convention (FAHAMU 2011; Kingston 2017; McMillan 2012). Rwandan refugee applicants dismiss the government's view and position as political performance for the international community (Jaji 2009). Conversely, denying Rwandan applicants refugee status in consideration of the government's position reflects ›the truth‹ for the government but is political and based on government falsehoods for the ›rejected‹ applicants. During interviews and focus group discussions, the latter raised questions on institutional neutrality and the role of RSD officials' personal biases. The controversy on whether Rwandans are genuine refugees or fugitives and the concomitant inconsistencies in denial or granting of refugee status to them is indicative of the politics that belies the idea of apolitical interpretation of refugee law. The views portrayed by Hutu Rwandans in Kenya on denial of

13 Interviewed on 22.11.2006 and on 20.7.2016 in Nairobi.

14 Interviewed on 22.11.2006 in Nairobi.

15 Interviewed on 15.10.2006 in Nairobi.

refugee status and application of the cessation clause to them are echoed by their compatriots in other host countries (see France-Rwandan Tribune 2012; IRIN 2011). What is interesting is that applicants from the various nationalities who were granted refugee status saw the decision as validation of the truth conveyed in their narratives while those who were ›rejected‹ saw the decision as an outcome and proof of RSD officials' personal biases and politics. In this scheme of things, truth and falsehood cease to be irreconcilable binaries as they shift and swap positions depending on applicants' circumstances; the boundary between facts and opinions or objectivity and subjectivity becomes blurred in credibility assessment, which is steeped in politics.

Similarly, it is in the context of applying refugee law that some Somali applicants are denied refugee status despite the UNHCR declaring them *prima facie* refugees due to the ongoing violent conflict in their country. Kenya has positive foreign policy relationships with the countries whose citizens it hosts and refugee applicants who were denied refugee status blamed RSD officials who handled their cases and their countries of origin but not their host government. However, the situation was different for Somalis. Kenya has to do a delicate balancing act between its positive relationship with the Somali government and its antagonistic relationship with the Somali al Shabaab militant group and the contradictory implication of this complex political situation on Somali refugees in Kenya. The hostile relationship which morphed into a Kenyan military incursion into Somalia in 2011 following kidnappings of tourists in Kenya, which the Kenyan government blamed on al Shabaab, plays a role in RSD in that Somalis are not granted wholesale refugee status in practice. Somalis who participated in the research had to go through RSD thus showing a discrepancy between the law and its translation into practice which considers security concerns in the wake of reports of al Shabaab militants training youths in Dadaab refugee camp in 2007 and several terrorist attacks that they have since launched on Kenya.

The discrepancy between the law and practice results in lack of uniformity, consistency and predictability in the application of refugee law and granting of refugee status leading to entanglement of refugee status and politics. This was demonstrated in 2016 when the Kenyan government revoked *prima facie* refugee status from Somalis citing insecurity. It announced that it would repatriate refugees and close Dadaab and Kakuma Refugee Camps and disband the DRA. This course of action was blocked by a High Court ruling in February 2017, which declared the revocation *ultra vires* Article 33 of the Geneva Refugee Convention and Section 18 of Kenya's Refugee Act, which enshrine the principle of *non-refoulement*. The court also ruled that disbandment of the DRA was ›null and

void«. Kenya's intended revocation of *prima facie* refugee status from Somalis illustrated tenuousness of refugee law in the face of political arbitrariness. It highlighted that implementation of refugee law in contexts of heightened political tensions reflects »a peculiar mix of action congruent with rules [...] and other action that is choice making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual« (Moore 2000: 3).

## 6. Quest for Legitimacy and Redressing Denial of Refugee Status

While officials predicate decisions during the RSD process on their experience, history, memory, precedence and COI, refugee applicants contest unfavourable decisions on grounds of uniqueness of individual experiences, which do not always conform to the notion of *the* refugee experience (Jaji 2009) or to country of origin pronouncements. Addressing the disjuncture between the general and the particular, Jean, a 25-year-old Burundian man countered, »[w]e didn't leave our countries and risk our lives asking truck drivers to smuggle us to countries we had never been to before and find ourselves begging and living like *chokola* [Swahili for street children] because we enjoy it.«<sup>16</sup> In both the individual interviews and focus group discussions, refugee applicants expressed dismay that RSD officials who denied them refugee status found it plausible that they would leave the familiarity and comfort of living in their own countries and risk their lives on the journey to Kenya for reasons other than that they needed security. Jacques, a 24-year-old Congolese man observed, »[b]eing called a refugee is embarrassing and no one would choose to be one.«<sup>17</sup>

Although refugee applicants occupy a subordinate position in their interface with RSD officials, this does not leave them in a situation where they are »[...] trapped and condemned to defeat« (Foucault 1980: 142). Refugee applicants exercise agency by devising strategies to counteract unfavourable decisions in RSD. As noted in the preceding sections, many refugee applicants from Rwanda, Burundi, Uganda, DRC, Ethiopia and two applicants from Eritrea who were denied refugee status in turn accused RSD officials of playing politics and contested »rejection« arguing that credibility was a matter of experience. Others portrayed RSD officials who denied them refugee status as lacking knowledge of or rejecting the truth about their countries of origin. Interestingly, this assessment changed when applicants were eventually granted refugee status on appeal. The

<sup>16</sup> Focus group discussion on 11.2.2007 in Nairobi.

<sup>17</sup> Focus group discussion on 11.2.2007 in Nairobi.

truth occupies a tenuous position in refugee applicants' narratives. On the one hand, applicants locate the truth in uniqueness of individual lived experiences which they separate from COI; the truth is relative rather than absolute (Zambelli 2017). On the other hand, the truth is relegated to the background or suppressed when its presentation in the RSD process is regarded as detrimental to chances of being granted refugee status. In this instance, what is presented as the truth is not the actual experience but a narrative with the greatest potential to pass the credibility test. Tania<sup>18</sup>, a 40-year-old woman from Rwanda, stated that some people who had gone through incredible experiences had difficulties narrating their experiences in ways that lent them credibility. For her, such experiences included flight towards gunshots in the pandemonium caused by war, her young family's abrupt departure from their newly built house and her near-death experience of giving birth during a long journey on foot with very little food and water. She remarked at the irony of escaping the violence and how she almost died giving birth to her third child on the way to safety. While one RSD official explained that decisions are premised on refugee law, Tania expressed a contrary perspective,

»The Convention [Geneva Refugee Convention] is broken when they reject us. They put rules and they are the first to break them. For example, about the [identity] papers and repatriation; they decide your fate and do not consult you and do what is in their political interests and you don't know which rules they are following. Their mandate may have limitations but that is because of politics. If they take politics as a priority and not human rights, then they cannot help refugees. [...] Are they interested in human rights? That is the question.«<sup>19</sup>

Contestation of reasons for denial of refugee status leads to strategies whose goal is self-help or »a spirit and practice that prevents the worst and promises something better« (Scott 1985: 350). These strategies yield real gains where they avoid confrontation, challenging the symbolic order and overt contestation of hierarchy and power (Scott 1985). It is also important to note that refugee applicants' responses are diverse and there is need to avoid creating a monolithic image of them as a socio-legal category or creating »reification of classificatory schemata« (Long 2001: 16). Even where applicants share experiences, they resort to differential courses of action or responses and therein lies agency. Reactions to »rejection« are determined by individual perception or interpretation of the »rejection«, available strategies to appeal the decision and the perceived chance of success. For instance, Tania explained that after »rejection« of her first

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18 Interviewed on 15.12.2006 in Nairobi.

19 Follow-up interview on 5.1.2007 in Nairobi.

application for refugee status because her story was judged as lacking credibility, she appealed and spent a year in which she went to the UNHCR branch offices several times as RSD officials cancelled and postponed appointments with her. She was eventually granted refugee status, but her husband gave up after the first time he was denied the status and lived without refugee status. Cynthia a 39-year-old woman from Burundi decided to live in Nairobi without refugee status after ›rejection‹ and this made her an illegal immigrant vulnerable to arrest by the police and deportation. She rationalised her decision to stay on in Kenya without refugee status thus, »When I came here, no one told me to leave for my security. The same way I came is the same way I will go back.«<sup>20</sup> Similar views were expressed by Mara, Zara and Meles from Ethiopia, John, Susan and Mary from Uganda as well as young men from Burundi, DRC and Rwanda. Such views portray these refugee applicants as claiming not only legal subjectivity but also »political subjectivity – the ability to assert one’s own identity and needs in ways that do not fit the paradigm of nation-state-capital, a construct that gains its normative power through law« (Behrman 2014: 21).

Whereas the refugees who give up on the system and live in Nairobi without refugee status choose disengagement, others deal with denial of refugee status by devising strategies to »beat the system«. This involves deception by which they intervene through perpetration of certain events or actions intended to influence a specific process or situation (Giddens 1984). As a form of resistance and manoeuvre, deception aims to achieve the goal of obtaining refugee status rather than challenging the humanitarian regime or system altogether. Deception among refugees does not seek to change the structure in which refugee law is implemented but the impact this structure has on applications. It thus aims to deal with what Scott (1985) refers to as the ›symptoms‹ or the manifestations of subordination and exclusion. An integral aspect of deception that emerged from the interviews and focus group discussions is performance, which entails presentation of the anticipated narrative and image to RSD officials. Several refugee applicants related stories of how they resorted to feigning ignorance, memory relapse and mental illness to divert attention from inconsistencies in their narratives and gain sympathy and favourable decisions on their applications. Performance also enables applicants to express views that antagonise officials without forfeiting the required services by couching their behaviour in past traumatic experiences. Hali, a 23-year-old woman from Somalia, related that after several trips to the UNHCR branch offices in Nairobi, she lost control, screamed and lurched onto the officer

20 Interviewed on 10.2.2007 in Nairobi.

attending to her, which resulted in her getting arrested. She explained her situation at the police station and was released without any charges and she went back to the offices and received immediate attention because, »they thought I was mad and they said let's give her what she wants so that she can go away before she starts trouble.«<sup>21</sup> In the follow-up research, Hali communicated that she had since left Kenya for third country resettlement in Canada.<sup>22</sup>

In the same way that RSD officials premise decisions on experience, history, memory and precedence, refugee applicants similarly use past experiences with the RSD process and familiarity emanating therefrom as a resource that enables them to construct and present credible narratives and images. Like a theatre performance, deception involves use of ›appropriate‹ language or what refugee men from the Great Lakes region described in a focus group discussion as »the language that the people at the UNHCR understand.«<sup>23</sup> This language is accompanied by corresponding clothing, gestures, actions, life histories and images that are consistent with what applicants perceive as credible. Participants in the same focus group discussion of men from the Great Lakes concurred on the view that humanitarian organisations assist »their own type of refugees« which they described as individuals who explained their flight in terms of active participation in national opposition politics leading to direct threat of incarceration or death. The men accordingly assume characteristics and narratives they associate with this ›type‹. They changed their stories from fear of indiscriminate violence to fear of targeted violence which they attributed to political activities. The idea of conforming to anticipated narratives was succinctly put across by Cynthia thus, »[w]e tell them [officials] what they want to hear!«<sup>24</sup> This lends the interface between RSD officials and refugee applicants a performative dimension by which information is revealed or concealed and embellished depending on how it is weighed in relation to its perceived influence on RSD officials' decisions.

Grace, a 59-year-old woman from Rwanda related that her Hutu friend who was denied access refugee status returned with the same story but presented herself as Tutsi and was granted refugee status. Grace justified this as a strategy to beat officials at their own perceived »political game«<sup>25</sup>; according to her, RSD officials' expectations force refugee applicants to resort to deception. Harrell-Bond, Voutira and Leopold (1992) and Kibreab (2004) note that refugees play

21 Interviewed on 5.12.2006 in Nairobi.

22 Interviewed via Skype on 11.12.2012.

23 Focus group discussion on 11.2.2007 in Nairobi.

24 Interviewed on 10.2.2007 in Nairobi.

25 Interviewed on 22.1.2007 in Nairobi.

victims to obtain more attention and access to resources. Similarly, refugee applicants demonstrate the capacity to deploy existing stereotypes that increase chances of being granted refugee status. Hali<sup>26</sup> spoke about her compatriots who presented themselves before officials as Christian converts or people who had married Christians who were facing persecution and death threats from their Somali Muslim community. The goal was to get secure accommodation or prioritisation for third country resettlement. Deceiving institutions such as the UNHCR is treated with humour and a sense of accomplishment where it succeeds in achieving its intended goal as it demonstrates applicants' ability to out-wit »powerful« organisations. Kibreab (2004: 13) explains that refugees' interaction with humanitarian organisations is not subject to moral constraints because »they consider these organisations rich, powerful, corrupt and unaccountable (to them)«. Similarly, some refugee applicants expressed the view that their strategies were meant to ensure that resources obtained for refugees reached them as the intended beneficiaries. In the words of Pierre, a Congolese man aged 25, »I go to the city centre and see people doing Christmas shopping and I am thinking I can't do the same because I am a refugee and the UNHCR rejected me.«<sup>27</sup> Views like this compelled refugee applicants to persevere until they were either granted refugee status or, in their parlance, their files were »placed under an X« which means that their cases were closed and they could no longer appeal the decision to deny them refugee status. Deception becomes a survival rather than moral issue and this enables applicants to legitimize it. In applicants' quest for protection, deception or cheating is neither good nor bad; it is mediated by the capability to play need against moral values depending on the context, the goal and the »victim« (Harrell-Bond 1986). The paradox is that refugee applicants who resorted to deception tended to take the view that it worked better than telling the truth in terms of credibility. As such, RSD officials' incredulity towards »anecdotes« and refugee applicants' engagement in deception are mutually reinforcing.

Refugee applicants' capacity to intervene and influence decisions on their applications portrays power relations in the interface between RSD officials and refugee applicants as »a complex strategical situation« or a »multiplicity of force relations« that are concurrently »intentional« but »non-subjective« (Foucault 1979: 92). In this respect, »power is not exercised simply as an obligation or a prohibition on those who <do not have it>; [...] it exerts pressure on them, just as they themselves, in their struggle against it, resist the grip it has on them« (Fou-

26 Follow-up interview on 5.1.2007 in Nairobi.

27 Interviewed on 15.2.2007 in Nairobi.

cault 1977: 27). Such resistance entails agency or the capacity to convert obstacles into resources or capital. Power is thus not a zero-sum game in which RSD officials wield it and refugee applicants do not; it is relational and »a joint product of the encounter and fusion of horizons« (Long 2001: 184). Refugee applicants bring history and memory into their encounter with officials (Malki 1997; Turner 2006). They also deploy experience and precedence – the very factors that RSD officials consider in making credibility assessments. For example, refugee applicants denied refugee status refer to granting of the status to their compatriots whom they see as sharing the same experiences as themselves. This is a case of refugee applicants citing precedent judgements to validate their claims. The RSD encounter between officials and applicants as presented above can be termed an arena characterised by struggles and manoeuvres over access to specific resources (Jenkins 1992). Deception as a readily accessible resource to refugee applicants does not imply that applicants who engage in it are not genuine refugees. Rather, deception is a ›game‹ about winning in which the truth is important not for its own sake but because of its instrumental worth. It is discarded where it is detrimental to refugee applicants' agendas. In this scheme of things, the truth does not have an inherent value; it alternately gains or loses value depending on how it shapes outcomes of applications for refugee status.

## 7. Conclusion

Refugee law is implemented in contexts that are governed by regimes of power, knowledge and truth and these regimes determine narratives that are accepted as credible and those that are dismissed as implausible leading to denial of refugee status. Power privileges RSD officials' ways of knowing and detaches them from emotion in line with the idea of universalism and objectivity of the law governed by the positivist tradition. Notwithstanding this dissociation of the law from emotion, decisions in RSD are susceptible to the political, subjective and particular, which blurs the law/politics binary. The interface between RSD officials and refugee applicants shows that reference to history, experience, memory and precedence in order to make credibility assessments is a subjective exercise, which leaves decisions to individual RSD officials' discretion, thus creating room for decisions that either conform to or deviate from these three points of reference. It is in the exercise of individual discretion that politics interferes with the law leading to inconsistency in decisions on refugee applications submitted by applicants categorised as similar in terms of nationality and experience among others. Yet,

RSD officials' viewpoints drew a line between their decisions and emotion and portrayed the latter as antithetical to establishment of facts in the various cases that they handle. At the same time, emotion plays an ambiguous role in influencing credibility assessment and determining outcomes of applications for refugee status. On the one hand, refugee applicants' exhibition of emotion may be construed as exaggeration intended to mask lack of facts. On the other hand, concealment of emotion is sometimes interpreted as a sign of detachment from the narrative, which renders its authenticity dubious. Notwithstanding the divergence between exhibition and concealment of emotion, the result can be the same: denial of refugee status. This leaves refugee applicants in a dilemma of how to handle emotion in relation to what passes for the credible narrative.

In spite of subordination of their narratives to the facts/emotion dichotomy, refugee applicants are invested with the capacity to either disengage from the system and live in Nairobi as ›illegal immigrants‹ or ›beat‹ the system through suppression of their own lived experiences and the truth where these are deemed detrimental to positive decisions on refugee status. ›Beating‹ the system occurs when refugee applicants contest RSD officials' decisions. It entails substitution of the truth and appropriation of narratives that are accepted by officials as credible. For refugee applicants, the truth has an instrumental rather than moral value. It is relinquished where it diminishes or blocks chances of being granted refugee status altogether and replaced by alternatives that present a higher likelihood of being granted refugee status. The truth is fluid and contextual in so far as what becomes the truth in the interface between RSD officials and refugee applicants is not what actually transpired to the applicants and forced them to flee their countries of origin but what is accepted as the credible narrative deserving refugee status. In this regard, the dichotomous boundary between truth and falsehood is blurred. Effectiveness of refugee applicants' strategies lies in how they embrace narratives and images that enable them to challenge power without dismantling structures that buttress it. This leaves regimes of truth and knowledge susceptible to contestation and mutual de-legitimation of perspectives between RSD officials and refugee applicants when the former return unfavourable decisions to applications for refugee status. Refugee applicants' manoeuvres and utilisation of deception as a strategy to obtain positive decisions demonstrate how subordinate positions are invested with the capacity to subvert power in ways that are often overlooked by routine depiction of refugees as disempowered. Out of the interface between RSD officials and refugee applicants emanates a situation in which officials' insistence on the credible narrative and refugee applicants' embellished narratives in response to this expectation are mutually constitutive and reinforcing.

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