Work, the Right to Work, and Durable Solutions: A Study on Sierra Leonean Refugees in The Gambia

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Abstract

It is rare indeed that the forced movement of people will not have an economic dimension. Economic issues related to the movement of people have generally been viewed as beyond the scope of the debate on the international status and protection of refugees. Instead, 'economics' and 'refugees' when heard together, or even in loose association, have evoked the pejorative images of those who move to seek a 'better life'. While recognising on the one hand the inevitability of economic dimensions to refugee movements, many advocates for refugees have traditionally taken great care in their policy and advocacy work to downplay the economic element of the complex matrix of motivations that lead refugees and other forced migrants to move. This paper takes a different approach. It promotes the right to work, a social and economic right, as integral to protection and to all durable solutions. It explores its relevance, and indeed its significance, as a matter of law, policy and practice to the lives of refugees and those responsible for their protection, including their hosts. After all, '[d]espite the statistical existence of unemployment in every country in the world, work continues to be “an essential part of the human condition”'. In addition, the paper examines the importance of a rights-based analysis of work in understanding its relevance in the field both of international and national protection. In doing so, it explores the connections between work and the right to work and the three durable solutions. It acknowledges that social and economic conditions and inequities are often amongst the root causes of conflict which then lead to the failure of national protection and precipitate flight.

1. Prologue

In October 1983 the UN High Commissioner for Refugees (UNHCR) and the International Labour Organisation (ILO) agreed a Memorandum of Understanding between the two organisations. The MOU clearly

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recognises work and other social and economic rights as a component of international protection:

1. In the exercise of its international protection function, UNHCR is called upon to ensure that refugees are treated in accordance with recognised international standards, including standards concerning economic and social rights which are defined, inter alia, in the 1951 United Nations Convention relating to the Status of Refugees…

2. In areas such as access to employment, conditions of work, equality of treatment and acquisition or preservation of social security rights, the standards defined in international labour Conventions also apply to refugees in so far as they are workers.

3. Both UNHCR and the ILO recognise the basic importance of accepted international minimum standards for the protection of refugees, particularly as regards economic and social rights. Both organisations will co-operate closely in the application of existing standards and in the framing of new standards in this field. In developing such new standards, the vulnerable situation of refugees will be given special consideration.²

With this MOU in mind, consider the case of a woman from Sierra Leone who arrives in The Gambia with a passport and is granted entry into the country. She is 23 years old and has two young children. She fled Freetown in 1996 and lived and worked in Conakry for 2 years. In 1998, she returned to Freetown but fled again after the 6 January crisis. This time she came to The Gambia. She is permitted to remain for 30 days. Before the 30 days expires, she approaches UNHCR in Banjul to register as a refugee but she is told that she first has to go to the immigration authorities to obtain a Residential Permit before she can register at the office. A Residential Permit authorises residence and grants permission to work. This is said to be a Government requirement. She says she cannot afford to pay the 500 dalasi ($35.71) fee for the Residential Permit. UNHCR says she must therefore go to the refugee camp in Basse, which is 6 hours away by bus. However, the camp only houses about 350 people. The camp is full. Her 30 day entry permit expires. She cannot afford a Residential Permit so she still cannot register with UNHCR. Even though Gambian law says it is illegal to do so, she needs to work to try and save for her permit. She has no choice. However, she has become a ‘prohibited immigrant’ under The Gambia’s Immigration Act.³ Under the 1951 Convention, is she lawfully staying in The Gambia? Does she have the right to work? In Sierra Leone she ran a small business. What sort of work will she end up doing? If she is a petty trader or hawker, she will find

² Ibid.
³ Section 12, see below.
discrimination in the market place and she will struggle to make ends meet. If she goes into commercial sex work, not only will this throw up a range of human rights questions, but she will also become a 'prohibited immigrant' because of her work, as the Gambian Immigration Act states that a non-national engaging in prostitution is a 'prohibited immigrant' and is subject to deportation. Where does she go? Who does she turn to? What are the solutions?

2. Introduction

It is rare indeed that the forced movement of people will not have an economic dimension. Refugees, as a subset of forced migrants, are no exception. Economic issues related to the movement of people have generally been viewed as beyond the scope of the debate on the international status and protection of refugees. Instead, 'economics' and 'refugees' when heard together, or even in loose association, have evoked the pejorative images of those who move to seek a 'better life'; a damnable thing to do in the eyes of some commentators. While recognising on the one hand the inevitability of economic dimensions to refugee movements, many advocates for refugees have traditionally taken great care in their policy and advocacy work to downplay the economic element of the complex matrix of motivations that lead refugees and other forced migrants to move. This approach has emerged in the face of divisive public opinion and government policies that often seize on the economic element of the forced movement of people and seek to undermine the credibility of those who have the 'audacity' to move. Instead, advocates have sought to focus on the more 'respectable' side of refugee advocacy, which relates to protection from persecution for reasons of civil or political status, and is said to have nothing to do with social or economic rights, status or opportunity.

This paper takes a different approach. It promotes the right to work, a social and economic right, as integral to protection and to all durable solutions. It explores its relevance, and indeed its significance, as a matter

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4 For the purposes of the present case study, a forced migrant includes the category of forced migrants who are refugees, either under the 1951 UN Convention or the 1969 AU Convention. It includes asylum seekers who have claimed refugee status and whose status has not been resolved, as well as persons who may be refugees but who, for whatever reason, have not presented themselves to UNHCR or any other authority for recognition as a refugee. It also includes rejected asylum seekers.


6 Although there are some exceptions to this, they have generally been in relation to Europe. See for example, the European Council on Refugees and Exiles (ECRE) and the British Refugee Council. In addition, UNHCR has published Vol. 5, No. 1 of its European Series, entitled Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries, July 2000. However, note that the European Series relates specifically to recognised refugees.
of law, policy and practice to the lives of refugees and those responsible for their protection, including their hosts. After all, 'despite the statistical existence of unemployment in every country in the world, work continues to be "an essential part of the human condition".' This is, necessarily, as true of refugees and other forced migrants as it is of nationals. Like anyone, refugees and other forced migrants work. They need to. To deny it or to ignore it is to disregard a fundamental reality.

In taking this approach, the paper identifies work as an adhesive continuum through the lives of refugees which, if broken, undermines protection rather than discrediting the right to it. Although this is not a new notion, work in the context of the cost-cutting benefits of self-sufficiency having received considerable attention in the aid community, it has received little attention from a rights perspective.

In addition, the paper examines the importance of a rights-based analysis of work in understanding its relevance in the field both of international and national protection. In doing so, it explores the connections between work and the right to work and the three durable solutions for refugees (voluntary repatriation, local integration and resettlement), as well as touching on some of the wider human rights implications of the right to work, the world of work, and the gaps that may exist between the right and the reality. In doing so, it acknowledges that social and economic conditions and inequities are often amongst the root causes of conflict which then lead to the failure of national protection and precipitate flight. This is particularly true of the conflict in Sierra Leone, which is a clear example of a conflict representing a struggle for economic power and control of resources.

It has been noted that social and economic rights, lacking sufficiently validated and reliable measures, have received far less academic attention. Using the Maastricht Guidelines as an analytical tool for

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8 Cf. the ILO/UNHCR Memorandum of Understanding *Memorandum of Understanding Between the Director-General of the International Labour Organisation and the United Nations High Commissioner for Refugees*, 21 Oct. 1983, which clearly recognises work and other social and economic rights as a component of international protection.

9 Durable solutions, that is voluntary repatriation, local integration and resettlement, represent both the processes and the results by which national protection is restored to a person entitled to international protection under the 1951 Convention or the 1969 AU Convention. The 1951 Convention and the 1969 AU Convention provide for this through the cessation provisions.

10 See for example, Richards, P., *Fighting for the Rain Forest — war, youth and resources in Sierra Leone*, 1996; Carver, R., *Sierra Leone — from Cease-fire to Lasting Peace*, WRITNET Country Papers, Jan. 1997. http://www.unhcr.ch/refworld/country/writenet/wrisle.htm. Note that the author's research for this paper was undertaken in late 2000 prior to the cessation of hostilities in Sierra Leone and therefore takes as its context the continuing conflict.

determining social and economic rights violations, this paper attempts to demonstrate the inter-linkages between social and economic rights and the impact that one can have on the others.

2.1 The case study — Sierra Leonean refugees in The Gambia

This study was undertaken in collaboration with Dr. Marc Sommers, an anthropologist from the African Studies Center at Boston University, and under the auspices of a project of the Social Science Research Council, Forced Migration and Human Rights. In addition, the research methodology was tested in Ghana in June/July 2000 by Raymond Atuguba.

It examines work and the right to work of Sierra Leonean refugees in The Gambia, the smallest country on the African continent, both in The Gambia’s only Sierra Leonean refugee camp and in urban areas. It is based on field research undertaken in October/November 2000 in The Gambia and desk research undertaken on either side of the field mission. The paper seeks to tease out the legal and institutional perspectives of work and the right to work in the context of the case study.

The case study that was selected had, both by design and by happenstance, a number of advantages. First, by identifying a group of refugees, the vast majority of whom so squarely fell within both the definition of a refugee in the 1951 Convention and the wider definition set out in the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 AU Convention), the potential for discrediting the population in considering work and the right to work a hitherto controversial element of refugee protection was diminished. This assists in bringing a focus to the discussion on work and the right to work without ‘polluting’ it with extraneous red herrings which call into question whether members of the population have a basic entitlement to protection in the first instance. Second, all durable solutions are relevant to refugee responses in The Gambia and are, at least in theory, available to refugees there. Third, The Gambia represents a particularly interesting case study, being a member state of the Economic Community of West African States (ECOWAS) which accords certain reciprocal economic rights to nationals.

12 Dr. Sommers’ paper, “It isn’t easy”: Work, Power, and Resettlement for Sierra Leonean Refugees in The Gambia, examines the world of work of Sierra Leonean refugees [note: currently unpublished].

13 LLM (Harvard) and an intern in 2000 with the Lawyers Committee for Human Rights (now Human Rights First).
14 Originally, it had been planned that the research would be conducted in Guinea. However, due to the deterioration in the security situation in Guinea around Sept./Oct. 2000, conducting this kind of research became wholly inappropriate and the decision was taken to explore the question of work for Sierra Leonean refugees in The Gambia, instead.
16 1951 Convention Relating to the Status of Refugees — art. 1A.

of other ECOWAS countries. Fourth, as will be shown, despite a range of protection issues that relate to work and to work rights of refugees and the absence of a Refugee Law, The Gambia represents an unusual example of how work has the potential to advance the search for solutions in a constructive way, an example which may be used or adapted in other countries. In a world where regional economic agreements are gaining increasing currency and force, agreements such as the ECOWAS Protocols which recognise the need to move and provide for the right to move, including where one is forced to do so, are highly informative.

In the context of Sierra Leoneans present in The Gambia, the following persons came within the parameters of the study:

- Refugees recognised under article 1A of the 1951 Convention;
- Refugees recognised under the 1969 AU Convention;
- Asylum seekers, seeking recognition under either the 1969 AU Convention or the 1951 Convention, but whose status is not yet resolved;
- Refugees sur place, that is persons who were not refugees at the time they left their country, but became refugees due to circumstances arising in their country of origin during their absence;\(^\text{17}\)
- Persons who would have been recognised as refugees but who, for one reason or another, had chosen not to take formal steps to seek the protection of The Gambia or UNHCR.

In the course of the research we did not identify any Sierra Leoneans who fell outside these categories of persons, given the nature of the conflict in Sierra Leone and the characterisation of their flight.

In view of the fact that refugee status is a declaratory status they may each also be considered to be refugees under the 1951 Convention or the 1969 AU Convention. In making these observations, it is important to recognise that the complex motivations that drive people to move do not of themselves preclude individuals from recognition as refugees. There is nothing in either the 1951 Convention nor the 1969 AU Convention which requires a refugee to have moved for 'purely' refugee-related reasons. Hence, it is sufficient to limit the categories to those identified above. The case study examined only the situation of Sierra Leoneans in that country, and for the purposes of the case study, the list may be considered to be an exhaustive one. In the course of our research, we found no evidence that there were Sierra Leoneans in The Gambia who had been forced to move exclusively for non-refugee related reasons or whose asylum claims had been rejected. In addition, although there was some evidence of a rebel presence in the country, there was no evidence that

there were refugees in The Gambia to whom article 1F of the 1951 Convention or article 1(5) of the 1969 AU Convention had been applied. Such persons would fall into a wider definition of 'forced migrant' but are not necessary for present purposes.

2.2 A working definition of ‘work’

'Work' is something quite different to the 'right to work'. Both require definition. The scope and content of the right to work will be discussed below. A working definition of 'work' was, however, important in defining the parameters of the study. The working definition that was adopted is as follows:

Activities or labour engaged in for the purposes of generating income, including barter exchange and non-monetized work.

Note that, while we have included non-monetized work in our working definition, and although it emerged anecdotally, we limited our research to the generation of income and barter exchange. Emerging from the field research, this definition covered exchange of favours, where work was done 'to overcome obstacles and achieve an objective or result. While the central role of remunerative work in the realisation of economic, social and cultural rights and therefore of poverty reduction must be acknowledged, so too must the limitations of this approach. Certainly, the non-inclusion of non-monetized work in our study is not intended in any way to diminish its social and economic significance. Rather, having taken the right to work as the lens through which we would examine protection and the realisation of other social and economic rights, we have identified within our working definition those areas of work which open up questions related to the exercise of the right to work. In doing so, it is important to ensure that the analysis of women’s economic, social and cultural rights is not prejudiced by this approach. Indeed, this approach exposes the fact that:

... women’s equitable realisation of their economic and social rights, as compared to men’s, is reduced by the indicator of economic activity (that is, gainful

18 See art. 14, 1979 Convention on the Elimination of All Forms of Discrimination against Women, which acknowledges in particular the non-monetized work of rural women.

19 The Webster's New Collegiate Dictionary offers several definitions of work as follows: activity in which one exerts strength or faculties to do or perform something; sustained physical or mental effort to overcome obstacles and achieve an objective or result; the labor, task or duty that affords one his accustomed means of livelihood. 1977 edition.

20 One of the definitions of work found in the Webster's New Collegiate Dictionary, 1977 edition, ibid.

employment). Women perform the majority of the world’s labor but they are not counted as economically active because their work often does not receive economic remuneration. Unfortunately, much of the work performed by women (housework, child bearing and rearing) is not valued because it is not viewed as economically productive.\textsuperscript{22}

This will be highly relevant in examining the extent to which the right to work leads to the realisation of other economic, social and cultural rights. It also highlights the inherent limitation of examining a complex issue such as international refugee protection through the optic of a single right. The intention, as has been noted above, is to promote the rights to work as integral to protection and to all durable solutions. No single right can stand alone or provide answers to contemporary challenges to deliver adequate and solution-oriented international protection.

2.3 The Sierra Leone conflict — a work perspective

The link between conflict and social and economic conditions is well established. It is starkly illustrated by the Sierra Leonean conflict whose causes are clearly acknowledged to have strong social and economic dimensions.

In a magazine of the International Labour Organisation (ILO), \textit{The World of Work},\textsuperscript{23} the social and economic context of conflict is simply, but profoundly, put: ‘No employment, no peace . . .’. Examining the situation in Sierra Leone, the article is entitled \textit{Sierra Leone: The terrible price of poverty and unemployment}. Recognising that a key cause of the conflict was poverty and unemployment, the situation was considered to have worsened with ‘70\% unemployed, of which an estimated 55\% are youths’.\textsuperscript{24} Indeed, with closure of the majority of industries and thousands laid off since 1991, Sierra Leone’s social and economic problems will take years to resolve. The article, reporting on a post-war needs assessment following the signing of the collapsed Lomé Peace Accords, clearly locates work in a pivotal role in relation to the peace agenda.

2.4 The law

The law relating to refugee work is governed by a range of international and regional instruments, as well as national laws. The paper will examine those applicable to The Gambia, and their scope and content. Notwithstanding this, even where The Gambia is not itself bound by certain international laws, The Gambia as well as others responsible for the protection of refugees (including donor states, UN agencies, and

\textsuperscript{22} \textsuperscript{Apodaca, C., above, 155.}

\textsuperscript{23} \textit{World of Work}, No. 33, Feb. 2000, \url{http://www.ilo.org/public/english/bureau/inf/magazine/33/sleone.htm}

\textsuperscript{24} Ibid.
implementing partners of the UN) may be called to account for policies or practices which do not accord with established international legal principles.25

In a similar vein, General Comment 3 of the UN Committee on Economic, Social and Cultural Rights (‘the CESCGR’) recognises that, in the protection of economic, social and cultural rights, there is an obligation on all States parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) to take steps, individually and through international assistance and co-operation, and especially economic and technical, towards the full realisation of the rights recognised therein.26

Work, as a matter of international law, may be broken down into two parts. First, is the threshold or access right, the right to work. Second are rights at work, such as the right to just and favourable conditions of work and the right to join trade unions. The focus of the present study will be on the threshold right to work. This is because it is critical for refugees and other forced migrants to establish the preliminary right to work given that it represents their biggest hurdle.27 Necessarily, the paper will also touch on some aspects of rights at work. However, a more detailed analysis of working conditions is worthy of a separate study.

25 'In addition to the mandate of UNHCR, other organs of the United Nations have recognized responsibilities regarding refugee protection. These include UNICEF, WFP, WHO, UNDP and OCHA. In relation to the obligations and mandates of each, it is axiomatic that all UN agencies, including the UNHCR, are bound to uphold, in policy and in practice, human rights that are guaranteed in the range of international instruments to which member States of the United Nations have subscribed. And like UN agencies, their implementing partners must be viewed as being similarly bound to uphold the purposes and principles of the United Nations'. WARIPNET (West African Non-Governmental Organisations Refugees and Internally Displaced Persons Network) and the Lawyers Committee for Human Rights (now Human Rights First), From response to solutions — strengthening the protection of refugees through economic, social and cultural rights: A Discussion Paper on the Economic, Social and Cultural Rights of Refugees in West Africa, Oct. 2000; and in relation to donor obligations it has been recognized that it is incumbent not only on States parties, but also on other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical assistance in order to enable developing countries to fulfil their core and other obligations in the realization of economic, social and cultural rights. See Art. 2(1) of the Covenant on Economic, Social and Cultural Rights, as cited in General Comment 14, The right to the highest attainable standard of health: 11/08/2000. E/C.12/2000/4, at para. 45. See also Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, General Assembly Resolution 53/144, 8 Mar. 1999. http://www.unhchr.ch/ hrgdocda/huridoca.nsf/(Symbol)/A.RES.53.144.En?OpenDocument. 26 See General Comment 3, The nature of States parties obligations (Art. 2, para. 1) of the UN Committee on Economic, Social and Cultural Rights, 14 Dec. 1990. See also WARIPNET and the Lawyers Committee for Human Rights, above.

27 'Whereas restrictions are usually accepted on the employment of aliens, this is not so with respect to the conditions of employment'. See Craven M., above, 174, n. 141. However, it is important to note that, in practice, there are a number of factors which tend to suggest a reluctance to accord asylum seekers and refugees rights at work which are commensurate to nationals of a state. For example, Austria avoids recognition of an employment relationship for refugees engaged in 'auxiliary activities' when they are receiving Federal care. See Reception Standards for Asylum Seekers in the European Union, UNHCR, Geneva, July 2000, Austria, 41.
2.5 The policy
In examining the policy dimensions to work and the right to work, the paper will then explore policies of inter-governmental organisations as well as the Gambian government, and touch on both the policies of other governments and the impact of policies of international financial institutions on rights at work. In doing so, an important distinction, which has not been clearly made in some of the literature on this subject, will be made between the terms 'right to work' and 'permission to work', the first denoting a legal term of art, and the second being a form in which the right, or perhaps a broader entitlement, is given expression.

2.6 The reality
Finally, in taking the three key elements of the right to work framework provided for in the 1951 Convention (wage-earning employment; self-employment; and the liberal professions), and using examples identified in the course of the field research, the paper will analyse, from a rights perspective, the reality of work and the right to work for Sierra Leonean refugees in The Gambia. Specific areas of focus will include teachers, the food industry, and the legal profession. In addition, recognising that the world of work extends beyond the reach of international, regional and national laws relating to work, the rights implications of commercial sex work will be examined.

The paper will conclude by tying together the three durable solutions with the thread of work in the context of the human rights implications that attend the solution web.

3. The Gambia — an overview
Before embarking on an examination of the law, policy and reality of the right to work, it is appropriate to provide an overview of the social and economic milieu in which refugees and other forced migrants find themselves in The Gambia.

The Republic of The Gambia is one of the poorest countries in the world. In 1999, it was ranked 163 on the human development index. It is the smallest country on the African continent, representing a ‘tongue’ of land along the Gambia river, the only navigable river in West Africa. It has a small coastline and is otherwise surrounded by the Republic of Senegal. In spite of this, or perhaps because of it, The Gambia enjoys a reputation of being a country which welcomes foreigners, including refugees.

Sierra Leone and The Gambia have long-standing social, economic and educational links. Administered by Sierra Leone until 1843, there has been

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extensive 'cross-fertilisation' between Freetown and Banjul, in particular, since that time. Many Gambians and Sierra Leoneans are related to one another, or have other social, educational or economic links. There was, until recently, no university in The Gambia, and many Gambians were educated in Freetown. In addition, the Aku who, like the Krio are descended from freed slaves, have a long history of movement and inter-marriage between Banjul and Freetown. In relation to the movement of refugees, this is said to '[help] a would-be explosive situation'. ‘Sierra Leoneans are not looked at as foreigners. They are seen as brothers. They understand each other.' In Basse, in The Gambia’s Upper River Division (URD), the connections with Sierra Leone are slightly different. Members of the Serahule ethnic group who inhabit the upper river region, have longstanding links with Kono district in Sierra Leone where migrant workers engaged in diamond mining until the conflict erupted in 1991. In Sierra Leone, the Serahule are known as Marakas. As one commentator observed, ‘95% of the men in the URD travelled to Sierra Leone to mine diamonds. Many married Sierra Leoneans’.

This climate of familiarity and interdependence has fostered an atmosphere which overall may be characterised as both tolerant and accepting of the movement of refugees from Sierra Leone to The Gambia. Unfazed, in large part, by the refugee movements as representing a threat of civil conflict or instability in their own country, Gambians recognise the source of conflicts elsewhere in the sub-region and ‘are proud of their peace’. In addition, in the words of one commentator, Gambians consider the lack of natural resources as a ‘blessing in disguise compared to Sierra Leone and Liberia where multinationals are competing and trying to influence certain groups’.

3.1 The economy

In 2000, The Gambia had a per capita gross domestic product (GDP) estimated to be $360. Although the Gambian economy is quite weak its currency, the dalasi (D14 = $1USD), is considered strong in the West African sub-region. This has been explained by the fact that the country

29 Interview with NGO, Banjul, 26 Oct. 2000. The University of The Gambia, previously affiliated with St. Mary’s University, Halifax, Canada which ran a university extension programme, established itself in its own right in 2000. Students enrolled in the 2000 academic year would, when they graduated, be the first to receive degrees from the University of The Gambia. The first graduates of the university extension programme were conferred with their degrees 2 years previously. See Interview with NGO worker, Banjul, 8 Nov. 2000.
31 Ibid.
has remained relatively peaceful. According to the United Nations Development Programme (UNDP), however, it had been declining over the previous 5 or 6 years. Nonetheless, in that time UNDP told us that The Gambia’s efforts to establish some level of economic stability had been reasonably effective. Inflation had been held at 2 or 3 per cent and the budget deficit was less than 8 per cent (around 5 per cent).

Economically, however, The Gambia is a trading nation rather than a production-driven economy. According to the UNDP, 50 per cent of the food eaten in The Gambia was imported. In the area of agriculture it was not doing very well. Technology was low and use of inputs (for example, fertilisers), which was said to be economically important, was low. And in addition, the problem of land tenure systems was not conducive to good agricultural production. Agriculture constitutes 21.53 per cent of GDP. Women, in particular, did not fare well in the agricultural industry where they were principally responsible for rice and food crops (subsistence farming), whereas the men were responsible for the cash crops (groundnuts).

Manufacturing contributed to just 10 per cent of the GDP, which is very low, and poor power and infrastructure heightened the struggle for the manufacturing industry to take hold. In the service industry, tourism featured as the key industry comprising an astonishing 50–60 per cent of The Gambia’s GDP. However, the industry was fairly precarious being dependent on external images and perceptions of security and stability. In 2000 tourism fell, largely said to be attributable to fear of instability following the killing of between 10 and 12 students in April of that year. According to one source, 8 hotels had closed down and a key discount travel company was understood to have ceased operations. And while we were in The Gambia, rampaging youths ransacked bars and restaurants in Banjul in response to government action taken to shut down beach bars. This too was unlikely to benefit the tourist industry.

All this meant that The Gambia’s economic base and the structure of the economy were very weak for employment generation, drawing primarily on trading activities and the service sector. Although there were no official figures available, unemployment can be taken to have been very high given that the official labour force was 400,000 (out of a population of 1.3 million), divided as follows: agriculture 75 per cent, industry,
commerce, and services 19 per cent, government 6 per cent.\textsuperscript{46} However, it may be assumed that the informal economy comprised a significant additional component of the actual labour force. Refugees were understood to constitute a substantial part both of the official and unofficial labour forces. However, interestingly, the refugee and other non-Gambian populations were generally considered to have a higher literacy and skill level than the local population.\textsuperscript{47} Indeed, one source indicated that 98 per cent of the skilled labour force were foreign workers.\textsuperscript{48} Most skilled traders, for example, such as carpenters and tailors, were non-Gambians.\textsuperscript{49} Although according to UNDP, this was already beginning to create some tension and animosity, the response to the refugee presence of most Gambians we spoke to, including the contribution they make to the economy, was open and receptive. For example, one observer told us that ‘non-Gambians are contributing tremendously to the economy of this country’.\textsuperscript{50} Specifically, we were told that ‘Sierra Leoneans are very hard working’.\textsuperscript{51} And another said, ‘It is interesting that they [the Gambians] don’t see their own economic hardship as a hindrance [to receiving refugees]’.\textsuperscript{52} In addition, one Gambian commentator said ‘Few Gambians are engaged in technical work. So immigration regulations are very flexible’.\textsuperscript{53}

From the point of view of encouraging investment, it was noted that The Gambia has a weak Chamber of Commerce, which tends to suggest that interest in investment is low.\textsuperscript{54} For example, the Chamber of Commerce was said to have limited capacities, a low membership base, and poor links with other Chambers of Commerce and other external partners.\textsuperscript{55} Certainly, the Chamber of Commerce confirmed that Sierra Leoneans did not have much to do with it. As they pointed out, ‘having lost a lot, they [the Sierra Leoneans] can’t start out in big business’.\textsuperscript{56}

Although the government did not keep statistics on the proportion of foreign contributions to government tax revenue,\textsuperscript{57} many Sierra Leoneans were clearly contributing to the economy: ‘They pay their taxes. They spend. The long and the short is that The Gambia gains.’\textsuperscript{58} In relation to

\textsuperscript{46} Sources: http://www.emulateme.com/content/gambia.htm; http://www.infoplease.com/ipa/A0107560.html
\textsuperscript{47} Interview with UNDP, Banjul, 7 Nov. 2000.
\textsuperscript{48} Although the accuracy of this figure may be difficult to verify and therefore open to question, it is clear that the number of non-Gambian members of the skilled workforce is proportionally very high.
\textsuperscript{49} Interview with UNDP, Banjul, 7 Nov. 2000.
\textsuperscript{50} Interview, Gambian Chamber of Commerce, Banjul, 9 Nov. 2000.
\textsuperscript{51} Ibid.
\textsuperscript{52} Interview with UNHCR, Banjul, 23 Oct. 2000.
\textsuperscript{53} Ibid.
\textsuperscript{54} Interview with NGO, Banjul, 24 Oct. 2000.
\textsuperscript{55} Interview with UNDP, Banjul, 7 Nov. 2000.
\textsuperscript{56} Ibid.
\textsuperscript{57} Interview at Gambian Chamber of Commerce, Banjul, 9 Nov. 2000.
\textsuperscript{58} Interview, senior civil servant, Department of Taxation, Banjul, 9 Nov. 2000.
income tax, for which there were no discriminatory provisions for non-Gambians,\textsuperscript{59} income tax rates were variable according to income,\textsuperscript{60} and there was a minimum tax threshold below which tax was not payable on income earned.\textsuperscript{61} That threshold was D625 ($46.43) per month or D7,500 ($535.71) per annum, below which income was tax exempt.\textsuperscript{62} In addition to income tax, there was a flat tax for businesses, sales taxes,\textsuperscript{63} and an environmental tax.\textsuperscript{64}

Therefore, refugee labour, in particular skilled labour, would appear to have had a key role to play in strengthening the economy of The Gambia.

3.2 Refugees

There is a long tradition of refugee protection in The Gambia. For example, refugees from Ghana came to The Gambia in the 1950s. They were able to work, and when the situation settled in their home country, the majority of them repatriated voluntarily. A number remained, and today a town known as Ghanatown has a large Ghanaian population. In the 1960s, refugees from Guinea-Bissau had a similar experience, seeking protection in The Gambia, working, and the majority repatriating voluntarily.\textsuperscript{65}

In 2000, The Gambia had a rapidly growing population of 1.3 million\textsuperscript{66} and, in the West African region, its population density was only surpassed by Nigeria.\textsuperscript{67} Despite this, it was a gracious host to refugees, officially estimated at around 17,500.\textsuperscript{68} However, other estimates placed the figure at more in the order of 25,000.\textsuperscript{69} According to UNHCR, the refugee population in The Gambia had grown by about 50 per cent in the previous three years\textsuperscript{70} and 80 per cent of The Gambia’s refugee population is Sierra

\textsuperscript{59} However, there was one 'discriminatory' payroll tax provision. Non-Gambians who were expatriates and work in The Gambia as executives paid a payroll tax of D30,000 ($2,142.86), the purpose being to minimize quotas in order to make Gambian executives more competitive. Mostly, however, they were not refugees. Interview, Department of Taxation, Banjul, 9 Nov. 2000.

\textsuperscript{60} Rates were as follows: D7,500–17,500 p.a. ($535.71–1,250) 10%; D17,501–27,500 p.a. ($1,250.07–1,964.29) 15%; D27,501–37,500 p.a. ($1,964.36–2,678.57) 20%; D37,501–47,500 p.a. ($2,678.64–3,392.86) 25%; D47,501 and above ($3,392.93+) 35% (which was the same as company rates). Interview, Department of Taxation, Banjul, 9 Nov. 2000.

\textsuperscript{61} Interview with Gambian Teachers Unions (GTU), 8 Nov. 2000.

\textsuperscript{62} Interview, Department of Taxation, Banjul, 9 Nov. 2000.

\textsuperscript{63} Interview with UNDP, Banjul, 7 Nov. 2000.

\textsuperscript{64} D1 ($0.07) per month payable on monthly salaries of D920 ($65.71) or above. Interview, Department of Taxation, Banjul, 9 Nov. 2000.

\textsuperscript{65} Interview with government official, 2 Nov. 2000.


\textsuperscript{67} The Gambia has a population density of 334 per square mile. Nigeria’s population density is 480 per square mile. Source: http://www.infoplease.com/countries.html

\textsuperscript{68} Source: UNHCR; http://www.unhcr.ch/world/afri/gambia.htm


\textsuperscript{70} Interview with UNHCR, Banjul, 25 Oct. 2000. See also UNHCR Project Description, 01/AB/GAM/CM/200, Annex A, which indicates that there has been an increase of ‘over 60% . . . in the refugee population especially from Sierra Leone in 1999’.
Leonean. Other refugees in the country included Senegalese (from the Casamance region in the south), Liberians, and a handful from Ethiopia, Eritrea, Guinea Bissau, Iraq, the Sudan, and Mauritania. About 60 per cent of refugees in The Gambia were in Banjul and the rest were residing in smaller towns, villages or in camps.

In urban areas, where the majority of refugees were residing, most refugees could be found in three major centres: the capital, Banjul (greater Banjul which includes Serekunda), Brikama, a short distance from Banjul, and Basse Sante Su (known as Basse), a commercial trading centre in the Upper River Division and the third largest population centre in The Gambia. There were about 6,000 Sierra Leonean refugees registered with UNHCR in Banjul. However, estimates suggested that a further 5,000 Sierra Leoneans were residing there.

There was at the time a total of three camps, two for Casamance refugees fairly close to Banjul, and then one in the Upper River Division (Kerr Alhasan Refugee Camp) about seven kilometres from Basse, which was for Sierra Leonean refugees. In Basse, although the camp population was somewhat fluid, there were usually about 350 people residing there. Indeed, this meant that less than 5 per cent of Sierra Leonean refugees in The Gambia were in the camp.

3.2.1 Profile of the Sierra Leonean refugee population

Seen as 'quite enlightened', 'middle class' and 'educated', Sierra Leonean refugees in The Gambia were viewed as a wealthy elite within the refugee population, in particular in comparison to the Casamance population, which was predominantly rural. This has been explained in

72 These are Senegalese refugees from the Casamance region in the south where a secessionist conflict has been simmering since 1982 between the Mouvement des forces démocratiques de Casamance and the Senegalese government. For more information see Amnesty International, Senegal: Climate of terror in Casamance, 17 Feb. 1998, AI INDEX: AFR 49/01/98.
74 According to UNHCR, they have registered refugees in 36 villages in the area. Interview with UNHCR, Banjul, 6 Nov. 2000.
76 Another NGO source indicated that there were about 3,000 Sierra Leonean refugees not registered with UNHCR because they 'can handle themselves' (interview, 25 Oct. 2000). See also interview with senior foreign diplomat, 9 Nov. 2000.
77 Figures on the numbers residing in the camp at any particular time varied. For example, one UNHCR representative said that the last time that he was in the camp there were 175 people there. Cf. Interview with NGO worker, Basse, 27 Oct. 2000.
80 Interview with NGO worker, 6 Nov. 2000.
part by the nature and foundations of the long-standing relationship between Sierra Leone and The Gambia, as well as the cost of covering the distance to reach The Gambia (by air and boat to Banjul and by road to Basse, the latter involving extensive travel through Guinea and then Senegal). However, this middle class and educated image is not entirely accurate. As one refugee woman observed 'Most of the refugee women are not educated. Gambians see us dressing decently all the time, so they think we have money. It isn’t so'. Although the perception of the middle class profile prevails amongst the host population, some clearly acknowledged what emerged as a stark reality, that ‘there is a lot of poverty in the Sierra Leonean community’.

Although in comparison to many other countries in the sub-region The Gambia is seen as being refugee-friendly, its numbers remained comparatively low. Despite the motivation to seek protection in an English-speaking country, in relation to the Sierra Leonean refugee population, low numbers were attributed at least in part to distance. Indeed, even following the escalation of violence in Guinea, we were advised that less than 100 refugees were recorded as having travelled from there to seek refuge in The Gambia. Another explanation, however, was that it was extremely difficult and dangerous to travel internally in Guinea.

4. The legal framework

Protection is not defined in the 1951 Convention or, indeed, in any other international instrument. For present purposes, protection means ensuring the enjoyment of human rights, as well as providing adequate means to seek redress for their violation, including civil, political, economic, social and cultural rights. It extends beyond mere physical protection and includes protection at national, regional and international levels. Support

81 See also Interview with UNHCR, Banjul, 25 Oct. 2000.
82 Interview with NGO, Banjul, 26 Oct. 2000.
83 ‘Most of the refugees who are here came by sea’. Interview with UNHCR, Banjul, 23 Oct. 2000.
85 Interview, Gambian Chamber of Commerce, Banjul, 9 Nov. 2000.
86 See for example, Interview with skilled refugee woman, Basse, 1 Nov. 2000.
87 Ibid.
88 Ibid.
for this view may be found in the 1951 Convention itself,\(^9^1\) which provides for certain specific protections, including social and economic rights, as well as other applicable international human rights instruments. This definition is preferred over any more restrictive definition of protection (such as those which limit it to protection against refusal) because of the imperative that international protection lead to a durable solution.

4.1 The United Nations System

4.1.1 Sources

In relation to The Gambia, the right to work of refugees, as a matter of international law, finds binding expression under a range of international instruments.\(^9^2\) Of key significance to refugees and forced migrants are the scope and content of the right to work as provided for in the 1951 Convention, as well as the ICESCR.

Interestingly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("The Migrant Workers Convention"), does not expressly provide for a right to work, even though it clearly makes provision for rights at work.\(^9^3\) Moreover, the Migrant Workers Convention expressly excludes refugees and stateless persons from protection under it, their rights being protected under other instruments.\(^9^4\) Nonetheless, it becomes relevant when one considers the broader category of forced migrants (who have crossed an international border) that extends beyond refugees and stateless persons, and may include, for example, rejected asylum seekers. However, while it may contribute to understanding the scope of the right to work as it applies to certain non-nationals, it is currently of marginal significance, given that those identified in the

\(^9^1\) See WARIPNET and the Lawyers Committee for Human Rights, above: 'It is significant that the first binding international instrument guaranteeing protection of certain social and economic rights was the 1951 Refugee Convention. Although some of the guarantees discriminate between nationals and non-nationals, and may be seen to have been superceded [sic] by provisions contained in subsequent instruments, including the International Covenant on Economic, Social and Cultural Rights (the ICESCR), it is informative that the drafters of the 1951 Refugee Convention clearly viewed social and economic rights as being essential for meaningful protection of refugees'. (See for example, Weis, P., The Refugee Convention, 1951, The Travaux Preparatoires analyséd with a commentary, at 147, where he states that 'Article 17 [right to wage-earning employment] is one of the most important of the Convention'.)

\(^9^2\) 1966 International Covenant on Economic, Social and Cultural Rights (arts. 6 and 7), 1979 Convention on the Elimination of all forms of Discrimination Against Women (arts. 11 and 14), 1965 Convention on the Elimination of All Forms of Racial Discrimination (art. 5), and the 1989 Convention on the Rights of the Child (art. 32). The Gambia is a party to each of these Conventions. Note that the ILO Conventions are more relevant to rights at work than to the right to work. The Gambia is not a party to any of the ILO Conventions.

\(^9^3\) See for example rights to life (art. 9), freedom from torture, cruel, inhuman or degrading treatment (art. 10), freedom of slavery, forced or compulsory labour (art. 11), and freedom from arbitrary arrest and detention (art. 16).

\(^9^4\) Note that almost identical rights are guaranteed to stateless persons under the 1954 Convention Relating to the Status of Stateless Persons. Although only marginally relevant to the present case study, The Gambia is not a party to the Statelessness Convention.
case study were refugees and thus excluded from protection under it, and The Gambia is not a party to the Migrant Workers Convention.95

Similarly, the ILO Conventions provide extensively for rights at work, but there is no express provision for the right to work. The ILO Conventions are, however, also only of peripheral significance, as The Gambia has not ratified any of the ILO's fundamental human rights conventions.96 Indeed, it is the only country in Africa not to have done so.

In the circumstances, the focus will be on the most pertinent applicable international law that centres around the 1951 Refugee Convention and the ICESCR. Notwithstanding this, it is arguable that even where international instruments may not bind non-States parties, they do nevertheless form part of the framework of standards to be observed by inter-governmental organisations.97

4.1.2 Scope and content

Of particular significance is the clear recognition of the right of refugees to work found in the 1951 Convention, to which The Gambia is a party. Ch. III (Gainful Employment) of the 1951 Convention provides for the right of refugees to engage in wage-earning employment (article 17), self-employment (article 18), and in the liberal professions (article 19).98 Each is expressed in slightly different terms.

A contemporary analysis of the right to work under the 1951 Convention also requires an integrated analysis of the right as provided in the ICESCR, each serving to shed light on the other. Although the right to work in the ICESCR post-dates the right to work of refugees in the 1951 Convention, it is more broadly defined and therefore is a logical starting point.

4.1.3 The ICESCR

Article 6 of the ICESCR provides for the right to work.99 In broad terms the elements of the right to work are as follows: access to

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95 The Migrant Workers Convention came into force on 1 July 2003, more than a decade after its adoption. It required a total of 20 ratifications in order to come into force. Cf. Most of the ILO Conventions, which require only 2 ratifications to come into force.

96 See for example Freedom of association and collective bargaining (Conventions 87 and 98), Elimination of forced and compulsory labour (Conventions 29 and 105), Elimination of discrimination in respect of employment and occupation (Conventions 100 and 111), Abolition of child labour (Conventions 138 and 182). Source: http://ilolex.ilo.ch:1567/public/english/docs/declAF.htm

97 See n. 25, above.

98 Note that identical rights are guaranteed to stateless persons under the 1954 Convention relating to the Status of Stateless Persons. Although only marginally relevant to the present case study, The Gambia is not a party to the Statelessness Convention.

99 Art. 6 provides as follows: 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.
Work, the Right to Work and Durable Solutions

employment; free choice of employment; and a guarantee against arbitrary dismissal. Free choice of employment extends, at least in theory, 'to ensuring the fullest opportunity for each worker to use his or her skills in a suitable job', as well as a prohibition on forced labour, protection against excessive restrictions on the right to strike, and even the right not to work or to refuse work. The right to work may also imply the right not to be arbitrarily deprived of work, an issue highly relevant to refugees and other forced migrants whose lack of collective bargaining power is well noted.

4.1.3(a) Access to employment Access to employment is understood to incorporate obligations to work progressively towards the objective of full employment, the opportunity to gain one's living by work (which straddles the right to work and rights at work), equal access to employment, access to employment services (implied), and occupational training. Notably absent from the categories of work which the 1951 Convention authorises for refugees is employment in the government or civil service. This is usually seen as a security issue, but this justification arguably has limited application, as 'restrictions which are not related to the protection of the national labor force, such as those reserving civil service jobs for nationals for reasons of national security, are not affected by this provision'. For example, teaching may be considered to be a non-security related job.

100 Craven M., above, 205.
101 Ibid., 217.
102 Ibid., 221.
103 Ibid., 217.
104 Ibid., 218.
105 Ibid., 220.
106 Ibid., 220.
107 Ibid., 205.
108 Ibid., 221.
109 Ibid., 223. In fact, the reference is to migrant workers, but the lack of collective bargaining power is clearly an issue for all non-nationals, as well as other vulnerable sectors within a society. See also UNHCR, European Series, Vol. 5, No. 1 of July 2000, Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries, at 75, where it is acknowledged that 'refugees generally have less negotiating power with regard to employment'.
110 Craven M., above, 205. Note also that 'an individual's right to work is not necessarily conditional upon the existence of full employment' (see Craven, at 205).
111 Ibid., 210.
112 Ibid.
113 Ibid., 216. This may include vocational training programmes and income generating activities.
114 Ibid., 216-217.
115 Weis, P. above.
116 See for example Craven M., above, 211-2: 'Although it is clear that restrictions will be placed upon foreign nationals and those of particular political persuasions on employment in certain higher civil service posts, such restrictions should be limited to posts that bear some relation to the security of the State, and to the extent that those persons can not reasonably be relied upon'.
118 Craven M., above, 212.
In applying it to refugees and forced migrants, article 6 must be read in conjunction with articles 2(2)\(^{119}\) and 2(3)\(^{120}\) of the ICESCR which proscribe discrimination except in certain circumstances. Regarding article 2(2), the general principle is that 'the Covenant applies equally to nationals and non-nationals'.\(^{121}\) Craven has argued that 'any restriction that has the effect of unreasonably impairing the employment opportunities of members of a particular group would be contrary to the provisions of the Covenant'.\(^{122}\) Although it has been noted that the CESCR 'will censure situations where aliens enjoy few rights and are the object of exploitation',\(^{123}\) it is accepted that the ICESCR permits States to draw certain distinctions between the right to work of nationals and non-nationals,\(^{124}\) such differential treatment generally being justified on the basis of economics.\(^{125}\)

Importantly, article 2(3) provides that 'developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'. While this is a surprising provision on its face, a closer examination of the language and intention of the provision suggests that its purpose was to end the domination of certain economic groups of non-nationals during colonial times. In light of this, it should be interpreted narrowly.\(^{126}\) Moreover, such limitations may only be imposed 'with due regard to human rights'.\(^{127}\) Although adopting a narrow approach to the interpretation of article 2(3), 'it is arguable that the particular concerns of these groups [aliens, migrant workers etc.] may best be dealt with by specific international instruments that address the

\(^{119}\) Art. 2(2) provides: 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

\(^{120}\) Art. 2(3) provides: 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.


\(^{122}\) Craven M., above, 210. The Belgian position in the course of the drafting debates was that art. 2(2) relates to arbitrary distinctions between foreign nationals and citizens, as opposed to 'differences in treatment based on objective and reasonable conditions in conformity with the principles prevailing in democratic societies'. See UNDOC.ST/LEG/SER.E.10, at 123 (1991), extracted in Craven, M., above, 172.

\(^{123}\) Ibid., 174.

\(^{124}\) Ibid., 211; Craven notes that the ILO has generally been cautious in its approach to distinctions between nationals and non-nationals.

\(^{125}\) Ibid., 174. And further, at 174: 'it is somewhat unlikely that States would consider themselves bound by a provision forcing them to eliminate any restrictions on the employment of aliens'.

\(^{126}\) Limburg Principles, para. 43. For a contrary view, see McKean W., Equality and Discrimination under International Law (1983), 201.

\(^{127}\) This approach accords with the Belgian position on art. 2(2) cited above n. 122.
issues in detail. Likewise, given the distinct status that refugees enjoy pursuant both to the 1951 Convention and the 1969 AU Convention, article 2(3) should not be taken as grounds to dilute rights to which refugees are duly entitled.

In addition to article 2, regard may also be had to article 4 of the ICESCR, which, while not prohibiting discrimination, provides that any restrictions imposed should be extraordinary and justified on the basis of the general welfare in a democratic society. Key guidance must therefore be sought from the 1951 Convention, which spells out rights to work of refugees more specifically. In view of the specificity of the right to work provisions in the 1951 Convention, they too will inform the interpretation of article 6 of the ICESCR as it applies to refugees.

4.1.4 1951 Convention

Article 17 of the 1951 Convention (the right to engage in wage-earning employment) is described as ‘one of the most important [provisions] of the Convention’. Its critical elements are that it applies to ‘refugees lawfully staying in their territory’ and accords ‘the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment’.

Article 18, on the other hand, uses slightly different language, requiring States to afford the right to engage in self-employment to refugees ‘lawfully in their territory’ rather than ‘lawfully staying in their territory’. ‘Lawfully in their territory’ has been understood to mean ‘physical presence, even a temporary stay or visit ... in distinction to “lawfully staying”, the terminology used in other Articles’ and may therefore be taken, in this regard, to have broader application than articles 17 and 19. However, discussion on the provisions has centred around the distinction that is made between refugees ‘lawfully in’ and ‘lawfully staying in’ a State’s territory rather than exploring the meaning of the term ‘lawfully’ itself. The question of lawfulness in this context is relevant to the Gambian case study as there are a large number of refugees whose residence in

128 Craven M., above, 25.
129 Ibid., 214. Art. 4, ICESCR provides that: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. It has been noted also that neither the UN Human Rights Committee nor the UN Human Rights Commission has taken a conclusive stand on the principle of non-discrimination in this context. See UNHCR, European Series, Vol. 5, No. 1 of July 2000, Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries, at 66, referring to J.A. Dent, Research paper on the social and economic rights of non-nationals in Europe, (ECRE), at 46.
130 Weis, P., above, 147.
131 Ibid., 152.
The Gambia is, according to The Gambia's immigration law, unlawful. In some circumstances they are permitted to work, in others they are not.

4.1.4(a) Lawfully staying  Although it was noted in the preparatory debates on the 1951 Convention that the term 'lawfully staying' was not defined, the term 'lawfully' is central to understanding the scope of these provisions. The question turns on whether lawfulness is to be defined by reference to international or national law. The answer to this is not immediately apparent. However, the answer will determine the range of people entitled to assert the right to work under the 1951 Convention. For example, is a refugee who has applied for refugee status but has not yet been recognised as a refugee entitled to benefit from these provisions? Do these provisions cover a refugee who has not made a request for refugee status? Is a refugee who has been recognised pursuant to UNHCR's mandate but has not regularised her immigration status in the country of asylum covered?

If we return to the example of the Sierra Leonean woman granted a 30 day permit upon arrival in The Gambia, the legal issues can be illustrated. In summary, she has been unable to afford the Residential Permit fee which is a requirement of the Gambian immigration authorities. She has approached UNHCR in Banjul but has not been permitted to submit her asylum application based on the fact that she is not the holder of a Residential Permit. So the question presents itself thus: is she lawfully staying in The Gambia and therefore able to assert that she has the right to work?

While, on its face, it may appear that 'lawfulness' is a matter of compliance with national laws, this would be a narrow interpretation which could run counter to the protective spirit of the 1951 Convention. In relation to the 1951 Convention itself and the travaux préparatoires there is little light shed on the meaning of lawfulness. For this reason, it is necessary to look elsewhere, to other interpretations of 'lawfulness' and related terms in other international human rights instruments.

Some guidance may be found in examining this question as it has arisen under the International Covenant on Civil and Political Rights (ICCPR). For example, in a case relating to arbitrary and unlawful detention, the UN Human Rights Committee (the HRC), which monitors implementation of the ICCPR by States Parties has found that 'unlawful' under article 9(5) of the ICCPR meant unlawful 'either under the terms of domestic law or within the meaning of the Covenant'132 (emphases added). In that case, the HRC found detention to be unlawful within the meaning of the Covenant. In a concurring individual opinion in the same case, it was noted that if 'lawfulness' merely meant compliance with domestic law, such an interpretation would be too narrow and would serve to attenuate a

human right, making a nonsense of it. This view also finds support in the Vienna Convention on the Law of Treaties, which states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." 

As an illustration of the point, a domestic law, which makes it lawful arbitrarily to detain a person, is unlawful as a matter of international law. In the same vein, it is logical that a domestic law which capriciously renders all refugees, even recognized refugees, unlawfully resident in the territory of a State with a view to, or with the result that, they are denied the right to work under articles 17-19 of the 1951 Convention would also be unlawful. If this broad and expansive interpretation is not endorsed, then a nonsense would be made of ‘one of the most important [provisions] of the Convention’. 

In addition, there is no sufficient basis for the argument that the rights in question (freedom from arbitrary detention and the right to work) may be distinguished on the grounds that they are qualitatively different (one being a civil and political right and the other being a social and economic right). Rather, the right to work is clearly a human right, and any such distinction would run counter to the notion of the indivisibility of human rights. 

To return to The Gambia example, the refugee is stuck in a quandary. She cannot work to pay for her Residential Permit. She cannot be registered as a refugee. In short, she is able to claim no protection. Recalling that refugee status is a declaratory status, she must be considered a refugee as a matter of international law even though she has not been formally recognised as such. In the present case study, despite lack of formal recognition, we can therefore confidently say that she is a refugee given that there is a 100 per cent recognition rate of Sierra Leonean refugees in The Gambia. She should therefore, unless or until she is shown to be otherwise, enjoy the rights guaranteed to refugees under the 1951 Convention. To this end, she must be understood to be ‘lawfully in’ or

135 Weis, P., above, 147.
136 The Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, re-affirmed the principle that all human rights are interdependent, inter-related and indivisible. A/CONF.157/23, 12 July 1993. See also Proclamation of Teheran, 13 May 1968, which also recognises the indivisibility of human rights, noting in particular that 'the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible'. 
137 It is a basic principle of international refugee law that asylum seekers must be treated on the assumption that they may be refugees, until their status has been determined. Note also that "the asylum seeker period must be recognised as a key part of the process of integration". See Recommendation 1a, British Refugee Council, Developing a Refugee Employment Agenda, Report from the Expert Meeting on Refugee Employment in Dublin, 11–12 Oct. 1999.
'lawfully staying in' The Gambia and thereby able to exercise her right to work under the 1951 Convention. Although it has been argued that the application of the terms 'lawfully staying' or 'lawfully in' are sufficiently nuanced so as to exclude asylum seekers who have not yet regularised their status, this would, at best, inadvertently expose refugees deserving of these rights to violations of them. At worst, such an interpretation would represent a tantalising invitation to a more capricious government to make laws in bad faith which would obstruct the work rights of asylum seekers, or even recognised refugees, rendered unlawfully resident pursuant to a domestic law.\textsuperscript{138}

Although it is true that the recognition of rights at international law will not in and of itself unravel the problem, failure to recognise them leaves no one accountable for her plight and international law would palpably fail in its standard-setting function. International law was developed to resolve dilemmas, not to perpetuate them. It must therefore logically follow that the meaning of 'lawfully staying' is deserving of a broad and expansive interpretation beyond mere reference to domestic law. Such an approach may found, in part, a basis for arguing that a refugee should be entitled to a Residential Permit as a matter of right (that is, waiver of the fee) and certainly that the lack of a Residential Permit should not prevent in any way a person from seeking to register herself as a refugee or asylum seeker with UNHCR.

4.1.4(b) Most favourable treatment accorded to aliens generally in the same circumstances

The other central element of the gainful employment provisions in the 1951 Convention is the stipulation that refugees be accorded either the 'most favourable treatment accorded to nationals of a foreign country in the same circumstances' (article 17) or 'treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances' (articles 18 and 19).

Self-employment and the liberal professions under articles 18 and 19 are more limited than article 17 in that they entitle refugees to treatment not less favourable to aliens 'generally' as opposed to the 'most favourable treatment' accorded to nationals of a foreign country.\textsuperscript{139} Article 17 is further strengthened by article 17(3), which mandates states to give 'sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals'. Nonetheless, it has been argued that the requirements of articles 18 and 19 imply a positive effort on the part of the state to facilitate self-employment and lift restrictions for refugees in particular. It also implies that refugees are to


\textsuperscript{139} See above.
benefit from those rights routinely granted to aliens.\textsuperscript{140} In addition, while the expression ‘in the same circumstances’ might ordinarily require that a refugee fulfil requirements that might also be expected of non-refugees, ‘an exception must be made with regard to those requirements which, by their nature, a refugee is incapable of fulfilling’\textsuperscript{141}

These provisions, when read with article 34, which requires that states, ‘as far as possible’, facilitate the assimilation and naturalisation of refugees, also suggest that a broad and expansive interpretation of the gainful employment provisions is appropriate.\textsuperscript{142}

In addition, on the basis of the earlier discussion on the scope of the right to work and the application of article 2 of the \textit{ICESCR}, it is appropriate to read down the scope for distinguishing between nationals and non-nationals which may be elicited from the language of articles 18 and 19 of the \textit{1951 Convention} by reference to the \textit{ICESCR} limitations on permissible distinctions being made between nationals and non-nationals.

In terms of their reach, however, the nature of the work rights conferred by the provisions of the \textit{1951 Convention} are more limited than those accorded all ECOWAS nationals under the \textit{ECOWAS Protocols} (who have the right to enter, reside, and establish) and pursuant to domestic provisions of relevant Gambian legislation (which makes broad-ranging provision for non-Gambians to work). Although the \textit{ECOWAS Protocols} contain some prescriptions for human rights protections,\textsuperscript{143} the basic premise of the \textit{ECOWAS Protocols} is an economic one. Similarly, while the \textit{Immigration Act} offers broad scope for permission to work, it does not provide for the right to work and the Residential Permit which is granted is revocable at any time. On the other hand, because the basic premise of the \textit{1951 Convention} is protection, the work rights conferred must be viewed in the protection context. This strengthens arguments which would, for example, favour waiver of fees for a Residential Permit or the requirement of a permit at all.\textsuperscript{144}


\textsuperscript{141} See UNHCR, European Series, Vol. 5, No. 1 of July 2000, \textit{Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries}, at 64.

\textsuperscript{142} Note that there would appear to be no legal impediment to naturalization of refugees in The Gambia, even though few would appear to have taken up that option.

\textsuperscript{143} For example, in relation to the Protocol which governs migration and illegal migration, Ch. III, Rights and Obligations of Migrants in Host Member States and Conditions and Procedures for Expulsion, art. 9(1) provides that ‘[i]n the event of clandestine or illegal immigration, both at national as well as Community level, measures shall be taken to guarantee that illegal immigrants enjoy and exercise their fundamental human rights’.

\textsuperscript{144} See UNHCR, European Series, Vol. 5, No. 1 of July 2000, \textit{Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries} (above) where UNHCR favours no requirement that a (recognized) refugee have a work permit.
4.2 The Organisation of African Unity

4.2.1 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (the Banjul Charter), provides that '[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work'. In addition, Article 29(6) provides that '[t]he individual shall also have the duty: . . . 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society'.

Gino J. Naldi argues that the language of articles 15 and 29(6) of the Banjul Charter suggests facilitation of the right to work or the right to work in a safe environment. He further suggests that this embraces the notion of equal pay for equal work. However, these rights find greatest strength in their characterisation as rights at work.

4.2.2 The 1969 AU Refugee Convention

The 1969 AU Convention, to which The Gambia is a party, makes no provision for refugees and the right to work. However, WARIPNET and the Lawyers Committee for Human Rights (now Human Rights First) have argued that while the 1969 AU Convention does not provide express guarantees of economic, social and cultural rights to refugees in Africa, the 1969 AU Convention imports the social and economic rights guarantees set out in the 1951 Convention, even where States are not party to the latter Convention.

In addition, the African Charter on the Rights and Welfare of the Child, which entered into force on 29 November 1999, provides for protection of children from 'all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development'. This clearly

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147 Joe Oloka-Onyango makes the following observation in relation to social and economic rights and the African Charter suggesting that its scope is quite limited in relation to the right to work: '... the Charter is silent on the right to create trade unions-a fundamental aspect of the right to work; ... the claw-back clause enshrined in Art. 10, which provides for freedom of association. Art. 10 stipulates that the right is exercisable provided that the individual “abides by the law”; this when numerous domestic legal regimes around the continent outlaw or severely proscribe trade union formation and activity. The problem is compounded by Art. 29, concerning the duty to preserve “national solidarity”, which could be (and has been) interpreted to mean any oppositional activity, whether in the political or economic sphere'. See Oloka-Onyango, J., Beyond the Rhetoric: Reinventing the Struggle for Economic and Social Rights in Africa, Vol. 26 Fall 1995 No. 1, http://www.lumn.edu/humanrts/africa/Oloka-Onyango.html
149 WARIPNET and the Lawyers Committee for Human Rights, above.
has relevance with regard to rights at work as well as the right to work in so far as it affords children a right not to work or to refuse work.  

4.3 The Economic Community of West African States

4.3.1 The ECOWAS Protocols

Movement between ECOWAS states is governed by the *ECOWAS Protocols*. These Protocols are primarily concerned with the free movement of goods and services. However, article 2 of ECOWAS Protocol A/P/1/5/79 *Relating to Free Movement of Persons, Residence and Establishment* provides for the right to ‘enter, reside and establish’ in the territory of Member States.  

In substance, the right to establish may be equated with the right to work, and in practice is so interpreted in The Gambia. Although, a key limitation on the movement of refugees is that ‘[a]ny citizen of the Community who wishes to enter the territory of any other Member State shall be required to possess valid travel documents and an international health certificate’. In addition, Gambian law requires that non-nationals presenting themselves at the border have to show that they have ‘visible means of support’.  

Under the *ECOWAS Protocols* the holder of an ECOWAS passport is entitled to enter an ECOWAS country free of visa requirements for up to 90 days. However, the Gambian government only authorises stay for 30 days. This severely curtails the time available for refugees to seek to regularise their status and may constitute a violation (applicable to a wider class of person than refugees) of the *ECOWAS Protocols*.

4.4 Gambian law

4.4.1 The Gambian Constitution

The *Gambian Constitution* does not expressly provide for a right to work or for the right to fair working conditions either of Gambian or non-Gambian nationals. However, provision is made for some rights at work, including the rights to form trade unions and to freedom of assembly and

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152 See n. 107 above.
153 It is noted that these rights, although explicit, are not always honoured by member States.
154 National Passport, laissez-passer, or ECOWAS Passport. See Interview with government official, Basse, 2 Nov. 2000. See also section 13(1)(d) of the *Immigration Act* which requires possession of a valid passport.
155 See art. 3(1), *ECOWAS Protocol A/P/1/5/79 Relating to Free Movement of Persons, Residence and Establishment*.
156 See section 13, *Immigration Act*.
157 See *ECOWAS Protocol A/P/1/5/79 Relating to Free Movement of Persons, Residence and Establishment*, art. 3(2).
While the Gambian Constitution does contain an anti-discrimination provision, with regard to non-citizens of The Gambia, it has very limited application. On the one hand, the non-discrimination provision states that 'no law shall make any provision which is discriminatory either of itself or in its effect'. This is, however, substantially qualified given that it expressly excludes from its application laws with respect to 'persons who are not citizens of The Gambia or to qualifications for citizenship'. It therefore affords refugees and other forced migrants little in the way of protection from discrimination. Nonetheless, it is arguable that article 33(2) of the Constitution requires that any discrimination with regard to non-citizens of The Gambia must be prescribed by law.

4.4.2 Labour Act, 1990.

The Labour Act offers some protections to workers including providing for standards in recruitment and hiring, registration and training, terms and conditions of employment, protection of wages, procedures for dismissal, and trade union activity. However, Section 2 of the Labour Act tells us that it has limited application to workers, being confined to those in an employment relationship. Nevertheless, the Minister has a broad power under s.2(5) to 'extend the application of this Act to any class of persons excluded by this section'. In addition, it does envisage that non-Gambians may be covered by the Labour Act.

4.4.3 Immigration Act and related legislation

The Gambia, as has been noted above, does not have a Refugee Law. Refugee status determination procedures in The Gambia are therefore carried out pursuant to the mandate of UNHCR. In Basse, registration and determination procedures were the responsibility of the Immigration Department which, unusually, acted as the UNHCR's implementing partner. In Banjul, UNHCR retained direct responsibility for delivering on its mandate but had recently established a Committee to undertake

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159 Art. 25(1)(d) Gambian Constitution.
160 Art. 33 Gambian Constitution.
161 See art. 33(2) Gambian Constitution.
162 See art. 33(5)(a) Gambian Constitution.
163 It does not extend, e.g., to persons employed in the civil service, the armed or security forces, and domestic workers, or those who are self-employed. However, it does include an apprentice.
164 Section 60 of the Labour Act stipulates the requirement that a foreign national who does not have a work permit may not be registered as an employee under Part VI of the Act, Registration and Training. According to s. 60(4), the Commissioner of Labour has a non-delegable discretionary power to issue a work permit to any non-Gambian who is in possession of permission from the immigration authority to enter and remain in The Gambia: 'The issue of a work permit to any person other than a Gambian national shall be a function of the Commissioner alone and the Commissioner may, after consultation with the Minister, issue such permit to any such person who is in possession of permission from the immigration authority to enter and remain in The Gambia'.
refugee status determination. There was no independent appeal procedure. However, this issue appeared to be largely academic for Sierra Leonean refugees, at least at the time, as we were told there was a 100 per cent approval rate. While a case was pending, Temporary Cards were issued by UNHCR to asylum seekers. Following recognition as a refugee, the individual was then issued with a ‘Refugee Identity Card’, a government document which included name, date and place of birth, address in The Gambia, nationality, profession, date of issue and a photograph. It was signed by an immigration officer and did not include a date of expiry.

However, none of the procedures described above took place pursuant to a national law and, although not the case in Basse, in Banjul one of the key obstacles to recognition as a refugee was the requirement, noted earlier, that a refugee first obtain a Residential Permit at a cost of D500 ($35.71) before s/he was able to register with the UNHCR. A number of refugees indicated that they had not registered as asylum seekers with UNHCR in Banjul because they could not afford to pay for the Residential Permit. According to UNHCR, this may have affected as many as 5,000 Sierra Leonean refugees in Banjul.

4.4.3(a) Documents of identity The Immigration Act requires every alien (any person who is not a citizen of The Gambia), to produce a passport. Where a person fails to do so, and is unable to provide a ‘satisfactory explanation of the circumstances which prevent him from producing such passport, other document or Certificate’, an Immigration Officer has a discretionary power to detain that person for not more than 48 hours, which custody is ‘deemed’ to be legal. Recognising that many refugees do not have passports or other documents of identity, it is arguable that a

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165 The establishment of an Eligibility Commission was foreshadowed under clause/art. 5 of the draft Refugee Decree, 1997 which, as noted, was yet to be passed. As an interim measure, the UNHCR Liaison Office had established the Eligibility Committee composed of representatives from UNHCR, implementing partner NGOs, the Immigration Department, the Police and the National Intelligence Agency (NIA). This Committee met weekly to review cases submitted for refugee status determination. Implementation of these informal procedures was cautious with the Committee concerned to guard against granting protection to refugees the government might not be comfortable with. In such circumstances resettlement to a third country either in or outside the region might be negotiated. Interview with UNHCR, Banjul, 23 Oct. 2000.
166 For an examination of UNHCR’s refugee status determination procedures see Alexander M., ‘Refugee Status Determination Conducted by UNHCR’, II JRL 251 (1999).
167 Interview with UNHCR, Banjul, 7 Nov. 2000.
168 Following recognition, we were informed that The Gambia does not issue Convention Travel Documents. Interview with government official, Basse, 2 Nov. 2000.
169 Interview with refugee, Banjul, 6 Nov. 2000.
171 Section 13(1)(a) of the Immigration Act.
172 Section 13(1)(b), Immigration Act.
173 Section 13(2), Immigration Act.
‘document or Certificate’ such as a Residential Permit or a UNHCR Temporary Card would suffice. We return also to the ECOWAS Protocols which require States to ‘take all possible steps to ensure or facilitate the obtaining of the correct documents by illegal immigrants, if desired and possible’.174

4.4.3(b) The Residential Permit and Aliens Card  The issue of a Residential Permit reflects the right to establish under the ECOWAS Protocols.175 Sierra Leonean refugees were viewed, first and foremost, as ECOWAS citizens so they were subject to the ECOWAS Protocols which permit the free movement of people and abolish visa requirements. They have the right to ‘enter, reside and establish’.176 In The Gambia, this is governed by Part V of the Immigration Act and subsidiary legislation, the Registration of Aliens Regulations and the Immigration Rules.

The Registration of Aliens Regulations provide for the issue of an Aliens Registration Certificate, also known as an Aliens Card.177 The Immigration Rules, which have been in operation for some 30 years, provide for the issue of Residential Permits A (for residence only), B (for residence and employment — skilled worker), and C (for residence and employment — unskilled worker). Residential permits are revocable at any time and are valid from the date of issue to 31 January next following. Apart from the cost issue associated with obtaining a Residential Permit, this represented a disadvantage to the refugee population, as part of the wider non-Gambian population, in the labour market and in terms of job security.178 It may also have represented a disadvantage for those refugees who arrived later in the calendar year and who would have been required to pay the fee for a Residential Permit even if it were only for a few months. This was noted by a number of refugees interviewed.

4.4.3(c) Special immigration status  A person with special immigration status is not required to hold a Residential Permit. A person possesses special immigration status if s/he is a citizen of The Gambia, has rendered outstanding service to The Gambia179 or s/he is a civil servant.180

174 See art. 5(1) of the Protocol which governs migration and illegal migration, Ch. III, Rights and Obligations of Migrants in Host Member States and Conditions and Procedures for Expulsion.
176 Art. 2 of ECOWAS Protocol A/P/1/5/79 Relating to Free Movement of Persons, Residence and Establishment.
177 Regulation 5, Registration of Aliens Regulations. The only people exempt from the provisions of regulation 5 are persons who enjoy diplomatic status in The Gambia. See regulation 6.
178 See also UNHCR, European Series, Vol. 5, No. 1 of July 2000, Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries, at 85. In relation to teachers, e.g., who raised concerns about job security in The Gambia, the issue was raised in the context of being employed on contract rather than permanently.
179 This must be granted by the Minister by Notice published in the government Gazette.
180 See Part II, section 3, Immigration Act.
4.4.3(d) Registration of Aliens Act — 1988 amendments  By a series of 1988 amendments to the Registration of Aliens Act, section 12 of that Act requires property owners where aliens reside or may reside and village chiefs (known as Alkalos) to provide, annually, the details of all aliens staying in the premises, village, town or area, as the case may be. Failure to do so is an offence and attracts a penalty of D500 ($35.71), the cost of a Residential Permit. According to the immigration authorities, the system worked well. Sensitisation programmes through the radio and direct contact with Alkalos explained the ‘risks involved in harbouring illegal immigrants’.\(^{181}\) However, this practice may raise human rights questions of its own.

4.4.3(e) Prohibited immigrants  It is an offence under section 12 of the Immigration Act for a prohibited immigrant to enter or reside in The Gambia. The following are ‘prohibited immigrants’:

(a) persons without visible means of support;
(b) an idiot or insane person or person suffering from a communicable disease;
(c) any undesirable person;
(d) any person without a valid passport;
(e) any prostitute;
(f) any person subject to a deportation order.\(^{182}\)

An immigration officer has a discretion to prevent a prohibited immigrant from entering The Gambia and has a discretion to arrest her or him and keep her or him in custody pending deportation or prosecution.\(^{183}\) This power coupled with the list of those categories of person said to be ‘prohibited immigrants’ raise a host of human rights considerations, which it is not possible to address here.

In conclusion, although, as will be discussed below, The Gambia has, in many respects, a flexible immigration policy the law itself, offers little protection in the event that the need for workers diminishes. The Gambian Constitution and the Labour Act afford minimal protection. In particular, under immigration legislation there is a broad discretion to detain in the event of an ‘unsatisfactory explanation’ for being inadequately documented, the Residential Permit (which costs $35.71 — roughly 10 per cent of the per capita GDP), is revocable at any time, citizens are required as a matter of law to report on the presence of aliens, and the language of the legislation suggests that there is considerable latitude for determining a person to be a ‘prohibited immigrant’ and therefore guilty of an offence and deportable.

\(^{181}\) Interview with Immigration Inspector, Basse, 2 Nov. 2000.
\(^{182}\) See section 13, Immigration Act.
\(^{183}\) See section 14, Immigration Act.
5. Policies, practices and perceptions

5.1 The policy

5.1.1 The Government — the need for workers

As has been noted in the overview of the economy above, The Gambia has a pressing need for skilled foreign workers, many of its own having emigrated in search of better prospects. Broadly speaking, this sets the scene for a flexible immigration policy. However, as will be shown, the policies and their implementation vary depending upon a range of factors, including geography, the nature of the work and official attitudes and perceptions.

5.1.1(a) Greater Banjul (incl. Banjul, Serekunda, Kanifing and Brikama) The issue of a Residential Permit seemed to be simply a procedural requirement, which raises revenue for the government. The fee for ECOWAS nationals was D500 ($35.71) and for non-ECOWAS nationals was D30,000 ($2,142.86) per year.\textsuperscript{184} The only exception was Senegalese nationals who were not required to have a Residential Permit.\textsuperscript{185} A calculation of government revenue in relation to registration of Sierra Leonean refugees alone indicates that the requirement brought in D3 million ($214,285.71) per year.\textsuperscript{186} The UNHCR indicated that it had raised an objection with the Government about the requirement of refugees to pay the Residential Permit fee, and had argued (successfully, only in limited cases)\textsuperscript{187} that it should be waived. Others suggested that instituting a system of payment of the fee by instalments may be a more equitable way of addressing the problem.\textsuperscript{188} The Residential Permit requirement also raises a different kind of revenue, with low level immigration officials soliciting bribes from those Sierra Leonean refugees resident in the greater Banjul area who do not have a Residential Permit.

The Government’s rationale for requiring refugees to have a Residential Permit before they could register with UNHCR in Banjul was that if they were not income-earning aliens they should go to the camp.\textsuperscript{189} The practical impossibility of this, given the size of the refugee camp, which housed an estimated 350 refugees at any one time, seemed to go unnoticed. In the result UNHCR estimated (and some estimates were even higher) that some 5,000 refugees were resident in greater Banjul but had

\textsuperscript{184} Some NGOs have the Residential Permit fee waived by the Government. Interview with government official, 30 Oct. 2000.

\textsuperscript{185} Interviews with Senegalese workers, 8 Nov. 2000.

\textsuperscript{186} We found no evidence that there is a quota on the number of Residential Permits which may be issued.

\textsuperscript{187} According to UNHCR, about three or four families had benefited from waiver of the Residential Permit fee.

\textsuperscript{188} Interview with senior foreign diplomat, Banjul, 9 Nov. 2000.

\textsuperscript{189} Interview with government official, 30 Oct. 2000.
not registered with UNHCR. This may be because they had no interest in doing so. However, the weight of the evidence gathered both by the author and by Marc Sommers suggested the contrary — that there are large numbers of refugees in Greater Banjul who could not register with UNHCR because they had not been able to afford to pay for the Residential Permit. These included skilled workers, unskilled workers, and commercial sex workers.

The combination of policies and practices suggests that the need for workers (and predominantly skilled workers) may have dominated receptiveness to refugees. Notwithstanding this, however, and as has been noted earlier, the tolerance and acceptance of a refugee presence in the country was noteworthy during the field research. This was also evident not only through most of our direct contact with people in the community, but also through a study of the press which, significantly, appeared to be free of expressions of racist or xenophobic sentiment.

5.1.1(b) Basse The Gambia is divided into five divisions, the Western Division, North Bank Division, Lower River Division, and the Upper River Division (URD). Basse is the capital of the URD and a thriving, multicultural centre of commerce and trade where Gambians, Guineans (Bissau and Conakry), Malians, Mauritanians, Nigerians, Senegalese, Sierra Leonians, and probably others gather to do business. Most property owners are Serahules who have worked in Sierra Leone’s Kono district largely in the diamond mines. Basse is the main market town, with a mobile market trade (known as Loumos) around the URD’s eight municipalities, which are made up of an estimated 365 villages.

In Basse, where UNHCR had engaged the Immigration Department to serve as its implementing partner in fulfilling UNHCR’s mandate, the same authority was responsible for the issue of Residential Permits and Alien Cards. There was a 100 per cent approval rate of Sierra Leonean refugees. The immigration inspector was well informed about his country’s obligations under both the 1951 Convention and the 1969 AU Convention, as well as the ECOWAS Protocols and The Gambia’s immigration laws. From an immigration point of view, skilled refugees were income-earning aliens and so they required a Residential Permit. According to one

191 The figure of 367 was also suggested. Interview with government official, URD, 31 Oct. 2000.
192 On one occasion while we were in Basse an official from the Divisional Commissioner’s office came into the Immigration Office to complain about an excessive vigilance at one of the border posts by a range of government officials collecting unnecessary taxes from cross-border traders. In his view, this ran totally counter to the spirit of the ECOWAS Protocols. Although not directly related to refugees, it is indicative not only of a recognition of the important role that non-Gambians play in The Gambia, including in relation to the economy, but also of recognition of the significance of the ECOWAS Protocols.
193 Interview with government official, 30 Oct. 2000. Note that the residential and work permit is the same document.
official in Basse, it was a requirement that a refugee obtain a Residential Permit before working, ‘but we give them a chance’. So Residential Permits were not routinely issued in Basse. Nonetheless, Residential Permits were required in Basse for certain kinds of work, such as the teaching profession. Generally speaking, however, a refugee simply needed to register her/himself with the immigration office. In Basse, we were also advised that unskilled workers never obtained the applicable Residential Permit and it was never enforced.

In a similar spirit, the office of the Divisional Commissioner and the Basse Area Council were well-disposed to the presence of refugees and receptive to their needs. For example, the Area Council imposed a ‘lodgers tax’ of D50 ($3.57) per adult head of household per annum for foreign town residents and a ‘strange farmers tax’ of D80 ($5.71) per adult head of household per annum for foreigners in rural areas as well as Gambians not registered in the URD. However, the Area Council had passed a by-law which exempted refugees from payment of these taxes.

5.1.2 The UNHCR

5.1.2(a) Residential Permits The requirement to obtain a Residential Permit before a refugee/asylum seeker may register with the UNHCR and apply for recognition as a refugee, clearly runs counter to basic principles of protection. Most importantly, it means that no one officially acknowledges her/his right to and need for protection. The suggestion that refugees should go to Basse to the refugee camp was no answer, not only on the basis of international legal principle but also at an entirely pragmatic level. Nonetheless, the UNHCR complied with the Government’s stipulation, declining even to register people with their office until they have a Residential Permit.

Interestingly, according to one diplomatic source, who indicated that there had previously been a budget for it, there was a time when the ‘UN paid for [Residential Permits] in bulk’. ‘Then, when UNHCR decided not to pay [in about 1998], they [the immigration authorities] started arresting [people]’.

5.1.2(b) UNHCR Policy on Refugees in Urban Areas The UNHCR Policy on Refugees in Urban Areas clearly sets refugee assistance in camps as its first

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195 Interview with government official, Basse, 1 Nov. 2000.
196 E.g., the right to freedom of movement. See, e.g., WARIPNET & Lawyers Committee for Human Rights, above.
197 Although there was some contradiction of this in one interview, the weight of the authoritative evidence weighed in favour of this conclusion.
198 Interview with senior foreign diplomat, 9 Nov. 2000.
199 Ibid.
priority.\textsuperscript{201} Whatever the rights and wrongs of this policy, its objectives assume a surreal quality in The Gambia where less than 5 per cent of Sierra Leonean refugees were residing in the only refugee camp and the remainder were residing in Greater Banjul, Basse, and some of the surrounding Serahule villages in the URD. Notwithstanding the tiny numbers in the camps, they receive a disproportionate amount of humanitarian assistance, and refugees in the urban areas had been all but forgotten. It is acknowledged, however, that in 2000, although there remained a long way to go, some efforts had been made by UNHCR to restore the balance.\textsuperscript{202}

5.1.2(c) Humanitarian assistance and work

There were two different types of assistance in The Gambia. Firstly, care and maintenance (food, non-food items, education, health care, environmental etc.) which was available to refugees in the camps.\textsuperscript{203} Secondly, under the urban programme, health and community services were available, including counselling.\textsuperscript{204} However, the approach in the camps was not intended simply to be one of care and maintenance. Rather, local settlement was intended to be part of the objective also. To this end, UNHCR supported the provision of assistance in food production and income generating activities (IGAs). According to UNHCR, success varied. Indeed, it was on this ground that food rations were reduced for two years. Notwithstanding this, in 2000 it was found that the refugees were not coping and so distribution of food rations had to be reintroduced.\textsuperscript{205} Rations were reduced to complement what they obtained through other means, for example through IGAs.\textsuperscript{206}

With a (conservatively) estimated refugee population of 17,450,\textsuperscript{207} expenditure on care and maintenance broke down to roughly $11.25 per refugee, per annum,\textsuperscript{208} clearly a significant measure of work was being assumed by refugees generally, as well as those assisted under the humanitarian assistance program. It was well established that UNHCR and its donors were constantly in search of mechanisms for minimising costs. Self-sufficiency, which it must be noted does not in and of itself constitute local integration,\textsuperscript{209} was therefore given high priority. Although refugees

\textsuperscript{201} See UNHCR Policy on Refugees in Urban Areas, 12 Dec. 1997, at paras. 3 and 4.
\textsuperscript{202} Interview with UNHCR, Banjul, 6 Nov. 2000.
\textsuperscript{203} Refugees in urban areas were clearly not happy with limiting this type of assistance to camps, and discontent has been noted by other observers as well. Interview with senior diplomatic official, Banjul, 9 Nov. 2000.
\textsuperscript{204} Interview with UNHCR, Banjul, 23 Oct. 2000.
\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid.
\textsuperscript{207} \url{http://www.unhcr.ch/world/afri/gambia.htm}
\textsuperscript{208} \url{http://www.un.gm/brief.html#economy} Note that this calculation assumes an equitable distribution, which is not consistent with information obtained or observations made. For present purposes, it is nonetheless illustrative of the point.
\textsuperscript{209} See WARIPNET & Lawyers Committee for Human Rights, above.
did not see much of what they did to survive as work, generally associating work with wage-earning employment, the minimal funding clearly demanded work. The question then emerged of what obligations UNHCR and donor States had to ensure not only that work was authorised but also that rights at work were just and favourable and children, for example, were not employed in forms of labour which would violate established international standards.

In relation to the obligations and mandates of inter-governmental organisations, it is axiomatic that all UN agencies, including the UNHCR, are bound to uphold, in policy and in practice, human rights that are guaranteed in the range of international instruments to which member States of the United Nations have subscribed. Similarly, like UN agencies, their implementing partners must be viewed as being bound to uphold the purposes and principles of the United Nations.210

And in relation to donor obligations it has been recognised that it is incumbent not only on States parties, but also on other actors in a position to assist, to provide international assistance and co-operation, especially economic and technical assistance in order to enable developing countries to fulfil their core and other obligations in the realisation of economic, social and cultural rights.211 In this regard, reference is also made to the Charter of the United Nations which, in particular, enjoins States, to take joint and separate action in giving effect to a broad obligation on member States, to promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.212

Another area of work which relates to humanitarian assistance is the sale of goods distributed under humanitarian assistance programs. For example, we were informed that many of the non-food items distributed to refugees in the camp near Basse in early November 2000 could be seen for sale in the market the following day. One can hardly blame the refugees or be surprised by this. It arose from poor assessments being made of the refugees’ need for non-food items as well as the need to generate cash. Similarly, poorly planned income generating activities could result in the

210 Ibid.
211 Ibid. and see Art. 2(1) of the ICESCR, as cited in General Comment 14, The right to the highest attainable standard of health: 11/08/2000. E/C.12/2000/4, at para. 45.
sale of materials distributed. All this was work and was indicative of a disconnect between policies and the quality of practices which were supposed to implement the policies. With an average annual contribution to their livelihood of $11.25 (or a little over 3 per cent of the per capita GDP), some of which would be absorbed in administrative costs, and even assuming an otherwise efficiently and effectively managed programme, it is little wonder that refugees used their own initiative to supplement any assistance they received. It was also indicative of the extent to which they struggled simply to survive, something significantly less than the economic power that was acquired through substantive engagement in the economy.

5.1.2(d) Protection and work  The essential link between protection and work is plain to see in the October 1983 MOU between UNHCR and the ILO, quoted in the prologue to this paper. Although it was agreed some years ago, this MOU appears scarcely to have seen the light of day. It is not insignificant, for example, that it can be found on the ILO’s website but not UNHCR’s. And in The Gambia there were no indications that programmes emerged from consultation or co-operation between UNHCR and ILO. Yet work, in the realisation of social and economic rights, clearly deserves recognition as an integral part of protection. In speculating as to why the black hole, there may be some significance to the fact that the agreement was concluded before the end of the Cold War and the climate has since changed regarding refugees and work and the perception, predominantly by developed states, that work rights must be curtailed as a deterrent to those who may be making abusive applications for asylum in developed countries. Another reason may be that work has traditionally been associated with local integration and resettlement, rather than being seen as elemental to making an informed and empowered choice to repatriate voluntarily.

5.1.2(e) Voluntary repatriation  UNHCR’s energies over the last decade or so have clearly been oriented towards voluntary repatriation, to such an extent that on many occasions the voluntary character of repatriation has been called into question.\(^{213}\) Although any plans for voluntary repatriation to Sierra Leone were put on hold after the collapse of the Lomé Peace Accords,\(^{214}\) programme plans continued to be shaped to anticipate voluntary repatriation, and a consequent budgetary reduction, to make them ‘palatable’ for donors, resulted. For example, in a project description for Banjul prepared by the UNHCR office in The Gambia, which

\(^{213}\) See WARIPNET & Lawyers Committee for Human Rights, above.

\(^{214}\) The author rejects any argument that the majority of Sierra Leonean refugees returning to Sierra Leone from Guinea in the face of hostilities in Guinea can be described as returning voluntarily. For a discussion of voluntariness, see WARIPNET & Lawyers Committee for Human Rights, above.
projected assistance to 1,000 vulnerable refugees in 2001, one section reads as follows:

Anticipating a successful voluntary repatriation programme for Sierra Leoneans this will reduce considerably the caseload classified as vulnerable which will require family assistance.

Recalling that there were an estimated 11,000 Sierra Leonean refugees in Greater Banjul, including 5,000 who were unregistered (and many of whom were likely to be vulnerable), the project description barely scratched the surface.

6. The reality

6.1 Wage-earning employment

The right to engage in wage-earning employment offers refugees the highest standard of treatment under the 1951 Convention, given that the rights they enjoy are only to be limited by restrictions imposed for the purposes of protection of the national labour market. In the course of the research a wide range of employment which may be categorised as wage-earning was identified. Examples included nurses, NGO workers, staff in restaurants, bars and hotels, mechanics, the tourist industry, schools, and the insurance industry.

6.1.1 The teaching profession

Sierra Leonean teachers in The Gambia are well-educated and highly valued by their employers. They also benefit from some level of protection of their rights at work through membership of the Gambian Teachers Union (GTU).

Teachers have highly transportable skills between anglophone countries in the West African region which has a standardised education system. In The Gambia this means that many had been able to step easily into teaching positions. Indeed, some Sierra Leonean teachers who had only recently arrived in The Gambia had virtually walked straight into full-time jobs.

According to information received, Sierra Leonean teachers may have comprised as much as 60–65 per cent of the teaching profession in The Gambia, a phenomenon attributed to the generally higher education levels of Sierra Leoneans than Gambians. Sierra Leonean teachers were employed in Basse and the Greater Banjul area as well as in some rural areas. In some cases, Sierra Leoneans were school

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216 Interview with Sierra Leonean teachers, Basse, 2 Nov. 2000.
217 Interview with senior foreign diplomat, 9 Nov. 2000.
218 In Sintet village, about 150 kilometres from Banjul near the Casamance border, we were told that there were 4 Sierra Leonean teachers, one of whom was the school principal in the junior secondary school. Interview with NGO, Banjul, 23 Oct. 2000.
principals. However, although it was possible for Sierra Leoneans and other non-Gambians to be appointed as principals of private schools, the government had not agreed to the appointment of Sierra Leoneans as principals of government schools. Officially, in order to be appointed as principal of a government school, a non-Gambian would have to naturalize. We were advised that there were examples of this, including the head of The Gambia Teacher Training College who was Sierra Leonean, and who was a naturalised Gambian.

Described by one observer as a 'new phenomenon', the teaching profession was one of the most heavily populated by Sierra Leonean refugees. This was as true in Basse as it was in Banjul. In one school in Basse, the school principal advised that the majority of teachers on his staff were Sierra Leonean. Like many secondary schools in the country, the school was a government assisted school which was run under the auspices of the Catholic Mission. According to the principal, 'Gambians don't want to teach. They [the Sierra Leoneans] are foreigners and they need employment. They are good teachers'.

In another school, of 21 teachers, 3 were Gambians and the rest were foreigners (Nigerians — 7; Sierra Leoneans — 6; Ghanaians — 2; Guineans — 2; and 1 Senegalese). And in another, of 15 staff, 5 were Sierra Leonean, 2 were Nigerian, 1 Senegambian and 7 Gambian. The majority of Sierra Leonean teachers were men.

6.1.2 Residential Permit

In order to be employed in the teaching profession it was essential to have a Residential Permit, including in Basse, even though the Residential Permit requirement was not widely enforced. A number of schools with whom this issue was discussed recognised the economic hardship that refugees were under. 'When they arrive they don't have money. They sign a bond with the school and then the cost [of the Residential Permit] is deducted by instalments'. At other schools, similar procedures were adopted and in one case a Sierra Leonean teacher was loaned the

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220 Interview with GTU, 8 Nov. 2000. In relation to this, the GTU observed that 'we would have to admit that it is the same in other countries. If I go to Sierra Leone it takes some time for me to compete'. However, at the same time it was noted that there were some Sierra Leonians who were serving as senior masters.
221 Ibid.
223 Sierra Leonians have been known to work in the school system in The Gambia, but they were not refugees. See Interview with school principal, Basse, 31 Oct. 2000.
226 Interview with school principal, Basse, 2 Nov. 2000.
228 Interview with school principal, Basse, 2 Nov. 2000.
money to pay for her Residential Permit and she then paid it back. Two young teachers from Sierra Leone arrived in Basse only a couple of months before we met with them. By the time we met them, both had jobs as teachers. One had a Residential Permit, the other could not afford it yet and so was running the risk until he could.

6.1.3 Employment on contract

Teachers under the Catholic Mission enjoyed the same rights and privileges as other government teachers. However, according to a government policy, non-Gambian teachers, unqualified Gambian teachers, and retired Gambian teachers were employed on contract. This meant that they were employed from September to July, on an annual basis, and had to reapply for their jobs at the end of each year. If the school year started, as it did in 2000, in late September, they would be paid pro rata according to the days worked. However, after three years of employment, a contract teacher is said to be entitled to be paid a salary for the month of August when schools are closed for the summer break. However, one person reported that one of his colleagues 'has taught here for more than seven years and he doesn’t get the holiday pay'.

According to one observer,

There was a time when foreign teachers were employed on the same basis but the government lost a lot of revenue because most of the foreign teachers would leave without notice ... This is my experience. So when they have their ticket to the UK or America, they go. Also, the government noticed that some of their documents are invalid. This is a problem. So they have to verify [qualifications] certificates every year.

This was the only occasion on which this observation was made and the observer conceded that 'we haven’t had these kinds of problems [in his school]'. The GTU also advised that it had not received any complaints in this regard, though they had heard of some cases in which false or invalid documents had been produced. In relation to Sierra Leone and the difficulties they may have in producing documentary evidence of

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230 Interview with school teachers, Basse, 2 Nov. 2000.
231 The expression non-Gambian teacher as opposed to foreign teacher is the preferred term used by the GTU. Ibid.
232 Ibid.
234 See interview with school teacher, Basse, 1 Nov. 2000.
236 Interview with school teacher, Basse, 1 Nov. 2000.
237 Interview with school principal, Basse, 2 Nov. 2000.
238 Ibid.
239 Interview with GTU, 8 Nov. 2000.
qualifications, the GTU confirmed that there was a long standing relationship with Sierra Leone, and that most Gambians had been educated in Sierra Leone and so people tended to know each other. This appeared to be a way around the issue, at least in some instances.\textsuperscript{240}

Ironically, according to the GTU, contract teachers did not in fact have written employment contracts. Indeed, rather than being appointed on contract, they were employed on a month by month basis. This, according to the GTU, was admitted by the Personnel Management Officer of the Department of Education when the GTU demanded to see a copy of the contract issued to contract teachers. According to the GTU, sometimes teachers did not even have a letter of appointment.\textsuperscript{241} The GTU attributed the fact that this had not been raised to the vulnerability of teachers under these contracts. ‘They are eager to take jobs and scared not to’.\textsuperscript{242} However, there was some recompense for being on contract. For example, a contract teacher qualified to be paid on the grade 8 scale would be paid at the highest end of that scale. A graduate teacher taking a permanent appointment would, on the other hand, start on the grade 8 scale at the lowest end of the scale.\textsuperscript{243}

\textbf{6.1.4 Salary scales and allowances}

Salary was paid dependent on qualifications and according to an integrated pay scale, a civil service scale that was negotiated with the GTU.\textsuperscript{244} Salaries were raised on the basis of an annual increment. According to all sources, including the refugees themselves, they were paid on the salary scale according to their qualifications and without discrimination.\textsuperscript{245} The point of contention was focused on the lack of job security and the lower payments arising out of the contractual basis on which teachers were employed.\textsuperscript{246} One source advised that this policy was attributable to advice received by the Gambian government from the World Bank as a mechanism for cost-containment.\textsuperscript{247} However, ‘Sierra Leoneans appreciate the job and although they can’t be completely satisfied, I have never seen them so [that is, too] annoyed. They prefer to have...
something than nothing. The dalasi is a strong currency in West Africa so they are able to send money back to Sierra Leone and to Guinea Conakry.\textsuperscript{248} From the refugee perspective, they 'can be hired and fired at any time and no one protects you'.\textsuperscript{249}

In addition to the pay scale, teachers in rural areas were entitled to a remote allowance. Mission schools gave an allowance of D200 ($14.29) per month for being in a remote area. The remote allowance for non-teaching staff depended on qualifications.\textsuperscript{250} However, it appears that this policy was not consistently implemented. According to the GTU, a provincial allowance payable at a rate of 12–15 per cent of the basic salary (15 per cent in the URD) was not paid to contract teachers.\textsuperscript{251}

6.1.5 Prospects for promotion

In terms of prospects for promotion, it was possible for non-Gambian teachers to be promoted. However, the GTU acknowledged that it was very difficult to be promoted because when positions were advertised, Gambians were given priority. The GTU noted that this would be the same in other African countries. In the private sector, however, there was more scope for promotion.\textsuperscript{252}

6.1.6 The Gambian Teachers Union

All teachers who were Sierra Leonean were automatically members of the GTU.\textsuperscript{253} The D 10 ($0.71) per month membership was not compulsory, but required a teacher actively to discontinue her or his membership.\textsuperscript{254} At the GTU congress in August 1999, a resolution was passed by the union that membership would be automatic. So union dues were automatically deducted from teachers' pay packets.\textsuperscript{255} If a person did not want to be a member of the union, they had to write to the secretary and give three months notice following which automatic deductions would cease.\textsuperscript{256} The GTU appeared to be a very active Union, and the representative interviewed was not aware of anyone having discontinued membership at least since May 2000.\textsuperscript{257} There were Union representatives in some of the schools visited, as well as a regional representative for the URD and

\begin{footnotes}
\item \textsuperscript{248} Interview with school principal, Basse, 30 Oct. 2000.
\item \textsuperscript{249} See interview with school teacher, Basse, 1 Nov. 2000.
\item \textsuperscript{250} Interview with skilled refugee man, 1 Nov. 2000.
\item \textsuperscript{251} Interview with GTU, 8 Nov. 2000.
\item \textsuperscript{252} Interview with GTU, 8 Nov. 2000.
\item \textsuperscript{253} Interview with school principal, Basse, 30 Oct. 2000.
\item \textsuperscript{254} Interview with GTU, 8 Nov. 2000.
\item \textsuperscript{255} Interview with GTU, 8 Nov. 2000. See also interview with school principal, Basse, 31 Oct. 2000.
\item \textsuperscript{256} Interview with GTU, 8 Nov. 2000.
\item \textsuperscript{257} Ibid.
\end{footnotes}
there were also district representatives (a district in the regional areas being the equivalent of a ward in the Banjul area), which numbered four or five.\textsuperscript{258} Total membership of the union fluctuated between 4,000 and 5,000. In late 2000, less than 4,000 were paid up members of the union. Nonetheless, the union said that they still undertook negotiations for people more widely than their membership.\textsuperscript{259}

According to the GTU, of all non-Gambian teachers in The Gambia, the Sierra Leoneans were the most established.\textsuperscript{260} Indeed, the GTU had recently entered into a Memorandum of Understanding with the Sierra Leonean Teachers Union (SLTU). According to the GTU, the President and Secretary-General of the SLTU had visited The Gambia recently and they were doing some research on refugee teachers, to explore the possibility of their returning to Sierra Leone once the situation settled.\textsuperscript{261}

The GTU explained that their mission was to be an organisation for all teachers in The Gambia. In addition, as a professional body, when they negotiated, they negotiated for everyone.\textsuperscript{262} Citing the August issue (see below), where additional pay was negotiated for four days extra work on the part of contract teachers, most of the teachers affected were non-Gambians. This, it was explained, was because most of those contract teachers affected were in secondary schools, where the majority of contract teachers were non-Gambians.\textsuperscript{263} However, some refugees nonetheless expressed little faith in the GTU.\textsuperscript{264}

In 2000, the school year was extended an additional four days into the month of August. The reason for this was that the Department of Education considered that much time had been wasted as a result of events surrounding demonstrations on 10 and 11 April 2000 in which 11 students were killed. For this reason, the Department of Education had resolved to extend the school year.\textsuperscript{265} The GTU, having studied the implications, resolved that contract teachers should be paid.\textsuperscript{266} So the GTU negotiated with the government to ensure that all contract teachers were paid for the additional four days.\textsuperscript{267} Initially they had been informed by the Permanent Secretary of the Department of Education that everything was in place to make the payments for the extra four days. However, by
15 August nothing had happened indicating, according to the GTU, that the government was either not prepared to listen or there was no money. So, the GTU issued a press release and the government invited them to the table. In a related issue, some principals decided to close their schools at the end of July rather than extending to 4 August and as a result the government decided to deduct some of the teachers’ salaries on the basis that only the Secretary of State was mandated to declare closure of the schools. Instructions were issued to deduct staff salaries. However, a departmental memo fell into the hands of the GTU indicating that instructions had been issued to deduct 50 per cent of one month’s teachers’ salaries which was going to be used to renovate a school in Banjul. Since that time, both issues were resolved in the teachers’ favour.

The GTU considers itself to be a very progressive union, and their work includes exploring the possibility of appointing non-Gambian teachers on a permanent basis. This is one of their advocacy platforms. Indeed, we were told that it had even been raised with the Head of State.

**Human rights implications** From the information obtained, therefore, in large part, the work rights at stake for Sierra Leonean refugees who were members of the teaching profession related largely to rights at work, including lack of job security, apparently attributable to policies implemented on the advice of the World Bank and seemingly contrary to the Bank’s publicly stated position. The right to work would, in essence, appear to be respected, especially in view of the fact that schools made arrangements to pay Residential Permit fees in advance, to then be repaid by teachers in instalments. Although, it is strongly arguable that refugees should not have to pay a Residential Permit fee at all, overall the fee did not represent an excessive interference with the exercise of their right to work. Nonetheless, this conclusion depends upon a co-operative education system and, it is supposed, the need for non-Gambian teachers. Systemically, therefore, Sierra Leonean refugee teachers remained vulnerable.

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269 Interview with GTU, 8 Nov. 2000.
270 Ibid. In terms of dispute resolution in the judicial system, the GTU advised that they have not received any instructions regarding litigation. However, they are mandated to provide legal assistance. In the one application before a court that they had had to deal with, they decide not to provide legal assistance to run the case, advising the litigant instead to withdraw and negotiate.
271 Ibid.
272 'The principles enshrined in the historic 1948 Declaration, and refined in later international agreements, continue to provide “the common standard of achievement for all peoples and all nations”. They also serve as a challenge for the World Bank and other members of the United Nations (U.N.) family to advance through their work the ideals represented in the U.N. Charter'. See Development and Human Rights: the role of the World Bank, 1998. This was a World Bank contribution to the commemoration of the 50th anniversary of the Universal Declaration of Human Rights — http://www.worldbank.org/html/extdr/rights/hrtext.pdf
In analysing State compliance with its obligations under the *ICESCR* and, by analogy, the same rights as provided for under the *1951 Refugee Convention*, the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*\(^{273}\) ("the Maastricht Guidelines") are a useful tool. In the implementation of their obligations under the *ICESCR*, States are bound to 'respect, protect and fulfil' their obligations, requiring them to refrain from interfering with the enjoyment of a right, to take action to prevent violations of the right by third parties, and take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of the right. In the case of teachers, the most obvious failings of The Gambia were in the protection and fulfilment of the right. Although a distinction has been made between rights *at work* and the right *to work*, it is none-theless clear that the two are inextricably linked. This is clear in the present example, where rights *at work* are compromised depending on how the right *to work* is realised.

Perhaps the most obvious violation in the case of teachers was the State policy of placing non-Gambian teachers on short term contracts which did not accord them the same benefits, including job security, as those on permanent contracts. This policy, as has been noted, was said to have arisen from a recommendation of the World Bank. As is noted in the *Maastricht Guidelines*, however, this would constitute a violation of the *ICESCR* (article 2(2)), given that the State has pursued a policy and practice which contravenes or ignores obligations of the Covenant, and which fails to achieve the required standard of conduct and result.\(^{274}\) It is to be noted, however, that the standard required by the *Maastricht Guidelines* is that the policy or practice *deliberately* contravenes or ignores obligations of the Covenant. If this requires that the policy or practice be implemented with the positive knowledge that the violation is in breach of the specific instrument (the *ICESCR*) deliberate contravention may be a difficult argument to sustain. However, given that the failure to achieve the required standard of conduct and result is couched as an alternative form of violation to 'deliberate contravention', it is argued that the violation is established.

In addition, in relation to acts by international organisations, which should be understood to include the World Bank, the *Maastricht Guidelines* state that

The obligations of States to protect economic, social and cultural rights extend also to their participation in international organisations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organisations of which they are members. It is crucial for the elimination of violations of economic,


\(^{274}\) Para. 11, Maastricht Guidelines.
social and cultural rights for international organisations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights.²⁷⁵

The Gambia and other members of the World Bank Group are therefore bound to take account of obligations under the ICESCR in both their policies and practices. It is further noted that some United Nations agencies (including the UN Research Institute for Social Development, UNICEF, and the World Bank) have also classified certain rights as basic, fundamental, core rights. Among these rights are the right to health and well-being, the right to a basic education, the right to work and fair remuneration, and the right to an adequate standard of living.²⁷⁶

6.2 Self-employment

In The Gambia we identified a wide range of people engaged in self-employment including the following: builders; carpenters; farm labourers; hairdressers; hawkers (food and commodity); labourers; mechanics; petty traders, laundry and other domestic workers. Although most were clearly struggling to make ends meet, some were doing well. One skilled worker who was self-employed, had a written employment contract which included provision for a monthly salary plus a bonus on completion of the job.²⁷⁷

A large number of refugees did not see what they were doing as work. For example, one trained teacher said he was not working. It transpired that he was not working as a teacher but was working as a commodity hawker, selling soap. Overall, self-employment dominated as the area of refugee work. This discussion will examine the food industry, looking at the work of food hawkers and those running restaurants.

6.2.1 The food industry

In Basse, there were a large number of people working as food hawkers. They were predominantly women, and came from the camps and the town, selling their wares in Basse town and in the surrounding villages. The range of goods for sale included, amongst others, groundnuts (peanuts), frozen ice, plasas (potato leaves), and cow skin.

In addition to food hawkers, there were a number of women who were running small restaurants in the market area. Some would rent a kitchen premises and a second restaurant area. In one case, two women were loaned a kitchen by a Gambian friend so they only had to rent a restaurant area where they would serve customers. A typical meal was rice with sauce of cassava leaf and fish which sold for D5 ($0.36).

²⁷⁵ Para. 19, Maastricht Guidelines. (Emphasis added).
²⁷⁶ See Apodaca, at 142.
²⁷⁷ Interview with skilled refugee worker, Basse, 29 Nov. 2000.
6.2.2 Local Government requirements

The Basse Area Council required traders of all kinds to hold licences. For a hawkers licence the cost was D150 ($10.71) p.a. (commodity)\textsuperscript{278} and D50 ($3.57) p.a. (food) in addition to which a hawker would pay daily market duties of D2 ($0.14)\textsuperscript{279}. However, one government official told us that he was not aware of a single refugee who had obtained a hawkers licence in Basse, and nor was there any evidence that this was enforced. However, payment of the D2 ($0.14) per day market fee was required and enforced.

In addition, for food hawkers and bars and restaurants, medical and health certificates were required. These were issued by the health department.\textsuperscript{280} Further, police were required to issue a fire safety clearance/security permit.\textsuperscript{281} Failure to fulfil these requirements could result in the payment of a heavy fine (as much as D500 ($35.71)) and if a restaurant owner could not pay, her/his premises would be closed. If the person was a hawker, s/he would not be allowed to sell. Before imposing definitive sanctions, however, a two week period of grace was usually permitted.\textsuperscript{282}

According to the Area Council, the same procedures applied whether or not the person was a foreigner and the tariffs did not vary in that regard. However, rural and urban area tariffs may have varied.\textsuperscript{283}

Although there was no obstruction to the right to work for refugees engaged in self-employment in Basse, much clearly depended on the attitude of government officials in the area. This factor was particularly true of the immigration authorities who appeared to have a strong and flexible appreciation of refugees' needs as well as of their rights.

In relation, for example, to Residential Permit requirements for builders and masons, 'they don't get jobs all the time, so [immigration] waive[s] it'.\textsuperscript{284} And further, 'some of them who are given sewing machines ... [for IGAs], [immigration does not] expect them to have a Residential Permit. [Immigration] just waive[s] it for them ... The policy is that [Immigration has] a discretion'.\textsuperscript{285} The immigration authorities in Basse acknowledged openly that 'the situation could be different if [a different staff were] here. Not everyone is the same'.\textsuperscript{286} Although this suggests that the system in Basse was heavily dependent on the qualities and attitudes of staff in a position to exercise discretion over the issue of Residential Permits, the

\textsuperscript{278} A commodity licence outside Basse, i.e., in the surrounding villages, cost D100 ($7.14).

\textsuperscript{279} Interview with government official, URD, 1 Nov. 2000.

\textsuperscript{280} Interviews with government officials, URD, 31 Oct. and 1 Nov. 2000.

\textsuperscript{281} Interview with government official, Basse, 1 Nov. 2000.

\textsuperscript{282} Ibid.

\textsuperscript{283} Ibid.

\textsuperscript{284} Ibid.

\textsuperscript{285} Ibid. However, where the Residential Permit requirement was waived, an Alien Card would still be issued.

\textsuperscript{286} Ibid.
example also illustrates that, at least in this respect, the system could run smoothly without an over-vigilant or over-zealous approach to the question of Residential Permits. A further rights curtailment, however, relating to free movement within the country of asylum, was that those without Residential Permits had to seek permission to travel to Banjul.

It was, however, in the area of self-employment that refugees experienced most discrimination. In the market-place they described refusal of people from other national groups to buy from them and regularly being called ‘fucking foreigners’. Notwithstanding this, there was no evidence of officially sanctioned, endorsed or institutionalised discrimination and even the most circumspect query in this regard was hotly contested by government officials in the area. Local authorities were clearly proud of their open attitude towards the presence of Sierra Leonean refugees. Many refugees also spoke favourably of government officials in the URD. As was noted earlier, this was also evident in the press where there was a noteworthy absence of expressions of racist or xenophobic sentiment.

**Human rights implications** Returning to the *Maastricht Guidelines*, at least in Basse, there would appear to have been some measure of respect for the right to work. However, The Gambia was clearly failing to deliver on its obligation to protect, that is to prevent violations of rights by third parties. Again, the link between the right to work and rights at work emerges, and it becomes clear that non-obstruction of the right to work is not in and of itself enough to ensure that the realisation of the wider set of social and economic rights as well as other human rights will result. In the area of self-employment, it is difficult to define the obligation to prevent the violation of rights at work, but it is clear that the vulnerabilities of the self-employed in The Gambia stem from an exploitative market place. And in the fulfilment of obligations under the *ICESCR*, the Basse experience suggests, by and large, that The Gambia was fulfilling its obligations in the breach in the sense that its failure to enforce its own laws and policies was opening up, at least to some extent, the opportunity for individuals to realise their own economic, social and cultural rights.

However, the largest number of those whose social and economic rights were left wanting amongst the self-employed were women, many of whom had been unable to secure employment such as in the teaching profession or other skilled areas of work. Given the special circumstances of women, the right to work as it affects women is worthy of separate and specific attention.

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288 Interview with government official, Basse, 1 Nov. 2000.
289 This is in part due to lack of educational and economic opportunities in Sierra Leone, illustrative of a long standing history of discrimination against women.
6.2.3 Some observations on women’s rights and work

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) provides, in its Preamble, that ‘States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights’. It has been poignantly observed, however, that the reality is of deepening concern — ‘the face of poverty is changing: in the [21st] century, a poor person is less likely to be a male smallholder in rural Asia and more likely to be an unskilled, low-wage female worker in urban Africa or Latin America’.

Many Sierra Leonean women in The Gambia considered that they were not working, because they were not employed as such. However, in interviews conducted both by the author and by Marc Sommers it was evident that women were working hard in the family and in the market place even though they did not consider what they were doing as work. This highlights the fact that there are substantial statistical and qualitative differences between those who are ‘employed’ and those who are ‘working’.

The nature of Sierra Leonean women’s work in The Gambia was clearly markedly different to the nature of men’s work. In general, women were working in unskilled, informal and lowly paid labour. The types of work they were doing, included farming, petty trading and hawking, small restaurants, hairdressing, laundry and domestic work. Some, though very few, were engaged in skilled and professional work, including secretarial and teaching work.

As was noted above, the majority of those who were self-employed as food hawkers etc. were women. High status positions were, with limited exceptions, the exclusive province of men. The question this poses then is to what extent does the right to work actually lead to the realisation of women’s economic, social and cultural rights? And how can the analysis of this impact constructively on protection and the realisation of basic human rights?

6.2.3(a) Statistics and women’s work

It has been observed that a basic lack of statistical data can impact severely on the implementation of policies and the promotion of economic development. This particularly affects women, in view of the informal nature of much of their work. In this context, ‘[m]any strategies and policies start from the assumption that women are marginal to the mainstream development process’. The need for


As Apodaca notes, "[a]lthough data analysis is important in evaluating the status of women's rights, aggregated data masks portentous differences in the realization of economic and social rights between males and females."\footnote{Ibid., 139-140.} Clearly, there is a need for States and others engaged in the protection of refugees and other forced migrants to provide accurate and thorough statistical data. This assists in assessing compliance with clauses found in both the ICESCR and CEDAW which mandate non-discrimination and equality of treatment.\footnote{Lang. above, 51.} The Gambia is a party to both instruments.

6.2.3(b) Income generation projects and women's work

It has been noted that efforts to integrate and include women in economic development strategies are often flawed:

For example, the idea behind income generation projects is for women to enter market oriented production to gain a supplementary or additional income. This is usually achieved by women working at home, in cottage industries and handicraft production projects. For income generation to be regressive, or progressive for women, depends on both the ideological aims and strategy of a project. If women tend to be defined as 'housewives', the work as an activity or hobby and the wage itself as 'pin money', the economic logic of such a strategy may be to reduce labour costs and negatively affect women by increasing workload. This differs in impact to a project which perceives income generation as the opportunity to create genuine remunerative employment and aims to develop women's management of resources. The latter is more likely to increase a woman's access to the fruits of her labour, improve her personal standards of living and position as well as the general condition of the household.\footnote{Sen, G. and C. Gown, Development, Crises, and Alternative Visions: Third World Women's Perspectives (1987).}

In a similar vein, Apodaca, referring to the work of Gita Sen and Caren Gown,\footnote{Apodaca C., above, 139.} notes that 'economic development strategies often reinforce gender, class, and race privileges'. Part of their argument is that development strategies use women to reconstruct the economy. Women provide cheap industrial labour that subsidises profits while making domestic markets internationally competitive.\footnote{Ibid., 139-140.} Although the entire analysis may not be directly applicable to the situation of Sierra Leonean refugee women in The Gambia, clearly the attitude towards women's work in

\footnote{Lang. above, 51.}
refugee situations, especially (but not exclusively) in camps, is that the fruits of their labour may not necessarily strengthen their own economic power, but they will keep aid costs to a minimum. This will, in turn, keep the donors happy. In other research, Susan Marshall found that the growth of the economy systematically favours male workers, who are recruited for managerial or skilled positions, while leaving women to labour as subsistence farmers, low status poorly paid clerical workers, service workers, petty traders, or temporary labour. This is consistent with the different types of labour that males, as compared to females undertook amongst the population we studied.

In the Basse Skills Centre, young women from both the camp and the town were offered skills training on a range of different subjects: secretarial skills, sewing and other handicrafts. Curiously, the young women who were selected for these courses were subsequently resettled which meant that the Basse Skills Centre had no means of evaluating the benefit of their programme to the individuals. What is clear, however, is that it must have had little impact on the refugee community itself given that the young women did not stay around to contribute to its betterment. Such an approach to programming and resettlement calls into question the selection process, criteria for and timing of the programmes. If these women were particularly vulnerable, and therefore in need of resettlement, then a more constructive use of scarce resources might be to make places available for those not in need of resettlement. A complicating factor, however, was that there was speculation that at least some of the young women enrolled in the Skills Centre had traded sexual favours in order to be enrolled and ultimately resettled, rendering them vulnerable or renewing their vulnerability.

6.2.3(c) Economic empowerment v. keeping costs to a minimum In a paper by Lang and Mohanna, it is observed that Israel’s ‘occupation strategy’ is one of preventing independent Palestinian development. This has been achieved through consolidating control over both land and labour resources. Economic integration has involved the transformation of Palestinians into a subservient, flexible and dependent supply of cheap labour, drawn and deposited according to the needs of the more powerful Israeli economy.

Although it is not the place of this paper to draw any conclusions specific to the Palestinian situation, the image of the ‘paternalistic protector’ role who retains control and keeps costs to a minimum is not unfamiliar to the wider aid scene, not least on the African continent.

299 For a more general discussion of this issue, see below.
300 Lang, above. 53.
As further observed by Lang and Mohanna,

[Work in] the perception of ordinary people, in all societies, remains one which views 'work' in terms of those activities which bring in a cash income, generally in the form of waged labour in a single job. People must either be 'employed' or 'unemployed'. Women must either be a 'worker' or a 'housewife'. These definitions are both insufficient and misleading. In such terminology, housewives are considered to be materially dependent on a male breadwinner. This is capable of providing needs. Housewives are assumed to be filling their 'natural' homemaking and childbearing role working for their husbands, children and households out of love and devotion. This picture reinforces a predominant image of women as consumers. Their work is neither seen to have any economic impact or productive value. Even directly productive work, for example the informal labour of women in agriculture, is hidden under the guise of domestic duty. The market must be involved in a significant way for those producing to be considered either workers or employed. The very same work, done for one's family, is categorised differently when done for others for an income. Such occupations come under other labels when on the market. Catering services, laundry facilities and professional childcare do not, however, manage to escape low pay and status. This work is associated with both the home and with women. As a consequence, such employments are not perceived as occupations requiring either skill or training. The fact is conveniently overlooked that most women have been programmed for this work all their lives.\textsuperscript{301}

\textbf{6.2.3(d) Factors affecting the realisation of social and economic rights of women}

Although economic development in general is considered to have a positive effect on women's equality in the enjoyment of social and economic rights, it has been noted that gender equality is not solely dependent upon having a large GNP.\textsuperscript{302} Other factors include cultural considerations which can be very important in explaining variations in the realisation of women's human rights. Apodaca provides a useful set of indicators and data sources, which she self-deprecatingly describes as 'crude, undeveloped and incomplete', which provide a useful starting point for evaluating the realisation of social and economic rights of women in a given population. They include:

- The right to work and fair remuneration
- Sex differentials in the rates of gainful employment
- The right to an adequate standard of living
- The right to health and well-being
- Sex differentiated mortality rates
- Sex differentiated child mortality rates
- The right to education
- Sex differentiated literacy rates
- Sex differentiated rates of primary school enrolment.

\textsuperscript{301} Lang, above, 52.
\textsuperscript{302} Apodaca, above, 163.
Analysis based on this set of indicators would illustrate that any analysis of and response to the right to work will, in and of itself, be inadequate to gain an understanding of the social and economic rights implications of work. It is not enough simply to ‘open the door’ through the realisation of the right to work. The rest will not ‘just happen’. Rather, further facilitative initiatives, which are rights-respecting, are required. The foundation should be article 3 of the ICESCR, which requires States to ‘undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant’.  

6.3 The liberal professions

In relation to the definition of ‘liberal profession’, UNHCR has observed that although the term:

... has not been specifically defined, commentators on the 1951 Convention have suggested that it is usually understood as referring to lawyers, physicians, architects, dentists, pharmacists, ... engineers, veterinarians, artists, and probably other professions such as accountants, interpreters, scientists et cetera. While ‘profession’ denotes the possession of certain qualifications, such as a diploma or license for example, the term ‘liberal’ suggests that this professional works on [his/her] own rather than as a salaried employee or state agent.

In the course of the field research we found that there were Sierra Leonean refugees who were lawyers, physicians, engineers, and accountants. In addition, there were some teachers who were working as tutors, which suggests that they too should fall under article 19, given that they were neither salaried employees nor civil servants. The circumstances of Sierra Leonean refugees from the legal profession provides an interesting study of the interaction between and the scope of the various right to work provisions as provided in the 1951 Convention.

6.3.1 The legal profession

6.3.1(a) The Gambian Bar  Sierra Leonean lawyers, like other lawyers from Common Law countries in Africa were represented in the legal profession in The Gambia. However, the Gambian bar was at the time closed to non-Gambian lawyers and only comprised about 100 lawyers. We were told that there had been no non-Gambian admissions to practice.

303 Art. 3, ICESCR. See also Maastricht Guidelines, at para. 12 which deal specifically with gender discrimination.


305 Many had been resettled.


307 Interview with NGO, Banjul, 6 Nov. 2000.
since 1997. A further limitation on practice in the private profession was that it was not possible for a non-Gambian to practice unless s/he was associated with a Gambian. This limitation was, however, apparently under challenge on the basis of the ECOWAS Protocols.

6.3.1(b) The Department of State for Justice  Instead, non-Gambian lawyers were employed in the Department of State for Justice which did not require them to be admitted to practice. This meant that they would technically fall outside the ambit of article 19 and, on account of being civil servants, may indeed have fallen outside the scope of the right to work as provided in the 1951 Convention. Clearly, it was in the interests of The Gambian government to take an expansive approach to employment.

6.3.1(c) The judiciary  In the judiciary, Sierra Leoneans and other non-Gambians were also represented. Indeed, very few of the judges in The Gambia were Gambian, the system operating as a kind of legal aid system from other Commonwealth countries. For example, Mr. Justice George Galaga King, a Sierra Leonean national, was a Justice of the Gambian Court of Appeal as well as Chairman of the Law Report of The Gambia. He was previously the President of the Sierra Leone Court of Appeal, but left in June 1997 and had been sitting on the Court of Appeal of The Gambia since December 1997. In addition, the High Court bench included a Zambian and a Nigerian, and the Court of Appeal was an entirely non-Gambian bench (Justice King, plus two Nigerians and one Ghanaian) and the Supreme Court included a Ghanaian Chief Justice, one Gambian and two Nigerians. There used to be more Sierra Leoneans in the judiciary, but most of them have been resettled. They included former Chief Justice Omar H. Algalie, and three others, including former Justice Robin Coker, who was removed from the bench for making a decision which 'the government was not particularly pleased with'. In addition, we were advised that, to Gambian lawyers, being a judge is not a financially interesting prospect so they prefer to remain in private practice. Notwithstanding this, however, there was said to be a recent trend towards appointing more Gambian judges to the courts.

311 Cf. n. 117 above on national security, section 3.1.3 above on Art. 2 ICESCR.
312 Interview with NGO, Banjul, 6 Nov. 2000.
314 Interview with civil servant, Banjul, 7 Nov. 2000.
315 Ibid. see also Interview with NGO, Banjul, 6 Nov. 2000.
316 Interview with civil servant, Banjul, 7 Nov. 2000.
317 Ibid. see also Interview with government official, Basse, 2 Nov. 2000.
318 Interview with NGO, Banjul, 6 Nov. 2000.
6.3.1(d) Special immigration status  Civil servants were not required to hold a Residential Permit as they were in possession of special immigration status.\textsuperscript{319} Noting, however, that teachers were required to have Residential Permits and some Sierra Leonean teachers were employed in the government school system, this suggests that not all civil servants acquired special immigration status. However, it must be noted that not all teachers were civil servants, some being employed in the private school system. Interestingly, there was evidence that at least some holders of special immigration status were registered with UNHCR, and optimistic about being resettled and that others had been resettled.\textsuperscript{320}

Overall, the situation of members of the legal profession suggests that the closure of the Gambian Bar to non-Gambians meant Sierra Leonean refugees were being subjected to 'treatment as favourable and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'.\textsuperscript{321} However, that lawyers who were refugees could be employed in the civil service, like teachers, suggests that there was a broader interpretation of the scope of civil service employment than is taken in most countries, probably on the basis of the need for workers.

**Human rights implications**  Perhaps the most striking element of the examination of the legal profession and the judiciary is that The Gambia opened doors to the realisation of the social and economic rights of refugees because it was seen to be in the interests of the State to do so. While the example itself does not appear to reflect social and economic rights violations, it does demonstrate that a State will develop policies and practices that will serve its interests. In this sense, the example exposes the inequities for those not able to offer the same level of skill and training to The Gambian economy, suggesting that the motivations are generally economic or structural. So, there was discrimination between refugees rather than against refugees in general.

### 6.4 Other realities

#### 6.4.1 The commercial sex industry

The commercial sex industry attracted Sierra Leonean refugees both in the Greater Banjul area as well as in Basse. In addition, we were advised that Sierra Leonean refugees sometimes worked in other commercial trading centres such as Farafenni. Sierra Leonean sex workers, described as a new 'phenomenon' in The Gambia’s commercial sex industry, tended to rent homes together and work from bars and restaurants rather than

\textsuperscript{319} see Part II, section 3, Immigration Act.
\textsuperscript{320} Interview with civil servant, Banjul, 7 Nov. 2000. Interview with UNHCR, Banjul, 23 Oct., and 7 Nov. 2000.
\textsuperscript{321} See art. 19, 1951 Convention. Cf. section 3.1.4(b) above.
brothels (known as lodges). As a group, they were understood to be popular amongst tourists and other expatriates as they spoke better English than their Senegalese and Gambian counterparts.

Sierra Leonean refugees went into commercial sex work for a range of reasons. For some it was their only means of survival. For others it was a part-time or temporary means of ‘fast money’ which they used to supplement other income or which they planned to do only for as long as it took to save and start a small business.

Most commercial sex workers were female, but there was some evidence that young boys worked as commercial sex workers.

In The Gambia, under the Immigration Act, a non-national engaging in prostitution is a ‘prohibited immigrant’ and is subject to deportation. Although we found no evidence of deportations, information gathered indicated that police sweeps were a fairly regular and feared occurrence. This left commercial sex workers vulnerable not only to arrest and assault, but also to sexual exploitation. An otherwise well-educated population in relation to HIV and other sexually transmitted diseases (STDs), police sweeps left them especially vulnerable to STDs, as they would be taken down to the beach, ‘used’ and dumped.

In the view of one UNHCR official, the problem was ‘not out of hand’. According to UNHCR, in order to guard against the problem amongst young women, ‘IGAs target young women to assist them and empower them’. This, it was said, meant that commercial sex work was ‘not really a big problem’. Although it is difficult to know how many refugees were engaged in commercial sex work, a number of people working in a range of different NGOs as well as the World Health Organisation (WHO) identified certain venues that were frequented by Sierra Leonean commercial sex workers.

6.4.1(a) Commercial sex and resettlement In the course of the research, we were told that some Sierra Leonean commercial sex workers (as well as sex workers of other nationalities) were motivated to work in the industry because they saw it as offering them increased prospects for resettlement.
One of the forms that this took was women who hoped that their client would fall in love with them and that, through him, she would be able to get out of the country. As one observer said, their ‘families have problems in the war. Many [Sierra Leoneans] came through Guinea Conakry. They stayed there and then heard about tourism in The Gambia. Within 6 months, [name deleted] got a ticket out of The Gambia — she met someone who helped her and she has got out.\footnote{330}  

One male refugee acknowledged that women were the most vulnerable in the refugee population. ‘Most of them don’t work [meaning that they don’t have salaried jobs] and a handful work in the skills centre. So they rely on — because of their economic plight, they are forced to do prostitution, both in brothels and “street pick-ups”’.\footnote{331}

Commercial sex work is ordinarily seen as a contract agreed between the worker and her/his client, where in exchange for sex, a payment is made. The cost of sex in The Gambia ranged from D15-25 (\$1.07–1.79) (Basse rates)\footnote{332} and D50 (\$3.57) (Banjul rates) per client.

In the course of the research, however, there was some evidence that another form of sex work existed in the refugee population, where sex was exchanged for favours, including according to some allegations, places on the US resettlement list. This raised very serious protection questions, and as one government official who was aware of the allegations indicated, they should be investigated.\footnote{333} One perspective that emerged was not so much that the sexual favour would guarantee a place on the resettlement list, but many refugees believed that refusing it would ensure that a refugee would never get on the list. Whether or not the deal involved resettlement, a commodity as precious as diamonds to many refugees, there were strong perceptions that sexual favours could buy places on the resettlement list. As was noted by Marc Sommers, for present purposes it is less important whether the allegations regarding resettlement were true. Rather, there was evidence that, as a result of the perception, a trade in sexual favours seemed to be emerging. (The issue was referred to UNHCR.)

6.4.1(b) Links to other human rights  
Prostitution exposes people to a range of human rights violations. Violations of the right to health are most starkly illustrated by the prevalence of HIV amongst the commercial sex worker population (running at 40 per cent)\footnote{334} as compared to the general population for which figures ranged from 1.72 per cent\footnote{335} to 2.2 per cent.\footnote{336}
In Basse, we were told that the incidence of AIDS was very high and that Basse had the most virulent type of AIDS. However, perhaps most damning was the violation of the right to food and other assistance and not having a Residential Permit which forced some people into prostitution. If a causal link can be established between lack of humanitarian assistance and commercial sex work, even an acquiescent one, with the additional result that any non-Gambian prostitute is considered to be a ‘prohibited immigrant’ and therefore liable to deportation, a measure of accountability on the part of the State as well as others delivering humanitarian assistance may be established. ‘Prohibited immigrant’ status undoubtedly also contributed to the vulnerability of this population vis-à-vis the police.

Certainly, commercial sex work amongst Sierra Leonean refugees would appear to have been a far bigger problem than UNHCR has suggested. No matter what the size of the problem, however, it is imperative that donors are made aware of the rights deficiencies which may lead to commercial sex work and urged to identify resources to devote to minimising rather than institutionalising the problem.

6.4.2 Disincentives to work

In examining the reality of work for Sierra Leonean refugees in The Gambia, it is important also to recognise that there are also disincentives to work. Although it is often argued that the availability of assistance serves as a disincentive to work, and there was some evidence of this, the overwhelming view was that the Residential Permit (especially in Banjul) and prospects for resettlement served as the greatest disincentives to work amongst the refugee population.

The Residential Permit requirement represented a major obstacle for those with insufficient means to pay the fee and seek work which equates with qualifications and experience, or in some cases any work at all. This raised fundamental issues of dignity. As noted above, however, teachers would appear to have been an exception to this, where schools paid for Residential Permits to be repaid by instalments. Similarly, members of the legal profession who had special immigration status were only liable to pay a minimal fee for a certificate which evidenced their status.

337 HIV1 and HIV2 are both prevalent in West Africa.
338 The Maastricht Guidelines specifically recognise that violations of economic, social and cultural rights can occur as much through acts of omission as they can through acts of commission — see paras. 14 and 15.
339 See section 13, Immigration Act.
340 Although steps have been taken by the Medical Research Council in The Gambia to alleviate this problem by negotiating for recognition of the MRC’s Medical Card which indicates that the holder is a regular visitor to the free STD clinic that the MRC offers for commercial sex workers, this does not reflect the state of the law.
341 See Immigration Act.
Another key disincentive to work is resettlement. A number of refugees were under the mistaken impression that refugees in the camp near Basse would be resettled. One refugee, for example, had given up a reasonably well paid job to move to the camp in the hope of resettlement. Although not yet one of the lucky ones, he remained optimistic and convinced that remaining in the camp would increase his chances. In the camp, he did very little on a day to day basis, except for what was necessary for basic survival. Others, in Banjul, indicated that they were not interested in working in The Gambia, as they were waiting for resettlement.

Another disincentive to work, which clearly involved some level of work itself, was poorly planned and administered humanitarian assistance including distribution of food and non-food items (which we were told found its way into markets and restaurants) and income generating activities (where materials were sold off for cash). There was little evidence that a clear set of criteria for assistance was applied.

### 7. Work and durable solutions

With unemployment and other poor social and economic conditions representing a key element of the root causes of conflict, as well as work being a critical element of life in exile, work continues to be a pressing need irrespective of geographic location. However, it is the essential nexus between work and the exilic durable solutions of local integration and resettlement which is more clearly recognised. An area that receives less attention in relation to work, on the other hand, is the role that work plays in decision-making while in exile in relation both to return and post-conflict reconstruction.

This suggests that the nature of work in exile is an essential component in determining prospects for durable solutions. Tacit assumptions about work (that are an anticipated complement to humanitarian assistance), for example, do significantly less to empower and dignify the life of a refugee than work which generates an income that opens up some measure of choice to a refugee. This is particularly the experience of women.

#### 7.1 Voluntary repatriation

The 1990s was described by the former High Commissioner for Refugees, Madam Sadako Ogata, as the ‘decade of repatriation’, a declaration that was accompanied by a prevailing preoccupation with voluntary repatriation, arguably at the expense of a balanced approach to durable solutions. In this sense, especially in situations of large scale influx, on one view

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343 Interview with refugee women, Banjul, 6 Nov. 2000.
anything that opened up the prospect of local integration as a durable solution, might have risked being seen as undermining voluntary repatriation.

The Gambia, long-time host to refugees from other countries in the West African sub-region, has an equally long history of affording refugees work opportunities leading ultimately to their voluntary repatriation. Work, in essence, along with legal status, lie at the core of the process of local integration. However, an historically open approach to local integration appears to have led, in fact, to an increased likelihood of voluntary repatriation. This conclusion was supported by several observers interviewed in the course of the field research.

7.2 Remittances

Another element of reconstruction, which was evident in a number of interviews with Sierra Leonean refugees in The Gambia, particularly those conducted with skilled workers, was the theme of remittances. While a number were themselves receiving remittances from family who had resettled abroad, others were sending money back to Sierra Leone to their families. As one refugee worker put it, 'everything you earn here leaves here'.

Although the scope for tracking the extent of the contribution that remittances make to reconstruction, there seems to be little doubt that if remittances were to dry up, overseas aid (which, globally, is less than the contribution to developing countries made through remittances), would not be adequate to fill the breach. Work for at least some Sierra Leonean refugees in The Gambia meant, therefore, the capacity to support their families in some measure at home.

8. Conclusion

So the relationship between work and the three durable solutions manifests itself in different ways. In the case of Sierra Leonean refugees in The Gambia, it is reasonable to suppose that those refugees who had been able to generate an adequate income, stood a better chance of taking their own decision to return to Sierra Leone once conditions became conducive. This was arguably so, despite the prevailing preoccupation of refugees with resettlement.

In relation to local integration, a number of obstacles in relation to work have been identified, dominated by the issue of the Residential Permit as well as inadequate planning in assistance and income-generating schemes.

And in relation to resettlement, the work dynamic was manifesting itself in a different way. A rights-respecting approach to work itself opens doors to the realisation of other social and economic rights. On the other hand,

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344 Interview with school teachers, Basse, 2 Nov. 2000.
in view of the perceived utility of sexual favours, work and, indeed programmes which lacked basic rights elements were being done in the hope or expectation that the door to the realisation of social and economic rights would be opened by someone else. In this sense, while rights-respecting work empowers, rights-violating work relinquishes or diminishes power.

As has been noted above, this paper has promoted the right to work, a social and economic right, as integral to protection and to all durable solutions. But no single right can pretend to provide the answers to strengthening international refugee protection or indeed the durable solutions. The right to work is an essential tool for harnessing durable solutions in a meaningful way, but the inter-relationship and indivisibility of human rights means that, while it is integral to achieving durable solutions it cannot be the only way. This is poignantly illustrated by the experience of women documented in this case study whether through the broad-ranging rights implications of commercial sex work or simply through the challenges women face in scratching out a meagre existence in their fight against poverty.

The analysis, therefore, of whether exercise of the right to work in fact amounts to a realisation of economic, social and cultural rights must take account of the relationship between poverty and employment. If employment fails to permit workers and their dependants to obtain goods and services necessary to meet minimum needs, then poverty remains and economic, social and cultural rights are not realised.

8.1 The right to work, programming, policies and poverty

Clearly, examination of the relationship between unemployment and poverty will be insufficient to understand, and then identify measures to resolve, the plight of the poor, which includes the vast majority of refugees in sub-Saharan Africa. As a UN Report of the Secretary-General on the role of employment and work in poverty eradication has observed:

In developing countries, this presumption does not necessarily hold, since the rate of open unemployment is a poor indicator of what the level and incidence of poverty are. This is because regular wage employment is not the dominant mode of employment in developing countries. Instead, the majority of the employed are in some form of self-employment (smallholder farming, petty production in the informal sector). There is considerable under utilisation of labour and the returns to work are often insufficient to stave off poverty. For these workers, economic adversity is absorbed through a fall in income, increased work and increased underemployment, and not open unemployment. Moreover, in the absence of unemployment benefits, very few workers, even those in regular

wage employment, can afford to remain unemployed. In all these cases, deteriorat-
ion in employment conditions and a rise in poverty will not be captured in the rate of unemployment. In sub-Saharan Africa in the past two decades, employment growth has been largely in the urban informal sector and in rural self-employment.

Erica Lang and Itimad Mohanna, in A study of Women and work in Shatti
refugee camp of the Gaza Strip, observed that ‘GDP . . . does not account for
the vast majority of local small-scale marketing and subsistence work. ‘Work’ is [often] narrowly defined leading to a gross underestimation of economic productivity’. Quoting M. Leon, they note further that this is not merely of academic interest:
governments base their policies of economic growth, . . . on census data, and if
these data contain a wide margin of error the plans can either have limited
effectiveness or produce results which are the opposite of those anticipated, or
in the worst of cases, can fail utterly.

According to Lang and Mohanna,
new definitions of work and productivity are required, particularly if development
policies, relevant to women, are to be promoted. It is much more appropriate to
conceptualise work in terms of the contribution of an activity to survival. This
includes not only wages work but also productive and reproductive work.

8.2 States’ obligations

'The inclusion of the statement to the “maximum of available resources”
in the ICESCR clearly requires states parties to use their available resources
to realize their citizens’ economic and social rights' (see article 2). There
are different interpretations of the implications of this phrase on the
realisation of social and economic rights. On the one hand, it has been
viewed as imposing an obligation on States Parties to give social welfare
priority in resource allocation. On the other, it has been argued that the framers of the ICESCR intended the concept of progressive realisation to reflect 'a necessary accommodation to the vagaries of economic circumstances'. These limitations, howsoever they may delimit the extent to

\[347\] Ibid., at para. 14.
\[349\] Lang, E., above, 57.
\[350\] Apodaca, C., above, 146.
which a violation of the *ICESCR* may be found, do not absolve other actors in the context of international refugee protection. In this regard, reference is made to General Comment No. 3 of the UN CESCR\(^{353}\) and paragraph 19 of the *Maastricht Guidelines*.\(^{354}\)

### 8.3 The need for statistics

In a relatively short research mission, it is difficult to be confident of the scope and extent of rights violations across the refugee population. In order to make an accurate assessment of the human rights implications which flow from the exercise or claim of the right to work, it would be necessary to develop a comprehensive set of indicators and, through the use of them, statistics. Statistics allow for an assessment of 'the magnitude and scope of human rights violations'.\(^{355}\) Indeed, statistics aid in determining patterns or trends of human rights violations ... that anecdotal evidence cannot detect.\(^{356}\) Notwithstanding this limitation, it is abundantly clear from the results of the research, that while there is substantial evidence that there are serious human rights implications (civil and political as well as economic, social and cultural) in the manner in which the right to work is given effect in The Gambia, there are also sound reasons for respecting, protecting and fulfilling refugees’ right to work which serve their interests, those of the Gambian economy, and assist in unlocking the door to durable solutions.

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\(^{353}\) UN Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of States parties obligations (Art. 2, para. 1 of the Covenant)* (Fifth session, 1990), U.N. Doc. HRI\GEN\1\Rev.1 at 45 (1994).

\(^{354}\) See n. 275, above.


\(^{356}\) Ibid.