

Protection Frameworks for Refugees and Migrants in Southern Africa



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The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support to human rights and public-interest litigation initiatives in Southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, South Africa, Zambia and Zimbabwe..

Acknowledgements

This collection of papers focusses on asylum, migration and refugee protection issues in Southern Africa. Some of these papers were presented at a Refugee Protection Conference held in Botswana in June 2017, in commemoration of the 50th anniversary of the Botswana Refugee Act.

This book was edited by Kaajal Ramjathan-Keogh, Executive Director at SALC. Former SALC intern, Tyler Walton, provided invaluable assistance with editing and fact checking. The report was designed by Limeblue.

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Foreword

Note from the Editor

States guarantee basic human rights and ensure physical security for their citizens. However when people become refugees these protections disappear. Refugees fleeing war or persecution become incredibly vulnerable. They lose the protection of their own state and often it is their own government that is persecuting them. If third countries do not let them in or offer protection, refugees may be condemned to an intolerable situation where their basic rights, physical security and their lives are in jeopardy. This publication includes articles looking at South Africa's dysfunctional asylum system, the arbitrary detention of migrants in Malawi as well as refugee protection in Uganda. It also considers the abuse of the refugee protection system in protecting suspected war criminals.

SOGI Awareness and Sensitivity

In a region where same sex acts are criminalised, it is encouraging to know that the UN 1951 Convention¹ recognises the granting of asylum on the basis of sexual orientation and gender identity (SOGI). That refugee status is to be accorded to individuals on the basis of a fear of persecution related to their sexual orientation or gender identity is now an accepted principle of international refugee law. However, receiving countries particularly those in Africa continue to be hostile to LGBTI persons especially within the asylum process. Long-held stereotypes have frequently led to inappropriate, intrusive and often abusive questioning by asylum interviewers and refugee status decision-makers and have been used to dismiss asylum claims based on SOGI. Sexual orientation and gender identity are broad concepts which create space for self-identification. Research has demonstrated that sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or opposite sex. Gender identity and its expression also take many forms, with some individuals identifying neither as male or female, nor as both. Whether one's sexual orientation is determined by genetic, hormonal, developmental, social and or cultural influences (or combination thereof) most people experience little or no sense of choice about their sexual orientation. Whilst for most people sexual orientation or gender identity are determined at an early age, for others this may continue to evolve across a person's lifetime. The UNHCR Guidelines on International Protection No. 9 have been drafted to assist refugee determination of SOGI claims.²

1 <http://www.unhcr.org/1951-refugee-convention.html>

2 <http://www.refworld.org/docid/50348afc2.html>

South Africa's poor treatment of migrants and proposed plans to close borders to asylum seekers

It is a concern that countries are closing their borders, seeking to prevent freedom of movement for asylum seekers; preventing migrants from transiting; and in many cases detaining migrants for prolonged periods. South Africa for example is developing a policy aimed at detaining asylum seekers at borders until final determination of their refugee status. This sounds alarmingly similar to Australia's horrific off-shore asylum processing on Nauru and Manus Island. South Africa plays a significant role in influencing policy, laws and practise on migration in Southern Africa. It does this in a selfish and introspective way without always realizing the knock on effect this has on migrants and on 3rd countries. This is particularly true for countries like Mozambique and Malawi who do not allow migrants to transit freely for fear of repercussions from South Africa. South Africa sends migrants who arrived via Mozambique back to Mozambique- rather than deporting them directly; these migrants then become Mozambique's problem and costs of detentions, deportation etc. need to be borne by Mozambique. We note with concern South Africa's Green Paper on International Migration's intention to establish secure administrative detention centres for asylum seekers. This is contrary to South Africa's policy of non-encampment. The Department of Home Affairs has made strides in complying with legislative safeguards on immigration detentions but this has in the most part been driven by litigation challenging unfair and unlawful processes. It is a concern that a process which allows for the administrative detention of asylum seekers will open up the state to further litigation processes. South Africa has further been unable to deal with the backlog of asylum applications which are currently pending- it may not be pragmatic to be contemplating detaining asylum seekers when the asylum processes have not been streamlined to fast track the finalisation of cases.

Towards the free movement of people

Free movement protocols exist in East and West Africa but have been slow to gain momentum in Southern Africa. In January 2014, the Government of South Africa publicly stated that it is considering a visa for Southern Africa Development Community (SADC) economic migrants, which may reduce new asylum applications. We have not seen any concrete moves in this direction. We have however continued to see government complaining about the abuse of the asylum system by economic migrants; without any interventions to facilitate work permits for SADC citizens residing and working in South Africa. The African Union has made promises of an African passport which has also not materialised.

Refugee Burden Sharing

The search for the most appropriate solution to the refugee problems needs to go on to find the most durable solutions for refugees and their hosts. In the African context where asylum policies are more liberal, and where the prospects for 3rd country resettlement are limited - prospects for local integration are much better and should be strongly promoted. Self-reliance in particular should be promoted at a very early stage. It is not possible to ignore the implications of refugee

movements on development. The impact of large scale refugee or returnee movements on the economic and social infrastructure of receiving countries needs to be addressed and supported.

Fifty years of refugee protection in Botswana

A number of papers in this publication were presented at a conference hosted jointly by the University of Botswana and the UNHCR in June 2017 focussing on refugee protection in Botswana. This event was held in commemoration of the fifty year anniversary of Botswana enacting the Refugees (Recognition and Control) Act of 1967. In 2017, Botswana was hosting 2,839 persons of concern, of whom 2,099 are refugees and 739 are asylum-seekers. Of these numbers, over 350 are women and children. The majority of the population of concern comes from Namibia, Zimbabwe, DRC and Somalia, and there are a few refugees from Burundi, Rwanda and other East African countries. Botswana is a signatory to the 1951 Refugee Convention and its 1967 Protocol and has ratified the 1974 OAU Convention Governing Specific Aspects of Refugee Problems in Africa. Botswana is also a state party to the 1954 UN Convention relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness. Although Botswana has assumed overall responsibility for the protection and security of persons of concern, it has lodged several reservations to the 1951 Convention. Botswana has commenced a process of reviewing the Refugees Act and this review process provides an opportunity to assess successes and challenges in refugee protection over the past 50 years.

Kaajal Ramjathan-Keogh

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Sharon is an activist. In the 1980s she was involved in education for liberation struggles working with young people who were forced to flee from their communities due to apartheid state repression and violence by the IFP. She worked with the Treatment Action Campaign at its inception in the struggle for access to treatment for people living with HIV and AIDS, and later for the AIDS Consortium. Before joining Lawyers for Human Rights as the Head of the Refugee and Migrant Rights Programme, Sharon worked for the international medical humanitarian organisation – Doctors Without Borders as the founding Director and later as the head of the advocacy and networking programme – The Dr Neil Aggett Unit at MSF.

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Arbitrary Detention of Migrants under the Malawi Immigration Act

Chikondi Chijozi

Introduction

Malawi has been detaining more economic migrants from Ethiopia and other African countries as they irregularly migrate across the Malawi border, in transit to opportunities in South Africa.¹ In 2015, the International Organisation for Migration (IOM) reported that 387 Ethiopian immigrants had been detained in Malawian prisons. They were often held for months at a time and one in six of the detained migrants was an unaccompanied minor.² In 2016 it was reported that a further 120 Ethiopian immigrants had been detained in prisons for more than two years whilst awaiting deportation.³ Many of them remained in prison even after finishing serving their custodial sentences or paying fines. Their detention was in harsh conditions, with extensive overcrowding, inadequate food and precarious sanitary conditions.

The detention of the migrants in Malawi lacks judicial oversight; the migrants are detained in prison for an indefinite period of time without any periodic review of their detention. Further, migrants are unable to challenge the legality of their continued detention because they cannot access legal aid or communicate with their families or relations to seek any legal assistance on their behalf. They remain in a state of uncertainty as to when they will be deported back to their country. This is cruel and unusual punishment.

The Immigration Act⁴ in Malawi enables prolonged and indefinite detention of migrants by failing to provide adequate legal safeguards. This amounts to arbitrary detention that violates international human rights principles for the detention of migrants. The Act does not provide for periodic judicial review of detention and migrants have no access to legal aid to challenge the legality of their detention. This paper examines these deficiencies and explores remedies available to the detained migrants.

1 “Stranded Ethiopian Migrants Return Home from Malawi” *International Organization for Migration* (2015) available at <http://www.iom.int/news/stranded-ethiopian-migrants-return-home-malawi> (last accessed 23 September 2017).

2 *Id.*

3 O Khamula “120 Ethiopian immigrants languish in Malawi jails” *Nyasa Times* (2016) available at <http://www.nyasatimes.com/120-ethiopian-immigrants-languish-malawi-jails/> (last accessed 23 September 2017).

4 Cap. 15:03 of the Laws of Malawi.

The Law under the Immigration Act

Sections 10 and 15 of the Immigration Act provide for the removal and detention of prohibited migrants. Detention of migrants is purely administrative, no criminal charge is contemplated under the two provisions.⁵ Detention under Section 15(1) of the Immigration Act is only permitted for the purpose of completing arrangements for removal from Malawi. Detention should not take place where the arrangements of removal have not yet commenced.⁶ Although Section 15(1) of the Act seems to guard against arbitrarily prolonged detention, the Act does not provide oversight mechanisms that could ensure that migrant detention is not punitive in nature, but rather solely for completing removal arrangements. Section 10(2)(a) of the Immigration Act actually goes against the safeguards of Section 15(1); it puts the burden of the cost of removal on the migrant. Unless the migrant opts for voluntary repatriation, it is unreasonable to put the burden of removal on them. Migrants who are in detention have no means of communicating with their families for any assistance. The UN Human Rights Committee has stated that individuals must not be detained indefinitely, on immigration control grounds, if the State party is unable to carry out their expulsion.⁷ The duty remains with the State to ensure that detention is only effected where removal process has already commenced.

Under Section 8(2) of the Immigration Act,⁸ the prohibited migrant who is detained has only three days to appeal the decision to detain him before a magistrate's court. The reasonableness of the period of three days of appeal is questionable considering that many of the detained migrants are very poor and fleeing from poverty in their countries and only transiting through Malawi to seek a better life in South Africa.⁹ Unless the detainee is assisted by the State, it is unreasonable to expect that within a period of three days, a detainee could seek legal advice or legal representation to challenge their detention or an order of removal issued by the immigration officer. Furthermore, without any legal aid available to them, detainees are not aware of the provisions of the law.

Where the prohibited migrant is an irregular economic migrant, Section 9(1) of the Immigration Act¹⁰ only permits an appeal in relation to the identity of the person affected by the decision of the immigration officer; the migrant cannot challenge the legality of his detention. The Act states that the migrant has no right to be heard before or after a decision declaring him or her a prohibited immigrant and has no right to be furnished with any information as to the grounds for such decision.¹¹

5 Immigration Act, Cap. 15:02, Section 15(3).

6 See "Malawi Immigration Law Audit" *Southern Africa Litigation Centre* (2016) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/05/Malawi-Immigration-Audit_FINAL_20-05-16.pdf (last accessed: 23 September 2017).

7 *F.K.A.G. v. Australia* (2013) CCPR/C/108/D/2094/2011 para. 9.3.

8 *Supra* note 6.

9 See "Ethiopian Migrants: Trapped in Malawi Prisons" *Medicins Sans Frontieres* (2015) available at <http://www.doctorswithoutborders.org/article/ethiopian-migrants-trapped-malawi-prisons> (last accessed: 26 September 2017).

10 *Supra* note 6.

11 *Id* Section 9(5).

Arbitrary Detention of the Migrants

The UN Human Rights Committee has said that detention of migrants presents severe risks of arbitrary deprivation of liberty.¹² UNHRC Detention Guidelines state that, “[i]llegal entry or stay does not give the State an automatic power to detain or to otherwise restrict freedom of movement.”¹³ Detention should only be exceptionally resorted to and only for a legitimate purpose. Without such a purpose, even detention for illegal entry will be considered arbitrary.¹⁴

Although the right to liberty is not an absolute right, the State has the duty to ensure that deprivation of liberty is not arbitrary and must be carried out with respect for the rule of law.¹⁵ In interpreting arbitrary detention, the Human Rights Committee stated that, “the notion of, ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”¹⁶

The Committee has also stated that detention should not last longer than absolutely necessary and that the overall length of possible detention should be limited in full respect of the guarantees provided for by Article 9 of the International Covenant on Civil and Political Rights (ICCPR).¹⁷ Furthermore, “[p]rompt and regular review of detention by an independent and impartial court or other tribunal...is a necessary guarantee for those conditions, as is access to independent legal advice.”¹⁸

In order for detention to pass the arbitrariness test, any further detention of the migrants must have particular reasons specific to the individual, such as an individualised likelihood of absconding, the danger of committing a crime or pose a risk to national security.¹⁹ The decision to further detain must consider relevant factors and not be based on a mandatory rule for a broad category.²⁰ As was summarized in the Detention Guidelines by UNHCR, “[i]ndefinite detention for immigration purposes is arbitrary as a matter of international human rights law.”²¹ In the case of *Baban v. Australia*²² the Committee found Australia in violation of Article 9 of the ICCPR when Baban and his son were detained for a prolonged period of time. The Committee stated that:

12 “General Comment No.35- Article 9 (Liberty and security of person)” *CCPR/C/GV/35* (2014) para. 18.

13 “Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention” *UNHCR* (2012) para. 32 available at <http://www.unhcr.org/505b10ee9.pdf> (last accessed: 26 September 2017); see also para. 4 (“These Guidelines although they do not specifically cover the situation of non-asylum-seeking stateless persons, persons found not to be in need of international protection or other migrants, many of the standards detailed herein may apply to them *mutatis mutandis*”).

14 *Id* at para. 21; The Guidelines provide for only three legitimate purposes of detention; to protect public order, public health and national security, see *id* paras. 21-30.

15 *Id* at para. 18.

16 General Comment No. 35 *supra* note 13 at para. 12; see also *Gorji-Dinka v. Cameroon* Comm. 1134/2002, U.N. Doc. A/60/40, Vol. II, at 194 (2005) para. 5.1; and *Van Alphen v. Netherlands* CCPR/C/39/D/305/1988 (1990) para. 5.8.

17 General Comment No. 35 *supra* note 13 at para. 15; see also General Assembly Resolution 2200A (XXI) (1966) Article 9.

18 General Comment No. 35 *supra* note 13 at para. 15.

19 *Id* at para. 18.

20 *Id*.

21 UNHCR Detention Guidelines, *supra* note 15 at para. 44.

22 *Baban v. Australia*, Comm. 1014/2001, U.N. Doc. A/58/40, Vol. II, at 331 (2003).

“...in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a noncitizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with the domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular, those of article 9, paragraph 1. In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of a substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated.”²³

The restriction placed by section 9(1) of the Immigration Act in relation to judicial review of detention of irregular economic migrants, hinders the migrants from challenging their detention in terms of compliance with article 9, paragraph 1 of the Covenant.

What are the Remedies for the Detained Migrants?

Migrants detained in the Malawi prisons have rights under the Constitution to judicial review proceedings that challenge the lawfulness of his or her detention.²⁴ Although this right is enshrined in law, migrants still face the challenge of bringing their case before the courts. Without any means or social support within the country, this proves to be problematic and the right becomes only theoretical. Migrants should be granted access to legal aid. This should be guaranteed to them because it is the right of a detained person.²⁵

Practically speaking, access to Legal Aid in Malawi is considered a privilege rather than a right. Such privilege is only afforded to those who are facing capital offences and is rarely afforded to persons detained for other offences. Taking the views of the Human Rights Committee on how administrative detention presents severe risks of arbitrary deprivation of liberty, it would be in tandem with interest of justice and the spirit of Section 42(1) (c) of the Constitution that legal aid for migrants should be provided as a matter of right.²⁶

In the meantime, there should be a practice direction from the Judiciary requiring that the periods of detention of migrants should be subject to review every fourteen days and an order that legal aid should be provided to all migrants as a matter of right. This would require judicial activism to acknowledge the rights of the migrants. In the long term, the Immigration Act should be amended to allow for periodic judicial review of the length of detention of migrants.

23 *Baban v Australia*, *supra* note 24 at para. 7.2; *see also Bakhtiyari v. Australia*, Comm. CCPR/C/79/D/1069/2002 (2003) para. 9.2.

24 Constitution of Malawi, Sections 41 and 42; *see also* ICCPR Article 9(4).

25 Constitution of Malawi, Section 42(1)(c).

26 *See* General Comment No. 35 *supra* note 13 at para. 15.

Conclusion

The Immigration Act in Malawi does not provide enough legal safeguards to ensure that migrants are not arbitrarily detained in prisons. The lack of judicial oversight of detention of migrants is one such shortfall. The courts should be called upon to assess the reasonableness, necessity and proportionality of the decision to further detain the migrants to prevent arbitrary detention. Immigration Officers should be called upon to explain in each individual case why detention is necessary and to prove that it is not punitive and that steps are being taken to deport the migrant.²⁷ In order for the migrants to challenge the legality of their detention, legal aid at the expense of the State should always be made available to the migrants.

²⁷ See *A v. Australia* CCPR/C/59/D/560/1993 (1997) paras. 9.3-9.4.

The current asylum protection system in South Africa is in crisis and is effectively dysfunctional

Sharon Ekambaram

South Africa's democracy cannot advance if we continue to violate the human rights of the most vulnerable amongst us.¹ South Africa's asylum system is in crisis; it often forces families to travel across the country, away from their homes, jobs and support systems, to renew permits and suffer through the bureaucratic process to get documented. This situation has been exacerbated by the closure of some Refugee Reception Offices (RROs). Those who manage to travel to these Offices are often rejected at their first arrival. Rejected asylum seekers face arrest, detention and deportation, with limited recourse available to them.

Over two decades ago, a democratic government replaced the apartheid regime in South Africa. The ideology of the apartheid regime rested on the prejudice that black people were sub-human, inferior to white people, justifying the use of the state apparatus to keep the black majority in subjugation. Instead of operating under the understanding that rights are inclusive of everyone, the apartheid government privileged the declared interests of the white minority and denied the black majority basic human rights and respect for their human dignity.

The Aliens Control Act² is as an example of an apartheid era policy which kept many black people, under the label of "alien", out of South Africa. The Aliens Control Act was replaced by the Immigration Act³ in 2002 to regulate immigration policy. The provisions of the Act, however, still do not regularise the immigration status of undocumented migrants in the country. This has the strongest impact on the unskilled, mostly black people which make up a large proportion of undocumented migrant population. Apartheid era sentiments remain part of our law.

While the spats of violence in 2008 and 2015 were the most publicised events of hostility against non-nationals within South African communities, these types of events are ongoing and pervasive. Instead of providing humanitarian assistance, the government has responded with heavy-handed police action like Operation Fiela.⁴ This 2015 incident included the arrest and deportation of at

1 "Lindela: At The Crossroads For Detention And Repatriation" *South African Human Rights Commission* (2000). https://www.gov.za/sites/www.gov.za/files/lindela2_0.pdf.

2 Act 96 of 1991.

3 Act 13 of 2002.

4 G Nicolson "Operation Fiela: Thousands of arrests, doubtful impact" *Daily Maverick* (2015) available at www.dailymaverick.co.za/article/2015-09-08-operation-fiela-thousands-of-arrests-doubtful-impact/#.WUbvL0uGOM8 (last accessed 16 September 2017).

least 15,000 people. This was reported as government “getting tough on crimes”.⁵ According to the police, “*Under Operation Fiela/Reclaim we are intensifying police visibility and strengthening our partnership with society in the fight against crime during this period*”,⁶

The Cabinet has recently adopted a White Paper on International Migration after a brief public consultation process.⁷ The shift in policy is reflected in the fact that the government relies on immigration detention as a tool to manage migration. While the White Paper outlines a more progressive approach to immigration, this comes at the expense of asylum seekers and refugees. Politicians scapegoat refugees and asylum seekers as being responsible for social ills including unemployment, crime and lack of decent housing. Foreign nationals are accused of being a danger to society. To back up this claim, the government regularly uses inflated asylum statistics to justify new restrictions. This includes the ludicrous claim as quoted in a 2015 UNHCR Report that there are over 1 million asylum seekers in South Africa.⁸ This was contradicted by subsequent government reports. The Department of Home Affairs stated that, as of 31st December 2016, there were only 218,299 asylum seekers and 91,043 recognised refugees in South Africa.⁹ This is in stark contrast to their earlier statements.

As discussed above, South Africa’s history includes colonisation, unjust legal systems and other discriminatory practices. This has cultivated a society of extreme imbalances and socio-economic inequalities. The democratically elected post-Apartheid government initially prioritized reconstruction and development.¹⁰ The constitution, which was established during that time, embraces the struggle for social justice, with transformative aspirations and targets. The current shifts in policy around refugees and migrants, however, go against the ethos of the Constitution. The cornerstone of the Bill of Rights and the Constitution is equality and respect for human dignity for *all* who live in South Africa and not just its citizens.¹¹

Infringements of basic human rights of non-nationals are a daily occurrence at the Lindela Repatriation Centre, which houses undocumented individuals prior to deportations. Since 1999, ten reports have been produced denouncing the conditions of detention at Lindela¹². The Centre

5 “Detention and Exclusion: New Restrictions to Refugee Protection in South Africa” *Lawyers for Human Rights* (2017).

6 Media Statement from Free State Media Centre Corporate Communication South African Police Service .11 November 2015. <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=6494>. Accessed 27 September 2017

7 “White Paper on International Migration” *Department of Homeland Affairs* (2017).

8 UNHCR Global Trends 2015 Report <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> Mzants, S. Cape Times. SA’s ‘alarming’ asylum seeker backlog . 20 June 2016. <https://www.iol.co.za/capetimes/news/sas-alarming-asylum-seeker-backlog-2036664>. Accessed 27 September 2017 <https://africacheck.org/reports/south-africa-home-million-refugees-numbers-dont-add/>

9 “Department of Home Affairs and UNHCR, the UN Refugee Agency commemorate World Refugee Day on 18 and 20 June in eThekweni Municipality” *UNHCR* (2017) available at <https://www.africa-newsroom.com/press/department-of-home-affairs-and-unhcr-the-un-refugee-agency-commemorate-world-refugee-day-on-18-and-20-june-in-ethekweni-municipality> (last accessed 19 September 2017).

10 See e.g. M Rapatsa “Transformative Constitutionalism in South Africa: 20 Years of Democracy” (2014) 5.27 *Mediterranean Journal of Social Sciences* 887.

11 G Budlender SC “20 Years of Democracy: The State of Human Rights in South Africa” *The Annual Human Rights Lecture, Faculty of Law, University of Stellenbosch* (2014) available at <http://blogs.sun.ac.za/law/advocate-geoff-budlender-sc-delivers-annual-human-rights-lecture/> (last accessed 19 September 2017).

12 Reports published about Lindela Repatriation Centre include: South African Human Rights Commission: *Lindela at the Crossroads for Detention and Repatriation* (2000). http://www.gov.za/sites/www.gov.za/files/lindela2_0.pdf

has been outsourced to a private company called Bosasa. Following an investigation into the Lindela Repatriation Centre conducted in 1999, Judge Jody Kollapen, the then Chair of the South African Human Rights Commission, stated, “[w]hat comes across clearly is the huge gap between standards of treatment of various categories of migrants as set out in international human rights instruments and the practicalities of immigration management in our country today.”¹³

Evidence of human rights abuses are provided in all these reports. The reports outline physical abuse of detainees by Lindela guards, lack of access to medical services, and interference by the staff at Lindela in the immigration process of detainees. *‘Most egregiously, detainees report being physically injured by the security guards and immigration officials at the detention centre. LHR has received many reports that detainees are beaten in order to sign documents showing they have ‘consented’ to being deported’*¹⁴

Following an inspection of Lindela in 2012, Justice Edwin Cameron of the Constitutional Court of South Africa noted that, “the absence of functioning institutional mechanisms to determine complaints...is noted with concern since it adversely affects the institution. We highlight this so that it can receive appropriate attention.”¹⁵ Five years later, there is still no independent institutional complaints mechanism.

Lawyers for Human Rights (LHR) and many other organisations are challenging the most recent policy shifts affecting refugees, asylum seekers and migrants in South Africa. LHR operates a refugee and migrant rights programme with law clinics located in different parts of South Africa. LHR consults with between 10,000 and 16,000 clients each year. LHR has first-hand experience of asylum seeker, migrant and refugee clients whose basic human rights and dignity are trampled on through their engagement with the Department of Home Affairs and more specifically, by the RROs.

In its submission to the Department of Home Affairs,¹⁶ LHR points out that, “...this power allows the Director-General to require these categories to report to a refugee reception office ‘or other place specially designated as such’. This clearly opens [the] door for the Director-General to establish refugee camps, either *de facto* or *de jure* which is squarely contrary to the urban refugee policy

Lawyers for Human Rights: *Monitoring Immigration Detention in South Africa* (2008).

ACMS: *Deportation and Public Health –Concerns around Detention in South Africa* (2010).

ACMS: *Lost In The Vortex: Irregularities in the detention and deportation of Non-nationals in South Africa.*(2010). <http://www.migration.org.za/uploads/docs/report-21.pdf>

Lawyers for Human Rights: *Monitoring Immigration Detention in South Africa* (2012).

Lawyers for Human Rights: *A submission on common complaints from people detained in Lindela compiled by Lawyers for Human Rights for the UN Special Rapporteur on human rights of migrants* (2012)

Solidarity Peace Trust and PASSOP: *Perils and Pitfalls: Migrants and deportation in South Africa* (2012). <http://www.solidaritypeacetrust.org/download/report-files/Perils%20and%20Pitfalls.pdf>

ACMS: *Breaking the Law, Breaking the Bank: the Cost of Home Affairs’ Illegal Detention Practices* (2012). <http://www.migration.org.za/uploads/docs/report-37.pdf>

Justice Edwin Cameron: *Visit to Lindela Repatriation Centre, Krugersdorp* (2012).

South African Human Rights Commission: *Investigative Report on Access to Health*

13 South African Human Rights Commission “Lindela: At The Crossroads For Detention And Repatriation” (2000). https://www.gov.za/sites/www.gov.za/files/lindela2_0.pdf

14 Monitoring Migration Detention in SA, Lawyers for Human Rights 2012:25

15 E Cameron “Report of Inspection of Lindela Repatriation Centre, Krugersdorp” *Constitutional Court of South Africa* (2012).

16 “Lawyers for Human Rights submission on the refugees amendment bill” *Lawyers for Human Rights* (2015).

which is the basis of South Africa's refugee protection policy; or to allow for certain categories of persons to be detained in places of detention [pending the outcome of their asylum application)].¹⁷ It further states that, "the Constitution will not permit arbitrary and irrational deprivation of liberty of an entire class of persons, particularly based on the very grounds of persecution from which they are fleeing. In addition, South Africa has not registered any reservations to the 1951 UN Convention which provide for non-discrimination and the free movement of refugees within the territory of the Republic."¹⁸

LHR also questions the absence of an effective plan within the Green Paper on International Migration to deal with the endemic and systemic corruption that takes place at the RROs.¹⁹ This presents in itself a serious barrier to access for asylum seekers, preventing them from accessing legal documentation.²⁰ Other issues include lack of capacity to deal with claims for asylum and lack of resources to allow department officials to conduct their work independently and fairly. The White Paper on International Migration contains policy proposals which further entrench the shift in policy from one which is based on urban integration and protection to one that sees asylum seekers and refugees as a threat. This was highlighted and addressed by LHR in 2013:

"The provision of shelter and basic services will necessarily be a central aspect of keeping large numbers of newly arrived asylum seekers in a remote border area with limited opportunities for self-sufficiency for the period of time needed to have some or all aspects of their status applications processed. If adequate provisions are not made, a humanitarian emergency is likely to result, as was the case in Musina in 2009."²¹

In 2009, the High Court found that the detention facility at the Soutpansberg Military Grounds (SMG) outside Musina, which is near the Beitbridge border with Zimbabwe, was operated in substandard and inhumane conditions.²² The Refugees Act only provided for the establishment of temporary reception centres for asylum seekers in the case of a "mass influx", so establishing such centres without such conditions would require a change in the Act. It is likely that moving RROs to remote ports of entry will be coupled with the detention of asylum seekers. South Africa has an urban refugee policy which does not include encampment but there are several indications that some form of *de facto* detention is planned, even if such detention facility may not be called a "camp".

There is no provision for oversight mechanisms at immigration detention centres. In April 2017, LHR reported on an incident of extreme use of violence as a means of punishing detainees. The detainees reported as follows:

17 *Id* at para. 75.4.

18 *Id* at para. 76; see also Convention relating to the Status of Refugees UN General Assembly Res 429 (V) (1951) Articles 3 & 26.

19 Joint Submission by the Legal Resources Centre and Lawyers for Human Rights: To the Department of Home Affairs in Respect of Green Paper on International Migration in South Africa (2016).

20 See R Amit "Queue Here for Corruption: Measuring Irregularities In South Africa's Asylum System" African Centre for Migration and Society and Lawyers for Human Rights (2016) available at <http://www.lhr.org.za/publications/queue-here-corruption-measuring-irregularities-south-africa%E2%80%99s-asylum-system> (last accessed 20 September 2017).

21 TP Ngwato "Policy Shifts in the South African Asylum System: Evidence and Implications" *Lawyers for Human Rights & The African Centre for Migration & Society* (2013) available at http://www.lhr.org.za/sites/lhr.org.za/files/policy_shifts_in_the_sa_asylum_system.pdf (last accessed 20 September 2017).

22 *Lawyers for Human Rights v Minister of Safety and Security* (2009) Case 5824/2009 ZAGPPHC 57.

“...testimony of what amounts to collective isolation and punishment of asylum seekers from the Democratic Republic of Congo (DRC). Medical examination by a physician from Doctors without Borders confirmed that collective isolation was accompanied with excessive use of violence, which according to the detainees included being shot with rubber bullets from close range, assaults with lead pipes.”²³

The proposed changes to the asylum policy include the establishment of detention centres at the borders currently referred to as “processing centres”. Without independent monitoring of these centres, there is a high risk that basic human rights will continue to be violated and that human dignity will continue to be disrespected through neglect and sub-human conditions.

South Africa needs to consider alternative strategies to immigration detention which will be cost-effective and respectful of human rights. This country is revered in the world for championing the struggle for justice and equality for all. We cannot have policies that deny human beings their basic rights, purely on the basis of their nationality and immigration status. We cannot have policies that result in disrespect for human dignity. Lest we forget the powerful utterances by former President, Nelson Mandela, “Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another.”²⁴

23 “Violence and Violations at Lindela Repatriation Centre” *Lawyers for human Rights* (2017) available at <http://www.lhr.org.za/news/2017/violence-and-violations-lindela-repatriation-centre> (last accessed 20 September 2017).

24 Nelson Mandela’s Inaugural Speech, Pretoria, South Africa 10 May 1994.

Space for impunity: How South Africa is using refugee protection to shield a senior former Rwandan military official implicated in the commission of international crimes

Kaajal Ramjathan-Keogh

Kayumba Nyamwasa, former Rwandan Patriotic Army General, is the subject of multiple international indictments and extradition requests from Spain, France, and Rwanda. These indictments include charges of murder, genocide, commission of war crimes, and crimes against humanity that occurred on the Rwanda-Democratic Republic Congo border during his service in the Rwandan army between 1994 and 1998.¹ Nyamwasa faces additional criminal charges in Rwanda pertaining to corruption and embezzlement.²

In 2006, French Judge Jean Louis Bruguiere issued an arrest warrant for Nyamwasa for his involvement in orchestrating the 1994 attack of an aircraft which killed former Rwandan President, Juvenal Habyarimana and a number of French nationals. In 2008, Spanish Judge Andreu Merelles issued an indictment³ charging 40 current and former Rwandan military officials with a range of international crimes including genocide, crimes against humanity, war crimes and terrorism. Rwandan President, Paul Kagame, was implicated in this indictment, however is protected from prosecution by immunity on account of his status as a sitting head of state. The indictment also charged Kayumba Nyamwasa, Rwanda's then Ambassador to India who was likely also immune from prosecution at the time of the indictment. Nyamwasa no longer enjoys immunity.

1 "In the Matter of: Lieutenant-General Faustin Kayumba Nyamwasa's Presence in South Africa" *CoRMSA Briefing Paper* (2010) para. 4 available at <https://southernafricalitigationcentre.org/wp-content/uploads/2010/06/Briefing-Paper.pdf> (last accessed: 6 November 2017).

2 "Q and A: CoRMSA v President of the Republic of South Africa and Others – Everything you need to know about the Nyamwasa Case" SALC (2010) available at <https://salcbloggers.wordpress.com/2012/10/25/q-and-a-cormsa-v-president-of-the-republic-of-south-africa-and-others-everything-you-need-to-know-about-the-nyamwasa-case/> (last accessed 6 November 2017).

3 31 Order of Indictment issued by Judge Fernando Andreu Merelles, Fourth Central Examining Court of the National Court, Madrid, Spain (Spanish indictment) at 129, available at: <http://www.rwandadocumentsproject.net/gsd/collect/comment/index/assoc/HASH4e91.dir/Espana-Audiencia%20nacional-English%20version.pdf>.

In 1998, the United Nations Secretary-General released a report to the Security Council which investigated, “allegations of massacres and other violations of human rights [that] arose from the situation that prevailed in eastern Zaire since September 1996”, the atrocities which were triggered by the 1994 genocide in Rwanda.⁴ This UN Report was accompanied by a detailed letter written by then UN Secretary General, Kofi Annan, to the Security Council President, which highlighted the most important observations of the Investigative Team.

Annan’s letter documented the killings committed by the Alliance of Democratic Forces for the Liberation of the Congo (AFDL) and “its allies, including elements of the Rwandan Patriotic Army” (RPA) along with the “denial of humanitarian assistance to Rwandan Hutu refugees.”⁵ It conveyed the Team’s belief that “some of the killings may constitute genocide, depending on their intent”, while but also their call “for further investigation of those crimes and of their motivation.”⁶ The letter concluded by calling state governments to be mindful and attentive to their international legal obligations, and stating that they should “[acknowledge] and [address] the very serious findings of the Team”.⁷

The Team confirmed human rights and humanitarian law violations in the conflict zones and drew unfavourable conclusions about the activities of both the AFDL and the RPA. The following timeline outlines some of the crimes which have been substantiated by testimony provided to the Team:

27 July 1996: Circumstantial evidence implicates the RPA in a cross-border attack launched on a Red Cross facility in Kibumba camp. A witness was injured and three co-workers were killed.⁸

October/November 1996: AFDL and RPA elements launched an attack on North and South Kivu refugee camps, and on anti-Rwandan government military elements; the AFDL also executed a number of civilian massacres in North Kivu villages, “apparently because of the suspected sympathy or support for the fleeing Rwandan Hutus.”⁹

November 1996: The AFDL launched an attack on the Mugunga camp, capturing and executing hundreds of unarmed civilians who had been in the process of fleeing this and neighbouring camps in South Kivu, Obiro, and Tingi-Tingi.¹⁰ RPA and AFDL troops were “implicated in several reports of killings near the border” of displaced camp residents, including the slaughter of a priest and some children at Bushwira.¹¹

18 December 1996: AFDL and RPA soldiers reportedly killed around 3,200 people – over 1,800 of which were children – in and around Walikale. In another report, these soldiers massacred at least 500 additional refugees residing along the Walikale road in North Bunyakiri, an area frequently

4 See “Security Letter Dated 29 June 1998 from the Secretary-General Addressed to the President of the Security Council” U.N. Doc. S/1998/581 (1998) 1.

5 *Id.*

6 *Id.* at 2.

7 *Id.* at 3.

8 *Id.* at “Summary of Allegations and Information Obtained” (Appendix), para. 72.

9 *Id.* at “Report of the Secretary-General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law & the Democratic Republic of the Congo” (Annex), paras. 80-85.

10 *Id.* at Annex, Executive Summary.

11 *Id.* at Appendix, para. 30.

obstructed for entry by AFDL troops.¹²

22 March 1997: RPA and/or AFDL troops reportedly massacred displaced Rwandans moving north toward the Kisangani area.¹³

22 April 1997: Two large temporary camps at Kasese suffered an attack in the early hours of the morning, with estimates of at least 500 fatalities. Witnesses express that the attack was executed by AFDL troops with RPA participation. The AFDL was said to have “blocked access to the area while the massacre was being carried out, and during efforts to remove and destroy corpses.” AFDL troops also attacked the Biaro camp on this day.¹⁴

April/May 1997: AFDL troops reportedly “removed a number of unaccompanied Rwandan Hutu minors and their adult caretakers” from a Lwiro hospital in South Kivu, where they subjected them to sub-human conditions. The Team concluded that gross human rights violations occurred here, and that RPA members often acted in conjunction with or in control of other armed forces such as the AFDL.¹⁵

May 1997: AFDL troops seemingly under effective RPA command massacred hundreds of unarmed Rwandan Hutus in Mbandaka and the neighbouring village of Wendji.¹⁶ In a separate massacre, AFDL troops continued killing both Rwandan and Zairian Hutus in North and South Kivu.¹⁷

The testimony provided to Spanish judicial authorities provides evidence that Nyamwasa is responsible for the criminal conduct attributed to the RPA by the UN Report.¹⁸

On 17 March 2008, the Registrar of the International Criminal Tribunal for Rwanda (ICTR) made a request to the Spanish judicial authorities for an official English version of the 6 February 2008 judicial indictment. This was subsequently forwarded to the ICTR. On pages 165 and 166 of that official version, the prima facie evidences against Nyamwasa related to international crimes of genocide, crimes against humanity, war crimes and terrorism (among other international crimes in connection) were stated as following:

3rd. Major General Kayumba Nyamwasa

Currently Ambassador to India

From the proceedings carried out so far, there is prima facie evidence which points to his participation in the following criminal acts:

1. He would be directly responsible for the massacres carried out either by himself or by his subordinates, such as Lieutenant Colonel Jackson RWAHAMA MUTABAZI, Colonel DAN MUNYUSA, or Captain Joseph NZABAMWITA, among others.
2. Following his orders, the abduction and subsequent murder of the Spanish priest

¹² *Id* at Appendix, para. 52..

¹³ *Id* at Appendix, para. 102.

¹⁴ *Id* at Appendix, paras. 105-106.

¹⁵ *Id* at Annex, para. 88; see *also* Appendix paras. 84-87.

¹⁶ *Id* at Annex, paras. 41 & 87.

¹⁷ *Id* at Annex, para. 88.

¹⁸ See CoRMSA *Briefing Paper*, *supra* note 1, para. 28.

JOAQUIM VALLAMAJO was perpetrated, as well as the murder of other Hutu Rwandan priests in the area of Byumba, at the end of April 1994.

3. He would have decided, ordered and controlled the murder of the three members of MEDICOS DEL MUNDO, the Spanish nationals FLORS SIRERA FORTUNY; MANUEL OSUNA and LUIS VALTUNA GALLEGO.
4. He would have been the person with most responsibility for the operations carried out by the A.P.R between the end of 1996 and the beginning of 1997 in the Northeast of Rwanda, among which, the massacres carried out in the region of Ruhengeri, and those in Gisenyo and Cyangugu, in Nyakinama and Mukingo.
5. He would have planned the actions carried out by the Intelligence Officers, especially the selective and terrorist attacks on persons.
6. He would have planned and organized military missions, such as the operation to conceal armament and ammunition in underground deposits, in preparation for the final assault to power.
7. He would have been responsible for systematic and planned attacks on predetermined populations, or on those persons who were gathered to this effect, disappearances, extra-judicial executions and other similar operations, above all those carried out in Munyanza, Kiyanza, Rutongo, Kabuye and the so called “real slaughter” massacre which was carried out in Nyacyonga Camp.
8. On 23 April, he would have coordinated the military operation that took place at the Buymba football stadium, where he regrouped some 2500 refugees, Rwandan nationals belonging to the Hutu ethnic group, in order to proceed to their massacre, firstly by launching grenades, and after indiscriminately opening fire with automatic rifles.
9. In his capacity as Chief of the D.M.I he would have organized and executed terrorist attacks on the enemies of the regime.

Following the 6 February 2008 judicial indictment, international arrest warrants were issued against Nyamwasa and 39 other Rwandan military officials.¹⁹ Between 2008 and 2014, the judicial investigation continued with new hearings of witnesses, protected witnesses, and experts. The investigative proceedings ordered by Judge Fernando Andreu confirmed and even broadened, with great detail, the scope of the criminal acts established by the 2008 indictment and disclosed from the 2005 International Forum for Truth and Justice in Africa of the Great Lakes Region.

The Spanish legal system does not permit trials in absentia; it requires the presence of accused persons. Between 2008 and 2017, on at least four different occasions, the government of Spain has requested Nyamwasa’s extradition from South Africa. South Africa is a State party to the Council of Europe’s Convention on Extradition.²⁰ Despite this, no response to these requests was received.

In June 2010, Nyamwasa survived an assassination attempt in Johannesburg. The Rwandan government denied all allegations of orchestrating the attack even though Nyamwasa maintained that the order to kill him came from the highest office in Rwanda.²¹ There is no official information available on Nyamwasa’s grounds of asylum nor the reasons for the granting of refugee status

¹⁹ These warrants included an INTERPOL Red Notice and a European Arrest Warrant.

²⁰ *Paris*, 13.XII (1957) (South Africa acceded to this convention on 12 February 2003).

²¹ “Rwandan Nyamwasa murder plot: Four guilty in South Africa” *BBC* (2014) available at <http://www.bbc.com/news/world-africa-28981317> (last accessed 6 November 2017).

by South Africa. Nyamwasa and his family were granted refugee status by the South African Department of Home Affairs.²²

The Consortium for Refugees and Migrants in South Africa (CoRMSA) filed for judicial review of Nyamwasa's refugee status in 2012. The hearings took place on 17 May 2013 at the South Gauteng High Court.²³ They requested that South African authorities withdraw their decision to grant Nyamwasa refugee status. Despite controversial high court proceedings, the parties reached an out of court agreement before the appeal hearing in April 2017.

This agreement has been made an order of court.²⁴ The Supreme Court of South Africa reviewed Nyamwasa's application for asylum and set it aside. It suspended the order for a period of 180 days from the date of appeal²⁵ in order to enable South Africa's refugee authorities to review the granting of asylum to him.²⁶ South Africa appears to be wilfully ignoring court orders in its ongoing attempt to provide protection to a suspected war criminal. Asylum was granted in 2010 and the judicial review process commenced in 2012. This fraught and drawn out legal process is evidence enough of South Africa's disregard for the rule of law in favour of impunity for the perpetrators of international crimes. A second asylum hearing took place in February 2018. At the time of publication the South African authorities had not yet made a fresh decision on whether to grant or refuse refugee status. At the time of publication South Africa's refugee authorities had not yet reviewed the granting of asylum.

22 *See id.*

23 *See* "Media Advisory: Final Arguments in SA High Court Challenge To Refugee Status Of Controversial Rwandan General And Suspected War Criminal" SALC (2013) available at <https://southernafricalitigationcentre.org/2017/05/22/media-advisory-judicial-review-of-decision-to-grant-refugee-status-to-suspected-war-criminal-appeal-hearing-before-the-supreme-court-of-appeal/> (last accessed: 6 November 2017).

24 <https://southernafricalitigationcentre.org/wp-content/uploads/2010/06/SUPREME-COURT-ORDER-SETTING-ASIDE-HIGH-COURT-JUDGMENT.pdf>

25 Supreme Court Hearing date was scheduled for 24 April 2017.

26 As of 1 November 2017, no decision had yet been made on the review of the granting of refugee status to Nyamwasa.

Human rights, national law and the reduction of statelessness

Kenneth Asamoah Acheampong

“Give us our identity cards and we will hand over our Kalashnikovs.”¹

Introduction

The opening quote, from Guillaume Soro,² is a poignant reflection of the dire ramifications arising out of disrespect for the basic human right to a nationality, which pre-empts statelessness. The foundational Universal Declaration of Human Rights (UDHR)³ asserts that, “[e]veryone has the right to a nationality.”⁴ The Preamble of the UDHR sets out one of the jurisprudential underpinnings of the Declaration by stating that, “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”⁵ This rights based statement directly engages the underlying rationale of Soro’s aforementioned quote; where human rights are ignored, the possibility of rebellion, which may be accompanied by violence, cannot be ruled out.⁶

In making this statement about Kalashnikovs, Guillaume Soro, was, therefore, stating a major reason for the Cote d’Ivoire civil war; a huge segment of Ivorian society lacked nationality, and was therefore stateless. Soro was contending that he and his followers would continue to engage in violence in order to achieve their goal of Ivorian nationality and, thereby, getting rid of their

1 G Soro, quoted by B. Manby, “How will the UNHCR’s statelessness campaign affect Africa?” available at africanarguments.org/2014/11/12/how-will-the-unhcrs-statelessness-campaign-affect-africa-by-bronwen-manby/ (last accessed: 14 October 2017).

2 Guillaume Kigbafori Soro was the Prime Minister of Cote d’Ivoire from April 2007 to March 2012. Prior to this position, he led the Patriotic Movement of Cote d’Ivoire and, later, the New Forces (rebel groups), as its Secretary-General. He made this statement during the First Ivorian Civil War, which took place from 19 September 2002 to 4 March 2007. During the war the country remained split in two, with the Muslim North controlled by the rebels and the Christian south held by the government. The Second Ivorian Civil War, which led to the overthrow of President Laurent Gbagbo (President since 2000) and his capture and dispatch to the The Hague to stand trial before the International Criminal Court for crimes against humanity, took place from 28 November 2010 to 11 April 2011. Soro has been Speaker of the Ivorian National Assembly since March 2012. See RA Lee “The First Ivory Coast Civil War (2002-2007)” *The History Guy* (2011) available at www.historyguy.com-ivory-coast-civil-war (last accessed 14 October 2017).

3 Universal Declaration of Human Rights (UDHR) UN Doc. A/RES/217 A (III) (1948).

4 *Id* Article 15(1).

5 *Id* Preamble, para. 3.

6 The Kalashnikovs he was referring to were the most famous assault rifle, aka AK-47, invented by Lt. General Mikhail Kalashnikov, a Russian soldier.

forced condition as stateless people. If they were denied their basic human right to nationality, they would continue to engage in armed conflict to secure and maintain that fundamental right of human existence.

The UNHCR has identified the following reasons for statelessness: discrimination; marriage laws; birth-registration laws; administrative practices; transfer of territory; nationality based upon the *jus sanguinis* principle; denationalisation; conflict of laws; citizenship renunciation; and laws which lead to the automatic loss of citizenship.⁷

This paper seeks to interrogate statelessness through treaties adopted by the international community to confront it and vindicate the human right to nationality. Of primary focus are the 1954 Convention relating to the Status of Stateless Persons (1954 Convention)⁸ and the 1961 Convention on the Reduction of Statelessness (1961 Convention).⁹ This paper centres itself on national law, as it is within nations or states that the reduction of statelessness takes place. Whatever human rights are guaranteed at the international level, it is usually at the domestic or national level that such rights find substantive meaning and content in terms of their application.

Statelessness and Nationality

The 1954 Convention, which is the seminal international treaty addressing the way that stateless persons should be treated, defines the term “stateless person” as, “a person who is not considered as a national by any State under the operation of its law.”¹⁰

States party to the Convention may not make a reservation to this definition of stateless persons.¹¹ Furthermore, the Office of the UN High Commissioner for Refugees, has affirmed that this definition binds all States party to the Convention. Additionally, the International Law Commission concluded that this definition can, “no doubt be considered as having acquired a customary nature.”¹²

In interpreting any convention, one must refer to the Vienna Convention on the Law of Treaties (VCLT).¹³ It states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁴ This context includes the treaty’s basic text as well as its preamble and annexes and agreements and instruments related to the treaty’s conclusion.¹⁵

7 “Information and accession package: the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness” UNHCR (1996) para. 10 available at <http://www.refworld.org/docid/3ae6b3350.html> (last accessed: 14 October 2017); see also C Collins & D Weissbrodt “The Human Rights of a Stateless Person” *Human Rights Quarterly Volume 1*(28) (2006) 253.

8 Convention relating to the Status of Stateless Persons (1954 Convention) *UN, Treaty Series, Vol. 360, 111; Registration No. 5158* (1954).

9 Convention on the Reduction of Statelessness (1961 Convention) *UN, Treaty Series, Vol. 989, 175* (1961) .

10 Stateless Convention (1954) Article 1.

11 *Id.*, Article 38(1) “At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1) and 33 to 42 inclusive.”

12 “Articles on Diplomatic Protection with commentaries” *International Law Commission* (2006) 49 available at <http://www.refworld.org/pdfid/525e7929d.pdf> (last accessed: 14 October 2017).

13 Vienna Convention on the Law of Treaties (VCLT) *United Nations, Treaty Series, Vol. 1155, 331* (1969).

14 *Id.*, Article 31(1).

15 *Id.*, Article 31(2).

According to the Preamble of the 1954 Convention, the High Contracting Parties considered four issues pertinent to the adoption of the Convention:

- (i) the affirmation, by both the UN Charter and the UDHR, of the principle that human beings shall enjoy fundamental rights and freedoms without discrimination;
- (ii) the United Nations manifestation, on various occasions, of its profound concern for stateless persons and its endeavour to assure stateless persons the widest possible exercise of these fundamental rights and freedoms;
- (iii) the fact that the 1951 Convention relating to the Status of Refugees covers only stateless persons who are, also, refugees and that there are many stateless persons who are not covered by the 1951 Convention; and, finally,
- (iv) that it is desirable to regulate and improve the status of stateless persons by an international agreement.¹⁶

These issues form the template for the analysis of the 1954 Convention.

According to the 1954 Convention, there are two constituent elements of the definition of the term stateless person, “not considered as a national...under the operation of its law” and “by any State”.¹⁷

A state in this context is determined by how the concept of statehood has evolved in international law. This evolution started with the Montevideo Convention on the Rights and Duties of States,¹⁸ which defines the personality of a state in international law as an entity which possesses, “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”¹⁹ These factors are, however, not exhaustive. Additional contemporary factors include the right to self-determination, the prohibition on the use of force, the effectiveness of the entity claiming statehood, and the consent of the State which previously exercised control over the territory in question.²⁰

As contended by the UNHCR, “[f]or an entity to be a ‘State’ for the purposes of Article 1(1) it is not necessary for it to have received universal or large-scale recognition of its statehood by other States or to have become a Member State of the United Nations. Nevertheless, recognition or admission will be strong evidence of statehood.”²¹

Furthermore, the reference to law in the clause “under the operation of its law” in the definition of a “stateless person” in article 1(1) of the Convention is broadly interpreted to go beyond constitutional law and statutory law (or legislation) and to include case law, ministerial orders, decrees, regulations and customary practices.

The issue of nationality also surfaces in this definition. In an advisory opinion, the Inter-American Court of Human Rights defined nationality as follows:

16 See Stateless Convention (1954) Preamble.

17 *Id.*, Article 1(1).

18 Montevideo Convention on the Rights and Duties of States *League of Nations, Treaty Series, Vol. 165* (1933) 20-43.

19 *Id.*, Article 1.

20 See e.g. MN Shaw, “Creation of Statehood” *International Law* (1986) 126 – 130; see also P Malanczuk, “States and Governments” *Akehurst’s Modern Introduction to International Law* (1997) 75 – 88.

21 “Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons” *UNHCR HCR/GS/12/01* (2012) para. 13.

“Nationality can be deemed to be the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state. In different ways, most states have offered individuals who did not originally possess their nationality the opportunity to acquire it at a later date, usually through a declaration of intention made after complying with certain conditions. In these cases, nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality; it is based rather on a voluntary act aimed at establishing a relationship with a given political society, its culture, its way of life and its values.”²²

The International Court of Justice stated that in terms of state practice, nationality is “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”²³

This statement sums up a basic philosophy underpinning nationality acquisition. In terms of national sovereignty, and its concomitant right to self-determination, the state exercises the right to determine its nationals and lays down the rules for determining nationality. However, this right is not unfettered; it is constrained by considerations of other states’ interests and international law, such as the statelessness conventions explored in this paper. As stipulated by the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws:

“It is for each state to determine under its own law who are its nationals. This law shall be recognised by other states in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.”²⁴

These statements are paradigmatic of both the classical and the contemporary view of nationality. The classical approach to nationality sees the state as having an absolute right in its determination of nationality of individuals within its territorial boundaries. Nationality is granted by a state to its subjects and a subject cannot initiate a claim for nationality. This classic doctrinal position on nationality has largely been replaced with the contemporary approach to nationality. The contemporary approach sets nationality as a right for each individual. While states still determine nationality, they must work within the constraints of international human rights law. As the Inter-American Court of Human Rights unequivocally stated:

“It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual’s legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.”²⁵

22 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-American Court of Human Rights OC-4/84 (1984) para. 35.

23 *Nottebohm Case (Liechtenstein v Guatemala)* Second Phase, ICJ Reports (1955) 4.

24 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws League of Nations, *Treaty Series*, Vol. 179, 89, Reg. No. 4137 (1930) Article 1; see also Preamble, Para. 3, “Recognising accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality.”

25 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-American

Nationality is an important human right that extinguishes statelessness. Because it is a human right, it is universal and applies to every person. As the UDHR stipulates:

“(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”²⁶

The two main principles propping up this human right to a nationality are *jus sanguinis*²⁷ and *jus soli*.²⁸ *Jus sanguinis*, nationality is based upon descent from parents who are nationals of a state whereas *jus soli* nationality is premised upon birth within a state’s territorial limits. In addition to these two principles, there is also *jus domicili*²⁹ which is nationality determined by the laws of the state in which an individual has her/his permanent home or domicile.

These foundational aspects of the right to nationality underlie the objectives of the 1954 and 1961 Conventions.

Objectives of the 1954 and 1961 Conventions

As discussed above, interpretations of a treaty must refer to the treaty’s basic text as well as its preamble and annexes and agreements and instruments related to the treaty’s conclusion.³⁰ The four issues considered pertinent to the adoption of the Convention, as set out in the Convention’s Preamble, form the cornerstone of the Convention’s objectives. Briefly, they are, as follows: (i) the enjoyment of fundamental rights and freedoms without discrimination; (ii) the endeavour to assure stateless persons the widest possible exercise of fundamental rights and freedoms; (iii) the fact that the 1951 Convention relating to the Status of Refugees covers only stateless persons who are, also, refugees and that there are many stateless persons who are not covered by the 1951 Convention; and, finally, (iv) the desirability to regulate and improve the status of stateless persons by an international agreement.

The 1961 Convention states in its Preamble that its objective is to “reduce statelessness by international agreement”. This convention is symbiotically linked to the 1954 Convention.³¹

Core obligations of States Parties to the 1954 and 1961 Conventions

The core obligations of States Parties to the 1954 and 1961 Conventions are related to the mutual and primary aim of the Conventions to eradicate statelessness. Because of this primary aim, the 1954 Convention stipulates that the following matters do not admit any reservation:³² (i) the defi-

Court of Human Rights OC-4/84 (1984) para. 32.

²⁶ UDHR, Article 15.

²⁷ This is a Latin expression meaning “law relating to blood” referring to nationality by birth.

²⁸ This is a Latin expression meaning “law relating to the soil” referring to nationality by birth on a territory.

²⁹ It is also referred to as the *lex domicilii*, which is a Latin expression meaning “the law of domicile”.

³⁰ Vienna Convention on the Law of Treaties (VCLT) *United Nations, Treaty Series*, Vol. 1155, 331 (1969) Article 31(2).

³¹ The UNHCR is the body charged with assisting a person claiming the benefit of the Convention and the presentation of her/his claim to the appropriate authority. See 1961 Convention, Articles 11 and 20; see also UN General Assembly Resolution 31/36 of 1976.

³² See VCLT (1969) Article 2(d), (“Reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of

inition of stateless person; (ii) the principle of non-discrimination; (iii) religious freedom; (iv) access to courts; (v) information on national legislation adopted by States Parties to the Convention to ensure the Convention's application; and (vi) the settlement of disputes between States Parties.³³

A better understanding of the objectives or aims of the Convention can be achieved by analysing why a State cannot make reservations to these aspects of the Convention. First, it can logically be contended that any reservation to the definition of a stateless person would totally destroy the main objective of the Convention. Without a definition of who is Stateless, the treaty could do nothing towards regulating States treatment of the stateless, improving the stateless' status and enabling them to enjoy human rights in equal measure with all human beings.

Secondly, States may never derogate from the human rights principle of non-discrimination. It is essential to ensure that all human beings are treated equally by virtue of their common humanity. This is the crux of the principle of the universality of human rights. As stated by Boutros Boutros-Ghali, former UN Secretary-General:

“Universality is inherent in human rights. The [UN] Charter is categorical on this score. Article 55 states that the United Nations shall promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.’ The title of the 1948 Declaration – *universal, not international* – reinforces this perspective.”³⁴

Thirdly, religious freedom is part and parcel of a group's culture; their way of life. When it is undermined or denigrated, the entire life of that group of people, including their very existence as human beings, is threatened. People whose way of life is threatened will often turn to social unrest and violence to protect their culture. This was one of the underlying reasons for the two civil wars of Cote d'Ivoire as the Muslim North of the country felt marginalised by the Christian South. It is for this reason that the United Nations General Assembly stated that, “the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live.”³⁵

Further, if Contracting Parties were empowered to make reservations from their obligation to uphold stateless persons' right of access to courts, there would be no point for the Convention's regulation of statelessness. A right without access to a remedy is worthless. These Parties could with one hand guarantee the enjoyment of human rights by stateless persons and, with the other hand, take them away simply by preventing the stateless persons access to courts to vindicate their rights when they face abuse.

The Contracting States obligation to, “communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention”

certain provisions of the treaty in their application to that State.”)

33 Stateless Convention (1954) Article 38; see Articles 1, 3, 4, 16(1), 33 and 42; see also Articles 35 (signature, ratification and accession), 36 (territorial application clause), 37 (Federal clause), 38 (reservation), 39 (entry into force), 40 (denunciation), 41 (revision), and 42 (notifications by the Secretary-General of the United Nations).

34 “Address by Secretary-General Boutros Boutros-Ghali, delivered at the opening of the World Conference on Human Rights, Vienna 14 June 1993” *UN Doc. A/CONF.157/22* (1993) (emphasis added).

35 “UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities” *UN Doc. A/RES/47/135* (1992) Preamble.

is essential for accountability.³⁶ If this article were to be capable of reservation, the Convention's Contracting Parties could avoid providing essential information to the UN Secretary-General. This would hamper the Secretary-General's office's ability to detect laws and regulations of Parties which undermine or completely destroy the rights of stateless people within their territories. This type of reservation would, in letter and spirit, defeat the objects and purposes of the Convention.³⁷

Finally, the Convention requires that State Parties settle disputes according to the terms of the Convention. It provides that "[a]ny dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."³⁸ Through this article, the Convention's Contracting Parties keep each other in check in the protection and implementation of the human rights of stateless persons. Where they are at odds with each other over how any of the Convention's provisions should be interpreted or applied and they cannot settle the dispute by themselves, either *inter se* or by means agreed to by them, they are obligated to refer the matter to the International Court of Justice (ICJ) for settlement. Without a fair arbitrator like the ICJ, the rights of stateless persons would be seriously jeopardised.

It is worth noting that the ICJ provides a suitable forum for such disputes' settlement. Firstly, the UN Charter provides that the International Court of Justice (ICJ) is, "the principal judicial organ of the United Nations."³⁹ Secondly, the Charter's obligates each Member State of the United Nations to comply with the decision of the ICJ in any case to which it is a party.⁴⁰ More tellingly, the Charter also provides an avenue for the enforcement of any such decision. As it states:

"If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court [ICJ], the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."⁴¹

In the context of the 1954 Convention, these processes could secure the human rights of stateless persons and prevent a dilution or repudiation of these rights as a result of disputes between the Convention's Contracting Parties.

In similar fashion, the 1961 Convention limits States' abilities to make reservations only in respect to Article 11 (assistance in claiming the benefits of the Convention), Article 14 (settlement of disputes between Contracting States concerning the interpretation or application of the Convention) and Article 15 (the Convention's application to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any Contracting State is responsible).⁴² Any other reservations to the Convention are prohibited.

36 Stateless Convention (1954) Article 33.

37 This would violate the Vienna Convention on the Law of Treaties (1969) Article 19(c).

38 Stateless Convention (1954) Article 34.

39 UN Charter (1945) Article 92.

40 *Id* Article 94(1).

41 *Id* Article 94(2).

42 Stateless Convention (1961) Article 17.

The texts of the two statelessness Conventions flesh out the dry bones of their highly motivational preambles. In this context, it is worth noting that no matter the level of respect accorded to the human rights of a stateless person by a state, such a person's circumstances in life can never be as secure as those of a similarly situated national of the state. In other words, statelessness is always disfavoured to citizenship. Hence, the 1954 Convention also obligates the Convention's Contracting States to, as far as possible, facilitate the assimilation and naturalization of stateless persons.⁴³

While the State is making every effort to expedite naturalization proceedings on behalf of stateless persons, the Convention also requires its Contracting States to afford stateless persons in its territories the opportunity to enjoy human rights. The principle of equality is the linchpin of such rights, as these rights belong to all human beings. As Imra Szabo has posited, "the universal equality of all constitutes the central institution of human rights", and that "by virtue of its importance among human rights, equality is regarded as a virtue to be protected before any other."⁴⁴ For this reason, the Convention obligates the Contracting Parties to assure stateless persons their enjoyment of the rights free from discrimination on account of race, religion or country of origin.⁴⁵

In furtherance of the equality principle, the Convention stipulates that States must treat stateless people the same as its nationals in regards to certain rights. These rights include the right to religious freedom and freedom as regards the religious education of their children,⁴⁶ the right of free access to courts of law,⁴⁷ the right of access to products in short supply and in respect of which a rationing system applicable to the population at large is in place,⁴⁸ the right to public education at the elementary level,⁴⁹ and the right to family allowance and social security.⁵⁰

There are other rights that the state must guarantee to stateless persons in a manner as favourable as possible and, in any event, not less favourable than that accorded to aliens or non-nationals generally in the same circumstances. These include the right to acquire movable and immovable property and to take out leases and enter into contracts pertaining to such property,⁵¹ the right of association as regards to non-political and non-profit-making associations and trade unions,⁵² the right to wage-earning employment,⁵³ the right to engage in self-employment in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies,⁵⁴ the right to practise a liberal profession,⁵⁵ the right to housing,⁵⁶ and the right to freedom of movement

43 Stateless Convention (1954) Article 32.

44 I. Szabo "Historical Foundations of Human Rights and Subsequent Developments" in K. Vasak (Ed.) *The International Dimensions of Human Rights* (1982) 38.

45 Stateless Convention (1954) Article 3.

46 *Id* Article 4.

47 *Id* Article 16.

48 *Id* Article 20.

49 *Id* Article 22.

50 *Id* Article 24.

51 *Id* Article 13.

52 *Id* Article 15.

53 *Id* Article 17.

54 *Id* Article 18.

55 *Id* Article 19.

56 *Id* Article 21.

without which most of the other rights would be severely curtailed or made redundant.⁵⁷

Apart from these expressed rights, the 1954 Convention stipulates that any additional rights and benefits granted by a Contracting State to stateless persons shall not be impaired by the Convention's provisions.⁵⁸ In the enjoyment of all these rights the stateless person's personal status shall be governed by the law of her/his domicile and, in the absence of such domicile, the law of the country of her/his residence. In this respect, Contracting States must respect rights previously acquired by stateless persons; this is especially the case with rights attaching to marriage, which are attached to this personal status.⁵⁹

In order for Contracting Parties of the Convention to be able to identify stateless persons and facilitate their enjoyment of the rights set out in the Convention, the Convention mandates that these Parties shall issue identity papers or documents to stateless persons within their territory who do not hold or possess a valid travel document.⁶⁰ Furthermore, these States should issue travel documents to stateless persons staying lawfully within their territories to enable them to travel outside those territories unless compelling reasons of national security or public order otherwise require.⁶¹

Without such documents, stateless persons would exist in limbo in the eyes of the law. Such existence would deprive them of the effective provision of the law, including the law's protection of their human rights. This could make them restless to the point of using any means, including those prohibited by the law, to back their demand for legal recognition through these documents. That, unfortunately, was the cause of the debilitating civil wars in Cote d'Ivoire.

Human rights are not enjoyed in a vacuum; they find substantive meaning in a community of human beings. It is for this reason that when one is enjoying these rights, s/he must realise that s/he owes an obligation or duty to other individuals not to prevent them from enjoying their own human rights. Furthermore, one owes similar obligations to the society as a collective in terms of the general welfare of the society. Thus, stateless persons are obligated to conform to the laws and regulations of the country in which they find themselves and to respect or uphold public order measures.⁶²

The Convention does not apply to persons with respect to whom there are serious reasons for considering that they have committed any of the following: a crime against peace, a war crime, or a crime against humanity, as defined in relevant international instruments; a serious non-political crime outside the country of their residence prior to their admission to that country; or acts contrary to the United Nations' purposes and principles.⁶³

⁵⁷ *Id* Article 26.

⁵⁸ *Id* Article 5.

⁵⁹ *Id* Article 12.

⁶⁰ *Id* Article 27.

⁶¹ *Id* Article 28.

⁶² *Id* Article 2.

⁶³ *Id* Article 1(2). For the Purposes and Principle of the United Nations, *see* UN Charter (1945) Chapters 1 and 2. In sum, the four Purposes of the UN are, as follows: the maintenance of international peace and security; the development of friendly relations among nations; the achievement of international co-operation in solving international problems in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion; and being a centre for harmonizing the actions of nations in the attainment of these common ends. The seven Principles of the UN are, in sum, the following: the principle of the sovereign equality of all UN Members; the principle of good-faith fulfilment of Charter

The 1961 Convention sets rules by which citizenship would be conferred on stateless persons and not withdrawn. The Convention stipulates that nationality shall be granted to a person born in a Contracting Party's territory if that person would otherwise be stateless.⁶⁴ The grant of such nationality shall take place at birth or in terms of an application lodged with the relevant or appropriate national authority by or on behalf of the person concerned.

This basic provision of the Convention is contingent upon the applicant making an application by the age of 21 years.⁶⁵ Such an applicant's brush with the law may count in the determination of this application as her/his conviction for an offence against national security or imprisonment for 5 years or more may be taken into consideration in assessing her/his application. Care should be taken in the evaluation of such an application, especially in balancing concerns of national security. What may be claimed as an issue of national security is sometimes a mere façade for a state to deny citizenship to a person whose personal, political or family's views and inclinations may be deemed offensive to the powers-that-be in the state of her/his birth.

The Convention also allows a person born in the territory of a Contracting State to take the nationality of that state if s/he was born in wedlock and her/his mother is a national of that state and if s/he would otherwise be stateless.⁶⁶ Ethically, wedlock is encouraged in most societies. That was generally deemed to be the golden yardstick of human relations in 1961 when the Convention was adopted by the United Nations. However, in contemporary times, it is not generally held up as the standard by which to judge the moral integrity of a society. It is worth noting that it is not the intention of this paper to denigrate wedlock. However, in matters of the concept of human rights, which is posited on the common humanity of human beings, all persons are equal and should be treated as such whether born in or out of wedlock. As the UDHR states, "[a]ll human beings are born free and equal in dignity and rights."⁶⁷ Furthermore, the UDHR stipulates, pointedly, that "[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection."⁶⁸ Therefore, wedlock should not be a yardstick in considering issues of nationality and statelessness.

Where a person is legally precluded from assuming her/his birth nationality, the Convention permits her/him to assume the nationality of the state of her/his birth if that nationality was held by either one of her/his parents at the time of her/his birth.⁶⁹ This mode of nationality acquisition may be contingent upon the following: (i) an application in respect of such claim for nationality must be made by the age of 23 years; (ii) a Contracting State may impose a residence requirement not exceeding 3 years immediately prior to the application; or (iii) it may be required that the applicant has always been stateless.⁷⁰

obligations; the principle of peaceful settlement of international disputes; the principle of the refrain from the threat or use of force against the territorial integrity or political independence of any state; the principle of unlimited assistance to the United Nations in any action it takes; the principle of ensuring that non-UN states act in accordance with UN principles for purposes of the maintenance of international peace and security; and the principle of non-interference in matters essentially within the domestic jurisdiction of any state.

64 Stateless Convention (1961) Article 1.

65 *Id* Article 1(2)

66 *Id* Article 1(3)

67 UDHR (1948) Article 1.

68 *Id* Article 25(2).

69 Stateless Convention (1961) Article 1(4).

70 *Id* Article 1(5).

Another major provision of the Convention deals with foundlings. They should be presumed to have been born in the state in which they were found and be conferred with nationality of that state. This, however is a rebuttable presumption if facts come to light that such a child is not a foundling.⁷¹ This provision helps diminish the number of people in the future who are stateless.

The Convention also compels Contracting States not to deprive a person of her/his nationality so as to render her/him stateless except when such a person has acquired nationality through misrepresentation or fraud or has been disloyal to the Contracting State.⁷² While misrepresentation, fraud and disloyalty are all capable of detection empirically, the issue of disloyalty to a state is more controversial. What constitutes disloyalty could easily be wrapped in a mist, especially politically. For example, actions deemed disloyal to a state may amount to nothing more than state officials' resentment of genuinely-held opinions or views by a stateless person or a group of such persons. Such opinions or views may be in relation to factual conditions of reception centres where stateless persons are being held, which may embarrass the state. It could also be in respect to the treatment they experience from public officials and law-enforcement agents in the name of state security. Where nationality is denied on account of disloyalty to a state, the Office of the UN High Commissioner for Refugees (UNHCR), the primary guardian of the 1954 and 1961 statelessness Conventions, must carefully examine these cases for spurious attempts to deny nationality to those who would otherwise be stateless. Otherwise, the Convention's laudable goals would amount to nothing more than empty rhetoric and statelessness would be neither reduced nor eliminated.

Like denial based on disloyalty to the state, denial of nationality on account of national security should also be watched with an eagle's eyes. Too many indeterminable factors, such as partisan political standpoints, could determine a state's conception of national security. National security as a justification for denying nationality has the potential to be abused and is a slippery road to undemocratic practices. It should be critically assessed when offered as the ground for the denial of nationality.

The 1961 Convention's mandate that nationality should not be deprived on racial, ethnic, political or religious grounds follows from the fundamental human rights' principle of equality and non-discrimination, without which human rights discourse would be vacuous.⁷³ Furthermore, under the Convention, all persons who are stateless have the right to seek the assistance of the UNHCR to claim benefits under the Convention.⁷⁴

In order to solidify its objective of reducing statelessness, the Convention mandates that its provisions should not be construed to detract from any law or treaty provision otherwise aiding the reduction of statelessness.⁷⁵ Furthermore the Convention prohibits entering into treaty which transfers territory in such a way that causes the creation of statelessness.⁷⁶ As with the 1951 Refugee Convention, any dispute as to the interpretation or application of the provisions of the 1961 Con-

71 *Id* Article 2.

72 *Id* Article 8.

73 *Id* Article 9.

74 *Id* Article 11.

75 *Id* Article 13.

76 *Id* Article 10.

vention has an ultimate forum in the International Court of Justice. The aim of all these provisions is to use human rights based legal frameworks to reduce and, ultimately, eliminate statelessness.

Statelessness and Human Rights

As stated above, statelessness negates human rights; it does so with no saving for any such right. A stateless person is deprived of the nationality on the basis of which s/he can assert and vindicate any human right. Theoretically, s/he can assert that by virtue of her/his humanity, *per se*, s/he is entitled to all human rights as human dignity underpins the concept of human rights. However, s/he is bereft of the legal power to vindicate such rights through the intervention of a state, in terms of the vertical application of these rights and other individuals and non-human legal entities like companies, through horizontal application of these rights.

This state of affairs is highly deleterious to an individual's dignity as a human being. As asserted by the United Nations, "[h]uman rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings."⁷⁷ Furthermore, in terms of the essence of human rights the UN has stated:

"Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. *They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.*"⁷⁸

The content of this inherent dignity is derivable from universal values some of which, as Malcolm Shaw contends, are respect, power (mainly in terms of ability to participate in, contribute to and enjoy development),⁷⁹ enlightenment, skill, health, well-being, affection, and rectitude.⁸⁰ These values are impliedly referred to by the UN Charter, the first contemporary human rights' instrument that affirms the dignity that inheres in all human beings. It does so, firstly, by its assertion that "the peoples of the United Nations [are] determined... to reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person."⁸¹ Secondly, the Charter's substantive provisions stress this determination through both direct references⁸² and indirect references⁸³ to the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The landmark UDHR outlines the substantive content of the fundamental human rights originally asserted in the UN Charter. It states that "[a]ll human beings are born free and equal in dignity and rights."⁸⁴ The International Bill of Human Rights,⁸⁵ the cornerstone of the myriad of human rights

77 "Human Rights: Questions and Answers" *United Nations* (1987) 4.

78 *Id* (emphasis added).

79 See "UN Declaration on the Right to Development" *UNGA Doc. A/RES/41/128* (1986) Article 1(1).

80 MN Shaw *International Law* (2003) 249.

81 UN Charter (1945) Preamble.

82 *Id* Articles 1(3), 13(1)(b), 55(c), 62(2), 68 and 76(c).

83 *Id* Articles 14, 23, 24 and 56; any reference to the purposes and/or principles of the UN is an indirect reference to human rights and fundamental freedoms as set out in Article 1.

84 UDHR (1948) Article 1.

85 This phrase refers to the Universal Declaration of Human Rights (UDHR) (1948); the International Covenant on Civil and Political Rights (ICCPR) (1966), and its Optional Protocols (1966 and 1989); and the International Covenant on Economic,

instruments adopted by the international community principally through the United Nations, also indicates that the enjoyment of human rights, such as the right to life, the right to freedom of speech, the right to freedom of movement, the right to medical care, the right to food, and the right to development, rests on the inherent dignity of all human beings.

For the stateless person these human rights are delusional or, at best, merely rhetorical. The fundamental human rights' principle of universality of human rights has no application to her/him. The principle asserts that all people everywhere are entitled to human rights, yet, the stateless person struggles to get noticed as a human being who exists in our world let alone enjoy the human rights that are entitled to her/him.

The importance of this principle of the universality of human rights, especially for stateless persons, was solidified when, for the first time, the Member States of the UN managed to come to a unanimous conclusion that human rights are universal in their Vienna Declaration and Programme of Action (VDPA).⁸⁶ After “[e]mphasising the responsibilities of all States, in conformity with the Charter of the United Nations to develop and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”, the Declaration states that, “[h]uman rights and fundamental freedoms are the birth right of *all human beings*; their protection and promotion is *the first responsibility* of Governments.”⁸⁷

Thereafter, the VDPA stresses that “[a]ll human rights are *universal*, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.”⁸⁸ In a similar vein, the United Nations Development Programme (UNDP) makes the following assertion:

“Human rights are the rights possessed *by all persons* by virtue of their common humanity, to live a life of freedom and dignity. They give *all people* moral claims on the behaviour of individuals and on the design of social arrangements – and are universal, inalienable and indivisible.”⁸⁹

The UDHR, which is foundational to the many other United Nations human rights' instruments, solidly adheres to the principle of the universality of human rights when its preamble identifies it, “as a common standard of achievement for all peoples and all nations.”⁹⁰ Although this human rights' instrument began as a non-binding Declaration, it has become legally binding in customary international law through the repeated practices of states and *opinio juris*. This transformation gives further evidence to the contention that the denial of human rights to stateless persons takes away their humanity and impinges upon their inherent human dignity.

Another human rights' principle seriously challenged by statelessness is the principle of equality

Social and Cultural Rights (ICESCR) (1966), and its Optional Protocol (2008).

86 Vienna Declaration and Programme of Action (VDPA) *UN Doc A/CONF.157/24* (1993); see also Boutros Boutros-Ghali, “We must recognize that while ideological splits and economic disparities may continue to be the hallmark of our international society, they cannot interfere with the universality of human rights.” *Address by Secretary-General Boutros Boutros-Ghali, delivered at the opening of the World Conference on Human Rights, Vienna, 14 June 1993* UN Doc. A/CONF.157/22 (1993).

87 VDPA (1993) preamble and para. 1(1) (emphasis added).

88 *Id* para. 5 (emphasis added).

89 “Human Development Report 2000” *UNDP* (2000) 16 (emphasis added) available at http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf (last accessed 14 October 2017).

90 UDHR (1948) Preamble.

and non-discrimination. It contends that on account of the fact that all human beings are equal by virtue of their common humanity, human rights apply to all of them equally without any distinction or discrimination based on race, sex, language, religion, birth, social or national origin, creed or other status. However, the stateless person suffers all kinds of discrimination in her/his daily life. Worse of all, s/he literally lives in Hobbes⁹¹ dreaded state of nature in which might is almost always right and social relations are unregulated and anarchical.

It is important to interrogate some national laws and policies to ascertain the extent to which they uphold the human rights of stateless persons. We should see whether they help accomplish the critical task of abating and, ultimately, eliminating statelessness altogether.

Some National Laws and Policies on Statelessness

The opening statement of this paper, “Give us our identity cards and we will hand over our Kalashnikovs”⁹² displays very clearly that national laws and policies on nationality can have disastrous social consequences. They can even lead to civil wars, as happened in Cote d’Ivoire. The *Ivoirité* policy formed the basis of the two civil wars in which the right to life was decimated.⁹³ This policy was promulgated by those in the Christian south in order to deny the Muslim north their Ivorian nationality. This was motivated by the fact that the northern population migrated into the country from other countries, principally Burkina Faso.

The fanning of ethnic tensions in Cote d’Ivoire, which was orchestrated mainly by politicians, has blighted the development of the country and undermined its social cohesion.⁹⁴ Each social group in the country is suspicious of every other group. Ethnicity has been manipulated to create a fragmented society where human rights protection is, largely, determined by the social group to whom one belongs. This is the outcome of the elections’ violence in which security forces targeted civilians solely and explicitly on the basis of their religion, ethnic group or national origin. The Ivory Coast Nationality Code,⁹⁵ was administered in a manner that denied nationality to a large segment of Ivorian society in the northern part of the country. The deadly result was the civil wars which plunged the country into total anarchy, destroyed the lives of many Ivoirians, and led to a plethora of human rights violations.

Several States have made reservations upon ratification or accession to the 1954 Convention relating to the Status of Stateless Persons. When such reservations are made conditional upon an un-stated law of a State Party to the Convention, it becomes difficult to ascertain whether the national law operates to defeat the aims and purposes of the Convention, which the VCLT prohibits.⁹⁶

For example, in ratifying the 1954 Convention, Antigua and Barbados made the following general reservation: “The Government of Antigua and Barbados can only undertake that the provisions

91 Leviathan, Thomas Hobbes http://files.libertyfund.org/files/869/0161_Bk.pdf

92 *Supra* Note 1.

93 The 1st civil war of Ivory Coast took place from 19 September 2002 to 4 March 2007 while the 2nd spanned 28 November 2010 to 11 April 2011.

94 “The New Racism: The Political Manipulation of Ethnicity in Cote d’Ivoire” *Human Rights Watch* (2001) available at <https://www.hrw.org/report/2001/08/28/new-racism/political-manipulation-ethnicity-cote-divoire> (last accessed: 14 October 2017).

95 Act No. 1961-415 of 1961.

96 VCLT (1969) Article 19.

of articles 23, 24, 25 and 31 will be applied in Antigua and Barbados so far as the law allows.”⁹⁷ Bulgaria, also, made a similar reservation when, in ratifying the Convention, it stated, *inter alia*, “Bulgaria shall apply article 21 according to the conditions and the order provided by the national legislation of the Republic of Bulgaria.”⁹⁸ In similar terms, Latvia made the following reservation to the Convention: “In accordance with article 38 of the Convention the Republic of Latvia reserves the right to apply the provisions of article 27 subject to limitations provided for by the national legislation.”⁹⁹ In the same vein, the Czech Republic made the following reservation when ratifying the Convention: “Article 23 of the Convention shall be applied to the extent provided by the national legislation of the Czech Republic.”¹⁰⁰

The question that comes to mind in all these cases is what law or legislation is being referred to by these reservations? It is difficult to establish whether these reservations violate the Vienna Convention on the Law of Treaties’ prohibition on reservations which have the effect of defeating the aims and purposes of a treaty such as the 1954 Convention. Such reservations, which appear to be claw-back clauses, could very easily be facades behind which Contracting Parties attempt to shield national laws which actually defeat the object and purpose of the Convention. These laws should not be upheld to the detriment of the protections afforded to stateless persons by the Convention.

While States Parties are allowed to make some reservations to international instruments under international law, these reservations cannot totally eviscerate the obligations assumed by such parties under these instruments. This is the context in which the VCLT states that, “[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation.”¹⁰¹ Furthermore, the VCLT explicitly defines a reservation as:

“A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”¹⁰²

Such reservations should not defeat the object and purpose of the treaty. States must conform with the stipulation of Article 19 of the VLCT, which permits reservations unless:

“(a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”¹⁰³

This provision forms the basis for the objections made by the Governments of Finland, Germany, Norway and Sweden to the Declaration made by the Government of Tunisia. Tunisia stated that it was making a reservation in accordance with Article 8, paragraph 3 of the 1961 Convention which

97 “Declarations and Reservations to the 1954 Convention relating to the Status of Stateless Persons” UN available at <http://www.unhcr.org/protection/statelessness/416114164/declarations-reservations-1954-convention-relating-status-stateless-persons.html> (last accessed: 14 October 2017).

98 *Id.*

99 *Id.*

100 *Id.*

101 VCLT (1969) Article 19.

102 *Id.* Article 2(1)(d).

103 *Id.*

allows it to retain the right to deprive a person of Tunisian nationality under certain circumstances provided for in its existing national law.¹⁰⁴ The objecting countries say that the Tunisian Declaration oversteps the permissible limits to the core duty of a state not to deprive a person of his/her nationality if such deprivation would render him/her stateless. In their view, the Tunisian Declaration restricts one of the essential duties of the 1961 Convention in a way contrary to the object and purpose of the Convention.

While treaty reservations should, in general, be avoided as they invariably water down treaty obligations, where any such reservation is made, it should be with specificity so as to make it abundantly clear which aspect of national law is applicable to the reservation. Even so, the reservation may still be found to be objectionable by some states party to the treaty. In this respect, the paper finds instructive the reservation made to the 1954 Convention by the Republic of Zambia. Zambia made the following two reservations:

“Article 22(1): The Government of the Republic of Zambia considers paragraph 1 of article 22 to be a recommendation only, and not a binding obligation to accord to stateless persons national treatment with respect to elementary education.”

“Article 28: The Government of the Republic of Zambia does not consider itself bound under article 28 to issue a travel document with a return clause in cases where a country of second asylum has accepted or indicated its willingness to accept a stateless person from Zambia.”¹⁰⁵

The international community would want the Republic of Zambia to withdraw these reservations for the better protection of stateless persons within her territory. However, at least these reservations are clearly spelt out and are not camouflaged by general reference to national law or national legislation. They enable other Contracting Parties to the 1954 Convention, the UN, and other stakeholders to constructively and pointedly engage Zambia on these reservations in terms of their impact on the object and purpose of the Convention.

104 See Stateless Convention (1961) Articles 8(2) and 8(3) (“2. Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State:

(a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality;

(b) where the nationality has been obtained by misrepresentation or fraud.

3. Notwithstanding the provisions of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

(a) that, inconsistently with his duty of loyalty to the Contracting State, the person

(i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or

(ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;

(b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.”)

105 Declarations and Reservations to the 1954 Convention relating to the Status of Stateless Persons UN available at <http://www.unhcr.org/protection/statelessness/416114164/declarations-reservations-1954-convention-relating-status-stateless-persons.html> (last accessed: 14 October 2017).

Conclusion

The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are important parts of the United Nations human rights' endeavour to identify, prevent, and reduce statelessness and protect stateless persons. Contemporary international law recognizes human rights based limitations of the state's traditional sovereign right to have absolute authority to confer and regulate nationality. This limitation helps protect the inherent dignity of stateless persons. The fundamental human rights' principles of universality of human rights, equality and non-discrimination provide important lenses to interpret the letter and spirit of the 1954 and 1961 Conventions on statelessness. These conventions unequivocally acknowledge that stateless persons are part of humanity, and thus deserve the full protections of human dignity that the human rights system provides.

Reservations to the Conventions should be specific, and not undermine their objects and purposes. Reservations based on general reference to national legislation without specification as to the content of such national legislation or which negate core duties of the Conventions are contrary to treaty law as stipulated in the Vienna Convention on the law of Treaties. These reservations should be withdrawn, in order to achieve full protection of stateless persons.

The paper ends with the following recommendations. First, the UN and all its agencies must intensify the effort to secure universal ratification of the statelessness Conventions as they ensure that those virtually living outside the ambit of our common humanity that secures human rights are brought into this fold. Secondly, the international community, acting principally through the UN, must continue to emphasise the subordination of the traditional absolute authority of a state to determine nationality to human rights' imperatives by which nationality is a human right to be enjoyed by all human beings. Furthermore, all Contracting Parties to these Conventions should withdraw reservations that they have made to the Conventions, especially those of a general nature, which tend to have the effect of claw-back clauses as they create room for the Conventions' Contracting Parties to renege on the obligations that they have assumed under the Conventions. In this manner, they would ensure absolute respect for the human rights of those who, but for the Conventions, would be denied the human rights that they share equally with the rest of humanity by virtue of their inherent dignity. Finally, UN Member States yet to ratify or accede to the Conventions should, on account of the imperatives of human rights, do so forthwith and, thereby, join the international effort to totally eliminate the odious scourge of statelessness.

Uganda's Refugee Act of 2006: Lessons for Botswana

Dr Elizabeth Macharia-Mokobi

Introduction

Fifty years of independence has given Botswana a golden opportunity to take a look back at legal successes and challenges.¹ One of the areas that has triggered interest, because of the apparent stagnation in law reform, has been Botswana's refugee laws. Botswana's Refugee (Recognition and Control) Act² has never been overhauled since its promulgation in 1967. The Act, as its name belies, is control-oriented and not protection-oriented. As is typical of control oriented legislation which subsisted in several countries on the African continent, the Botswana's Refugee Act is not comprehensive, it has little emphasis on protection but is more concerned with controlling the influx of refugees, it makes no provision for non-refoulement, and it gave wide discretionary powers to determine who was a refugee to the relevant minister.³

The lack of a protection-oriented law in Botswana should not be seen as unusual. In fact, Botswana's practice regarding the acceptance of refugees over the years can be described as generous. Like many countries in the region which had to abide existing side by side with apartheid South Africa, refugees were welcomed into the country despite the control oriented nature of the act. Botswana's practice was exemplary and not as severe as might be imagined.⁴

Botswana became a state party to the 1951 Convention on the Status of Refugees⁵ and its 1967 Protocol on 6 January 1969. Botswana became a signatory to the OAU Convention Governing Specific Aspects of Refugee Problems in Africa⁶ on 16 May 1995. Unfortunately, no steps have been taken nationally to domesticate these treaties. Botswana is a dualist country and treaties have no force of law in Botswana until implementing legislation is promulgated.⁷ Botswana's refugee law therefore remains archaic and anachronistic and much in need of review.

1 Botswana attained independence from British rule on 30 September 1966 and in 2016 celebrated its fiftieth year of independence.

2 Cap 25:03 Laws of Botswana.

3 B Rutinwa "Asylum and Refugee Policies in Southern Africa: A Historical Perspective" *SARPN* (2002) para. 3.2 available at http://www.sarpn.org/EventPapers/april2002_imp/rutinwa/page3.php (last accessed: 14 October 2017).

4 *Id.*

5 General Assembly resolution 429 (V) (1951).

6 UN Treaty Series No. 14691 (1969).

7 See *Good v The Attorney General* (2005) (1) BLR 462 (HC); *Attorney General v Dow* (1992) BLR 119 at 152; *Ramantele v Mmusi* (2013) CACGB 104 – 12 (unreported) at para 69; and *BOPEU and Ors v Minister of Home Affairs* MAHLB 674-11 at para. 190 - 209.

Uganda is one of largest refugee hosting country in Africa; third after Ethiopia and Kenya. Refugees in Uganda hail from war ravished countries in the region like Sudan, Burundi and the Democratic Republic of Congo.⁸ In 2006, Uganda repealed its Refugee Act and enacted a new statute, the Refugees Act of 2006,⁹ which has been described as “a model for Africa.”¹⁰ The long title of the new Ugandan Act states that it is intended to:

“make new provision for matters relating to refugees, in line with the 1951 Convention relating to the status of refugees and other international obligations of Uganda relating to the status of refugees; to establish an Office of Refugees; to repeal the Control of Alien Refugees Act, Cap. 62; and to provide for other related matters.”¹¹

The 2006 Act repealed and replaced the Ugandan Control of Alien Refugees Act of 1960,¹² which made no reference to the 1951 Refugee Convention. Under the 1960 Act, Refugees in Uganda enjoyed some rights. The right to work,¹³ the right to obtain permits to remain in Uganda,¹⁴ and the right to compensation for sale of their animals by the Minister were protected.¹⁵ However, Uganda operated an encampment policy which means that the freedom of movement of refugees was severely limited. Leaving a designated camp had to be authorised.¹⁶ Other shortcomings with the repealed Act include the possibility of a vehicle belonging to a refugee being seized by the Government without compensation.¹⁷ A refugee could also be detained without trial if he was suspected of criminal behavior,¹⁸ and the Camp Commandant could arrest a refugee without a warrant on suspicion of committing an offence.¹⁹ With such exacting provisions, the 1960 Act provided little protection of refugee’s rights under the 1951 Convention.²⁰

Botswana’s control oriented Act is devoid of many refugee rights contained in international treaties and conventions. Botswana can learn a great deal from Uganda’s new Refugee Act. By comparing and contrasting both statutes, one can discover what improvements need to be made to Botswana’s refugee laws in order to bring them in line with international obligations. Important substantive areas that should be examined include the definition of a refugee, those disqualified from claiming refugee status, revocation of status, and status determination procedures. Hopefully this can lead to strategies for positive law reform in Botswana.

8 “Uganda Factsheet” *UNHCR* (2015) available at <http://www.unhcr.org/protection/operations/524d880a9/uganda-fact-sheet.html> (last accessed: 14 October 2017).

9 Uganda Refugee Act, 21 of 2006.

10 V Akello “Uganda’s Progressive Refugee Act Becomes Operational” *UNHCR* (2009) available at <http://www.unhcr.org/news/latest/2009/6/4a3f9e076/ugandas-progressive-refugee-act-becomes-operational.html> (last accessed: 14 October 2017).

11 Uganda Refugee Act, *supra* note 9.

12 Ugandan Control of Alien Refugees Act, Cap. 62 of 1960.

13 *Id* Section 15.

14 *Id* Section 6.

15 *Id* Section 10.

16 See *id* Sections 5, 6, 8, 11, and 21.

17 *Id* Section 16.

18 *Id* Sections 9 and 19.

19 *Id* Section 22.

20 See ZA Lomo “The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work” 18 *Berkeley J. Int’l L.* 268 (2000) 275; JD Mujuzi “From Archaic to Modern Law: Uganda’s Refugee Act 2006 and her International Treaty Obligations” *EAIJPHR* 399 (2008) 402.

Who is a Refugee?

The Botswana Refugee Act characterizes one whom is granted asylum in Botswana as a “political refugee”.²¹ The definition of a political refugee is actually the same as that found in the 1951 refugee convention. The Act states as follows:

“‘political refugee’ means a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.”²²

It is interesting that the Act frames the Convention definition of a refugee using the word “political”. This terminology may have been informed by the political climate in the Southern African region in 1968 when the Act was promulgated. Most refugees coming to Botswana at that time were fleeing political upheaval in apartheid South Africa.

Given the change in the political landscape following the new democratic dispensation in South Africa, Botswana should move away from the term “political refugee” to a term that is more in tune with international law.

In contrast, the new Uganda Refugee Act defines a refugee in a broader more inclusive manner under section 4.²³ The Uganda Refugee Act contains a six-part definition of a refugee. Like the Botswana Refugee Act, the Uganda Act encapsulates the standard UN Convention definition of a refugee.²⁴ But, that is where the similarity ends. The Uganda Refugee Act expands on that definition by also making provision for refugees who are stateless,²⁵ and incorporating the 1969 OAU Convention definition of a refugee into Ugandan Law.²⁶

Additionally, the Uganda Refugee Act adopts three other modern definitions of refugees. First, persons who flee their habitual place of residence to escape discrimination on the basis of gender are also regarded as refugees.²⁷ Gender discrimination practices are defined to include “strict and forced adherence to a dress code, obligatory pre-arranged marriages, physically harmful facial or genital mutilation, rape, domestic violence and other gender related negative activities.”²⁸ In explaining this provision in the Ugandan Refugee Act, Mujuzi states that proving gender discrim-

21 Botswana Refugee Act, *supra* note 2, Section 2.

22 *Id* Schedule 1.

23 Uganda Refugee Act, *supra* note 9, Section 4.

24 *Id* Section 4(a).

25 *Id* Section 4(b) (“A person qualifies to be granted refugee status under this Act if not having a nationality and being outside the country of his or her former habitual residence owing to a well-founded fear of being persecuted for reasons of race, sex, religion, membership of a particular social group or political opinion, that person is unwilling or unable to return to the country of his or her former habitual residence.”)

26 *Id* Section 4(c) (“A person qualifies to be granted refugee status under this Act if owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, that person is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality.”)

27 *Id* Section 4(d) (“A person qualifies to be granted refugee status under this Act if owing to a well-founded fear of persecution for failing to conform to gender discriminating practices, that person is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside the country of origin or nationality.”)

28 *Id* Section 2.

ination to the state may be difficult.²⁹ He suggests that an asylum seeker would have to establish that they have been subjected to gender discrimination and that having reported the matter to authorities, no action can or will be taken against the perpetrators.³⁰ The question of gender discrimination also raises interesting discourse for Botswana and Uganda which still retain laws that criminalise same-sex relationships.³¹ In recent years, vociferous and violent opposition to LGBTI people and issues has existed in Uganda.³² Although the opposition is not as vocal in Botswana, adopting a provision that grants refugee status based on gender discrimination in Botswana may have little meaning and effect in practice due to deep running cultural attitudes towards questions of gender identity.

The other classes of refugees recognised in Uganda are mandate refugees, those already enjoying refugee status under any law before enactment of the 2006 statute,³³ and refugees gaining that status under the group determination procedures provided for by Section 25 of the Refugee Act.³⁴

The Botswana Refugee Act adopts only one of these definitions of a refugee. The Botswana Refugee Act should be improved by including other well recognised classes of refugees. This expanded definition would help Botswana fulfil its international treaty obligations.³⁵ A widened definition of refugees, which domesticates the 1951 and 1969 Conventions and takes cognisance of stateless persons would be a much needed improvement to Botswana's Refugee Law.

Disqualification from Refugee Status

Under Botswana law, refugee status shall not be availed to a dual national who has a well-founded fear of persecution from one country where they hold citizenship if they do not seek the protection of the other country of their nationality.³⁶ This provision enjoins persons enjoying dual nationality to seek the protection of one of their states of nationality before seeking refugee status in Botswana. This is the sole disqualification from seeking refugee status in Botswana.

The Ugandan Refugee Act contains the same exclusion with regard to dual nationals as Botswana does.³⁷ However, three more groups of persons are excluded from obtaining refugee status in Uganda. These are persons who have committed crimes against peace, crimes against humanity and war crimes,³⁸ persons who have committed serious crimes of a non-political nature before seeking asylum in Uganda,³⁹ and persons who have acted contrary to the purpose and principles

29 JD Mujuzi "From Archaic to Modern Law: Uganda's Refugee Act 2006 and her International Treaty Obligations" (2008) *EAJPHR* 399, 406.

30 *Id.*

31 *Id.* 414.

32 See "The Road to Safety: Strengthening the Protection of LGBTI Refugees in Uganda and Kenya" Human Rights First (2012) available at <http://reliefweb.int/report/uganda/road-safety-strengthening-protection-lgbti-refugees-uganda-and-kenya> (Last accessed: 15 October 2017).

33 Uganda Refugee Act, *supra* note 9, Section 4(e).

34 *Id.* Section 4(f); *see also* Section 25.

35 Botswana is party to the 1951 Refugee Convention, its 1967 Protocol, the 1969 OAU Refugee Convention and the 1954 Convention Relating to the Status on Stateless Persons.

36 Botswana Refugee Act, *supra* note 2, Schedule 2.

37 Uganda Refugee Act, *supra* note 9, Section 5(d).

38 *Id.* Section 5(a).

39 *Id.* Section 5(b).

of the United Nations or the African Union.⁴⁰

Botswana should adopt the expanded grounds for disqualification of refugees in the Ugandan Refugee Act. These provisions have the effect of discouraging applications from perpetrators of serious crimes who may use the refugee status as a means to avoid responsibility for their offences. If individuals know from the outset that they are suspects in relation to serious offences and that this fact may hamper their application for asylum, they may opt out of making an application thus easing the work load of the status determination body. There is no clearly defined procedure for determining whether or not a serious crime was committed. It is not clear if a conviction is required or if reasonable suspicion of serious criminal activity will suffice for an exclusion under this Section.

Revocation of Status

The Botswana Refugee Act provides for the review of recognised refugee status every six months.⁴¹ Following these reviews, the Minister is empowered to revoke the refugee's recognition as a political refugee.⁴² Under the Ugandan Refugee Statute, a person ceases to be a refugee when they voluntarily choose to do so, when they re-acquire a lost nationality, or when they naturalise and become Ugandan citizens or acquire the nationality of some other country.⁴³ A person may also lose refugee status should the circumstances in connection with which the individual became a refugee have ceased to exist. Refugee status will also be revoked under the Ugandan statute where it was awarded in a group determination and the individual concerned has committed serious non-political crimes after being admitted as a refugee. Lastly, a person may lose refugee status if the person has committed serious crimes under the Geneva Convention or the OAU Convention.⁴⁴

The Ugandan Act is more comprehensive than the Botswana Act in detailing the circumstances in which a refugee may lose their recognition as such. Botswana should adopt similar comprehensive provisions for the revocation of status. Such provisions will assist in making the provisions of the already skeletal Botswana act more accessible and understandable to refugees, asylum seekers and those who assist them.

Status Determination

*Current Procedures in Botswana*⁴⁵

Status determination procedures under the Botswana Refugee Act are basic. An individual seeking asylum under the Act in Botswana is required to declare his intention to apply for asylum at the earliest possible opportunity. This may be done at a border post upon initial entry, by appearing at a police station, or at the UNHCR offices in the capital city Gaborone. At the time of making the initial claim for asylum, the applicant is immediately referred to the police, immigration officers

⁴⁰ *Id* Section 5(c).

⁴¹ Botswana Refugee Act, *supra* note 2, Section 11(1).

⁴² *Id* Section 11(2).

⁴³ Uganda Refugee Act, *supra* note 9, Section 6.

⁴⁴ *Id*.

⁴⁵ This section draws extensively from a prior article co-written by the author of this paper: E Macharia-Mokobi & J Pfumorodze, "Advancing Refugee Protection on Botswana through improved Status determination" AHRLJ 152 (2013) 156 – 158.

or UNHCR for an initial interview. At this interview, his details are taken and he is required at this stage to inform the interviewer of his reasons for fleeing his country. An interview may also be conducted by an intelligence officer for security purposes should this be deemed necessary.⁴⁶

After the application for protection as a refugee is received, asylum seekers used to be transferred to the Centre for Illegal Immigrants in Francistown.⁴⁷ However, following the decision of the High Court of Botswana in *AG v Emma Ngezi and 165 Others*,⁴⁸ finding that the indefinite detention of asylum seekers at the Centre for Illegal Immigrants was not legally justified, the Centre no longer houses asylum seekers. Asylum seekers are now directed to the Refugee Camp at Dukwi until their cases are concluded. It is unclear whether this will be the long term response to the High court ruling. The Botswana Refugee Act provides that the detention pending determination of a claim for asylum should not exceed 28 days.⁴⁹ However, the wait for status determination is typically longer.⁵⁰ In the meantime, the asylum seeker's application is forwarded to the Refugee Advisory Committee (RAC), the body established under Section 3 of the Act, charged with status determination. The asylum seeker is then summoned by the RAC for a status determination inquiry where he or she is required to inform the RAC of the circumstances surrounding their flight and establish that he or she has a well-founded fear of persecution.⁵¹ This inquiry is held in private.⁵² The RAC has powers to summon any individual to give evidence in the case before it.⁵³ The UNHCR participates as an *ad hoc* member of the RAC providing relevant country information and advice on how similar cases were treated in other countries.⁵⁴ Upon completion of the inquiry, the RAC then prepares a report for the Minister.⁵⁵

The Refugee Act vests the Minister with the power to recognise a person as a refugee or deny the individual such recognition.⁵⁶ In the event that the individual receives recognition as a refugee, he or she is then transferred to the Dukwi settlement⁵⁷ where they will be required to reside for as long as they remain a refugee. In the event that an individual is denied recognition, she then becomes subject to the immigration law of Botswana. She is classified as an illegal immigrant and will be removed from Botswana since they no longer have a legal basis to remain under Botswana's immigration laws.⁵⁸

There is no requirement in the Refugee Act not to refoule an asylum seeker whose application for

46 This information is obtained from discussions with UNHCR personnel and is based on their experience and knowledge of the status determination process. The Botswana Refugee Act does not contain well defined procedures for asylum seekers.

47 This is a government centre for detention of undocumented immigrants or persons in violation of their entry permits. Persons detained at this Centre are deported under immigration laws.

48 UAHFT 000026-17 (Unreported).

49 Botswana Refugee Act, *supra* note 2, Section 6(b).

50 L Mosikari, "Refugees win illegal detention case" *Mmegi Online* (2017) available at <http://www.mmegi.bw/index.php?aid=68278&dir=2017/april/21> (last accessed: 15 October 2017).

51 Botswana Refugee Act, *supra* note 2, Sections 4 and 5.

52 *Id* Section 5(2).

53 *Id* Section 5(1)(d).

54 This arrangement is not legislated for, but is what occurs in practise.

55 Botswana Refugee Act, *supra* note 2, Section 4(3).

56 *Id* Section 8(1)(a).

57 This is a refugee settlement about 150 kilometres north of Francistown.

58 Botswana Refugee Act, *supra* note 2, Section 8.

asylum has been rejected. However, in terms of the Act, an asylum seeker who is detained pending the outcome of their application may leave Botswana to enter some other country if they satisfy an immigration officer that it is lawful for them to enter such a country. The asylum seeker choosing this route will not be granted a right of re-entry into Botswana.⁵⁹

The Act has several obvious limitations. The Refugee Act contains no requirement that the report prepared by the RAC and the reasons for the decision taken by the Minister be provided to the asylum seeker. The Refugee Act contains no right of appeal against the decision of the Minister. The Minister does have the power in appropriate cases to direct the RAC to re-open the inquiry or make a further report.⁶⁰ This review by the RAC does not amount to an appeal. In practice, however, refugees who receive a negative decision write letters to the Minister to request a review of the negative first-instance decision. A final criticism is that the Refugee Act makes no provision for group determination, providing no mechanism for status determination in cases of mass influx of refugees of a particular category.

Botswana's status determination procedure outlined above is basic and antiquated. While much is done in practice to augment the bare bones provided by the Act, a great deal still needs to be done to improve status determination procedures.

Refugee Status Determination Procedures in Uganda

A review of status determination procedures under Uganda's Refugee Act is instructive for Botswana. Refugee matters in Uganda are under the purview of the Office for Refugees.⁶¹ This office is run by the Commissioner for Refugees who coordinates all administrative matters relating to refugees.⁶² It is within this office that the Refugee Eligibility Committee has been created.⁶³ The Committee's role is to consider and deal with applications for refugee status in Uganda. The Refugee Committee also advises the minister on cases for expulsion, extradition or cessation of refugee status.⁶⁴ The UNHCR may attend the monthly meetings of the Eligibility Committee in an advisory capacity.⁶⁵

The Ugandan Refugee Act has also made provision for a Refugee Appeals Board.⁶⁶ The Refugee Appeals Board must hear and consider appeals from decisions of the Eligibility Committee within 60 days.⁶⁷ The Refugee Appeals Board may confirm a decision of the Eligibility Committee, dismiss and appeal.⁶⁸ It may also set aside a decision and refer the matter back to the Eligibility Committee for a re-hearing.⁶⁹ The Refugee Appeals Board is staffed by persons who have knowledge and experience of refugee law, immigration, foreign affairs, national security, local administration and

⁵⁹ *Id* Section 7.

⁶⁰ *Id* Section 8(1)(c).

⁶¹ Uganda Refugee Act, *supra* note 9, Sections 7 and 8.

⁶² *Id* Section 9.

⁶³ *Id* Section 11.

⁶⁴ *Id* Section 12.

⁶⁵ *Id* Section 11(3).

⁶⁶ *Id* Section 16.

⁶⁷ *Id* Section 17.

⁶⁸ *Id*.

⁶⁹ *Id*.

human rights. The UNHCR is empowered to attend Refugee Appeals Board and make oral and written representations on behalf of the person whose appeal is being considered.⁷⁰

Any asylum seeker must within 30 days of his arrival in Uganda make a written application for Refugee status to the Eligibility Committee.⁷¹ The written application is delivered to the Commissioner for Refugees through any authorised officer or a UNHCR representative.⁷² The Eligibility Committee is required to consider the application and make a decision within 90 days.⁷³ The decision on the status of the refugee must be communicated in writing to the refugee.⁷⁴ Where the Eligibility Committee finds an application manifestly unfounded or clearly abusive, then the Committee may take appropriate lawful measures to deport the asylum seeker.⁷⁵

An appeal is available within 30 days of notification of the decision of the Eligibility Committee. The asylum seeker may represent himself or be represented in his appeal by an advocate at his own cost. The decision of the Appeals Board is final.⁷⁶ Special arrangements for expedited hearings may be made by the Commissioner with respect to vulnerable people, minors, people living with disabilities, trauma victims, detained persons, and victims of torture.⁷⁷

Whilst awaiting the decision from either the Eligibility Committee or the Refugee Appeals Board, the refugee and his family have the right of residence in Uganda.⁷⁸ Once a final decision has been reached on the status application, and the right of appeal has been exhausted the Refugee should leave Uganda to a country of his choice within 90 days failing which he will be deported under immigration laws.⁷⁹ During the period when their application is pending, an asylum seeker is entitled to a temporary document, notification of the possibility of assistance from the UNHCR, the services of a competent interpreter, and assistance from any person including an advocate at his Eligibility Hearing.⁸⁰

Uganda has made provision for group status determination in the event of a mass influx of refugees. Temporary protection will usually last 2 years or until the cause of the influx from the refugees' country of origin is removed. Asylum seekers obtaining protection under a group determination are entitled to all the right of refugees under the Uganda Refugee Act.⁸¹ Asylum seekers are accommodated in transit centres or settlements designated by the Minister pending the determination of their applications for asylum.⁸²

70 *Id* Section 18.

71 *Id* Section 19(1).

72 *Id* Section 19(2).

73 *Id* Section 20(2).

74 *Id* Sections 20(3) and 20(4).

75 *Id* Section 20(6).

76 *Id* Section 21.

77 *Id* Section 22.

78 *Id* Section 23(1).

79 *Id* Sections 23(2) and Section 23(3).

80 *Id* Section 24.

81 *Id* Section 25.

82 *Id* Section 44.

Rights, Freedoms and Duties of Refugees

Botswana's Refugees Act is silent on many rights, freedoms, and duties of refugees. In contrast, the Ugandan Act contains comprehensive provisions guaranteeing many rights and freedoms of refugees as well as elucidating their duties. The rights of refugees are guaranteed under part 5 of the Uganda Refugee Act. The Act protects all the rights and obligations of refugees under the Geneva Convention, the OAU Convention and any other international convention to which Uganda may be party.⁸³ Some of the explicit rights that Ugandan Refugees enjoy include the right to non-discrimination and equal treatment similar to other aliens in Uganda under the Constitution, the right to own and transfer property, the right to education, the right to engage in farming and other commercial activities, the right to practice their profession, access to employment, the freedom of religion, the right to non-political association, the right to unionise, access to the courts and legal assistance.⁸⁴ Refugees are also guaranteed the right to a travel document.⁸⁵ Refugee children are entitled to elementary education similar to that of Ugandan Children and rights under the Children's Act and the African Charter on the Rights and Welfare of the Child and the Convention on the rights of the child are also extended to refugee Children.⁸⁶ Refugee women enjoy special protections from gender discrimination and are entitled to equal protected under Uganda law and under The Convention for the Elimination of All Forms of Discrimination against Women and the African Charter.⁸⁷

Uganda does not operate an encampment policy but allows for free movement of Refugees. It has encouraged communities to view refugees as partners in development. It encourages and supports communities to host refugees who live alongside local populations. Uganda provides recognised refugees with land to live on and farm.⁸⁸ Through the Refugee and Host Population Empowerment (ReHoPE) program, Uganda empowers and supports refugees to be self-sufficient. Returns for communities hosting refugees include improvement in service delivery and support from UN Agencies to enhance capacity of districts that host refugees. Uganda has also legislated for and encourages repatriation wherever possible.⁸⁹

The duties of refugees in Uganda include complying with the law, abiding with measures taken for the maintenance of public order, not engaging in acts that could endanger national security, not engaging in political activities in Uganda on the local or national level, not engaging in political activities in Uganda that involve their country of nationality, not engaging in activities contrary to the principles of the United Nations or the African Union, and paying taxes where engaged in economic activity.⁹⁰

Botswana could benefit from similar comprehensive provisions detailing the rights and duties of refugees in the country.

83 *Id* Section 28.

84 *Id* Section 29(1).

85 *Id* Section 31.

86 *Id* Section 32.

87 *Id* Section 33.

88 *Id* Section 30.

89 *Id* Section 46; see also "Uganda Factsheet" UNHCR (2015) available at <http://www.unhcr.org/protection/operations/524d880a9/uganda-fact-sheet.html> (accessed 15 October 2017).

90 Uganda Refugee Act, *supra* note 9, Section 35.

Lessons for Botswana?

Botswana should improve its reception of refugees. Botswana should also consider the following recommendations.

First, the narrow definition of who qualifies as a refugee could be expanded to include persons fleeing political unrest and social upheaval in their countries as envisaged by the OAU Refugee Convention. The definition may also be expanded to include stateless persons and person's fleeing gender discrimination as in the Uganda Refugee Act.

Second, the absence of a rule prohibiting refoulement of asylum seekers is regrettable. Because of its absence, there is a real risk that some persons may be turned back to a dangerous situation at the moment they request asylum.

Third, the Botswana Refugee Act should provide more information on case preparation. Lessons should be learnt from the Uganda Refugee Act which provides clear provisions for the possibility of legal or other case preparation assistance and the right to be informed that UNHCR is available to assist the person seeking asylum. The right to an interpreter and the right to access to rules of the Refugee Act may also provide for the assistance of an interpreter.

Fourth, Botswana should consider adopting the position in Uganda where the Eligibility Committee makes the decision regarding the status of the asylum seeker. This will be a departure from the current system where the RAC makes a recommendation to the relevant minister who is then empowered to make the decision granting or refusing refugee status. Adopting the Uganda model would allow the RAC which has heard all the evidence to make the decision regarding the asylum seekers refugee status. Further to this recommendation, the Botswana Refugee Act should be amended to allow a written decision containing the reasons for a rejection to be provided to the asylum seeker.

Fifth, as with Uganda, Botswana should legislate to ensure that at least one member of the RAC has expertise in Refugee law and matters as is the case in Uganda.

Sixth, the Botswana Refugee Act should provide for appeals to an independent body as happens under Ugandan Law. A truly independent appeal process will enhance transparency of the status determination process in Botswana.

Seventh, Botswana's statute should provide for group status determination. This is a necessary provision, that enables countries to deal promptly and effectively with mass influxes of refugees.

Eighth, the Botswana Refugee Act should also explicitly provide for the presence of the UNHCR in the status determination hearing and allow the UNHCR to make interventions on behalf of the asylum seeker should he wish as is the case in Uganda.

Ninth, the Government should consider the establishment of a designated areas for asylum seekers to reside whilst awaiting their status determination hearings. As mentioned above, the High Court has recently ruled that accommodating asylum seekers in the Centre for Illegal Immigrants is unlawful. These persons have now been transferred to Dukwi Refugee Camp. Formal arrangements for the reception of asylum seekers should be legislated under a revised Botswana Refugee Statute.

Lastly, Botswana should consider clearly elucidating in statute the rights and duties of refugees and, in particular, vulnerable refugee populations like refugee women and children. Further, Botswana should consider doing away with the encampment policy, allowing freedom of movement, and adopting partnerships with communities to host refugees whilst encouraging self-reliance amongst refugees and asylum seekers.

The protection of the human rights of refugees in international law

Onkemetse Tshosa

Introduction

All people enjoy minimum protections in international law; this includes refugees. They are entitled to human rights and fundamental freedoms contained in international human rights treaties and instruments as well as general international law. This paper examines the broad framework for the protection of the human rights of refugees found in international law. These rights are protected both by the universal human rights instruments and refugee specific instruments such as the Convention Relating to the Status of the Refugees,¹ Protocol Relating to the Status of the Refugees,² and the OAU Convention on Specific Aspects of the Refugee Situation in Africa.³ As with all other individuals, refugees and people in similar situations have rights in international law which should be respected and protected at all times. These rights should only be limited in exceptional circumstances of public necessity.

The collection of international human rights that protect refugees can be broken into three categories. Firstly, general or traditional rights. These are human rights that are enjoyed by everyone irrespective of their status, and are found in universal international human rights. Secondly the specific rights of the refugees. These are rights that are specific to refugees based on of their particular status as refugees. Thirdly, these rights based on the motion of trying to find durable solutions for refugees such as the resettlement and voluntary repatriation.

An Overview of Human Rights Instruments for the Protection of Refugee Rights

A conceptual nexus between international refugee law and international human rights law is not hard to establish. Oftentimes, a refugee is an individual who is compelled to flee his country of

1 General Assembly resolution 429 (V) (1951); see also GS Goodwin-Gill *The Refugee in International Law* (1983) 1-19; BS Chimmi (ed) *International Refugee Law – A Reader* (2000) 13.

2 General Assembly resolution 2198 (XXI) (1967).

3 1001 U.N.T.S. 45 (1969); see also *Human Right: A Compilation of International Instruments United Nations Volume 1 Second Part* (1994); and SA Amanze *Protection of Refugees in Africa* (1978) 95. For a general discussion of the refugee situation in Botswana see T Maluwa, "The Concept of Asylum and the Protection of Refugees in Botswana: Some legal and political aspects" 2(4) *International Journal of Refugee Law* (1990) 587; J Zetterqvist "Refugees in Botswana in the Light of International Law" *Scandinavian Institute of African Studies* (1990); MRK Rwelamira "Some Reflections on the OAU Convention on Refugees: Some Pending Issues" 16(2) *Comparative and International Law Journal of Southern Africa* 165 (1983) 167.

origin or habitual residence because of violation or threatened violation of his human rights and fundamental freedoms. This means that when a refugee is finally given refugee status in a host country, he does not shed his human rights. He continues to enjoy fundamental human rights and freedoms both under international law and the national law of the receiving country.

There are a number of human rights treaties and instruments that protect human rights of refugees. These instruments can conveniently be divided into two major categories: universal instruments and specialised instruments.

Universal Instruments

One foundational universal instrument is the Charter of United Nations.⁴ The UN Charter provides that member states reaffirm their faith in fundamental human rights of the human person and in equal rights of men and women.⁵ One of the principles of the UN is to promote and encourage respect for human rights and fundamental freedom without discrimination.⁶

An international bill of human rights has developed out of these foundational principles in the UN Charter. Firstly, the Universal Declaration of the Human Rights (UDHR) recognizes the “inherent dignity and of the equal and inalienable rights of all members of the human family”.⁷ Furthermore, it reaffirms “the equal rights of men and women”,⁸ and provides that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.⁹ The UDHR also declares that everyone is entitled to all the rights and freedoms in the Declaration “without distinction of any kind”.¹⁰

In its protection of human rights, the UDHR proclaims a clear prohibition on discrimination and this includes refugee status. Refugees should not be discriminated on the basis of being refugees.

The UDHR deals specifically with refugees when it provides that, “[e]veryone has the right to seek and enjoy in other countries asylum from persecution”.¹¹ Therefore, the UDHR not only provides refugees with rights that are enjoyed generally by everyone but it specifically provides them the right to seek and enjoy in other countries asylum from persecution.

The UDHR is a non-binding instrument. However, it is accepted as laying down general principle that have been accepted by the international community. Many of its provisions, and the rights contained in them, have matured into customary law such that they are binding on all states.

In addition to the UDHR, there are the two sister covenants: the International Covenant on Civil and Political Rights (ICCPR)¹² and the International Covenant on Economic Social and Cultural Rights (ICESCR).¹³ Like the UDHR, the ICCPR and ICESCR protect the human rights and funda-

4 UN Charter (1945).

5 *Id* Preamble.

6 *Id* Article 1(3).

7 *Universal Declaration of Human Rights (UDHR)* General Assembly resolution 217 A (III) (1948) Preamble.

8 *Id*.

9 *Id* Article 1.

10 *Id* Article 2.

11 *Id* Article 14(1).

12 ICCPR General Assembly resolution 2200A (XXI) (1966).

13 ICESCR General Assembly resolution 2200A (XXI) (1966).

mental freedoms of every individual including refugees and individuals in like situations. Both covenants protect the right to non-discrimination.¹⁴ The ICCPR, in particular, protects the right to life,¹⁵ protection from torture or cruel, inhuman or degrading treatment in punishment,¹⁶ protection from slavery, slave trade or servitude,¹⁷ liberty and security of persons,¹⁸ equality before the law,¹⁹ recognition as a person before the law,²⁰ freedom of religion,²¹ privacy,²² and freedom of expression.²³ According to these instruments, these rights are to be enjoyed by everyone irrespective of his/her status, including refugee status.²⁴

Specialised Instruments

Apart from the universal instruments, there are specialised instruments that recognise, guarantee and protect human rights and fundamental freedoms of refugees and individuals in kindred situation. These instruments are specialised because they deal explicitly with the rights of refugees and asylum seekers. They do not contain human rights and fundamental freedoms of any other individuals except refugees and people in similar situations.

Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR)

The Statute of the Office of the UNHCR²⁵ establishes the office of the United Nations High Commissioner for Refugees (UNHCR) to assume the function of providing international protection to refugees, under the auspices of the United Nations, and to seek permanent solutions for the problems facing refugees.²⁶ The function of the office of the UNHCR extends to individuals who fall under the Convention Relating to the Status of Refugees. While it is important to note that the general mandate of the UNHCR to promote measures calculated to improve the situation of refugees, apart from the general protection mandate, the Statute does not enumerate the various rights of refugees.

Convention Relating to the Status of Refugees (Refugee Convention)

The Convention Relating to the Status of Refugees (UN Refugee Convention)²⁷ is one of the first instruments adopted by the United Nations that addresses refugees exclusively and comprehensively.²⁸ The Convention defines the grounds for granting an individual refugee status and terminating an individual's refugee status.

The Refugee Convention catalogues the various human rights and fundamental freedoms of refugees. The Convention obliges States to apply the provisions of the Convention to refugees without

14 ICCPR Article 2(1); and ICESCR Article 2(2).

15 ICCPR Article 6(1).

16 *Id* Article 7.

17 *Id* Article 8.

18 *Id* Article 9.

19 *Id* Article 14.

20 *Id* Article 16.

21 *Id* Article 18.

22 *Id* Article 17.

23 *Id* Article 19(2).

24 ICCPR Article 2(1); and ICESCR Article 2(2).

25 General Assembly resolution 428 (V) (1950).

26 *Id* Article 8(b).

27 General Assembly resolution 429 (V) (1951).

28 See GS Goodwin-Gill *supra* note 1; T Maluwa *supra* note 2 at 584; J Zetterquist, *supra* note 2 at 167.

discrimination as to race, religion or country of origin.²⁹ This right is especially important since oftentimes refugees face discrimination in countries of asylum based on the fact that they come from a different country. Substantive rights that are available to refugees under the Refugee Convention include freedom of religion,³⁰ the right to property (movable and immovable),³¹ artistic and industrial property rights,³² freedom of association,³³ access to courts,³⁴ the right to wage earning employment,³⁵ the right to self-employment,³⁶ the right to liberal professions,³⁷ and freedom of movement.³⁸

The Refugee Convention also accords refugees welfare rights.³⁹ These rights include rationing where it exists,⁴⁰ housing,⁴¹ public education,⁴² public relief,⁴³ and labour legislation and social security.⁴⁴ Protections under this last category include labour rights such as remuneration, limitations on hours of work, minimum age of employment and enjoyment of collective bargaining as well as social security benefits provided for refugees facing things such as old age, unemployment, and maternity.⁴⁵

The Refugee Convention obliges member states to provide administrative measures and assistance for refugees.⁴⁶ This includes the provision of identity documents.⁴⁷ Where a refugee does not possess a valid travel document, he/she should be issued with a travel document that enable him or her to travel outside the country of asylum.⁴⁸ Refugees also need protection from fiscal charges and sympathetic consideration during transfer of assets.⁴⁹ Refugees are also protected from expulsion where they are lawfully resident in the refugee country save on grounds of national security or public order.⁵⁰

It should be noted that, of course, protection of welfare rights depends, by and large, on the economic realities of the country. It would be illusory to expect states to protect these rights in situations where they are not economically viable. In Botswana however, the positive economic situation means that these rights can be guaranteed in the national legal framework without overburdening the country.

29 *Convention Relating to the Status of Refugees (Refugee Convention)* General Assembly resolution 429 (V) (1951) Article 3.

30 *Id* Article 5.

31 *Id* Article 13.

32 *Id* Article 14.

33 *Id* Article 15.

34 *Id* Article 16.

35 *Id* Article 17.

36 *Id* Article 18.

37 *Id* Article 19.

38 *Id* Article 26.

39 *See id* Chapter IV.

40 *Id* Article 20.

41 *Id* Article 21.

42 *Id* Article 22.

43 *Id* Article 23.

44 *Id* Article 24.

45 *Id*.

46 *See id* Chapter V.

47 *Id* Article 27.

48 *Id* Article 28.

49 *Id* Articles 29 and 30.

50 *Id* Article 32.

The Refugee Convention also protects refugees from *refoulement*.⁵¹ The Convention says that, “[n]o contracting State may expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of the territories where his life and freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁵²

Non-refoulement is one of the main principles of international refugee law. It is embodied in the main refugee conventions. The rationale for this principle is that to return an asylum seeker to his country of origin or habitual residence would expose him to the same human rights violations from which he is fleeing and on the basis of which he requires protection. The principle has crystallised into customary international law and it is generally accepted that States should observe it irrespective of whether or not they are parties to the relevant treaties recognising it. The principle of *non-refoulement* provides a secure protection to asylum seekers faced with rejection at the point of entry into the country in which they seek asylum.

The other equally important protection of the Refugee Convention is the requirement that states work towards durable solutions to the refugee problem in the country. These include naturalisation, assimilation and resettlement. These are internationally recognised solutions to the refugee situations. The Refugee Convention states that, “States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and reduce as far as possible the charges and costs of such proceedings.”⁵³

The requirement of assimilation and naturalisation of refugees is aimed at integrating refugees into local communities in the country of asylum. It is essential that the law in the country should give refugees, especially those who have been in the country for a considerable period of time, the option for assimilation and naturalisation. Similarly, there should be provisions and avenues for third country resettlement for refugees who are unable to assimilate.

OAU Convention Governing Specific Aspects of Refugee Problems in Africa

The Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)⁵⁴ is a regional treaty that extends the definition of a refugee found under the 1951 Refugee Convention. It states that:

“[t]he term “refugee” shall also apply to, every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”⁵⁵

The OAU Refugee Convention also contains many of the human rights for refugees found in the UN Refugee covenant. These rights, which are particularly for refugees in Africa, include the right

51 *Id* Article 33.

52 *Id*.

53 *Id* Article 34.

54 *Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)* 1001 U.N.T.S. 45 (1969).

55 *Id* Article 1(2).

of non-discrimination,⁵⁶ the right to voluntary repatriation,⁵⁷ the right to travel documents,⁵⁸ and protections against *refoulement*.⁵⁹ The protection against refoulement is one of the fundamental rights for refugees and asylum seekers.

Duties of Refugees

Apart from enjoying rights in international law, refugees also have corresponding duties; particularly in their countries of asylum. They have a duty to respect laws and regulations of the receiving country. As stated in the UN Refugee Convention:

“Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.”⁶⁰

Likewise, the OAU Refugee Convention obligates refugees to conform to the laws and regulations of the host country, as well as measures taken for the maintenance of public order.⁶¹ The Convention further obligates a refugee to abstain from any subversive activities against any member state of an OAU. However, the convention does not define subversive activities. Additionally, the OAU Refugee Convention obligates states to prohibit refugees residing in their territories from attacking any other member states of the OAU, including through arms, the press and radio.⁶²

Limiting the Human Rights of Refugees

The rights enjoyed by refugees like all other rights are not absolute. These rights are limited and may be derogated from in the public interest, for public order, morality, and during emergency. All of the international bill of rights instrument and specialised instruments provide for derogation from these rights.

National security is the most frequently cited reason for limiting the rights of refugees. All of the specialised instruments provide that the rights of refugees may be limited in the interest of national security of the country of asylum. For example, the OAU Refugee Convention provides that refugees should be issued with travel documents to enable them to travel outside the country of asylum, unless there are, “compelling reasons of national security or public order”.⁶³ Likewise, the UN Refugee Convention provides that the contracting states shall issue to refugees lawfully staying in their territory travel documents for the purpose of travelling outside their territory, “unless compelling reasons of national security or public order otherwise require”.⁶⁴ Furthermore,

56 *Id* Article IV, (“Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions”).

57 *Id* Article V, (“The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will”).

58 *Id* Article VI, (“...Member States shall issue to refugees lawfully staying in their territories travel documents”).

59 *Id* Article II(3), (“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened”).

60 *Convention Relating to the Status of Refugees (Refugee Convention)* General Assembly resolution 429 (V) (1951) Article 2.

61 *OAU Refugee Convention* Article III(1).

62 *Id* Article III(2).

63 *Id* Article VI(1).

64 UN Refugee Convention, Article 28.

the UN Refugee Convention also provides that the contracting parties “shall not expel a refugee lawfully in their territory save on grounds of national security or public order.”⁶⁵ It is clear that the main grounds on which the rights of refugees lawfully admitted can be limited is national security.

This means a recognised refugee, lawfully in the country of asylum, is still liable to be removed from the country, if he/she is a danger to the security of the country. Obviously, it is within the sovereign right of a State to remove an individual from within its territorial boundaries who constitutes, or whose activities constitute, a danger to the security of the country in order to protect the country and its people. For instance, the Refugee Act of Malawi contains this exception by stipulating that the benefit of this protection “shall not be claimable by a person in respect of whom there are reasonable grounds for regarding him as a danger to the security of Malawi.”⁶⁶ However, the concept of security does not recommend itself to an easy and precise definition, and in most cases is very subjective. This means that countries are likely to exploit security concerns to remove recognised refugees from the country under the pretext that their presence is injurious to the security of the country. This problem is aggravated by the absence of guidelines on what constitute a danger to the security of the country in the UN Refugee Convention.

The other exception to the right of *non-refoulement* is where the refugee has been convicted by a final judgment for a particularly serious crime, and constitutes a danger to the community of the country of asylum.⁶⁷ This exception has an element of legality; it requires that a person should have been convicted by the highest court of the land for a serious offence and because of the seriousness of the offence he constitutes a danger to the community of the country in which he seeks or has been granted asylum. However, there is still a problem with the definition of terms; what constitutes a serious crime is not defined. It is a subjective matter to be decided by authorities who sometimes interpret and apply it in an arbitrary manner.

Conclusion

The foregoing discussion has sought to demonstrate that there is body of human rights normative standards that is available to refugees in international law. The rights are contained in a variety of human rights instruments both universal and specialised. These rights range from the right to non-discrimination, freedom of religion, artistic and industrial property rights, welfare rights and *non-refoulement*. States parties to the human rights and refugee conventions are under obligations to protect these rights. The refugees have a duty to respect laws and regulations of the receiving countries. They also must not carry out any activities likely to harm the countries of asylum. Importantly, the rights enjoyed by refugees in the countries of asylum are not absolute. They may be limited in the interest of public safety and public morality. Moreover, the rights may be limited to protect the national security of the receiving state. However, the issue of national security is problematic because the international instruments do not define it and it may be used as a pretext to deprive and deny refugees of the protection under the international instruments.

65 *Id* Article 32; *see also* Article 33(2), (“the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of the particularly serious crime, constitutes a danger to the community of that country”).

66 Refugee Act of Malawi, Act 3 of 1989, Section 10(6).

67 *See e.g. id*; compare with section 10(1) of the Refugee Act of Malawi.

Legal identity for all - ending statelessness in SADC

Liesl H. Muller

Introduction

Since 2014 significant progress has been made towards ending statelessness in the Southern African Development Community (SADC) region. Most notably, parliamentarians, who ultimately make the laws which prevent or aggravate statelessness, have committed to addressing statelessness in SADC. On 13 November 2016 SADC parliamentarians at the 40th plenary assembly of the SADC Parliamentary Forum adopted a resolution towards this end. This development, along with other similar resolutions and developing jurisprudence, will go a long way towards ensuring legal identity for all by 2030 as set out in Goal 16 of the United Nations Development Programme (UNDP) Sustainable Development Goals.¹

According to a study done by the African Commission on Human and Peoples' Rights (ACHPR) hundreds of thousands, possibly millions, of Africans do not have access to a nationality and may be stateless.² Being stateless means that a person's legal identity is compromised. It causes barriers to many other human rights such as the right to education, the right to healthcare and public services, as well as the right to vote and the right to freedom of movement. Basically, citizenship is the right to have other rights. Often, stateless persons cannot transfer nationality to their spouses and children, nor register the births of their children causing generational statelessness.³

Statelessness in Africa can be linked to a State's colonial history as well as migration, changes in State borders and discrimination based on gender, ethnicity or religion. Withdrawal of nationality or refusal to grant nationality has led to conflicts which have caused severe human rights violations on the continent.⁴

In the SADC region statelessness can be ascribed to large scale labour migration over generations; protracted displacement caused by conflict; the migration of unaccompanied minors; systematic discrimination against certain population groups; modernisation of the civil registry systems without proper access to administrative justice and poverty. One of the most prominent causes of statelessness in the SADC region is the lack of birth registration. According to UNDP the birth registration in the SADC region is disappointingly low and more than half of children are still unregistered by the age of five.⁵ Without a birth certificate it is impossible to prove one's claim to

1 Target 16.9. "Goal 16: Promote just, peaceful and inclusive societies" *United Nations* (2016) available at <http://www.un.org/sustainabledevelopment/peace-justice/> (last accessed: 19 November 2016).

2 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa*, (2015) 5.

3 *Id.*

4 *Id.*

5 Sustainable Development Knowledge Platform, "Sustainable Development Goal 16", available at <https://sustainabledevelopment.org>.

nationality.

The right to a nationality is implicit in the African Charter (the Charter) even though it was not included in the list of rights specifically protected under the Charter. This is evident from the interpretation of the Charter by the African Commission when deciding cases related to the right to nationality. The African Commission has linked the right to nationality to specific principles enshrined in the Charter, such as the prohibition of discrimination (article 2); equality before the law (article 3); respect for human dignity (article 5); the right to a fair trial (article 7); the right to freedom of movement (article 12); the right to participate in the government of the country (article 13); and the protection of the family and of the rights of women and children (article 18).⁶

African leaders have sought to address the lack of a specific provision on nationality through the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on the Rights of Women in Africa (the Protocol on the Rights of Women). The ACRWC specifically includes the child's right to a nationality. African States have been urged to ensure that children acquire the nationality of the State in which they are born if they are not granted nationality by any other State. The Protocol on the Rights of Women confirms that women in Africa have the right to acquire a nationality and to acquire their husband's nationality.⁷ These measures confirm the determination of African leaders to ensure that Africans have access to the right to nationality in Africa.⁸

The African Commission study finds that despite these initiatives, the impact of these provisions is limited by the lack of infusion of these treaties into national legislation and their limited application in national and regional courts. The complexity of the right to a nationality in Africa is further complicated by factors such as the practice of African pastoralism, borders inherited from the colonial period and the African diaspora.⁹

Accordingly, parliamentarians have a fundamental role to play in ending statelessness through legislative reform. There is a need to redesign laws in order to allow individuals to access their right to a nationality. These laws should meet the existing international law standards for access to nationality in international treaties to which many SADC States are signatories. These include, amongst others, the African Charter on Human and Peoples' Rights (ACHPR); the African Charter on the Rights and Welfare of the Child (ACRWC); the UN Convention on the Rights of the Child (UNCRC); the Universal Declaration of Human Rights (UDHR); and the International Covenant on Civil and Political Rights (ICCPR).

Ideally all SADC States should also accede to the 1954 UN Convention on the Status of Stateless Persons (the 1951 convention)¹⁰ and the 1961 UN Convention on the Reduction of Statelessness

un.org/sdg16 (last accessed: 13 December 2016).

6 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa*, (2015) 5 and 6.

7 Article 6(g) of the Protocol on the Rights of Women in Africa, available at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (last accessed: 15 December 2016).

8 *Id* 6 and 7.

9 *Id* 7.

10 Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 in pursuance of Economic and Social Council resolution 526 A (XVII) of 26 April 1954, entry into force: 6 June 1960, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatelessPersons.aspx> (last accessed: 15 December 2016).

(the 1961 convention)¹¹ which set out the definition of statelessness, protects the basic rights of stateless persons and provides legislative standards for the prevention and reduction of statelessness. Unfortunately, only seven SADC States have acceded to the 1954 convention (Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe) and only three SADC States have acceded to the 1961 convention (Lesotho, Swaziland and Mozambique). In order to ensure full protection of the right to a nationality in SADC laws, all SADC states should sign these two treaties to ensure that loopholes in legislation which lead to statelessness are avoided and that countries do not create statelessness in their neighbouring States. It is a problem which can only be effectively solved with the cooperation of all States in the region.

Policy Developments at SADC Level

Recent policy developments in the SADC region seek to address statelessness and change the fate of its stateless inhabitants. These include resolutions by the SADC Parliamentary Forum, the SADC Migration Dialogue for Southern Africa (MIDSA) and the International Parliamentary Union (IPU).

On 13 November 2016 the plenary assembly of the SADC Parliamentary Forum called upon national parliaments and governments in the SADC Region to:

- i. “Resolve any existing situations of statelessness within our own countries;
- ii. Review the legislative frameworks and administrative practices in nationality matters with a view to ensure their consistency with international standards on the prevention and resolution of statelessness, as well as on protection of stateless persons;
- iii. Initiate legislative reforms that addresses any identified gaps or challenges, including any discrimination on the basis of race, ethnicity, religion, or gender, thereby helping to prevent statelessness;
- iv. Ensure gender equality as regards the equal right of men and women to pass on their nationality to their children and spouses, and to change or retain their nationality;
- v. Expedite the implementation of article 6(4) of the African Charter on the Rights and Welfare of the Child, thereby preventing childhood statelessness;
- vi. Establish and maintain comprehensive birth registration and civil registration systems within Member States with a view to prevent statelessness;
- vii. Accede to the 1954 UN Convention relating to the Status of Stateless Persons, the 1961 UN Convention on the Reduction of Statelessness and the 1990 UN Convention on the Rights of all Migrant Workers and Members of their Families;
- viii. Support the drafting, adoption and ratification of a Protocol to the African Charter on Human and Peoples’ Rights on the Right to Nationality and the Eradication of Statelessness in Africa; and
- ix. Work towards the development and adoption of a SADC Ministerial Declaration and Action Plan on Statelessness.”¹²

11 Convention on the Reduction of Statelessness, adopted on 30 August 1961 in pursuance of General Assembly resolution 896 (IX) of 4 December 1954, entry into force: 13 December 1975, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Statelessness.aspx> (last accessed: 15 December 2016).

12 SADC Parliamentary Forum 40th Plenary Assembly Session, 3-15 November 2016, Harare, Zimbabwe.

Leading up to this event, parliamentarians in the SADC region attended an event in Cape Town in November 2015, hosted by the Parliament of South Africa, the International Parliamentary Union (IPU) and the United Nations High Commissioner for Refugees (UNHCR). At this event the members of parliaments agreed to advocate for the resolution of existing situations of statelessness and the prevention of statelessness through legislative reform and strengthened parliamentary oversight of implementation. They also committed to raising awareness and encouraging States to accede to the two UN conventions on statelessness.

In August 2016, the SADC Migration Dialogue for Southern Africa (MIDSA) produced conclusions and recommendations on statelessness including the following:

- 2.1. “Continue to advocate for the adoption and ratification of the African Charter on the Rights and Welfare of the Child, the domestication and implementation of, and adherence to the reporting obligations of the UN Convention on the Rights of the Child by SADC Member States.
- 2.2. Member States are encouraged to strengthen their capacity to enhance birth registrations and national identification systems, as well as to develop and maintain a well-functioning Population Register.
- 2.3. Ensure equality between men and women to pass on their nationality to their spouse and children.
- 2.4. Work towards the development and adoption of a SADC Ministerial Declaration/Action Plan on Statelessness.

Member States are encouraged to ratify and domesticate the 1954 UN Convention relating to the Status of Stateless Persons, the 1961 UN Convention on the Reduction of Statelessness and the 1990 UN Convention on the rights of all Migrant Workers and Members of their Families.”¹³

A follow up to these recommendations such as a MIDSA resolution to end statelessness in SADC at ministerial level would further strengthen these commitments.

Three follow up workshops at national level have been conducted to explore ways that parliamentarians and other branches of government can prevent statelessness through legislative reform and establishment of statelessness determination procedures. Such workshops were held in Malawi, Swaziland and Mozambique during the course of 2016 hosted jointly by UNHCR and Lawyers for Human Rights. In all three of these countries gender parity in nationality laws is still not a reality. Despite having signed both the statelessness conventions, Swaziland does not allow married mothers to pass their nationality to their children nor to their foreign spouses. Both Mozambique and Malawi either do not allow women to pass their nationality to their foreign spouses or set discriminatory requirements for foreign spouses to acquire citizenship from their spouses.¹⁴ In all three of these countries birth registration is still worryingly low despite efforts to increase it. Hopefully, their recent commitments to meet international standards will reform these laws and practices.

¹³ International Organisation for Migration, “Conclusions and Recommendations” Technical Migration Dialogue for Southern Africa Addressing Mixed Migration in Southern Africa: Linking Protection, Immigration, Border Management and Labour Migration, Gaborone, Botswana, 16-18 August 2016, available at <https://ropretoria.iom.int/news/technical-migration-dialogue-southern-africa-addressing-mixed-migration-southern-africa-linking> (last accessed: 15 December 2016).

¹⁴ Bronwen Manby for *Open Society Foundations Citizenship Law in Africa: A comparative Study* 2nd ed (2010) 5.

Goal 16 of the Sustainable Development Goals

Sustainable Development Goal 16 stresses the importance of birth registration of children concerning legal identity and ensuring access to individual rights. Birth registration is a crucial step in preventing statelessness as most States require proof of place of birth and identity of the parent(s) to establish nationality. Ensuring birth registration is therefore crucial toward ending statelessness in SADC. Lawyers for Human Rights has conducted an in depth study¹⁵ of the legislative framework in South Africa which creates barriers to birth registration and may lead to childhood statelessness and have made recommendations toward legal reform. Research of this kind is rare in the SADC region and more needs to be done to provide the necessary data which will guide policy reform.

Other initiatives which support the Sustainable Development Goals with regard to legal identity include Aspiration 3¹⁶ of Africa's Agenda for Children which aims to have every child's birth registered by 2040; and the recently formed coalition¹⁷ on every child's right to a nationality led by UN-HCR and UNICEF. The coalition seeks to ensure that no child is born stateless; to eliminate laws and practices that deny children nationality because of religion; remove gender discrimination from nationality laws; improve birth registration to prevent statelessness; and encourage States to accede to the UN statelessness conventions.

The judiciary also plays an important role in developing the law and will be instrumental in ensuring that laws are interpreted and applied in line with international standards. A 2014 judgment of the High Court of South Africa declared a stateless child born in South Africa to be a South African citizen.¹⁸ This judgment interprets and implements a 20 year old unknown provision which provides nationality to stateless children born in the territory. The South African system is one of few which has incorporated the international law principle that stateless children should acquire the nationality of the country where they are born.¹⁹ This section was previously inaccessible to children and necessitated the intervention of the judiciary. The Court directed the State to provide regulations and forms to this provision in order to make it accessible to the public.²⁰ Without this

15 Lawyers for Human Rights *Childhood Statelessness in South Africa* (2016) at <http://www.lhr.org.za/publications/childhood-statelessness-south-africa> (last accessed: 13 December 2016).

16 African Committee of Experts on the Rights and Welfare of the Child, "Africa's Agenda for Children 2040" available at <http://www.acerwc.org/ourevents/africas-agenda-for-children-2040/> (last accessed: 13 December 2016).

17 UN Refugee Agency, "Coalition on Every Child's Right to a Nationality" available at <http://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/> (last accessed: 13 December 2016).

18 *DGLR and Another v Minister of Home Affairs and Others*, Case No. 38429/13, North Gauteng High Court. In that case, a Cuban mother approached the court after her 5-year old child was refused citizenship in South Africa. The child's parents had lost their Cuban citizenship prior to the child's birth as they had been out of Cuba for more than 11 months. With both the South African and Cuban governments refusing the child citizenship, the child was stateless. See also Lawyers for Human Rights Press Release, July 2014, available at <http://www.lhr.org.za/news/2014/press-release-high-court-recognises-child-stateless-and-declares-her-be-sa-citizen> (last accessed: 15 December 2016).

19 Article 7 of the UN Convention on the Rights of the Child and article 6 of the African Charter on the Rights and Welfare of the Child states that a child has the right to birth registration and a name and a nationality from birth and shall acquire the nationality of the country of birth where the child would otherwise be stateless.

20 The High Court declared the child a South African citizen and directed the Minister of Home Affairs to issue her with a South African ID number and birth certificate. The Court further directed the Minister to draft regulations to make the protection of stateless children achievable. See Lawyers for Human Rights Press Release, July 2014, available at <http://www.lhr.org.za/news/2014/press-release-high-court-recognises-child-stateless-and-declares-her-be-sa-citizen> (last accessed: 15 December 2016).

judicial intervention the provision would remain obsolete.²¹

The South African judgment is in line with the findings of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in the landmark case of *IHRDA & OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*.²² Children of Nubian descent in Kenya were often left stateless, because they were unable to be registered at birth which prevented them from accessing nationality. Nubians in Kenya are regarded as foreigners even though they have been residing in the country for generations as a result of forced displacement. Even when birth certificates were issued, they did not confer nationality. Children of Nubian descent were often left to wait until they turned 18 to apply to acquire nationality. The African Committee found this to be a violation of article 6 of the African Children's Charter.²³ They held that "a purposive reading and interpretation of [article 6.1] strongly suggests that, as much as possible, children should have a nationality beginning from birth".²⁴

The African Committee added that "although States maintain the sovereign right to regulate nationality... States are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness".²⁵ There is an opportunity and a need to further develop the jurisprudence on nationality in Africa and in SADC specifically.

However encouraging the legal and policy developments in SADC may be there is a need to urgently act and finally end statelessness in SADC. The African Commission study found that "the right to a nationality is still not fully recognised as a fundamental human right on the African continent, as the current legal framework does not allow individuals to effectively protect themselves in the exercise of their right to a nationality".²⁶ The African Commission has been tasked with drafting a protocol to the African Charter to address the right to nationality in Africa. The effect of such an instrument will depend largely on the support of African States. SADC States are in a position to truly make a difference to the lives of stateless people by pledging to sign this crucial protocol.

Statelessness remains a problem in Southern Africa and continues to increase because of the lack of an appropriate legal framework to address the issue. Ending statelessness in SADC will require both legal and practical solutions to the problems faced by millions of Africans in their fight to gain access to the right to nationality and thereby access to all other rights, particularly the right to human dignity.

21 Sadly the South African government did not implement the Court's ruling. The Department of Home Affairs instead appealed the High Court ruling. Two years later, the Department withdrew its appeal a day before the hearing, and agreed to comply with the High Court order. *LegalBrief*, 7 September 2016, *Minister of Home Affairs and Others v DGLR and Another*, SCA Case No. 1051/2015.

22 *IHRDA & OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision: No 02/Com/002/2009.

23 *Id* at para. 42.

24 *Id*.

25 *IHRDA & OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision: No 02/Com/002/2009, at para. 48.

26 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa*, (2015) 50.

Refugee or immigrant distinguishing at the border

Tshepiso Seth Ndzinge-Makhamisa

Introduction

Botswana has seen a steady influx of migrants due to a variety of factors.¹ These migrants largely emanate from other Southern African countries such as Zimbabwe, Angola and Zambia. Furthermore, apartheid caused thousands of migrants to flee from South Africa. Some of these people have never returned to South Africa.

With the declining economic situation in Zimbabwe in the 1990s, migration to Botswana accelerated. Many of these migrants were undocumented.² Within this flow of migrants to Botswana, there were those who sought asylum and refugee status. Documented migrants, undocumented migrants and refugees all used the same migration routes and border crossings to enter Botswana.

This situation created a challenge for Botswana, as it does other countries facing an influx of migrants and refugees seeking asylum. Under international law, there is a distinction between a refugee and a migrant, even though their methods of entry into a country may be the same.³

International law attempts to protect people who have been recognised as refugees or who are in the process of gaining a refugee status determination. If a migrant is determined not to be a refugee, they are subject to the immigration laws of state. Depending on the legality of their entry into that particular state, they can face detention and deportation.

Because of the mixed migration of migrants and refugees, it is increasingly difficult for state officials at the border to make a distinction between a refugee (as defined by international and domestic law) who is seeking asylum and a migrant who is fleeing their country due to economic hardships, but also seeking asylum. This problem is even more acute when dealing with refugees and migrants who enter a state without the requisite documentation and later seek to be recognised as refugees and be granted asylum.⁴ Border officials also face difficulties in differentiating between the nuances of different migrant statuses.

There is a widespread belief that substantial numbers of people seek asylum in other countries not because they have a valid claim to refugee status, but because they want to improve their standard

1 See M Makheba "Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community" *SP Discussion Paper 0906* (2009).

2 *Id.*

3 See J Crisp & D Dessalegne "Refugee protection and migration management: the challenge for UNHCR" *New Issues in Refugee Research, Working Paper No. 64* (2002) 2 available at <http://www.unhcr.org/en-us/research/working/3d6c9e714/refugee-protection-migration-management-challenge-unhcr-jeff-crisp-damte.html> (last accessed: 17 October 2017).

4 *Id.*

of living and wish to circumvent established forms of migration control.⁵ Some people consider this an abuse of the international refugee system.

Whilst international law provides for the protection of refugees and asylum seekers, it does not provide clear procedures for determining the status of an asylum seeker.⁶ States have discretion to adopt a process for determining the status of an asylum seeker.⁷ There are, however, guidelines which states can follow to provide for a just, humane and fair status determination.⁸ Further, this determination mechanism should encompass the common law principles of natural justice.⁹

This paper will examine the distinction between a refugee and a migrant under international law, and the status of that distinction in Botswana law. The paper will then examine the guiding international legal principles for status determination, and will assess whether those principles are provided for in Botswana law. The paper will conclude with a critique of the Botswanan status determination process and make recommendations for a revision of the system to make it more rights based and just.

Refugee or Migrant?

Under international and national law, the differentiation between refugees, asylum seekers and migrants are often confused. They are not the same thing. The 1951 UN Convention on the Status of Refugees (1951 Convention),¹⁰ the Protocol Relating to the Status of Refugees,¹¹ and the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention)¹² have all defined the term “refugee” similarly. As stated in the text of the OAU Convention, a refugee is:

“...every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹³

The term “persecution” is not defined in either of the Conventions, or their additional protocols. It seems that persecution should be understood in terms of the denial of basic human rights. Although there is some debate as to what constitutes “basic human rights”, there is general agreement that acts directed against a person’s life, limb or physical liberty constitute persecution.¹⁴ These

5 See KE Cortes “Are Refugees Different from Economic Immigrants? Some Empirical Evidence on the Heterogeneity of Immigrant Groups in the United States” *IZA DP No. 1063* (2004) 3 available at <http://ftp.iza.org/dp1063.pdf> (last accessed:17 October 2017).

6 See J Zetterqvist “Refugees in Botswana in Light of International Law” *The Scandinavian Institute of African Studies Research Report No. 87* (1990).

7 *Id.*

8 See e.g. “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” *HCR/IP/4/Eng/REV.1* (1992).

9 *Id.*

10 UN Convention on the Status of Refugees (1951 Convention) *A/RES/429* (1951).

11 Protocol Relating to the Status of Refugees *General Assembly resolution 2198* (XXI) (1967).

12 OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention) *UN Treaty Series No. 14691* (1969); Botswana became party to the 1951 Convention and Protocol on 6 January 1969 and the OAU Convention 16 May 1995.

13 *Id.* Article 1(1).

14 See “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees” *UNHCR* (2001) 5.

acts include torture; cruel, inhuman or degrading treatment; or arbitrary arrest or detention. To constitute persecution, the acts must be committed by the government, state actors or by other groups whose acts are tolerated by the government.¹⁵ This tolerance can be voluntary or through lack of control.

The phrase “well-founded fear” was also not defined by the instruments. In practice, determining the presence of well-founded fear requires both a subjective and objective analysis. The subjective element examines the refugee’s individual feelings of fear. The objective part of the analysis then determines whether the fear is “well founded”.

The OAU Convention expands the definition of “refugee” to broader aspects than what is present in the 1951 Convention. It states that the term refugee should also apply:

“...to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”¹⁶

Through the inclusion of this provision, the drafters of the OAU Convention no longer require refugees to prove that they have a “well-founded fear” of persecution.¹⁷ This, however, further muddies the waters with respect to the determination of who a refugee is, and the distinction between a refugee and a migrant. The difficulty lies in relying on the objective element without any subjective analysis which can work as a counter weight in making such analysis.

For many countries, the distinction between a refugee and an asylum seeker is ambiguous. This is due, in part, to the lack of a clear definition of an asylum seeker in the 1951 Refugee Convention. Because there is no treaty based definition, countries often set out the guidelines for granting asylum to those in need of protection. However, an internationally accepted definition of an asylum seeker may be found in various UNHCR documents.¹⁸ Asylum seekers are recognised as persons of concern for the UNHCR.¹⁹

According to the UNHCR, “asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined”.²⁰ A refugee is always initially an asylum seeker, as she originally applies for asylum in the host country. An asylum seeker is not necessarily a refugee, but can become one if she falls within the aforementioned definition of a refugee. Her application for asylum should be recognised and she should be granted refugee status.²¹

Certain provisions of the 1951 Refugee Convention may apply to both refugees and asylum seekers. One example is the principle of non-refoulement.²²

15 See J Zetterqvist, *supra* note 7.

16 OAU Convention, *supra* note 12, Article 1(2).

17 *Id.*

18 “Handbook on Procedures and Criteria for Determining Refugee Status”, *supra* note 9.

19 *Id.*

20 UNHCR Population Statistics Database (2017) available at <http://popstats.unhcr.org/en/overview> (last accessed: 18 October 2017).

21 It is important to note that one does not apply to be a refugee, but rather for the right to be recognised as a refugee.

22 See 1951 Convention, *supra* note 10, Article 33.

In conclusion, an asylum seeker is generally defined as a person who seeks asylum or shelter in a country other than his country of origin, and who is waiting for their application their application to be processed. Her flight may be motivated for many different reasons such as persecution, aggressions, conflicts, human rights abuses, threats to life, and other reasons. etc. After applying for asylum, this asylum seeker may become a refugee or an economic migrant in the host country. However, sometimes the reason an asylum seeker migrated does not fit within the Refugee Convention criteria and the asylum seeker is not granted refugee status. Without refugee status, the asylum seeker may be deported and still might face suffering, persecution and hardship in the country from which she fled.

As was stated by Eugene Campbell²³:

“Asylum-seekers and refugees may stay temporarily under conditions associated with illegal immigration while awaiting decisions on their applications for legal residence in a country. However, they should not be seen to be illegal immigrants on the basis that the government would have acknowledged their presence in the country from their application forms.”²⁴

The UNHCR Handbook lays out a helpful distinction between refugees and economic migrants²⁵:

“A migrant [as opposed to a refugee] is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant’s country of origin is not always clear. Behind economic measures affecting a person’s livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.”²⁶

All of these conversations have implicit references to illegal immigration. As stated by Eugene Campbell²⁷:

“An illegal immigrant may be defined as a person who enters a country of which he/she is not a citizen without demonstrating at the port of entry that he/she possesses legal documents that justify such entry. In effect, illegal immigration constitutes a criminal offence for which, if apprehended,

23 EK Campbell “Reflections on Illegal Immigration in Botswana and South Africa” Volume 21(2) African Population Studies 23-44 (2006) available at <http://www.bioline.org.br/request?ep06010> (last accessed: 18 October 2017).

24 EK Campbell “Reflections on Illegal Immigration in Botswana and South Africa” Volume 21(2) African Population Studies 23-44 (2006) available at <http://www.bioline.org.br/request?ep06010> (last accessed: 18 October 2017).

25 “Handbook on s and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” *HCR/IP/4/Eng/REV.1* (1992) paras. 62-63. Available at <http://www.unhcr.org/4d93528a9.pdf> (last accessed 18 October 2017).

26 “Handbook on Procedures and Criteria for Determining Refugee Status”, *supra* note 9, paras. 62-63; *see also* A Edwards “UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?” *UNHCR* (2015) available at <http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> (last accessed: 18 October 2017);

27 EK Campbell “Reflections on Illegal Immigration in Botswana and South Africa” Volume 21(2) African Population Studies 23-44 (2006) available at <http://www.bioline.org.br/request?ep06010> (last accessed: 18 October 2017).

could carry the full penalty of the States immigration laws. Not surprisingly, in countries where criminal behavior is dealt with very seriously, persons accused of attempting or making an illegal entry may be treated very harshly.”²⁸

Another helpful reminder from the UNHCR Handbook²⁹ states:

“It should be [noted] that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant’s particular difficulties and needs.”³⁰

Refugee Status Determination

As stated by Mokobi and Pfumorodze³¹:

“As previously stated, international refugee law does not prescribe any specific procedure to be followed by countries in the determination of refugee status. The means and processes of status determination are left to the discretion of each state. One may at the outset assume that any procedure established by a state that achieves the desired aim of distinguishing between genuine cases for recognition and other non-deserving cases would be sufficient. . . State practice with regard to status determination differs depending on the nature of the refugee problem and the general efficiency of the particular state’s courts and administrative systems. Further, the UNHCR has observed that the methods used to decide whether to recognise someone as a refugee vary around the world, reflecting a variety of legal traditions, local circumstances and national resources.”³²

Because the matter is not specifically regulated by the 1951 Convention or its Protocol, procedures adopted by States parties vary considerably. In a number of countries, the procedure to determine refugee status is formally legislated and clearly spelt out. In other countries, the determination of refugee status is decided within broader frameworks or general procedures for the admission of aliens. This can lead to confusing, unjust and convoluted processes and results. In yet other countries, refugee status is determined under informal arrangements or ad hoc.³³

Even though states may, “devise their own status determination procedures, each state is in fact subject to international standards, of which one may argue amount to soft law. In ensuring the effective implementation of international refugee law, each state must have ‘some form of procedure for the identification of refugees, and some measure of protection against laws of general applica-

28 EK Campbell, *supra* note 23; see also J Zetterqvist, *supra* note 7.

29 “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” HCR/IP/4/Eng/REV.1 (1992) paras. 62-63. Available at <http://www.unhcr.org/4d93528a9.pdf> (last accessed 18 October 2017). “UNHCR Handbook on Procedures and Criteria for Determining Refugee Status”,

30 “UNHCR Handbook on Procedures and Criteria for Determining Refugee Status”, *supra* note 9, para. 190.

31 E Macharia Mokobi and J Pfumorodze “Advancing refugee protection in Botswana through improved refugee status determination” 1 *AHRLJ* 152-177 (2013). Available at <http://www.ahrlj.up.ac.za/macharia-mokobi-e-pfumorodze-j> (last accessed: 18 October 2017).

32 E Macharia-Mokobi & J Pfumorodze “Advancing refugee protection in Botswana through improved refugee status determination” 1 *AHRLJ* 152-177 (2013).

33 See A Edwards “Refugee status determination in Africa” 14 *African Journal of International and Comparative Law* 204 (2006).

tion governing admission, residence and removal of refugees.”³⁴

It must however be remembered that “a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”³⁵ This nuanced understanding of a refugee is integral in ensuring that refugees are not treated as illegal immigrants pending and during their refugee status determination.³⁶

“Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case”³⁷ through obtaining information from the applicant (and other sources where necessary), whether written, or oral, or both.³⁸ “Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.”³⁹

Because of the diverse approaches that States took creating procedures required for the refugee status determination, the Executive Committee of the High Commissioner’s Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements. These basic requirements, which reflect the special situation of applicants for refugee status, would ensure that the applicant is provided with certain essential guarantees. They are the following:

- “(i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority—wherever possible a single central authority—with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognized as a refugee, he should be informed accordingly and is with

34 Macharia-Mokobi, *supra* note 27; quoting G Goodwin-Gill & J McAdam *The Refugee in International Law* (2007) 528. E Macharia Mokobi and J Pfumorodze “Advancing refugee protection in Botswana through improved refugee status determination” 1 *AHRLJ* 152-177 (2013). Available at <http://www.ahrj.up.ac.za/macharia-mokobi-e-pfumorodze-j> (last accessed: 18 October 2017).

35 “Handbook on Procedures and Criteria for Determining Refugee Status”, *supra* note 9, para 28.

36 See Macharia-Mokobi, *supra* note 27.

37 “Handbook on Procedures and Criteria for Determining Refugee Status”, *supra* note 9, para 29.

38 See Macharia-Mokobi, *supra* note 27.

39 “Handbook on Procedures and Criteria for Determining Refugee Status”, *supra* note 9, para 29.

documentation certifying his refugee status.

- (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.⁴⁰

The Status of International Refugee Law in Botswana

The natural question that arises is what then is the position of international law, and the aforementioned international standards within the prism of national law. Botswana, as has been often discussed in numerous cases is a dualist state.⁴¹ As was stated by Professor Duru, “[d]ualism – or, rather, the doctrine of transformation – for its part perceives international law and national law as two distinct and independent legal orders, each having an intrinsically and structurally distinct character.”⁴²

Within dualist States, treaties do not become part of domestic law merely by virtue of their ratification. Once ratified, treaties have to be incorporated explicitly into the domestic legal system- i.e through an act of parliament. International law may thus be incorporated into these dualist legal systems in one of two ways: directly, through incorporation, or indirectly through a process of reception (transformation).⁴³

Incorporation entails the wholesale enactment of an international treaty. Transformation takes place if the provisions of an international agreement are reflected in parts of national legislation or if pieces of national legislation are amended or repealed to conform to international norms. Usually transformation refers to change which do not explicitly reference the source of the norms.⁴⁴

For provisions of the 1951 UN Convention and its addendum Protocol or the OAU Refugee Convention to form part of Botswana national law, they must be legislatively incorporated. Botswana

40 “Report of the 28th Session” *UN doc. A/AC.96/549* (1977) para. 53.6 available at <http://global.oup.com/booksites/content/9780199207633/resources/annexe4> (last accessed 18 October 2017 *supra* note 9, para 29.

41 *See Republic of Angola v Springbok Investments (Pty) Ltd* [2005] 2 BLR 159, Kirby J (“The position is this country is thus similar to that which obtains in Zimbabwe, where there is also no act and to that which obtained in the United Kingdom and South Africa before their acts were introduced. All three countries have moved away from the formal view (the doctrine of transformation) that all aspects of international law require to be introduced by statute, or by specific decisions of judges, or by long-standing custom, before they become part of the law of a country. Instead they have embraced the doctrine of incorporation, which holds that the rules of international law, or the *ius gentium*, are incorporated automatically into the law of all nations and are considered to be part of the law unless they conflict with statutes or the common law. Under this doctrine the rules of international law may be developed by the courts in line with changes in the world. ... have no doubt that the rules of international law form part of the law of Botswana, as a member of the wider family of nations, save in so far as they conflict with Botswana legislation or the common law, and it is the duty of the court to apply them.”)

42 OWC Duru “International Law Versus Municipal Law: A Case Study of Six African Countries; Three of Which are Monist and Three of Which are Dualist” 18 available at <http://ssrn.com/abstract=2142977> (last accessed 18 October 2017); *see also* F Viljoen *International Human Rights law in Africa* 2nd ed. (2013).

43 *See* F Viljoen *International Human Rights law in Africa* 2nd ed. (2013).

44 *See id.*

has only ratified and not domesticated these Conventions. Although it is not bound by its provisions, it cannot ignore them because they are of persuasive value. In addition, Section 24 of the Interpretation Act of Botswana⁴⁵ enjoins courts to consider international instruments for purposes of construction of provisions of statutes. Although the Conventions remain influential in Botswana, the domestic law of Botswana continues to be determinative. The requirements outlined by the UNHCR with regard to basic minimum requirements for a fair and just status determination process amount to 'soft law' and are non-binding.

Botswana National Law and Distinguishing between a Refugee and a Migrant at the Border

Against this backdrop, one can analyse the national law of Botswana, and whether it provides mechanisms that enable the requisite authorities to make a proper distinction at border crossings, and thereafter, to take appropriate steps.

The Refugee (Recognition and Control) Act 1967 has adopted the definition of a refugee as defined in the 1951 UN Refugee Convention.⁴⁶ Although Botswana has signed and ratified the 1969 OAU Convention, it has not sought to widely construe the definition of a refugee as provided for in that Convention. One may argue that the OAU refugee definition is binding on Botswana anyways. The Immigration Act of 2011⁴⁷ has defined an immigrant as any person in Botswana who is not a citizen of Botswana.

Macharia-Mokobi gives a helpful summary of the procedures as they currently exist in Botswana:

"Status determination procedures in the [Refugee] Act can fairly be described as rudimentary. An individual seeking asylum under the Act in Botswana is required to declare his intention to apply for asylum at the earliest possible opportunity. This may be done at a border post upon initial entry, by appearing at a police station, or at the UNHCR offices in the capital city Gaborone. At the time of making the initial claim for asylum, the applicant is immediately referred to the police, immigration officers or UNHCR for an initial interview. At this interview, his details are taken and he is required at this stage to inform the interviewer of his reasons for fleeing his country. An interview may also be conducted by an intelligence officer for security purposes should this be deemed necessary.

After his application has been received and processed, an asylum seeker will then be transferred to the Centre for Illegal Immigrants in Francistown. He or she will reside there pending the determination of his or her status as a refugee – within the same area as undocumented migrants. In the meantime, the asylum seeker's application is forwarded to the Refugee Advisory Committee (RAC), the body established under section 3 of the Act charged with status determination."⁴⁸

45 Cap. 01:04 of the Laws of Botswana.

46 The Refugee (Recognition and Control) Act (1967) Cap 25:01 of the Laws of Botswana, Schedule 1.

47 Cap 25:02 of the Laws of Botswana.

48 Macharia-Mokobi, supra note 27, 156-57.

The Act is silent on group determinations, which could be used if there was a mass influx of refugees from one state to another. As Mokobi highlights, there is a need to amend the Act to include group determination in the Act in order to expedite the determination of group asylum claims.⁴⁹

Conclusion and Recommendations

The line between who is and who is not a refugee can often times be a blurry one. The heightened levels of mixed migration into Botswana, at its designated and non-designated ports of entry, makes the determination process even more difficult. It is imperative that certain measures be considered to ensure that there is a smooth, clear, fair, efficient and humane determination procedure at the first point of contact. This procedure must also take into consideration fundamental human rights.

Firstly, our national law must provide a distinction between a refugee, a migrant and an asylum seeker. The law must be able to provide officials with a clear guide of who should fall within the refugee status determination procedure, and who should be subject to national immigration laws.

Secondly, Botswana must enact laws that deal specifically with the refugee status determination which incorporate basic minimum standards for ensuring a just and fair determination procedure. Furthermore, those “standards [should] require that border officials receiving applicants have some training in international refugee law. This training would enable them to effectively identify cases for referral to the refugee determination authority. Training would also ensure that refoulement is not inadvertently occurring at the border post due to a lack of knowledge of the relevant international law instruments.”⁵⁰

Thirdly, domestic legislation must protect undocumented refugees seeking asylum. Botswana entered a reservation to the 1951 Convention on both the freedom of movement of refugees and their right to work.⁵¹ In practice, asylum seekers are detained at the Centre for Illegal Immigrants pending the determination of their status. Asylum seekers and illegal immigrants share the same facility. There should be separate facilities for asylum seekers and undocumented migrants. The current situation is not desirable and may result in enhanced trauma for migrants who are fleeing persecution and seeking a safe haven.

It is imperative that Botswana recognises the rights of refugees. This should happen from the moment they enter the country, not after long periods in detention.

49 Id.

50 *Id* para. 8.4; see also G Toka entitled “Immigration officers’ poor training, low morale undermine national security” *Sunday Standard* (2009) (“The Auditor- General, in his Performance Audit Report 9, 2008 on Management of Illegal Immigrants by the Department of Immigration, has expressed concern at this state of affairs. DIC is one of the government departments which, at most, work with minimum experienced officers in terms of academic background, and who, upon entry, were offered 1-2 weeks on the job training, which would anyhow be considered inadequate”).

51 See list of reservations to the 1951 Convention, available at <http://www.unhcr.org/afr/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html?query=1951%20Refugee%20Convention> (last accessed: 18 October 2017).

Socio-economic rights of refugees in Botswana: Towards an enabling legal framework

Bonolo Ramadi Dinokopila

Introduction

The importance of protecting and promoting the rights of refugees has become increasingly evident over the past several years. This is in large part because of the Syrian crisis and other conflicts which are displacing people around the world. More than a million migrants and refugees crossed into Europe in 2015.¹ Countries in the West, especially those in Europe, were thrown into crisis because of this influx. Some critics argue that the crisis in Europe was overstated, pointing to the consistent flow of refugees in places such as Africa. Additionally, Africa is home to many migrants and refugees. The reaction by Europe and the West to the refugee crisis has sparked controversy about promotion and protection of the rights of migrants and refugees. The dramatic events surrounding this crisis has shifted focus to refugees in Europe, rather than those in Africa.

The recent refugee crisis has brought to the forefront the many ways that refugees are at risk of having their socio-economic rights violated. While fleeing war, it is difficult for people to acquire the basic necessities of life such as food, clothing and shelter. That difficulty is all too common for many refugees. They are compelled to move across borders with little idea of where they are going to sleep and eat. They are often dependent on the receiving state to afford them such amenities. The reality of many refugees is that they are unable to enjoy the basic socio-economic rights that are supposed to be availed to them. From the time when they are awaiting results for their status determination to the time when they are granted status as refugees or asylum seekers, they are at the mercy of the receiving state to fulfil their socio-economic rights.

Botswana, like many other countries, has struggled to fulfil the socio-economic rights of refugees in its territory. This has given rise to many problems. For example, there have been issues with respect to the provision of life saving medication, in the form of HIV/AIDS anti-retroviral drugs, to refugees located at the Dukwi Refugee Camp by the Government of Botswana². There have also been instances where refugees in Botswana were not given access to education. In particular, the

1 See J Clayton and H Holland "Over one million sea arrivals reach Europe in 2015" *UNHCR* (2015) available at <http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> (last accessed 15 October 2017).

2 <http://www.unhcr.org/protection/health/44966cdf2/botswana-refugee-hiv-aids-dukwi-camp.html>

concern was that they were not being assisted with their tertiary education³. Recently, the government has detained a number of potential asylum seekers or refugees without ensuring that the children are provided with education. The Government has taken a haphazard approach towards the fulfilment of socio-economic rights. There is no compelling domestic legal framework that lays out the responsibilities or procedures for the Government. This makes it difficult for refugees and advocates to hold the government accountable.

The challenges relating to the fulfilment of socio-economic rights of refugees are compounded by the generally weak protection of socio-economic rights for the general population by governments. Generally, these rights have enjoyed less fulfilment because of weak commitments by governments to the promotion and protection of such rights. The argument by most governments is that they do not have sufficient resources to provide for a wide array of socio-economic rights. There are pockets of judiciaries in Africa who are reluctant to enforce socio-economic rights as they are convinced that any adjudication over such issues amounts to judicial overreach into the legislative function of government to allocate resources. If these arguments are made when litigating the rights of citizens, what then of refugees? Can refugees expect their socio economic rights to be protected by host countries if the host countries do not fulfil the socio-economic rights of its own citizens?

This paper will assess whether the policy and legal framework in Botswana protects and promotes the socio-economic rights of refugees. The Constitution of Botswana, refugee protection laws and policies will all be examined, as will Botswana's international legal obligations. Based on the current status of the law in Botswana, the paper will end with recommendations for a more enabling framework that better protects and fulfils the socio-economic rights of refugees.

Botswana's refugee policy and national law

Botswana's framework for the protection of refugees and asylum seekers is well established. It dates back to the apartheid era in Southern Africa, during which time the country hosted freedom fighters from countries such as South Africa. Botswana has been credited with playing a crucial role in the liberation of black South Africans. The country also hosted refugees from Angola, Mozambique, Namibia and Lesotho before these countries attained independence.⁴ This time period was not without numerous challenges.⁵

The country's refugee policy and practice is as old as the country itself. The country's refugee population has remained relatively small considering that Botswana is a peaceful and democratic country. At the end of 2016 the number of refugees in Botswana stood at 2832⁶. Even though the numbers are not astronomical, as may be the case in Kenya⁷ or South Africa⁸, there is a clear increase

3 <http://www.thegazette.news/?p=18191>

4 See T Maluwa "The concept of asylum and the protection of refugees in Botswana: Some legal and political aspects" 2 *International Journal of Refugee Law* 587 (1990) 589.

5 *Id.*

6 <http://reporting.unhcr.org/node/10323>

7 Kenya hosted 488 415 refugees at the end of 2017 http://www.unhcr.org/ke/wp-content/uploads/sites/2/2018/01/Kenya-Statistics-Infographics_December-2017.pdf

8 South Africa received 62 159 asylum applications in 2015 and approved 16 681 as refugees <https://pmg.org.za/committee-meeting/22163/>

in the number of refugees that Botswana hosts.

Botswana's policy towards refugees and asylum seekers is codified by the country's Refugee (Recognition and Control) Act (Refugee Act).⁹ The Refugee Act was enacted in 1968, two years after Botswana attained independence. The law is now antiquated. In addition to the Refugee Act, the Immigration Act,¹⁰ the Constitution of Botswana,¹¹ the Geneva Conventions Act,¹² and other pieces of legislation affect the receipt and treatment of non-citizens in Botswana. Some stakeholders have begun discussing reforming the law to better protect the rights of refugees in Botswana.

The Refugee Act provides for the recognition and control of refugees.¹³ The Act also seeks to ensure that those who have sought refuge in Botswana are only removed in accordance with the provisions of the law.¹⁴ The Act specifically mentions that it is aimed at recognising and controlling "certain political refugees."¹⁵ The Act defines a political refugee as:

"a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."¹⁶

The use of the qualifier "political" might have been intended to remove any ambiguity on the class of refugees that might seek protection and settle in Botswana. From the onset, it is clear that even though Botswana is bound by the provisions of the United Nations Convention Relating to the Status of Refugees (Refugee Convention),¹⁷ it is not bound by any of the provisions of the Refugee Convention that have not been domesticated into the laws of Botswana.¹⁸ The effect of this provision is that not all subsequent amendments or amendments to the Convention will be binding on Botswana.

The Refugee Act also establishes the Refugee Advisory Committees¹⁹ and sets out their powers and procedures.²⁰ The Act mandates these Refugee Advisory Committees to determine the status of any immigrant who claims to be a political refugee.²¹ The Refugee Advisory Council was established to carry out this task. The refugee status determination process in Botswana is inadequate in advancing refugee protection in Botswana.²² While the Refugee Advisory Council might be accessible, it is

9 Cap 25:03 Laws of Botswana.

10 Cap 25:02 Laws of Botswana.

11 1966.

12 Act No. 28 of 1970.

13 Refugee Act, *supra* note 5, Preamble.

14 *Id.*

15 *Id.*

16 *Id.* Section 2 and Schedule 1.

17 Convention Relating to the Status of Refugees (Refugee Convention) *General Assembly resolution 429 (V)* (1951).

18 *Id.* Section 2.

19 *Id.* Section 3.

20 *Id.* Section 4.

21 See E. Macharia-Mokobi & J. Pfumrodze "Advancing refugee protection in Botswana through improved refugee status determination" 13 *African Human Rights Law Journal* 152 (2013).

22 *Id.*

generally slow and takes a long time to make a determination on someone's refugee status.²³ Whilst awaiting status determination, immigrants are kept in immigration detention facilities until they are taken to the Refugee camp or deported. Initially, the practice was to keep immigrants in prisons until a decision was reached as to whether they are to be offered refugee status or asylum status.

The Refugee Act makes it clear that no immigrant will be removed from Botswana unless their status has been determined by the Minister and the Refugee Council.²⁴ This practice ensures that immigrants are not deported unless the refugee status determination process has been completed. Further, once a person is recognised as a political refugee, there are restrictions that are placed on the removal of that person from the country.²⁵ For example, a person who is recognised as a refugee may only be removed to a country that has been approved by the Minister as being a country which will not endanger the life or freedom of the refugee.²⁶ However, if a refugee is determined to pose a threat to national security or of public order, they may be deported to any country, any threat notwithstanding.²⁷ Removal on the basis of public order can only take place if the person has been convicted of a serious crime.²⁸

The protection of socio-economic rights of refugees under international law

This section draws heavily on a previous published work by the author²⁹.

Socio-economic rights have been given recognition under the 1948 Universal Declaration of Human Rights (UDHR).³⁰ Though non-binding in nature, the declaration initiated the protection and promotion of socio-economic rights by listing a number of these rights. The UDHR was later followed by the International Covenant on Economic, Social and Cultural Rights (ICESCR).³¹ Socio-economic rights are also protected under a number of thematic international instruments, including the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),³² the Convention on the Rights of Persons Living with Disabilities (CPLWD),³³ and the Convention on the Rights of the Child (CRC).³⁴ They are also protected under various regional human rights treaties such as the African Charter on Human and People's Rights (African Char-

23 *Id.*

24 Refugee Act, *supra* note 5, Section 6.

25 *Id.* Section 9.

26 *Id.* Section 9(1).

27 *Id.*

28 *Id.*

29 THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN BOTSWANA AND THE CASE OF BASARWA IN THE CENTRAL KALAHARI GAME RESERVE (CKGR) BONOLO RAMADI DINOKOPILA Available at http://www.ancl-radc.org.za/sites/default/files/images/the_enforcement_of_socio-economic_rights_in_botswana_full_paper_by_boolo_ramada_dinokopila.doc

30 Universal Declaration on Human Rights (UDHR) *UN Doc. A/RES/217 A (III)* (1948)

31 International Covenant on Economic Social and Cultural Rights (ICESCR) *General Assembly resolution 2200A (XXI)* (1966).

32 A/RES/34/180 (1979).

33 A/RES/61/106 (2006).

34 A/RES/ 44/25 (1989).

ter),³⁵ the African Charter on the Rights and Welfare of the Child (ACRWC),³⁶ and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol).³⁷ The general protection of socio-economic rights under international law is clear. While these rights were historically marginalised, they are slowly being or have been recognised as rights. These rights belong to all people, including refugees.

The UDHR contains provisions relating to the protection of both socio-economic rights and civil and political rights. For example, the UDHR provides for the right to equality,³⁸ freedom from discrimination,³⁹ and the right to equality before the law.⁴⁰ The totality of these provisions means that a refugee is entitled to the same protection and the enjoyment of these rights as citizens in their host country. The UDHR explicitly that those who are fleeing persecution have the right to seek asylum in another country.⁴¹ They only lose that right if they have committed a serious offence.⁴² There are few provisions in the UDHR that make specific reference to socio-economic rights. In particular, the UDHR provides for the right to social security,⁴³ the right to desirable work and to join trade unions,⁴⁴ the right to adequate living standard,⁴⁵ the right to education,⁴⁶ and the right to participate in cultural life of community.⁴⁷

The ICESCR is a foundational treaty that expounds on the socio-economic rights found in the UDHR. It has many provisions that extend to the promotion and protection of the right to adequate standard of living,⁴⁸ the right to health,⁴⁹ the right to education⁵⁰ and other rights that give meaning to the right to life.⁵¹ The principal body charged with the global implementation of ICESCR is the Committee on Economic, Social and Cultural Rights (the ESCR Committee). It is mandated to supervise the compliance by member states with their obligations under the ICSECR. It accomplishes this through state reporting in accordance with the reporting guidelines. The Optional Protocol on the ICESCR⁵² also forms part of the international legal framework for the protection and promotion of socio-economic rights. The Optional Protocol creates a complaints mechanism for individuals and groups to help monitor states parties' compliance with the provisions of the ICESCR.⁵³ It has been hailed by some as having the potential effect of strengthening

35 OAU Doc. CAB/LEG/67/3/Rev. 5 (1981).

36 OAU Doc. CAB/LEG/153/Rev. 2 (1990).

37 Adopted at the 2nd Ordinary Sess., Assembly of the Union (2003).

38 UDHR, *supra* note 25, Article 1.

39 *Id* Article 2.

40 *Id* Article 7.

41 *Id* Article 14.

42 *Id* Article 14(2).

43 *Id* Article 22.

44 *Id* Article 23.

45 *Id* Article 25.

46 *Id* Article 26.

47 *Id* Article 27.

48 ICESCR, *supra* note 26, Article 11.

49 *Id* Article 12.

50 *Id* Article 13.

51 See e.g. *id* Articles 6 and 7 (the right to work); Article 8 (the right for everyone to form trade unions and join the trade union of his/her choice); Article 9 (the right to social security); and Article 15 (the right to take part in cultural life).

52 A/RES/63/117 (2008).

53 See L. Chenwi "Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on

the promotion and protection of socio-economic rights worldwide.⁵⁴ Others have criticised the Optional Protocol as a mere mimicry of the structures of the ICCPR.⁵⁵

The movement to protect and promote economic, social and cultural rights (ESCRs) in Africa received tremendous support from the adoption of the African Charter. The African Charter makes no distinction as to the type of rights, makes no indication as to which of the rights is of lesser importance than the other and theoretically made no distinction as to their implementation.⁵⁶ The African Charter did not create a hierarchy of rights and is seen as a leap beyond ideological disputes that lead to the subjugation of the importance of socio-economic rights below that of political rights.⁵⁷ The African Charter protects a wide range of ESCRs⁵⁸ and is supplemented by thematic regional instruments such as the African Women's Protocol⁵⁹ and the ACRWC.⁶⁰ Socio-economic rights are protected under Articles 15 to 24 of the African Charter. They include the right to health,⁶¹ the right to education,⁶² the right to self-determination,⁶³ the right to economic social and cultural development,⁶⁴ as well as the right to a satisfactory and stable environment.⁶⁵ These rights are free from claw back clauses⁶⁶ and are unequivocally justiciable like all other rights enshrined under the charter.⁶⁷ States are enjoined to immediately implement these rights.⁶⁸ The normative content of the economic, social and cultural rights enshrined under the African Charter has been laid out in several decisions of the African Commission on Human and Peoples' Rights (African Commission).⁶⁹

The debate as to whether or not socio-economic rights are justiciable continues. Scholars have debated this since the adoption of the ICCPR and ICESCR. The argument, to a large extent, is whether socio-economic rights are actually rights under international law. Opponents to this position frame them as mere privileges extended to individuals by the state subject to the availability

Economic, Social and Cultural Rights" 9 *African Human Rights Law Journal* 23 (2009).

54 *Id* 50.

55 MJ Dennis & DP Stewart "Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the right to food, water, housing, and health?" 98 *American Journal of International Law* 462-515 (2004).

56 See *Purohit and Another v The Gambia* AHRLR 96 ACHPR (2003) (African Commission limits the right to health with the qualification of availability of resources); see also F Viljoen *International Human Rights Law in Africa* (2007) 240.

57 See C Mbazira "Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years redundancy, progression and significant strides" *Volume 6(2) African Human Rights Law Journal* (2006) 338.

58 *Id* 340.

59 African Women's Protocol, *supra* note 32, Articles 12-18;

60 ACRWC, *supra* note 31, Articles 11, 12, 14, and 18.

61 African Charter, *supra* note 30, Article 16.

62 *Id* Article 17.

63 *Id* Article 20.

64 *Id* Article 22.

65 *Id* Article 24.

66 S Ibe "Beyond Justiciability: Realising the promise of socio-economic rights in Nigeria" 7 *African Human Rights Law Journal* 229 (2007).

67 F Viljoen *International Human Rights Law in Africa* (2007) 237.

68 Mbazira, *supra* note 52.

69 See e.g. *Social and Economic Rights Centre (SERAC) and Another v Nigeria* AHRLR 60, ACHPR (2001); *Media Rights Agenda and Others v Nigeria* AHRLR 200 (ACHPR 1998) (2000); *Free Legal Assistance Group and Another v Zaire* AHRLR 74 (ACHPR 1995) (2000); *Purohit and Another v The Gambia* AHRLR 96, ACHPR (2003); *Union Interfricaine des Droits de l'Homme and Others v Angola* AHRLR 18 (ACHPR 1997) (2000); *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* AHRLR 212 (ACHPR 1998) (2000); and *Malawi African Association and Others v Mauritania* AHRLR 149, ACHPR (2000).

of resources.⁷⁰ This, according to Olademeji, is attributable to the classification of socio-economic rights as “positive rights” or “second generation rights”, requiring state action for their fulfilment, and the classification of civil and political rights as “negative rights” or “first generation rights”, only requiring a state to avoid interfering with their enjoyment by the individual.⁷¹ This classification, Olademeji rightly asserts, is unhelpful and sends the wrong signal with regards the non-hierarchical nature of rights.⁷²

According to Mbazira, the objection to the judicial enforcement of ESCRs has taken two dimensions: legitimacy and institutional competence.⁷³ He asserts that arguments based on legitimacy are, “deeply rooted on the traditional conception of the philosophical understanding of human rights, with the issue being whether or not it will be legitimate to confer constitutional protection on these rights.”⁷⁴ This differs from discussions about institutional competence which do not relate to the nature of ESCRs as rights, but rather relates to which institutions are appropriate for the enforcement of these rights.⁷⁵ There is a widely held view that ESCRs cannot be justiciable because they are, unlike civil and political rights, not suited to judicial enforcement; the judiciary lacks the democratic legitimacy to be involved in the allocation of social and economic resources.⁷⁶ Additionally, proponents of this argument assert that the protection of ESCRs falls within the purview of the legislature and the Executive arms of government and that affording them constitutional protection has the effect of transferring power from these two branches of government to the judiciary.⁷⁷ Proponents of justiciability of ESCRs have continuously held that a blanket dismissal of such rights as rights *per se* is totally misguided since socio-economic rights and civil and political rights are interdependent. Further, that these rights, like civil and political rights, also engender both the “negative rights” and “positive rights” framework.⁷⁸

Socio-economic rights that are protected in the various international instruments apply to refugees. This is evidenced by the inclusion of equality and non-discrimination provisions in these treaties. Refugees deserve the same protections of these rights in their host country as citizens. Article 14 of the UDHR makes this even more explicitly apparent.

Socio-economic rights and refugees in Botswana

The status of socio-economic rights in Botswana has been given sufficient attention elsewhere.⁷⁹ It is only necessary to highlight a few salient points with respect to the rights of refugees. The first point to note is that Botswana is party and signatory to several relevant international instru-

70 See OA Olajamedi “Economic, Social and Cultural Rights: Rights or Privileges?” SSRN (2008) available at <http://ssrn.com/abstract=1320204> (last accessed: 16 October 2017).

71 *Id* 1-2.

72 *Id* 10.

73 C. Mbazira “Public Interest Litigation and Judicial Activism in Uganda: improving the enforcement of Economic, Social and Cultural Rights” *HURIPPEC Working Paper No. 24* (2009) 4.

74 *Id*.

75 *Id* 5.

76 K Mclean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (2009) 111.

77 Mbazira, *supra* note 68, 5.

78 Mbazira, *supra* note 52, 340.

79 See e.g. BR Dinokopila, “The Justiciability of Socio-Economic Rights in Botswana” 57 *Journal of African Law* (2013) 108-125.

ments. Botswana is party to the International Covenant on Civil and Political Rights (ICCPR),⁸⁰ the African Charter, CEDAW, the CRC, and the ACRWC. Notably, Botswana is neither party nor a signatory to the ICESCR. The Constitution of Botswana is silent on the status of such international instruments. However, due to the fact that courts have indicated that Botswana is a dualist state, treaty provisions do not become part of the laws of the Botswana unless specifically incorporated into the laws of Botswana through an Act of parliament.⁸¹ As such, treaties creating rights and obligations ratified by Botswana do not create rights and obligations enforceable by the courts immediately upon ratification. However, Section 24 of the Interpretation Act⁸² provides that such treaties may only be used in the interpretation of the law where the wording of the statute is ambiguous.⁸³ Customary international law is applicable in Botswana in so far as it is not inconsistent with any piece of domestic legislation.⁸⁴ This means that the socio-economic rights that are included under the various treaties that Botswana is party to are not available to refugees until and unless they are domesticated. In the absence of such domestication, the protection and fulfilment of the socio-economic rights of refugees cannot be asserted on the basis of international law.

The Constitution of Botswana also does not make any reference to Socio-economic rights, whereas many civil and political rights are protected in the Constitution. The Constitution also does not list socio-economic rights under the Directive Principles of State Policy (DPSPs) as is the case in some other jurisdictions. The Constitution of Botswana does not explicitly protect any socio-economic rights. The question that remains is whether it is possible for refugees to enforce or assert their socio-economic rights on the basis of other provisions in the Constitution.

Scholars have arrived at several conclusions about the possibility of asserting socio-economic rights of refugees in Botswana. Generally, the courts appear to be reluctant to use cross-cutting rights to enforce socio-economic rights in Botswana. This reluctance has been shown in two of the cases brought before the courts that dealt with the enforcement of socio-economic rights. In *Roy Sesana & Others v The Attorney General*⁸⁵ Justice Phumaphi (as he then was), quoting Forsyth,⁸⁶ opined that:

“It seems to me that, if this Court were to decide that the services should be restored, in the face of admitted evidence to the effect that provision of services in the reserve is unsustainable on account of costs, the import of the Court’s decision would be to direct the Respondent to re-prioritise the allocation of national resources. In my view, the Court should be loathe to enter the arena of allocation of national resources unless, it can be shown that the Respondent has, in the course of its business transgressed against the Supreme Law of the land or some other law.⁸⁷”

80 International Covenant Civil and Political Rights (ICCPR) *General Assembly resolution 2200A (XXI)* (1966).

81 *See Attorney General v. Dow* BLR 119 (1992); and *Kenneth Good v. The Attorney General* 1 BLR 462 (2005).

82 Cap. 01:04 Laws of Botswana.

83 *See Attorney General v. Dow* BLR 119 (1992); and *Kenneth Good v. The Attorney General* 1 BLR 462 (2005).

84 *Amadou Oury Bah v Libyan Embassy* (1) BLR 22 (IC) 25 (2006).

85 MISCA No. 52 of 2002 reported as *Sesana and Others v The Attorney General* 2002 1 BLR 452 (HC). For the purpose of the present paper, reference will be made to the original judgment.

86 C Forsyth “The protection of Legitimate expectations: Some pitfalls for Botswana to avoid” 3 *University of Botswana Law Journal* 5 (2006).

87 *Roy Sesana & Others v The Attorney General*, *supra* note 80, para. 55.

The above sentiments were also echoed by Kirby JP in the more recent decision⁸⁸ of the Court of Appeal when he cautioned that:

“Sight must also not be lost of the fact that constitutional rights do not extend in Botswana to socio-economic rights, such as the right to health, the right to shelter, and the right to clean water. This is deliberate and is appropriate in view of the manpower and financial constraints experienced particularly by developing countries. Some countries, by their own choice, have included such rights in their Constitutions. Botswana has chosen not to do so, but strives nonetheless to achieve those ideals where resources allow. Any attempt by the Courts to confer socio-economic rights, such as universal access to health care, by the overbroad construction of sections of the Constitution such as section 4 (the right to life) and section 7 (the prohibition on inhuman or degrading punishments or other treatment) as Dingake J. appears to suggest, would, in my judgment, be overstepping the bounds of judicial discretion. That would be venturing into policy areas and budgetary concerns which are properly to be addressed by the other arms of Government.”⁸⁹

Furthermore, current case law on the issue of socio-economic rights in Botswana do not bring clarity to the justiciability of such rights before the Botswana courts. Some recent cases were decided on principles of legitimate expectation with the latest case, the ARV decision,⁹⁰ being based on the provisions of the Prisons Act. While these disparate reasons make it difficult to create a strategy for protecting socio-economic rights through the Botswana courts, it should give some hope as to their justiciability, including for refugees.

Under the current legal framework, and given the reluctance of the Courts recognise socio-economic rights, it might be difficult for refugees to assert their rights on the basis of the Constitution. As highlighted above, the provision of ARV lifesaving medication was extended to foreign prison inmates because the provisions of the Prisons Act and the National Policy on HIV/AIDS prevention and treatment availed such an opportunity. Unfortunately, the provisions of the Refugee Act lead to no such possibility. The Act is silent on the treatment and provision of amenities to refugees. The only right that is alluded to in the Act is the possibility for refugees to engage in wage earning employment.⁹¹ This is at the discretion of the Minister. Refugees must turn to other sources of law if they seek to enforce socio-economic rights. However, opinions from the courts on other approaches are also not encouraging.

Refugees in Botswana are entitled to the same constitutional protection as other people within the country.⁹² They may assert any of the rights provided for under the Constitution. If courts are willing to protect the socio-economic rights of Botswanan citizens, then these should also apply to refugees.

88 *The Attorney General & Others v Dickson Tapela; The Attorney General & Others v Gift Brendan Mswale* (ARV cases) CACGB-096-14 (unreported) & CACGB-076-15 (consolidated & unreported judgement).

89 *Id* para. 73.

90 *Id*.

91 Refugee Act, *supra* note 5, Section 14.

92 See *Kenneth Good v Republic of Botswana* 313/05 ACHPR (2010); and *Attorney General v. Dow* BLR 119 (CA) (1992); see also Constitution of Botswana, Article 3 (“every person in Botswana is entitled to the fundamental rights and freedoms of the individual...whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest”).

Botswana should enact a more enabling legal framework for the promotion and protection of the rights of refugees. There should be clear and unequivocal commitment from the Government to fulfil the socio-economic rights of those who have sought refuge in Botswana. Furthermore, Botswana's pursuit of the encampment policy should compel the government to protect refugee's socio-economic rights. When refugees live in government run camps, they are at the mercy of the state. It is essential that the Botswana government provide adequate living conditions, access to health care, housing, education, and the ability to engage in wage earning employment. Although efforts have been made by the Government in collaboration with UNHCR to adequately provide for refugees, it is important that the Government is also able to be held accountable for any shortcomings through legally enforceable avenues.

Towards an enabling legal framework

The current legal framework does not provide a strong system for protecting the rights of refugees. Constitutional amendment is difficult, and does not seem to be a practicable strategy at this time. There are two other more expedient avenues: through changes in law and in policy. Policy changes are difficult to enforce, especially for refugees who have no ability to vote and participate in political accountability. The legal route is more favoured because it can be enforced through the courts, even by refugee applicants.

In addition to changes in policy and new legislation, the legal framework can be augmented by regulations passed under the auspices of the Refugee Act. The Act provides that:

“The Minister may make regulations-

- (a) providing for the custody of the property of any political refugee who is detained;
- (b) prescribing the form of any notice which may be given under this Act;
- (c) prescribing the allowances payable to members of a Committee and the fees payable to persons giving evidence before it; and
- (d) generally for the better carrying out of the provisions of this Act.”⁹³

The Minister is not given the power to make regulations as regards the maintenance of an adequate standard of living by refugees. In light of the current legal reforms, the Government should consider amending the above section to allow the Minister to make regulations for the maintenance of an adequate standard of living by refugees.

The most effective way of ensuring adequate promotion and protection of the socio-economic rights of refugees would be to amend the Refugee Act to include these rights. This would allow refugees to approach the courts in the event that the Government has failed to provide adequately. The justiciability of socio-economic rights, with respect to refugees, would no longer in doubt. Including socio-economic rights in a new Refugee Act would also be consistent with Botswana's obligations under the African Charter. More-over, entrenching socio-economic rights in law is not an uncharted position; countries with a large population of refugees such as South Africa have adopted similar statutes.

93 Refugee Act, *supra* note 5, Section 15.

The South African Refugee Act⁹⁴ has made provision for some socio-economic rights.⁹⁵ Its Chapter V provides the rights and obligations of refugees. Refugees are entitled to seek employment and have access to the same basic health services and basic primary education as inhabitants of the Republic.⁹⁶ Socio-economic rights have strong and explicit protection in the Constitution of South Africa.⁹⁷ There are indications that a similar approach has been followed in Tanzania, Lesotho, Namibia and Zimbabwe. These countries have protected socio-economic rights to varying degrees. Law and policy makers should consult with the UNHCR on how to best protect the socio-economic rights of refugees under an amended Refugee Act.

The Government should:

1. Report the extent to which the socio-economic rights of refugees are currently being fulfilled;
2. Establish the key priority areas necessary to fulfil the socio-economic rights of refugees;
3. Ratify the ICESCR and pass domestic legislation that can be enforced by the judiciary;
4. Amend the Constitution to include socio-economic rights;
5. Amend the Refugee Act to include provisions which protect the socio-economic rights of refugees.

Conclusion

The protection of socio-economic rights is sometimes controversial. While governments generally assist with the provision of amenities to refugees it has been more of an act of good will, rather than fulfilling a legal obligation. Botswana's legal framework does not adequately provide for the fulfilment of the socio-economic rights of refugees. The provisions of the Constitution and the Refugee Act offer inadequate protection and must be amended to comply with Botswana's obligations under international law. Refugees are a vulnerable group in society and should be legally protected.

⁹⁴ Act 130 of 1998.

⁹⁵ See RE Kapindu "Towards a more effective guarantee of socio-economic rights for refugees in Southern Africa" (unpublished & undated Phd thesis).

⁹⁶ South Africa Refugee Act, *supra* note 89, Section 27.

⁹⁷ See *Khosa and Others v Minister of Social Development and Others* (6) SA 505 (CC) (2004) (held that the Constitutional provision are also applicable to foreign nationals and that "... permanently resident foreign nationals in South Africa are entitled to the socioeconomic rights guarantees under section 27 of the Constitution, on the same footing as citizens").

