

A CRITICAL ASSESSMENT OF NAMIBIAN REFUGEE LAW IN
LIGHT OF GLOBAL AND REGIONAL TRENDS OF REFUGEE
MIGRATION

A THESIS SUBMITTED IN PARTIAL FULFILMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAW

OF

THE UNIVERSITY OF NAMIBIA

BY

ANGELIQUE LITITIA GROENEWALDT
200405977

April 2010

Main Supervisor : Prof NJ Horn
Co-supervisor : Mr FX Bangamwabo

Abstract

Southern Africa is relatively less affected by refugee movements than for instance, Central Africa, but the impact of refugees on Southern African societies and the increasing retreat of Southern African governments from their responsibilities towards refugees are nonetheless causes for concern. Namibia is a signatory to both the 1951 and AOU Refugees Conventions. In line with its international obligations, the country has promulgated the Namibia Refugees (Recognition and Control) Act 2 of 1999. The Act is designed in accordance with the 1951 and OAU Refugee Conventions, but the country has entered a reservation to Article 26 of the 1951 Refugee Convention that deals with freedom of movement.

The fact that the free movement of refugees is restricted means that they cannot seek jobs or earn a living. In addition, restrictions on movements of any person or a group of persons can severely curtail other basic human rights central to the survival of such a person or group of persons. Consequently, and despite, the positive steps taken by the Government of the Republic of Namibia (GRN) in taking ownership and responsibility for persons in refugee like situations, asylum seekers and refugees remain highly vulnerable with no official access to arable land, labour markets, and higher education opportunities due to strict confinement policies. Indeed, the process of identifying durable solutions for the refugee population at Osire, Namibia's one official refugee shelter, has been slow. This is a cause for concern, especially since the UNHCR intends to scale down its activities worldwide by 2010, a move that will adversely affect the lives of refugees worldwide.

In the premise this study seeks to investigate the reception system of asylum seekers as well as the social and economic rights of accepted refugees. Such an assessment is crucial since it establishes whether or not the rights and protection of asylum seekers and refugees should be a renewed concern for the Namibian Legislature. The provisions of the 1951 Refugee Convention, the 1967 Protocol and the OAU Refugee Convention of 1967 are examined and compared with national laws with a view to identifying possible gaps in the national legislative structure. In many developing countries, refugees are denied basic rights, often due

to a lack of resources. To this end, a disproportionate amount of energy and resources tends to be focused on determining *who is a refugee* rather than on their treatment pre-and-post recognition. It remains tragically true that international human rights law has not been permitted to evolve to a state of genuine efficacy in the international as well as national legal arenas. Given that, it is highly unlikely in the present political climate that State Parties would agree to any revision of the 1951 Convention in order to broaden its protective scope, that international human rights law is an effective device available to strengthen and to enhance existing standards.

This research also endeavours to identify possible gaps for the protection of other forced migrants and internally displaced persons. Currently environmental and economic migrants are excluded from the definition of a 'refugee' in international and most national legal instruments on refugees, including that of Namibia. Consequently it is imperative to explore possible avenues for a broader approach to the understanding of a 'refugee'.

This study found that Namibia's refugee law is properly in place, but the challenge is clearly in the implementation. Indeed, a generous interpretation of the Refugees Act, read with the two conventions, can go some distance to meeting the needs of at least the most acutely at risk populations outside the borders of their own nation. It is recommended that the legislator adopt and enhance the three traditional durable solutions, namely voluntary repatriation, resettlement and local integration. For some refugees the solution to their dilemma might be voluntary repatriation, but the Namibian government should also consider local integration of, especially long staying refugees who have severed ties with their countries of origin or who are unable to return to their home countries because of a fear of persecution. In the final analysis a combination of the three traditional solutions might prove to be the ultimate durable solution.

Table of Contents

Abstract	ii
Table of contents	iv
Acknowledgements	vi
Dedication	vii
Abbreviations	viii
Declarations	ix
<u>Table of Contents.....</u>	<u>iv</u>

Acknowledgements

Various people have made it possible and less demanding for me to do this study. I am tremendously indebted to Prof. Nico J. Horn and Mr Francois X. Bangamwabo for their advice, guidance and support during the studies for the compilation of my thesis. Not only have I grown academically through my encounters with you, but you have also shaped me personally in many ways and for that I will be forever grateful to you.

I would also like to thank my family and friends for their continued patience and love, particularly during this past year. In particular I want to express thanks to my partner and friend, Fritz Zender. Without your love and support over the past six years I would not have been able to achieve my life-long dream of becoming a legal professional. You've shown me that with faith everything is possible! I would certainly fail in this task if I do not acknowledge the contributions of the assistants at the various libraries in Windhoek. To that

end I want to thank the librarian assistants at the UNAM library, the Supreme Court library and the National library for their prompt and friendly assistance during my research.

Furthermore I want to express my sincere gratitude towards the UNHCR Namibia for funding the research for my thesis. Your compassion and dedication for matters that affects refugees and displaced persons - not only in Namibia, but globally - are an inspiration to those who aspire to assist people in need. My greatest appreciation and gratitude undoubtedly goes to my Heavenly Father for giving me the courage, strength and wisdom to complete this thesis. I know now more than ever that I can do all things through Christ who strengthens me and that all things work together for good to them that love God!

Angelique L. Groenewaldt

April 2010

Dedication

This thesis is dedicated to my beloved mother, Sophia Elizabeth Groenewaldt, to my partner and friend of almost seven years, Fritz Zender and to the memories of my late father, Izak Johannes Groenewaldt. Your faith in me has always inspired me to achieve greater heights in life!

Abbreviations

ADR	Association for the Defence of Refugees Rights
AHA	Africa Humanitarian Action (Namibia)
ARV	Anti-retroviral drugs
AU	African Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
IPDs	Internally Displaced Persons
IRL	International Refugee Law
ISS	Institute for Security Studies
JAEM	Joint Assessment and Evaluation Mission

LAC	Legal Assistance Centre of Namibia
MHAI	Ministry of Home Affairs and Immigration
NEPRU	Namibia Economic and Policy Research Unit
OAU	Organisation of African Unity (now the African Union – AU)
SADC	Southern African Development Community
UN	United Nations
UNDH	Universal Declaration of Human Rights
UNAM	University of Namibia
USCRI	United States Committee for Refugees and Immigration
UNHCR	United Nations High Commissioner for Refugees
WFP	World Food Programme

Declarations

I, Angelique Lititia Groenewaldt, declare that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.

No part of this thesis may be reproduced, stored in any retrieval system, or transmitted in any form, or by means (e.g. electronic, mechanical, photocopying, recording or otherwise) without the prior permission of the author, or The University of Namibia in that behalf.

I, Angelique Lititia Groenewaldt, grant the University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which The University of Namibia may

deem fit, for any person or institution requiring it for study and research; providing that The University of Namibia shall waive this right if the whole thesis has been or is being published in a manner satisfactory to the University.

.....

Angelique Lititia Groenewaldt

April 2010

Chapter 1 Introduction

“The biggest crisis, in my opinion, is in the minds of people. It’s the fact that in today’s world we are seeing a huge threat to the values of tolerance, that are absolutely essential to protect refugees, to treat migrants in a humane way, to respect foreigners, to respect those that are different. We are seeing intolerance growing, we are seeing racism and xenophobia develop even in the developed societies, and this is creating a very negative environment for refugee protection. So more important than the crisis in some areas of the world, or the specific problems that we face here or there, are the walls that are being built in our minds”.

--- António Guterres¹

1.1 Orientation of the proposed study

In March 2007, Aurelio a 19-year old Angolan refugee whilst visiting friends in Windhoek was stopped and asked for his identification card by the Namibian police.² He ended up spending weeks in jail before returning to the Osire refugee camp.³ The Ministry of Home Affairs and Immigration (MHAI), which is responsible for asylum seekers and refugees, in collaboration with the Office of the United Nations High Commissioner for Refugees (UNHCR) in Namibia, was conducting a re-registration of refugees from February 2007. In terms of this process identity documents were to be issued to all recognised refugees aged six and above, while asylum seekers from the age six were to be given certificates.⁴ However, in June 2008 some refugees at Osire were still unclear about their refugee status.⁵

¹ High Commissioner of the UNHCR. This was his response to the question ‘What is the biggest crisis your organisation is facing today?’ posed by a Euronews reporter in an interview with Euronews (2009), <<http://www.euronews.net/2009/12/04/antonio-guterres-the-biggest-crisis-is-in-peoples-minds/>> last accessed on 30 November 2009.

² J Redden ‘Refugee Registration in Namibia Advances the Search for Solutions’ UNHCR Namibia news (March 9, 2007), <<http://www.unhcr.org/news/NEWS/45f15af64.html>>, last accessed on 5 April 2009.

³ Ibid.

⁴ United Nations High Commissioner for Refugees (UNHCR) & United Nations World Food Programme (WFP) *UNHCR/WFP Joint Assessment and Evaluation Mission: Osire Refugee Camp, Namibia* (February 2008) 6, <<http://documents.wfp.org/stellent/groups/public/documents/ena/wfp185643.pdf>> last accessed on 21 March 2009.

⁵ F Links ‘We Want to Live with Dignity’ *The Namibian* (June 20, 2008), <<http://www.namibian.com.na/news/full-story/archive/2008/june/article/we-want-to-live-with-dignity/>> last accessed on 15 April 2009.

The Association for the Defence of Refugees Rights (ADR) wrote a letter to the concerned officials in the Namibian Government, the UNHCR and the Osire camp administrator, on June 12, 2008, requesting permission to hold a peaceful demonstration in the camp and to present a petition to the authorities on World Refugee Day, June 20.⁶ One of the main concerns raised by ADR in this letter is the fact that asylum seekers and refugees are ‘warehoused’ for more than five years without a valid refugee status.⁷ The United States Committee for Refugees and Immigration (USCRI) reported that, according to an email of July 11, 2008 from members of ADR, the demonstration took place peacefully. A few weeks after the demonstration, refugees who went to the camp administrator’s office to seek permits to allow them freedom of movement outside the camp were told to go to the ADR’s office to get the permits, an act described by ADR as ‘intimidation’.⁸

Links further reported that refugees at Osire were unhappy about the fact that they lived “in the middle of nowhere” without opportunities and adequate facilities.⁹ When asylum seekers came to Namibia in the early 1990s, the Osire camp was created.¹⁰ Osire is camp on a farm in the Otjozondjupa Region with the nearest town, Otjiwarongo, 120 km from there. According to UNHCR statistical data for 2007, Namibia was home to more than 6 000 refugees and asylum seekers.¹¹ The camp population at the end of 2007 included Angolans, who chose not to repatriate, and refugees and asylum seekers from the Democratic Republic of the Congo, Burundi, and Rwanda.¹²

⁶ United States Committee for Refugees and Immigrants (USCRI) ‘World Refugee Survey: Country Update 2007’ (2007) <<http://www.refugees.org/countryreports.aspx?id=2010>> last accessed on 10 April 2009.

⁷ Ibid.

⁸ Ibid.

⁹ Links (note 4 above).

¹⁰ UNHCR/WFP 2008 (note 4 above) 9.

¹¹ K Diallo & TA Chabaké (eds) *Statistical Yearbook 2007: Trends in Displacement, Protection and Solution* (2008, December) 66. Geneva, Switzerland: United Nations High Commissioner for Refugees (UNHCR) <<http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html>> last accessed on 10 March 2009.

¹² UNHCR/WFP 2008 (note 4 above) 9.

Namibia signed the 1951 OAU Refugee Convention and the 1967 Protocol on February 17, 1995.¹³ It also acceded to the Organisation of African Unity's (OAU)¹⁴ Convention Governing Specific Aspects of Refugee Problems in Africa of 1969 (OAU Refugee Convention) on September 2, 1994.¹⁵ The Government of Namibia has entered a reservation to Article 26 of the 1951 Refugee Convention which deals with freedom of movement.¹⁶ Thus, asylum seekers and refugees do not have freedom of movement within Namibia, and can be arrested, detained, and prosecuted if found outside of the camp without a valid permit.¹⁷ According to the UNHCR/World Food Programme (WFP) report, the Government attributes the legal restrictions on freedom of movement for asylum seekers and refugees to Namibia's high unemployment rate of around 37 per cent.¹⁸

The restriction of the free movement of asylum seekers and refugees means that they cannot seek jobs, despite some refugees having the skills to fill gaps in the Namibian labour market.¹⁹ However, in an article in *The Namibian*²⁰ it was reported that the Namibian Cabinet stated that there was a need for clarity on the possibility of local integration of a selected number of refugees with the skills and potential to contribute to Namibia's economic development. According to the statement, "Skilled refugees of all nationalities should be seen as a valuable resource and should be integrated into a policy strategy to be adopted by Government".²¹ Be that as it may, unless and until the relevant legislative or policy framework is in place coupled with effective implementation

¹³ H Blain & D Hubbard *Namlex Index to Laws – 2004 Update* (2004) 94. Windhoek: Legal Assistance Centre (LAC), <www.lac.org.na/laws/pdf/namlex2004.pdf>, last accessed on February 27, 2009.

¹⁴ The Organisation of African Unity (OAU) has been replaced by the African Union (AU).

¹⁵ *Ibid* 94.

¹⁶ USCRI (note 6 above) 2. Also see Sections 19(1) and 20 of the Namibia Refugees Act of 1999.

¹⁷ Section 20(1) read with 21 of the Namibia Refugees Act of 1999.

¹⁸ UNHCR/WFP 2008 (note 4 above) 16.

¹⁹ *Ibid* 11.

²⁰ 'Refugee Status of Angolans to Change' *The Namibian* (March 2, 2009), <<http://www.namibian.com.na/news/full-story/archive/2009/march/article/refugee-status-of-angolans-to-change/>> last accessed on 17 April 2009.

²¹ *Ibid*.

mechanisms, the protection and rights of asylum seekers and refugees in Namibia will remain a challenge.

1.2 Statement of the problem

Namibia is relatively less affected by refugee movements than South Africa and countries in Central Africa. Yet the impact of refugees on Southern African societies and the increasing retreat of Southern African governments from their responsibilities towards refugees are causes for concern. Namibia is no exception to the challenges of hosting and protecting asylum seekers and refugees. Despite the positive steps taken by the Government of the Republic of Namibia (GRN) in taking responsibility for persons in refugee-like situations, asylum seekers and refugees remain highly vulnerable with no official access to arable land, employment or higher education opportunities due to strict confinement policies.²² The process of identifying durable solutions for the Osire population has been slow.²³ This is a cause for concern, especially since the UNHCR intends to scale down its activities worldwide by 2010, a move that will also affect the lives of refugees at Osire.²⁴

This study seeks to investigate the reception system of asylum seekers and the social and economic rights of accepted refugees. Such an assessment is crucial to establish whether or not the rights and protection of asylum seekers and refugees should be a renewed concern for the Namibian Legislature. In addition the provisions of the 1951 Refugee Convention, the 1967 Protocol and the OAU Refugee Convention of 1967 are examined and compared with national laws on the subject matter to identify possible gaps in the national legislative structure. Namibia has entered a reservation to Article 26 of the 1951 Refugee Convention that deals with freedom of movement, yet the country has endorsed all the rights contained in the 1951 and OAU Refugees Conventions. The problem is that

²² UNHCR/WFP 2008 (note 4 above) 2.

²³ Ibid.

²⁴ “Refugee Status” (note 20 above).

restrictions on movements of any person or a group of persons curtail other basic human rights central to the survival of a person or a group of persons.

Furthermore this research endeavours to identify possible gaps for the protection of other forced migrants and internally displaced persons. Currently environmental and economic migrants are excluded from the definition of a 'refugee' as provided for in international and most national legal instruments on refugees, including that of Namibia. Consequently it is imperative to explore possible avenues for a broader approach to the understanding of the term 'refugee', especially if one considers the very recent political and economic instability that the people in Zimbabwe have experienced. This study would also examine and identify durable solutions whereby the warehousing of the more than 6 000 refugees at Osire may be terminated. Ultimately, this study will endeavour to arrive at a reasoned and consolidated conclusion.

1.3 Objectives and research questions of the study

This study seeks to:

- a) examine the international legal principles on refugee protection;
- b) analyse the reception system of asylum seekers under the current applicable laws;
- c) study the social and economic rights of asylum seekers and refugees in Namibia;
- d) assess the existing domestic refugee legal framework by comparing it with international refugee law standards;
- e) investigate options for a broader approach to the concept 'refugee';
- f) explore and identify durable solutions for the current refugee population in Namibia; and
- g) proffer possible recommendations to the decision and policy makers and influence reform of Namibian refugee law, where necessary.

In view of the above outlined objectives, the research question for the present study may be summarised as follows: Whether or not the present domestic legal framework

adequately provides for the rights and protection of asylum seekers and refugees in Namibia or is there a need for legislative intervention?

1.4 Significance of the study

It is a fact that solutions to any social, economic or political dilemma often fail because of an unfavourable socio-economic, legislative and policy environment. It is, therefore, trusted that the outcomes in the present study will contribute towards finding durable solutions for the more than 6 000 asylum seekers and refugees at Osire, that it would provide a better understanding of the subject matter and that it would influence law reform, where necessary.

1.5 Literature review

Since the adoption of the OAU Refugee Convention, the 1967 Protocol and the OAU Refugee Convention, empirical and theoretical studies have produced a wide range of literature on various aspects relating to refugees. Generally speaking, literature in this area has been largely based on issues such as: the definition of terms like ‘refugee’, ‘protection’ and ‘asylum’; the role of institutions like the UNHCR and its ability to meet its mandate; refugee entitlements and duties in host states; detention of asylum seekers; durable solutions for refugees and the impact of 9/11 on asylum. Whereas some studies have been conducted on Africa, despite the continent generating and playing host to a vast number of asylum seekers and refugees, specific country accounts are rare. In the premise, and using Namibia as a case study, this research endeavours to plug the literature gap on specific country experiences.

An analysis of the evolution of refugee protection within any particular setting would give the reader a perspective on the social and political context from which the concept of refugee protection within a specific setting developed.²⁵ Therefore, it is essential to examine the social and economic conditions of refugees in Namibia. In order to ascertain

²⁵ EO Abuya ‘Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective’ (2007) *Int J of Refugee Law* (3) 51-95, 53.

the extent of the social and economic conditions of asylum seekers and refugees at Osire, the study done by François on the social and economic conditions at the camp would be analysed and compared with the joint assessment and evaluation mission compiled by UNHCR and WFP in 2008.²⁶ François provides information on food and nutrition, water supply and sanitation, access to health and education facilities and community-based activities for the Osire population.²⁷ On the other hand, the UNHCR/WFP JAEM of 2008 focuses on assessing food security and livelihood options for asylum seekers and refugees at Osire.²⁸

A comparison between the two studies reveals that the food and nutrition situation at the camp did not improve and thus remains a challenge. The Osire population relies heavily on the food assistance accorded by UNHCR and WFP.²⁹ Therefore, one of the recommendations proposed by UNHCR/WFP is additional agricultural or livelihood support to improve self-reliance in Osire.³⁰ It also suggested ongoing discussions with the Namibian government concerning the taking-over of service provision at Osire.³¹ These studies reveal that refugees in Namibia encounter a host of social and economic challenges. Consequently it is befitting to review existing laws that deal with asylum seekers and refugees as a starting point in the quest for much needed solutions to the present dilemma of the Osire population. Goodwin-Gill³² and Hathaway³³, both internationally recognised authors on refugee law, provide excellent accounts on the development and application of international refugee legal instruments. Their writings serve as a basis in the examination of the scope and content of the international and

²⁶ N Françoise *The Social and Economic Conditions of Refugees in Osire Camp* (2001). B.A. Dissertation. University of Namibia and UNHCR/WFP 2008 (note 4 above).

²⁷ Françoise (note 26 above).

²⁸ UNHCR/WFP 2008 (note 4 above).

²⁹ *Ibid* 2.

³⁰ *Ibid*.

³¹ *Ibid* 2-3.

³² GS Goodwin-Gill *The Refugee in International Law* 2 ed (1996) 117. New York: Oxford University Press; GS Goodwin-Gill *Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugee* (2008) 1-9, <http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf> last accessed on 15 April 2009.

³³ JC Hathaway *The Law of Refugee Status* (1991), 1-24. Vancouver, Canada: Butterworths; JC Hathaway *The Rights of Refugees under International law* (2005) 300-301. Cambridge, United Kingdom: Cambridge University Press.

regional protection systems for refugees. However, no discussion on refugees can commence without tracing the development of refugee law, and in particular the definition of the word ‘refugee’ from an international as well as a national perspective.

The meaning of the word ‘refugee’ has been the subject of much debate. Goodwin-Gill³⁴ and Hathaway³⁵, among others³⁶, provide an analysis of the definition of a ‘refugee’ as set out in the 1951 Refugee Convention and the OAU Refugee Convention. Warner³⁷ is of the opinion that the refugee definition in the 1951 Convention is too narrow, a view that is shared by a number of other writers³⁸. Conversely the refugee definition expressed in the OAU Refugee Convention is perceived to be broader.³⁹ It must be appreciated that both approaches (i.e. wide and narrow) have merits and demerits. What needs to be established is which interpretation would afford persons in a refugee-like situation the most protection. The researcher will advocate for, and substantiate a broader approach to the delineation of the concept “refugee”.

Despite the fact that the OAU Refugee Convention had been praised for its broader scope, relatively little effort has been made to subject it to rigorous interpretative analysis.⁴⁰ Furthermore, neither the 1951 Convention nor the OAU Convention affords protection to

³⁴ Goodwin-Gill 1996 (note 32 above).

³⁵ Hathaway 1991 (note 33 above) 6-11, but note that the entire book is devoted to requirements of the refugee definition as expounded in the 1951 Refugee Convention.

³⁶ DJ Steinbock ‘The Refugee Definition as Law: Issues of Interpretation’ in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 13-36. Cambridge, United Kingdom: Cambridge University Press; J Sztucki ‘Who is a Refugee? The Convention Definition: Universal or Obsolete?’ in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 55-80. Cambridge, United Kingdom: Cambridge University Press and P Tuit ‘Rethinking the Refugee Concept’ in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 106-118. Cambridge, United Kingdom: Cambridge University Press. MB Rankin ‘Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years on’ (2005) *SAJHR* 21(3) 406-435.

³⁷ D Warner ‘We are all Refugees’ (1992) *Int J of Refugee Law* 4(3) 365, 366.

³⁸ J Oloka-Onyango ‘Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty years after Geneva’ (1991) *Int J of Refugee Law* (3) 453; Rankin (note 36 above).

³⁹ Rankin (note 36 above) 406; M Fullerton ‘The International and National Protection of Refugees’ in H Hannun (ed) *Guide to International Human Rights Practice* 2 ed (1992) 211, 213. Philadelphia, USA: University of Pennsylvania Press.

⁴⁰ Rankin (note 36 above) 406.

people displaced by environment and economic factors or who became internally displaced due to factors other than those listed in the Convention. It would appear that most academics, who write on an expanded refugee concept, simply advocate for the inclusion of people who fear harm in their country of origin as a result of serious disturbances of public order in the refugee definition. They do not really address the need to acknowledge and incorporate involuntary migrants created by natural or man-made causes such as economic and environmental disasters as well as internally displaced persons (IDPs).

Oloka-Onyango highlights the fact that international and African refugee law does not, for instance, recognise people who leave their countries of origin solely on the grounds that the economics of the situation are unbearable.⁴¹ For him, this denies the fact of the close linkage between the realisation and achievement of economic and social rights on the one hand, and the respect for civil and political rights on the other.⁴² In addition the author opines that internally displaced persons who have left their homes due to factors such as drought, famine, civil war or state policy should also be provided with some protection mechanism even though they did not cross their country's border as expected by the OAU Convention.⁴³

Indeed, the absence of freedom from want or fear, due to the lack of observance of economic and social rights may be intricately connected with the political system and the violation of civil and political rights. To what extent, for instance, would hunger, employment discrimination, corruption, the denial of equal access to economic opportunity, et cetera, not constitute logically compelling reasons for one to flee their country of origin and seek refuge in another country? This also holds true for people who are forced to leave their homes as a result of environmental disasters.

⁴¹ Oloka-Onyango (note 38 above) 458.

⁴² Ibid.

⁴³ Ibid 457.

The *Namibia Refugees (Recognition and Control) Act 2 of 1999* (Refugees Act) endorses in Section 3 the definitions of a ‘refugee’ as provided for in the 1951 and OAU Refugee Conventions. The Act is basically constructed in accordance with the provisions of the aforementioned refugee instruments. It provides, in Section 18, that the rights and duties of refugees are set out in Parts I and II of the Schedule to the Act. These parts are excerpts from the 1951 Refugee Convention and the OAU Refugee Convention. As stated before in this study, Namibia has entered a reservation to the freedom of movement provision (Article 26) in the 1951 Refugee Convention, but has included this provision as a right of refugees in the local Act. However, the Refugees Act clearly stipulates that refugees may be assigned any place in the country as determined by the Minister of Home Affairs.⁴⁴

Refugees have been warehoused at the Osire refugee camp because of the very fact that Namibia has noted a reservation in respect of freedom of movement of refugees. According to the Namibian interpretation, refugees have to remain in the camp and may only leave the camp if they obtain a permit from the Osire camp administrator. Consequently they cannot scout for jobs, or engage in social activities to improve their life in the country. This presents the problem of limitation of other important rights, especially the social and economic rights of refugees. There is no existing literature on the interpretation of the Refugees Act, except for the decisions by the Namibia Refugees Committee. In this thesis, the views expressed in the preceding and following chapters in respect of the provisions of the Act are those of the author, unless otherwise attributed.

Apart from laying down the requirements that must be met for someone to be considered a ‘refugee’, the 1951 (Article 33) and OAU (Article II (3)) Refugee Conventions recognise the much celebrated principle of *non-refoulement*. The key content of the principle is that a refugee or asylum seeker may not, in any manner, be returned to his country of origin to face persecution.⁴⁵ Under established international law, the general rule is that states have

⁴⁴ Section 20 (1) of the Refugees Act.

⁴⁵ Goodwin-Gill 1996 (note 32 above) 117.

the right to decide whether to allow entry to aliens.⁴⁶ However, *non-refoulement* requires that states should treat foreigners arriving in the jurisdiction, at the borders or in the territory of a state humanely.⁴⁷

Refoulement is also prohibited in a number of international human rights⁴⁸ conventions and instruments applicable at regional levels⁴⁹. For instance, the principle is powerfully expressed in Article 3 of the UN Convention against Torture (CAT); the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; Article II(3) of the OAU Refugee Convention and Article 5 of the African (Banjul) Charter of Human and Peoples Rights. *Non-refoulement* is also a recognised principle of customary international law (i.e. law that has evolved from the practice and customs of states).⁵⁰ Thus states are obliged to observe this principle regardless of whether or not they have ratified international instruments on human rights or refugees or whether or not the domestic legal system contains provisions prohibiting *refoulement*.⁵¹ Commentators like Goldman, Martin and Goodwin-Gill subscribe to this view, while authors like Grahl-Madsen and Hailbronner challenge the conclusion arrived at by the former. Their views are discussed in detail in Chapter 4.

Namibia is a signatory to all of the aforementioned instruments and thus has a double obligation to observe the principle. Despite the obvious international recognition of this principle, Hathaway outlines practices in a number of countries, including Namibia that are contrary to its requirements.⁵² For instance, in late 2001, the Namibian Government

⁴⁶ J Dugard *International law: A South African Perspective* 3 ed (2005), 341. Lansdowne, South Africa: Juta & Co Ltd.

⁴⁷ J Pirjola 'Shadows in paradise – Exploring *Non-refoulement* as an Open Concept' (2008) *Int J of Refugee Law* 19(4) 639-660, 639.

⁴⁸ For an account of the relevant provisions in the various international human rights instruments see E Lauterpacht & D Bethlehem 'The Scope and Content of the Principle of *Non-refoulement*: Opinion'. In E Feller, V Türk & F Nicholson (eds) *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (2003) pp. 87-164, 90-93. Cambridge, UK: Cambridge University Press.

⁴⁹ Ibid 93.

⁵⁰ Ibid 149.

⁵¹ Abuya (note 25 above) 82.

⁵² Hathaway 2005 (note 33 above) 279-300.

imposed a dusk-to-dawn-curfew, with soldiers being ordered to shoot violators, along a 450 km stretch of the Kavango River.⁵³ Consequently, Angolan refugees seeking to escape violence in that country's Cuando Cubango Province were effectively prevented from seeking asylum, since Angolan government and UNITA patrols could be safely avoided only at night.⁵⁴ At the time the Namibian Refugees Act that provides for the principle of *non-refoulement* in Section 26 was already promulgated and in operation. Under established international law, this principle allows no limitations or exceptions.⁵⁵ While there are exceptions to the general rule, it is essential to establish the extent of such limitations to the principle of *non-refoulement*, from an international as well as domestic legal perspective.

Another issue central to debates on refugees is the fact that, in the first place, people become asylum seekers and refugees as a result of the failure of the state to protect human rights. Writing in the context of the African refugee crisis, Oloka-Onyango expresses the opinion that it is imperative to inject into the discussion of refugees the fact that it is not merely a technical matter of covenants, charters or declarations, but that it is a question directly related to the on-going struggles globally for the realisation of more sustainable and popular democratic ideals and the protection of human rights of a category of persons, too often relegated to the background during the course of such struggles.⁵⁶

Edwards, for instance, maintains that the application of deterrence measures has more recently been extended in some countries to recognised refugees, principally through the erosion of standards of treatment, including the 'denial of some of the important social, economic and cultural rights guaranteed by the Refugees Convention and other rights guaranteed under international human rights law'.⁵⁷ She highlights that many developing countries deny refugees basic rights, often due to 'a sheer lack of resources', while a

⁵³ Ibid 280.

⁵⁴ Ibid.

⁵⁵ Lauterpacht & Bethlehem (note 48 above) 150.

⁵⁶ Oloka-Onyango (note 38 above) 453-454.

⁵⁷ A Edwards 'Human Rights, Refugees, and the Right 'to Enjoy' Asylum' (2005) *Int. J. of Refugee Law* 17 (2) 293, 293.

‘disproportionate amount of energy and resources tends to be focused on determining *who is a refugee*’, rather than on their treatment, pre- and post-recognition.⁵⁸

Clark adds to the discussions by stating that some governments justify their policies in light of 1951 Convention provisions, without further reference to other applicable human rights and humanitarian instruments.⁵⁹ For Türk and Nicholson ‘Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum-seekers have also increased in recent years’ and contribute to a ‘hostile local environment in which reduced standards of treatment are tolerated or even seen as acceptable’.⁶⁰ The point is that the treatment of non-nationals is an area of persistent, serious and systematic human rights violations on a worldwide scale.

Keeping international refugee law distinct from international human rights law has played into the hands of governments choosing to flout minimum standards. Although reference to international human rights law has gained momentum in refugee discourse in recent years, not least due to the work of academic commentators and advocates in this field, its focus in inter-governmental exchanges remains primarily located in the root causes of refugee flight, rather than in the deprivation of rights by host country practices. That is, the relevance of international human rights law is mostly seen as an issue for the country of origin, rather than for the country of destination. The researcher wants to expand on these views by showing that the recognition of the inter-relationship between international and regional human rights law and refugee law and an application thereof is essential to fully identify and protect the rights of refugees in Namibia.

1.6 Methodology

⁵⁸ Ibid 293.

⁵⁹ T Clark ‘Human Rights and Expulsion: Giving Content to the Concept of Asylum’ (1992) *Int. J. of Refugee Law* 4(2) 189-204, 193.

⁶⁰ V Türk & F Nicholson ‘Refugee Protection in International Law: An Overall Perspective’ in E Feller et al (eds) *Refugee Protection in International Law – UNHCR’s global consultations on international protection* (2003) 3-45, 4. Cambridge, UK: Cambridge University Press.

The first step in the compilation of this thesis was to collect information on existing issues pertaining to refugees. This was done through a literature review of earlier research on the subject matter and desktop research. Thereafter the relevant pre- and post-independence legislation, ordinances, and policies that may have an impact on the rights, obligations and protection of refugees were collected and analysed with a view to establish the coming into being of the existing legal framework on issues that affect refugees. In addition, international and regional instruments on refugees were examined so as to ascertain whether or not domestic laws on the subject matter conformed to Namibia's international obligations. Furthermore interviews were conducted with stakeholders who have a particular interest and expertise in the topic.

1.6.1 Research design

Peil underscores that designing a research project involves organising the collection analysis of data to provide the information which is sought.⁶¹ This study intended to base its interpretation on thorough consideration of relevant data. Hence, the most appropriate method for this research would be the *qualitative* methodology. Sarantakos explains that qualitative methodology usually includes any method that is not quantitative.⁶² With a qualitative method, real world situations can be studied whereby the researcher gets close to the people, situation or phenomenon under study.⁶³ The qualitative methodology is clearly the preferred method for the present study because it presupposes design flexibility, in terms of which the evaluator remains open to adopting inquiry as understanding deepens. Qualitative researchers go to the particular setting under study because they are concerned with the context in which the setting occurs. Although the research did not involve fieldwork, it is, nevertheless, useful to employ the qualitative approach to the gathering, analysing and recording of information.

1.6.2 Research instruments

⁶¹ M Peil *Social Science Research Methods: A Handbook for Africa* 2 ed (1982) 9. Nairobi: East African Educational Publishers Ltd.

⁶² S Sarantakos *Social Research* (1993) 44-45. Hampshire, UK: The Macmillan Press Ltd.

⁶³ *Ibid* 46.

According to Bartunek and Louis, interviews, observational and questionnaire schedules are perhaps the most important research instruments for collecting data.⁶⁴ However, the researcher did not employ the observational method with respect to the present study. Instead, this study relied on primary and to a large extent secondary data sources relevant to the subject matter and on questionnaires. It follows that the following were sources of data for this study:

i. Desktop research

Existing literature on the topic was explored in order to provide an understanding and overview of the rights and protection of asylum seekers and refugees in the world, Africa and Namibia. This included sources such as books, journals, newspaper articles, governmental and non-governmental reports, et cetera.

ii. Internet

The World Wide Web is one of the most powerful sources of information in modern times. Therefore, the researcher utilised academic search engines to obtain material on the subject matter. This source was particularly relevant for searching and comparing the practice of other jurisdiction pertaining to the topic.

iii. Interviews

Structured and non-structured interviews were conducted with experts from different Namibian institutions, governmental and non-governmental organisation with particular interests or expertise the topic. Altrek and Settle underscore that the advantage of using personal interviews is that detailed qualitative and descriptive information can be collected which has a high degree of reliability and accuracy.⁶⁵ The information gathered through these interviews assisted in formulating an opinion on gaps in Namibian refugee law and possible solutions to fill such gaps. Questions to interviewees centred on the outlined

⁶⁴ JM Bartunek *Insider/outsider Team Research* Qualitative Research Method Series 40 (1996) 30. California, USA: Sage Publication Inc.

⁶⁵ PL Altrek & RB Settle *The Survey Research Handbook* 2 ed (1995), . Boston: Irwin/Mc Graw-Hill.

research questions. Interviews were conducted with UNHCR official/s responsible for asylum seekers and refugees at Osire; the Commissioner for Refugees of the Namibia Refugees Committee and officials in the Directorate of Law Reform of the Namibian Ministry of Justice.

iv. Questionnaires

The fundamental reason for choosing questionnaires is to elicit first hand information from the respondents. Consequently the researcher designed structured questionnaires on the subject. These questionnaires addressed the research questions, objectives and unresolved issues on the subject that arose during the course of the study.

1.6.3 *Research procedures*

Existing literature on the subject matter was scrutinised in order to assess the current trend of refugee protection, including their rights and obligations. In addition the appropriate international, regional and national legal instruments on refugees were examined and analysed with a view to establishing the efficacy of the present legal framework on asylum seekers and refugees. The idea was to assess the prospects for reform of Namibian refugee legislation. The researcher made appointments with identified stakeholders and provided them with questionnaires in advance. Interviews conducted were recorded on audiotape and later transcribed.

1.6.4 *Data analysis*

It must be appreciated that the researcher did not do empirical research. Best and Kahn suggest that data analysis is a process that entails three special steps.⁶⁶ The first step involves the collection of information, while the second step involves synthesis, evaluation and integration of the collected data. The final and most important phase is

⁶⁶ JW Best & JV Kahn *Research in Education* 10 ed (2006), 270. Boston: Pearson Education Inc.

interpretation in the form of drawing deductions and conclusions relevant to the existing facts.⁶⁷ The present study observed these steps and thus collected, examined and analysed the relevant data in order to compare and contrast the Namibian refugee legal framework *vis-à-vis* the international and regional refugee protection systems.

1.6.5 Research ethics

As a general principle, the right to knowledge must be balanced against the rights to personal and community integrity and privacy.⁶⁸ It is thus important in any study to weigh the costs and benefits of a proposed project, obtain the informed consent of those participating in the research and to ensure that the after-effects are not damaging to either individuals or the public at large.⁶⁹ Therefore, the researcher respected governmental and organisational classified information by obtaining permission to access and use classified or confidential information. Where interviews were conducted, the researcher had formally requested permission to interview the interviewee/s, provide him or her with a questionnaire beforehand, and had underscored that participation was voluntary. Where an interviewee had requested to remain unidentified, the researcher ensured that his or her name not associated with the study. The rules of the University of Namibia in respect of plagiarism were observed at all times during the course of this study.

Chapter 2 International and domestic legal frameworks for refugee protection

2.1 Historical development of refugee protection

Since ancient times people have been forced to flee their homes and seek refuge in other lands. The Bible describes places of asylum for those who were persecuted. The Greeks and Romans similarly set aside certain places to provide refuge to individuals fleeing for their lives. The point is that throughout the history of humankind individuals, part of a

⁶⁷ Ibid.

⁶⁸ M Peil (note 61 above) 16.

⁶⁹ Ibid.

group and in some instances even whole groups were forced to flee and seek refuge. Political and religious persecutions are perhaps the main forces that generated, and continue to generate, large numbers of refugees. Today a host of other factors compel people to migrate.⁷⁰

The refugee problem is thus an age-old phenomenon, but societal responses to refugees during the past century differ substantially from those in earlier times. Prior to the emergence of industrialised societies and the rise of the welfare state, refugees were readily received by rulers.⁷¹ The practise of sheltering those compelled to flee was not perceived as a burden, but rather as a necessary incidence of power and as a source of communal enrichment.⁷² Refugees were regarded as a source that would increase the taxpayer rolls and enlarge the pool of those available to be conscripted for military service.⁷³

During the early twentieth century, the freedom of movement accorded to persons in a refugee like situation was adversely affected by the adoption of instrumentalist immigration policies in Western States.⁷⁴ Immigration became a means of allowing individuals to exercise their right to self-determination, and more as a vehicle to facilitate the selection by states of new inhabitants who could contribute in some tangible way, such as skills or wealth, to the national well-being.⁷⁵ This effectively presented a clash between assisting those in need and those at home. Indeed as governmental obligations to assist the helpless and indigent became a fundamental tenet of society, states began to impose restrictive conditions on those who sought to enter their national territories.⁷⁶

⁷⁰ See Chapter 3 below.

⁷¹ Hathaway 1991 (note 33 above) 1.

⁷² Ibid.

⁷³ Fullerton (note 39 above) 212.

⁷⁴ Hathaway 1991 (note 33 above) 1.

⁷⁵ Ibid.

⁷⁶ Fullerton (note 39 above) 212.

The disintegration of the Turkish, Russian and Austro-Hungarian empires in the early twentieth century emphasised the international scope of refugee movements.⁷⁷ Millions of refugees fled in all directions and international organisations were created as part of the solution to the then refugee dilemma. As a result, legal formulations of refugee status were produced in an attempt to define legally who would be a “refugee”.⁷⁸ Early delineations⁷⁹ tended to describe refugees in terms of their nationality, implicitly recognising that political events had triggered the flight of certain groups of people.⁸⁰

From the aforesaid one may deduce that legal formulations of refugee status are a product of recent western history. World War II drastically increased the number of refugees, stateless persons and displaced persons, bringing the number to a whopping 21 million.⁸¹ The protection and solutions for these millions of people necessitated another paradigm shift, namely the creation of an international and global refugee regime. As a result the International Refugee Organisation (IRO), which replaced the United Nations Relief and Rehabilitation Agency (UNRRA), was established in 1948.⁸² In December 1949 the IRO was replaced by the UNHCR.

2.2 The international and regional refugee protection regime

2.2.1 UN Refugee Convention and Protocol Relating to the Status of Refugees

As stated above, the cataclysm of World War II made it necessary to regulate the situation of refugees at an international level. Consequently the Convention relating to the Status of Refugees (1951 Convention) was drafted and promulgated under the auspices of the United Nations. The Convention, with just one ‘amending’ and updating Protocol adopted

⁷⁷ A Kaczorowska *Public International Law* (2002), 299-300. London: Old Bailey Press.

⁷⁸ Fullerton (note 39 above) 213.

⁷⁹ For an overview of the definition of refugees in international instruments from 1922 to 1946 see Goodwin-Gill 1996 (note 32 above) 4-5.

⁸⁰ Hathaway 1991 note 33 above) 2-3. Also see the United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992), <<http://www.unhcr.org/refworld/docid/3ae6b3314.html>> last accessed on 22 February 2009.

⁸¹ Kaczorowska (note 77 above) 300.

⁸² *Ibid.*

in 1967, is the central feature in today's international regime of refugee protection, and some 144 States (out of a total United Nations membership of 192) have now ratified either one or both of these instruments (August 2008 statistic).⁸³ The Convention, which entered into force on April 22, 1954, is by far the most widely ratified refugee treaty, and remains central also to the protection activities of the UNHCR.⁸⁴

An overview of the historical context would be useful to explain the nature of the Convention and some of its apparent limitations. Just six years before its conclusion, the Charter of the United Nations had identified the principles of sovereignty, independence, and non-interference within the reserved domain of domestic jurisdiction as fundamental to the success of the Organization (Article 2 of the Charter of the United Nations).⁸⁵ In December 1948, the General Assembly adopted the Universal Declaration of Human Rights, article 14, paragraph 1, of which recognizes that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution", but the individual was only then beginning to be seen as the beneficiary of human rights in international law.

These factors are important to an understanding of the manner in which the 1951 Convention was drafted. Initially and primarily, it was as an agreement between States in respect to how they would treat refugees. It also explains the essentially *reactive* nature of the international regime of refugee protection, namely a system triggered by a cross-border movement, so that neither prevention, nor the protection of internally displaced persons come within its range.

Apart from defining the concept 'refugee'⁸⁶, the 1951 Convention also sets out when refugee status comes to an end.⁸⁷ For particular, political reasons, the Convention also puts Palestinian refugees outside its scope (at least while they continue to receive protection or

⁸³ Goodwin-Gill 2008 (note 32 above) 1.

⁸⁴ Hathaway 1991 (note 33 above) 6.

⁸⁵ Goodwin-Gill 2008 (note 32 above) 1.

⁸⁶ Article 1A

⁸⁷ Article 1C. For example, in the case of voluntary return, acquisition of a new, effective nationality, or change of circumstances in the country of origin

assistance from other United Nations agencies)⁸⁸, and excludes persons who are treated as nationals in their State of refuge⁸⁹. Furthermore the Convention categorically excludes from the benefits of refugee status anyone in respect of whom there are serious reasons to believe that he/she has committed a war crime, a serious non-political offence prior to admission, or acts contrary to the purposes and principles of the United Nations.⁹⁰ From the very beginning, therefore, the 1951 Convention contained clauses to ensure that serious criminals and the terrorists do not benefit from international protection.⁹¹

The origins of the 1967 Protocol relating to the Status of Refugees, which reflected recognition by UNHCR and the member States of its Executive Committee that there was a disjuncture between the universal, unlimited UNHCR Statute and the scope of the 1951 Convention, were quite different from those of the latter. Instead of an international conference under the auspices of the United Nations, the issues were addressed at a colloquium of thirteen legal experts who met in Bellagio, Italy, from 21 to 28 April 1965.⁹² According to Goodwin-Gill the colloquium did not favour a complete revision of the 1951 Convention. Instead they opted for a Protocol by way of which States Parties would agree to apply the relevant provisions of the Convention, but without necessarily becoming party to that treaty.⁹³ The approach was approved by the UNHCR Executive Committee and the draft Protocol was referred to the Economic and Social Council for transmission to the General Assembly. The General Assembly took note⁹⁴ of the Protocol and requested the Secretary-General to transmit the text to States to enable them to accede.⁹⁵ The Protocol required just six ratifications and it duly entered into force on 4 October 1967.⁹⁶

⁸⁸ Article 1D

⁸⁹ Article 1E

⁹⁰ Article 1F

⁹¹ Goodwin-Gill 2008 (note 32 above) 3.

⁹² *Ibid.* 7.

⁹³ *Ibid.*

⁹⁴ The General Assembly commonly “takes note” of, rather than adopts or approves, instruments drafted outside the United Nations system.

⁹⁵ See Resolution 2198 (XXI) of 16 December 1966.

⁹⁶ UNHCR 1992 (note 80 above) 3.

The Protocol is often referred to as “amending” the 1951 Convention, but it does no such thing.⁹⁷ The Protocol is an independent instrument, not a revision within the meaning of Article 45 of the Convention. States Parties to the Protocol, which can be ratified or acceded to by a State without becoming a party to the Convention, simply agree to apply Articles 2 to 34 of the Convention to refugees defined in Article 1 thereof, as if the deadline of 1 January 1951 were omitted.⁹⁸ Article II on the cooperation of national authorities with the United Nations is equivalent to Article 35 of the Convention, while the few remaining articles (eleven in all) add no substantive obligations to the Convention regime. In a nutshell, one may thus conclude that the 1951 Convention and the 1967 Protocol contain three types of provisions:

- (a) Provisions giving the basic definition of who is (and who is not) a refugee and who, having been a refugee, have ceased to be one. However the determination of who is entitled to refugee status is left to the contracting states, but the UNHCR may provide assistance in this regard and in some instances it may even determine that a person is entitled to refugee status.
- (b) Provisions that define the legal status of refugees and their rights and duties in their country of refuge. Although these provisions have no influence on the process of determination of refugee status, the authority entrusted with this process should be aware of them, for its decision may indeed have far-reaching effects for the individual or family concerned.
- (c) Other provisions dealing with the implementation of the instruments from the administrative and diplomatic standpoint. Article 35 of the 1951 Convention and Article 11 of the 1967 Protocol contain an undertaking by Contracting States to co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions and, in particular, to facilitate its duty of supervising the application of the provisions of these instruments.⁹⁹

Issues of supervision and implementation of the 1951 Convention have become relevant today not because States would challenge the UNHCR’s task of providing international protection as such, but because the implementation of the 1951 Convention and the 1967 Protocol is faced with many problems, including a lack of uniformity in the actual

⁹⁷ Goodwin-Gill 2008 (note 32 above) 7. Also see Kaczorowska (note 77 above) 303-304.

⁹⁸ Article I of the Protocol.

⁹⁹ UNHCR 1992 (note 80 above) 4.

application of its provisions.¹⁰⁰ Indeed the Convention is today portrayed as a relic of the cold war and as inadequate in the face of “new” refugees from ethnic violence and gender-based persecution.¹⁰¹ In addition it is said to be insensitive to security concerns, particularly terrorism and organised crime, and even redundant, given the protection now due in principle to everyone under international human rights law.¹⁰²

According to Goodwin-Gill the Convention neither deals with the question of admission, nor does it oblige a State of refuge to accord asylum as such, or provide for the sharing of responsibilities (for example by prescribing which State should deal with a claim to refugee status).¹⁰³ The Convention also does not address the question of “causes” of flight, or make provision for prevention; its scope does not include internally displaced persons, and it is not concerned with the better management of international migration.

Be that as it may, within the context of the international refugee regime, which brings together States, UNHCR and other international organisations, the UNHCR Executive Committee, and non-governmental organisations, among others, the Convention continues to play an important part in the protection of refugees, in the promotion and provision of solutions for refugees, in ensuring the security of States, sharing responsibility, and generally promoting human rights. In many States, judicial and administrative procedures for the determination of refugee status have established the necessary legal link between refugee status and protection, contributed to a broader and deeper understanding of key elements in the Convention’s refugee definition, and helped to consolidate the fundamental principle of *non-refoulement*.¹⁰⁴

While initially concluded as an agreement between States on the treatment of refugees, the 1951 Convention has inspired both doctrine and practice in which the language of refugee

¹⁰⁰ W Kälin *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond* (2001) 1, <<http://www.unhcr.org/publ/PUBL/419dc0b84>> last accessed on 15 February 2009.

¹⁰¹ Goodwin-Gill 2008 (note 32 above) 7.

¹⁰² Kaczorowska (note 77 above) 302.

¹⁰³ Goodwin-Gill 2008 (note 32 above) 7.

¹⁰⁴ *Ibid.*

rights is entirely appropriate. Today there is a need to acknowledge that the scope and extent of the refugee definition have matured under the influence of human rights and that there is now increasing recognition of the need to enhance and ensure the protection of individuals still within their own country (that is internally displaced persons) as well as economic and environmental refugees.

A discussion of the Refugee Convention and Protocol thereto would not be complete without a brief survey of the mandate and role of the UNHCR in the protection of refugees. After extensive discussions in its Third Committee, the General Assembly moved to replace the IRO with a subsidiary organ¹⁰⁵ and by resolution 428 (V) of 14 December 1950, it decided to set up the Office of the United Nations High Commissioner for Refugees with effect from 1 January 1951.¹⁰⁶ Initially set up for three years, the High Commissioner's mandate was regularly renewed thereafter for five-year periods until 2003, when the General Assembly decided "to continue the Office until the refugee problem is solved"¹⁰⁷.

The High Commissioner's primary responsibility, set out in paragraph 1 of the Statute annexed to resolution 428 (V), can be summarised as follows:

- providing international protection for refugees;
- seeking permanent solutions for the problems of refugees;
- co-ordinating international action in favour of refugees;
- promoting the conclusion and ratification of international conventions for the protection of refugees and to supervise their application.

Notwithstanding the intended complementarity between the responsibilities of the UNHCR and the scope of the 1951 Convention, a marked difference already existed: the mandate of the UNHCR was universal and general, unconstrained by geographical or temporal limitations, while the definition forwarded to the Conference by the General Assembly, reflecting the reluctance of States to sign a "blank cheque" for unknown

¹⁰⁵ Under Article 22 of the Charter of the UN.

¹⁰⁶ Goodwin-Gill 2008 (note 32 above) 1-2.

¹⁰⁷ Resolution 58/153 of 22 December 2003, paragraph 9

numbers of future refugees, was restricted to those who became refugees by reason of events occurring before 1 January 1951 (and the Conference was to add a further option, allowing States to limit their obligations to refugees resulting from events occurring *in Europe* before the critical date).

The UNHCR is not without criticisms and challenges. One of the main challenges of the Organisation is to find continuous funding to assist persons in refugee like situations. To that end the UNHCR has been criticised for reacting to the preferences of donor governments of the industrialised world in the formulation of policy towards third world refugees.¹⁰⁸

Be that as it may, the UNHCR has provided assistance to millions of asylum seekers and refugees, since its inception. Even Namibians before independence in 1990 were assisted by the UNHCR. The Organisation airlifted 43 000 Namibian refugees back to the country in 1989.¹⁰⁹ In addition the UNHCR is assisting internally displaced persons in various parts of the world.¹¹⁰

2.2.2 OAU Convention Governing Specific Aspects of Refugee Problems in Africa

Apart from 1951 Convention and the 1967 Protocol, and the Statute of the Office of the United Nations High Commissioner for Refugees, there are a number of regional agreements, conventions and other instruments relating to refugees, particularly in Africa, the Americas and Europe. These regional instruments deal with such matters as the granting of asylum, travel documents and travel facilities, et cetera. Some also contain a definition of the term “refugee”, or of persons entitled to asylum. In Latin America, the

¹⁰⁸ SA Cunliffe & M Pugh ‘UNHCR as Leader in Humanitarian Assistance: Triumph of Politics over Law’ in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 175-199, 183-186. Cambridge, United Kingdom: Cambridge University Press.

¹⁰⁹ Kaczorowska (note 77 above) 301.

¹¹⁰ See V Türk ‘The Role of UNHCR in the Development of International Refugee Law’ in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 153-174. Cambridge, United Kingdom: Cambridge University Press, for an excellent account on the evolution, role and functions of the UNHCR.

problem of diplomatic and territorial asylum is dealt with in a number of regional instruments including the Treaty on International Penal Law, (Montevideo, 1889); the Agreement on Extradition, (Caracas, 1911); the Convention on Asylum, (Havana, 1928); the Convention on Political Asylum, (Montevideo, 1933); the Convention on Diplomatic Asylum, (Caracas, 1954); and the Convention on Territorial Asylum, (Caracas, 1954).¹¹¹

A more recent regional instrument and central to the present discussions is the Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 10 September 1969.¹¹² It is widely argued that the definition of a refugee in this Convention is more responsive to contemporary refugee movement.¹¹³ This is so because it extended protection to all persons compelled to flee across national borders by reason of any man-made disaster.¹¹⁴ In addition, unlike the 1951 Convention, the OAU Convention addresses the issue of receiving and resettling refugees.¹¹⁵

The OAU Convention definition represents an important conceptual adaptation of the 1951 Convention refugee definition in that it successfully translates the core of refugee status to the reality of the developing world.¹¹⁶ Hyndman expresses the view that the 1951 Convention was primarily drawn up to deal with the situation of displaced persons in Europe after World War II and to provide protection for those person.¹¹⁷ The States acceding to the Convention were anxious to make their obligations specific and to ensure that those obligations could not be extended indefinitely.¹¹⁸ Today circumstances have

¹¹¹ Goodwin-Gill 1996 (note 32 above) 20-21.

¹¹² UNHCR 1992 (note 80 above) 5.

¹¹³ See note 38 above.

¹¹⁴ Hathaway 1991 (note 33 above) 16.

¹¹⁵ Fullerton (note 39 above) 214. Also see Goodwin-Gill 1996 (note 32 above) 20.

¹¹⁶ Hathaway 1991 (note 33 above) 11.

¹¹⁷ P Hyndman 'Refugees under International Law with Reference to the Concept of Asylum' (1988) *Australian LJ* (60) 148, 150.

¹¹⁸ *Ibid.*

changed and many people who need international protection of the kind provided by the Convention definition do not fall within its ambit.¹¹⁹

The OAU Convention standard thus represents an important conceptual adaptation of the 1951 Convention refugee definition since it successfully translates the core meaning of refugee status to the reality of the developing world.¹²⁰ Therefore, it is not surprising that because of the relevance of the OAU definition to conditions in the developing world, it is the most influential conceptual standard of refugee status apart from the 1951 Convention definition itself.¹²¹ Indeed it has provided the basis for enhanced UNHCR activity in Africa, was at the root of the proposed conventional definition of persons entitled to territorial asylum, and has inspired the liberalisation of a variety of regional and national accords on refugee protection.¹²²

2.2.3 The place of international refugee law within the Namibian legal framework

It is important at this juncture to give an outline of how international law is applied in Namibia, particularly in terms of the effect of international law on the domestic level. Such an assessment is crucial since Namibia is a signatory to all of the discussed international instruments. The relationship between international law and municipal law troubles both theorists and courts. Indeed the question whether international rules make up a body of law not only different but also radically autonomous and distinct from municipal legal orders has been the subject of much controversy. This usually involves enquiries such as what is the relationship between a state's municipal law and international law; if a domestic court has to decide a case before it on the basis of making a choice between municipal or international law rules, how is that choice exercised and moreover, what principles apply?¹²³

¹¹⁹ Ibid.

¹²⁰ Hathaway 1991 (note 33 above) 17.

¹²¹ Ibid 19.

¹²² Ibid.

¹²³ G Erasmus 'The Namibian Constitution and the Application of International Law' in D Van Wyk et al. (eds) *Namibian Constitutional and International issues* (1990) 81-110, 84. University of Pretoria: VerLoren van Themaat Centre for Public Law Studies.

The theoretical issue is normally presented as a clash between monism (*monist theory*) and dualism (*dualist theory*).¹²⁴ Both these schools of thought assume that there is a common field in which the international and municipal legal orders can operate simultaneously in regards to the same subject matter, and the problem then is which is to be the master? Before turning to the Namibian approach to the subject matter, it would be useful to give a synopsis of these theories.

The monist theory¹²⁵ of the relationship between international and domestic law originates from the naturalist theory of international law. Jurists of this theory hold that both sets of law are components of a universal legal order based on natural law.¹²⁶ Its leading exponents, namely Kelsen, Verdross and Scelle, maintain “that international and municipal law, far from being essentially different, must be regarded as manifestations of a single conception of law”.¹²⁷ These writers regard all law as a single unity composed of binding legal rules.¹²⁸ They argue that municipal courts are obliged to apply rules of international law directly and without the need for any act of adoption by the courts or transformation by the legislature.¹²⁹ This is because international and municipal law are “parts of one normative system”.¹³⁰ Furthermore the theory advocates supremacy of international law over municipal law.¹³¹ Its proponents are deeply suspicious of the concept of sovereignty and the absolute independence of a state.¹³²

¹²⁴ J Starke *Introduction to International Law*, 10 ed (1989) 1-73. London: Butterworth & Co (Publishers) Ltd.

¹²⁵ It is also sometimes referred to as the ‘doctrine of incorporation’.

¹²⁶ A Cassese *International Law* (2001) 164. New York (USA): Oxford University Press Inc.

¹²⁷ Dugard (note 46 above) 47. See also I Brownlie *Principles of Public International Law* 4 ed (1990) 33-34. Clarendon Press Oxford, for a discussion of the exposition of various jurists of the monist theory.

¹²⁸ Starke (note 124 above) 73.

¹²⁹ Dugard (note 46 above) 47.

¹³⁰ Cassese (note 126 above) 164.

¹³¹ Starke (note 124 above) 73-74.

¹³² *Ibid.*

Conversely, dualists led by positivist writers Triepel and Anzilotti view international and municipal law as completely different systems of law.¹³³ The dualist doctrine points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject matter.¹³⁴ International law regulates the relations between sovereign states, while municipal law applies within a state and regulate the relations of its citizens with each other and with the executive. For the positivists international law would not as such form part of the internal law of a state, to the extent that international law may be applied by domestic courts only if adopted by those courts or if transformed by legislation.¹³⁵

Exponents of this theory avoid any question of the supremacy of the one system of law over the other since they share no common field of application: each is supreme in its own sphere.¹³⁶ For them rules of international law can only apply in municipal court at the will of the state. The will of the state is expressed by the incorporation of the rules of international law into municipal law through the continual process of the state.¹³⁷ Consequently this approach has often been referred to as the “theory of transformation’.¹³⁸ Between the aforementioned extreme theories there are jurists¹³⁹ who argue that the two systems have no common field of operation. They do not come into conflict as systems since they operate in different fields and each is supreme in its own sphere.¹⁴⁰ This resulted in the emergence of the “theory of harmonization or coordination”, which in essence qualifies the absolute monist position by acknowledging that in cases of conflict between international and domestic law the judge must apply his own jurisdictional rules.¹⁴¹ This means that customary international law is to be applied directly as part of the

¹³³ Cassese (note 126 above) 162-163.

¹³⁴ Brownlie (note 127 above) 34.

¹³⁵ R Jennings & A Watts (eds) *Oppenheim’s International Law* 9 ed, Vol. 1 (1992) 53. Great Britain: Longman Group UK Limited.

¹³⁶ *Ibid* 74.

¹³⁷ *Ibid* 73-74.

¹³⁸ Cassese (note 126 above) 162-163.

¹³⁹ Sir Gerald Fitzmaurice in particular challenges the premise adopted by monists and dualists, that international and municipal law have a common field of operation. See Brownlie (note 127 above) 36.

¹⁴⁰ Brownlie (note 127 above) 35.

¹⁴¹ Dugard (note 46 above) 47-48.

common law of the land, but that conflicting statutory rules and acts of state may prevail over international law.¹⁴² In this way, ‘harmony’ is achieved between international law and municipal law.

Before Namibia’s independence, the South African approach to the application of international law within the municipal sphere applied in Namibia (then South West Africa) because the country was under South African rule at the time.¹⁴³ With regard to customary international law, the position then – no different from the present position – was that customary international law formed part of the domestic law.¹⁴⁴ As to treaties, the position in South Africa (and hence Namibia prior to independence) was that the signing, ratification and other stages of treaty making comprise an executive act.¹⁴⁵ In order to become part of municipal law, incorporation is required (meaning the dualist approach was adopted in respect to treaties).¹⁴⁶ This position is correctly reflected by Steyn C.J., in the case of *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*¹⁴⁷ as follows:

It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African government is an executive and not a legislative act. As a general rule, the provision of an international instrument so concluded, are not embodied in our municipal law except by legislation process ... In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.

¹⁴⁸

¹⁴² Ibid 48.

¹⁴³ Erasmus (note 123 above) 81.

¹⁴⁴ *Nduli v The Minister of Justice* 1978 (1) SA 893 (A) at 893. See also *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 238; *Inter-Science Research and Development Services (Pty) Ltd v Republica Poupular de Moçambique* 1980 (2) SA 111 (T) at 124; *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709 (E) at 712 and 715.

¹⁴⁵ MO Hinz & OC Ruppel “Legal Protection of Biodiversity in Namibia” in M O Hinz & O C Ruppel (Eds) *Biodiversity and the Ancestors: Challenges to Customary and Environmental Law* (2008) 3-62, 8-9. Windhoek: Namibia Scientific Society.

¹⁴⁶ Erasmus (note 123 above) 81.

¹⁴⁷ 1965 (3) SA 150 (A).

¹⁴⁸ At 161.

After Namibia attained independence in 1990, the attitude towards the application of international law within the Namibian legal system was altered.¹⁴⁹ The question of the application of international law in Namibian law is now determined by Article 144 of the Constitution of Namibia.¹⁵⁰ It provides that:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this constitution shall form part of the law of Namibia.

In terms of this Article, public international law is *ab initio* part of the law of Namibia.¹⁵¹ This means that it needs no transformation or subsequent act of the legislature to become so.¹⁵² However, since the Constitution is the supreme law¹⁵³ of the country, international law has to be in conformity with the provisions of the Constitution in order to apply domestically.¹⁵⁴ In the event that a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter will prevail.¹⁵⁵ Article 144 has in the past been relied upon to invoke certain provisions of international instruments binding on Namibia. For instance in *Kauesa v Minister of Home Affairs and Others*¹⁵⁶, the court held that the African Charter on Human and People's Rights had become binding on Namibia and formed part of the law of Namibia and, therefore, had to be given effect in Namibia.

Article 144 mentions two sources of international law that will be applicable in Namibia, namely general rules of public international law and international agreements binding upon Namibia. General rules of public international law include rules of customary international law supported and accepted by a representatively large number of states.¹⁵⁷

¹⁴⁹ Hinz & Ruppel (note 145 above) 9.

¹⁵⁰ Republic of Namibia *The Constitution of the Republic of Namibia (Revised)* (2007). Windhoek: Ministry of Information and Broadcasting.

¹⁵¹ Erasmus (note 123 above) 94.

¹⁵² *Ibid.*

¹⁵³ See Article 1(6) of the Constitution of Namibia.

¹⁵⁴ Hinz & Ruppel (note 145 above) 9.

¹⁵⁵ *Ibid.*

¹⁵⁶ 1994 NR 102 (HC).

¹⁵⁷ OC Ruppel "Teaching and Research Environmental Law in Africa and Namibia" (2008). Unpublished paper presented at the *International Colloquium on the Teaching of Law in Africa*, Windhoek, 27 March

International agreements on the other hand firstly refers to treaties in the traditional sense, i.e. international agreements concluded between states in written form and governed by international law¹⁵⁸; but also includes conventions, protocols, covenants, charters, statutes, acts, declarations, concords, exchange of notes agreed minutes, memoranda of agreements, et cetera.¹⁵⁹ As stated elsewhere in this study, Namibia is signatory to the 1951 Refugee Convention, the 1967 Protocol as well as the OAU Refugee Convention. Therefore, even if Namibia did not give legislative effect to the provisions of these legal instruments, they are, in accordance with Article 144, binding on the country from the date of ratification.

It must be noted that the conclusion of or accession to international agreements is governed by various constitutional provisions. In terms of Article 32(3)(e) the President is empowered to negotiate and sign international agreements and to delegate that power. Cabinet has to assist the President in determining which international agreements are to be concluded, acceded to, succeeded to, and to report to the National Assembly thereon.¹⁶⁰ Article 63(1)(d) empowers the National Assembly to decide whether to succeed to international agreements entered into prior to independence by the previous administration and to agree to the ratification of or accession to international agreements entered into by the President. This article must be read with Article 143, which provides that ‘All international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(1)(d) hereof otherwise decides’.¹⁶¹ This is a clear indication that the Constitution draws a distinction between treaties concluded before 1990 and those concluded or acceded to after 1990. The rules relating to the respective agreements are governed by the Constitution.¹⁶²

2008, 9. Also see Erasmus (note 120 above) 98.

¹⁵⁸ Definition in Article 1 of the Vienna Convention on the Law of Treaties of 1969 which entered into force in 1980.

¹⁵⁹ Ruppel (note 157 above) 9.

¹⁶⁰ Article 40 (i).

¹⁶¹ On the question of succession by Namibia to existing treaties, see P Szasz ‘Succession to Treaties under the Namibian Constitution’ in D Van Wyk et al (eds) *Namibia Constitutional and International Issues* (1991) 65-80. University of Pretoria: VerLoren van Themaat Centre for Public Law Studies.

¹⁶² *Ibid.* See also Erasmus (note 123 above) 103-104.

In terms of Article 74(1)(a) the National Council has to consider Bills passed by Parliament. At this point it is, however, doubtful whether the National Council may refuse to ratify or accede to international agreements approved by the National Assembly as this is not specifically stated as part of its functions. Another Article of importance is Article 96 that provides, *inter alia*, that “[t]he State shall endeavour to ensure that in its international relations it ... fosters respect for international law and treaty obligations”. This Article, like the preceding ones, clearly expects Government to honour and uphold its international commitments, including those dealing with the protection of refugees.

2.3 Domestic legal framework

2.3.1 The Constitution of the Republic of Namibia, Act 1 of 1990

Having dealt with Article 144 and some other appropriate Articles in the Constitution of Namibia above, this part will examine other constitutional provisions relevant to refugee protection. The first Article central to the protection of refugees is Article 97. It provides that “The State shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group”. The Article comes under Chapter 11 which deals with ‘Principles of State Policies’. This chapter sets out certain policy objectives that the State considers morally and politically desirable and which in some cases will be implemented through legislation.

In the main, the provisions in Chapter 11 are clearly long-term objectives to be achieved as resources and parliamentary time permit.¹⁶³ Chapter 11 can, however, not be enforced in a court of law, because Article 101 explicitly provides that “[t]he principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to

¹⁶³ G Naldi *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (1995) 100. Kenwyn, South Africa: Juta & Co Ltd.

have regard to the said principles in interpreting any laws based on them”. However, the Supreme Court of Namibia has given an expansive interpretation of certain civil and political rights in Chapter 3 of the Namibian Constitution in order to protect some of the social and economic rights provided for in Article 95.

The Namibian Government has, in line with this provision coupled with its international obligations, promulgated the Namibia Refugees Act in 1999. Although this all-important legislation came into force nine years after the country obtained her independence, it did not deter the Namibian authorities from providing asylum to Angolan refugees during the civil war in that country. This is clearly an indication that the government of Namibia endeavoured to uphold its international obligations and rightly so, since many Namibians were refugees themselves not too long ago.¹⁶⁴

Article 18 on the Administration of Justice is also central to any discussions of refugee protection. It stipulates that “*Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts shall have the right to seek redress before a competent Court or Tribunal*”. This Article guarantees administrative justice and requires that administrative bodies and officials must act fairly and reasonably and comply with all their legal obligations. In addition, an aggrieved person has a right to seek judicial redress.¹⁶⁵ It is apparent from the wording of this Article that the actions of administrative bodies and officials must be in conformity with the relevant legislation as well as the common law.

The concept ‘relevant legislation’ is self-explanatory. However, what needs elucidation is the phrase ‘common law’. In this context the common law refers to the principles of natural justice. The principles of natural justice are the bedrock of procedural and

¹⁶⁴ C Tapscott & B Mulongeni *An Evaluation of the Welfare and Future Prospects of Repatriated Namibians in Northern Namibia* NISER Research Report No. 3 (1990) 4. Windhoek: Namibia Institute for Social and Economic Research, University of Namibia.

¹⁶⁵ *Ibid* 85.

substantive *ultra vires* which forms one of the major basis of judicial review or control of administrative action. Previously¹⁶⁶ the rules of natural justice applied only in the exercise of judicial or quasi-judicial administrative action which affected antecedent or existing rights, privileges or freedoms. These rules were extended in *Administrator Transvaal v Traub*¹⁶⁷. In *casu* the court found that the rules also applied in instances where an individual had a ‘legitimate expectation’. The concept of “legitimate expectation” was explained in *Traub*¹⁶⁸ as: “... cases where the affected party has no vested right, but does have a potential right or legitimate expectation that his application will succeed, and has therefore gained the right to be heard by virtue of his expectation”.

The principle of natural justice rests on two legs, namely the *audi alteram partem* rule (literally hear the other party) and *nemo iudex causa* rule (literally nobody may be a judge in his own cause).¹⁶⁹ The *audi* rule imposes on the administrator the duty to grant a fair hearing in the exercise of administrative discretion. It requires the administrator to give the affected party sufficient notice of what is proposed against him so that he may be in a position to prepare his own case to answer the case he has to meet.¹⁷⁰ Secondly, the *audi* rule demands that the affected party be given an opportunity to correct an impression or contradict any evidence that has been given against him.¹⁷¹ In the Namibian jurisprudence, Strydom C.J. laid down in *Chairperson of the Immigration Selection Board v Frank and Another*¹⁷² certain requirements as some of the demands of this rule.¹⁷³ Although these guidelines were delivered in the minority judgement of that case, they nevertheless carry persuasive value.

¹⁶⁶ See for instance *Loubser v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A)

¹⁶⁷ 1989 (4) SA 731 (A). See also *West-air Aviation (Pty) Ltd and Others v Namibia Airports Company* 2001 NR 256

¹⁶⁸ 1989 (4) SA 731 (A).

¹⁶⁹ Y Burns & M Beukes *Administrative Law under the 1996 Constitution* 3 ed (2006) 318-319. Durban: LexisNexis Butterworths.

¹⁷⁰ Ibid 321-331. Also see C Parker “The Administrative Justice Provision of the Constitution of the Republic of Namibia: A Constitutional Protection of Judicial Review and Tribunal Adjudication under Administrative Law” (1991) *CILSA* (24) 93.

¹⁷¹ Burns & Beukes (note 169 above) 321.

¹⁷² *Chairperson of the Immigration Control Board v Frank and Another* 2001 NR 107 (SC).

¹⁷³ See also SK Amoo *An Introduction to Namibian Law: Materials and Cases* (2008) 321. Windhoek: Macmillan Education Namibia Publishers (Pty) Ltd, for a thorough outline of these requirements.

Conversely the *nemo* rule requires that nobody may be a judge in his own cause.¹⁷⁴ According to Parker, this rule has limited application in relation to the exercise of administrative power.¹⁷⁵ He explains that “In modern public administration there are many instances where the administrative body or administrative official may be both the decision-maker and the judge in the same matter. What the natural justice rule against bias seeks to prevent is personal bias and not, it would appear, ministerial or agency bias where the official is enforcing policies of ministry, for instance”.¹⁷⁶ The courts will only set aside a decision of an administrative body or official where there is substantial or real bias.¹⁷⁷ The decision maker will be biased where he or she has a pecuniary¹⁷⁸ or other interest (such as a personal interest¹⁷⁹) in the matter.¹⁸⁰ A decision or action of an administrative body or official taken in breach of natural justice or where the body or official acted unfairly is null and void in terms of Article 18.¹⁸¹

The determination of refugee status is predominantly an administrative action. This is so because the Namibia Refugees Committee is a body established¹⁸² in terms of the Refugees Act and derives its powers¹⁸³ from the same statute. The basic principle of administrative law is that any exercise of power must always be authorised by law (e.g. legislation or subordinate legislation such as ministerial regulations and municipal by-laws).¹⁸⁴ The administrative relationship further has two important features: one of the parties to the relationship must be an organ of government, and the latter must be vested with authority, which it is in a position to enforce.¹⁸⁵ The relationship is, therefore, an

¹⁷⁴ *Ibid.*

¹⁷⁵ Parker (note 170 above) 93.

¹⁷⁶ *Ibid* 93-94.

¹⁷⁷ *Metropolitan Properties CC (FGG) Ltd v Lannon* 1969 1 QB 577, 599.

¹⁷⁸ See *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 (A).

¹⁷⁹ See *Liebenberg v Brakpan Liquor Licensing Board* 1944 WLD 52.

¹⁸⁰ *Meyer v Law Society Transvaal* 1978 (2) SA 209 (T), 212H.

¹⁸¹ Parker (note 170 above) 96.

¹⁸² Section 7.

¹⁸³ Section 10.

¹⁸⁴ Burns & Beukes (note 169 above) 73.

¹⁸⁵ G Carpenter Public Law: Administrative Law’ in W J Hosten *et al* (eds.) *Introduction to South African Law and Legal Theory* 2nd ed (1995) 1044-1081, 1046. Durban: Butterworths.

unequal one, with the individual subject being in a subordinate position, e.g. the Namibia Refugees Committee and the applicant for refugee status.

It is a fact that the nature of present day public administration is such that a certain degree of administrative discretion is indispensable for the effective and expeditious day to day running of government.¹⁸⁶ An administrative body or official is said to have discretion in a matter when that official or body has the power or liberty to choose between two alternative courses of action and the correctness or incorrectness of the decision cannot be demonstrated.¹⁸⁷ Discretion may be vested in an administrative authority either by the Constitution itself or a statute.

Section 10 of the Refugees Act empowers the Refugees Committee to determine refugee status. It is thus exercising discretion in that refugee status may either be confirmed or rejected, i.e. the Committee has the power or liberty to choose between two alternative courses of action.

In the *Frank* case, Strydom C.J. in his analysis of the nature of administrative discretion in the context of the powers given to the Officials of the Ministry of Home Affairs and Immigration to grant permanent residence permits, held that:

there is also authority for the principle that a foreign national cannot claim permanent residence as of right and that the State has an exclusive discretion as to whether it would allow such nationals in its territory. However, as far as Namibia is concerned, this principle is subject to the provisions of Article 18 of the Constitution and as long as the Board act fairly and reasonably and in accordance with a fair procedure there is no basis for interference by a court of law.¹⁸⁸

The Immigration Selection Board¹⁸⁹ and the Refugees Committee may be equated in that both are established by an Act of Parliament and derive their powers from the same

¹⁸⁶ Amoo (note 170 above) 319.

¹⁸⁷ Ibid.

¹⁸⁸ Note 172 above.

¹⁸⁹ Section 25, Immigration Control Act.

source.¹⁹⁰ In addition both bodies have their own internal hierarchy and may be seen as being in a relationship of authority towards applicants, be it applicants for permanent residence or refugee status. The Board and the Refugees Committee thus both perform administrative actions. In the premise Article 18 and the rules of administrative law apply to the actions and decisions of the Refugees Committee and the excerpt of the judgment in the *Frank* case may be considered good guidelines in the determination of refugee status. The right to just administrative action may be limited, like all other constitutional rights.

However, any limitation has to comply with the requirements laid down in Article 22.¹⁹¹ Article 22 provides that wherever the Constitution contemplates a limitation of any fundamental rights, any law providing for such limitation shall be of general application and not directed at any individual but shall have restricted effect so that the essential content of the right is not negated and the ascertainable extent of the limitation and the lawful authority on which it is based must be specified.¹⁹² Under the provisions of the Constitution and the common law, any person aggrieved by the exercise of discretion can bring an action for the review of the decision or administrative action for any of the remedies, *certiorari*, prohibition or interdict, mandamus, habeas corpus and damages.¹⁹³

2.3.2 *Namibia Refugees (Recognition and Control) Act 2 of 1999*

Increasing pressure on African states has led to the promulgation of domestic legislation that would provide effective surrogate protection to victims of armed conflict and persecution. To that end Namibia was no exception and the Namibian Parliament had therefore promulgated the *Namibia Refugees (Recognition and Control) Act 2 of 1999*

¹⁹⁰ The Security Commission is equally considered an administrative body and hence it is also required to take its actions in accordance with administrative rules and procedures. See *Government of the Republic Namibia v Sikunda* 2002 NR 203.

¹⁹¹ Article 21(2) by contrast limits the fundamental freedoms contained in Article 21 (1). See *Kauesa v Minister of Home Affairs and Others* 1996 (4) SA 965 (NmS) for an interpretation of this provision.

¹⁹² See also *Kauesa* at 977G-I and 979 E-G

¹⁹³ Amoo (note 173 above) 323.

(Refugees Act) and Regulations¹⁹⁴ thereto in accordance with its international and regional obligations. The Act came into force on September 22, 2000.¹⁹⁵

The Refugees Act makes provision for the recognition and control of refugees in Namibia and gives effect to certain provisions of the 1951 and OAU Refugees Conventions. It also provides for the appointment of a Commissioner for refugees and establishes the Namibia Refugees Committee. The Act further sets out the powers, duties and functions of the Committee. It provides an elucidation of the concept 'refugee' and lay down the procedure for the determination of refugee status. An Appeal Board is also established by the Act as well the procedure to appeal. Furthermore the Act also makes provision for the rights and duties of recognised refugees and protected persons and embraces the principle of *non-refoulement*. The various aspects of the Act, central to the issues in this study, are discussed further in this thesis under the appropriate headings.

Another statute of equal importance to this topic is the *Immigration Control Act 7 of 1993 (Immigration Act)*, which came into force on July 29, 1994. This Act regulates and controls the entry of persons into Namibia as well as their residence inside the country. It also provides for the removal from Namibia of certain immigrants. While the Immigration Act forbids the unlawful entry into Namibia, Section 13 (1) of the Refugees Act nevertheless lays down that "Notwithstanding the provisions of the Immigration Control Act, any person other than a Namibian citizen who is in Namibia, whether such person has entered Namibia lawfully or unlawfully, and who wishes to remain in Namibia as a refugee in terms of this Act shall, within 30 days from the date on which he or she so entered Namibia, apply in writing to an authorized officer for the granting to him or her of refugee status". In addition Section 32 of the Refugees Act provides that where there is conflict between a provision of that Act and the Immigration Control Act, then the provisions of the former shall prevail. This indicates the supremacy of the Refugees Act, that asylum seekers clearly enjoy a higher and more important status than other aliens.

¹⁹⁴ Regulations are contained in GN 236/2000 (GG 2412).

¹⁹⁵ Blain & Hubbard (note 13 above) 94.

The *Citizenship Act 14 of 1990*¹⁹⁶ that regulates the acquisition and loss of Namibian citizenship in accordance with Article 4 of the Constitution is also central to any debate on refugees. This is so because one of the solutions to the current dilemma of the refugees hosted at Osire is local integration. Local integration requires that refugees who do not wish to return to their home country be integrated into the Namibian society and economy. This would entail the granting of Namibian citizenship. Consequently it is imperative to consider the appropriate provisions of this Act in that context.¹⁹⁷

Chapter 3 Who is a refugee? Refugees and other migrants from an international and domestic legal perspective

3.1 Voluntary and forced migrants: causes of movement

It would seem on a reading of literature on migration in Southern African that South Africa, Botswana and Namibia are the favoured countries of destination, regardless of whether such migration is forced or voluntary.¹⁹⁸ The term ‘migration’ is generally understood to mean ‘a process of moving, either across an international border, or within a state. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, uprooted people, and economic migrants’.¹⁹⁹ Conversely, ‘forced migration’ is used to describe a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes.²⁰⁰ This later elucidation is usually connected with refugees.

¹⁹⁶ It was brought into operation by Proc. 13/1990 (GG 72) and Regulations are contained in GN 14/1991 (GG 154), See Blain & Hubbard (note 13 above) 92.

¹⁹⁷ Discussed below in Chapter 6.

¹⁹⁸ JO Oucho *Migration in Southern Africa: Migration Management Initiatives for SADC Member States* (December 2007) 1, ISS Paper 157, <www.iss.co.za/index.php?link_id=4059&slink_id=5447&link_tyoe=12&slink_t...> last accessed on 25 January 2010.

¹⁹⁹ International Organization for Migration (IOM) *Glossary on migration* (2004) 41. Geneva, Switzerland: International Organization for Migration [IOM], <<http://www.iom.int>> last accessed on 18 February 2009.

²⁰⁰ *Ibid* 25.

It would be useful to distinguish between the concepts ‘migrant’, ‘asylum seeker’ and ‘refugee’. According to the IOM Glossary on Migration, there is no universally accepted definition of the word ‘migrant’ at an international level. However, the term migrant is usually understood to cover all cases where the decision to migrate is taken freely by the individual concerned for reasons of “personal convenience” and without intervention of an external compelling factor.²⁰¹ This term, therefore, applies to persons, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family.²⁰² Where a person is moved exclusively by economic considerations, he is an economic migrant and not a refugee, at least in terms of the definition contained in international and local domestic legal instruments.²⁰³

The distinction between an economic migrant and a refugee is sometimes blurred in the same way that 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.²⁰⁴

It would appear that some academics use the words ‘asylum seekers’ and ‘refugees’ interchangeably. However, a close scrutiny of some scholarly publications provides a distinction between these concepts. Moreover, the delineation of a ‘refugee’ in international and national legal instruments does not refer to ‘asylum seekers’ when

²⁰¹ Ibid 40.

²⁰² Ibid.

²⁰³ UNHCR 1992 (note 80 above) 12.

²⁰⁴ The issue of whether or not economic and environmental migrants ought to be considered refugees is discussed in 3.2.

speaking of refugees. It can thus be deduced that there is a clear distinction between an ‘asylum seeker’ and a ‘refugee’. What can however not be ignored is the close relationship between the issue of refugee status and the principle of *non-refoulement* on the one hand and the concept of asylum, on the other hand.²⁰⁵ These three elements are links in the chain between the refugee’s flight and his or her attainment of a durable solution.

The meaning of the word ‘asylum’ tends to be assumed by those who use it, but its content is rarely explained. Goodwin-Gill devotes a whole chapter to the meaning and understanding of the word ‘asylum’.²⁰⁶ According to the learned author, the concept came to imply a place of refuge, but also the right to give protection to exiles and refugees.²⁰⁷ The definition of ‘asylum’ in the IOM Glossary on Migration has a similar notion. It provides that asylum is the ‘protection granted by a state to an alien on its own territory against the exercise of jurisdiction by the state of origin, based on the principle of *non-refoulement*, leading to the enjoyment of certain internationally recognized rights’.²⁰⁸ Asylum seekers are accordingly defined in the IOM Glossary on Migration as ‘persons seeking to be admitted into a country as refugees and awaiting decision on their application for refugee status under relevant international and national instruments. In case of a negative decision, they must leave the country and may be expelled, as may any alien in an irregular situation, unless permission to stay is provided on humanitarian or other related ground’²⁰⁹.

The word ‘refugee’, is a term of art, that is, a term with a content verifiable according to principles of general international law. In ordinary usage, ‘refugee’ has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal

²⁰⁵ Goodwin-Gill 1996 (note 32 above) 174.

²⁰⁶ Ibid 172-204.

²⁰⁷ Ibid 172.

²⁰⁸ IOM (note 199 above) 8.

²⁰⁹ Ibid.

circumstances, found to be intolerable.²¹⁰ The IOM Glossary on Migration draws a distinction between a refugee ‘mandate’ and a refugee ‘recognised’. The former refers to persons who meets the criteria of the UNHCR Statute and qualifies for the protection of the United Nations provided by the High Commissioner, regardless of whether or not she or he is in a country that is a party to the 1951 Refugees Convention or the 1967 Protocol relating to the Status of Refugees, or whether or not she or he has been recognised by the host country as a refugee under either of these instruments.

A refugee ‘recognised’, on the other hand, refers to a person, who “owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, 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”.²¹¹ However, the Namibia Refugees Act makes reference to a ‘recognised refugee’ and defines it as ‘a person who has been granted refugee status in terms of section 13(4)(a)²¹²’ of that Act.²¹³ This means that a recognised refugee is one that has applied for refugee status in terms of the procedure provided for in the Act, and his or her application has been successful. Accordingly, a ‘refugee’ is defined in the Namibian Refugees Act as ‘any person who is a refugee in terms of section 3’.²¹⁴ Section 3 lays down the requirements an asylum seeker has to meet before refugee status can be conferred on him or her. Another dimension of the word ‘refugee’ is a refugee ‘*sur place*’. It refers to a person who was not a refugee when he left his country, but who becomes a refugee at a later date on fulfilling the criteria set out the 1951 Refugees Convention read with national refugee laws.²¹⁵

The definitions of a refugee in both international and national legal instruments are examined in detail below. It is worth noting that most domestic legislation has simply reproduced the definition of a refugee contained in the 1951 and OAU Refugees

²¹⁰ Goodwin-Gill 1996 (note 32 above) 3.

²¹¹ Ibid 52-53. Also see Article 1 A (2) of the 1951 Refugees Convention.

²¹² This section deals with the application for refugee status.

²¹³ Definitions, Section 1

²¹⁴ Ibid.

²¹⁵ IOM (note 199 above) 53.

Convention. Nonetheless it is widely accepted that the concept has been broadened in the OAU Refugee Convention. There are a host of factors that can contribute to or cause people to move within or outside the borders of a country. Natural or environmental disasters are among the most popular reasons for migration. Economic consideration, famine or development projects can also trigger movement of people. In addition war and civil strife or chemical and nuclear disasters are top reasons why people would migrate.

3.2 The refugee definition in international and national legal instruments

As stated before, legal formulations of refugee status are very much a product of recent western history. Discussions of ‘who is a refugee’ are dominated by the definition in Article 1 of the 1951 Refugees Convention, which is widely recognised as ‘universal’. At the same time, the Convention with its definition is sometimes described as a Cold War product, ‘Eurocentric’ and, in some cases even as obsolete.²¹⁶ Apart from delineating the concept ‘refugee’, the Convention also sets out provisions dealing with dual or multiple nationality and the circumstances in which one may either cease to be a refugee or be excluded from the benefits of refugee status.²¹⁷

The provisions of the 1951 Convention defining who is a refugee consist of three parts, which have been termed respectively “inclusion”, “cessation” and “exclusion” clauses. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses.

²¹⁶ Sztucki (note 35 above) 55-56. Hathaway 1991 (note 33 above) 16-17.

²¹⁷ Articles 1(A) (2); 1(C); 1(D), (E) and (F) of the 1951 Refugees Convention.

Article 1 A (1) of the 1951 Convention deals with statutory refugees, i.e. persons considered to be refugees under the provisions of international instruments preceding the Convention. It provides:

“For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

- (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugees being accorded to persons who fulfil the conditions of paragraph 2 of this section.”

The above enumeration is given in order to provide a link with the past and to ensure the continuity of international protection of refugees who became the concern of the international community at various earlier periods.²¹⁸ However, a person who has been considered a refugee under the terms of any of these instruments is automatically a refugee under the 1951 Convention. Thus, a holder of a so-called ‘Nansen Passport’²¹⁹ or a ‘Certificate of Eligibility’ issued by the International Refugee Organization must be considered a refugee under the 1951 Convention unless one of the cessation clauses has become applicable to his case or he is excluded from the application of the Convention by one of the exclusion clauses.²²⁰ This also applies to a surviving child of a statutory refugee.

The general definition of a ‘refugee’ is contained in Article 1(A)(2) of the 1951 Refugees Convention. It provides that any person who:

²¹⁸ Goodwin-Gill 1996 (note 32 above) 8-9.

²¹⁹ Nansen Passport" is a certificate of identity for use as a travel document, issued to refugees under the provisions of pre-war instruments. See UNHCR 1992 (note 80 above) 7.

²²⁰ UNHCR 1992 (note 80 above) 7.

“As a result of events occurring before 1 January 1951 and 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in this 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 recognised because he is a refugee.²²¹ From the above definition, the following requirements may be deduced:

1. The applicant/claimant must be outside his or her country of origin;
2. The applicant/claimant must be unable or unwilling to return home due to a ‘well founded fear of being persecuted’, i.e. well-founded fear;
3. The applicant/claimant must apprehend a form of harm which can be characterised as ‘persecution’;
4. There must be a nexus to civil or political status, i.e. the applicant/complainant must be a person at risk of serious harm *for reasons of* race, religion, nationality, membership of a particular social group or political opinion.²²²

These criteria of ‘who is a refugee’ have been interpreted by a plethora of legal writers and academics. Hence it is appropriate to briefly outline the interpretation afforded to the elements of the definition individually. There is nothing intuitively obvious about the first element. Many if not most of the people forced to flee their countries in search of safety remain within the boundaries of their state.²²³ According to Hyndman ‘[m]any people may find themselves in refugee-like situations, and may have fled considerable distances, but if no border has been crossed they will not be considered refugees. An example of people in

²²¹ UNHCR 1992 (note 80 above) 7.

²²² Goodwin-Gill 1996 (noted 32 above) 19-20.

²²³ Hathaway 1991 (note 33 above) 29.

this situation would be the many displaced persons in Vietnam during the 1970s²²⁴. Indeed, many people in Africa also fall within this category.²²⁵ The strict insistence on this territorial criterion has then also prompted concern that there is a mismatch between the definition and the human suffering consequent to involuntary migration.²²⁶ It is clearly unfair to exclude internal refugees, since this more than half century old definition omits to recognise the existence of social, legal and economic barriers, which make it impossible for all to escape to international protection.

Hathaway is of the opinion that the notion of ‘well-founded fear’ has nothing to do with the state of mind of the applicant for refugee status, except in so far as the claimant’s testimony may provide some evidence of the state of affairs in her home country.²²⁷ It is generally asserted that the concept of well-founded fear entails two requirements.²²⁸ In the first place the refugee claimant’s personal response to the prospect of return to her home country must be an extreme form of anxiety that is neither feigned nor overstated, but is rather sincere and reasonable. Secondly, the subjective perception of risk must be consistent with available information on the conditions in the state of origin.²²⁹

According to Hathaway, this two-pronged approach to the definition of well-founded fear is neither historically defensible nor practically meaningful.²³⁰ He suggests instead that the concept of well-founded fear is inherently objective, and was intended to restrict the scope of protection to persons who could demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past.²³¹ However, various writers are of the opinion that this element

²²⁴ Hyndman (note 117 above) 149.

²²⁵ *Ibid.*

²²⁶ Hathaway 1991 (note 33 above) 29.

²²⁷ *Ibid.* 65.

²²⁸ *Ibid.* for an outline of some academics who hold this view.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.* 66.

requires a mixed subjective-objective test, a view that is supported by the current author.

²³²

With regard to the element of ‘persecution’, it is generally acknowledged that the drafters of the 1951 Convention intentionally left its meaning undefined because they probably realised the impossibility of enumerating in advance all of the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign state.²³³ However, if one considers the Convention’s drafting history, it may be argued that refugee status was premised on the risk of serious harm, but not on the possibility of consequences of life and death proportion.²³⁴ The word ‘persecution is generally taken to exclude individuals who face discrimination or maltreatment other than that of a serious kind.’²³⁵ In addition it would seem that during the early years of the Convention, European determination authorities readily recognised serious social and economic consequences to be within the purview of persecution.²³⁶

Hathaway draws attention to the fact that the intention of the drafters was not to protect persons against any and all forms of serious harms, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population.²³⁷ This means that the maltreatment in question must be demonstrative of a breakdown of national protection. Therefore, the existence of past or anticipated suffering alone does not make one a refugee, unless the state has failed in relation to some duty to defend its citizenry against the particular form of harm anticipated.²³⁸

²³² See Oloka-Onyangu (note 38 above) 455-456 and Rankin (note 36 above) 410-411.

²³³ C Fong ‘Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats’ (1981) *British Year Book Int. L* (52) 53, 92.

²³⁴ Hathaway 1991 (note 33 above) 102-103.

²³⁵ R Plender ‘Admission of Refugees: Draft Convention on Territorial Asylum’ (1977) *San Diego LR* (15) 45, 53.

²³⁶ Hathaway 1991 (note 33 above) 102-103.

²³⁷ *Ibid* 103-104.

²³⁸ *Ibid* 104.

The last criterion requires that the persecution feared must be based on reasons of race, religion, nationality, membership of a particular social group or political opinion. The beneficiaries of refugee law have always been defined to exclude those who enjoy the basic entitlements of membership in a national community, and who ought reasonably to vindicate their rights against their own state.²³⁹ The rationale for the limitation was not that other persons were less at risk, but was rather that, at least in the context of historical moment, persons affected by these forms of fundamental socio-political disfranchisement were less likely to be in a position to seek effective redress from within the state.²⁴⁰ Refugee law thus requires that there be a nexus or link between who the claimant is or what she believed and the risk of serious harm in her home state. In my opinion, the membership principle should embrace, for instance, persons in flight of natural disaster, economic calamity, civil strife and war simply as a response to their human misery. It must be appreciated that a person is a refugee from the moment he or she fulfils the criteria set out in the 1951 Refugees Convention read with the relevant national laws on refugees. The formal recognition, for instance through individual refugee status determination, does not establish refugee status, but confirms it.

The OAU Refugee Convention appears to embrace some of these much needed aspects. It also defines the concept ‘refugee’, but in this Convention the definition consists of two parts: the first part is identical with the definition in the 1967 Protocol (i.e. the definition in the 1951 Convention without the dateline or geographic limitation). The second part applies the term “refugee” 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.²⁴¹

²³⁹ Ibid 135.

²⁴⁰ Ibid 136.

²⁴¹ Article 1(2) of the AOU Convention.

As mentioned before, this formulation of a “refugee” is perceived to be wider by academics, and rightly so. The definition of refugees in the OAU Convention was drafted, recognising that in developing countries many people are forced to leave their own countries for reasons other than persecution.²⁴² The Namibia Refugees Act substantially reproduced the definitions of a “refugee” as provided for in the 1951 and OAU Refugee Conventions. Section 3 of the Act stipulates that ‘[f]or the purposes of this Act, a person shall be a refugee if: -

- (a) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, he or she is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or²⁴³
- (b) not having a nationality and being outside the country of his or her former habitual residence, he or she is unable or, owing to a well-founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion, is unwilling to return to it; or
- (c) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality, he or she 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.²⁴⁴

The Namibian legislature has adopted a combination of the definition of a refugee as provided for in the 1951 and the OAU Refugees Conventions. The only difference is that the Refugees Act does not refer to ‘any person’ or ‘every person’ as is done in the 1951 and OAU Conventions respectively. Instead it simply makes reference to ‘a person’. Apart from this distinction, the Namibian definition of a refugee is a reproduction of the definitions in the two Conventions. Consequently it may be argued that, like the OAU definition, the Namibian delineation of a refugee is also wider in content and meaning than the 1951 Convention definition. However, there is currently no Namibian jurisprudence outlining the precise meaning of a refugee within the Namibian legal

²⁴² Fullerton (note 39 above) 214.

²⁴³ This is exactly the 1951 and the first part of OAU Convention criteria of a refugee.

²⁴⁴ This is the expansion of the refugee definition, adopted from the OAU Refugee Convention.

context. As is the case with the AU²⁴⁵, Namibia has no monitoring mechanism in place that can effectively pursue the matter of adherence to the principles of the Convention.²⁴⁶ Consequently it is difficult to identify authoritative interpretation of the OAU Convention definition in international law.²⁴⁷ The same problem arose in the context of the Namibia Refugees Act definition.

In the absence of authority on the interpretation of the refugee definition, recourse may be had to international and regional judicial decisions and legal writings on the matter. With regard to sub-section 3(1), the above outlined criteria and interpretation of the word contained in the 1951 Convention may be guidelines in deciding whether or not a person is a refugee. In adopting the part from the OAU delineation, i.e. sub-section 3(3) it may be argued that the Namibian Legislature also intended to move away from the UN Convention's '... well-founded fear of persecution' standard. By doing so, it recognises that refugee exodus could be the result of factors of a more general nature, intrinsic to the particular country in question, rather than to individual subjective status or fears of the applicant.²⁴⁸ This extension gives legal recognition to the plight of persons seeking refuge from the wider effects of coups d'état, civil strife and political unrest. In that way, a person who is, for instance, fleeing the effects of a state of emergency would not be put to the onerous burden of strictly proving that he or she had been the victim of individual persecution.

Furthermore, no distinction is made in the extended definition between persons fleeing independent African states, and those emanating from colonial or minority-controlled dominions. As a result, freedom fighters might also be included under the definition, as was clearly case with Namibians who opposed the South African apartheid administration.

²⁴⁵ See note 14 above.

²⁴⁶ Rankin (note 36 above) 409.

²⁴⁷ The only source of interpretation of the OAU Convention definition is that of scholarly writings. Also see Rankin (note 36 above) 418, fn 78.

²⁴⁸ The test is rather a mixed subjective-objective one. See Rankin (note 36 above) 410.

Suffice to say that it could not have been the intention of the drafters of the OAU Convention that those who sought to overturn the governments of independent democratic states be included in the extended definition.²⁴⁹ Rankin expresses the view that the OAU definition may be vague and ambiguous.²⁵⁰ In his assessment of the scholarly writings on the subject matter, he draws attention to three general propositions that seemingly characterised the extended definition, namely that:

1. it is objective, rather than subjective;
2. it creates a framework within which the cause of harm and motive for flight may be indeterminate; and
3. it is said to have been created to used as a group definition.²⁵¹

Rankin's analysis of the extended version of the OAU definition is refreshing in that most authors writing on the issue tend to accolade rather than provide rigorous interpretations of the definition. Consequently a quick glance at the author's suggestions would edify the 'broad definition' debate. As stated earlier in this study, the 1951 Convention definition lays down a mixed subjective-objective test.²⁵² The OAU Convention definition is said to be based on objective criteria, in terms of which a refugee who leaves his or her country of origin ought to be given refugee status regardless of whether or not they can satisfy the subjective criteria.²⁵³ The objective quality of this definition is explained by way of two notions. In the first place its objectivity is ascribed to the fact that the word 'fear' has been replaced by the word 'compelled'.²⁵⁴ Secondly the OAU definition is said to focus on the 'unbearable and dangerous conditions which set entire populations on the move' and looks to the objective circumstances which have compelled flight rather than the individual's personal subjective reaction to the adversity he or she perceived'.²⁵⁵

²⁴⁹ Also see the comment by Oloka-Onyango (note 38 above) 456.

²⁵⁰ Rankin (note 36 above) 410.

²⁵¹ *Ibid.*

²⁵² See UNHCR 1992 (note 80 above) 8.

²⁵³ Rankin (note 36 above) 411.

²⁵⁴ TD Mendell 'Refugee Law and Practice in Tanzania' (1997) *Int J of Refugee Law* (9) 54.

²⁵⁵ MR Rwelamira 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugees Problem in Africa' (1989) *Int J of Refugee Law* (1) 559.

For Rankin these explanations are unsatisfactory in that it overestimates the ‘subjective’ element in the 1951 definition, because the notion of ‘fear’ was never intended to introduce a subjective element.²⁵⁶ Instead it was meant to incorporate a prospective risk assessment.²⁵⁷ While case law has confirmed the need for a subjective element, in practice, it tends to be of secondary importance to the objective element of ‘well-foundedness’.²⁵⁸ Rankin opines that it is neither the term ‘compelled’ nor the OAU ‘events’ that make this definition objective, but, amongst other things, the relationship between the two notions.²⁵⁹ Consequently he concluded that the Africanised notion of asylum is built around the quality of community, rather than around the quality of the individual.²⁶⁰ This view has merit in that African states generally tend to support the communitarian philosophy in terms of which the community is emphasised over the individual.

The next issue is that of a lack of specificity in the cause of flight. The 1951 Convention requires in part the deliberate targeting of an individual by the agent of persecution. Conversely the OAU definition considers situations where the qualities of deliberateness and discrimination need not be necessarily present.²⁶¹ The OAU definition captures four events, namely: external aggression, occupation, foreign domination and events seriously disturbing public order. A problem that might arise in respect of these terms is that they lack firm definition in international and national law. Moreover the fact that these specific events were listed may suggest a conscious effort on the part of the drafters of the OAU Convention to place limits on the scope of the definition.

²⁵⁶ Rankin (note 36 above) 411.

²⁵⁷ *Ibid.*

²⁵⁸ ‘Interpretation of the Convention Refugee Definition in the Case Law’ Legal Services: Immigration and Refugee Board Canada (2007) 5.1, <http://www.irb.gc.ca/eng/brdcom/references/legjur/rpdspr/def/documents/crdef05_e.pdf> last accessed on 30 November 2009; see also Hathaway 1991 (note 32 above) 70-74.

²⁵⁹ Rankin (note 36 above) 412.

²⁶⁰ *Ibid* 413-414.

²⁶¹ *Ibid* 414.

As is questioned below under the heading ‘Appraising the refugee definition: an expanded concept’: could an earthquake or flood be events that ‘seriously disturb public order? Rankin reckons that a plain reading of the definition certainly does not indicate immediately why environmental migrants ought to be excluded from this definition.²⁶² Although many of the revolutionary conditions that led to the inclusion of the OAU events no longer exists, Okoth-Obbo expresses the astute remark that they could be ‘viewed as vessels still possessed if the capacity for the legal transcription of Africa’s refugee realities.’²⁶³ It would thus not be a stretch to apply the occupation clause to South Africa’s long occupation of Namibia, an occupation deemed illegal by the International Court of Justice (ICJ).²⁶⁴

The final contention is what might be called the *prima facie* group definition. This assertion is mostly derived from practice, in that the majority of states and UNHCR experience with the OAU definition has been in the context of mass influx situations.²⁶⁵ Group status determination on a *prima facie* basis is generally employed when a large-scale movement of people occurs because of a specific disruptive event.²⁶⁶ If one considers the disruptive events in the OAU definition, it is clear why the consideration of group status, as opposed to individual status, would be relevant. These enumerated events often tend to prompt large-scale movements. However, the fact that the definition might be well suited to group situations does not mean that it was intended to be applied to groups only.

²⁶⁷

²⁶² Ibid 415.

²⁶³ G Okoth-Obbo ‘Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing Specific Aspects of Refugee problems in Africa’ (2001) *Refugee Survey Q* (20) 90.

²⁶⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) *Notwithstanding Security Council Resolution 276* (1970) Advisory Opinion of 21 June 1971.

²⁶⁵ Rankin (note 36 above) 416.

²⁶⁶ I Jackson *The Refugee Concept in Group Situations* (1999) 3. The Hague: Martinus Nijhoff Publishers.

²⁶⁷ Rankin (note 36 above) 416.

The rationale for the group thesis is often attributed to the motives of the drafters of the OAU Convention, a contention that is, according to some writers, neither apparent in the drafting history nor in the Convention itself.²⁶⁸ Moreover, there is no mention of group status determination or prima facie group status recognition in the OAU Convention.²⁶⁹ The point is that the prima facie group thesis gives tacit recognition of a practice, which, while often necessitated by the exigencies of circumstances, can undermine refugee protection.²⁷⁰ In addition some scholars argue that the prima facie group thesis also tends to undermine refugee rights.²⁷¹ While the above interpretations of the OAU Convention definition may be said to raise serious interpretive issues, ranging from assumptions about its nature to more specific concerns about its content, is nonetheless a starting point, especially in the absence of case law, limited evidence of state practice and a near absence of travaux préparatoires. The problems of interpreting the broader version of the refugee definition are discussed in 3.5.

3.3 Refugee status determination procedure in Namibia

According to the IOM Glossary on Migration the concept ‘refugee status determination’ entails a process to determine whether an individual should be recognised as a refugee in accordance with international and national laws.²⁷² This entails first an ascertainment of the relevant facts of the case. Thereafter the definitions in the 1951 and OAU Conventions read with national refugee laws have to be applied to the facts thus ascertained.²⁷³ Neither the 1951 nor the OAU Refugee Conventions indicate the type of procedures to be adopted for the determination of refugee status.²⁷⁴ Consequently each contracting State has to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.²⁷⁵

²⁶⁸ Ibid 416-417; see also Okoth-Obbo (note 262 above) 117.

²⁶⁹ Rankin (note 36 above) 417.

²⁷⁰ Ibid.

²⁷¹ Ibid 417-418.

²⁷² IOM (note 199 above) 55.

²⁷³ UNHCR 1992 (note 80 above) 7.

²⁷⁴ Goodwin-Gill 1996 (note 32 above) 34.

²⁷⁵ Ibid.

It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He or she finds him or herself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his or her case to the authorities of a foreign country, often in a language not his own. His or her 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.

In view of this situation and of the unlikelihood that all states bound by the 1951 Convention and the 1967 Protocol could establish identical procedures, 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.²⁷⁶ These basic requirements, which reflect the special situation of the applicant for refugee status, to which reference has been made above, and which would ensure that the applicant is provided with certain essential guarantees, are the following:

1. 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.
2. The applicant should receive the necessary guidance as to the procedure to be followed.
3. 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.
4. 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.
5. If the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
6. If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a

²⁷⁶ Ibid.

different authority, whether administrative or judicial, according to the prevailing system.

7. 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 (3) 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.²⁷⁷

Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties to the 1951 Convention and its Protocol as well as the OAU Convention vary considerably. In a number of countries, refugee status is determined under formal procedures specifically established for this purpose. In other countries, the question of refugee status is considered within the framework of general procedures for the admission of aliens.²⁷⁸ In yet other countries, refugee status is determined under informal arrangements or ad hoc for specific purposes, such as the issuance of travel documents. In Namibia the matter is regulated by the Refugees Act of 1999.²⁷⁹ The Commissioner for Refugees²⁸⁰, on recommendation of the Namibia Refugees Committee²⁸¹, is responsible for deciding whether or not to grant or refuse refugee status. Section 6 (a) of the Act states that:

The Minister shall, on the recommendation of the Public Service Commission and subject to the laws governing the Public Service, appoint a staff member to be the Commissioner for Refugees, whose functions are-

- (a) *on the recommendation of the Committee, to grant or to refuse to grant refugee status to persons who have applied in terms of this Act for such status;*

This provision should be read with Section 10 that outlines the powers, duties and functions of the Committee, namely:

²⁷⁷ These Guidelines are recommended by the UNHCR. See UNHCR 1992 (note 80 above) 31-32; Fullerton (note 39 above) 222-223.

²⁷⁸ UNHCR 1992 (note 80 above) 31.

²⁷⁹ Article 2 of the Act provides that the Conventions are law in Namibia, subject to the provision of the Refugees Act and indeed also the Constitution of Namibia.

²⁸⁰ Mr Nkrumah Mushelenga is currently the Commissioner for Refugees.

²⁸¹ Section 7.

- (a) *to receive and consider every application for granting of refugee status referred to it by the Commissioner in terms of section 13(2)(c);*
- (b) *to carry out such investigation or to conduct such inquiry into any matter relating to an application which is under consideration in terms of paragraph (a) as it may deem necessary;*
- (c) *to make in respect of every person who has applied in terms of this Act for refugee status recommendations to the Commissioner as to the granting or not of such status to such person;*²⁸²
- (d) to register, in the prescribed manner, every recognized refugee and protected person; and
- (e) in addition to the powers and duties entrusted to it by or under this Act, to perform such other functions entrusted from time to time to it by the Minister or the Commissioner⁷.

The UNHCR usually forwards applications to the Namibia Refugee Committee, which includes representatives from the Ministry of Home Affairs and Immigration, the Ministry of Foreign Affairs, the Office of Attorney General, the Namibia Central Intelligence Service and two persons not employed by the State, but with wide experience of humanitarian work.²⁸³ As stipulated by the Refugees Act, UNHCR participates as an observer. The Minister of Home Affairs and Immigration appoints such members.²⁸⁴ The procedure for determining refugee status is outlined in Section 13 of the Act as follows:

- (1) Notwithstanding the provisions of the Immigration Control Act, any person other than a Namibian citizen who is in Namibia, whether such person has entered Namibia *lawfully or unlawfully*²⁸⁵, and who wishes to remain in Namibia as a refugee in terms of this Act shall, within 30 days from the date on which he or she so entered Namibia, apply in writing to an authorized officer for the granting to him or her of refugee status.
- (2) An authorized officer to whom an application is made in terms of subsection (1) shall
 - (a) if the applicant is not capable of writing or does not understand English, reduce the application into written form;
 - (b) if he or she is not an immigration officer, within 7 days from the date on which the application was made to him or her, notify an immigration officer in writing that the applicant is in Namibia and has applied for refugee status;
 - (c) within the period mentioned in paragraph (b), transmit the application, together with such other documents (including written representations)

²⁸² My emphasis.

²⁸³ See Section 7 (2).

²⁸⁴ Ibid.

²⁸⁵ My emphasis.

as the applicant desires to submit in support of the application, to the Commissioner, who shall without undue delay, refer it to the Committee.

- (3) The Committee shall, within 30 days from the date of receipt of an application referred to it in terms of subsection (2)(c) or within such longer period as the Commissioner may determine, consider every application so referred to it and-
 - (a) may, either within such period of 30 days or, if that period has been extended by the Commissioner, within the extended period, carry out such investigation or conduct such inquiry into any matter relating to an application under consideration as it may deem necessary;
 - (b) shall thereupon in respect of every application make recommendations to the Commissioner as to the granting or not of refugee status to the applicant concerned.
- (4) Subject to the provisions of section 4, the Commissioner shall, on the recommendation of the Committee-
 - (a) either grant refugee status to the applicant concerned, if the Commissioner is satisfied that he or she is a refugee and qualifies for refugee status in terms of this Act; or
 - (b) refuse to grant refugee status to the applicant concerned, if the Commissioner is not so satisfied.
- (5) The Commissioner shall in writing notify the applicant concerned of his or her decision contemplated in subsection (4) and, in the event of refugee status being refused to such applicant, furnish him or her with reasons in writing for the refusal.

The law requires the Refugees Committee to approve or reject every application within 30 days of receipt. The Commissioner for Refugees makes the final status determinations and has to give reasons in writing for any refusal. Subsection 1 overrides the provisions of the Immigration Control Act in terms of which persons who enter Namibia must, for instance, provide certain documentation such as passports and identities to an immigration officer at an immigration port.²⁸⁶ Most of the time, asylum seekers do not have their identity or passport documentation with them because of the very fact that they had to flee from persecution. This subsection also reinforces the principle of asylum in the Constitution (Article 97) as well as the principle of *non-refoulement* (section 26). Moreover, section 32 unambiguously states that “[i]n the event of a conflict between a provision of this [Refugees] Act and a provision of the Immigration Control Act, the provisions of this Act shall prevail”.

²⁸⁶ Sections 6, 7 & 8 of the Immigration Control Act. See *S v Luanda and Another* 1993 NR 287 (HC).

The above procedure also appears to adhere to the rules of administrative law, in particular Article 18 of the Constitution. For instance, an applicant for refugee status may support his or her application with the necessary evidence and if an application is rejected the Commissioner of Refugees has to furnish reasons for such refusal to the concerned applicant (principles of natural justice discussed above). Furthermore, an applicant aggrieved by the decision of the Commissioner and the Refugees Committee has the right to appeal to the Namibia Refugees Appeal Board established in terms of Section 28 of the Act. Section 27 stipulates that:

- (1) Any person who is aggrieved by a decision taken by the Commissioner under any provision of this Act may, subject to the provisions of section 24(8) and subsection (2) of this section, *appeal to the Appeal Board against such decision within 14 days* -
 - (a) from the date of receipt of the Commissioner's notice in writing of such decision; or
 - (b) if such notice does not contain the Commissioner's reasons for such decision, from the date on which the Commissioner furnished him or her with a written statement of the reasons for such decision.
- (2) An appeal in terms of subsection (1) shall be lodged with the Appeal Board in the form of a written statement and -
 - (a) shall contain the complete grounds of appeal; and
 - (b) may be accompanied by such documents as the appellant desires to submit in support of the appeal.

The USCRI reports in its 2007 World Refugee Report that there was a backlog of more than 1 000 cases in April 2007.²⁸⁷ During that year Namibia recorded 242 new applications and decided 239 of them. Of these, it granted protection to 146, denied it to 67, and held 24 past the end of the year. The Legal Assistance Centre (LAC) reports the following cases in respect of refugee status determination and application for citizenship by accepted refugees:

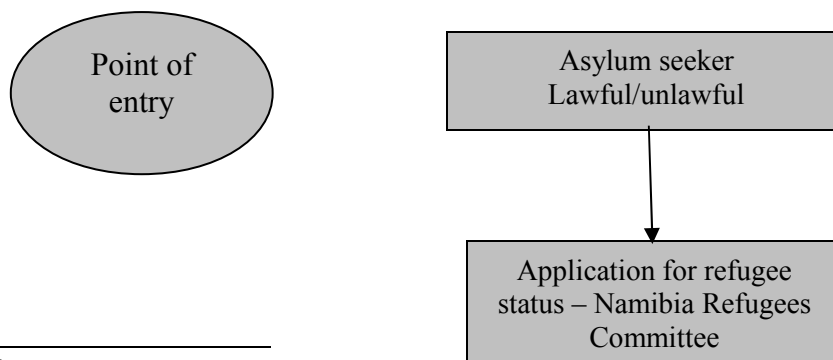
- *Antonio v Minister of Home Affairs*: An application was brought on behalf of the client, an Angolan asylum seeker whom the government intended deporting back to Angola. As a result the High Court directed the Minister of Home Affairs to consider

²⁸⁷ USCRI) (note 6 above).

his application for refugee status and interdicted the Minister from deporting the client pending his decision. This order recognises that the various refugee conventions to which Namibia is a party, prohibits the government from deporting asylum seekers to their countries of origin without first deciding their applications for asylum.

- A *mandamus* application forcing the Ministry of Home Affairs and Immigration to make a decision on a pending application for citizenship filed by a family of refugees was finalised and served. Government initially opposed the application but thereafter took the decision to refuse the citizenship applications, thus nullifying the reason for the court application. The reasons for the decision by the Ministry were found to be easily dealt with but the Ministry has not reversed its decision.

- *Deo Gahizi v Minister of Home Affairs*: An application was brought on behalf of the client, a recognised Rwandan refugee, to compel the Minister of Home Affairs to grant his application for Namibian citizenship. He qualified for citizenship on the basis of marriage to a Namibian citizen, but the Ministry required him to renounce his refugee status first. The Minister did not oppose the application, recognising the correct legal position that the client would automatically cease to be a refugee on becoming a Namibian citizen, and a certificate of citizenship was granted.²⁸⁸



²⁸⁸ LAC Cases on Human Rights and Constitutional Issues, <<http://www.lac.org.na/projects/huricon/huricon/cases.html>> last accessed on 23 October 2009.

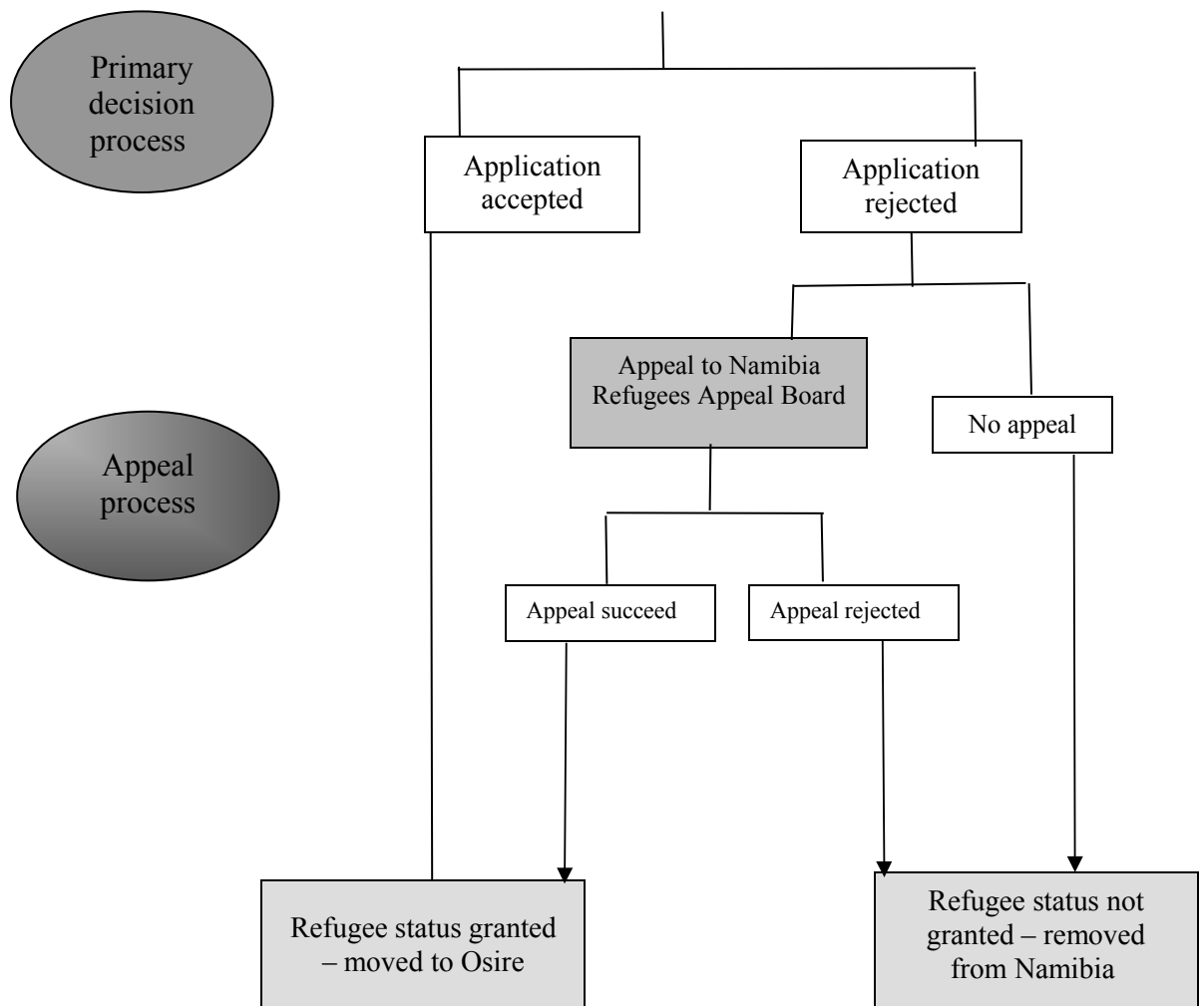


Figure 1. Refugee status determination in Namibia: The legislative structure

3.4 Loss and denial of refugee status

The 1951 and the OAU Refugees Conventions read with the Namibia Refugees Act provide for circumstances in which refugee status shall terminate or in which the benefits of status shall be denied or withdrawn. The 1951 Convention sets out when refugee status comes to an end. These so-called cessation clauses are based on the consideration that international protection should not be granted where it is no longer necessary or justified.

²⁸⁹ Goodwin-Gill 1996 (note 32 above) 80; Fullerton (note 39 above) 217.

In these instances, a person was granted refugee status, but it ceased to exist based on the grounds enumerated in Convention. Article 1 C of the 1951 Convention provides that:

This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

- (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;
- Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

The first four clauses clearly reflect a change in the situation of the refugee that has been brought about by him or herself, namely, voluntary re-availment of national protection; voluntary re-acquisition of nationality; acquisition of a new nationality and voluntary re-establishment in the country where persecution was feared.²⁹⁰ The last two clauses, on the other hand, are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared, because the reasons for a person becoming a refugee have ceased to exist.²⁹¹ The above outlined cessation provisions are negative in character and are exhaustively enumerated. In the

²⁹⁰ For a detailed discussion of each of these provisions see Goodwin-Gill 1996 (note 32 above) 80-84; and Hathaway 1991 (note 33 above) 189-199.

²⁹¹ See Goodwin-Gill 1996 (note 32 above) 84-87; and Hathaway 1991 (note 33 above) 199-205.

premise they should be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.²⁹²

Furthermore it must be appreciated that Article 1C does not deal with the cancellation of refugee status. However, circumstances may come to light that indicate that a person should never have been recognised as a refugee in the first place.²⁹³ For example, if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that the person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known. In such cases, the decision by which he was determined to be a refugee will normally be cancelled.

The Refugees Act of Namibia also lists the instances in which a recognised refugee may lose his or her status. These are almost identical to the above outlined cessation clauses in the 1951 Convention. Section 5 provides

A recognized refugee shall lose his or her refugee status for the purposes of this Act, if he or she-

- (a) voluntarily returns to the country of which he or she was a national or to the country where he or she was habitually resident; or
- (b) has voluntarily re-availed himself or herself of the protection of the country of his or her nationality; or
- (c) acquires a new nationality and enjoys the protection of the country of his or her new nationality; or
- (d) can no longer, because the circumstances in connection with which he or she has been granted refugee status have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality.

Apart from the ‘cessation clauses’, the 1951 Convention explicitly excludes from refugee status those individuals who, despite satisfying the refugee definition fall into the

²⁹² UNHCR 1992 (note 80 above) 19.

²⁹³ Ibid.

following categories. Such persons fall into three groups. The first group (Article 1D) consists of persons already receiving United Nations protection or assistance; the second group (Article 1E) deals with persons who are not considered to be in need of international protection; and the third group (Article 1F) enumerates the categories of persons who are not considered to be deserving of international protection. Deserving of some elucidation is this last category of persons. Article 1F excludes from the benefits of refugee status anyone in respect of whom there are serious reasons to believe has committed a war crime, a serious non-political offence prior to admission, or acts contrary to the purposes and principles of the United Nations. From the very beginning, therefore, the 1951 Convention has contained clauses sufficient to ensure that the serious criminal and the terrorist do not benefit from international protection. With respect to this last category, there is no requirement of proof of criminal prosecution and conviction. It would seem that it is sufficient that there are serious reasons for believing that the refugee applicant committed the prescribed act.

The Refugees Act of Namibia also contains a provision that restricts the granting of refugee status. Section 4 of the Act states:

- (1) Notwithstanding the provisions of section 3, a person shall not be granted refugee status in terms of this Act, if such person-
 - (a) has more than one nationality and is able to avail himself or herself of the protection of one of the countries of which he or she is a national and has no valid reason, based on well-founded fear of being persecuted for any of the reasons mentioned in paragraph (a) of section 3 or on any of the reasons mentioned in paragraph (c) of that section, for not availing himself or herself of the protection of that country; or
 - (b) has, before his or her admission to Namibia as a refugee, committed-
 - (i) a crime against peace or a war crime or a crime against humanity; or
 - (ii) a serious non-political crime; or
 - (iii) acts contrary to the purposes and principles of the United Nations Organization or the Organization of African Unity; or
 - (c) belongs to a category of persons declared by the Minister by notice in the Gazette to be persons who are not entitled to refugee status in terms of this Act.

- (2) The Minister may by notice in the Gazette revoke or amend a declaration contemplated in paragraph (c) of subsection (1).
- (3) In this section-
- ”crime against peace or war crime or crime against humanity" includes the conduct of a war of aggression or a war in violation of an international treaty, or mistreatment or torture of civilians or prisoners of war, or enslavement or murder of civilians, or political, racial or religious persecutions;
- “non-political offence" means an offence other than a political offence;
- “political offence" means an offence which is committed in the course of some political disturbance and in furtherance of its objects;
- “serious non-political crime" means any non-political offence which, if committed in Namibia, would be punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of five years or more.

The above ‘exclusion’ provisions are more detailed than that of the 1951 Convention. For instance it endeavours to define the various enumerated crimes, whereas the Convention does not. The Act stipulates that the definitions of the listed crimes in the relevant international instruments in which they are defined will have effect.²⁹⁴ Furthermore, the Refugees Act also explicitly excludes persons who have more than one nationality from the definition of a refugee. Conversely the 1951 Convention does not make reference to persons with more than one nationality. But then again the Refugees Act does not seem to exclude persons who have successfully obtained surrogate international or national protection, but this category might be read into the Act if Section 2(1)²⁹⁵ is taken into account.

3.5 Refugees in municipal law: examples from other jurisdictions

It would be useful to consider some examples on the protection of refugees in jurisdictions other than that of Namibia. Some countries, like Namibia, expressly acknowledge the principle of asylum in their constitutions. In others, ratification of the 1951 Convention

²⁹⁴ Article 1 F (a).

²⁹⁵ This section provides: “Subject to the provisions of this Act, the provisions of the Conventions set out in the Schedule to this Act shall be observed and shall have the force and effect of law in Namibia.”

and the 1967 Protocol has direct effect in local law, while in still other cases, ratifying may follow up their acceptance of international obligations with the enactment of specific refugee legislation or the adoption or appropriate administrative procedures.

Germany has both constitutional and enacted provisions benefiting refugees. Its 1949 Constitution prescribes that the politically persecuted enjoy the right of asylum, and the 1992 Asylum Procedure Law provides that those recognised shall enjoy the status provided for by the 1951 Convention, as a minimum standard.²⁹⁶ Germany has made some amendments to its asylum law in term of which a geographical limitation is established. These amendments prescribe that the right to asylum may not be invoked by one who enters Germany from a European Union State or from a third country where application of the 1951 Convention and the 1950 European Conventions on Human Rights is guaranteed.

²⁹⁷

In France, the principle of asylum is acknowledged in the Preamble of its 1958 Constitution.²⁹⁸ Additionally, a law of 1958, establishing the *Office français de protection des réfugiés et apatrides* (OFPRA) declares that refugees within the competence of the Office shall include those within the mandate of UNHCR and those within Article 1 of the 1951 Convention.²⁹⁹ The United States of America (USA) has enacted the Refugees Act of 1980 that abandons the earlier ideological and geographically based definition of refugees in favour of that offered by the Convention and Protocol.³⁰⁰ What is interesting about the USA refugee definition is that it goes beyond international instruments by offering 'resettlement' opportunities to those who might qualify as Convention refugees, but may

²⁹⁶ Article 16a, previously Article 16(2).

²⁹⁷ Goodwin-Gill 1996 (note 32 above) 22.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ R Inzunza 'The United States Refugee Act 1980: Ten Years After – Still the Way to Go' (1990) *Int J of Refugee Law* 2(3) 413-42.

even be in his or her country of origin, i.e. such person are outside the USA.³⁰¹ However, the USA places a so-called ‘ceiling’ on refugee resettlement every year.³⁰²

Canada also adopted the Convention definition in the 1976 Immigration Act. This delineation of a refugee serves as a criterion for selection under admission programmes and as the basis for formal recognition of refugee status and for the granting of residence to those already in Canada.³⁰³ What is more, Canada’s laws also make provision for the designation of other classes whose admission to that country would be in keeping with humanitarian tradition.³⁰⁴

In the United Kingdom (UK), the rules adopted for the implementation of the 1971 Immigration Act have traditionally referred to the Convention definition in the context of applications for entry, for extensions of stay and against deportation.³⁰⁵ The Convention and the Protocol are not formally incorporated in UK law.³⁰⁶ Nevertheless, under the UK’s discretionary refugee policy, persons perceived by authorities to have a valid reason for not returning to their countries of origin may be granted asylum, irrespective of whether or not they meet the Convention refugee definition.³⁰⁷

Australia does not draw a distinction between Convention and other refugees.³⁰⁸ Consequently persons displaced by serious disturbances of public order may benefit from asylum in that country.³⁰⁹ However, van Selm draws attention to the fact that Australian immigration policy is one of control, in the sense that the vast majority of immigrants and

³⁰¹ J van Selm ‘Refugee Protection Policies and Security Issues’ in E Newman & J van Selm (eds) *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (2003) 68. Tokyo, Japan: United Nations University Press.

³⁰² L Thomas-Greenfield ‘U.S. Refugee Admissions History and Policy’ (2001) *Refugee Survey Q* (20) 165-166.

³⁰³ Good-win Gill 1996 (note 32 above) 23.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ Hathaway 1991 (note 33 above) 22.

³⁰⁸ *Ibid* 22-23.

³⁰⁹ *Ibid* 23.

refugees have arrived in Australia with prior authorisation for their immigration.³¹⁰ She notes that refugees have been selected according to the intensity of the danger of their situation coupled with their existing connections with Australia and Australians.³¹¹

Closer to home, Section 3 of Zimbabwe's Refugee Act of 1983 defines a refugee in the same manner as the 1951 and OAU Refugee Conventions and contains particular detailed provision for class determination.³¹² Botswana's Refugee (Recognition and Control) Act defines a refugee only in terms of the 1951 Convention.³¹³ South Africa, on the other hand, also incorporated both the 1951 and AOU Conventions delineations of a refugee into its Refugees Act of 1998 (as amended).³¹⁴

This far from comprehensive selection is an illustration of the extent to which certain states have translated their concern for the international problem of refugee into action at the domestic level. Clearly most states, if not all have adopted the 1951 Convention definition, whereas most African states have additionally incorporated the OAU Convention definition. While some states notably take account of the plight of those who are either not recognised or not strictly refugees in the sense of the 1951 Convention, there is certainly room for an improved attitude towards those migrants forced from their homes and or countries of origin for reasons other than those listed in the Convention. The next part considers the issue of an expanded refugee concept and will highlight the merits and demerits of such an approach.

3.6 Appraising the refugee definition: an expanded refugee concept?

³¹⁰ Van Selm (note 301 above) 74.

³¹¹ *Ibid.*

³¹² Goodwin-Gill 1996 (note 32 above) 24.

³¹³ *Ibid.*

³¹⁴ JA Klinck 'Recognizing Socio-Economic Refugees in South Africa: A Principled and Rights-Based Approach to Section 3(b) of the Refugees Act' (2009) *Int J of Refugee L* (21) 654.

Who is a refugee? Which foreign victims of oppression or hardship in their homelands should we shelter? It is evident from the aforesaid that for the last half a century the world's basic answer has been: those outside their own countries with a 'well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. This formulation of who is a refugee has then formed the cornerstone of the international response to forced migration for the past fifty or so years. Although numerous countries adopted it, my concern lies with the expanded refugee definition in the OAU Convention and adopted in Section 3(c) of the Refugees Act of Namibia. In this part I examine this, taking into account international commentaries on the issue.

The values of the Namibian Constitution, which form the historical context for the enactment of the Refugees Act, the demands and values of the Namibian Constitution and the text of the Refugees Act itself, point towards an interpretive approach which gives effect to Namibia's constitutional and international human rights commitments, and reflects Namibia's cooperative role within the international community. In *Minister of Defence, Namibia v Mwandighi*³¹⁵ the Supreme Court of Namibia held that *The whole tenor of Chapter 3 [the Bill of Rights] and the influence upon it of international human rights instruments, from which many of its provision were derived call for a 'generous, broad and purposive interpretation that avoids the austerity of tabulated legalism'*.³¹⁶ The Namibian Courts have also recognised the role of international law in the Namibian legal system in *Kauesa v Minister of Home Affairs*.³¹⁷ From these considerations one may derive that Section 3(c) of the Refugees Act is capable of a broad interpretation that incorporates socio-economic and environmental factors.

³¹⁵ 1992 (2) SA 355 (Nm) SC.

³¹⁶ At 364B.

³¹⁷ 1994 NR 102 (HC).

The end of apartheid, in Namibia with the 1989 Constituent Assembly elections, is the most significant feature of the historical landscape in which the Refugees Act was developed and enacted. Namibia expressed this new commitment by adopting a liberal constitution, by signing and ratifying an array of international conventions and by supporting international and regional organisations. In addition the Supreme Court of Namibia explicitly recognise that the ‘The Constitution of Namibia articulates a jurisprudential philosophy which, in express and ringing tones, repudiates legislative policies based on the criteria of race and ethnicity ...’³¹⁸ It is trite that Namibia was a refugee producing country under the apartheid rule of the previous administration.³¹⁹ Many Namibians had fled the South Africa government’s racist and authoritarian domestic policies.

The aforementioned considerations should trigger compassion and understanding, despite the fact that refugee law throughout the world has traditionally maintained a sharp dichotomy between refugees and victims of economic misfortune or natural disaster. Some writers take the view that the concept ‘events seriously disturbing public order’ may provide a solution to the dilemma of the narrow refugee notion.³²⁰ This requires an interpretation of the concept. According to Rankin, the concept ‘events seriously disturbing public order’ is vague.³²¹ However, there are some writers who concur with Rwelamira that the clause is ‘designed to cover a variety of *man-made* conditions which do not allow people to reside safely in their countries of origin’.³²² A plain reading does not immediately indicate why famine and starvation, an earthquake or a flood would not seriously disrupt public order.

³¹⁸ *Government of the Republic of Namibia v Cultura* 2000 1994 (1) SA 407 (Nm) SC, 411 C-D.

³¹⁹ See generally Tapscott & Mulongeni (note 164 above).

³²⁰ Rwelamira (note 256 above) 558.

³²¹ Rankin (note above) 414.

³²² Rwelamira (note 256 above) 558.

Oloka-Onyango also advocates for a wider interpretation of the concept. He maintains that in not recognising persons who leave their countries of origin solely on the grounds of, for instance, unbearable economic situations, is to deny the fact of the close linkage between the realisation and achievement of economic and social rights on the one hand, and the respect for civil and political rights, on the other.³²³ The author argues that ‘the absence of freedom from want or fear, due to the lack of observance of economic and social rights may be intricately connected with the political system and the violation of civil and political rights’.³²⁴ Moreover, the UNHCR also draws attention to the fact that, in the context of the 1951 Convention, it has been acknowledged that what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.³²⁵ This means that individuals who leave their countries for socio-economic reasons are generally excluded from refugee protection unless they can establish an underlying civil-political rights basis for the violation.

In my view socio-economic factors should be taken into account in the assessment of refugee claims in relation to the ‘events seriously disturbing public order’ and the compulsion to leave. The argument is based upon a consideration of Namibia’s constitutional and international human rights commitments, its post-apartheid role within the international community and its legitimate policy concerns, as well as conceptual objections to the traditional dichotomy between refugees and economic migrants. The point is, if one considers the nature of dictatorship on the African continent, there is no denying the fact that social and economic rights and civil and political rights are inextricably linked. Moreover, Africa’s economic crisis is mostly politically induced.

³²³ Oloka-Onyango (note 38 above) 458.

³²⁴ *Ibid.*

³²⁵ UNHCR 1992 (note 80 above) 12.

A clear example would be the Ethiopians who faced a combination of civil war, hunger and famine a decade and a half ago. It is quite possible that their motives were more closely related to the loss of livelihood than to the prevailing hostilities.³²⁶ A more recent example is the prevailing calamities faced by Zimbabweans. Some members of the Southern African Developing Community (SADC) refuse to acknowledge the link between the political measures and the social and economic ramifications in that country. When farmers are prevented from producing crops and business people are faced with no avenues in which to channel their wares on account of war or civil strife, they are forced to move out to earn a livelihood elsewhere. History has proven that there is mostly a political link when people have perished of hunger or environmental disasters have caused death.

The UN High Commissioner for Refugees, António Guterres also voiced his concerns for the narrow refugee elucidation in the 1951 Convention. In an interview with *The Guardian* he stated that “Climate change is today one of the main drivers of forced displacement, both directly through impact on environment - not allowing people to live any more in the areas where they were traditionally living - and as a trigger of extreme poverty and conflict”.³²⁷

Guterres also drew attention to the global economic crises and noted that as climate change, a global economic slowdown, conflict and persecution fuelled each other, it would be increasingly hard to categorise those on the run.³²⁸ In his words “What we are witnessing is a trend in the world where more and more people feel threatened by conflict, threatened by their own government, threatened by other political, religious ethnic or social groups, threatened by nature and nature’s retaliation against human aggression -

³²⁶ Oloka-Onyango (note 38 above) 458.

³²⁷ Guardian News & Media ‘Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns Un’ (June 2008) <<http://www.buzzle.com/articles/202000.html>> last accessed on 20 April 2009. Also see Adaptation to Climate Change Act ‘[UN Warns of New Refugee Crisis Fuelled by Climate Change](#)’ (June 2008) <<http://act-adapt.org/?p=29>> last accessed on 20 April 2009.

³²⁸ Ibid.

climate change is the example of that. And also threatened by ... a slowdown in global growth, plus structural change in energy and food markets”³²⁹.

People who are forced to move due to economic and environmental factors should be a concern for international and domestic leaders. I am not endeavouring to reintegrate refugees into a universal category. On the contrary, I am simply highlighting how those outside the scope of the refugee definition are similar to refugees. While the categorisation of certain people as refugee serves an important legal function, it, nevertheless, delimits one group from another, creating insiders and outsiders. Those outside the refugee definition might very well be in need of international protection. The intransigence of refugee law in this matter is clearly not justifiable in all cases and at all times, especially when the social and economic effects of political measures become the more apparent. This is in particular evident today where ‘structural adjustment’ policies produce adverse social and economic effects.

It was no failure in 1951 not to have known precisely how the world would evolve; on the contrary, it may be counted a success that the drafters of the 1951 Convention were in fact able to identify, in the concept of a well-founded fear of persecution, the enduring universal characteristics of the refugee, and to single out the essential, though never exclusive, reason for flight. However, it would certainly be a failure not to recognise and acknowledge that the scope and extent of the refugee definition have matured under the influence of human rights instruments and debates, and that there is now an increasing need to enhance and ensure the protection of refugees in Namibia. Consequently it is imperative to not only reconsider the legal framework on political refugees, but also to develop our law in accordance with other global issues such as climate change and the current economic recess, which may trigger more migration.

³²⁹ Ibid.

Chapter 4 A synopsis of refugee rights and duties in international and domestic legal instruments

This chapter examines the rights and duties of refugees as provided for in international and national legal instruments. In addition, the social and economic conditions of refugees in Namibia are investigated with a view to establish whether the country complies with its international and national obligations. In the last part the legal position of internally displaced persons is scrutinised in order to ascertain whether they need protection. While most rights in the 1951 Convention only come into force once a refugee is either lawfully

in, lawfully staying in or durably residing in an asylum state, a small number of core rights are defined to apply with no qualification of the level of attachment.³³⁰

The 1951 and OAU Conventions require that certain rights be granted to asylum seekers and refugees. However, the universal rights of refugees are also derived from the general standards of intentional human rights law. Article 1 of the Universal Declaration of Human Rights (UDHR) provides ‘*All human beings* are born free and *equal in dignity and rights*’.³³¹ It further states in Article 2 that ‘*Everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or others status’.³³² Although the UDHR is non-binding *per se*, it sets the scene for subsequent elaboration of human rights standards, which do not generally distinguish between nationals and non-nationals. These provisions were later incorporated in Article 2(1) of the ICCPR and Article 2(2) of the ICESCR. Thus, international human rights law has as its point of departure the principles of non-discrimination and equality.

Basic human rights norms recognise that ‘[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights’.³³³ The non-discriminatory basis of international human rights law supports the view that such rights are applicable to ‘all individuals within [a state’s] territory and subject to its jurisdiction’.³³⁴ Thus, national human rights instruments are territory and not nationality-based, except where it is otherwise explicit in particular provisions.³³⁵

Considering the aforementioned one can deduce that since human rights law does not differentiate between nationals and non-nationals, except in a few specific instances,

³³⁰ Hathaway 2001 (note 33 above) 166.

³³¹ My emphasis.

³³² Emphasis added.

³³³ HRC General Comment No. 18, UN doc. HRI/GEN/1/Rev.5, 1989, para. 1.

³³⁴ Article 2(1), ICCPR.

³³⁵ For instance Article 25 of the ICCPR on the right to take part in public affairs, to vote and be elected, and to have access to public service, is limited to ‘citizens’ only, while the provisions of Art. 13 apply only to ‘aliens’. See also Article 2(3) of the ICESCR.

Moreover, Article 7(1) of the 1951 Convention proposes, as a minimum standard, that refugees should receive at least that treatment which is generally accorded aliens. In addition, Article 3 prohibits discrimination on the grounds of race, religion or country of origin. Both these Articles are adopted in the Namibia Refugees Act as rights of refugees.³³⁶ The principle of non-discrimination is in particular important in respect of asylum seekers and refugees, in that efforts to protect them are often thwarted by discrimination, racism and xenophobia.³³⁷

4.1 Rights of refugees physically present

Several rights in the 1951 Convention accrue to all refugees who are simply ‘in’ or ‘within’ a contracting state’s territory, such as Articles 4 (religion), 27 (identity papers), 31(1) (non-penalisation for illegal entry), 31(2) (movements of refugees unlawfully in the country of refuge) and 32 (*non-refoulement*) of the 1951 Refugee Convention. Any refugee physically present, lawfully or unlawfully, in the territory under a state’s jurisdiction may invoke these rights. These rights follow automatically and immediately from the simple fact that a person is a Convention refugee within the effective jurisdiction of a state party. These primary protection rights can obviously not be claimed until all the requirements of the Convention definition are satisfied. However, since refugee rights are defined to inhere by virtue of refugee status alone, state parties must respect them until and unless a negative determination of the refugee’s claim to protection is rendered.³³⁸ Moreover, these rights must continue to be respected throughout the duration of refugee status, with additional rights accruing once the asylum seeker’s presence is regularised, and again when a refugee is allowed to stay or reside in the asylum country.

While the extension of some rights can logically be delayed until a refugee’s status has been regularised by, for instance, admission to a procedure for verification of refugee

³³⁶ See Section 18 read with Part I of the Schedule to the Refugees Act.

³³⁷ Since May 2008, South Africans have attacked foreigners, including asylum seekers and refugees. These xenophobic attacks are ongoing and at least 62 people have been killed and 46 000 displaced. See UNHCR ‘Sub-regional Operations Profile – Southern Africa’ (2009), <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48588a7b>> last accessed on 25 November 2009.

³³⁸ Hathaway 2001 (note 33 above) 278.

status, there are nonetheless at least six categories of vital concern that should be recognised immediately and unconditionally. It is these areas that form the subject of the discussion in this section.

4.1.1 *The right to enter and remain in an asylum state*

The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted.³³⁹ However, this fundamental concern must somehow be reconciled to the fact that all of the earth's territory is controlled and claimed by governments which, restrict access by non-citizens to a greater or lesser extent. Indeed, the general international rule is that every sovereign state has the power, inherent in sovereignty, to forbid the entrance of aliens into its territory or to admit them only in such cases and upon such conditions as it may see fit to prescribe.³⁴⁰ The stakes are thus high that refugees who are denied entry into a foreign country are likely either to be returned to the risk of persecution in their home state, or to be thrown into perpetual 'orbit' in search of a state willing to authorise entry.³⁴¹ In the premise, international law has introduced an exception to the general rule of sovereignty through the principle of *non-refoulement*.

The term *non-refoulement* derives from the French *refouler*, which means to return or to drive back or to repel, as of an enemy who fails to breach ones' defences.³⁴² *Refoulement* should be distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly removed.³⁴³ The concept of *non-refoulement* thus prohibits States from forcibly returning an asylum seeker or refugee to territories where there is a risk that his or her life or freedom would be threatened.³⁴⁴ The idea that a State ought not to return persons to other States in certain circumstances is first referred to in Article 3 of the 1933 Convention relating to the

³³⁹ Ibid 279.

³⁴⁰ A Katz 'Refugees' in J Dugard *International Law: A South African Perspective* 3 ed (2005) 341-353, 341. Lansdowne, South Africa: Juta & Co Ltd.

³⁴¹ Hathaway 2001 (note 33 above) 279.

³⁴² Goodwin-Gill 1996 (note 32 above) 117.

³⁴³ Ibid.

³⁴⁴ Lauterpacht & Bethlehem (note 48 above) 89.

International Status of Refugees. under which In terms of Article 3 the contracting parties undertook not to remove resident refugees or keep them from their territory, “by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)”, unless dictated by national security or public order.³⁴⁵ Each State undertook, “in any case not to refuse entry to refugees at the frontiers of their countries of origin”.³⁴⁶

With the establishment of the International Refugee Organisation and the adoption of the 1951 Refugee Convention and its Protocol of 1967, a new era commenced. The prohibition of the return or expulsion of refugees to states where they fear for their lives is today one of the cornerstones of refugee protection. This norm is codified internationally in Articles 32 and 33 of the 1951 Refugee Convention. Article 32 sets constraints on the ability of states to expel a refugee lawfully in their territory:

- (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
- (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Article 33 provides for the norm of *non-refoulement*. It prohibits States from:

[E]xpel[ling] or return[ing] (‘refouleme[n]t’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The OAU Refugee Convention also contains the *non-refoulement* prohibition. Article 2(3) of this treaty reads: ‘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

³⁴⁵ Goodwin-Gill 2008 (note 32 above).

³⁴⁶ Ibid.

remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2'. Thus, unlike the 1951 Convention, the OAU Convention provides expressly that the norm of *non-refoulement* covers both non-rejection at the frontier and non-return and applies even to persons who are still inside places where they fear harm.³⁴⁷ The principle of *non-refoulement* is also provided for in Section 26 of the Namibia Refugees Act:

- (1) *Notwithstanding anything to the contrary in any other law contained, no person -*
- (a) *who is a refugee; or*
 - (b) *who is a member of the family of a refugee,*
shall, subject to the provisions of subsection (2), be refused entry into Namibia or, whether such person has entered Namibia lawfully or unlawfully or is lawfully or unlawfully present in Namibia, be expelled or extradited from Namibia to any other country, or be subjected to any similar measure, if, as a result of such refusal, expulsion, extradition or other measure, such person is compelled to return to or remain in a country where – (my emphasis)
- (i) he or she may be subjected to persecution on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or
 - (ii) his or her life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or the whole of that country.

Article 3 of the 1984 Convention against Torture extends the same protection where there are substantial grounds for believing that a person to be returned would be in danger of being tortured. In addition the International Covenant on Civil and Political Rights also contains a prohibition on returning. Under Article 7 of the Covenant, no one shall be subjected to torture or cruel or inhuman or degrading treatment or penalty. It adds that subjecting persons to medical or scientific experimentation without their free consent is particularly prohibited. This provision is also applicable to the expulsion of foreign nationals. *Non-refoulement* is included in many other international instruments such as the 1967 Declaration on Territorial Asylum, UNGA Resolution 2132 (XXII), 14 Dec. 1967;

³⁴⁷ B Rutinwa 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) *Refugee Survey Quarterly* (21) 12-41, 17.

1969 OAU Refugee Convention, 1001 UNTS 3; 1969 American Convention of Human Rights, 9 *ILM* 673.³⁴⁸

Notwithstanding the strong recognition of *non-refoulement* in international and national refugee and human rights law and legislation, the Namibian Government imposed a dusk-to-dawn curfew – with soldiers being ordered to shoot violators – along a 450 km stretch of the Kavango River in late 2001.³⁴⁹ This effectively prevented Angolan refugees seeking to escape violence in that country's Cuando Cubango province from being able to seek asylum, since Angolan government and UNITA patrols could be safely avoided only at night.³⁵⁰

A state's right to decide whether to allow a foreign national to remain in its territory or to expel them is one of the most strongly protected principles of international law. The problem here is the tension between this right of states and the right of the foreign national to international protection, as guaranteed by international law. This leaves a refugee's application for international protection hanging in the balance between these two opposing principles. In practice, so-called absolute rights are not outside balancing.³⁵¹ The point is that refugees face a broad array of practices and policies which may prevent them from entering and remaining in an asylum state. They may be repelled from a state's border, whether in particular instances, as part of a generalised border closure, or by the erection of physical barriers to access. For instance, during the apartheid era South Africa erected a 3 000 volt electrified razor wire fence to prevent the entry of refugees from Mozambique³⁵² and in the process prevented its own nationals from seeking refugee from its often inhumane apartheid practises.

³⁴⁸ Goodwin-Gill 1996 (note 32 above) 124-125.

³⁴⁹ Hathaway 2001 (note 33 above) 280 and 279-300 for examples of a failure by other countries to observe the principle of *non-refoulement*.

³⁵⁰ *Ibid.*

³⁵¹ See the examples given by Pirjola (note 47 above) 643, fn 13.

³⁵² C Nettleton 'Across the Fence of Fire' (1990) *Refugees* (78) 27, 27-28.

According to Hathaway, the duty of *non-refoulement* is not the same as a right to asylum from persecution.³⁵³ He maintains that the duty of *non-refoulement* only prohibits measures that cause refugees to be pushed back into the arms of the persecutors, that it does not affirmatively establish a duty on the part of states to receive refugees.³⁵⁴ However, this does not mean that states are free to reject at the frontier, without constraint, those who have well founded fear.³⁵⁵ On the contrary, it means that, where states are not prepared to grant asylum to persons who have well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*.³⁵⁶ Lauterpacht and Bethlehem suggests that this may involve removal to a safe third country or some other solution such as temporary protection or refuge.³⁵⁷

It must be appreciated that *non-refoulement* is not an absolute principle and it is surely not absolutely guaranteed in the mentioned legal instruments. Article 33 (2) of the 1951 Convention stipulates that the benefit of *non-refoulement* may not be claimed by a refugee ‘whom there are reasonable grounds for regarding as a danger to security of a country ... or who having been convicted by a final judgement of [a] particular[ly] serious crime, constitutes a danger to the community of that country’. Sub-section 26(2) of the Refugees Act also contains an exception to the general claim of *non-refoulement*. It states that ‘[t]he provisions of sub-section (1) shall not apply to any person referred to in section 4(1) or to a person who is removed from Namibia under section 49(1) of the *Immigration Control Act* for reasons of the security of the State’. Conversely the OAU Convention declares the principle of *non-refoulement* without exception.³⁵⁸

As stated in Chapter 1, some authors subscribe to the view that the principle of *non-refoulement* has crystallised into a rule of customary international law. Writers like Goldman and Martin claim in a 1983 article that the *non-refoulement* prohibition was by then embodied in a number of regional treaties and agreements, in addition to

³⁵³ Hathaway 2001 (note 33 above) 300.

³⁵⁴ Ibid 300-301.

³⁵⁵ Lauterpacht & Bethlehem (note 48 above) 113.

³⁵⁶ Ibid.

³⁵⁷ Ibid. Also see Hathaway 2001 (note 33 above) 301.

³⁵⁸ See Goodwin-Gill 1996 (note 32 above) 140.

international refugee law.³⁵⁹ They further assert that the norm had ‘received widespread authoritative recognition throughout the world’.³⁶⁰ Accordingly the authors conclude, ‘this principle has evolved from a basic humanitarian duty into a general principle of international law that binds all states, even in the absence of an express treaty obligation’.³⁶¹ Goodwin-Gill draws a similar conclusion. He argues that because this prohibition had ‘established itself as a general principal of international law’ states were bound ‘automatically and independently [to] any specific assent’.³⁶² Katz, on the other hand, draws attention to a number of cases in support of this assertion³⁶³, notably some South African decisions.³⁶⁴

Generally the first part of the argument advanced by the aforementioned authors does not pose serious concerns. They cite treaty and soft laws that embody the *non-refoulement* principle, in support of their position. While Goldman and Martin refer to the 1957 European Convention on Extradition³⁶⁵ and the 1966 Legal Principles Governing the Treatment of Refugees adopted by the Asian-African Legal Consultative Meeting in Bangkok³⁶⁶, Goodwin-Gill mentions the Refugee Convention.³⁶⁷ However, the incorporation of any principle into a treaty or agreement *per se*, is not sufficient to translate the principle into a general rule of customary international law.³⁶⁸

³⁵⁹ R Goldman & S Martin ‘International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law’ (1983) *HRQ* (5) 302.

³⁶⁰ *Ibid* 315.

³⁶¹ *Ibid*.

³⁶² G Goodwin-Gill *International Law and the Movement of Persons between States* (1978) 141. Oxford: Clarendon Press.

³⁶³ Katz (note 340 above) 341, fn 6.

³⁶⁴ Such as *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T), *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T) and *Parekh v Minister of Home Affairs* 1996 (2) SA 70 (D)

³⁶⁵ See Article 3 of the European Convention on Extradition 359 UNTS 273 (done at Paris, 13 December 1957).

³⁶⁶ Article 3 of the Asian-African Legal Consultative Committee ‘Principles Concerning Treatment of Refugees’ adopted in Bangkok 8-17 August 1966.

³⁶⁷ See Goodwin-Gill 1996 (note 32 above) 136.

³⁶⁸ Also see Abuya (note 25 above) 82.

In the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Republic of Germany v The Netherlands)*³⁶⁹ the International Court of Justice (ICJ) underscores the elements necessary for the formation of a general rule of customary international law. The Court argued that state practice may give rise to customary international law if it fulfils certain criteria: the practice must be consistent, widely accepted and regarded as obligatory by states.³⁷⁰ Notably these authors identify the correct criteria that a particular practice must meet in order to be accepted as customary international law. However, a universally binding norm cannot be brought into existence by a simple declaration. Instead, a large and representative part of the community of states must concretise its commitment to a particular principle through its actions.

Authors like Grahl-Madsen, Hailbronner and Hathaway challenge the conclusion arrived at by Goldman, Martin and Goodwin-Gill. Grahl-Madsen, for instance, notes that although by 1980 domestic legislation prohibited certain states from returning refugees ‘and there were a record of some court decisions pointing to the same direction’, this was by itself insufficient to constitute ‘a basis for contending that the principle of *non-refoulement* had become a ‘generally accepted principle’.³⁷¹ In an elaborate survey of asylum law and practice of Western European and North American states, published in 1986, Hailbronner demonstrates that state practice did not support the claim that *non-refoulement* had crystallised into a norm of customary international law.³⁷² Rather, as the title of his article ‘*Non-Refoulement* and “Humanitarian” Refugees: Customary International Law or Wishful Thinking’ suggests, this principle as customary international law was ‘more properly viewed as the product of wishful thinking’.³⁷³ Grahl-Madsen and Hailbronner, however, fail to discuss the practice in other parts of the world, such as Africa and Asia.³⁷⁴

³⁶⁹ 41 ILR 29.

³⁷⁰ Ibid 72.

³⁷¹ See Abuya (note 25 above) 82.

³⁷² K Hailbronner ‘*Non-refoulement* and “Humanitarian” Refugees: Customary International Law or Wishful Thinking’ (1985-1986) *Virginia J of Int L* (26) 857. 858.

³⁷³ Ibid 858.

³⁷⁴ Also see the Goodwin-Gill 1996 (note 32 above) 134-137 on the debate of *non-refoulement* as a rule of customary international law.

Hathaway also opines that the standard, in terms of which a principle may be said to be a rule of customary international law, is simply not met in case of the duty of *non-refoulement*.³⁷⁵ In addition the author submits that a recounting of state practice shows that *refoulement* still remains part of the reality for a significant number of refugees in most parts of the world.³⁷⁶ In the premise, Hathaway is of the view that the nature of the various duties of *non-refoulement* relied upon is highly variable and thus it cannot be concluded that there is a universally applicable duty of *non-refoulement* owed to refugees by states. In my view the perspective of the latter writers is less convincing than the view taken by Goldman, Martin and Goodwin-Gill. Moreover, in 2001 state parties to the 1951 Convention formally acknowledged ‘the principle of a *non-refoulement*, whose applicability is embedded in customary international law’.³⁷⁷

While the formal requirements of *non-refoulement* may be limited to Convention refugees, the principle of refuge is located within the body of general international law. It encompasses those with a well-founded fear of being persecuted, or who face a substantial risk of torture and it equally includes those who would face other ‘relevant harm’.³⁷⁸ The principle of *non-refoulement* has certainly opened up a debate between political and legal actors and civil society on the state’s responsibility to protect persons against expulsion. The appeal to the principle of *non-refoulement* is a demand made by an individual: do not return me to my home country because, if you do, I may be subjected to pain or humiliation. Perjola draws attention to the statement by Klaus Günther who wrote that ‘the content of human rights is always associated with social activity we consider painful or humiliating’.³⁷⁹ It is about individuals who suffer or fear and raise their voice to

³⁷⁵ Hathaway 2001 (note 33 above) 363.

³⁷⁶ Ibid 364.

³⁷⁷ ‘Declaration of State Parties to the 1951 Convention and or its Protocol relating to the Status of Refugees’, UN Doc. HCR/MMSP/2001/09 (December 13, 2001) para 4, incorporated in Executive Committee of the High Commissioner’s Programme, ‘Agenda for Protection’, UN Doc. EC/52/SC/CRP.9/Rev.1. June 26, 2002.

³⁷⁸ As provided for by the extended version of the refugee definition in the OAU Convention and the Namibia Refugees Act.

³⁷⁹ Pirjola (note 47 above) 660, fn 69.

demand a stop to inhuman treatment. Appealing to *non-refoulement* is such a demand, irrespective of whether or not it is regarded as rule of customary international law.

4.1.2 *The right to liberty and security of person: non-penalisation for illegal entry*

The 1951 Convention provides in Article 31:

1. The Contracting States *shall not impose penalties, on account of their illegal entry or presence*, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, *enter or are present in their territory without authorisation*, provided they present themselves *without delay to the authorities and show good cause for their illegal entry or presence*.
2. The Contracting States *shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country*. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.
My emphasis.

Section 15 of the Namibia Refugees Act also states that:

Notwithstanding the provisions of the Immigration Control Act, but subject to the provisions of sections 23, 24 and 25, no proceedings shall be instituted or continued against any person, or any member of the family of such person, in respect of his or her unlawful entry into or unlawful presence in Namibia, if such person-

- (a) *has applied in terms of section 13(1) for refugee status, but only until a decision has been given on the application or, where such person has noted an appeal in terms of section 27 against such decision, until such person has had an opportunity to exhaust his or her right of appeal; or*
- (b) *has been granted refugee status in terms of this Act.*

My emphasis

The crux of these provisions is that it prohibits states from penalising refugees who enter or remain illegally in the country of asylum, provided that they have come directly from a land where their lives or freedom were threatened and that they present themselves to the authorities without delay and show good cause for their illegal entry. However, it would

seem that refugees are not strictly required to come ‘directly from their country of origin’.³⁸⁰ The intention appears to be that Article 31(1) should also apply when refugees pass through other countries or territories where they were threatened with *refoulement*.³⁸¹ There is thus a close relation between non-penalisation for illegal entry, asylum and the principle of *non-refoulement*.³⁸² Conclusions of ExCOM³⁸³ have confirmed that asylum-seekers should ‘not be penalised or exposed to *any unfavourable treatment* solely on the ground that their presence in the country is considered unlawful’.³⁸⁴

In the event that Article 31 is applicable, any measures taken to penalise refugees by reason of their illegal entry or presence, such as the denial of family rights or the right to work, need to be justified in the interests of national security or on the basis of public order, as well as being proportionate to their intended purpose. The requirement to implement their obligations in good faith further requires that States justify their actions on the basis of at least one of the above-enumerated grounds.

Accordingly, the UNHCR have identified four permissible exceptions to the general rule that asylum seekers should not be detained. These are:

- to verify identity (when identity is undetermined or in dispute);
- to determine the elements on which the claim for asylum is based ;
- in cases where asylum seekers have destroyed their travel or identity documents or have used fraudulent documents in order to mislead the authorities of the country in which they intend to claim asylum; and
- to protect national security and public order.³⁸⁵

³⁸⁰ United Nations High Commissioner for Refugees *Human Rights and Refugee Protection*, Self Study Module 5, Vol. II. (December 2006) 85. Geneva: UNHCR, Division of International Protection Services.

³⁸¹ *Ibid.*

³⁸² Hathaway 2005 (note 33 above) 386.

³⁸³ UNHCR Executive Committee. It was created in 1958 by ECOSOC following a request from the UN General Assembly. See United Nations High Commissioner for Refugees *Human Rights and Refugee Protection*, Self Study Module 5, Vol. I, (December 2006) 17. Geneva: UNHCR, Division of International Protection Services.

³⁸⁴ Edwards (note 57 above) 300.

³⁸⁵ UNHCR Vol. II, December 2005 (note 379 above) 86.

In 2001, Namibian Immigration Officials threatened to prosecute any citizen who failed to report an Angolan refugee who was in the country without authorisation.³⁸⁶ Once located, the refugees were forcibly transported to camps hundreds of kilometres away from the towns and villages where they had taken shelter.³⁸⁷ *Djama v Government of the Republic of Namibia and Others*³⁸⁸ concerns the arrest and detention of a person who had entered Namibia under the auspices of the UNHCR as a returnee. The arrest was affected in accordance with Section 5 of the Admissions of Persons to the Republic Regulation Act 59 of 1972, i.e. the predecessor of the Immigration Control Act. Djama was born in Somalia, but claimed that he was entitled to Namibian citizenship by reason of the fact that his father was born in Namibia. He was not informed of the reasons for his arrest and thus brought an urgent *habeas corpus* application to the High Court of Namibia, seeking in the alternative his immediate release from detention on the grounds that his arrest had been arbitrary.

Consequently the issues that arose in this case were whether the applicant's detention was arbitrary and whether he should be released or not. The court considered Articles 7 and 11(3) of the Constitution that dealt respectively with deprivation of liberty and prohibition of arbitrary arrest, as well as Section 40(5) of the Admission of Persons Act. In terms of the latter provision, a prohibited person may be detained pending his removal from the country.³⁸⁹ Article 11(4) of the Constitution states that the provisions of Article 11(3) are not applicable to prohibited immigrants, but that 'such persons shall not be deported unless such deportation is authorised by a Tribunal empowered by law to give such authority'. At the time, the tribunal envisaged by the sub-article had not yet been established. After considering these authorities the court argued that 'to require that a person be detained until such time as the machinery of Government to facilitate the deportation of prohibited persons ... cannot be considered reasonable'.³⁹⁰ The Court

³⁸⁶ Namibia Press Agency (Nampa)/MFAIB 'Namibia Citizens who help Non-citizens to be dealt with severely' (18 April 2001). Also see Hathaway 2005 (note 33 above) 374.

³⁸⁷ *Ibid.*

³⁸⁸ 1992 NR 37 (HC).

³⁸⁹ *Ibid* 44B-45F.

³⁹⁰ *Ibid* 45D-E.

correctly founded that the detention of Djama was arbitrary and that he should be released immediately.³⁹¹

Unfortunately the Court did not deal with the issue of whether or not Djama was a Namibian citizen. Such an inquiry would have answered the question on the legality of the arrest and detention of Namibian refugees who return to the country. The facts in *Sikunda*³⁹² were more or less the same. However, in that case the court found it imperative to establish citizenship and or domicile, since a determination thereof would immediately render the arrest and detention of Sikunda illegal. In *Sikunda*, several people suspected of being UNITA activists, sympathisers or soldiers, as well as foreign nationals of Angola, Rwanda and Burundi, were rounded up on suspicion of being a security threat to Namibia. Sikunda Senior was one of them. His son, the Applicant in that case, approached the court for relief on behalf of the father. The High Court ruled in favour of the Applicant and the Respondents appealed against this finding. On appeal, the Supreme Court identified and addressed three issues in *Sikunda*, namely:

1. whether or not Sikunda Senior was a citizen and/or domiciled in Namibia;
2. whether or not the decision to declare him *persona non grata* without affording him an opportunity to make representation, was valid;
3. whether the four member Security Commission were properly constituted.³⁹³

After examining all the circumstances surrounding Sikunda's presence in Namibia, the court was satisfied that he was indeed legally domiciled in the country at all relevant times. Consequently the court concluded that the Minister had no legal authority to act against him since Section 49(1) of the Immigration Control Act was not applicable to Namibians or persons legally domiciled in the country. In that respect the order issued for his detention and removal under that section was void *ab initio*.³⁹⁴ According to the court, this ground was enough reason to dismiss the appeal by the government.³⁹⁵ However, in view of the fact that Counsel for the Respondents (i.e. Sikunda) had asked for clarification

³⁹¹ Ibid 45G.

³⁹² Note 190 above.

³⁹³ Ibid 214C-D.

³⁹⁴ Ibid 219I.

³⁹⁵ Ibid 219I-J.

on the remaining issues, the court expressed the view that the other two issues would probably arise frequently in future and some guidance by the Supreme Court was appropriate and justified.³⁹⁶

With regard to the composition of the Security Commission and its recommendation to the Minister, the court noted the following:

This is not a case [of whether] the Tribunal was properly composed, but [where] some members were merely absent. The preset case is worse. The Commission was no longer properly constituted, and this situation continued for a considerable period.

It is obvious that the Commission could not come into existence unless six members were appointed, because in such a case the Tribunal lacked the essentials for its coming into existence. Similarly, if for a considerable period, there were only four (4) members instead of six (6) because vacancies were never filled, the Commission lost the essentials for its continued legal existence.

As a result, any recommendations made by an improperly constituted Commission had no legal effect. On the question of the right to be heard, the Court found that both the Minister and the Security Commission denied Sikunda Senior the opportunity to make presentations before a decision was made. This denial was a fundamental violation of Articles 18 (the right to just administrative action) and 12 (the right to a fair trial) of the Constitution of Namibia. Although these decisions do not strictly deal with the issue of arrest and detention of asylum seekers, they, nevertheless, clearly illustrate the Namibian government's attitude towards foreigners. In addition they portray the inherent danger in national security becoming an issue.

4.1.3 Socio-economic rights

It is often difficult for asylum seekers and refugees to fully enjoy their right to a minimum level of subsistence, including the right to an adequate standard of living, which covers adequate food, water, clothing and safe shelter, as well as the highest attainable standard of physical and mental health. Denial by states of minimum survival conditions to asylum seekers and refugees may lead to a violation of the prohibition against ill-treatment or,

³⁹⁶ Ibid 220C.

ultimately, the right to life found in major human rights instruments.³⁹⁷ Furthermore, the prohibition of discrimination enshrined in the 1951 and OAU Conventions as well as human rights treaties can be applied when refugees are subjected to unequal access to the means of meeting their basic needs.

Since the flight to safety cannot always be planned, and because the logistics of travelling often make it impossible for refugees to bring significant resources or provisions with them, even refugees who were self-sufficient in their homeland typically depend for survival on the generosity of the asylum country. There are numerous examples that depict situations where host countries failed to treat refugees fairly.³⁹⁸ Often asylum seekers and refugees are denied their basic rights as part of an attempt to force them to leave the asylum country or deter others refugees from arriving.³⁹⁹ Similarly the necessities of life may be denied to refugees as part of a strategy to punish them for actual or perceived misdeeds. For instance, refugees from Sudan and Somalia, living in the Kakuma camp in Kenya, were denied food for several weeks in both 1994 and 1996 as part of a strategy of collective punishment.⁴⁰⁰ In Namibia, the restriction of refugees to an isolated centre far from any opportunities, deny them these rights.

Article 20 of the 1951 Convention provides that “[w]here a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals”. This Article is adopted as a right of refugees in the Namibia Refugees Act.⁴⁰¹ In addition, Article 6(1) of the ICCPR stipulates that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The Namibian Constitution contains almost a similar provision in Article 6, where it states that “[t]he right to life shall be respected and protected ...”

³⁹⁷ UNHCR Vol II, December 2005 (note 379 above) 99.

³⁹⁸ See Hathaway 2005 (note 33 above) 461-463.

³⁹⁹ *Ibid* 462.

⁴⁰⁰ *Ibid* 463.

⁴⁰¹ See Section 18 read with Part I of the Schedule to the Act.

Furthermore Article 7 of the ICCPR also guarantees that “[n]o person shall be subject to torture and or to cruel, inhuman or degrading treatment or punishment ...” Article 8(2) of the Constitution provides the same guarantee. Furthermore Article 9(1) of the ICCPR states that [e]veryone has the right to liberty and security of person ...”, whereas Article 10(1) provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. The Namibian Constitution also guarantees the protection of liberty in Article 7.

The rights in the Constitution of Namibia apply to all people, since the instances where they may not apply is clearly outlined. For instance, Article 11(4) and (5) respectively excludes illegal immigrants from the right to be brought before a magistrate within 48 hours and to consult a legal practitioner of their choice. Nevertheless, the Supreme Court proclaimed in *Mwandinghi*⁴⁰² that the rights and freedoms in the Namibian Constitution “are framed in a broad and liberal ample style and are international in character. In their interpretation they call for the application of international human rights norms”.⁴⁰³ Indeed, international human rights law, the jurisprudence of international tribunals as well as the jurisprudence of municipal jurisdictions with similar constitutional models are regarded as persuasive aids when interpreting the rights and freedoms under the Constitution.⁴⁰⁴ Consequently it may be concluded that the rights in the Namibian Constitution applies to citizens and foreigners alike, except where the Constitution explicitly excludes the latter.

⁴⁰⁵

Access to food, water and shelter are also necessities of life. Without food it is impossible to enjoy other rights. The right to food and the inherent dignity of the person are inseparable.⁴⁰⁶ While the right to food has to be realised progressively, states are obliged

⁴⁰² Note 315 above.

⁴⁰³ Ibid 362.

⁴⁰⁴ See *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS) 87 and 90. Also see *S v Tcoeib* 1993 (1) SACR 274 (Nm) 287.

⁴⁰⁵ Also see Hathaway 2005 (note 33 above) 485.

⁴⁰⁶ UNHCR Vol. II, December 2005 (note 379 above) 100.

to take all actions necessary to mitigate and alleviate hunger as provided for in Article 11(2) of the ICESCR, even in times of natural or other disaster.⁴⁰⁷ Asylum seekers and refugees often do not have the same opportunity as others to achieve an adequate standard of living. Consequently where deficits occur, asylum states must provide the goods and services needed until asylum seekers and refugees can satisfy their own needs. Articles 11 read with Article 2(1) of the ICESCR guarantee access to the necessities of life.

Article 11 establishes what is now understood to be an immediate obligation to alleviate hunger, as well as a duty progressively to implement the right to an adequate standard of living. The Namibian Constitution does not guarantee the right to food, housing or shelter. The only relevant provision is Article 95(j) found in Chapter 11 that deals with Principles of State Policy. This paragraph seeks to raise and maintain an acceptable standard of living, including nutrition and to improve public health. The problem is that the principles enumerated under Chapter 11 of the Constitution are merely societal goals that cannot be enforced in a court of law (Article 101). Nevertheless, as stated before in this study, the Supreme Court of Namibia has given an expansive interpretation of certain civil and political rights in Chapter 3 of the Namibian Constitution in order to protect some of the social and economic rights provided for in Article 95.⁴⁰⁸

However, it is often impossible for local economies already faced with shortages of food and jobs for its citizens simply to absorb all refugees who arrive. Since international refugee efforts are funded by voluntary state contributions, there is no guarantee that aid will be adequate to meet needs. For instance, the funding shortfall for the more than 20 000 Angolan refugees in the Osire camp during 2001 resulted in severe food reductions.⁴⁰⁹ At the time the camp was home to more than 10 times the number of refugees for which it had been constructed, resulting in shortages of all kinds, such as pit latrines, tents,

⁴⁰⁷ Ibid.

⁴⁰⁸ See *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC), 236I-J where it was held that if legal representation is not afforded to an indigent accused (Article 95(h)) and his or her trial was rendered unfair because he or she cannot afford legal representation, then this would result in a breach of such person's right to a fair trial (Article 12).

⁴⁰⁹ Hathaway 2005 (note 33 above) 472.

kerosene and water.⁴¹⁰ Apart from the scarcity of these items, the clinic at Osire was strenuously overstretched and more medical equipment and drugs were needed to combat possible disease outbreaks during that time.⁴¹¹ Fortunately true disaster was averted at the camp, because of last minute responses from the Swedish and American Governments.⁴¹²

To understand the Namibian shortfall in caring for refugees it must be appreciated that poverty is widespread in Namibia, particularly in rural communities, where nearly half of households spend more than 60 percent of their income on food.⁴¹³ In addition, the majority of the population have insufficient access to basic services like education and health, despite the fact that government spends a considerable part of its budget on such service.⁴¹⁴ The provision of low cost housing poses another challenge to the government, because with the current rate at which low-cost houses are being delivered, an applicant for such a house will have to wait 70 years to have his or her application for a house considered.⁴¹⁵ This might explain why Namibia cannot provide from its own budget for refugees.

Be that as it may, social and economic rights are covered in a variety of treaties such as the UDHR, ICESCR, the African Charter on Human and Peoples' Rights and the International Labour Convention. However, the social and economic rights are protected in a rather limited and modest fashion in the Namibian Constitution.⁴¹⁶ Most of the provisions relating to social and economic rights are couched as guiding principles of state policy⁴¹⁷ that are fundamental to the governance of the country, and the state is obliged to

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² United States Committee for Refugees and Immigrants (USCRI) 'World Refugee Survey: Country Update 2002' (2002) 87, <<http://www.refugees.org/countryreports.aspx?id=1708>>, last accessed on 10 April 2009.

⁴¹³ J Nakuta 'The Justifiability of Social, Economic and Cultural Rights in Namibia and the Role of Non-Governmental Organisations' in N Horn & A Bösl (eds) *Human Rights and the Rule of Law in Namibia* (2008) 89, 90. Windhoek: Macmillan Namibia.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid 91.

⁴¹⁶ Ibid 93.

⁴¹⁷ See Chapter 11 of the Constitution of Namibia, in particular Article 95.

have regard to these principles in making laws.⁴¹⁸ The point is that current practices in Namibia show that economic and social rights are still not regarded as legal rights unto themselves.

Nakuta points out that the perception of economic and social rights as unenforceable principles of state cannot be left unchallenged.⁴¹⁹ He maintains that “[s]uch an attitude is defeatist and contrary to the principle that all human rights and fundamental freedoms are indivisible and interdependent”.⁴²⁰ According to Nakuta, economic and social rights can be enforced both directly and indirectly under the Namibian Constitution. The direct way would be to apply Article 144. As stated before in this study, this Article makes international law and international agreements automatically part of the law of Namibia, so long as they do not conflict with the provisions of the Constitution of Namibia. If one is thus to apply this provision to the ICESCR, or for that matter, any other international treaty ratified by Namibia, it would mean that they become part of the *corpus juis* of Namibia.

Nakuta further points out that the construction of Article 144 presupposes that the provisos and entitlements of the ICESCR have direct and immediate application within the Namibian legal system; thereby enabling individuals to seek enforcement of their internationally recognised economic and social rights in the Namibian courts.⁴²¹ The Namibian government, therefore, is obliged to take steps, including the adoption of legislation, to the maximum of its recourses so as to progressively achieve the full realisations of all economic and social rights protected in the Covenant.⁴²² In *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi*

⁴¹⁸ Nakuta (note 412 above) 93.

⁴¹⁹ Ibid 96.

⁴²⁰ Ibid.

⁴²¹ Ibid 97. See also *Mwilima* (note 407 above) 259H-I.

⁴²² Nakuta (note 412 above) 98. See also ICESCR General Comment No 3 as well as the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

*Treason Trial*⁴²³ the Supreme Court adopted a similar approach and held that international agreements binding on Namibia must be given effect to.⁴²⁴

The indirect protection of economic and social rights would call for an expansive interpretation of certain civil and political rights, such as the right to life, human dignity, equality and security of the person. In addition, the prohibition of discrimination enshrined in human rights treaties, Refugee Conventions and very specifically the Namibian Constitution can be applied when individuals are subjected to unequal access to meeting their basic needs. State parties to these instruments thus have an immediate obligation to avoid discrimination with respect to access to food, clothing, housing and health care. Denial by states of minimum survival conditions to asylum seekers and refugees may, therefore, be a violation of the prohibition against ill-treatment, or ultimately, the right to life found in major human rights treaties and enshrined in Article 6 of the Constitution of Namibia.

Inadequacy of food, water and shelter in turn may take a major toll on the health of refugees. It is essential that asylum seekers and refugees have access to healthcare. It is not simply hunger that kills refugees, but a complicated interaction between hunger, disease and human dignity.⁴²⁵ Article 12(1) of the ICESCR focuses specifically on the intimately related right to physical and mental health care. Namibia's Constitution does not guarantee the right to health, but enjoins the government to adopt policies aimed at the improvement of public health⁴²⁶ and Namibia is signatory to most of the World Health Organisation and UNICEF declarations, and not least of all the Millennium Goals.

However, despite the fact that the Constitution contains no right to health, UNHCR and WFP studies found that health services at the Osire camp were adequate and meet

⁴²³ Note 407 above.

⁴²⁴ Ibid 259I-260A.

⁴²⁵ Hathaway 2005 (note 33 above) 508.

⁴²⁶ Article 95(j).

Namibian standards.⁴²⁷ Health services are provided by implementing partners, of which African Humanitarian Action (AHA) Namibia is the main partner of the Namibian Government through the Ministry of Health and Social Services (MOHSS).⁴²⁸ The UNCHR and the WFP commend the Namibian Government on the decision to extend free ARV treatment to the refugees in the camp.⁴²⁹ The Joint Assessments and Evaluation Mission reports that there is a 25-bed hospital with full x-ray services, serviced by a doctor, two enrolled nurses, four clinic assistants (refugee nurses) and 40 health promoters.⁴³⁰ Two ambulances are available at the camp.⁴³¹

4.1.4 *Other rights*

Rights such as family unity, property rights, education, documentation of identity and status, judicial and administrative assistance as well as freedom of thought, conscience and religion are also central to the physical well-being of refugees. The protection of the family is provided for under numerous human rights instruments. Beginning with the Universal Declaration of Human Rights, which states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”, most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.

Furthermore, Article 23(1) of the ICCPR acknowledges that “the family is the natural and fundamental group of society and is entitled to protection by society and the state”, whereas Article 23(2) stipulates that “the right of men and women of marriageable age to marry and to found a family shall be recognised”. In addition Article 17 of the ICCPR protects *inter alia* the family from arbitrary and unlawful interference. On the other hand, Article 10(1) of the ICESCR provides that “... [t]he widest possible protection and

⁴²⁷ UNHCR/WFP *Assistance to Refugees and Asylum Seekers at Osire Camp, Namibia* (April 2006) 16 UNHCR/WFP Joint Assessment Mission, <<http://documents.wfp.org/stellent/groups/public/documents/ena/wfp115217.pdf>> last accessed on 27 November 2009. Also see UNHCR/WFP 2008 (note 4 above).

⁴²⁸ UNHCR/WFP 2008 (note 4 above) 27.

⁴²⁹ UNHCR/WFP 2006 (note 427 above) 16.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

assistance should be accorded to the family which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependant children ...”

The 1951 Convention does not incorporate the principle of family unity into the definition of the term “refugee”, but the Final Act of the Conference that adopted the 1951 Convention recommends governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

- (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.
- (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.⁴³²

According to the UNHCR Handbook on Procedures and Criteria, the abovementioned recommendation in the Final Act of the Conference is observed by the majority of states, whether or not parties to the 1951 Convention or to the 1967 Protocol.⁴³³ It would seem that if the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity.⁴³⁴ However, formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status.⁴³⁵ Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection.⁴³⁶ To grant him refugee status in such circumstances would not be called for.

As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in

⁴³² Recommendation “B” of the Final Act of the Conference. Also see Hathaway 2005 (note 33 above) 540.

⁴³³ UNHCR 1992 (note 80 above) para 183.

⁴³⁴ Hathaway 2005 (note 33 above) 541.

⁴³⁵ UNHCR 1992 (note 80 above) para 184.

⁴³⁶ Ibid.

the same household.⁴³⁷ On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol.⁴³⁸ In other words, the principle of family unity operates in favour of dependants, and not against them.

The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members. Family members may become separated from each other during forced displacement, either because of the chaos of an emergency situation or because a persons must leave other family members as he or she flees persecution.⁴³⁹ Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered refugees.⁴⁴⁰ If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied him.⁴⁴¹

There may be instances in which a state party's refusal to allow a member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a state party does not necessarily mean that requiring other members of the family to leave involves such interference, and any violation needs to be assessed on a case by case basis.⁴⁴² The African Commission on Human Rights has found, in the context of Article 18 of the African Charter on Human and Peoples' Rights that also deals with the protection of

⁴³⁷ Ibid para 185.

⁴³⁸ Ibid.

⁴³⁹ UNHCR Vol. II, December 2005 (note 379 above) 129.

⁴⁴⁰ UNHCR 1992 (note 80 above) para 187.

⁴⁴¹ Ibid para 188.

⁴⁴² UNHCR Vol. II, December 2005 (note 379 above) 131.

the family, that the forcible exile of political activists and expulsion of foreigners violated the duties to protect and assist the family, as it broke up the family unity.⁴⁴³

Apart from the right to family unity, all refugees have the right to property under international human rights law as well as the 1951 Convention. On occasion, refugees may be victims of confiscation of their property. The right to property is not only important to refugees and asylum seekers when they return to their countries and seek to recover their properties, but also to protect the possessions they acquire during displacement.⁴⁴⁴ Article 13 of the 1951 Convention states that “[t]he contracting states shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property”.

Refugees often face restrictions on their ability to acquire and deal with personal property in asylum states.⁴⁴⁵ Restrictions may be refugee-specific, as in the case of the refusal by Botswana to allow refugees to own cattle.⁴⁴⁶ However, refugees may also be subject to general limitations on the acquisition of personal property applied to all foreigners. For example, in Namibia it is a crime to sell agricultural land to a non-Namibian without the permission of the Minister of Lands and Resettlement.⁴⁴⁷

The human right to own and dispose of property enjoys a tenuous place in international law. It would, however, appear that the only general and universal formulation of the right to property is found in Article 17 of the UDHR, which proclaims a right both to own property individually and collectively. The Constitution of Namibia provides a similar

⁴⁴³ *Amnesty International v Zambia plus Angola* Communication 212/98, African Commission on Human and People’s Rights.

⁴⁴⁴ UNHCR Vol. II, December 2005 (note 379 above) 162.

⁴⁴⁵ Hathaway 2005 (note 33 above) 515.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ See Part VI of the Agricultural (Commercial) Land Reform Act, No 6 of 1995, as amended, in particular Sections 58 and 59.

guarantee in Article 16(1) in terms of which *all persons*⁴⁴⁸ have the right to acquire, own and dispose of all forms of immovable and movable property alone, or in association with others. However, as in most jurisdictions, the right to property in Namibia is not absolute.

449

It is recognised, both in law and in practice, that there are limitations imposed on ownership. These limitations may be imposed both by public and private law.⁴⁵⁰ The Constitution (Article 16 (2)); legislation, common law⁴⁵¹ and private treaty⁴⁵² are all ways by which ownership may be limited. However, where the right to ownership is limited by either public or private law, it is required that the infringement must be ‘reasonable’ and ‘equitable’.⁴⁵³ Thus a balance must always be struck between the individual’s right to property and the interest of the community or public. The point is that, refugees have the right to restitution of the property of which they have been arbitrarily or unlawfully deprived of.⁴⁵⁴ If restitution is practically impossible to achieve, refugees must then be appropriately compensated as determined by an independent tribunal.⁴⁵⁵

The 1951 Convention accords asylum seekers and refugees the same treatment as nationals with regard to primary (elementary) education.⁴⁵⁶ In addition Article 22(2)

⁴⁴⁸ My emphasis

⁴⁴⁹ This principle was established in *Gien v Gien* 1979 (2) SA 1113 (T) at 1120. See also *King v Dykes* 1971 (3) SA 540 (RA) at 545. In *Bp Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 151, the South African Court quoted with approval the position as set out in the *King* case. The principles laid down in ~~pre-independent~~ South African cases prior to Namibia’s independence in 1990 remain valid in independent Namibia because of the operation of Article 66 read with Article 140. South African decisions after 1990, however, have convincing value in the Namibian legal system.

⁴⁵⁰ See AJ Van der Walt “The Effect of Environmental Conservation Measures on the Concept of Ownership” (1987) *SALJ* (104) 469-479, 470-471 for a list of possible limitation on the concept of land ownership.

⁴⁵¹ Such as neighbour law (nuisance, encroachment, lateral and surface support).

⁴⁵² For instance public servitudes, trusts and management agreements.

⁴⁵³ AJ Van der Walt & GJ Pienaar *Introduction to the Law of Property*, 4th Ed (2002) 51. Lansdowne: Juta & Co Ltd. Also see *Port Elizabeth Municipality v People’s Dialogue on Land and Shelter* 2000 (2) SA 1074 (SEC), where the concepts ‘just’ and ‘equitable’ were employed to assist the court in reaching the decision.

⁴⁵⁴ UNHCR Vol. II, December 2005 (note 379 above) 162.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Article 22(1) of the 1951 Convention.

provides that the “Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships”. However, the ICESCR and the Convention on the Rights of the Child (CRC), go far beyond the Refugees Convention, requiring not only that primary education be available to everyone, but that it also must be compulsory and free of charge.⁴⁵⁷

The Namibian Constitution contains similar provisions to that of the ICESCR and the CRC. Article 20(1) state that “all persons shall have the right to education”, while Article 20(2) underscores that primary education shall be compulsory and free of charge. However, the Constitution is silent on this point as regards secondary and higher education. The primary means for refugees in the less developed world to access secondary and tertiary education has been through the award of scholarships provided by UNHCR and other agencies.⁴⁵⁸ Rioting broke out in the Osire camp when only three out of 56 applications for study grants were accepted.⁴⁵⁹ Consequently secondary and tertiary education remains a challenge, and more so since refugees do not have freedom of movement in the country. Secondary and tertiary institutions are all situated outside the Osire camp, thus creating another challenge of accessibility for refugees and asylum seekers.

Freedom of thought, conscience and religion is another sensitive issue for asylum seekers and refugees in asylum countries. Often, refugees who introduce a foreign religion into the host state are subjected to targeted restriction on their freedom of religion. Article 4 of the 1951 Convention provides that “[t]he contracting states shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with

⁴⁵⁷ See Articles 13 and 14 of the ICESCR and Article 28 of the CRC.

⁴⁵⁸ Hathaway 2005 (note 33 above) 591.

⁴⁵⁹ Ibid.

respect to freedom to practice their religion and freedom as regards the religious education of their children”. The right to freedom of thought, conscience and religion are closely related to privacy.⁴⁶⁰ Articles 21(b) and (c) guarantee all persons the right to “freedom of thought, conscience and belief ...” as well as the “freedom to practice any religion and to manifest such practice”. Moreover, Article 1(1) clearly establishes Namibia as a “sovereign, *secular*”⁴⁶¹ democratic and unitary state, founded on the principles of democracy, the rule of law and justice for all”. Clearly thus all asylum seeker and refugees should be able to enjoy their right to freedom of thought, conscience and religion.

Whatever rights are held by refugees may be of little value if their refugee status cannot be proved.⁴⁶² Personal documentation is thus a key tool to refugee protection. Although the right to identity is not explicitly referred to in any major human rights instruments, it may be asserted indirectly under some provisions. Examples are the right to recognition of as person before the law (Article 16 of the ICCPR and Article 3 of the ACHPR), the right of every child to be registered immediately after birth (Article 24(2) of the ICCPR and Article 7 of CRC) and the right of the child to ‘preserve its identity, including nationality, name and family relations as recognised by law without unlawful interference’.

Article 27 of the 1951 Refugee Convention provides that “[t]he contracting states shall issue identity papers to any refugee in their territory who does not possess a valid travel document”. This provision is also adopted by the Refugees Act as one of the rights of refugees.⁴⁶³ The issue of identity documentation is imperative for refugees as it provides proof of identity and status as a protected person and it also gives courtiers of asylum an important means of ensuring that no refugee will be returned to danger. Namibia, in collaboration with the UNCHR has started a re-registration process of asylum seekers and refugees in February 2007.⁴⁶⁴ This process saw identity documents being issued to

⁴⁶⁰ UNHCR Vol II, December 2005 (note 379 above) 147.

⁴⁶¹ My emphasis.

⁴⁶² Hathaway 2005 (note 33 above) 614.

⁴⁶³ See Article 18 read with Part I of the Schedule to the Act.

⁴⁶⁴ UNHCR 2008 (note 4 above) 9.

recognised refugees above the age of six years and certificates to asylum seekers above the age six.⁴⁶⁵

As important it is to insist that persons claiming refugee status are identified and provisionally treated as entitled to the protection of the Convention, the practical reality is that refugees will often be unable to enforce their rights without the assistance from state or international authorities.⁴⁶⁶ The right to seek asylum requires that individual asylum seekers have access to fair and effective procedures for the examination of their claims.⁴⁶⁷ As stated above the 1951 Convention sets no specific requirements for national refugee determination systems, but the Executive Committee of the High Commissioner's Programme recommends certain basic requirements that procedures should satisfy.⁴⁶⁸ In addition Article 16(1) of the 1951 Convention provides that '[a] refugee shall have free access to the court of law on the territory of all contracting states'.

Namibia may be said to observe these provisions since the Refugees Act listed Article 16 of the 1951 Refugee Convention as a right of refugees.⁴⁶⁹ Moreover, Article 12 of the Constitution of Namibia guarantees all persons the right to a fair trial. Furthermore, various international human rights instruments also provide for the right to fair and efficient procedures in particular with regard to asylum claims. Article 14 of the ICCPR provides individuals, including asylum seekers and refugees, with extensive rights relating to fair trial in the determination of a 'criminal charge' and of a person's 'rights and obligations in a suit of law'. Article 7(1) of the ACHPR also provides for the right to a fair trial. The African Commission on Human Rights concluded on various occasions that the right to a fair trial must also be respected in cases of expulsion. Consequently it found that expelling refugees, either individually or *en masse*, without granting them the opportunity

⁴⁶⁵ Ibid 6.

⁴⁶⁶ Hathaway 2005 (note 33 above) 626.

⁴⁶⁷ UNHCR Vol. II, December 2005 (note 379 above) 114.

⁴⁶⁸ See under Chapter 3.3.

⁴⁶⁹ See Article 18 read with Part I of the Schedule to the Refugees Act.

to have their cases heard, violates Article 7(1).⁴⁷⁰ In Namibia, refugees have often had to resort to the Legal Assistance Centre of Namibia to access courts and the National Society for Human Rights (NSHR) of Namibia for their voices on their rights to be heard.⁴⁷¹

4.2 The rights of refugees lawfully present and lawfully staying

As the degree of attachment between a refugee and state party increases, so too do the rights which the refugee may claim.⁴⁷² All of the rights acquired by *simple physical presence* enumerated and discussed above continue for the duration of refugee status. However, once a refugee is not only de facto under the jurisdiction of the asylum state, but also *lawfully present*, he or she acquires three additional rights, namely protection from expulsion, freedom of residence and internal movement as well as self-employment.⁴⁷³ Lawfully present in this context means that the refugee is admitted to a State Party's territory for a fixed period of time, even if only for two hours, provided they had been duly authorised to enter.⁴⁷⁴

The guarantee of protection from expulsion includes any effort to remove the refugee to any country, and is in addition to the right not to be sent to a country in which there is a real risk of persecution.⁴⁷⁵ Article 13 of the ICCPR and Article 12(4) of the ACHPR give aliens, who are lawfully within the territory of state party, procedural rights to protect them from an obligatory departure, whether described in national law as expulsion or otherwise. In addition Article 32 of the 1951 Convention provides:

1. The Contracting States *shall not expel a refugee lawfully in their territory save on grounds of national security or public order.*

⁴⁷⁰ See *Organisation Mondiale Contre la Torture et al v Rwanda* Communication 27/89; *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Inter africaine des Droits de l'Homme v Rwanda* Communications 27/89, 46/91 and 99/93 as well as *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia* Communication 71/92, African Commission on Human and People's Rights (ACHPR).

⁴⁷¹ See the National Society for Human Rights reports available at <<http://www.nshr.org.na/index.php?module=Search&func=search>> last accessed on 26 November 2009.

⁴⁷² Hathaway 2005 (note 33 above) 657.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid* 173-174.

⁴⁷⁵ *Ibid* 657.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

In essence, the concern is that unlike other aliens, refugees subject to expulsion generally have no safe place to go. Often the expulsion of refugees, particularly in Africa, is linked to fear that their presence will embroil the host state in armed conflict or retaliatory attack.⁴⁷⁶ Such was the case when South Africa issued threats of military attacks during the apartheid era, which led countries such as Swaziland, Botswana and Mozambique to expel South African refugees.⁴⁷⁷

The Refugees Act of Namibia sets out a detailed procedure on the detention or expulsion of refugees and also provides for the detention of recognised refugees and protected persons pending expulsion in Section 25. In terms of Section 26(1), the Minister may, subject to provisions of section 26 and the following subsections of that section, if he or she is reasonably of the opinion that it is in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, request the Commissioner in writing to order the detention or the expulsion from Namibia of any recognised refugee or protected person. However, the Section outlines a detailed procedure before the Minister can utilise the powers conferred by Section 26(1).⁴⁷⁸ Both sections clearly illustrate the Namibian government's commitment to fair procedures, but it remains to be seen whether or not these provisions will be observed in practice. Refugees who are expelled and aggrieved by such decision also have a right to appeal as provided for in Section 27(1) of the Refugees Act.

⁴⁷⁶ Ibid 662.

⁴⁷⁷ Ibid.

⁴⁷⁸ See Sections 26(2)-(9).

Refugees lawfully present enjoy a presumptive right to freedom of internal movement. Under international human rights treaties, the right to freedom of movement include four distinct rights, namely: the right to move freely in a given territory; the right to choose a residence within a territory; the right to leave a country, including one's own; and the right to enter one's own country.⁴⁷⁹ Article 26 of the 1951 Refugee Convention provides that "[e]ach contracting state shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances". In addition Article 12(1) of the ICCPR protects the freedom of movement of persons lawfully within the territory of a state, whereas Article 12 of the ACHPR particularly protects the freedom of movement of 'every individual'. Thus, the moment a refugee's status has been determined positively, he or she must be able to move around the entire territory and establish themselves in a place of their choice.

However as is stated before, Namibia has made a reservation to Article 26 of the 1951 UN Convention that deals with the free movement of refugees. Although the legislature has endorsed Article 26 as a right of refugees in the Refugees Act⁴⁸⁰, the same Act provides in Section 19 that notwithstanding the provision of Article 26, the Minister may declare any part of Namibia to be an area for the reception of refugees. In addition Section 20(1) provides the Minister with powers to order refugees to reside in such a reception area. Section 20(3) explicitly states that "[t]he provisions of subsections (1) and (2), in so far as they provide for a limitation on the fundamental right to move freely throughout Namibia and to reside and settle in any part of Namibia contemplated in paragraphs (g) and (h), respectively, of Sub-Article (1) of Article 21 of the Namibian Constitution, are enacted upon the authority conferred by Sub-Article (2) of the said Article".

⁴⁷⁹ UNHCR Vol. II, December 2005 (note 379 above) 120.

⁴⁸⁰ See Article 26 in Part I of the Schedule to the Act.

Non-compliance with an order under Section 20(1) is an offence and asylum seekers and refugees guilty thereof will be liable on conviction to imprisonment for period not exceeding 90 days.⁴⁸¹ Notably no monetary penalty is prescribed for contravening Section 20 (1), which means asylum seekers or refugees found guilty of such an offence will simply be sent to jail. Limiting the right to freedom of movement also has an effect on other rights such as the right to work. Moreover, in cases where the freedom of movement of refugees are restricted and prevents them from earning a living or accessing food stores, the burden of care lies more heavily on the host nation. One cannot help but to concur with Hathaway that there was no lawful basis for the decision of Namibia to force refugees to live on an on-going basis in designated camps.⁴⁸²

Furthermore lawfully present refugees are explicitly entitled to engage in self-employment. While permission to engage in employment or professional practice may be withheld until the refugee is authorised to remain in the asylum state, mere lawful presence entitles the refugee to engage in independent income generating activities. The refugee's ability to engage in productive economic activity in the asylum country may not only improve the refugee's self-image, but is also critical to survival. Consequently Article 18 of the 1951 Convention explicitly states that "[t]he contracting states shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies".

Thus refugees have a right to engage in independent economic activities. According to Hathaway, this right accrues at an earlier stage than the right of refugees to be employed or to engage in professional practice.⁴⁸³ The point is that the latter two means of earning a livelihood may lawfully be withheld from refugees for a period of time and hence the

⁴⁸¹ Section 21.

⁴⁸² Hathaway 2005 (note 33 above) 419.

⁴⁸³ Ibid 719.

ability of refugees to survive through their own efforts takes on a particular importance for refugees. Although the limitation on the freedom of movement of refugees can extensively curtail their ability to engage in self-employment, refugees were at least allowed by the Namibian government to take up agricultural activities and form small business at Osire to alleviate poverty and hunger.⁴⁸⁴

A significant number of important rights accrue to refugees only once they are *lawfully staying* in a state party.⁴⁸⁵ These include the right to work, to professional practice, public relief and assistance, housing, intellectual property rights, international travel, freedom of expression and association as well as assistance to access court. A refugee is lawfully staying when his or her presence in a given state is ongoing in practical terms.⁴⁸⁶ The right to work is crucial for refugees, because they need to be able to support themselves and their families, especially if there is no prospect that conditions in their home country will change in the near future.⁴⁸⁷ In most developing countries, access to the national labour market is either denied altogether or extremely limited for refugees.⁴⁸⁸ The most obvious reason for this is that asylum states are concerned that allowing refugees to work will drive down wages for their own citizens, thereby creating tensions between the refugees and their hosts.

The right to work encompasses three elements, namely wage earning employment, fair working conditions and social security.⁴⁸⁹ In respect of wage earning employment, Article 17 of the 1951 Convention stipulates:

1. The Contracting State *shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment.*
2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to

⁴⁸⁴ Ibid 720-721.

⁴⁸⁵ Ibid 186 for an explanation of the concept 'lawfully staying'.

⁴⁸⁶ Ibid 186-187 and 730.

⁴⁸⁷ UNHCR Vol. II, December 2005 (note 379 above) 138.

⁴⁸⁸ Hathaway 2005 (note 33 above) 730.

⁴⁸⁹ Ibid 739-772

a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

- (a) He has completed three years' residence in the country;
 - (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse;
 - (c) He has one or more children possessing the nationality of the country of residence.
3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

This Article is also incorporated into the Namibia Refugees Act as a right of refugees as per Section 18 read with Part I of the Schedule to the Act. In addition, Article 6 of the ICESCR also governs “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”. According to Hathaway Article 17 binds all states, whatever their level of economic development.⁴⁹⁰ Thus, even assuming that developing countries may rely on Article 2(3) of the ICCPR to insulate themselves from breach of that treaty where aliens are not allowed to work, the application of such policies to refugee will likely be a breach of the 1951 Refugee Convention. In the premise, Article 17 is said to have the highest number of reservations of any provision of the 1951 Convention.⁴⁹¹

Furthermore, Article 24(1)(a) of the 1951 Convention stipulates that “[t]he contracting states shall accord to refugees *lawfully staying* in their territory the same treatment as is accorded to nationals ... in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women’s work and the work of young persons, and the

⁴⁹⁰ Ibid 741.

⁴⁹¹ UNHCR Vol. II, December 2005 (note 379 above) 139.

enjoyment of the benefits of collective bargaining ...” This proviso is said to capture the element of fair working conditions and is strengthened by Article 7 of the ICESCR.

Article 24(1)(b) furthermore highlights the importance and necessity of social security for all refugees. It provides that “[t]he Contracting States shall accord to refugees *lawfully staying* in their territory the same treatment as is accorded to nationals in respect of ... *Social security* (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme)”. However, the provision of social security is subjected to the following limitations:

- (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
 - (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.
2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.
 3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.
 4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

The necessity of social security for workers is also underscored by Article 9 of the ICESCR. It lays down that “state parties to the present Covenant recognise the right of everyone to social security, including social insurance”. Apart from the right to work, the

1951 Convention also makes provision for the right to professional practice. Article 19 lay down that:

1. Each Contracting State shall accord to refugees *lawfully staying* in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Although the Namibian Constitution does not contain a right to work per se, it does provide all persons with the right to practice any profession or carry on any occupation, trade or business in Article 21(j). Furthermore, Article 95(i) of the Constitution requires that workers be paid a living wage which will enable them to maintain a decent standard of living. Article 95(a) provides for the “enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek, through appropriate legislation, to provide maternity and related benefits for women”.

The problem that arose in the context of the right to work is the limitation that is placed on the free movement of refugees. Since refugees cannot move freely in Namibia, it is virtually impossible for them to work legally in Namibia despite the fact that many were well educated and the economy, especially the mining, tourism, social work, engineering, transportation, and public service sectors suffered from skilled labour shortages that increased unemployment of lower skilled workers. According to the World Refugee Survey of 2007 refugees and asylum seekers had to apply for work permits from the Immigration Selection Board as ordinary foreigners under the Immigration Control Act of 1993 even though the Refugees Act permitted the Home Affairs minister to require

employers to give refugees preferential treatment over other foreigners.⁴⁹² Applicants also had to prove their qualifications and that there were not already a "sufficient number of persons already engaged in Namibia to meet the requirements of the inhabitants of Namibia".⁴⁹³

In October 2007, the newly appointed Refugee Commissioner, Nkrumah Mushelenga, visited Osire and proposed allowing refugees to farm, market their produce and work legally on nearby farms.⁴⁹⁴ In December 2007, he wrote, "Namibia needs to take a position regarding the use of the existing locally based untapped refugee skills for the growth of this country's economy. ... [Refugees] can make a meaningful contribution to both the economic growth and the social upliftment of the people".⁴⁹⁵ According to Mushelenga, the aim of the re-registration of asylum seekers and refugees is "to make sure that instead of a brain drain, Namibia advocates brain gain by effectively utilising the untapped refugees' skills and expertise".⁴⁹⁶

Article 23 of the 1951 Convention further states that "contracting states shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals". Refugees who are unable to work or for whom work is either unavailable or too poorly paid, may find it impossible to meet their basic needs.⁴⁹⁷ Consequently, the question of access by refugees to a country's general system of social support is crucial. Article 95(g) of the Namibian Constitution provides that legislation should be enacted "to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the

⁴⁹² USCRI 2007 (note 6 above).

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Hathaway 2005 (note 33 above) 800.

State”. Asylum seekers and refugees are in a particular vulnerable position because they cannot return home to benefit from their own country’s support system.

While the issue of public relief and assistance to refugees has not come before a Namibian Court as of yet, it has been argued in the South African Constitutional Court. In *Khoza et al v Minister of Social Development*⁴⁹⁸, the Court struck down as unconstitutional laws, which denied Mozambican refugees the full benefit of national assistance programmes, including child support and old age dependency status. Refugees in the Osire camp of Namibia are dependent on humanitarian aid. The World Food Programme announced in February 2007 that, despite its hopes that most refugees would have been repatriated, it would continue feeding them until the end of the year.⁴⁹⁹ The UNHCR/WFP JAEM found in 2006 and in 2008 that refugees at Osire were only food secure because of the regular food assistance from WFP.⁵⁰⁰ The social and economic conditions of asylum seekers and refugees at Osire are discussed in detail below under 4.3.

The majority of refugees who seek protection in the less developed world are expected to live in organised camps or settlements, such as the Osire refugee camp in Namibia. Often these camps or settlements are located in remote or marginal areas with absolute shortages of essential building materials. In addition they have a tendency to grow to an unwieldy size and to suffer from overcrowding. Such was the case at Osire between 1999 and 2002 when Namibia received a vast influx of refugees from Angola when the war intensified in that country. Overcrowding at refugee camps can result in a host of other problems such as lack of water, sanitation and waste disposal. This could in turn lead to the deterioration of refugees’ health.

Article 21 of the 1951 Convention stipulates that “[t]he contracting states, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities,

⁴⁹⁸ (2004) 6 BCRR 569

⁴⁹⁹ USCRI 2007 (note 6 above).

⁵⁰⁰ UNHCR/WFP 2006 (note 427 above) 14-15 and UNHCR/WFP 2008 (note 4 above) 2.

shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances". This Article is also incorporated into the Refugees Act of Namibia as a right of refugees, despite the fact that the Namibian Constitution has no express provision on the right to housing. Article 11(1) of the ICESCR also stresses the right of everyone to adequate housing. However, without freedom of movement, refugees in Namibia will never be able to exercise their right to shelter, as in the case of the right to work.

It is now appropriate to examine the extent to which refugees may express themselves and participate in associations. Freedom of expression, based on the principles of rationality and mutual respect for human dignity, is deemed to be an indispensable prerequisite for life in society.⁵⁰¹ Freedom of association is also important because it allows individuals to join together to pursue collective interests in group.⁵⁰² This freedom may help refugees to counteract feelings of isolation, increase their self-esteem and lessen their sense of alienation.⁵⁰³ Refugee associations may also play a role in preserving values and elements of identity of the refugee community within the context of a dominant host culture.⁵⁰⁴

Article 15 of the 1951 Convention provides "[a]s regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances". Freedom of expression and association is also captured in a number of international human rights treaties. Articles 19 to 22 of the ICCPR deal with this right and the elements thereto, whereas Article 8 of the ICESCR protects the right to association. The Namibian Constitution provides for the rights to freedom of expression and association in Articles 21(a) and (e) respectively.

⁵⁰¹ Hathaway 2005 (note 33 above) 874.

⁵⁰² UNHCR Vol. II, December 2005 (note 379 above) 150.

⁵⁰³ Hathaway 2005 (note 33 above) 875.

⁵⁰⁴ *Ibid.*

However, despite the fact that the right to freedom of expression and association is so widely recognised in international and domestic legal instruments, Namibian authorities ordered the arrest of several refugee members of a musical group, the Osire Stars, on the grounds that they had illicitly participated in domestic politics by performing at a Congress of Democrats function.⁵⁰⁵ The group were also threatened with review of their refugee status.⁵⁰⁶ However, government did not review their refugee status.⁵⁰⁷ I concur with Tjombe that the drafters of the Namibian Constitution surely did not intend that some rights and freedoms should be granted to refugees, while others should not.⁵⁰⁸ Similarly, following a peaceful demonstration by ADR on World Refugee Day, 20 June 2008, refugees who went to the camp administrator to seek permits to allow them free movement outside the camp were told to go to ADR's office to get them.⁵⁰⁹ Refugees were even arrested at times for demonstrating at Osire after Namibian authorities had allegedly told them that they were not allowed to do so.⁵¹⁰

Another matter central to refugees' rights is that of travel documents. With a few exceptions, international travel has long required the possession of a passport issued by a national government. Yet refugees often arrive without a passport from their country of origin, either because they were incapable of safely securing that document before departure, or because its destruction was effectively compelled to avoid visa control, carry sanctions or other impediments to their escape and entry into an asylum state.⁵¹¹ In addition refugees are not free to apply for passports from the consular authorities of their country of origin, since to do so risks the cessation of their refugee status in accordance

⁵⁰⁵ N Tjombe 'Refugees have rights in Namibia' *Legal Assistance Centre (LAC) News*, Issue 2 (August 2000) 4-5, 4.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ See C Inambao 'Refugees can take part in politics' *The Namibian* (16 June 2000) 1-2, 1.

⁵⁰⁸ Tjombe (note 503 above) 5.

⁵⁰⁹ UNHCR/WFP (note 4 above) 9.

⁵¹⁰ See T Amupadhi 'Refugees in Hiding Police Thwart Demo at Osire' in *The Namibian* (22 June 2004), <[http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=8204&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=8204&no_cache=1)>, last accessed on 18 August 2009.

⁵¹¹ Hathaway 2005 (note 33 above) 840-841.

with Article 1(C)(1) of the 1951 Convention. In the premise, the Convention makes provision for the issue to refugees of a Convention Travel Document. Article 28 states:

1. *The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents.* The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.
2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.
(My emphasis)

In addition to this Article, the Convention contains in a schedule attached thereto, a detailed analysis on the contents and procedures for the issuing of such travel documents and even provides a specimen of such travel document. Article 28, the schedule and the specimen of the travel document are incorporated into the Refugees Act of Namibia as a right of refugees. Furthermore, Article 6(1) of the OAU Refugee Convention also provides that:

Subject to Article 3, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. Member States may issue such a travel document to any other refugee in their territory.
(My emphasis)

All these provisions on travel documents are imperative for refugees. According to the World Refugee Survey of 2007, the Government of Namibia made international travel documents difficult to obtain and renew.⁵¹² The survey further reports that the Ministry of Home Affairs refused to renew the travel document of one refugee who worked for another branch of the Government because it had yet to act on his application for renewal of his work permit, causing him to miss a regional conference.⁵¹³

⁵¹² USCRI 2007 (note 6 above).

⁵¹³ *Ibid.*

All the aforementioned rights become obsolete if refugees are not allowed to assert such rights before an independent tribunal. Consequently it is important that refugees' right to access the courts be upheld and respected by host states. Article 16 of the 1951 Conventions provides:

1. A refugee *shall have free access to the courts of law on the territory of all Contracting States.*
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi.*
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.
(My emphasis)

This Article is also incorporated into the Refugees Act of Namibia. Article 12(1)(a) guarantees the right to a fair and public hearing by an independent, impartial and competent court or tribunal. In addition Article 25(2) bestow on aggrieved persons who claim that a fundamental right or freedom guaranteed by the Constitution has been infringed, the right to approach a competent court to enforce and protect such right or freedom. These rights accrue to 'all persons', which as stated before, include refugees. Furthermore Article 14 of the ICCPR provides individuals with extensive rights relating to fair trial in the determination of a criminal charge and of person's rights and obligations in a suit of law. The right to a fair trial is reinforced by Article 7 of the ACHPR. Since Namibia is party to all the international instruments enumerated and discussed thus far and the Namibian Supreme Court has expressed itself on Namibia's liability to such instruments, the country has an obligation to observe the provisions thereof.

While State Parties to international instruments have obligations to observe and respect the provisions of international laws, including their domestic ones, all persons have a corresponding duty to observe and respect the laws of the international community as well as those of states. Therefore, apart from recognising and providing the above minimum

rights to asylum seekers and refugees, the 1951 Convention also underscores in Article 2 that a 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”. The OAU Convention has an almost similar provision in Article 3(1), but goes even further by proclaiming that refugees “shall also abstain from any subversive activities against any Member State of the OAU”. UNHCR has, however, observed that these duties must be interpreted in compliance with international human right standards.⁵¹⁴ Namibia has incorporated the provisions on the duties of refugees from both the 1951 and OAU Refugee Conventions.⁵¹⁵

4.3 Social and economic conditions and rights of refugees in Namibia

Since 1992, asylum seekers and refugees have been hosted at Osire.⁵¹⁶ The Osire refugee camp was originally a detention centre (for whom???) during South African apartheid rule. But now home to more than 8 000 refugees mainly from Angola,⁵¹⁷ Osire was officially declared a reception area for refugees in 2000.⁵¹⁸ The regulations under which it was declared were promulgated in accordance with Section 19 of the Refugees Act, which states:

- (1) Notwithstanding the provisions of Article 26 of the UN Convention on Refugees, 1951, the Minister *may by notice in the Gazette declare any part of Namibia to be an area (in this Act referred to as a reception area) for the reception or residence of -*
 - (a) recognised refugees and protected persons; and
 - (b) persons who have applied in terms of this Act for refugee status; and
 - (c) members of the families of persons referred to in paragraph (b), or any categories thereof, as may be specified in that notice.
- (2) The Minister may by notice in the Gazette *establish in any reception area a refugee settlement for refugees or any category of refugees.*
- (3) The Minister may designate an authorised officer to be in charge of any reception area or refugee settlement.
(My emphasis)

⁵¹⁴ UNHCR Vol. II, December 2005 (note 379 above) 151.

⁵¹⁵ See Article 18 read with Parts I and II of the Schedule to the Refugees Act.

⁵¹⁶ UNHCR/WFP 2006 (note 427 above) 8.

⁵¹⁷ USCRI *Trapped in Osire Refugee Camp* (2008), <<http://www.refugees.org/newsroomsub.aspx?id=2213>> last accessed on 17 August 2009.

⁵¹⁸ See GN 235/2000 (GG 2412), i.e. Regulation to the Refugees Act.

Osire is situated in the Otjozondjupa Region with the nearest town, Otjiwarongo, 140 km from there. An article by the USCRI captures the location accurately when it stated that ‘[t]he sprawling settlement of brick and mud houses is literally fenced off from the rest of the world’.⁵¹⁹ The map below illustrates the location of the camp.



⁵¹⁹Trapped in Osire Refugee Camp (note 515 above).

Figure 2. Map of Namibia: Location of Osire and UNHCR Offices in Namibia⁵²⁰

At the end of 2001, the UNHCR recorded that there were at least 30 000 asylum seekers and refugees in Namibia, primarily from Angola.⁵²¹ This was due to the fact that during that time the civil war in Angola had intensified, forcing Angolans to flee and seek safe havens. However, according to UNHCR data for October 2007 the number of asylum seekers and refugees has decreased dramatically. The reduction in the number of refugees at Osire is mainly due to the successful repatriation of Angolan refugees. Nevertheless, the pie graph in Figure 3 shows the main camp population is composed of Angolans, with smaller numbers from the Democratic Republic of Congo, Burundi and Rwanda.⁵²² The total camp population of 6309 in 2008 decreased in 2009.

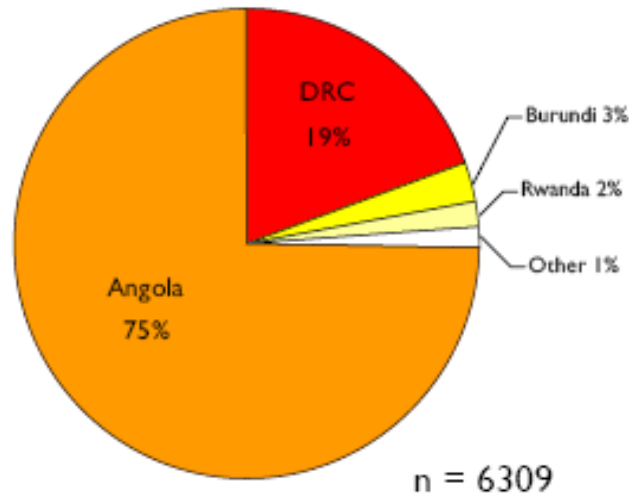


Figure 3. The percentage of camp population by origin in 2008⁵²³

⁵²⁰ Adopted from the UNHCR *Global Report for 2002* (2003), 253, <<http://www.unhcr.org/3edded7f0.html>>, last accessed on 25 August 2009.

⁵²¹ Ibid.

⁵²² UNHCR *Sub-regional Operation Profiles – Southern Africa* (2008), <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48588a7b>> last accessed on 15 October 2009.

⁵²³ Adopted from UNHCR/WFP 2008 (note 4 above) 9.

The Government of Namibia in its Medium Term Expenditure Framework for 2008/2009 to 2010/2011 underscores that one of its objectives for the MHAI is to ‘receive and protect refugees and asylum seekers’.⁵²⁴ It notes in respect of refugee administration that the programme is tasked with the responsibility to provide protection and support to refugees and asylum seekers.⁵²⁵ In order to achieve these objectives the Government lists activities such as the reception, registration and issuing of identification cards or letters to recognised refugees and asylum seekers respectively for the purposes of keeping statistical data and improving the facilities at the Osire refugee camp.⁵²⁶

According to the Joint Assessment Mission by the UNHCR and WFP of 2006, UNHCR conducted all registration of new arrivals. Upon arrival at the camp, asylum seekers are first registered with the Namibian Police, then proceed to have their bio-data⁵²⁷ recorded and are issued with rations cards.⁵²⁸ The ration cards for both food and non-food items are valid for one year.⁵²⁹ The MHAI is represented by the Camp Administrator, who assists with the issuance of study and leave permits, new arrivals and death registrations. Other Ministries such as the Ministry of Safety and Security, through a permanent Namibian Police presence stationed in Osire camp provides security to the refugees whereas the Ministry of Health and Social Services provides a nurse, medical supplies and since 2006, access to anti-retroviral drugs for refugees living with HIV.

The Ministry of Education employs ten teachers and provides educational supplies to the refugee students in the camp. UNHCR Namibia is responsible for the overall protection, care and maintenance of the refugees in Namibia. It is UNHCR’s mandate to provide refugees and asylum seekers with non-food items, such as shelter materials, tools required

⁵²⁴ Republic of Namibia, Ministry of Finance *Medium Term Expenditure Framework for 2008/2009 to 2010/2011* (2009) 73, <<http://www.mof.gov.na/Budget%20Documents/2008-09/MTEF%20200910-201112.pdf>> last accessed on 20 June 2009.

⁵²⁵ Ibid 76.

⁵²⁶ Ibid.

⁵²⁷ That is date of birth, place of origin, names of family members, etcetera.

⁵²⁸ UNHCR/WFP 2006 (note 427 above) 13.

⁵²⁹ Ibid.

to build pit latrines, kitchen utensils and sanitary materials for women, blankets, jerry cans and soap. The majority of these products are bought from the UNHCR regional stockpile in Lusaka, Zambia.⁵³⁰ WFP provides monthly food rations and a supplementary feeding programme to moderately malnourished and chronically ill children below five. The food assistance to refugees and asylum seekers in Osire camp has been ongoing since the first influx of Angolan refugees in 1999, when over a three-year period some 23,000 Angolans fled into Namibia.⁵³¹

In December 1999, the Namibian Office of the Prime Minister officially appealed to WFP for the provision of food to Angolan refugees.⁵³² WFP approved Emergency Operation 6206.00 to assist 7 500 beneficiaries with 751 metric tonnes of food assistance on 10 January 2000. Since then the food assistance by UNHCR and WFP to refugees and asylum seekers in Osire camp has been ongoing. In 2006 it was found that refugees and asylum seekers at Osire camp were food secure due to the regular food assistance from WFP and that in the event of termination of food assistance, refugees and asylum seekers' nutritional status would deteriorate in a matter of months.⁵³³ 'Food security' is considered to be in place when households can access food through own production or through purchase, provided the food is available and households have incomes to buy the food.⁵³⁴

According to the UNHCR/WFP JAEM of 2008 at least 33 percent of the camp's population were either moderately or severely food insecure at the time.⁵³⁵ The JAEM of 2008 noted that despite the positive steps taken by the Namibian Government in assuming ownership and responsibility for refugee care, especially in the education and health care sectors, the remaining number of refugees requiring protection and food was unlikely to change in the next two three years (i.e. 2008 – 2010/2011).⁵³⁶ Consequently the Mission

⁵³⁰ Ibid.

⁵³¹ UNHCR/WFP 2008 (note 4 above) 2.

⁵³² Ibid

⁵³³ UNHCR/WFP 2006 (note 427 above) 14.

⁵³⁴ Ibid.

⁵³⁵ UNHCR/WFP 2008 (note 4 above) 35.

⁵³⁶ Ibid 35.

concluded that UNHCR and WFP should plan to extend its food and protection assistance to refugees and asylum seekers until such time as durable solutions are identified.⁵³⁷

Own production is constrained by lack of access to land. Osire is surrounded by private commercial livestock farms. (The people aren't surrounding Osire, the farm land are.) The land in the Osire area has a low potential for crop cultivation, because of the soil's poor water holding capacity, poor organic matter content and low nutrient content.⁵³⁸ Excessive heat and low and erratic rainfall adding to these factors make farming risky and uncertain. Furthermore, livestock production by residents of Osire is very limited. About 15% of households own poultry, while the other livestock types (goats) are mainly owned by the camp officials.⁵³⁹ According to the UNHCR/WFP JAEM of 2008, the major constraints upon livestock activities in Osire are lack of money to buy livestock (70%), lack of space to construct livestock housing (29%), and no access to grazing lands (26%).⁵⁴⁰

The Namibian Government's encampment policy whereby refugees require a permit to leave Osire camp makes free access to local markets extremely difficult. UNHCR/ WFP JAEM reports a less vibrant refugee market in the camp and little or no food aid commodities being sold, probably due to strict food aid monitoring mechanisms. The restriction on freedom of movement also deters refugees and asylum seekers from seeking formal employment opportunities.⁵⁴¹ Employment is also limited by the education level of many of the camp residents.⁵⁴² The UNHCR/WFP JAEM found that only 50 percent of the adults in Osire are educated beyond the primary school level.⁵⁴³ While adults within the camp who are not highly educated may not have opportunities to obtain employment or to integrate into the Namibian economy, over 50 percent of the camp population is under the age of 18.⁵⁴⁴ UNHCR/WFP noted that educating this sector of the population, providing

⁵³⁷ UNHCR/WFP 2006 (note 427 above) 14.

⁵³⁸ UNHCR/WFP 2008 (note 4 above) 13.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid 18.

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid

them with skills that can be used in Namibia or elsewhere may be the best way to encourage durable solutions for the camp population.⁵⁴⁵

At this point, it must be appreciated that the Namibian Refugees Act provides in Section 18 that the rights and duties of refugees are set out in Part I and II of the Schedule to the Act. These parts are basically excerpts from the 1951 and OAU Refugees Conventions. However, as is stated elsewhere in this study, Namibia made a reservation to the free movement of refugees. Not only did the government enter a reservation in terms of Article 26 of the 1951 Convention which deals with freedom of movement, but it also explicitly legalised the issue in Section 20 of the Refugees Act.

Furthermore, Section 22 prohibits access to reception areas and refugee settlements and prescribes penalties if a person should contravene the provisions relating to access to such areas. Section 21 makes it a criminal offence if refugees do not comply with Section 20(1). It provides that:

- Any person who, having been duly served with an order under section 20(1) -
- (a) fails to comply with any provision of such order; or
 - (b) without the prior written permission of the authorised officer or any other person in charge of the reception area or refugee settlement in which such first-mentioned person is required to reside, leaves or attempts to leave such reception area or refugee settlement, *shall be guilty of an offence and on conviction be liable to imprisonment for a period not exceeding 90 days.*

Asylum seekers and refugees have been protesting peacefully over the past couple of years about Namibia's encampment policy and the social and economic conditions at the camp. The photographs show refugees at Osire peacefully demonstrated for their rights on World Refugees Day, 20 June 2008.⁵⁴⁶ In retaliation, Namibian officials banned refugees from setting foot outside the camp, despite the fact that the Constitution of Namibia allows residents to demonstrate peacefully. Many of these refugees have been warehoused in this camp for more than 15 years. Kindu Selemani, a Congolese refugee and leader of

⁵⁴⁵ Ibid.

⁵⁴⁶ USCRI 'Refugees Banned from Leaving Camp Following Peaceful Demonstration' (2009), <<http://www.refugees.org/newsroomsub.aspx?id=2213>> last accessed on 12 February 2009.

the Association for the Defence of Refugee Rights, explained, “As we speak, anything can happen to our members. We once were threatened of deportation. We do not know what will happen this time. There is fear in the hearts of many refugees”.⁵⁴⁷



Figures 4. Refugees and asylum seekers at Osire demonstrated on June 20, 2008 (World Refugees Day)⁵⁴⁸

⁵⁴⁷ Ibid

⁵⁴⁸ Adopted from the USSRI website, available at <<http://www.refugees.org/newsroomsub.aspx?id=2213>> last accessed on 12 February 2009.



Figure 5. Members of Cry for Refugee Women demonstrate as UNHCR delegate from Geneva visits on September 1, 2009.⁵⁴⁹

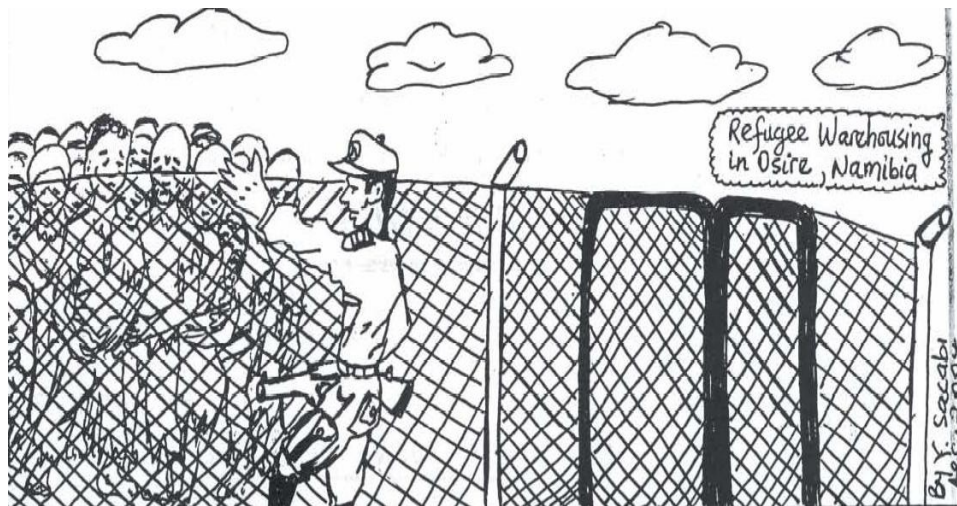


Figure 6. Illustration of refugee warehousing at Osire by Y. Sacabi⁵⁵⁰

⁵⁴⁹ Adopted from the USSRI website, available at <<http://www.refugees.org/article.aspx?id=1708>> last accessed on 25 November 2009.

⁵⁵⁰ A drawing by a member of ADR, adopted from USSRI website, available at <<http://www.refugees.org/article.aspx?id=1708>> last accessed on 25 November 2009.

The photograph in figure five shows refugees protesting about various issues, whereas the cartoon in figure six was drawn by a member of ADR, illustrating the warehousing of asylum seekers and refugees at Osire. From these images it would seem that asylum seekers and refugees at Osire are sometimes subjected to harsh living conditions and that without the food assistance from UNHCR and WFP, the Osire population would perish of hunger and starvation. It is thus not surprising that a group of 41 asylum seekers and refugees from the DRC fled Namibia on July 7, 2009, on the grounds that they feared for their lives because of “death threats” from the Namibian Government after they complained of “unacceptable conditions” at the Osire Refugee Camp, where they had been living.⁵⁵¹

According to the National Society for Human Right Namibia (NSHR), the group received expulsion letters. The letters, issued by the Namibian Commissioner for Refugees, *inter alia*, read: “[t]he Namibia Refugees Appeal Board has decided to confirm my earlier decision and therefore, your application for appeal of refugee status in Namibia is rejected. However, it is also decided that you are given [a] three months grace period to leave the country”.⁵⁵² Minister of Information and Communication Technology, Joel Kapanada, however, denied the claims by the refugees and stated that “[t]his was an unfortunate and ill conceived strategy used by the refugees and asylum seekers in the hope that they will be resettled better elsewhere in Europe or America”.⁵⁵³ The group was

⁵⁵¹ N Shejvali ‘Botswana to Deport Runaway Refugees’ (9 October 2009), adopted from The Namibian of October 9 2009 by NSHR Namibia), <<http://www.nshr.org.na/index.php?module=News&func=display&sid=1185>> last accessed on 15 December 2009. Also see USCRI ‘Too Many African Nations Fail Refugees’ (2009), <<http://www.refugees.org/article.aspx?id=2380>> last accesses on 18 November 2009.

⁵⁵² NSHR Namibia ‘Namibia Continues to Flout Refugees Rights’ (12 August 2009), <<http://www.nshr.org.na/index.php?module=News&func=display&sid=1139>> last accessed on 15 December 2009. For a range of reports on the situation of the refugees who fled the Osire camp see the National Society for Human Rights reports available at <<http://www.nshr.org.na/index.php?module=Search&func=search>> last accessed on 26 November 2009.

⁵⁵³ Media Conference by the Hon. Joel Kapande, Minister of Information and Communication Technology, on the 41 Refugees and Asylum Seekers at the Trans Kalahari Border (24 July 2009). Windhoek, Namibia. <<http://www.hellonam.com/news-politics/47655-nam-gov-refugees-asylum-seekers-trans-kalahari-border-post.html>>, last accessed on 20 August 2009.

arrested by Botswana authorities in October 2009, with a view to deport them back to a still war stricken DRC.⁵⁵⁴

Namibia became eligible for development funding as part of the Millennium Challenge Account (MCA) in 2006. Namibia's September MCA Program Document said it would relax work permit requirements for service providers in the SADC region but the 312-page document did not mention the refugee issue.⁵⁵⁵

4.4 The legal position of internally displaced persons

Internally displaced persons (IDPs) can be defined as persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.⁵⁵⁶ Thus, for whatever reasons, such people are still within the territory of their own country. There are no specific international instruments relating to the protection of IDPs. However, as any human being, they are protected by international human rights and humanitarian law. In addition the UN Guiding Principles on Internal Displacement serve to protect the internally displaced.⁵⁵⁷ Although these Guiding Principles are not legally binding, they are the main instrument specifically dealing with IDPs.⁵⁵⁸ The Kampala Convention, adopted by the AU in 2009, reflects the African view on standards for dealing with internally displaced people.

⁵⁵⁴ Ibid.

⁵⁵⁵ USCRI 2007 (note 6 above).

⁵⁵⁶ IOM (note 199 above) 32-33.

⁵⁵⁷ [Guiding Principles on Internal Displacement](http://www.unhcr.org/refworld/idps.html), E/CN.4/1998/53/Add.2, 11 February 1998, <<http://www.unhcr.org/refworld/idps.html>> last accessed on 18 December 2009.

⁵⁵⁸ However, in the African context there is the [African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa \("Kampala Convention"\)](#), 22 October 2009. In addition there is also the [International Standards Relating to Internal Displacement](#). See <<http://www.unhcr.org/refworld/idps.html>> last accessed on 18 December 2009.

From an international law perspective, primary responsibility for the protection of and assistance to IDPs rests with the territorial state, in virtue of its sovereignty and the principle of non-intervention.⁵⁵⁹ Consequently the response of the international community to the plight of IDPs has been weak, despite the fact that IDPs have become a global crisis and one of the most pressing problems of our time. Kaczorowska is of the opinion that if one considers their situation at home, it is apparent that instead of being protected by their governments, IDPs are often victims of persecution and abuse.⁵⁶⁰

According to UNHCR about two thirds of the world's forcibly uprooted people are displaced within their own country.⁵⁶¹ The UNHCR Global Report for 2008 states that unchanged from 2007, there were 26 million IDPs around the world in 2008.⁵⁶² The 26 million internally displaced civilians recorded in 2008 included 4.6 million newly displaced, up 900 000 from the previous year, and an equivalent number of returns.⁵⁶³ The biggest new displacement in 2008 was in the Philippines, where 600 000 people fled fighting between the government and armed groups in the south. There were also large-scale displacements of 200 000 people or more in nine other countries: Sudan, Kenya, Democratic Republic of the Congo, Iraq, Pakistan, Somalia, Colombia, Sri Lanka and India.⁵⁶⁴ South and South-east Asia were the regions with the largest relative change – an increase of 13 % - in the number of IDPs in 2008, with a 13 percent increase. Africa was the most affected continent, with 11,6 million IDPs in 19 countries, though this figure was down nine percent since 2007.⁵⁶⁵

The reasons why IDPs remain within their country are many, and can vary from situation to situation and individual to individual. For instance, geographical obstacles such as

⁵⁵⁹ Goodwin-Gill 1996 (note 32 above) 264.

⁵⁶⁰ Kaczorowska (note 77 above) 314.

⁵⁶¹ UNHCR *IDP Figures*, < <http://www.unhcr.org/pages/49c3646c23.html>> last accessed on 20 December 2009.

⁵⁶² UNHCR *Global Report 2008 – Internally Displaced Persons* (1 June 2009) 46, <<http://www.unhcr.org/4a2d199b2.html>> last accessed on 20 December 2009.

⁵⁶³ UNHCR *IDP Figures* (note 554 above).

⁵⁶⁴ *Ibid.* Also see UNHCR 2009 (note 550 above) 46-47.

⁵⁶⁵ *Ibid.*

mountains and rivers or personal factors such as age, disability and health may impede transit.⁵⁶⁶ In some cases, they may be denied freedom of movement by their governments, or face restrictions on their right to seek asylum by outside countries. This was the case in Afghanistan in the aftermath of the terrorist attacks against the United States on September 11, 2001.⁵⁶⁷ While the Taliban severely restricted the ability of Afghans to move freely within the country, surrounding countries closed their borders. Consequently instead of a mass exit of refugees from Afghanistan following the events of September 11, 2001, Afghanistan experienced an increase in the number of IDPs from 1.5 million to over 2 million.⁵⁶⁸

The fact that they did not cross a border renders them outside the scope of the Convention definition. While the dictates of state sovereignty determine that responsibility for providing assistance and protection to IDPs rests with their governments, it is, however, often the case that governments are mostly unable to meet these obligations or simply unwilling to do so. An international and national regime is, therefore, needed for protecting IDPs worldwide. This could be achieved by either incorporating their plights into the existing refugee protection regime, or by developing a separate legal standard for the protection of IDPs as derived from international human rights law, international humanitarian law and international refugee law.

As human beings IDPs are first and foremost entitled to the rights guaranteed under international human rights instruments, which recognise and protect the human dignity of all individuals. Since human rights concerns cuts across all phases of internal displacement – from its cause, to the conditions of displacement and the search for solutions – the comprehensive coverage of human rights law is of tremendous importance to IDPs. When internal displacement occurs in a situation of armed conflict, whether

⁵⁶⁶ ED Mooney 'Towards a Protection Regime for Internally Displaced Persons' in E Newman & J van Selm (eds.) *Refugees and Forced Displacement: International Security, Human vulnerability, and the State* (2003) 159-180, 159. Tokyo, Japan: United Nations University Press.

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid.

interstate or domestic in character, international humanitarian law comes into effect. Humanitarian law can be particularly valuable since unlike human rights law, it contains norms expressly prohibiting displacement.⁵⁶⁹ In addition, whereas international human rights law generally is binding only on states and their agents, international humanitarian law specifically applies not only to states but also to insurgent forces.

Apart from these two sources of law, international refugee law can prove useful to IDPs. At present refugee law only protects individuals who are outside their country of origin of nationality and unable to avail themselves of its protection. Therefore, strictly speaking, it is not applicable to the situation of IDPs. Nevertheless, reference to refugee law by analogy can be instructive in pointing to the particular types of protection required by persons in refugee-like situations, and which are not necessarily specifically addressed by human rights or international humanitarian law. An example would be the well-established principle of *non-refoulement*.

While the aforementioned legal regimes may be useful to guide the protection of IDPs, Mooney opines that they provide insufficient legal protection for internally displaced.⁵⁷⁰ She draws attention to the fact that international human rights and humanitarian law lacks explicit norms addressing identifiable needs such as the right not be arbitrarily displaced, including the right to restitution of or compensation for property lost as a consequence of displacement during situations of armed conflict.⁵⁷¹ In addition Mooney points out that the non-ratification by states of key human rights or humanitarian treaties can be another gap in the legal protection of the internally displaced.

Be that as it may, it is undisputed that the coverage of international human rights and humanitarian law can be well extended to IDPs. Together with the Guiding Principles on

⁵⁶⁹ See *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relation to the Protection against Arbitrary Displacement. Report of the Representative of the Secretary-General on Internally Displaced Persons*. UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, paras 56-64.

⁵⁷⁰ Mooney (note 554 above) 162.

⁵⁷¹ *Ibid.*

Internal Displacement it is possible to develop an international legal regime that would protect internally displaced persons. The onus rests on the international community to recognise, adhere to and protect IDPs, more so since for them, unlike refugees, there is no single international organisation with a specific mandate and responsibility for ensuring their protection and assistance worldwide. In many cases, the UNHCR has assisted IDPs, but the global crisis of internal displacement requires a truly global solution, more so as governments in the countries of displacement may be embroiled in the reasons for displacements.

Chapter 5 A critical assessment of Namibian refugee law: The challenge of human protection in a self-interested world

5.1 Assessing Namibian refugee law: what are the gaps?

Considering the above analysis of international and national laws on refugee protection it may be concluded that Namibia's laws on refugee protection *prima facie* comply with international and regional legal requirements. However the time has come for the Namibian government to review its reservation to Article 26 of the 1951 Refugee Convention as well as the corresponding provisions in the Refugees Act. Restrictions on the freedom of movement of any person, be it citizen or non-citizen, can severely curtail most of the social and economic rights of an individual. Often the problem is not a lacuna in the law, as laws may be rightly in place. Instead the challenge is implementation of the relevant laws. In the face of contemporary challenges, it is imperative to give a purposive interpretation to the Refugees Act of Namibia.

It is notable that anti-refugee attitudes coincidentally have emerged at a time when most of Africa is democratising and governments are compelled to take into account public opinion in formulating various policies. The result has often been the adoption of anti-refugee platforms by political parties which in turn give rise to anti-refugee policies and actions by governments. Although Namibia has a favourable policy framework for refugees, the limitation government has placed on the free movement of refugees is a cause for concern. The Namibian government has often justified its reservation to the freedom of movement provision on the country's high unemployment rate of around 37 percent.⁵⁷² This is clearly an example of how government considers public opinion when formulating and adopting laws.

However public opinion is never static. Instead it is a dynamic phenomenon that can be altered over time. Government need to engage in efforts that aims at educating Namibians about the special status of refugees and why, unlike other aliens, refugees need and deserve national and international protection. Such an education campaign should target all segments of the society including parliamentarians, government officials, academics,

⁵⁷² UNHCR/WFP (note 4 above) 16.

students at all levels, the media, non-governmental organisations and civil society. Perhaps notable is the refugee law training programme that the MHAI in collaboration with the UNHCR office in Namibia and the Faculty of law at the University of Namibia has engaged in the second half of 2009. The aim of the programme has been to train government officials in the MOHI on Namibian refugee law, including the international refugee protection regime. Unfortunately such training is dependent on funding, but this should not be a justification for not continuing such a positive course and also extend it to other sectors of society.

Furthermore it is also important that other states outside Africa, in particular in the developed world, deal with asylum seekers and refugees in a humane and principled manner. Such an attitude will encourage other states, including those in Africa to treat refugees in a similar fashion. In recent years Africa's approach to the refugee problem has changed dramatically from an 'open door' policy to a retreat from commitment to the institution of asylum. This change is evident in restrictive admission policies, expulsion of refugees to places where they face harm, disregard of the rights of refugees and a retreat from durable solutions.

Africa's restrictive policies may be attributed to a number of factors such as the magnitude of the refugee problem on the continent and its impact on host countries, the limited capacity of host countries, the absence of equitable burden sharing as well as the adoption of similar policies elsewhere in the world. In the premise, safeguarding the institution of asylum in Namibia, but also in the rest of Africa, requires a joint and concerted action at the international level to avert or overcome the problems experienced by asylum countries.

The measures that could be taken include addressing the root causes of forcible displacement in Africa, mobilisation of resources to enable the continent to cope with refugee flows and a worldwide commitment to a principled approach to the refugee

problem. Lastly, refugees themselves should perhaps been granted an opportunity to participate in the shaping mechanisms and systems that will ensure their protection, particularly in the areas of food, shelter and provision of employment. This would mean that government officials who are responsible for the implementation of the Namibian Refugees Act must actively canvass the opinions and perhaps even the expertise of Namibia's refugee communities. In the end the focus should be on finding durable solutions that would benefit both the host state as well as the concerned refugees. This can only be achieved if asylum states are willing to reconcile refugee protection responsibilities with their own, often difficult, domestic circumstances.

5.2 The challenge of human protection in a self-interested world

In the beginning of this study I quoted António Guterres saying, amongst others, that “more important than the crisis in some areas of the world, or the specific problems that we face here or there, are the walls that are being built in our minds”. Increasingly, the priority shaping both state and community responses on the continent are the "protection" of the country of refuge from refugees themselves. Thus, containment, rather than protection, is figuring as a major purpose in the relationship with refugees at the national level. However, and as stated before, apart from individual state obligations towards refugees, the global refugee problem can only be tackled successfully if there is a fair and equitable distribution of the burden of caring for refugees so that no state or region would be disproportionately saddled with this obligation.

We are living in a world where there is, from a legal perspective, no right to freedom of movement between states. Indeed, general principles of international law recognise the right to leave one's country, and to return to it, but impose no duty on other states to permit entry. International human rights law acknowledges only a right of individuals to seek asylum, with no concomitant duty on states to in fact accede to such request. However, refugee law constitutes a narrow exception to this norm of auto determination of immigration policy. Refugee law is a politically pragmatic means of reconciling the

generalised commitment of states to self-interested control over immigration to the reality of coerced migration. The challenge of human protection is the ability of states to go beyond protecting their sovereignty and embrace the notion of humaneness by extending that protection to those who have a genuine fear for their lives. This includes the challenge of enforcing refugee policies at a domestic level as well as the political will to oversee such implementation.

5.2.1 The challenge of enforceability

The drafters of the 1951 Convention declined to give the international supervisory agency, now the UNHCR, a general right to facilitate the enforcement of refugee rights in States Parties.⁵⁷³ Instead, the UNHCR was entrusted with a general duty “of supervising the application of the provisions of this Convention”.⁵⁷⁴ While the UNHCR may, to the extent that States Parties are willing, provide direct assistance to refugees to enforce their rights in the asylum state, it is governments themselves which ultimately remain responsible to ensure that refugees are treated as per the Convention.

In practice, and despite the externally imposed limits on its authority, there is no doubt that the UNHCR plays an absolutely vital role in promoting respect for refugees rights around the world. However, it remains that the vital role played by UNHCR does not amount to a transparent system to ensure accountability by states for duties undertaken pursuant to the Convention. Although the UNHCR does provide confidential compliance reports to headquarter staff, states are not required to submit to public, or even collegial, scrutiny of their records. Consequently there is no forum within which to require governments to engage in the kind of dialogue of justification that is standard practice under almost every human rights instrument.

Despite these obvious gaps in the enforcement of international refugee law, there are ways to go around these difficulties. It is a recognised fact that the rights of refugees are

⁵⁷³ Hathaway 2005 (note 33 above) 992.

⁵⁷⁴ Article 35(1) of the 1951 Convention.

inseparable from human rights. Therefore states can be compelled under the reporting mechanisms of international human rights instruments to also account for the treatment and protection of refugees. For instance, it would be entirely appropriate for the Human Rights Committee to refer to the Refugee Convention requirement that detention ordinarily be limited to the time prior to the regularisation of status in supervising state's obligation under the ICCPR to ensure liberty and security of the person. Similarly, the Committee on Economic, Social and Cultural Rights could inquire of States Party to both the ICESCR and the 1951 Convention why it has not taken account of the Refugee Convention's duty to grant refugees the same access to elementary education as afforded to nationals in implementing the Economic Covenant's right to education.

Furthermore, Article 38 of the 1951 Convention can also be employed to ensure compliance with that 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". The crux of this proviso is that any state party may legitimately take up concerns regarding non-compliance directly with any other state party, and may require the non-compliant state to answer to the ICJ. It is thus clear that this Article requires the co-operation of Member States in order to fully foster respect for refugees' rights. Often indifference or fear of bilateral advantage means that few direct efforts are made to correct even egregious breaches of Convention rights. Therefore it is not surprising that, to date, no application has ever being made to the ICJ as contemplated by Article 38. Even so, this cannot alter the fact that Article 38 could be a powerful enforcement mechanism.

5.2.2 The challenge of political will

While states continue to proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill, many appear committed to a pattern of defensive

strategies designed to avoid international legal responsibility toward involuntary migrants. This is in particular true for developed states and often it is the poorest countries that have to bear an intolerable cost. Consequently the challenge is to design a structure for the implementation of Convention rights which all states will embrace, or at least see as reconcilable to their own priorities. The end objective should not be to deprive states of either authority or operational flexibility. Instead, the goal of refugee law should be to enable governments to work effectively to resolve problems of a trans-national character, thereby positioning them better manage complexity, contain conflict, promote decency and avoid catastrophe.⁵⁷⁵

The aforementioned involves very much the change of attitudes by both states and the international communities as a whole. However, the international response to refugee protection can only change if states individually alter their approach to the global refugee problem. This is so because the international community comprise all the different states in the world. Closer to home, Namibia has always maintained a rather negative attitude towards foreigners in general. On various occasions, Jerry Ekandjo, former Minister of Home Affairs, have spoken out strongly against foreigners.⁵⁷⁶ In the premise political will can either contribute to the current refugee dilemma or may be employed towards finding much needed solutions for the refugee population in the country.

Furthermore, our own past should help us better understand our obligations towards refugees. Apartheid forced many Namibians to seek refuge in neighbouring countries and elsewhere in the world. They left not only because of dissatisfaction with being politically and economically marginalized or fear of state violence, but also because they were prepared to 'fight the fight' of the liberation struggle that would lead to Namibia becoming a democracy. Most states in Africa and elsewhere in the world provided safe havens for Namibian refugees and exiles, at times with tremendous costs to themselves.

⁵⁷⁵ Hathaway 2005 (note 33 above) 999.

⁵⁷⁶

However, these are not the only reasons why we should protect and promote the rights of refugees in the country. We have a moral and reciprocal obligation to our African neighbours. International pressure (with most of Africa's support) applied to Apartheid South Africa, was instrumental in attaining our current system of democracy, under which we now prosper as citizens with more opportunities for political, social and economic advancement. Similarly, refugees choose to leave because conditions in their own home countries deteriorate to the extent that it becomes unbearable for them to remain there. Moreover, many choose to leave because they are determined to transform their societies into democratic systems of government, and their leaving is often a sign of their refusal to accept the present political conditions. Refugees are not economic or political threats but active role-players in their countries' transitional processes.

The time has come for us to actively help our neighbours in their own struggles for liberation and democratic systems of government. Refugee rights are human rights. In respecting the rights of refugees, we relay a broader message to the rest of the world - that we will not tolerate the abuse of rights in Africa. It is this kind of civil pressure that Africa needs to help rebuild its pride and strength as a continent. It is our ordinary, daily attitudes at grassroots levels that are often the most potent form of struggle we can wage against those who abuse power and human rights, which leads to the suffering of millions of our brothers and sisters on the continent.

Chapter 6 Conclusions and recommendations

It would be highly misleading to suggest that there are quick or easy solutions to the protracted problem of refugee situations in the world. A refugee movement necessarily has an international dimension, but neither general international law nor treaty obliges any state to accord durable solutions to the global refugee dilemma.⁵⁷⁷ Nevertheless the attainment of durable solutions is as cardinal an objective of the system of international protection. For those who lie outside the net of protection of the 1951 Convention and in respect of those cases it was never intended to encompass, for example, economic and environmental migrants, it becomes evident that any meaningful solution can only be found by building bridges. This requires moving out of the confines of the traditional regime, by implicating also the state of origin as well as the international community as a whole, and by addressing the entire spectrum of the problem from before flight to after return.

The solution to any dilemma lies in tackling the root causes of the problem. In the context of the refugee problem, forced migration should be addressed. These include poverty, conflicts, arms trade, and violation of human rights as well as a lack of accountability on the part of those who make it impossible for others to remain in their own countries. In addition the three traditional⁵⁷⁸ durable solutions promoted for refugees, namely, voluntary repatriation; local integration; and resettlement in a third country should be employed to deal with the current refugee population in Namibia.

6.1 Voluntary repatriation and reintegration in country of origin

For decades, repatriation has come to be designated by the international community of states and the UNHCR as *the* solution to the global refugee problem. The IOM defines

⁵⁷⁷ Goodwin-Gill 1996 (note 32 above) 268.

⁵⁷⁸ So referred to by writers such as Y Saito 'Refugees rights' in M Bedjoui (ed) *International law: achievements and prospects* (1991) 1131-1147, 1140. Canada: Kluwer Academic Publishers and Oloka-Onyango (note 38 above) 459.

repatriation as “the personal right of a refugee or a prisoner of war to return to his or her country of nationality under specific conditions laid down in various international instruments”.⁵⁷⁹ Thus, voluntary repatriation concerns “the return of eligible persons to the country of origin on the basis of freely expressed willingness to so return”.⁵⁸⁰ In the context of refugees, the focus is undoubtedly on ‘voluntary repatriation’ as opposed to ‘repatriation’. The 1951 Convention does not contain a provision that directly deals with voluntary repatriation. Instead it provides for the cessation of refugee status if the voluntary return amounts to re-establishment in the country of origin. Article 1(C)(4) provides:

This Convention shall cease to apply to any person falling under the terms of section A if:

- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution.

Hathaway expresses the view that this provision provides refugees with significant protection not available under the voluntary repatriation regime.⁵⁸¹ He draws attention to the fact that the ‘voluntariness’ of the return and subsequent re-establishment is an essential element of this solution under Article 1(C)(4). This is so because it is part of the test for cessation of refugee status under that provision and more fundamentally because any involuntary return may amount to a breach of the host state’s duty of *non-refoulement*.⁵⁸²

In the African context, the OAU Refugee Convention explicitly provides for the voluntary return of refugees in Article 5. It stresses the essential voluntary character of repatriation, the importance of country of origin and country of refuge collaboration, of amnesties and non-penalisation, as well as assistance to those returning. Namibia has incorporated Article 5 of the OAU Convention into the Refugees Act of Namibia.⁵⁸³ It provides:

⁵⁷⁹ IOM (note 199 above) 55

⁵⁸⁰ Ibid 69.

⁵⁸¹ Hathaway 2005 (note 33 above) 919.

⁵⁸² Ibid.

⁵⁸³ Section 18(a)(ii) read with Part II of the Schedule to the Refugees Act.

1. *The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his or her will.*
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalised for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organisations, to facilitate their return.
(my emphasis)

Voluntary repatriation depends largely on the political goodwill of the home government in power and thus relates directly to the democratic question, and its attendant issues. Repatriation requires the coherent and sustained involvement of the international community, and certain conditions, including physical, judicial, and material security are essential for any return to be feasible. Indeed, the promotion of self-sufficiency and reducing the need for constant external support are crucial to ensure a lasting return. Generally, returnees need assistance with income-generating activities to help them reintegrate. Consequently its implementation is complex and Namibian refugees who returned to the country after independence can testify to that.⁵⁸⁴ Tapscott and Mulongeni highlight a number of social and economic challenges that repatriated Namibians faced on their return after Namibia obtained independence, such as unemployment, problems with food, housings and education as well as problems with post traumatic stress.⁵⁸⁵

⁵⁸⁴ See generally Tapscott & Mulongeni (note 164 above).

⁵⁸⁵ Ibid 9-21.

Voluntary repatriation is, in particular, also crucial to the current refugee population in the Osire camp of Namibia. After the cessation of active conflict in Angola, the UNHCR signed a Tripartite Agreement with the Governments of Namibia and Angola to voluntarily repatriate Angolan refugees during 2003-2004.⁵⁸⁶ Returning refugees were provided with a return package in Angola under WFP Angola PRRO 10054.1.⁵⁸⁷ The voluntary repatriation program was extended by the UNHCR until December 2005, by which time there was a residual caseload of some 4,666 Angolan refugees and 1,540 non-Angolan asylum seekers/refugees, totalling some 6,200.⁵⁸⁸ According to the UNHCR/WFP JAEM of 2008, the current caseload is unlikely to reduce significantly until parliamentary and presidential elections are held in Angola or some decision concerning the refugee status of Angolans in Namibia is taken by the host government.⁵⁸⁹

The case of Rwanda also portrays the difficulties inherent in voluntary repatriation. For several years, the Rwandan government's official position concerning refugees from that country was that any possible solution for them would not include return from exile.⁵⁹⁰ Although the refugees continued to insist on their right to return to their country of origin, the implications of this policy for them was made particular serious by the fact that no asylum state was willing to embark on a massive exercise of granting citizenship as a way of solving their problem.⁵⁹¹ Therefore the question that remains is in what legal situation are refugees placed if, because of a fundamental political, ethnical or regional restructuring, an effective country or place of return no longer exists? The answer to such an issue is not simple, but international refugee as well as general international law may contribute to the whole area of solutions by elucidating applicable legal principles, rights and obligations. In addition the resettlement to a third country or in the alternative local

⁵⁸⁶ UNHCR 2008 (note 4 above) 9.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

⁵⁹⁰ G Okoth-Obbo 'Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law' in V Gowlland-Debbas (ed) *The problem of refugees in light of contemporary international law issues* (1996) 7-17, 16. The Hague, Netherlands: Kluwer Law International.

⁵⁹¹ *Ibid.*

integration could be answers for those refugees who cannot or will not consider repatriation.

6.2 Resettlement to a third country

Resettlement is about refugees moving from a transit or country of first asylum to another, or third, state.⁵⁹² The IOM Glossary on Migration's delineation of resettlement coincides with that of Goodwin-Gill. It states that resettlement is "[t]he relocation and integration of people (refugees, internally displaced persons, etc.) into another geographical area and environment, usually in a third country".⁵⁹³ It is thus the durable settlement of refugees in a country other than the country of refuge. This term generally covers that part of the process which starts with the selection of the refugees for resettlement and which ends with the placement of refugees in a community in the resettlement country. However, the so-called third country must be willing to give the refugee a durable form of immigration status.⁵⁹⁴

Article 2(5) of the OAU Convention provides that "[w]here a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph". The 1951 Convention does not contain an explicit provision on resettlement to a third country, but it may be inferred from Articles 30(1) and (2) as well as Article 31(2).⁵⁹⁵ Article 31 regulates the issue of "refugees unlawfully in the country of refuge". Sub-section two thereof states that "[t]he Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary

⁵⁹² Goodwin-Gill 1996 (note 32 above) 276.

⁵⁹³ IOM (note 199 above) 55.

⁵⁹⁴ Hathaway 2005 (note 33 above) 963.

⁵⁹⁵ *Ibid.*

facilities to *obtain admission into another country*” (i.e. resettlement). This provision is not sanctioned by the Refugees Act of Namibia. However Article 30 is incorporated into the Act. The crux of Article 30 is the transfer of refugees’ assets to another country where they have been admitted for purposes of resettlement. The Article stipulates that:

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, *to another country where they have been admitted for the purposes of resettlement.*
2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and *which are necessary for their resettlement in another country to which they have been admitted.*
(my emphasis)

Resettlement opportunities have so far been limited by the focus on large-scale repatriation. The reality is that this is an option for very few refugees. Nevertheless, where refugees choose to resettle to a third country, the host state must ensure that such refugees have access to all the necessary facilities to obtain admission into that country. This means that they must be afforded the means and opportunity to pursue their preferred settlement options. Therefore, the refugee must “not be [so] restricted in his movement as not to [be able] to see foreign consulates, the representatives of the UNHCR or voluntary agencies”.⁵⁹⁶ While not ruling out the possibility of detention, this obligation will as a rule exclude confinement in a camp or prison or in remote places, and require the state to permit the refugee to travel and to communicate with the outside world and such bodies as are likely to assist him or her in obtaining admission into a third country.⁵⁹⁷

The above rules is in particular important for the refugees in Namibia, since they are confined to Osire and cannot leave the camp unless in possession of an exit permit. Article 12 of the ICCPR clearly grants any person, including a refugee, the right to decide to leave any country, including a state of asylum. Therefore Namibia has an obligation to allow and even assist those refugee who choose to resettle in a third country, especially if

⁵⁹⁶ Ibid 965.

⁵⁹⁷ Ibid 966.

it is clear that he or she will not be able to return to his or her country of origin. In the alternative, the Namibian government could consider local integration.

6.3 Local integration / naturalisation

At the time of the drafting of the 1951 Convention, there was widespread recognition by States that local integration was a real solution to the plight of refugees.⁵⁹⁸ In fact, historically, local integration was the preferred durable solution and repatriation was actively discouraged, as most of the refugees originated from communist countries. The emphasis on voluntary repatriation as the ‘primary’ solution only arose at the end of the Cold War.⁵⁹⁹ Local integration, or naturalisation as it is sometimes referred to, involves “the granting by a State of its nationality to an alien through a formal act on the application of the individual concerned”.⁶⁰⁰ The point is that refugees in protracted situations find themselves trapped in a state of limbo: they cannot go back to their homeland, in most cases because it is not safe for them to do so; they are unable to settle permanently in their country of first asylum, because the host state does not want them to remain indefinitely on its territory; and they do not have the option of moving on, as no third country has agreed to admit them and to provide them with permanent residence rights.

Article 2(1) of the OAU Convention also addresses itself to local integration, albeit in an indirect manner. It lays down that “[m]ember States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality”. Conversely the 1951 Convention is more explicit and states in Article 34 that “[t]he Contracting 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 to reduce as far as possible the

⁵⁹⁸ Edwards (note 57 above) 301.

⁵⁹⁹ Ibid.

⁶⁰⁰ IOM (note 33 above) 44.

charges and costs of such proceedings”. Although framed in discretionary language, assimilation and naturalisation represent the natural end point of long-term stay in the country of asylum.⁶⁰¹ In addition Article 1(C)(3) states that “[t]his Convention shall cease to apply to any person falling under the terms of section A if ... [h]e has acquired a new nationality, and enjoys the protection of the country of his new nationality”.

Article 34 Convention of the 1951 is endorsed by the Refugees Act of Namibia.⁶⁰² Consequently it may be argued that the Namibian government did foresee and consider local integration as a solution to any future refugee problem. Since 2006, UNHCR has been discussing options to allow the local integration of refugees with the Namibian Government.⁶⁰³ Progress has been slow, but UNHCR maintains that local integration remains the most viable durable solution, especially for long-staying refugees, like those from Angola. The UNHCR/WFP report reveals that the UNHCR has commissioned a study through the Legal Assistance Centre (LAC) to explore legal options and restrictions in relation to local integration of refugees at Osire.⁶⁰⁴ Even though local integration opportunities are very limited for refugees in Namibia, UNHCR is hopeful that efforts to formulate durable solutions for the remaining refugee and asylum seeker caseload will include exploring options for this durable solution.

According to the JAEM the recent re-registration exercise of refugees by the MHAI might be a major step towards local integration; those refugees and asylum seekers possessing documents are able to use them as valid forms of identification in Namibia.⁶⁰⁵ Further to the local integration initiative, a household expenditure and income survey was conducted by the Namibia Economic Policy and Research Unit (NEPRU) in 2007 to capture the skills, education levels, experience, and coping mechanisms of registered refugees and asylum seekers in Namibia. It is trusted that some individuals who are found to be self-

⁶⁰¹ Edwards (note 57 above) 301.

⁶⁰² See Article 18(a)(i) read with Part I of the Schedule to the Act.

⁶⁰³ UNHCR “2010 Sub-Regional Operations Profile - Southern Africa” (2010) < <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48588a7b> > last accessed on 15 December 2009.

⁶⁰⁴ Ibid 55.

⁶⁰⁵ Ibid 6.

reliant might qualify for local integration and be granted an alternative status (other than refugee).

A recent study conducted by NEPRU on the skills or livelihoods and coping mechanisms of refugees and asylum seekers in Osire revealed that many are interested in the prospects for local integration – 82% of the respondents said they wanted to stay in Namibia.⁶⁰⁶ However talks on local integration with the Namibian government is hampered by a number of factors, including a very high unemployment rate for Namibians themselves, an undiversified economy, the need for specific legislation and a formal policy, the required broad social consensus and an encampment policy which limits freedom of movement of refugees and asylum seekers.

Local integration may sometimes be the only option for refugees, because they may have established close family, social, cultural and economic links with their country of asylum; and or are born in countries of asylum and have no ties with their parents' country of origin.⁶⁰⁷ For some Angolan refugees in Namibia this is certainly the case. The integration of refugees certainly has merits and demerits. Successful integration of refugees into an asylum state will mean infusion of skills (i.e. brain-gain); bringing creative ideas, energy and ways of living and contributions to peace, human security and socio-economic development.⁶⁰⁸ Conversely the challenges to local integration may include issues such as hostility against refugees; culture or language barriers; lack of economic diversity and or high unemployment in host community; competing dreams to migrate to the Western World and competition between refugees and locals for scarce resources.⁶⁰⁹

It is therefore apparent that any local integration program or policy needs strong government commitment. In addition it is crucial to involve local governments and

⁶⁰⁶ Ibid 12.

⁶⁰⁷ Y Shimizu 'Understanding Local Integration' (2009). Unpublished paper presented at a Workshop on Local Integration, Windhoek, September 2009.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

traditional communities when developing a local integration policy. The broad participation of other development actors, NGOs and donor agencies is also essential for successful local integration. Moreover, any local integration program should address the concern of local communities and promote peaceful coexistence between refugees and locals. Since the UNHCR is currently involved in discussions with Namibian government on the local integration for long-staying refugees, the aforementioned are certainly matters that should be considered in such a debate.

Considering the above one can deduce that the issue for refugees in Namibia is not necessarily a lack of laws or a lacuna in existing laws, but rather the efficacy in implementing such laws. It is imperative to detach the refugee issue from the question of immigration, and to pursue the issue directly, as a matter of universal respect for human rights. International human right law is an effective device available to strengthen and to enhance existing standards, especially since it is perhaps highly unlikely in the present political climate that State parties would agree to any revision of the 1951 Convention in order to broaden its protective scope. Namibians should not forget that the hard won freedom of this country is indirectly due to the generosity of so many countries throughout this world towards those who went into exile and the respect of the international community for their human rights.

References

i. Books

Altrek, PL & Settle, RB *The Survey Research Handbook* 2 ed (1995). Boston: Irwin/Mc Graw-Hill.

- Amoo, SK *An Introduction to Namibian Law: Materials and Cases* (2008). Windhoek: Macmillan Education Namibia Publishers (Pty) Ltd.
- Bartunek, JM *Insider/outsider Team Research* Qualitative Research Method Series 40 (1996). California, USA: Sage Publication Inc.
- Best, JW & Kahn, JV *Research in Education* 10 ed (2006), 270. Boston: Pearson Education Inc.
- Brownlie, I *Principles of Public International Law* 4 ed (1990). Clarendon Press Oxford.
- Burns, Y & Beukes, M *Administrative Law under the 1996 Constitution* 3 ed (2006). Durban: LexisNexis Butterworths
- Cassese, A *International Law* (2001). New York (USA): Oxford University Press Inc.
- Diescho, J *The Namibian Constitution in Perspective* (1994). Windhoek: Gamsberg Macmillan Publishers (Pty) Ltd.
- Dugard, J *International Law: A South African Perspective* 3 ed (2005). Lansdowne, South Africa: Juta & Co Ltd.
- Goodwin-Gill, G *International Law and the Movement of Persons between States* (1978). Oxford: Clarendon Press.
- Goodwin-Gill, GS *The Refugee in International Law* 3 ed (1996). New York: Oxford University Press.
- Hathaway, JC *The Law of Refugee Status* (1991). Vancouver, Canada: Butterworths.
- Hathaway, JC *The Rights of Refugees under International Law* (2005). Cambridge, United Kingdom: Cambridge University Press.

Jennings, R & Watts, A (eds) *Oppenheim's International Law* 9 ed, Vol. 1 (1992). Great Britain: Longman Group UK Limited.

Kaczorowska, A *Public International Law* (2002). London: Old Bailey Press.

Naldi, G *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (1995). Kenwyn, South Africa: Juta & Co Ltd.

Nettleton, C 'Across the Fence of Fire' (1990) *Refugees* (78) 27.

Peil, M *Social Science Research Methods: A Handbook for Africa* 2 ed (1982). Nairobi, Kenya: East African Educational Publishers Ltd.

Sarantakos, S *Social Research*. (1993). Hampshire, UK: The Macmillan Press Ltd.

Tapscott, C & Mulongeni, B *An Evaluation of the Welfare and Future Prospects of Repatriated Namibians in Northern Namibia* (1990). NISER Research Report No. 3. Windhoek: Namibia Institute for Social and Economic Research, University of Namibia.

ii. Articles

Abuya, EO 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective' (2007) *Int J of Refugee Law* 19 (1) 51-95.

Carpenter, G 'Public Law: Administrative Law' in W J Hosten *et al* (eds.) *Introduction to South African Law and Legal Theory* 2nd ed (1995) 1044-1081. Durban: Butterworths.

Chaulia, S 'Angola: Empire of the Humanitarians' (July 2006) *Journal of Humanitarian Assistance* 1-36.

- Clark, T 'Human Rights and Expulsion: Giving Content to the Concept of Asylum' (1992) *Int. J. of Refugee Law*, 4(2), 189-204.
- Cunliffe, SA & Pugh, M 'UNHCR as Leader in Humanitarian Assistance: Triumph of Politics over Law' in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 175-199. Cambridge, United Kingdom: Cambridge University Press.
- Edwards, A 'Human rights, Refugees, and the Right 'to Enjoy' Asylum' (2005) *Int. J. of Refugee Law* 17(2) 293–330.
- Erasmus, G 'The Namibian Constitution and the Application of International Law' in D Van Wyk et al. (eds) *Namibian Constitutional and International Issues* (1990) 81-110. University of Pretoria: VerLoren van Themaat Centre for Public Law Studies.
- Fong, C 'Some Legal Aspects of the Search for Admission into other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats' (1981) *British Year Book Int. L* (52) 53.
- Fullerton, M 'The International and National Protection of Refugees' in H Hannun (ed) *Guide to International Human Rights Practice* 2 ed (1992) 211-227. Philadelphia, USA: University of Pennsylvania Press.
- Goldman, R & Martin, S 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law' (1983) *HRQ* (5) 302.
- Goodwin-Gill, GS 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalisation, Detention and Protection' in E Feller, V Türk & F Nicholson (eds) *Refugee protection in international law – UNHCR's global consultations on international protection* (2003) 185-258. Cambridge, UK: Cambridge University Press.

- Hailbronner, K ‘*Non-refoulement* and “Humanitarian” Refugees: Customary International Law or Wishful Thinking’ (1985-1986) *Virginia J of Int L* (26) 857.
- Hinz, MO & Ruppel, OC “Legal Protection of Biodiversity in Namibia” in M O Hinz & O C Ruppel (Eds) *Biodiversity and the Ancestors: Challenges to Customary and Environmental Law* (2008) 3-62.
- Hyndman, P ‘Refugees under International Law with a Reference to the Concept of Asylum’ (1986) *Australian L J* (60) 148.
- Inzunza, R ‘The United States Refugee Act 1980: Ten Years After – Still the Way to Go’ (1990) *Int J of Refugee Law* 2(3) 413-427.
- Jackson, I *The Refugee Concept in Group Situations* (1999). The Hague: Martinus Nijhoff Publishers.
- Katz, A ‘Refugees’ in J Dugard *International Law: A South African Perspective* 3 ed (2005) 341-353. Lansdowne, South Africa: Juta & Co Ltd.
- Klinck, JA ‘Recognizing Socio-Economic Refugees in South Africa: a Principled and Rights-Based Approach to Section 3(b) of the Refugees Act’ (2009) *Int J of Refugee L* (21) 653-699.
- Lauterpacht, E & Bethlehem, D ‘The Scope and Content of the Principle of *Non-refoulement*: Opinion’. In E Feller, V Türk & F Nicholson (eds) *Refugee Protection in International Law – UNHCR’s global consultations on international protection* (2003) pp. 87-179. Cambridge, UK: Cambridge University Press.
- Mendell, TD ‘Refugee Law and Practice in Tanzania’ (1997) *Int J of Refugee Law* (9) 54.
- Mooney, ED ‘Towards a Protection Regime for Internally Displaced Persons’ in E Newman & J van Selm (eds.) *Refugees and Forced Displacement: International*

Security, Human vulnerability, and the State (2003) pp. 159-180. Tokyo, Japan: United Nations University Press.

Nakuta, J ‘The Justifiability of Social, Economic and Cultural Rights in Namibia and the Role of Non-Governmental Organisations’ in N Horn & A Bösl (eds) *Human Rights and the Rule of Law in Namibia* (2008) 89-100. Windhoek: Macmillan Namibia.

Okoth-Obbo, G ‘Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugees and International law’ in V Gowlland-Debbas (ed) *The problem of refugees in light of contemporary international law issues* (1996) 7-17 The Hague, Netherlands: Kluwer Law International..

Okoth-Obbo, G ‘Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing Specific Aspects of Refugee problems in Africa’ (2001) *Refugee Survey Q* (20) 90.

Oloka-Onyango, J ‘Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years after Geneva’ (1991) *Int J of Refugee Law* (3) 453-460.

Parker, C “The Administrative Justice Provision of the Constitution of the Republic of Namibia: A Constitutional Protection of Judicial Review and Tribunal Adjudication under Administrative Law” (1991) *CILSA* (24) 88.

Peach, L ‘An Introduction to Ethical Theory’ in RL Penslar (ed) *Research Ethics: Cases and Materials* (1995) 13-26. Bloomington and Indianapolis, USA: Indiana University Press.

Pirjola, J ‘Shadows in Paradise – Exploring *Non-refoulement* as an Open Concept’ (2008) *Int J of Refugee Law*, 19(4) 639-660.

Plender, R ‘Admission of Refugees: Draft Convention on Territorial Asylum (1977) *San Diego LR* (15) 45.

- Rankin, MB 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition thirty years on' (2005) *SAJHR* 21(3) 406-435.
- Rutinwa, B 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) *Refugee Survey Quarterly* (21) 12-41.
- Rwelamira, MR 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugees Problem in Africa' (1989) *Int J of Refugee Law* (1) 559.
- Starke, J *Introduction to International Law*, 10 ed (1989). London, Butterworth & Co (Publishers) Ltd.
- Steinbock, DJ 'The Refugee Definition as Law: Issues of Interpretation' in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 13-36. Cambridge, United Kingdom: Cambridge University Press.
- Szasz, P 'Succession to Treaties under the Namibian Constitution' in D Van Wyk et al (eds) *Namibia Constitutional and International Issues* (1991) 65-80. VerLoren van Themaat Centre for Public Law Studies, University of Pretoria.
- Sztucki, J 'Who is a Refugee? The Convention Definition: Universal or Obsolete?' in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 55-80. Cambridge, United Kingdom: Cambridge University Press.
- Thomas-Greenfield, L 'U.S. Refugee Admissions History and Policy' (2001) *Refugee Survey Quarterly* (20) 165-169.
- Tuitt, P 'Rethinking the Refugee Concept' in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 106-118. Cambridge, United Kingdom: Cambridge University Press.

- Türk, V ‘The role of UNHCR in the Development of International refugee law’ in F Nicholson & P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 153-174. Cambridge, United Kingdom: Cambridge University Press.
- Türk, V & Nicholson, F ‘Refugee Protection in International Law: An Overall Perspective’ in E Feller et al (eds) *Refugee Protection in International Law – UNHCR’s Global Consultations on International protection* (2003) 3-45. Cambridge, UK: Cambridge University Press.
- Van der Walt, AJ “The Effect of Environmental Conservation Measures on the Concept of Ownership” (1987) *SALJ* (104) 469-479.
- van Selm, J ‘Refugee Protection Policies and Security Issues’ in E Newman & J van Selm (eds) *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (2003) 66-92. Tokyo, Japan: United Nations University Press.
- Warner, D ‘We are all refugees’ (1992). *Int J of Refugee Law* 4(3) 365-372.

iii. Electronic and print media

- Adaptation to Climate Change Act ‘UN Warns of New Refugee Crisis Fuelled by Climate Change’ (June 2008) <<http://act-adapt.org/?p=29>> last accessed on 20 April 2009
- Amupadhi, T ‘Refugees in Hiding Police Thwart Demo at Osire’ in *The Namibian* (22 June 2004), <[http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=8204&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=8204&no_cache=1)>, last accessed on 18 August 2009.
- Blain, H & Hubbard, D *Namlex Index to Laws – 2004 Update* (2004). Windhoek: Legal Assistance Centre (LAC), <www.lac.org.na/laws/pdf/namlex2004.pdf>, last accessed on February 27, 2009.

- Diallo, K & Chabaké, TA (eds) *Statistical Yearbook 2007: Trends in Displacement, Protection and Solution* (2008, December) 9. Geneva, Switzerland: United Nations High Commissioner for Refugees (UNHCR) <<http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html>> last accessed on 10 March 2009.
- Goodwin-Gill, GS *Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugee* (2008), <http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf> last accessed on 15 April 2009.
- Guardian News & Media ‘Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN’ (June 2008) <<http://www.buzzle.com/articles/202000.html>> last accessed on 20 April 2009.
- Inambao C ‘Refugees can take part in politics’ *The Namibian* (16 June 2000) 1-2.
- ‘Interpretation of the Convention Refugee Definition in the Case Law’ Legal Services: Immigration and Refugee Board Canada (2007), <http://www.irb.gc.ca/eng/brdcom/references/legjur/rpdspr/def/documents/crdef05_e.pdf> last accessed on 30 November 2009.
- Kälin, W *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond* (2001) 1, <<http://www.unhcr.org/publ/PUBL/419dc0b84>> last accessed on 15 February 2009.
- Links, F ‘We Want to Live with Dignity’ *The Namibian* (June 20, 2008), <<http://www.namibian.com.na/news/full-story/archive/2008/june/article/we-want-to-live-with-dignity/>> last accessed on 15 April 2009.
- Oucho, JO *Migration in Southern Africa: Migration Management Initiatives for SADC member states* (December 2007), ISS Paper 157, <www.iss.co.za/index.php?link_id=4059&slink_id=5447&link_tyoe=12&slink_t...> last accessed on 25 January 2010.

- Perruchoud, R (ed) *International Migration Law: Glossary on Migration* (2004). Geneva, Switzerland: International Organization for Migration [IOM], <<http://www.iom.int>> last accessed on 18 February 2009.
- Redden, J *Refugee Registration in Namibia Advances the Search for Solutions* (2007, March 9), <<http://www.unhcr.org/news/NEWS/45f15af64.html>, last accessed on 5 April 2009.
- ‘Refugee Status of Angolans to Change’ *The Namibian* (March 2, 2009), <<http://www.namibian.com.na/news/full-story/archive/2009/march/article/refugee-status-of-angolans-to-change/>> last accessed on 17 April 2009.
- Republic of Namibia, Ministry of Finance ‘Medium Term Expenditure Framework for 2008/2009 to 2010/2011’ (2009), <<http://www.mof.gov.na/Budget%20Documents/2008-09/MTEF%20200910-201112.pdf>> last accessed on 20 June 2009.
- United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992), <<http://www.unhcr.org/refworld/docid/3ae6b3314.html>> last accessed on 22 February 2009.
- UNHCR *The Personal Security of Refugees* (1993), <<http://www.unhcr.org/refworld/docid/3ae68cd10.html>>, last accessed on 24 February 2009.
- United Nations High Commissioner for Refugees & United Nations World Food Programme. *UNHCR/WFP joint assessment and evaluation mission: Osire refugee camp, Namibia* (2008, February), <<http://documents.wfp.org/stellent/groups/public/documents/ena/wfp185643.pdf>> last accessed on 21 March 2009.

UNHCR *Sub-regional Operations Profile – Southern Africa* (2009) <<http://www.unhcr.org/cgi-bin/tehis/vtx/page?page=49e48588a7b>> last accessed on 25 November 2009.

UNHCR *2010 Sub-Regional Operations Profile - Southern Africa* (2010) <<http://www.unhcr.org/cgi-bin/tehis/vtx/page?page=49e48588a7b>> last accessed on 15 December 2009.

United States Committee for Refugees and Immigrants (USCRI) ‘World Refugee Survey: Country Update 2002’ (2002) <<http://www.refugees.org/countryreports.aspx?id=1708>>, last accessed on 10 April 2009.

USCRI World Refugee Survey: Country Update 2007 (2007) <<http://www.refugees.org/countryreports.aspx?id=2010>>, last accessed on 10 April 2009.

iv. Other sources

Françoise, N *The Social and Economic Conditions of Refugees in Osire Camp* (2001). B.A. Dissertation, University of Namibia.

Ruppel, OC ‘Teaching and Research Environmental Law in Africa and Namibia’ (2008). Unpublished paper presented at the *International Colloquium on the Teaching of Law in Africa*, Windhoek, 27 March 2008.

Shimizu, Y ‘Understanding Local Integration’ (2009). Unpublished paper presented at a Workshop on Local Integration, Windhoek, September 2009.

Tjombe, N ‘Refugees have Rights in Namibia’ *Legal Assistance Centre (LAC) News*, Issue 2 (August 2000).

UNHCR *Human Rights and Refugee Protection*, Self Study Module 5, Vol I (December 2006). Geneva: UNHCR, Division of International Protection Services.

UNHCR *Human Rights and Refugee Protection*, Self Study Module 5, Vol II (December 2006). Geneva: UNHCR, Division of International Protection Services.

v. International instruments

Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) 1001 UNTS 45.

Convention Relating to the Status of Refugees. (1951) UNTS 189.

International Covenant on Civil and Political Rights (1966) Resolution 2200 A (XXI) of 16 December 1966.

International Covenant on Economic, Social and Cultural Rights (1966) Resolution 2200 A (XXI) of 16 December 1966.

Protocol relating to the Status of Refugees (1967) UNTS 606.

Universal Declaration of Human Rights (1948) Resolution 217 A (III) OF 10 December 1948.

vi. Statutes

Agricultural (Commercial) Land Reform Act, No 6 of 1995

Immigration Control Act 7 of 1993.

Namibian Citizenship Act 14 of 1990

Namibia Refugees (Recognition and Control) Act 2 of 1999.

Republic of Namibia *The Constitution of the Republic of Namibia (Revised)* (2007). Windhoek: Ministry of Information and Broadcasting.

vii. Table of cases

a) Namibia and other Southern Africa jurisdictions

Antonio v Minister of Home Affairs (LAC)

Bp Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (W)

Djama v Government of the Republic of Namibia 1992 NR 37 (HC)

Deo Gahizi v Minister of Home Affairs (LAC)

Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmS)

Gien v Gien 1979 (2) SA 1113 (T)

Government of the Republic Namibia v Sikunda 2002 NR 203 (SC)

Government of the Republic of Namibia and Others v Mwilima and all Other Accused in the Caprivi Treason Trial 2002 NR 235 (SC)

Immigration Control Board v Frank and Another 2001 NR (SC)

Inter-Science Research and Development Services (Pty) Ltd v Republica Poupular de Moçambique 1980 (2) SA 111 (T)

Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia 1980 (2) SA 709 (E)

Kauesa v Minister of Home Affairs and Others 1996 (4) SA 965

Kauesa v Minister of Home Affairs and Others 1994 NR 102 (HC).

Khoza et al v Minister of Social Development (2004) 6 BCRR 569

King v Dykes 1971 (3) SA 540 (RA)

Liebenberg v Brakpan Liquor Licensing Board 1944 WLD 52

Metropolitan Properties CC (FGG) Ltd v Lannon 1969 1 QB 577 at 599

Meyer v Law Society Transvaal 1978 (2) SA 209 (T) at 212H

Minster of Defence, Namibia v Mwandighi 1992 (2) SA 355

Naidenov v Minister of Home Affairs 1995 (7) BCLR 891 (T)

Nduli v The Minster of Justice 1978 (1) SA 893 (A)

Parekh v Minister of Home Affairs 1996 (2) SA 70 (D)

Port Elizabeth Municipality v People's Dialogue on Land and Shelter 2000 (2) SA 1074 (SEC)

Rose v Johannesburg Local Road Transportation Board 1947 (4) SA 272 (A)

S v Luanda and Another 1993 NR 287 (HC)

S v Tcoeib 1993 (1) SACR 274 (Nm) 287

South Atlantic Islands Development Corporation Ltd v Buchan 1971 (1) SA 234 (C)

West-air Aviation (Pty) Ltd and Others v Namibia Airports Company 2001 NR 256

Xu v Minister van Binnelandse Sake 1995 (1) SA 185 (T)

b) International and African Tribunals

Amnesty International v Zambia plus Angola Communication 212/98, African Commission on Human and People's Rights (ACHPR)

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) *Notwithstanding Security Council Resolution 276* (1970) ICJ Advisory Opinion of 21 June 1971

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Republic of Germany v The Netherlands) 41 ILR 29

Organisation Mondiale Contre la Torture et al v Rwanda Communication 27/89 ACHPR

Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democratres, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme v Rwanda Communications 27/89, 46/91 and 99/93 ACHPR

Recontre Africaine pour la Defense des Droits de l'Homme v Zamibia Communication 71/92 ACHPR

List of figures

Figure 1 Refugee status determination in Namibia: The legislative structure

- Figure 2 Map of Namibia: Location of Osire and UNHCR Offices in Namibia
- Figure 3 The percentage of camp population by origin in 2008
- Figures 4 Refugees and asylum seekers at Osire demonstrated on June 20, 2008 (World Refugees Day)
- Figure 5 Members of Cry for Refugee Women demonstrate as UNHCR delegate from Geneva visits on September 1, 2009
- Figure 6 Illustration of refugee warehousing at Osire by Y. Sacabi