

**NON-REFOULEMENT VERSUS MIGRATION CONTROL: A STUDY
OF THE REFUGEE PHENOMENON IN ZAMBIA**

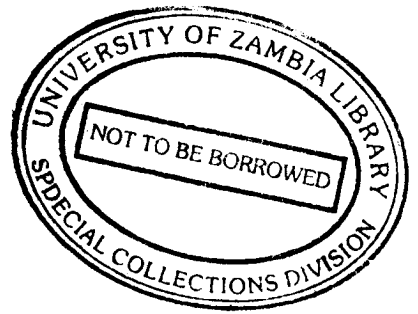
BY

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THE UNIVERSITY OF ZAMBIA
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DEDICATION

This work is dedicated to my parents, Emmanuel and Grace Chenda whose love, wisdom and guidance I will always cherish. It is also dedicated to the millions of bona fide refugees worldwide who are victims of circumstance.

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PREFACE

Governments normally guarantee the basic human rights of their citizens but when civilians become refugees, this safety net disappears. Virtually every country in the world has been affected by the refugee crisis. States directly involved in war produced millions of uprooted people in the last century alone. Other countries untouched by chaos themselves provided aid and shelter to the displaced. The roles have sometimes reversed...in many cases, today's neighbour is tomorrow's refugee.¹

Even though refugees are but a segment of the total migrant population, the measures taken by states to manage migration and control unauthorised movements often have disproportionate effects on them.²

Whereas each state has the right to control those entering its territory, such right is to be exercised in accordance not only with the applicable national law but with the 1951 Geneva Convention Relating to the Status of Refugees, its 1967 Optional Protocol and international law in general.³

This paper examines the refugee phenomenon within the Zambian context with a view to ascertain whether there is conformance to the foregoing standards.

¹ UNHCR (2005) Helping Refugees: An Introduction to UNHCR. p3

² Journal of Humanitarian Assistance.(2001) Working Paper 41.p2

³ UNHCR Global Report 2000.p47

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LIST OF ABBREVIATIONS

Abbreviation.	Explanation.
AU-----	African Union
Cap 120 -----	The Refugee (Control) Act of Zambia
Cap 123-----	The Immigration and Deportation Act of Zambia
CAT-----	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DRC-----	Democratic Republic of Congo
ExCom-----	Executive Committee of the UNHCR
JRS-----	Jesuit Refugee Services
IDPs-----	Internally Displaced Persons
NEC-----	National Eligibility Committee
OAU-----	Organisation of African Unity
RSD-----	Refugee Status Determination Procedure
UDHR-----	Universal Declaration of Human Rights
UNHCR-----	United Nations High Commissioner for Refugees
WFP-----	World Food Programme
YMCA-----	Young Mens' Christian Association

CHAPTER ONE

1.1 INTRODUCTION

Migration is a multidimensional concept. It intersects with issues of demography, human rights, environment and foreign policy amongst others. One of its facets involves a balancing act of reconciling the interests of states such as security concerns as safeguarded through immigration laws on one hand with their obligations to implement international standards like those relating to the protection of refugees.⁴

Refugees are not migrants in the lay sense of the word. This is because their movements are precipitated by certain factors ranging from human rights violations to persecutions and violent conflicts based on political, ethnic and or religious considerations in their countries of origin. Thus they are categorised as forced migrants alongside Internally Displaced Persons (IDPs) as distinct from voluntary migrants who include economic migrants.

1.2 WHO IS A REFUGEE?

A question may then be posed as to whom a refugee is. As the term suggests, a refugee is in simple terms, a person who seeks refuge in another country because their life or freedom is threatened in their home country.

⁴ UNHCR (2000) Discussion Paper: Reconciling Migration Control and Refugee Protection in the European Union.p1

Anyhow the universally recognized definition of the term in mention is contained in the 1951 United Nations Convention Relating to the Status of Refugees, hereinafter referred to as the 1951 UN Refugee Convention;⁵

*“...a refugee is a person who is outside his or her country of origin , has a well founded fear of persecution because of his or her race, religion, nationality, membership of a particular social group or political opinion and is unable or unwilling to avail himself or herself the protection of that country or to return there for fear of persecution.”*⁶

A person is a refugee within the meaning of the 1951 UN Refugee Convention as soon as he fulfills the criteria contained in the definition above. 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.⁷

The definitional scope of the term refugee has been broadened by some regional legal instruments such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, hereinafter termed as the OAU Refugee Convention. It was generated within the auspices of the then Organisation of African Unity, now the African Union.

⁵ UNHCR (2001). _Protecting Refugees: A Field Guide for NGOs.p17

⁶ Art 1 A (2)

⁷ UNHCR (1992) Handbook on Procedure and Criteria for Determining Refugee Status.p.9

It repeats the 1951 UN Refugee Convention's definition but also caters for persons compelled to leave their countries "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of their countries of origin or nationality."⁸

The implication is that in Africa, persons fleeing from civil disturbances, widespread violence, ethnic strife and civil wars qualify as refugees regardless of whether they have a well founded fear of prosecution or not.⁹

States have an international law obligation not to 'refouler' or return bonafide refugees to a territory from which they have fled. This is known as non-refoulement and it is a core principle of refugee law as will be discussed in the chapters to follow.

It has even been expressed in certain quarters that by virtue of constant and consistent state practice, the principle of non-refoulement is now part of customary international law and is therefore binding on all states whether or not they are parties to the 1951 UN Refugee Convention or similar international instruments.¹⁰

1.3 HISTORICAL BACKGROUND TO THE PHENOMENON

The refugee phenomenon has existed since time immemorial. One may cite the 16th century conflicts during the Protestant Reformation in France where King Louis XIV 's

⁸ supra. note 5 at 16

⁹ ibid.p.17

¹⁰ ibid.p.19

counter measures forced about two hundred thousand Huguenots to flee to the non-Catholic parts of Europe.

They carried with them the word 'refugee' into the English language. The 1917 Communist Revolution in Russia and subsequent civil war saw about 1.5 million aristocrats leaving the territory.¹¹

In Asia, the Korean War (1950-53) and the Chinese takeover of Tibet resulted in the forced external displacement of more than one million people.¹²

The Americas are no exception as was exemplified by the Cuban Revolution led by Fidel Castro which led to a large exodus of its nationals between 1960 and 1979.¹³ However the refugee phenomenon took world centre stage during and after the two world wars (1914-1918) and (1939-1945).

The League of Nations established a commission for refugees succeeded by the United Nations Relief and Rehabilitation Administration then the International Refugee Organisation that was later replaced by the office of the United Nations High Commissioner for Refugees (UNHCR) in 1950.

The UNHCR is an agency mandated to lead and co-ordinate international action to protect refugees and resolve their problems worldwide.¹⁴

¹¹ en.wikipedia.org/wiki/refugee_law.p.9

¹² *ibid.*p.11

¹³ *ibid.*p.16

¹⁴ *supra*.note.1 at 2

As for Africa and Zambia in particular, the refugee phenomenon became a source of serious concern towards the end of the 1960s and 1970s with the onset of the influx of Angolan nationals into the territory. The movements continued for almost thirty years as the conflict that began as a struggle for independence later degenerated into a civil war involving an internal struggle for economic and political dominance.¹⁵

In the 1990s a second but smaller group of refugees began to enter Zambia from present day Democratic Republic of Congo (then Zaire). This was in flight from the Katanga-Kasai conflict.¹⁶ Furthermore, in 1996 the civil war in the eastern part of the DRC affected not only its nationals but also the refugees from Rwanda and Burundi who had sought refuge there upon fleeing from the genocide crises in their home countries. Consequently there was a massive influx of Congolese, Rwandan and Burundese nationals into Zambia.¹⁷

The Somalians are another group of refugees who have been entering Zambia in a small but continuous flow following the political decomposition affecting their country. In fact, statistics show that during the first half of 2002 the refugee population in Zambia exceeded 300,000 with the largest part being Angolan.

1.4 PRIMARY FOCUS

From the foregoing it is evident that the incidence of the refugee phenomenon is spontaneous in nature and can occur and recur at anytime for Zambia or any other state.

¹⁵ Chanterie, F (2000). The Future for Refugees. Jubilee 2000 Publications.p.1

¹⁶ ibid

¹⁷ ibid.p2

Thus it came to be that in 1969 Zambia became a signatory to the 1951 Geneva Convention and its 1967 Protocol as well as to the OAU Convention Governing Specific Aspects of Refugee Problems in Africa. This was followed by a municipal law enactment in the form of the Refugee (Control) Act of 1970.¹⁸

Hence it is without a doubt that Zambia is by international law obligated to adhere to certain standards of refugee protection. However, like all sovereign states, Zambia has a legitimate right to maintain national security, which includes issues of migration control. The relevant municipal law in this case is the Immigration and Deportation Act.¹⁹

Mention must be made that the Immigration and Deportation Act which preceded the Refugee (Control) Act by five years does not define the term 'refugee.' Similarly the latter Act does not make reference to it, the immigration department or its officers. The two Acts are seemingly parallel yet the work of the immigration officers and that of authorities concerned with refugee issues is seemingly intertwined in that they both deal with foreign entrants into Zambia.

In light of the foregoing, the crux of this paper as a study of the refugee phenomenon lies in expounding the principle of non-refoulement within the Zambian legal framework. The focus will be on the interface between the concepts of migration and asylum as the title suggests "Non-Refoulement Versus Migration Control" A Study of the Refugee Phenomenon in Zambia.

¹⁸ Cap 120 of the Laws of Zambia

¹⁹ Cap 123 of the Laws of Zambia

1.5 CONCLUSION

The phenomenon being discussed falls within the ambit of the sphere of law known as Refugee Law, which deals with the rights and protection of refugees. It is related to though distinct from Human Rights Law and Humanitarian Law, which respectively deal with human rights in general and the conduct of war in particular.²⁰

The legal framework is three tier with the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol at international level. It is the basic and universal legal instrument on the subject.

At regional level there are various legal instruments such as the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration of 1984 for the Americas.

At national level, respective states have municipal enactments of which the Zambian Refugee (Control) Act is but an example. The international agency mandated to specifically address issues pertaining to refugees is the office of the United Nations Commissioner for Refugees (UNHCR).

Refugees are but a segment of the international migrant population, the nature of which is a non-homogenous mixed composite making it difficult to distinguish between the various groups on the move.

²⁰ en.wikipedia.org/wiki/refugee_law.p.24

In fact asylum seekers may sometimes use the same mode of travel as voluntary migrants at times falling prey to criminal human traffickers and smugglers. At the same time persons who do not qualify for international protection may resort to asylum channels in the hope of gaining temporary or even permanent stay abroad.

Consequently, the line between voluntary migrant and bonafide asylum seeker blurs in the public mind, as does the distinction between migration control and refugee protection in the policies of some states.²¹

However, whereas each state has the right to control those entering its territory, this right is to be exercised in accordance not only with the applicable national law but with the principles of the 1951 UN Refugee Convention and other international law standards.

²¹ Refugee Protection and Migration Control: Perspectives from UNHCR and IOM.p2

CHAPTER TWO: THE PRINCIPLE OF NON-REFOULEMENT

The root causes of refugee displacements are inextricably linked to conflict, persecution and the denial and gross violation of human rights.²² Human rights are claims that every individual has upon his society. Human beings are entitled to enjoyment of their human rights regardless of considerations based on geographical location, gender, race, ethnicity, religion, political opinion, social status and or nationality.²³ The rights of refugees are governed inter alia by the right to non-refoulement and to seek and enjoy asylum from persecution. This chapter is concerned with an exposition of the principle of non-refoulement including its history and embodiment at international, regional and municipal level.

Due to the fact that refugee movements are by nature unplanned sudden and erratic, they should not, according to the principles of refugee law, be penalised on account of their illegal or undocumented cross border entry.²⁴

It is in fact a cardinal principle of refugee law that states are forbidden from forcibly returning persons to a country or territory where they would be at risk of serious human rights violations. This is known as the principle of non-refoulement²⁵ and it will be examined in detail later on.

²² Bayefsky, A.F & J. Fitzpatrick (eds) (1998) Human Rights and Forced Displacement.p27

²³ Chanda,A.W (1998) Human Rights in Zambia's 3rd Republic: An Overview. Legality Journal.UNZA Press: Lusaka.p.59

²⁴ UNHCR (1996) Introduction to International Protection: Emergency Management Training Programme and art 31(1) 1951 Convention Relating to the Status of Refugees

²⁵ Amnesty International (1997) Failure to Protect Asylum Seekers. EUR/46/03/97

This may be illustrated by way of a hypothetical example. The principle basically prevents the government of State A from returning refugees from State B to State B where there is a valid concern that they could be in danger should they be returned.

2.1 HISTORICAL BACKGROUND TO THE PRINCIPLE

Prior to the 1930s, the principle did not exist at international law.²⁶ In order to understand the principle it would be useful to look at the circumstances and reasons surrounding its development. During the first half of this century the idea that it was fundamentally wrong to return refugees to places where they would clearly be in danger was mentioned occasionally by states in agreements or statutes, or was evident in the practice of some states. Although by 1905 it had been enshrined in a UK statute that refugees with a fear of persecution for political or religious reasons should be allowed into the country, it was not until later that the idea of non-refoulement of such people became widely accepted.²⁷ It was first expressed at international law in the 1933 Convention Relating to the Status of Refugees, which however, was ratified by very few states.²⁸

However, the massive human external displacement caused by the atrocities that characterised World War two provided an impetus for a re-examination of the rules relating to refugees. Prior to this time, states had been very aware of the extent to which

²⁶ Robert L Newmark(1993) Non-Refoulement run afoul : The Questionable Legality of Extraterritorial Repatriation Programs.71 Wash U.L.Q.833,838

²⁷ G.S, Goodwin-Gill (1996) The Refugee in International Law.2nd edit.Claredon Press: Oxford.p.118

²⁸ ibid.p118

consent to rules especially international rules, relating to refugees, would impact on their sovereign right to determine who was allowed to reside within their boundaries.²⁹

Although many appeared to have accepted that there was a moral duty to accept refugees and not return them, this was done largely on an ad hoc basis. However, in the first few years of its creation, the United Nations Organisation showed its concern with the refugee issue. In 1946 the General Assembly passed a resolution stating that refugees should not be returned when they had 'valid objections'.³⁰ This concern, prompted largely by the huge number of refugees in Europe following the war, eventually led to the drafting of the United Nations Convention Relating to the Status of Refugees, which was signed in 1951.³¹ An Optional Protocol followed in 1967 to remove the geographical and time limitations of the said Convention so that it could apply to non-European states and to matters arising after 1951.³²

The said Refugee Convention³³ enshrines the principle of non-refoulement by stipulating that states should not return a refugee to a country in which he or she would be in danger of persecution based on one of five grounds namely race, religion, nationality, political opinion, or membership of a particular social group.

²⁹ supra. note 26 at 833, 838

³⁰ supra. note 27.at 119

³¹ ibid.

³² UNHCR (2006) The 1951 Refugee Convention: Q n A. Media Relations & Public Information Service: Geneva.p.6

³³ Art 33 United Nations Convention Relating to the Status of Refugees (1951)

2.2 BASIC PREMISE

It has already been stated that non-refoulement is a core principle of the refugee protection regime. The principle prohibits rejection at the frontier, and countries must keep their borders open, and afford refugees protection. This protection need not be permanent or even long term; refugee protection lasts only as long as the human rights situation in the refugees' country of origin necessitates.

In a situation where a large number of refugees enter a state in a short period of time, that state is clearly obliged to offer protection at least pending a durable solution of the refugees' plight. Efforts to seek durable solutions are to be made by the international community, the three traditional durable solutions being voluntary repatriation, integration into the host country, and resettlement in a third country.³⁴

It has been expressed in certain quarters that in situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection. In all cases the fundamental principle of non-refoulement, including non-rejection at the frontier, must be scrupulously observed.³⁵

It must be alluded to that the principle of non-refoulement is actually an element of the wider concept of asylum. Asylum is, in essence, a grant of protection by a state to

³⁴ Amnesty International (1999) The Protection of Kosovo Albanian Refugees. EUR 65/03/99

³⁵ Conclusion 22 of the UNHCR Executive Committee (Excom). While Excom Conclusions are not binding as such, they represent an international consensus and carry persuasive authority.

persons from another state that have fled from persecution or serious danger. Other elements include permission to remain in the asylum country and humane standards of treatment.³⁶

The right to asylum, which is a fundamental human right, is enshrined in the Universal Declaration of Human Rights (UDHR) as “everyone has the right to seek and enjoy in other countries asylum from persecution.”³⁷

However it must be highlighted that the concept of asylum is rather controversial as there is no international instrument that obliges states to grant asylum while the UDHR is but a common standard of achievement with moral force. Asylum is not even expressed in the 1951 Convention Relating to the Status of Refugees nor in its 1967 Protocol. Hence it has been expressed in certain quarters that whereas an individual has the right to seek asylum, states have a right to exercise discretion on whether to grant it or not.³⁸

An asylum-seeker is an individual who has entered a country with or without the legally required documentation, who seeks to obtain refugee status, and whose status has not yet been determined. The term is considered by UNHCR to include individuals whose application for refugee status has been rejected, where the rejection is on "purely formal grounds" (for example, when the receiving government decides that the individual can seek asylum in a safe third country); or on substantive grounds that UNHCR would not consider sufficient; or following a process for determination of refugee status that is not

³⁶ *supra*. note 5 at 126

³⁷ art. 14 UDHR 1948

³⁸ Melander, G (1997) *Refugees with No Country of Asylum: Strategies for Third Country Resettlement*. p39
Martinus Nijhoff Publishers: London

procedurally fair. Asylum-seekers should be considered to have the same rights as refugees, until such time as it is fairly determined that they do not have refugee status.³⁹

Stemming from the principle of non-refoulement is the obligation for states to establish adequate procedures to identify those in need of protection, and to ensure access to these procedures. Amnesty International⁴⁰ asserts that it is a fundamental principle of refugee law that pending final determination of their claim to refugee status, individuals seeking asylum must be protected from refoulement. A person who has been granted asylum is formally recognised as a refugee.

However it must be expressed that the observance of the principle of non-refoulement is by no means a straightforward undertaking. This is because whereas on the one hand there is the humanitarian argument that all states should accept refugees there are also practical problems that the host nation has to address. Sometimes there are internal problems of an economic nature such as rampant unemployment and poverty. Hence the cost of processing and caring for refugees may sometimes be perceived as an unwelcome burden. Security risks may also be a source of concern especially when refugee inflows have armed militia in their midst.

It comes as no surprise therefore that sentiments have been echoed in certain quarters that refugees are now seen as threatening a host country's security by increasing demands on its scarce resources or threatening the region by their sheer presence.⁴¹

³⁹ UNHCR, Guidelines on the Detention of Asylum Seekers, paragraph 11.

⁴⁰ *supra*. note 25 at 5

⁴¹ Chimni, B.S. (1998) *The Global Refugee Problem in the 21st Century & the Emerging Security Paradigm* in A. Anghie & G. Sturgess. (eds) The Hague: Cluwer Law International

From the foregoing it is evident that adherence to the principle of non-refoulement involves, to a large extent, the balancing of the host state's domestic and foreign policy interests.

2.3 NON-REFOULEMENT AT UNIVERSAL LEVEL

2.3.1 LEGAL FRAMEWORK

In the previous chapter it was stated that the legal framework of the refugee protection regime is three tier that is to say it exists at international, regional and municipal level. Mention was also made that the 1951 UN Convention Relating to the Status of Refugees is the basic and universal legal instrument on the subject. As stated earlier the principle of non-refoulement is enshrined in article 33 of the Convention as follows:

“ No Contracting State shall expel or return (‘refouler’) 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.”

Hence if there is a likelihood of persecution based on one or more of the five mentioned grounds then the principle of non-refoulement applies.

i) EXCLUSIONS

It is important to mention that there are a number of exclusions pertaining to the principle. This is because the Convention in mention has provisions⁴² under which persons otherwise qualifying as refugees are precluded from acquiring refugee status and consequently from enjoying the associated rights including that of non-refoulement.

For instance persons who have committed war crimes⁴³ (violations of the customs of war) such as murdering hostages and or prisoners of war are considered as not deserving of international protection and as such have no claim not to be refouled. Similarly, persons guilty of crimes against humanity such as genocide and extermination are also excluded. Persons who committed a serious non-political crime prior to their entry or attempt to enter the would-be host country, are also precluded from recognition as refugees.⁴⁴ One such crime is murder.

The 1951 UN Refugee Convention also has a broad residuary exclusion clause that persons guilty of acts that contravene the purposes and principles of the United Nations Organisation are not deserving of refugee status in consequence of which they can be refouled, expelled or merely rejected at the frontier.⁴⁵

ii) OTHER INTERNATIONAL INSTRUMENTS

The principle of non-refoulement has also found expression in other international legal instruments. One may cite the Convention against Torture and Other Cruel, Inhuman or

⁴² art 1F.1951 Convention Relating to the Status of Refugees.

⁴³ *ibid.* art 1F(a)

⁴⁴ *ibid.* art 1F(b)

⁴⁵ *ibid.* art 1F(c)

Degrading Treatment or Punishment (CAT) which obliges states parties to refrain from returning persons to states where there are "substantial grounds for believing" they would be in danger of torture.⁴⁶

The CAT provides broader protection than the Convention Relating to the Status of Refugees in the sense that the right to non-refoulement as enshrined therein, is seemingly absolute. However, its effect is restricted because it only applies to situations involving torture.

The United Nations Declaration on Territorial Asylum (adopted by the General Assembly in 1967) is also worth mention. It is stated therein that:

*"No person shall be subjected to measures such as rejection at the frontier, expulsion or compulsory return to any state where he may be subjected to persecution."*⁴⁷

2.3.2 ADMINISTRATIVE MEASURES

As stated in the previous chapter, the Office of the United Nations High Commissioner for Refugees (UNHCR) is the international agency mandated to lead and co-ordinate international action to protect refugees and resolve their problems worldwide. The 1951 UN Convention Relating to the Status of Refugees was, as a matter of fact, generated within its auspices such that the securing of refugees rights enshrined therein, including that of non-refoulement, are of primary importance to the Office.

⁴⁶ art 3(1)

⁴⁷ art 3(1)

The provisions of the Refugee Convention provide for numerous obligations, including the obligation to co-operate with the UNHCR. Clarity may be sought from the Statute of the Office of the United Nations High Commissioner for Refugees⁴⁸, which states as follows:

“The High Commissioner is designated as the authority charged with providing international protection to refugees and is required inter alia to promote the conclusion and ratification of international conventions for the protection of refugees and to supervise their application.”

The UNHCR also has an executive committee called ExCom⁴⁹ that plays an advisory role concerning the discharge of its functions. It is composed of representatives of states with a demonstrated interest in refugee issues and NGOs whose status is that of observers. Not all members of ExCom are signatories to the 1951 UN Refugee Convention. The ExCom makes conclusions that are not binding on states but represent an international consensus thus carrying persuasive authority. One may cite conclusion XXVIII,⁵⁰ which advocates for the adherence to the principle of non-refoulement including non-rejection at the frontier.

It must be alluded to that the UNHCR considers the principle of non-refoulement to be part of customary international law and as such binding on all states whether or not they

⁴⁸ Resolution 428(V) UNHCR Statute

⁴⁹ *supra.* note 5 at 128

⁵⁰ ExCom Conclusion No.6 (xviii) 1977

are parties to the 1951 UN Refugee Convention.⁵¹ The same view is held by Amnesty International which is a human rights based Non-Governmental Organisation that centers its refugee work on the principle of non-refoulement.⁵² As of 1st March 2006, the total number of states parties to either the Convention alone or its Protocol as well was 146.⁵³

2.4 NON-REFOULEMENT AT REGIONAL LEVEL

2.4.1 LEGAL FRAMEWORK

A regional level, for Africa, the principle is enshrined in the Convention Governing Specific Aspects of Refugee Problems in Africa, a legal instrument generated within the auspices of the then Organisation of African Unity (OAU) in 1969 and entered into force in 1974.⁵⁴ The exact wording is as follows.

*“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened...”*⁵⁵

The scope of the principle in the OAU Refugee Convention is not as limited as its equivalent in the 1951 UN Refugee Convention. This stems from the broader definition given to the term ‘refugee’ as alluded to in the previous chapter. Consequently the protection extends beyond persons fleeing from persecution to those fleeing from

⁵¹ *ibid.* p132. customary international law refers to laws that derive their authority from constant and consistent state practice rather than from formal expression in a treaty or legal text.

⁵² *supra.* note 25 at 9

⁵³ *supra.* note 32 at 17

⁵⁴ Human Rights Watch (1998) ‘Prohibited Persons’ Abuse of Undocumented Migrants, Asylum Seekers & Refugees in Southern Africa.

⁵⁵ art 2(3)

external aggression, occupation, dominion or any events seriously disturbing public order in their countries of origin.⁵⁶

The right to seek asylum is also given express recognition in the OAU Refugee Convention, on condition that it is not inconsistent with the respective legislations of member states.

“Member 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.”⁵⁷

The condition is regrettable because the regional convention is supposed to set the standard according to which municipal laws should conform and not vice versa.

The provisions of the OAU Refugee Convention make explicit reference to the fact that it is a regional complement to the 1951 UN Refugee Convention and as such, member states are obliged to cooperate with the UNHCR. It is further stated that the grant of asylum to refugees is a peaceful and humanitarian act that should not be regarded as an unfriendly act by any state.⁵⁸

⁵⁶cf art.1paras 1-2 OAU Convention Governing Specific Aspects of the Refugee in Africa and art 33(1) 1951 UN Convention Relating to the Status of Refugees

⁵⁷ OAU Convention Governing Specific Aspects of the Refugee in Africa .art 2(1)

⁵⁸ ibid.arts.2(2) & 8

The OAU Refugee Convention also recognises that besides the right to non-refoulement and to seek asylum, refugees have duties owed to the host country. These include the duty to conform to the laws, regulations and measures put in place to maintain public order as well as the duty to abstain from subversive activities.⁵⁹

i) EXCLUSIONS

The provisions of the OAU Refugee Convention replicate the circumstances provided for in the 1951 UN Refugee Convention under which an individual will not be entitled to claim the right of non-refoulement. That is to say, non-deservedness of international protection by reason of having committed a war crime, a crime against humanity, peace or a serious non-political crime or any acts that contravene the purposes and principles of the OAU and or the UN.⁶⁰

2.4.2 ADMINISTRATIVE MEASURES

The implementation of the OAU Refugee Convention and the rights therein is the responsibility of the African Union (the OAU's successor) with its African Commission on Human and Peoples Rights playing a functional role.

In 2004 the Commission alluded to the fact that despite the adoption of the OAU Refugee Convention, refugees in Africa continued to endure untold suffering as a result of human rights abuses. Consequently, at its 35th ordinary session in the same year, a decision was

⁵⁹ arts.2(2), 3(1) & 8

⁶⁰ art 1(5)

made by the Commission to create a Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons (IDPs) in Africa.⁶¹

According to the Commission's resolution, the mandate of the rapporteur is to seek, receive, examine and act upon information on situations involving the material categories of persons (refugees, asylum seekers and IDPs in Africa). The rapporteur is empowered to undertake fact-finding missions, visits and even investigations throughout the continent.⁶²

It is within the rapporteur's competence to assist the member states of the African Union to formulate appropriate policies, regulations and laws for the effective protection of the relevant target groups. The mechanism is charged with and mandated to promote the implementation of both the 1951 UN Refugees Convention and the OAU Refugee Convention. The Rapporteur is required to submit reports of its activities at every ordinary session of the African Commission on Human and Peoples Rights.⁶³

2.5 NON-REFOULEMENT AT MUNICIPAL LEVEL

From the outset it must be alluded to that Zambia is a state party to the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol. This is by reason of

⁶¹ The 35th Ordinary Session of the African Commission on Human & Peoples Rights held from 21st May-4 June 2004 in Banjul, The Gambia

⁶² Resolution on the Mandate of the Special Rapporteur for Refugees, Asylum Seekers and IDPs in Africa: The African Commission on Human and Peoples' Rights meeting at its 36th Ordinary Session held from 23rd November to 7th December 2004, in Dakar, Senegal

⁶³ *ibid*

the country having succeeded and acceded respectively to the two instruments on 24th September 1969.⁶⁴ Consequently, Zambia is deemed to have accepted the definition of the term 'refugee' provided for therein as well as to be bound by the principle of non-refoulement as enshrined in the said convention.⁶⁵

Zambia is also a member of the UNHCR's Executive Committee (ExCom) alongside 69 other states who are also important asylum countries, refugee producing or major donors to the UNHCR's programmes.⁶⁶ Therefore, Zambia is constrained to abide by the ExCom's Conclusion XXVIII, which reaffirms the fundamental importance of observance of the humanitarian principle of non-refoulement.⁶⁷

Another preliminary point is that Zambia acceded to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1998 making it bound by the prohibition of refouling persons as provided for in Article 3 (1).⁶⁸

Mention must also be made that Zambia is a state party to the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa (ratified in 1973)⁶⁹ in consequence of which it is deemed to embrace the broad definition given to the term 'refugee' and more so to be bound by the principle of non-refoulement as expressed therein.⁷⁰

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⁶⁵ arts 1A(2) & 33(1)

⁶⁶ supra. note 54

⁶⁷ No.6 (XXVIII) of 1977

⁶⁸ Zambia Initial Report on CAT.6th November 1999

⁶⁹ *ibid.*

⁷⁰ arts 1(1),(2) and 2(3)

2.5.1 LEGAL FRAMEWORK

Neither the right to seek asylum nor the fundamental right to non-refoulement are recognised by the Zambian Constitution, the supreme law of the land. Anyhow, the relevant municipal law enactment as pointed out in the previous chapter is the Refugee (Control) Act of 1970.⁷¹

The term ‘refugee’ is not defined in the Act, which instead empowers the Minister to declare, by statutory order, who can and cannot be recognised as a refugee for purposes of the Act⁷².

Furthermore Cap 120 does not expressly provide for the principle of non-refoulement, though it may be argued that it is implicit in sections 10(1),(2),(4) and 11(2), which are worded as follows.

“The Minister may at any time order any refugee to return ...to the territory from which he entered Zambia...A Court convicting any refugee of an offence under this section may order the deportation of such refugee... No order (deportation) shall be made against a refugee if the Minister or the Court is of the opinion that the refugee may be punished for a political offence or subjected to a physical attack...” and...

“An authorised officer shall not refuse a refugee a permit to stay in Zambia if the officer has reason to believe that the refusal of the permit would necessitate the return of the refugee to a territory where such refugee may be punished for a political offence or

⁷¹ Cap 120 of the Laws of Zambia

⁷² Cap 120 s.3

subjected to a physical attack. . . save as aforesaid such authorised officer may in his discretion and without assigning any reason refuse to issue a permit”

On the other hand it may be argued that section 10(1) and (2) empower the Minister and Court to refouler refugees with subsection (4) being a weak fetter on such power.

This is justified on the Court’s part because whatever decisions it makes are as a result of deliberations inherent in the adjudicative process which is not necessarily the case with Ministerial decisions.

The implication is that according to the provisions of Cap 120, the fundamental right to non-refoulement is dependent on the subjective determination of the Minister and the broad discretionary powers given to authorised officers in as far as the issuance of permits to stay in Zambia is concerned. The situation is made worse by the fact that the Act does not give recognition to the right to seek asylum.

2.5.2 ADMINISTRATIVE MEASURES

A procedural consequence of the 1951 UN Refugee Convention’s definition of the term ‘refugee’ is that an individualised status determination is required. This is because an asylum seeker must establish two motives for leaving their home country that is to say the fear of prosecution on one hand as well as the motive of the would-be prosecutor.⁷³

In Zambia the responsible government office for refugee status determination (RSD) and refugee affairs in general is the Office of the Commissioner for Refugees, a department

⁷³ Gallagher, M (2005) JCTR Bulletin #61 Article 5. Jubilee Publications: Lusaka. p1

within the Ministry of Home Affairs. The office has under, it a committee called the National Eligibility Committee (NEC) that comprises representatives from various government departments including the Police, Immigration, Ministry of Foreign Affairs and the Office of the President while the UNHCR plays the role of an observer.⁷⁴

The NEC has a sub-committee dubbed Individual Refugee Status Determination Committee to deal with individual applicants for refugee status. It has other sub-committees called Provincial Joint Operations Committees to handle situations of mass influxes of asylum seekers.⁷⁵

If an application for refugee status is rejected, the practice has been to allow the applicant to appeal to the Commissioner for Refugees who forwards the appeal to the NEC.

However mention must be made that there is no legal provision for an appeal mechanism as the Refugee (Control) Act is silent on the issue. Furthermore, the decisions of the NEC concerning such appeals are final with no recourse to a judicial or quasi-judicial tribunal. The UNHCR monitors the process and occasionally intervenes on behalf of individual applicants.⁷⁶

It must be pointed out that Zambia entered a reservation to the 1951 UN Refugee Convention that allows it to designate where refugees can reside.⁷⁷ Therefore upon the approval of their applications for refugee status, most refugees have to live in the designated refugee settlements namely Meheba, Mayukwayukwa, Nangweshi, Kala, Mwange with a few living in the urban areas. Statistics from the UNHCR show that as of

⁷⁴ *ibid.*

⁷⁵ *supra.* note 68 at 14

⁷⁶ US Committee for Refugees and Immigrants. World Refugee Survey 2005-Zambia.p2

⁷⁷ *ibid.*

January 2005, out of a total refugee population of 101,854 in Zambia, 96,923 of them resided in the designated settlements while 4931 lived in the urban areas.⁷⁸

2.6 CONCLUSION

The root causes of refugee displacements are inextricably linked to conflict, persecution and the denial and gross violation of human rights. At the core of the refugee protection regime is the principle of non-refoulement that forbids states from forcibly returning persons to a country or territory where they would be at risk of serious human rights violations. It is part of the wider concept of asylum. The right to seek and enjoy in other countries, asylum from persecution is a fundamental human right the grant of which is discretionary by virtue of the sovereignty of states. However it is necessarily a humanitarian act that should not be construed as hostile or unfriendly.

The carnage and human atrocities that characterised the Second World War resulted in mass human external displacements, precipitating the re-evaluation of the international legal framework on refugee issues. Consequently the 1951 United Nations Convention Relating to the Status of Refugees came into being.

It remains the basic and universal legal instrument of the refugee protection regime. The principle of non-refoulement is enshrined therein alongside other refugee rights. The principle is considered to be part of customary international law in consequence of which it is binding on all states regardless of whether or not they are parties to the 1951 Convention. The international agency mandated to lead and co-ordinate refugee

⁷⁸ UNHCR Country Operations Plan (COP) 2006 Zambia.p1

protection is the Office of the United Nations High Commissioner for Refugees (UNHCR).

At regional level for Africa is the Convention Governing Specific Aspects of the Rights of the Refugee in Africa generated within the auspices of the then Organisation of African Unity (now African Union). The principle of non-refoulement and the right to seek and enjoy asylum have found embodiment in the Convention in mention. The AU through its Commission has a mechanism in place to address issues pertaining to refugee protection and implementation of both the universal and regional Conventions. It is known as the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons (IDPs) in Africa.

Zambia is a state party to both the 1951 and 1969 Refugee Conventions though it has not domesticated them. Hence it is not surprising, though regrettable, that neither the right to non-refoulement nor that to seek asylum are expressly provided for in the Zambian Constitution or any other subsidiary legislation. The relevant municipal legislation on the subject is the Refugee (Control) Act. It does not define the term 'refugee' nor does it expressly prohibit refoulement. It has been alluded to that the Act gives broad discretionary powers to the relevant Minister and his authorised officers to refuse asylum permits and deport refugees such that the right to non-refoulement is largely dependent on the subjective determination of the said authorities. The administrative mechanism in place is the Office of the Commissioner for Refugees, a department within the Zambian Ministry of Home Affairs. Its National Eligibility Committee (NEC) conducts refugee

status determination procedures (RSD) through sub committees. Though there is no formal appeal avenue for unsuccessful asylum seekers, the practice has been to allow for an appeal to the Commissioner who forwards it to the NEC. The NEC's decision is final with no recourse to a judicial tribunal. The UNHCR is part of the NEC as an observer. A successful application for asylum results in the conferment of refugee status in Zambia.

CHAPTER THREE: THE ZAMBIAN IMMIGRATION LAW AND POLICY

The term immigration refers to the cross border movement of people from one territory into another. Persons undertaking such movements are called immigrants. The immigration policy of any state is a matter of national interest. It deals with fundamental issues of national identity and national security. The protection of a state's borders is said to be key to the definition of itself.⁷⁹

Every country has immigration laws. Immigration law including the grant of the right of entry, right to work, to remain permanently and the power to expel have been solidly within the sphere of national sovereignty for as long as there have been nation states.⁸⁰

It must be expressed that the question as to who may enter and remain in a state is by and large a matter for determination by the legislative and executive branches of government. The latter formulates the relevant policy, which is given force of law by virtue of its enactment by the former.

According to the UNHCR, whereas a state has the competence to control and regulate the movement of persons across its borders such competence is not absolute.

⁷⁹ The Journal of Humanitarian Assistance. (2001) Working Paper 41: Global Migration Trends and Asylum. Georgetown University Press: Washington.p12

⁸⁰ Aleinikoff, Martin & Motomura (1995) Immigration Policy & Process 3rd edit. West Publishing: New York.p899

It is limited by the rights of individuals to move across borders and the obligations of states that arise from generally accepted principles of international law and international instruments.⁸¹

Anyhow, this chapter is concerned with a brief exposition of the Zambian immigration law and policy as it stands today.

3.1 THE IMMIGRATION POLICY OF ZAMBIA

The relevant government establishment is the Immigration Department within the Zambian Ministry of Home Affairs. According to the 2003 policy guidelines, the goal statement of the department is:

To facilitate and regulate the movement of persons entering and leaving Zambia and to control the stay of immigrants and visitors in order to contribute to the maintenance of internal security.

It is stated therein that the Zambian immigration law and policy is based on four principles:

- i) An immigrant to Zambia must have a contribution to make in the form of skill, profession or capital that should be of benefit to the people of Zambia.
- ii) An immigrant should not deprive a citizen of Zambia employment.
- iii) An immigrant should not be a charge on the state. He must have the means with which to support himself and his dependants in Zambia.

⁸¹ supra. note 21 at 4

- iv) An immigrant intending to settle in Zambia must be in possession of an entry permit.

It is evident from the foregoing that the immigration policy of Zambia does not distinguish the different categories of foreign entrants into the country regardless of their causes of migration and purpose for entering Zambia.

3.2 THE IMMIGRATION LAW OF ZAMBIA

The relevant municipal statute for immigration purposes is Immigration and Deportation Act, Chapter 123 of the Laws of Zambia. The Act creates the office of the Chief Immigration Officer and allows him to delegate his power to immigration officers and assistants. They are all public officers.

Cap 123 places an obligation on every person who enters Zambia, by whatever means, air, land, or water, to appear before the nearest immigration officer.⁸² The said officers are also given broad powers of arrest to arrest without warrant, anyone whom they reasonably suspect to be a prohibited immigrant or to have contravened the provisions of the Act.

Prohibited immigrants are persons that enter Zambia without any valid documents or who do not report their presence upon entry to an immigration officer or whose presence in the country is illegal. The status of prohibited immigrant (PI) is very easy to acquire, as it

⁸² Cap.123 s 9

does not require any judicial inquiry. An immigration officer need only classify an alien as such upon reasonable cause.

The term 'prohibited immigrant' is not defined in Cap 123 though there are prescribed categories of persons who are classified as prohibited immigrants. They include the following.

Any person who lacks a valid permit to remain in Zambia and has contravened the provisions of the Act, its regulations or has failed to comply with lawful requirements stipulated therein. Prohibited immigrants as prescribed also include persons of the apparent age of sixteen years or more and lacking of proper travel documents such as a passport. Persons who have been deported, removed from, required to leave or prohibited from entering or remaining in Zambia are also included within the prescribed categories of prohibited immigrants.⁸³

Immigration officers may examine anyone they suspect to be a prohibited immigrant so as to ascertain their identity, nature and object of their claim to remain in Zambia and whether they are infact a prohibited immigrant. According to Cap123, the Chief Immigration Officer or his delegates may require aliens to furnish monetary security or some form of guarantee as a condition precedent to their stay in Zambia.⁸⁴

Prohibited immigrants are required to leave Zambia. The Act dictates that they be informed as to which of the prescribed categories they fall under and that they be given

⁸³ *ibid.* SECOND SCHEDULE (s.22)

⁸⁴ *Ibid.*s10

notice concerning the period within which to leave Zambia as well as the route to be used. Upon receipt of the notice to leave Zambia, the prohibited immigrant may make representations to the Minister of Home Affairs, challenging the same.⁸⁵

An immigration officer may arrest, detain and even deport any person whom he reasonably suspects to be a prohibited immigrant. Contravention of the provisions of the Act is an offence punishable with up to three years imprisonment.⁸⁶

It is evident that Cap 123 is concerned with the handling of aliens by the Zambian authorities. It has been shown that immigration officers have wide discretionary powers to regulate the various foreign entrants into the country. Such powers include the examination of such persons, their declaration as prohibited immigrants upon reasonable suspicion and the power to arrest, detain and deport persons convicted of immigration related offences.

⁸⁵ *ibid.*s24

⁸⁶ *ibid.*s26(4), s.30

CHAPTER FOUR - ANALYSIS

Before one proceeds to analyse the preceding chapters and to address the research topic at hand, Non-Refoulement versus Migration Control: A Study of the Refugee Phenomenon in Zambia, it is pertinent to remind oneself of the nature and category of persons concerned.

As alluded to earlier, refugees are not migrants in the lay sense of the word. This is because they do not leave because they want to but because they are constrained to for fear of their lives and well being. Consequently they fall into the latter of the two broad categories of migrants namely voluntary and forced migrants.

The immediate need of a refugee is security and protection. This is because their movements are done in flight from persecution, armed conflict or other factors posing a danger to their lives. Hence their first requirement is a place where they will be safe from the feared dangers. This also includes security that they will not be forcibly returned (refouled) to the territories from which they fled.

Once security is ensured by admittance to a peaceful country, the next need is that of physical or material subsistence. This includes food, water, shelter and sanitation. As stated earlier, since refugee movements are involuntary, they necessarily lack planning such that many of the migrants arrive in a helpless state with little or no money, without

proper travel documents and lacking the means to sustain themselves as they abandoned their source of livelihood in their home countries.

The intermediate need after physical subsistence is that of economic self-sustainability. This is because if refugees are to rebuild their lives and restore their dignity, they should be able to sustain themselves and their dependants out of the proceeds of their own hard work as distinct from humanitarian handouts.

The long term or permanent solutions to the problems faced by refugees have been said to be repatriation to the country of origin, integration within the host country or resettlement in a third.

As stated in the previous chapter, every country has immigration laws to control and regulate the movements of aliens with the *Zambian Immigration and Deportation Act* Cap 123, being one such law. It has been alluded to that the Act does not make reference to the term refugee nor to the relevant municipal law, the *Refugee (Control) Act*, Cap 120 of the laws of Zambia.

Consequently, it may be expressed that the two Acts are seemingly parallel. In fact, the only distinction that Cap 123 makes between immigrants is that of legal and illegal with the latter being termed as prohibited immigrants.

Legal immigrants have been shown to be those who comply with the preconditions to lawful entry and admittance into Zambia. Such conditions include presenting oneself to the nearest immigration officer upon entry into Zambia, satisfying them as to the lawful purpose of one's entry, the furnishing of a monetary consideration where required and the acquisition of the relevant authorising permit.

Any defaulting of the conditions outlined or contravention of any of the provisions of Cap 123 amounts to an immigration related offence. The accompanying legal sanctions include detention, arrest, requirement to leave Zambia and deportation.

From the foregoing it is evident that Cap 123 does not recognise the fact that refugees are special migrants instead it treats them on equal footing as any other type of migrants including economic migrants. The gravity of the implications for the asylum seeker and refugee are heightened by the fact that they may be captured by at least three of the prescribed categories of prohibited immigrant⁸⁷:

- Any person who is of the apparent age of sixteen years and above and lacks proper travel documents (many refugees depart in a hasty manner without a chance to acquire the requisite travel documents);
- Persons who do not present themselves to the nearest immigration official upon entry into Zambia (refugees are often weary of authorities for fear of being forcibly returned to the territory from which they fled);

⁸⁷ Cap123.SECOND SCHEDULE (s.22) Classes E, F, G

- Persons who lack a permit to remain in Zambia and contravene or fail to observe the provisions of the Immigration and Deportation Act or its regulations (this is a catch all clause as it relates to all immigration related offences).

Cap 123 poses a potential hazard to the immediate need of asylum seekers and refugees to protection and security from persecution vis a vis the confines of the historically *peaceful state of Zambia. This is because once they get categorised as prohibited immigrants they are subject to the broad powers of arrest and detention vested in the* immigration officials regardless of the fact that they are not prohibited immigrants by choice like voluntary migrants but rather by circumstances beyond their control.

Furthermore, there is even the requirement of prohibited immigrants to leave the republic in default of which they are deported to their countries of origin. Thus asylum seekers risk being refouled. Even after being granted official recognition of refuge status, the refugees are still in danger with regards to their immediate need of protection and security from persecution. This is because the Act gives broad discretionary powers to immigration officers to deport any alien, refugee or not who appears before them and whom they reasonably believe to be a prohibited immigrant.

Thus even recognised refugees are still at risk of being refouled by Zambian immigration officers. One may cite refugees who stray from their designated settlements and come across immigration officers whilst the former are lacking the relevant documents (permits

or other travel documents). Observance of the fundamental principle of non-refoulement would in such an instance be dependant on the discretionary power vested in the immigration officers who the refugee encounters.

The above potential hazards are due to the omission to recognise refugees as being distinct (vulnerable) when compared with other migrants and as such deserving of preferential treatment with regards to immigration related offences. The situation is compounded by the fact that the first authorities encountered by asylum seekers are immigration who are necessarily deployed at border points. Immigration officers often lack an understanding let alone appreciation of refugee issues and the requisite standards under the international protection regime. That refugees are placed in a precarious position because of the lack of harmonisation between Cap 120 and 123 is also evident from the case law.

In Radebe V A-G,⁸⁸ a South African national left his country for fear of persecution based on political grounds. He eventually ended up in Zambia. Immigration officers detained him on suspicion of being a prohibited immigrant and served him with a notice requiring him to leave Zambia. In its determination of the matter the court stated that the Refugee (Control) Act, Cap 120, was enacted to provide a particular status and safeguards for refugees. It was further expressed that the Immigration and Deportation Act, Cap 123, was enacted at a time when there were no mass influxes of refugees into Zambia. Owing to this, it was the intention of the legislature that refugees should be excluded from its classification of prohibited immigrants as Cap 120 controls and

⁸⁸ (1973) ZR237HC

provides for them with the Minister being empowered to deport them subject to a consideration of their interests⁸⁹. Thus it was held that the detention and requirement to leave Zambia pursuant to Cap 123 was ultra vires as a refugee could not be a prohibited immigrant as envisaged by the Act.

In Re Chirwa⁹⁰ a recognised refugee was advised by authorities alongside others to leave the camp and find employment so as to create room for mass influxes of Angolan and Mozambican refugees. Immigration officials apprehended him and declared him a prohibited immigrant before serving him with a notice to leave Zambia. Cullinan, J in his determination of the case observed that the Refugees (Control) Act has certain safeguards that are absent in the apparently unfettered discretion that the Minister has to deport aliens under the Immigration and Deportation Act. It was also expressed therein that the intention of the legislature would be defeated if those safeguards could be discarded by resorting to the alternative removal mechanism under the latter Act. Consequently it was held that once a refugee is accepted as such, the deportation mechanism in the Immigration and Deportation Act cannot be invoked against him thus the notice and requirement to leave Zambia were declared null and void.

Hence it is no surprise that in 2004 the Zambian government detained and deported over 130 foreigners without granting them the opportunity to seek asylum.

⁸⁹ Cap120.s10 (4) “The Minister may at any time order any refugee to return ...to the territory from which he entered Zambia...A Court convicting any refugee of an offence under this section may order the deportation of such refugee... No order (deportation) shall be made against a refugee if the Minister or the Court is of the opinion that the refugee may be punished for a political offence or subjected to a physical attack...”

⁹⁰ (1974) ZR14HC

Atleast 20 of them were recognised refugees from the Democratic Republic of Congo, Rwanda and Burundi. 71 of them were of Somali origin and may have had credible asylum claims.⁹¹

In 2005 the Zambian government deported at least 5 recognised refugees and 30 asylum seekers without review of their claims. It also detained about 160 refugees and asylum seekers during the year for immigration related offences such as illegal entry or presence, and stay in an urban area without a permit. The police and immigration officers often extorted bribes from the persons in mention and frequently used excessive force when apprehending them with reports of torture during interrogation not being uncommon.⁹² The immigration department does not have an established detention centre or centers such that detained refugees and asylum seekers are placed in common prisons.

According to the Legal Resources Foundation, Zambian immigration officers often forget to follow up cases upon placing suspected PIs in detention such that they remain in the prisons indefinitely. Others are not released even after serving sentence for whatever immigration related offence they were convicted of. The conditions in the Zambian prisons are characterised by severe overcrowding, poor sanitation and insufficient food. The local inmates often physically assault the foreign ones.⁹³

⁹¹ US Committee for Refugees and Immigrants. World Refugee Survey 2005-Zambia.p.1

⁹² ibid.(2006).p.1 & 3s

⁹³ Legal Resources Foundation.(2000)Prison Visitation Programme: Annual Report.p.2

It is without a doubt a grave injustice for persons fleeing persecution in their home countries and hoping to find safety in another country to be rounded up and thrown in jail amongst common criminals, convicts and suspects.

With regards to the other two needs of refugees, that is to say physical subsistence and economic sustainability, the lack of harmonisation between Caps 120 and 123 places refugees in a disadvantaged position. Cap 123 prohibits all foreigners including refugees from working, doing business or studying beyond basic education without the requisite permits. With regards to education the relevant permits cost US\$100. As for employment, the law requires refugees to apply for and obtain job offers from employers before they can obtain work permits that cost a staggering US\$400.⁹⁴ Clearly, voluntary migrants such as economic migrants are better placed to meet the above conditions as their movements are planned such that they have the opportunity to anticipate and prepare to meet the said financial obstacles.

Refugees on the other hand do not have such opportunities hence they should have been given some form of preferential treatment. The US\$100 education permit fee grossly impedes on the educational opportunities of refugees as humanitarian agencies like the Jesuit Refugee Services (JRS) and the Young Mens' Christian Association (YMCA) can only offer scholarships to a limited number of individuals. The US\$400 employment permit fee in effect takes away the right to work, making it a privilege hence constraining the ability of refugees to meet their needs of physical subsistence and economic

⁹⁴ Immigration Guidelines (2003) A 1(i) & 6(i)

sustainability. The repercussion being that they are relegated to life of dependence on handouts from Humanitarian Agencies like the UNHCR and the World food Programme (WFP).

COMMENT

Despite the aforementioned lacunas in the legal framework concerning the plight of refugees in Zambia and also notwithstanding the absence of a tangible and comprehensive refugee policy, the practice is remarkably different. This is because there is in place an effective refugee protection regime that has evolved through responsive administrative practice. It was alluded to in the second chapter that there is a government department within the Ministry of Home Affairs known as the Office of the Commissioner for Refugees. It has established under it a National Eligibility Committee (NEC) whose primary objective is to determine refugee status.

Despite the lack of a definition of the term refugee in the Refugee (Control) Act and all other municipal laws, in practice the NEC relies on the definitions and criteria provided for in the 1951 UN Refugee Convention Relating to the Status of Refugees and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

The NEC through its sub-committees at district and provincial level deal with both individual and group status determination in case of mass influxes.

Again, even though Zambian laws are devoid of an express provision enshrining the cardinal principle of non-refoulement, the NEC's work is in practice guided by the regional and international instruments to which Zambia is a state-party.⁹⁵

Consequently the individual and collective criteria qualifying refugees at international level takes precedence over the restrictive municipal legal provision. Similarly the broad discretionary powers given to the minister and authorised officers to deny asylum permits is toned down by the RSD process which significantly reduces arbitrariness.

The UNHCR and the Commissioner for Refugees collaborate to constantly monitor the prisons for refugees and asylum seekers who may be in danger of being refouled whether by removal or deportation for immigration related offences. Foreign detainees deserving of international protection are availed access to RSD and if successful they are granted recognition of refugee status and relocated to the designated settlements or exceptionally to urban areas. The RSD procedure and practice reduces the chances of arbitrary rejections of applications for refugee status, asylum permits as well as the chances of refoulement.

That the practice in Zambia conforms to the requisite standards of the international refugee protection regime is evident from the statistics. In 2004, the Zambian government granted refugee status to 77 out of 166 individual applicants for status determination.

⁹⁵ 1969 OAU Convention Governing the Specific aspects of Refugee Problems in Africa & 1951 UN Convention Relating to the Status of Refugees

It further recognised a total of 4,300 as prima facie refugees through the group determination procedures. 47, 000 Angolan refugees were repatriated in the same year.⁹⁶

In 2005 the NEC granted refugee status to 88 out of 152 cases of individual asylum seekers, approximately 17, 700 were repatriated with 300 Congolese refugees being resettled in a third country.⁹⁷

Mention must be made however, that the RSD is flawed by the lack of an elaborate appeal mechanism. An unsuccessful asylum applicant can appeal against a sub-committee's decision. Such appeal is made to the Commissioner for Refugees who forwards it to the NEC. It is commendable that there is no time limit within which an unsuccessful applicant has to lodge an appeal and that they are further allowed to remain in Zambia pending its determination.

However it is regrettable that the NEC's decision over the matter is final with no recourse to a judicial tribunal. Furthermore since the existence of the Office of the Commissioner for Refugees, the RSD procedure and its composite structures like the NEC is not backed by law, the current refugee protection regime is subject to the whims and caprices of the government of the day. Hence it would be perfectly legal and intra vires for the Minister of Home Affairs to scrap the Office of the Commissioner for Refugees and the NEC in preference for a centralised status determination at the Ministry's headquarters.

⁹⁶supra. note 91 at 2

⁹⁷ibid.(2006).p.2

CHAPTER FIVE – RECOMMENDATIONS AND CONCLUSION

As expressed in the preceding chapters, the asylum seeker and recognised refugee are in a *de jure* precarious position in Zambia by virtue of the lack of harmonisation between the Refugee (Control) Act and the Immigration and Deportation Act. On the other hand, a *de facto* effective refugee protection regime exists as a creature of administrative practice and goodwill on the part of the Zambian government which responds to and cooperates with the UNHCR. Consequently the most important recommendation to be made involves the following law reforms:

- The non-derogable provisions of the 1951 United Nations Convention Relating to the Status of Refugees and the OAU Convention Governing Specific Aspects of Refugee Problems in Africa should be domesticated.
- The Refugee (Control) Act should be repealed or extensively amended to:

; incorporate the definition of the term refugee as provided for in the regional and international legal instruments;

; expressly provide for the principle of non-refoulement and the right to seek and enjoy asylum from persecution as contained in the same;

; assert that notwithstanding the provisions of the Immigration and Deportation Act, refugees shall not be penalised for their unlawful entry or presence in Zambia provided that they intend to seek asylum;

; expressly provide for the Office of the Commissioner for Refugees, its sub-structures and the Refugee Status Determination Procedure(RSD) with recourse to a judicial tribunal for appellate purposes.

- The Immigration and Deportation Act should be amended to;

; distinguish generally between voluntary and forced migrants;

; exclude refugees from classification as prohibited immigrants;

; exclude refugees from being charged with immigration related offences, such being the reserve of the Refugee (Control) Act;

;assert that employment, education and other permits should be priced according to which category of migrant one is classified under with refugees being given special and preferential treatment.

It is also recommended that the Zambian government should devise a comprehensive refugee policy. It is further recommended that the two government departments, Immigration and the Commissioner for Refugees should conduct regular sensitisation programmes for their officers with regards to their respective roles towards national security.

5.2 CONCLUSION

In finality, it may be expressed that unless the requisite amendments are made to the Refugee (Control) Act coupled with its harmonisation with the Immigration and Deportation Act, in other words, unless theory be harmonised with practice and an equilibrium be struck between migration control and the institution of asylum, the principle of non-refoulement and the rights of the refugee in Zambia will continue to be dependant on the good will of the government of the day.

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