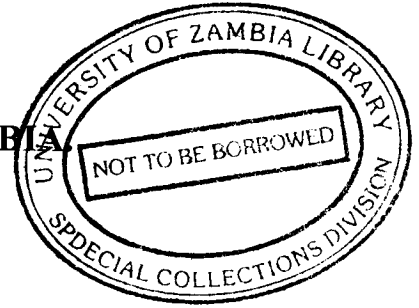


**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW.**



I recommend that this Obligatory Essay prepared under my supervision

By

**Angela. I. Anyoti.**

Entitled:

**THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS IN ZAMBIA:  
RE THINKING LEGISLATION.**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to format as laid down in the regulations governing Obligatory Essays.

SUPERVISOR..... DATE .....2005.  
Mr. Mumba Malila.

THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS IN ZAMBIA: RE THINKING  
LEGISLATION.

BY

ANGELA. I. ANYOTI.  
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BEING A PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE DEGREE OF  
BACHELOR OF LAWS OF THE UNIVERSITY OF ZAMBIA.

UNZA- SCHOOL OF LAW.

DECEMBER, 2005.

## DECLARATION.

I, Angela. I. Anyoti of computer number of 20066295 do declare that I am author of the essay entitled: "The Rights of Refugees and Asylum Seekers in Zambia: Re thinking legislation." I further solemnly swear that this work represents my own ideas and is not a production of any other work produced or submitted by any other person to the University of Zambia or to any other institutions. Due acknowledgment has been given where other scholarly work has been cited.

Student's Name: Angela I Anyoti

Signature: 

Date: 29<sup>th</sup> December 2005

## **DEDICATION.**

I dedicate this work to my mother Mrs. Salome Anyoti, I will always be indebted to your loyalty and kindness, your support and your love. You have been a pillar of strength in raising my siblings and myself, through financial strain and gain you have showed us that hard work is the answer to every problem. I pray for you everyday. God bless you mama!

I also dedicate this work to my young sisters Amulo and Vanessa Anyoti, this paper should be inspirations that despite it all we will be doing "BIG THINGS" follow your dreams no matter how hard they may seem. Amulo you halfway there, first year medicine!!! You deserve to be there. Vanessa, you have always been the brightest of our "clan" am sure you will do us proud!

To my brothers Amilcar and Obiara. Amilcar, I believe you are going to build something spectacular one day and you and I both have suffered at Unza together but with all honesty you more ~~that~~ me, one day all our troubles will pay off. Obiara, my dearest brother there's a saying life waits for no one, and its true, it doesn't. Elish, what would our family be without you as the addition, you are truly something else!

To Matala Suba, you are irreplaceable in my life, words are never enough.

## **ACKNOWLEDGEMENTS.**

I have reached this far only because of the kindness and greatest love from God, I thank you God for bringing me this far. Isaiah 48:17-18," I, Jehovah am your God, the one teaching you to benefit (yourself), the one causing you to tread in the way in which you should walk. O if only you would actually pay attention to my commandments. Then your peace would become just like a river, and your righteousness like the waves of the sea."(New World Translation of the Holy Scriptures).

To my dearest friends that have made the suffering bearable, Matale Suba, Abigail Chimuka, Namuchana Mushabati. For the past years you have been my family away from, thank you for the kindness, love, fights, tears and the good times. God bless you all!!!!

To my brother in Christ, Clavel Sianondo, you have opened up my heart to gratitude unfulfilling. You will do great things, "ni mu Lusaka muno!"

My "people" the friends who would call for me at all hours of the day, Mayamba Mwanawasa, Mando "Bo Mando" Mwitumwa, Benson "bwa Mpalo" Mpalo, Mao, Kondwani Musukwa, Joseph Ilunga. Thank you guys and see you out there in society.

## PREFACE.

THIS obligatory essay comprises of five chapters. Chapter one deals with the definition of a refugee and asylum seeker, in relation to the 1951 Convention on the Status of a Refugee, its 1967 protocol and the 1969 OAU Convention. It also deals with the difference between a refugee and asylum seeker and highlights the problem with the Refugee Control Act and the Immigration and Deportation act in Zambia.

Chapter

Chapter Two discusses the Refugee Control Act and the Immigration and Deportation Act in great detail, it looks at the lacunas in the Acts, how these acts may lead to the deprivation of liberties of asylum seekers and cases that deal with the illegal detention of refugees in Zambia.

Chapter three, looks at the international documents that deal with the provision of rights to asylum seekers and the role of the UNHCR in Zambia in relation to the protection of the said rights. It looks at the issue of non-application of these rights by governments, the implication of this non-application and any relief provided by these conventions to asylum seekers and refugees in Zambia.

Chapter four deals with the deportation and detention of asylum seekers in Zambia, the compliance with the principle of non-refoulement and if the Zambian government is in compliance with it. The chapter discusses the detention conditions in Zambian prisons and also the issue detention of women and children. It also mentions briefly repatriation resettlement and integration as a means of combating the increasing refugee crisis in Zambia.

Chapter five comprises of recommendations and conclusion of this essay.

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## **Introduction.**

The aim of this paper is to highlight the violation granted to asylum seekers in Zambia because of the alarming rate at which such violations are accruing. Asylum is a grant by a state of protection on its territory to persons from another state that are fleeing persecution of serious danger asylum seeker is also a refugee and the status of an asylum seeker encompasses a variety of elements including refoulment, permission to remain in the territory of the asylum country and humane standards of treatment by the host country.

International protection is a temporary substitute for the normal safeguards of natural protection. In mass refugee movements it is important to provide particular circumstances and protection needs regularly and comprehensively. Gaining entry into a country of asylum may be difficult; states often have laws imposing time limits on how long after entry in the country an asylum seeker can apply for asylum. If the asylum seeker fails to contact the government authorities within the time limit, he or she risks possible deportation as an illegal alien.

In the *Zambian refugee/ asylum scenario*, such procedures are not referred to by the **Refugee Control Act of 1970** and **Immigration and Deportation Act 1967**. Thus, since a known procedure is not established then this paper aims to view how these Acts violate the United Nations Declaration of Human Rights and other International protocols to which Zambia is a party.

It is the hypothesis of this paper that refugees/ asylum seekers in Zambia have experienced major violations of their rights of which they can seek no remedy. It is the purpose of this inquiry to investigate and to illustrate cases of violations and the measures that are incorrectly applied.

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An in depth analysis and review of the Refugee Control act and the Immigration and Deportation Act and the sections that are used to violate the rights of refugees and asylum seeker will be conducted. These sections will be reviewed in relation to the International covenants to which Zambia is a party and the aim is to show the extent and gravity of such violation and provide a basis for the understanding of the severity of such actions on human dignity.

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This paper will also discuss possible solutions to the long-term refugee situation in Zambia. These solutions will not only dwell on the issue of repatriation but also resettlement in a third country or possible integration into the host country.

## Chapter one.

This chapter will deal with the issue of the definition of a Refugee in the International context and in Zambia. Its aim is to differentiate between a refugee and an asylum seeker as the distinction between the two is not clear and is a cause of great concern. It will look at the definitions provided in the 1951 Convention Relating to the Status of a Refugee and its 1967 Protocol, the African Union (formerly the OAU) and the Refugee Control Act.

### 1.0 WHO IS A REFUGEE AND ASYLUM SEEKER?

"Asylum" is often used imprecisely to describe three distinct categories of persons in Immigration law that allows a person fleeing persecution to either enter or to remain in:

1. Refugee status
2. Asylum seeker status
3. A situation of withholding of a deportation or return.

Each of these categories has distinct eligibility requirement and application procedures and it is therefore important not to confuse them. A person granted asylum is still a refugee, which encompasses a variety of elements such as non-refoulement, permission to remain on the territory of the asylum country and humane standards of treatment.

By granting asylum to a refugee, a country accepts its obligation to protect the refugee against refoulment, to respect and safeguard the refugee's human rights, and to allow the refugee to remain in its territory until a durable solution is found. Granting asylum is a peaceful and humanitarian act of state sovereignty and should not be regarded unfriendly

by any state, especially the refugee's state of origin<sup>1</sup>. Technically, there exists no "right to be granted asylum" as such a right does not appear in any legally binding International document. The Universal Declaration of Human Rights<sup>2</sup> however, asserts ... that everyone has a right to seek and enjoy from other countries asylum from persecution<sup>3</sup>.

Since the early 1970's Zambia has accepted the definition of a refugee found in **Article 1 (a)(2)** of the 1951 Convention Relating to the Status of a Refugee and its 1967 protocol in which a person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore, makes him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee<sup>4</sup>.

In the 1969 Organization of African Unity Convention Governing the Specific Aspects of the Refugee problem<sup>5</sup> also provides a definition of a refugee. The first part of the definition is identical to that of **Article 1 (a) (2)** of 1951 and its 1967 protocol. The second part of the definition refers to a refugee as:

"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."

Therefore, persons fleeing civil disturbances widespread violence and wars are entitled to the status of refugee in states that are parties to this Convention once it has been established that they possess a well-founded fear of persecution.

The 1951 Convention Relating to the Status of a Refugee<sup>5</sup> defines a refugee as a person who is outside of his country of origin because of a well-founded fear of persecution based on race, religion, nationality or membership in a particular social group. Therefore, in essence, this definition requires that a person seeking refugee status shows that he or she is present in Zambia because he or she fears persecution based on one or more of the five grounds listed.

The assessment as to who is a refugee, that is, the determination of refugee status under the 1951 Convention and its 1967 Protocol is incumbent upon the contracting state in whose territory the refugee applies for recognition of refugee status. Both the 1951 Convention and its 1967 Protocol provide for co operation between contracting states and the Office of the United Nations High Commissioner for Refugees. This co-operation extends to the determination of refugee status according to the arrangements made in various contracting states<sup>6</sup>

The American case of **INS VS CARDOZA-FONSECA**, concluded that the definition in **Article 1 (a) (2)** of the 1951 Convention should be interpreted by reference to International instruments and an applicant for asylum must demonstrate a well-founded fear of persecution<sup>7</sup>. It was further stated that asylum is a greater form of relief. When

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granted asylum the alien may be eligible for adjustment of status to that of a lawful permanent resident subject to minimal restriction or limitations and applicable regulations. Asylum is a grant by a state of protection in its territory to persons from another state that are fleeing persecution or serious danger. As a result, one procedural consequence of this definition is that individual status determination is required.

....

Although not expressly stated in any Act, the asylum determination process in Zambia is that an asylum seeker presents his or her claims to the Refugee Eligibility Committee. The Committee is made up of one representative from each of the following institutions; Immigration, the Ministry of Foreign Affairs and the Office of the President and is chaired by the Commissioner for Refugees or his delegate. Their task is to determine whether the asylum seeker presents a credible explanation of his or her presence in Zambia, which establishes that he or she has a reasonable fear of persecution in their homeland.

This is a time consuming process although vitally important, and constitutes one of the drawbacks of the 1951 Convention considering the large influxes of refugees that enter Zambia.

**Section 3** of the Refugee Control Act deals with the issue of determination of the refugee status in Zambia. The Refugee Control Act does not provide a separate procedure for asylum seekers.

..

The African Union (formerly OAU) **Convention Governing the Specific Aspects of Refugee Problems in Africa** is the regional complement to the 1951 Convention whose

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refugee definition is broader than that provided in the 1951 Convention. It was adopted in 1969; the Convention provides that the term "**refugee**" applies to those fleeing from external aggression, occupation, foreign domination or events seriously disturbing public order on either part or whole of country of origin.

It defines refugees as those fleeing the consequences of freedom struggle of the time as well as someone away from the homeland because of events seriously disturbing public order in either part or whole of the country of origin<sup>8</sup>.

As a qualification **Section 7** of the Refugee Control Act<sup>9</sup> places a restriction on the possession of firearms, weapons and like objects by refugees. The purpose of this section is to ensure that a refugee is not a hostile being and presents no threat to national security.

Michael Gallagher<sup>10</sup> points out that the most important aspect of the African Union definition is what is NOT included namely an individualized fear of persecution; therefore, a practical consequence of the Conventions definition of a refugee is that all that is required of a host country in terms of status determination is that the government officials keep abreast with current events.

Thus in Zambia, a person who is not qualified under either of these definitions is not a refugee, such a person who enters Zambia for purposes of business, study or tourism, armed combatant, persons who enter the country to steal or commit a crime.

The Zambian government has a refugee policy of "open borders" combined with heavy restrictions on fundamental rights of refugee, such as the right of movement, the right to work, the right to own property and the right to nationality for refugee children. It would be assumed that an open border policy would entail the restrictions would be reduced due to the number of people who would flee to Zambia and to make their refugee or asylum status less oppressive. This policy builds on the idealism that vital human rights would be observed, respected and secured by the legislation of the Zambian government.

The United Nations Declaration of Human Rights stresses that human rights come before the state and are not dependant on it; they are universal and apply to every human being. However, this document does not strike a balance between individual rights and those of society that is the balance between basic and fundamental rights versus those of national security. This declaration was followed in 1966 two International covenants namely the International Covenant of Civil and Political Rights and International Covenant of Social and Economic Rights.

Unlike the declaration these covenants provide procedures for monitoring their implementation body. If a country is a party to the Convention and it indicates no observance is made to the provisions then refugee and asylum seekers must utilize this mechanism to bring their own government as well as the host country.

However, life is not easy for refugees in Zambia. Zambia lacks sufficient material resources to share with those who come fleeing from war and Persecution, and as a result,” most of the responsibility lies on the United Nations system and Non Governmental Organizations to provide for the refugee and asylum seekers. A lack of donations has seen the World Food Program halving rations for several months, these shortcomings by the International agencies has diminished the possibilities of the refugees to rebuild their lives to recognizable normality.

Refugees who are not granted a permit or refugee/asylum status may often choose to stay in Zambia illegally due to fear of persecution. However, once found such persons are subject to detention in prison until deportation. It proves unjust and inhumane that a person with a well founded fear of persecution should once again be detained for long periods until deported once again to their home countries. This is in contravention with the principle of refoulement.

Most detained asylum seekers did not commit a criminal offence but simply breached The administrative requirement that they remain in designated areas. The provisions of the Refugee Control Act specifically deny the refugees the right to exercise freedom of movement and residence and provide one of the bases for detaining refugees and asylum seekers. Also asylum seekers may be detained under the Immigration

and Deportation Act despite the fact that refugees are not covered by this Act.

The term "refugee" is not even mentioned in this Act, but notwithstanding this refugees in urban areas are technically considered foreigners.

Thus the refugee and asylum system is open to abuse by Immigration and police officers that frequently round up and detain refugees and asylum seekers for unspecified periods of time. Cases of solicitation of bribes by officers from victims are common<sup>11</sup>. The Refugee Control Act needs to be reviewed and reformed to ascertain conformity with international conventions that Zambia has ratified and the inclusion of the asylum procedure of all claims with a genuine claim without discriminating on the basis of their nationality or previous status in other countries.

## **ENDNOTES FOR CHAPTER ONE.**

1. **PROTECTING REFUGEES, A FIELD GUIDE FOR NGO'S**, produced jointly by the UNHCR and its NGO partners, p.48.
- 2 Article 1 (a) (2) of the 1951 Convention.
- 3 **HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEES STATUS**, re edited Geneva, January 1992, p.2.
- 4 480 U.S 421 (1987)
- 5 IBID. @ 499
- 6 IBID.
- 7 THE AFRICAN UNION CONVENTION.
- 8 CHAPTER 120 OF THE LAWS OF ZAMBIA.
- 9 **"REPARTRIATION OF REFUGEES IN ZAMBIA,"** [www.jctr.org](http://www.jctr.org).
- 10 JOHN CARROL, **"HUMAN RIGHTS AND HUMAN WRONGS"**, [www.jctr.org](http://www.jctr.org).
11. MULENGA NKULA, **"LIBERTY OF REFUGEES AND ASYLUM SEEKERS DENIED ON A WHIM,"** [www.jctr.org](http://www.jctr.org).

## **CHAPTER TWO.**

### **THE REFUGEE CONTROL ACT AND THE IMMIGRATION AND DEPORTATION ACT.**

In Zambia, it is required by law for all refugees to reside in one of the six refugee camps and settlements. These are Maheba, Mayukwyukwa, Ukwimi, Kala and Mwangi, unless they are in possession of a permit. There are various kinds of permits that are granted to refugees and foreigners such as work or study permits, self employment permits etcetera, possession of which means that a refugee may stay in any urban area of their choice. Also a refugee may be granted permission to stay in an urban area on medical grounds. However, still a considerable number of refugees reside in urban areas without authorization from the government, in particular in Lusaka and the Copperbelt provinces<sup>1</sup>.

This chapter aims to review the Refugee Control Act<sup>2</sup> and the Immigration and Deportation Act in Zambia<sup>3</sup>, their flaws and how these Acts facilitate the violation of the rights of refugees and asylum seekers in Zambia. It will focus on the violations carried on under the dark umbrella of ambiguity and misapplication of these rights.

## **2.1 THE REFUGEE CONTROL ACT.**

This Act was enacted on the 4<sup>th</sup> September 1970 to make provision for the control of refugees, and to provide for matters incidental thereto. This was in order to deal with the insurgence of refugees and asylum seekers in Zambia and to provide a legal framework with which refugees and asylum seekers were to be handled in Zambia.

The Act provides the definition of a refugee in **section 2** as a person belonging to a class of persons to whom a declaration under **Section 3** applies. **Section 3** of the Act provides for the declaration of a refugee by the Minister of Home Affairs. It provides that the Minister may declare, by statutory order, any class of persons who are, or prior to their entry into Zambia were ordinarily resident outside Zambia to be refugees for the purposes of this Act. It also provides in **Section 3(2)** the instances in which a declaration shall not be made.

It also grants the Minister the power to declare settlement and reception areas provided in **Section 4** of the Refugee Control Act. **Section 4 (1)** provides that the Minister may declare any part of Zambia to be an area for the reception or residence of any refugees or category thereof. **Section 4 (2)** provides that “the Minister may establish in any reception area a refugee settlement for refugees or any category thereof, and may appoint a refugee officer to be in charge of such settlement.” These sections indicate the powers granted unto the Minister under the Act, to provide for the refugee settlement camps and for reception areas, these powers are diverse and mainly discretionary.

**Section 11** provides for the granting of permits to refugees, it provides that no refugee shall remain in Zambia unless within 7 days of his entering Zambia he is issued with a permit to remain by an authorized officer<sup>4</sup>, unless he complies with the terms or conditions from time to time annexed to such permit by an authorized officer. If a refugee fails to obtain a permit in accordance with this section his presence in Zambia is unlawful. In **section 11(2)** provides that “An authorized officer shall not refuse a refugee a permit under this section if the officer has reason to believe that the refusal of a permit will necessitate the return of the refugee to the territory from which he entered Zambia and that the refugee may be tried, or detained or restricted or punished without trial, for an offence of a political character after arrival in that territory or is likely to be the subject of physical attack in that territory; but, save as aforesaid, such authorized officer may in his discretion and without assigning any reason refuse to issue a permit.” This section refers to the vital issue of non-refoulement of refugees to their home country if it can be proven that they in fact are faced with a genuine fear of persecution.

**Section 12** provides for the requirement of refugees to reside in a reception area or refugee settlement area. The Minister may by order, require any refugee to reside within a reception area or refugee settlement or require any refugee who is within a reception area or refugee settlement to remove to and reside in some other place, being a reception area or refugee settlement<sup>5</sup>. Whilst the whole purpose of this section is not to violate the refugee right to movement, it has been used specifically by authorities to deny refugee and asylum seekers the right to exercise freedom of movement and residence and has

provided on major basis for detaining refugee and asylum seekers. This section makes failing to comply with the directions of the Minister an offence unless the refugee or asylum seeker possess a permit, granting to reside in a reception area elsewhere and to leave a reception area one has been permitted to live in.

Zambian law allows Immigration officers to arrest and detain any refugee's and asylum seekers who fail to obey any lawful order of the Zambian Commissioner of Refugees or a refugee officer<sup>6</sup>.

In addition refugees and asylum seekers can be arrested and detained for obstructing an authorized officer in the exercise of his duties under the Act. **Section 15** deals with the offences and penalties committed by refugee and asylum seekers. It provides that "any refugee who fails to obey any lawful order of the Commissioner or refugee officer or who obstructs an authorized officer in the exercise of his powers under the Act shall be guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding three months."

In essence what actually happens is that violators of the provisions of this Act are being punished with administrative detention of more than 3 months when in actual fact **Section 15 (2)** of the Act, provides that no one maybe detained for more than three months. **Section 15** seems to connote that detainees should be taken to court although they are rarely granted such an opportunity promptly. Most refugees' and asylum seekers do not commit criminal offences but simply violate the administrative requirement that they remain in a designated area. Therefore, it is easy to see that the system is open to

being abused by the detention of refugees and asylum seekers for unspecified periods of time that is occurring with no known remedy being perpetuated by the Act.

**Section 17** of the Act provides that “no act or thing done or omitted to be done by any authorized officer or other person shall, if any act or omission was done or omitted bona fide while acting in the execution of his duty under this Act, subject him personally to any liability, action, claim or demand whatsoever.” This section implies that the officers are protected by the Act (or law) for whatever acts they may perform whether or not they violate the rights of asylum seekers and refugees in the process.

This should not be the case, the law should provide a means for the acts of authorized officers to be monitored and reviewed in certain circumstances especially if there are claims that these acts or omissions have caused major violations to the rights of refugee and asylum seekers.

## **2.2 THE IMMIGRATION AND DEPORTATION ACT.**

This Act was created on the 21<sup>st</sup> February 1967, it is aimed at regulating the entry into and the remaining within Zambia of immigrants and visitors, it also aims to provide for the removal from Zambia of criminals and other specified persons and, to make provision for matters incidental to the foregoing<sup>7</sup>. It was created in order to curb illegal entry into Zambia.

Asylum seekers and refugees in Zambia may be detained under the Immigration and Deportation Act; despite the fact that the word “refugees” is not referred to in this Act.

Refugees and asylum seekers in urban areas are technically considered to be foreigners. **Section 19** subsections (1), (2) and (3) provide that foreigners need to obtain a permit to engage in any gainful employment prescribed trade, business or other occupation and to study at an educational institute. To reside in an urban area, a refugee or asylum seekers if self employed must have at least \$25, 000/ a work permit costs approximately \$400 and a study permit \$100. It is quite obvious that not many refugees or asylum seekers are able to pay, nor can they afford such amounts of money.

As a result, many resort to living in urban areas illegally placing themselves at the risk of being arrested and detained. **Section 25** of the Act allows Immigration authorities to detain any person suspected of being a prohibited immigrant (PI), for a period up to 14 days. **Article 2** of the International Covenant of Civil and Political Rights<sup>8</sup> provides that a state party must respect and ensure that the right of the Covenant to all persons within its jurisdiction. With some exceptions, such as the right to vote, these rights extend not only to citizens but also to all persons in the State's territory and must be respected without discrimination. If necessary, legislation should be enacted to properly guarantee these rights. State parties are required to provide remedies to persons, whose rights under the Covenant are breached<sup>9</sup>. The Human Rights Committee, in its jurisprudence, has interpreted this right to require a forum to be available to hear an allegation of a violation of a covenant right when it is sufficiently well founded to be arguable under the covenant<sup>10</sup>.

Commonly it is the courts and administrative authorities that provide these remedies.

Without this right to enforce a Covenant right before the domestic authorities by way of

remedy, the actual substantive rights of the Covenant are deprived of much practical effect. Thus **section 25** must be reviewed to ascertain that it complies with the aforementioned convention that Zambia has ratified and the Zambian courts must provide for the required remedies.

**Section 26** deals with the issue of deportation; this section permits Immigration officers to detain prohibited immigrants for an indefinite period of time, pending completion of deportation from Zambia at the first reasonable opportunity. For detainees from non-neighboring countries this would entail an indefinite period in prison because the Immigration Department does not have resources to deport them. Apart from being detained for unspecified periods, it is also common for cases of officers to solicit bribes from their victims<sup>11</sup>. It should be pointed out that Immigration officers who conduct deportation and removal of individuals do not always take human rights protection into consideration. In other words, there is no provision for protection from refoulement in the Immigration and Deportation Act.

Problems presented by **Section 26** of the Act can be addressed by focusing on the inclusion in the asylum procedure of all persons with a genuine claim without discriminating on the basis of their nationality or previous status in other countries. Although groups of people with strong claims for international protection find themselves in such situations the Commissioner of Refugees has decided not to accept or process asylum applications from the detained nationals from certain countries<sup>12</sup>. They also fall in this category if they are recognized refugees from another country, in which neither the United Nations High Commissioner for Refugees (UNHCR) nor the Commissioner of

Refugees can recognize the asylum seekers and refugees as individuals of their concern, unless they show that they abandoned their previous country of asylum for protection reasons.

## **2.3 THE PROBLEM WITH THE REFUGEE CONTROL ACT AND THE IMMIGRATION AND DEPORTATION ACT.**

Whilst it may be a crime to violate Immigration laws, the practice of placing persons in prison who have not been accused or convicted of any crime for an indefinite period of time, is a evidently violation of a number of fundamental rights that are guaranteed both by the Constitution of Zambia<sup>13</sup> and by International treaties to which Zambia is a signatory.

The International Covenant on Civil and Political Rights<sup>14</sup> in particular articles 9, 11 and 12 of this Covenant are constantly being violated. **Article 9 (1)**, says that everyone has a right to liberty and security of person; and no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Also, upon arrest the detainees shall be furnished with reasons for their detention and be brought before a judge within a reasonable period of time. Anyone subject to unlawful detention shall have the right to seek redress in court and seek compensation.

**Article 11** of the Covenant deals with the issue of no one being imprisoned merely on the ground of inability to fulfill a contractual obligation. In **Article 12**, it states that everyone

lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those, which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Although Zambia acceded without reservations or declarations on the 10<sup>th</sup> April 1984, there are still violations that are occur of which is contrary to the provisions of the Covenant.

It cannot be overemphasized that freedom of movement is a fundamental human right.

The UNHCR Executive Committee (EXCOM) notes that:

***“...Restrictions may be placed on the movement and residence of refugee in reception areas only as apart of public order system for managing the influx, but such restrictions must be temporary in character and should not constitute detention or internment.”<sup>15</sup>***

EXCOM, called on states to take all the necessary measures to ensure that refugee are protected effectively through national legislation and the compliance with their obligations under the International Human Rights and Humanitarian instruments having a direct bearing on refugee protection of refugees<sup>16</sup>. It encouraged states and the UNHCR to continue to promote regional initiatives for the Refugee protection and durable solutions and to ensure that regional standards are conformed fully to universally recognized standards and responded to particular regional circumstances and protection needs.

It was noted that a comprehensive approach to refugee protection comprised inter alia respect for human rights, the principle of non-refoulement, access of asylum seekers to fair procedures for determining status and protection needs and the provision of material assistance where necessary.

Another important aspect of protection involves promoting ratification of the relevant International instruments by states and incorporation of those instruments into national legislation. It was stated that refugees and asylum seekers had been expelled, rejected at borders, involuntarily returned and major human rights solutions had occurred during forced resolutions.

As noted in this is not the case in Zambia. Both the Refugee Control Act and Immigration and Deportation Act of the laws of Zambia need to be reviewed and reformed. It is essential that persons in need of international protection be admitted and identified and need to be protected against refoulment as well. The peaceful note of asylum must be respected by national legislation, the failure to implement international structures in respect of certain nature of camps and protected populations had contributed to the perception of refugee influxes as a threat to national and regional instability<sup>17</sup>, all of these must be echoed in the legislation of the host country.

## **2.4 ILLUSTRATIONS OF DETENTION OF REFUGEES AND ASYLUM SEEKERS IN ZAMBIA.**

The UNHCR and EXCOM have continued to participate in intergovernmental consultations aimed at having, national laws and procedures to promote regional and national uniformity in application in the protection and Immigration policies. In terms of asylum, they re- iterated the need for full respect to be accorded to the institution of asylum including inter alia the principle of non refoulment, the need to admit refugees into states, access of UNHCR to persons in need, the responsibility of host states to separate any armed or military elements from refugee populations and the duty of refugees to respect the laws of host states<sup>18</sup>.

Detention of refugee and asylum seekers in Zambia are usually under the Refugee Control Act and the Immigration and Deportation Act, the Jesuit Refugee Service in Zambia compiled the following cases: it is an organization that deals specifically with assisting refugees and asylum seekers in Zambia<sup>19</sup>.

### **1. THE CASE OF F (A SUSPECTED PRHIBITED IMMIGRANT).**

F entered Zambia to seek asylum under the OAU Convention following war in Angola in 1997. He left Angola for Congo D.R, on the 26<sup>th</sup> May 1999 in order to seek asylum there. Due to the fact that he did not find peace and security he decided to proceed to Zambia to seek asylum. He entered Zambia on the 1<sup>st</sup> June 1999; he was then detained on the 6<sup>th</sup> June 1999 upon presenting himself as an asylum seeker at the

Kabwe Immigration Offices. A court in Kabwe then sentenced him to six months imprisonment for illegal entry into Zambia. He finished serving the sentence on the 1<sup>st</sup> February 2000, thereafter; he was brought to Kamwala Remand Prison on Lusaka. The Immigration Department indicated to the Jesuit Refugee Service that they intended to deport him on grounds that they did not believe his claim, he remained in prison for three years without being deported or released, despite efforts to secure his release, and he was finally deported in June 2003.

## **2 THE CASE OF G (LACK OF A WORK PERMIT)**

G, an Ethiopian national, arrived at eh Nakonde border crossing in 1997. He was subsequently recognized as a refugee and granted a refugee identity card. On the 10<sup>th</sup> February 2004, while in possession of his identity card, he was arrested by the Immigration officials because his work permit had expired. He was detained at Kamwala remand prison form February to October when he was finally relocated to Maheba camp.

## **3. THE CASE OF THE C BROTHERS ( IRREGULAR MOVERS).**

These two gentlemen were initially from Sierra Leone. They were recognized as refugees in Congo Brazzaville. They left that country and entered Zambia in February 2002. The Immigration Department arrested them as suspected prohibited immigrants. They informed the Jesuit refugee service that they were traveling using UNHCR traveling documents and they were going to South Africa for family reunification purposes. Both the Commissioner of Refugee and the UNHCR refused to take up their case, because they did not qualify to be persons of their concerns.

They remained in prison for two years and were finally removed from Zambia after someone donated two air tickets in September 2004.

These cases provide the necessary examples to illustrate how the rights of asylum seekers and refugees in Zambia are being violated with the aid of the Refugee Control Act and the Immigration and Deportation act. These violations are either ignored or not given priority by Government, the UNHCR, and the international community at large, despite the effort emphasized by the United Nations that such institutions should have.

## END NOTES FOR CHAPTER TWO.

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- 1 Mulenga Nkula, “**Liberty of Refugees and Asylum seekers denied on a whim**”, <http://www.jctr.org>.
- 2 Chapter 120 of the Laws of Zambia.
- 3 Chapter 123 of the Laws of Zambia.
- 4 **Section 11 (a) and (b)** of Cap 120.
- 5 **Section 12 (a) and (b)** of Chapter 120.
- 6 Mulenga Nkula, “**Liberty of Refugees and Asylum seekers denied on a whim**”, <http://www.jctr.org>.
- 7 Preamble of Chapter 123 of the Laws Of Zambia.
- 8 Convention of 1966. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976, in accordance with Article 49 of the Universal Declaration of Human Rights.
- 9 The United Nations, Civil and Political: The Human Rights Committee, Fact sheet No. 15 (rev.1), p.4.
- 10 *ibid.*

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<sup>11</sup> Mulenga Nkula, “**Liberty of Refugees and Asylum seekers denied on a whim**”, [http:// www.jctr.org](http://www.jctr.org).

<sup>9</sup> The United Nations, Civil and Political: The Human Rights Committee, Fact sheet No. 15 (rev.1), p.4.

<sup>10</sup> *ibid.*

<sup>11</sup> Mulenga Nkula, “**Liberty of Refugees and Asylum seekers denied on a whim**”, [http:// www.jctr.org](http://www.jctr.org).

<sup>12</sup> *Ibid.*

<sup>13</sup> Chapter 1 of the Laws of Zambia.

<sup>14</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976, in accordance with Article 49 of the Universal Declaration of Human Rights.

<sup>15</sup> UNHCR, EXCOM Conclusion No. 44. 1986.

<sup>16</sup> United Nations of Yearbook, 1997 “Refugees and Displaced persons” (Volume 51) (2000) UNITED NATIONS p. 1231.

<sup>17</sup> The United Nations High Commissioner, July 1997 Note on International Protection, A/AC.96882.

<sup>18</sup> *ibid.*

<sup>19</sup> The Jesuit home page at <http://jesref.org/com>.

## **CHAPTER THREE.**

### **THE CONCEPT BEHIND INTERNATIONAL COVENANTS AND TREATIES AND THE SCOPE OF THEIR APPLICATION IN ZAMBIA.**

International attention was drawn to the fact that refugees and asylum seekers exist and will continue to be a growing concern for humanitarians and philanthropists for years to come unless curbed or at least maintained in the most reasonable manner. Initially the asylum and refugee problem was mainly a concern for each countries domestic law and was not granted the required attention until the severity of the holocaust was experienced at the end of World War two. At this point refugee and asylum seekers began to receive the worthy international attention and this led to the development of the United Nations Declaration for Human rights and other international covenants and documents developed in order to guarantee rights and protection of the said rights. This chapter shall in turn focus on the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, the International Convention on Civil and Political Rights, the Universal Declaration of Human Rights and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa as these documents provide the widest framework that deal with the provision of rights as well as means for refugee and asylum seekers to seek redress for actions that have aggrieved them.

The main concept underlying the recognition of rights of asylum seekers and refugees is the issue of maintenance of one's dignity. This is the main concern of all treaties and conventions enacted to deal with the issue of rights owed to a particular class of people. It was elegantly expressed in the American Declaration<sup>1</sup> that "We hold these truths to be self-evident that all men are created equal: that they are endowed by their creator with certain inalienable rights that among these life, liberty and the pursuit of happiness." The concept of protection of human dignity can be traced to its theological beginnings where a human being is seen in the image of God<sup>2</sup>, respect is due also to the alien and stranger<sup>3</sup> and was depicted in Christ's concern over and over again for the weak, the outcast and the stranger<sup>4</sup>. Thus international documents are prepared and aimed to protect the dignity of a person at all times.

The United Nations Declaration of Human rights<sup>5</sup> stressed that human rights come before any statute and are not dependant on it; they are universal and apply to every human being. However, this document did not state exactly where the balance is to be struck when individual rights and those of society seem to be in conflict. Thus several governments to this day assume that it is trying to impose western individualism on the world.<sup>6</sup>

The declaration was followed in 1966 by two additional covenants, one on Civil and Political rights and the other on Economic, Social and Cultural rights. Unlike the declaration these covenants provide for monitoring their implementation, especially in the case of civil and political rights it provides a mechanism by which citizens may bring a complaint against their own government before an International body.

A state may become a party to a treaty in one of two main ways. Firstly, it can be via signing the treaty. According to the rule of international law the state may not act contrary to the objects and purposes of the treaty. The signature is followed by ratification, in depositing a signature for ratification a state formally indicates its intent to be bound by the treaty.

Secondly, a state may accede to a treaty. Accession, whereby a state has not signed a treaty agrees to be bound by it, is equivalent to ratification. The treaty or convention in question typically provides a short period of time after the date of ratification or accession before the state is actually bound by the terms of the treaty.<sup>7</sup>

### 3.1 **THE 1951 CONVENTION RELATING TO THE STATUS OF A REFUGEE AND ITS 1967 PROTOCOL.**

Zambia has ratified this convention but has made several reservations in terms of certain articles. This implies that even though Zambia is a party to the convention it cannot be held to uphold the articles it has not ratified.

**Articles 26 and 28** of this convention are not applicable in Zambia.

**Article 26** relates to the freedom of movement of refugees and asylum seekers, which provides that each contracting state shall accord refugees lawfully in its territory the right to choose their place of residence and to move freely within their territory subject to any regulations applicable to aliens generally in the same circumstances. **Article 28** in turn deals with the issuance of travel documents, to be granted for the purpose of travel outside the territory unless compelling reasons of national security or public order otherwise requires. The contracting state shall also give sympathetic consideration to the

issue of such travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

However, in Zambia the Refugees are still restricted to their camps, unless they obtain a specialized work permit or a permit for medical or security reasons or to study at an institution of higher learning. Thus under the Immigration Act as stated in previous chapters, such an asylum seeker or refugee in contravention of such provisions is considered to be a prohibited immigrant and is arrested for usually long periods of time.

Zambia also included an exception to **Article 17, Section 2** of the 1951 Convention, which guarantees refugees with more than three years tenure in a country the right to work on par with nationals. Exceptions include medical personal, of which Zambia has a shortage, and those who are can afford to make a \$50,000 investment in a small business.

It must be noted that these are not the only articles that Zambia has chosen to exempt itself from but they are the most relevant that deal with the rights of refugees and asylum seekers rights being violated or restricted by the Zambian government.

### **3.2 THE OAU CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA , 1969.**

This convention was reviewed when the OAU/UNHCR symposium was held in Commemoration of the twenty-fifth anniversary of the adoption of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the twentieth year of its entry into force<sup>8</sup>. During the symposium it was noted that whilst a great number of issues still challenge the 1969 Convention, its validity as a regional document concerning the protection of refugees in Africa still stands unparalleled to any other document. It is the recommendations of the symposium in relation to the rights of refugees that this chapter will take into account.

As a regional complement of the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol, the 1969 OAU Convention has been a strong pillar for refugee protection and solutions in Africa. It has enabled the provision of asylum to refugees and the implementation of voluntary repatriation in a way that has consolidated brotherhood and comity among African States. It has also inspired the development of favorable refugee laws, policies and practices in Africa and indeed in other regions of the world, most notably in the Latin American region. The Convention remains the only international legal instrument, which contains elaborate principles on the voluntary repatriation of refugees<sup>9</sup>.

The convention places an obligation that member countries should uphold the principles of the Convention on the humanitarian nature of asylum, prohibit activities inconsistent with refugee status, safeguard refugees against refoulement or expulsion, actively promote voluntary repatriation, and respect the principle of voluntaries in repatriation, and practice burden-sharing and solidarity among States<sup>10</sup>. The Convention also provides for a broad definition of a refugee, provisions on the non-projection of refugees at borders and the prohibition of refoulement of refugees, and the respect of the voluntariness of refugee repatriation.

The institution of asylum and the system of refugee protection are under tremendous stress in Africa. The large number of refugees seeking asylum in countries already themselves experiencing tremendous social and economic hardships, has brought into question the very capacity of nations to cope with refugees. In a number of countries, the basic principles of refugee protection are not being upheld. Refugees have been arrested and detained without charge. Others have been resumed against their will to places where their lives may be in danger. Yet others have been restricted to refugee camps or to remote, inaccessible locations where they are sometimes exposed to banditry, rape and other forms of criminality. Many have not been able to enjoy social, economic and civil rights. This is partly the result of a combination of political, security, social and economic constraints whereby States are able to abide by their international legal obligations only under the most difficult and burden-some circumstances. Unfortunately, because of a global recession and the increased number of persons seeking asylum and humanitarian assistance worldwide, the international community's financial and material support to lighten the burden on African host countries has diminished. Thus the symposium

recommended that Governments should use their best endeavors to treat refugees according to the standards established under refugee law. In particular, they should ensure the personal safety of refugees, locate them in areas which are accessible, safe and where basic services and amenities can be provided, and enable them to regain a normal way of life<sup>11</sup>.

Finally the symposium recommended that the international community, the United Nations, the United Nations High Commissioner for Refugees, and other relevant organizations, should support and assist host Governments in fulfilling their responsibilities towards refugees in a manner consistent with the principles of refugee law on the one hand, and legitimate national security, social and economic interests on the other hand<sup>12</sup>.

### 3.3 INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS.

**Article two** is one of the cornerstones of the Covenant. It provides that a State party must respect and ensure the rights of the covenant to all persons within its jurisdiction. Thus, if necessary legislation should be enacted to properly guarantee these rights. Crucially state parties are required to provide remedies to persons whose rights under the Covenant are breached. This right has been interpreted as the right to require a forum to be available to hear an allegation of a violation of a covenant right when such a right is well founded under the covenant.<sup>13</sup> It is the courts and administrative authorities that provide these remedies. Without this right to enforce a covenant right before the domestic authorities

by way of remedy, the actual substantive rights of the Covenant would be deprived of much practical effect.<sup>14</sup> **Article 5** provides for a general provision stating that nothing in the covenant confers the right to limit or destroy any of its provisions, and that a state party whose domestic law provides greater protections than those contained in the covenant may not use that as an excuse to restrict and derogate from the fundamental rights contained in the covenant.

**Article 23 and 24** recognize the particular role of the family unit and address the issues of marriage and the rights of children, in Zambia it is not uncommon for separated children who come to seek asylum to be detained on arrival as a first resort and to be detained with adults and convicted criminals who often take advantage of their vulnerability and abuse them<sup>15</sup>, furthermore mothers are detained together with their young children, which is also a violation of the convention on the rights of the child to which Zambia is also a party.

**Article 26** is the cornerstone part three, it provides for rights dealing with equality before the law and equal protection of the law, with a wide guarantee of non-discrimination. The human rights commission has taken a broad view of this provision, relating it to all provisions of law, rather than simply the terms of the covenant. Thus if a state party confers a particular benefit of any kind on a person or group of persons, it must be accorded in a non-discriminatory fashion. Distinctions drawn by law must be based upon reasonable and objective grounds, in order to be consistent with this provision<sup>16</sup>. Thus asylum seekers should be afforded such opportunities in Zambia as well.

A state party may choose to limit such rights within the limits prescribed and does not amount to a violation of the right in question. The permissible limits are neither wide nor generous and certainly do not permit a state party effectively to void a certain right of practical meaning. The burden of justification lies with the state party to show that certain limitations satisfy the tests of legality, necessity, reasonableness and legitimate purpose.<sup>17</sup> Rights may also be restricted by reservation.. A traditional indicator whether a reservation is acceptable is the reaction of the other states, which may submit objections to a reservation lodged by another state party.<sup>18</sup> If a reservation is found to be incompatible, it is severed and the full obligation in question to the state party is applied. Reservations are often regarded as a poor policy choice in that deprive certain persons of rights for reasons which are unclear to other state parties or which may be valid for only some time.

### 3.4 THE HUMAN RIGHTS COMMITTEE.

It is established under **article 28** of the covenant. Under article 31, the committee may not include more than one national of the same state party. Consideration should be given to equitable geographical distribution of membership and to representation of different forms of civilization and principal legal systems. This is to enable impartiality of the decisions made by the committee. The members serve in their personal capacity not as representatives of their governments; therefore proceedings should be politically impartial. To ensure the highest standards of conduct the committee has adopted ethical guidelines for the guidance of its members<sup>19</sup>.

The Human Rights Committees task is to supervise and monitor the implementation of covenant obligations by state parties. One of the great strengths is the moral authority it derives from the fact that its membership represents all parts of the world. It has four major responsibilities the first, is to receive and examine reports from the state parties on the steps they have taken to give effect to the rights spelt out in the covenant. Secondly, the committee elaborates so called general comments, which are designed to assist state parties to give effect to the provisions of the covenant by providing greater detail regarding the substantive and the procedural obligations of state parties. Third, the committee receives and considers individual complaints or “communications”, under the optional protocol made by individuals who claim violations of their covenant rights by a state party. Fourth, the committee has jurisdiction to consider certain complaints made by a state party that another state party is not abiding by the obligations assumed under the covenant.

The last two functions are of the most importance to this chapter, the first deals with the filing of an individual complaint under the Optional Protocol. It may take several years for a complaint to proceed from initial submission through the series of exchanges between the parties to a final decision by the committee. If a complaint is urgent the committee may request the state to take “interim measures” to avoid irreparable damage to the alleged victim while the complaint is being considered. These measures are designed to preserve the respective rights of the parties until the committee takes a decision on a complaint<sup>20</sup>. Once submitted a number of permissible criteria set out in the optional protocol must be satisfied before the committee will consider the merits of an

individual communication under the optional protocol. No oral evidence is submitted and there is no strict rule as to the allocation of the burden of proof. The committee will tend to accept the states specific denials of certain facts unless the victim can provide documentary proof supporting his or her assertions. The very least requirement is that a state is required to investigate a complainant's allegations in good faith. If the committee finds the case admissibility, it adopts "views" on the substance or merits of the complaint. The views are communicated to the author of the complaint as well as to the state party and are made public after the session at which they are adopted. The case law provide a valuable point of reference for courts and decision makers in all states parties when considering the same or similar issues. If the committee finds a violation in a particular case, the state party is requested to remedy that violation; pursuant to the obligation in **article 2 paragraphs 3** of the covenant to provide an effective remedy may take specific form such as payment of compensation, the repeal or amendment of legislation and/or the release of a detained person. Thereupon the case is taken up by the Committees Special Rapporteur on the Follow up to Views who in turn communicates with the parties with a view to achieving a satisfactory resolution to the case in the light of the committees' views.

In relation to inter state complaints, a party may submit a communication to the committee alleging that another state is not fulfilling its obligations under the covenant. In this fashion it can thus be said that legally human rights violations in a state party are of the direct concern to all other state parties. This is provided for in article 41 of the covenant but may only be made by two states that state that they recognize the competence of the committee to receive and consider inter state complaints. To date

however, No inter state complaint has been submitted to the committee. The first step would be for the state lodging the complaint to bring the matter to the attention of the state that is alleged not to be fulfilling its obligations. Within three months the latter should reply in form of a written explanation or clarification. If within six months the matter is not settled to the satisfaction of both parties either may refer it to the committee which may deal with it once satisfied that within a reasonable period of time all domestic remedies have been tried without success. The committee may take a matter up and propose its good offices in the search for a friendly solution. If still no agreement the committee may appoint a five person conciliation commission with the agreement of the states directly concerned with instructions to complete its business and submit a report to the chairperson of the committee in 12 months.

The provisions of the committee that enable it to hear complaints is most appealing to asylum seekers and refugees in Zambia whose rights are aggrieved and as such this provides a platform for filing complaints. However, the expense of communicating with the committee and the time elapsing till a decision is not beneficial and needs to be addressed adequately.

The Human rights committee is the pre-eminent interpreter of the meaning of the International Covenant on Civil and Political Rights. It gives a generous interpretation to the meaning of the covenants provisions consistent with its character as an instrument guaranteeing fundamental rights and freedoms. The committee's discharge of the monitoring functions entrusted to it under the covenant has improved the lives of the

individuals in countries in all parts of the world. However, the committee must make itself more accessible to the relevant state parties and strive for the exercise by aggrieved persons to invoke the right to individual complaints in order to enjoy the civil and political rights guaranteed by the covenant without discrimination. It should be more accessible and quicker to grant solutions to individuals who are aggrieved.

### **3.5 THE UNHCR'S CONTRIBUTION IN ZAMBIA.**

The UNHCR works in collaboration with government of Zambia to safeguard the humanitarian character of the asylum seeking process. It provides technical support guaranteed in terms of respect of protection of refugee women and children and the management of statistical databases. The UNHCR is the inter-governmental agency responsible for policing the 1969 UN Convention on Refugees, and is present wherever there are refugees in significant numbers. A liberal interpretation of its mandate has meant that the UNHCR has also come to monitor the implementation of the OAU Convention as well. The UNHCR has a statutory protection role, and it is this protection role, which distinguishes it from other international aid agencies.

The UNHCR aims for urban regions, the protection of refugees and asylum seekers by forming a protection regime with emphasis on care management, are ensuring higher standards of treatment while allowing for self-reliance and ultimately for durable solution for all persons of concern to the office<sup>21</sup>. In relation to the Zambian government the UNHCR will explore opportunities to facilitate and when appropriate approve voluntary

repatriation with safety and dignity. It also aims to ensure resettlement in selected areas in close consultation with the prospective receiving countries. It has played an important role in advocating social inclusion of refugees pending the identification of other durable solutions for them.

In practice, however, the UNHCR has been hampered in its efforts to fulfill its mandate by contradictions inherent in its nature. Primarily, the large bureaucratic structure of the UNHCR makes it almost impossible for them to respond in a flexible, creative manner to new situations as they occur. Secondly, the twin functions of providing both relief and protection can mean that sometimes UNHCR personnel are working at cross-purposes. For example, the UNHCR may be unwilling to take a confrontational position towards the host authorities on issues of physical protection of refugees in the interest of maintaining good relations, which facilitate aid distribution. Human Rights First contends that the UNHCR has more leverage with host governments than it likes to admit, given the flow of foreign exchange that accompanies mass flows of refugees, and the governments' unwillingness to deal with refugees on their own

While the use of NGOs to perform limited protection roles (i.e. provision of legal advice to asylum-seekers) may mitigate some of protection problems faced by refugees, the UNHCR must not neglect its statutory protection role. In the final analysis the UNHCR is not answerable to host governments, but to the international community and to refugees themselves. To be fair, however, there is an urgent need to increase the funding allocated to the protection wing of the UNHCR, and increased recognition on the part of donors of the importance of protection issues.

Zambia to a large extent has remained faithful to international principles of asylum and has maintained a positive and open asylum policy; historically it has felt obliged for security reasons to make reservations specifically the sending of refugees to designated areas and the limiting of access to employment.

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## ENDNOTES FOR CHAPTER THREE.

- <sup>1</sup> The American Declaration of Independence, 1871
- <sup>2</sup> Genesis chapter 1 verse 26.
- <sup>3</sup> Exodus chapter 23 verse 9 and Leviticus chapter 19 verse 34.
- <sup>4</sup> Matthew chapter 25 verses 31-34.
- <sup>5</sup> Adopted in the year of 1951.
- <sup>6</sup> John Carrol S.J, "Human rights and human wrongs",  
<http://www.jesref.org/reports/>.
- <sup>7</sup> TREATY HANDBOOK OF UNITED NATIONS OF THE OFFICE OF LEGAL AFFAIRS, <http://untreaty.un.org/olu-internet/Assistance/handbook-eng/hbfraneset.htm>
- <sup>8</sup> The Addis Ababa Document on Refugees and Forced Population Displacements in Africa Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa 8 - 10 SEPTEMBER 1994 ADDIS ABABA, ETHIOPIA
- <sup>9</sup> Ibid.
- <sup>10</sup> Preamble of the 1969 OAU Convention.
- <sup>11</sup> Recommendation number 7 of the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, held on the 8-10 Th September 1994.
- <sup>12</sup> RECOMMENDATION NUMBER 11 Ibid.
- <sup>13</sup> CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE. FACT SHEET NUMBER 15 (REV 1) MAY 2005.
- <sup>14</sup> General comment number 31 on the nature of the general legal obligation imposed on state parties to the covenant (CCPR/C/74/CRP.4/Rev.6)
- <sup>15</sup> Mr Mulenga Nkula, "Detention conditions for Refugees and asylum seekers in Zambia" <http://www.jesref.org/>
- <sup>16</sup> IBID, p.7.
- <sup>17</sup> Ibid, p.8.
- <sup>18</sup> Ibid, p.8.
- <sup>19</sup> The Committee's rules of procedure, (CCPR/C/3 REV.7).

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<sup>20</sup> <http://www.unhchr.ch/html/menu6/2/sheets.htm>. or FACT SHEET NO 7 (REV1), COMPALINTS PROCEDURES, PUBLISHED AT THE UNITED NATIONS HIGH COMMISIONER FOR HUMAN RIGHTS.

## CHAPTER FOUR.

### THE DETENTION AND DEPORTATION OF ASYLUM SEEKERS.

The adoption of the Convention Relating to the Status of Refugees<sup>22</sup> refined the UNHCR's mandate to provide international protection to refugees without specifying what "*protection*" meant. It led to the term being a compromise between a narrow legal function such as providing legal assistance and an all-encompassing participation in the provision of international protection. The compromise between both positions was a recipe for disagreement that still exists as it is felt by some nations that protection must begin in the country of origin and others feel that it is most urgent during flight and a few believe it is most urgent at the country of asylum.

The Convention Relating to the Status of Refugees implied that the grant of asylum was a sovereign matter for governments, not a human right. It restricted coverage and endorsed the subjective definition of a refugee and it was left to governments not the UNHCR to determine who qualified. This means that governments determined who qualified to be granted protection as a refugee or asylum seeker in accordance to their domestic law policies and also in accordance with their International obligations determined by conventions they have ratified.

The current policy in Zambia, for instance, is mainly based on concerns for security and social stability, the presence of hundreds and thousands of refugees moving out of the country could certainly create a national security problem. The eventual movement of

these masses into towns or urban areas would worsen the situation of social marginality and create tensions with the local population in the competition and maybe wind up in public order problems.

It is the determination of a refugee made by a government that is the main concern of this chapter. During the process of determination many refugees and asylum seekers are either deported or detained. This chapter aims to see whether there is any compliance with the concept of non-refoulement, if there is a criterion for the forms of violations that would warrant deportation and whether deportation and detention are the most appropriate means to addressing the asylum seeking process and the legality of detaining asylum seekers for indefinite periods of time.

#### **4.1            REFOULEMENT.**

Refoulement is the prohibition of expulsion or return and is referred to in Article 33 of the Convention Relating to the Status of a Refugee. It provides that 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.

The benefit of the present provision is limited to a refugee and asylum seeker who raises no reasonable grounds to be regarded as a danger to the security of the country in which he is, or who, has not been convicted by a final judgment for a particularly serious crime.

Thus the removal of a person to a territory where he/she would be at risk of being persecuted, or of being moved to another territory where he/she would face persecution, constitutes a violation of the principle of non-refoulement and is therefore a breach of refugee law and of customary international law.

**Section 26** of the Immigration and Deportation Act<sup>23</sup> deals with the issue of deportation. It permits Immigration officers to detain prohibited immigrants for indefinite periods of time, pending reasonable deportation from Zambia at the first reasonable opportunity. This act shows that Zambian laws are unable to account for the human situations of refugees and asylum seekers who have no realistic expectation of returning to their countries of origin. Thus the Zambian policy instead increases the number of persons in illegal situations of residence, status or documentation; this in turn serves to adequately undermine the national security. Persons that are reduced to illegality when trying to find a durable solution to their human problems pose a greater security challenge than people whose legitimate aspirations for rebuilding life are taken into account under the law of the land.

Thus it can be seen that the legislation in power in Zambia does not respect the principle of non-refoulement and instead returns the refugee and asylum seeker to a situation in which their life or freedom is threatened once again. There is a disregard of the concept of reasonable fear of persecution and fleeing with this reasonable fear encountered by the placing the asylum seeker within proximity with their fear.

It is an inhumane act and probably the worst form of a violation that any particular official may commit. However, this action may be carried out if an asylum seeker proves

to be a danger or threat to national security and it would enable that person to be tried in their home country rather than in their country of preferred refuge.

#### **4.2 DETENTION CONDITIONS FOR REFUGEES AND ASYLUM SEEKERS IN ZAMBIA.**

The use of detention to deter future asylum seekers from seeking protection is contrary to principles of international protection. This conclusion is confirmed by the UNHCR that detention of asylum seekers which is applied as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Moreover, detention for purposes of deterrence is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile. It is a practice that is legally questionable under **Articles 31 and 33** of the United Nations Convention.

It is the breach of an administrative requirement or of law by a refugee and an asylum seeker in Zambia that merit detention. When found by Immigration officers, refugees and asylum seekers with no proper papers allowing their residence in town are imprisoned for months, along with common criminals and are out of the control of the courts. Such actions can be supported by sections of the Immigration and Deportation Act but however, they contradict the positions of Zambia as a country of asylum responsible for the protection of refugees. This is the set standard for what may warrant detention of asylum seekers for indefinite periods of time. The fair and efficient adjudication of the

claims of asylum seekers is severely undermined by the very fact of detention and by particular detention practices. Without a doubt, it is particularly difficult for a detained asylum seeker to obtain legal counsel. Many detained asylum seekers are held at prisons in remote areas where it is often difficult to obtain legal counsel. For those who cannot afford to pay for counsel, the availability of free legal assistance is limited. Even at larger prisons, the need for free legal assistance often surpasses the availability of such assistance. Those who are lucky enough to secure competent legal counsel will face substantial obstacles in preparing and proving their asylum cases, simply because they are detained.

### **4.3 The Conditions in Zambian prisons.**

Firstly, refugees and asylum seekers can be detained in any of Zambia's over crowded prisons together with convicted criminals. The living conditions in these prisons are extremely harsh and sometimes life threatening<sup>24</sup>.

They are detained under poor conditions with little or no food and with poor sanitary provisions<sup>25</sup>, this has a lot to do with the poor infrastructures that are called "prisons" and also the fact that these prisons are packed beyond their capacity with prisoners having to sleep packed like "sardines" in a tin can at night<sup>26</sup>.

A report of November 2004 showing an interview with an officer in charge stated that prisons like the Lusaka Central prison was built to hold 100-150 inmates now holds 200 - 300 inmates and the Kamwala remand prison built to hold 150 detainees currently has over 876 inmates<sup>27</sup>. As a result detainees are so crowded that most are forced to sleep

while sitting until the following morning in a sea of bedbugs, lice and other parasitic insects.<sup>28</sup>

The sanitary conditions are atrocious to say the least, as most of the time toilets are blocked, that is to say not operational. Normally detainees do not have access to bathing water and may only bath when sick and about to be taken to the hospital<sup>29</sup>.

There is also a high level of abuse including random beatings, assault and sexual abuse mostly targeting new detainees and the physically weak by other inmates. This coupled with the congestion, might explain the high prevalence rates of dysentery, skin rash among the many diseases present.

Detainees are only fed once a day. The nutritious value of the meals is minimal.

Also separated children who come to Zambia to seek asylum are often detained as a first resort. To make matters worse, separated children are detained with adults and convicted criminals who often take advantage of their vulnerability and abuse them. Under the 1951 Convention there is no special provision relating to the refugee status of persons under age and thus the same definition applies to all persons regardless of their age.

A problem that often arises in the determination of the status of a minor is when it comes to applying the criteria of "well founded fear". It is difficult to apply this criterion to a child that has fled via mass movement, or has fled after the death of all family members. If accompanied by at least one family member or parent determination may be done via the principle of family unity.

Mothers are detained at Central Prison together with their babies and very young children in life threatening conditions. This is in violation with the Convention on the Rights of the Child to which Zambia is a party<sup>30</sup>.

Under the Universal Declaration of Human Rights, the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The final act of the conference that adopted the 1951 Convention recommended governments to take necessary measures for the protection of a refugee's family, especially with a view of ensuring that the unity of the refugee family is maintained and the protection of refugees who are minor's in particular unaccompanied children and girls with special reference to guardianship and adoption.

The Zambian government should cease to make their prisons a place of first resort containment; detention leads to the deprivation of person's right to liberty and movement and should only be used as a last resort. Government should instead provide refugee reception centers where refugees and asylum seekers may be "detained" until they are processed adequately. Normally the refugee status is not meant to be permanent; it is intended to terminate in one of the three ways, namely voluntary repatriation, resettlement in a third country or local integration into the host country. Thus an asylum seeker, rather than being placed automatically in prison, should be offered these three options. Local integration would seem to be an attractive solution for refugees who have at least two generations prior to them having lived in the host country but it is not possible under Zambian laws and regulations. Integration would entail the option of becoming a citizen after a relatively short period of time. This is common in the United States, Canada and Australia who are the three major resettlement countries in the world.

Thus of the three options only repatriation is available in Zambia as mentioned earlier the other two methods are not strictly adhered to due the lack of resources and lack of conviction by officials that such acts are effective. Repatriation is usually not a good approach if the home country still possesses as a threat to the asylum seeker or one has to return to homeland one has never seen. The effects of repatriation are illustrated in the case of John, a refugee who has been repatriated to a country to which he has never been.

### **THE CASE OF JOHN.**

John is in his mid 20's; he was born in the North Western Province, but not at the Maheba settlement. His father was and is a teacher in the Zambian School system. John's parents are both from Angola and came to Zambia in the early 1970's as refugees. John attended primary and secondary school in Zambian schools. He did well at his exams and won a scholarship to the University of Zambia where he is pursuing his studies in Education. He wants to be a teacher like his father who has been teaching for nearly 25 years. John cannot become a Zambian or an established resident. The current laws or rather the current interpretations of the law do not permit this to happen. Thus he cannot work or move freely without the fear of breaching some law and being detained in a country where his parents have fled to and where one has been born, educated and in which their parents have helped develop. He instead has the option of voluntary repatriation to a country he does not know rather than continue such a restricted life. Any action taken by John to not adhere to his restricted life would render him eligible as a "prohibited immigrant" and susceptible for deportation from Zambia.

This case also highlights that Zambian law due to its lack of receptiveness of the current refugee status and the lack of adequate legislation to provide a means in which a refugee can either be integrated into the Zambian system or provided with a means to remain in the country, adheres to the policy of refoulement.<sup>31</sup>

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## **ENDNOTES FOR CHAPTER FOUR.**

<sup>21</sup> <http://www.unhcr.ch/cgi-bin/texis/vtxl/protect>.

<sup>22</sup> UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES. Entered into via the auspices of the African Union.

<sup>23</sup> CHAPTER 123 OF THE LAWS OF ZAMBIA.

<sup>24</sup> Such As CHIMBOKAILA AND KAMWALA REMAND PRISON.

<sup>25</sup> MULENGA NKULA. **“DETENTION CONDITIONS FOR REFUGEES AND ASYLUM SEEKERS IN ZAMBIA”**  
<http://www.jesref.org//>.

<sup>26</sup> Ibid.

<sup>27</sup> **“THE CONDITIONS IN OUR PRISONS”** NOVEMBER 2004 REPORT NUMBER 31, THE Jesuit Refugee Service OFFICE LUSAKA ZAMBIA.

<sup>28</sup> MULENGA NKULA **“DETENTION CONDITIONS FOR REFUGEES AND ASYLUM SEEKERS IN ZAMBIA”**  
<http://www.jesref.org//>.

<sup>29</sup> **“THE CONDITIONS IN OUR PRISONS”** NOVEMBER 200 REPORT NUMBER 31, THE JRS OFFICE, LUSAKA ZAMBIA.

<sup>30</sup> A CONVENTION OF 1989 THAT SETS OUT COMPREHENSIVE STANDARDS FOR THE PROTECTION OF THE RIGHTS OF CHILDREN. ARTICLE 2 OF THE CRC STATES THAT THE CONVENTION COVERS ALL CHILDREN WITHOUT DISCRIMINATION OF ANY KIND AND REFUGEE CHILDREN ARE THEREFORE COVERED BY THE STANDARDS SET BY THE CRC.

## **Chapter Five.**

### **Recommendations and Conclusion.**

This chapter focuses on recommendations to the current legislation and procedure in Zambia concerning asylum and refugee seekers in Zambia.

#### **5.1 Recommendations dealing with the detention of refugee and asylum seekers in Zambia.**

Parliament should ensure that legislation is not used generally to detain asylum seekers who pose no risk to the community, and in particular not to detain asylum seekers who have met the "credible fear" standard by establishing a significant possibility of winning asylum. Any exceptions to this general rule should be narrowly tailored in the Acts so that there is little area left for grey acts in oblivion where the law is lacking. These changes would ensure that the Zambian law is consistent with African tradition and international standards.

The Ministry of Home of Affairs should direct the issue of regulations providing for the release of asylum seekers who meet the "credible fear" standard and pose no danger to the community. The Immigration department should not be permitted to carry out any acts rather than those specified by the Act and when such acts are to be carried close consultation should be done with the adequate authorities concerned with the issuance of asylum, as this practice has repeatedly proven insufficient to ensure accountability and compliance by local Immigration officers.

Local immigration officials should no longer make individual detention decisions.

Officers who are specially trained in asylum, country condition, and parole issues, such as asylum officers, should make initial detention and detention decisions for asylum seekers. These decisions should be made pursuant to legally binding regulations, rather than at the discretion of local officials.

Decisions to detain asylum seekers must be automatically and promptly referred for review to a judicial or other competent and independent authority. A meaningful, independent, and timely appeal process must be established to review denials. As well the decisions being amendable to detain should be reviewed periodically by this independent authority.

In those limited cases in which some form of detention is deemed necessary and where there is no risk of harm to the community, the Zambian government should make maximum use of alternatives to detention. Such alternatives might include use of refugee accommodation centers, group homes, supervised release programs, release to a guarantor, or release on bond. Asylum seekers should not be held in prisons and should not be held with criminal populations.

The Commissioner should ensure that any proposed restructuring makes provision for the unique situation of detained asylum seekers. The function of the asylum commission should be divided into separate "service" and "enforcement" divisions, determinations regarding the care and release of detained asylum seekers should not be entrusted to other authorities. Adequate resources must be allocated to the commission for such acts are the UNHCR.

In developing release procedures and programs, the Zambian government should work cooperatively with non-profit organizations that have over the years of experience in assisting asylum seekers with their legal, religious, social, and resettlement needs.

The Zambian government must be required to maintain and publicly release accurate and current statistics regarding the number of asylum seekers in detention, the length of detention of asylum seekers, and the release and/or parole of asylum seekers.

**Conclusion.**

It is my contention that the Zambian legislation and procedures have a long way to reach the prescribed international modes. New acts should be developed in order to deal with areas that are still not clearly adhered to such as distinguishing between a prohibited immigrant and an asylum seeker, also the establishment of asylum reception centers in Zambia. There are a lot of lacunas provided by Zambian legislation that enable the violation of the rights of asylum seekers and refugees in Zambia, these acts seriously need to be reviewed and re-enacted in several instances. However, this requires the backing of the Zambian Government, the UNHCR and other non-governmental institutions, as this is a very costly but necessary act. It is the final conclusion that there should really be rethinking of the current legislation and the adequate sensitization of the adequate officials and refugees so that adequate means of recourse is known by all.

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## **ACTS REFERRED TO:**

The Constitution of Zambia, Chapter 1 of the Laws of Zambia.

The Refugee Control Act, Chapter 120 of the Laws of Zambia.

The Immigration and Deportation Act, Chapter 123 of the Laws of Zambia.

## **COVENANTS REFERRED TO:**

THE AFRICAN UNION CONVENTION GOVERNINF THE SPECIFIC ASPECTS OF THE REFUGEE PROBLEM OF 1969.

THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES.

THE CONVENTION ON THE RIGHTS OF A CHILD OF 1989 THAT SETS OUT COMPREHENSIVE STANDARDS FOR THE PROTECTION OF THE RIGHTS OF CHILDREN.

THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICL RIGHTS, Convention of 1966.