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MY SUPERVISION BY:

ROYDAH M. CHINUNGI

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Roydah M. Chinungi
SUPERVISOR

REFUGEE LAW IN ZAMBIA
WITH THE REFUGEE CONVENTIONS AND
THE REFUGEE(CONTROL) ACT, 1970

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BY ROYDAH M. CHINUNGI

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DEDICATIONS

This work is dedicated to Kashinga, mum, dad and my sister Mrs. M.B. Ndakasha in gratitude and appreciation and to my late dearest friend Beauty Masozi Chirwa.

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At the end of such a study one thinks with special appreciation of the wide range of persons and groups that have given so freely of their time and their expertise. It would be satisfactory to name them all, but I trust they will recognise how much I appreciate the help and confidence they have contributed to my work.

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INTRODUCTION

Zambia has been one of the active states in seeking and accepting legal solutions to the problems presented by an enormous influx of refugees to the country. The efforts to regulate the refugee situation corresponds to the humanitarian and hospitality with which Zambia has received, protected and assisted a great number of refugees, regardless of the costs, the hardships to the country's own citizens and the sacrifice of the over-worked national administrators.

Zambia thus is a party to the most important international instruments in existence relating to refugees and aiming at their protection that is, the 1951 Geneva Convention, the 1967 Protocol and the 1969 OAU Convention. Zambia has enacted refugee legislation of its own in order to implement on the national level the obligations entered into upon ratifying the Conventions. It is worth presenting in this paper the most important rules on the rights and duties of refugees in Zambia, both international and domestic.

However, not only law which is explicitly referred to as refugee law is important for the life of the refugee in the country of asylum. For this reason, chapter three deals with various other international instruments with some bearing on refugee right. To what extent the refugee is impaired by the obligations to obey national law and

to what extent it is of benefit, is an important question for legal research. The main purpose of this study is, therefore, to discuss the Zambia refugee law as provided for in the Refugee (control) Act, 1970. To bring out the short-comings of the law and how the situation can be improved by incorporating into the refugee law the rights or benefits of refugees stipulated in the international instruments discussed in chapters two and three.

CHAPTER ONE

1. THE HISTORICAL BACKGROUND

1.1 AFRICA'S AND ZAMBIA'S REFUGEES

Urbanisation and labour migrations are the major forms of modern population movement. They are predominantly free and usually economically motivated. In the past, however, most migrations were involuntary or forced. And today involuntary movements continue to account for a large proportion of world mobility, especially forced migrations that is a consequence of "man's inhumanity to man". These are the world's refugees and they currently number about twelve million and about half are located on the African continent.¹

Refugee movements are clearly not a new phenomenon. They are woven through the fabric of human history, in response to political, racial or religious persecutions or the enslavement of one society by another. Africa is no exception to this rule. One of the greatest forced migration ever to have taken place saw a massive transfer of human resources as slaves from Africa to Americas. Before the arrival of Europeans in Africa, the displacement of weaker tribes by stronger one was common place. During the Ngoni expansion for example, many refugee movements were set in motion along the line of their

conquests. With the advent of colonialism, new forms of displacement manifested themselves as Europeans set about alienating tribal lands for their own settlement. What differentiates these earlier forced migrations from those being currently experienced is the sheer magnitude of the modern movement, as well as that so many movements are today occurring simultaneously in so many regions on the continent. The rate at which the number of refugees had increased since the last decade or so is extremely great. In 1970 for example there were only seven hundred and fifty thousand refugees on the continent but today there are about six million.²

1.2 CAUSES OF AFRICA'S REFUGEE MOVEMENTS

Refugees are human beings who have been forced to flee their homelands. Of course, no one can choose to become a refugee but circumstances beyond one's control forces one to do so. These circumstances embrace the social, economic and political spheres of life. For instance, in terms of economic crisis when one cannot afford just anything to get him going, one is easily forced to seek refuge in any near or far off country as long as it provides the peace that one is in pursuit of. Also in times of starvation, which can be attributed to the sole cause of social economic problems some people

are forced off their own native lands.

However, to everyone's dismay nowadays, the chief promoter of the refugee situation in the world is political instability of countries coupled with frequent coup d'etat, massive killings of innocent people by the regime in power and all that is considered inhuman to mankind. In such situations man is left with no choice but to flee for safety to other countries. The policy of occupation, aggression and racial discrimination practiced by the racist regime of South Africa compelled thousands of people to search for peace and dignity in countries bordering South Africa and beyond. However, it is not our intention whatsoever to make these South African refugees "the tree that conciles the forest", for unfortunately we all know too well that the largest number of refugees have fled from sovereign and independent African countries. There is not a single region in Africa where there are no refugees. Why then should we not acknowledge the fact that some of our communities have not yet done away with the vestiges of ethnic and tribal conflicts? Why can we not also acknowledge the existence of conflict within and between our countries from colonialism and fanned by imperialism and neo-colonialism? Lastly, why can we not deplore the reign of intolerance prevalent in some parts of the continent, contrary to our tradition of humanitarianism and respect of our fellow

human beings?

Basically, we can place the continent's refugee movements into one or more of the following groups of causes:

1. Conflict due to secessionist tendencies
2. Anti-colonial or independence wars
3. Interethnic hostilities
4. Political repression
5. Religious persecution.

Civil wars resulting from secessionist movements have plagued Africa's postindependence history. They are a direct product of the colonial partitioning of Africa and testimony to the fact that few African states have any precolonial antecedents. Indeed, it can be argued that the need to instil a sense of national unity among heterogenous ethnic groups incorporated within colonial boundaries has been a pressing need since independence as the need to generate viable economies. The consequences have been attempted secession and resultant civil war, and the by-product of such conflict may of course been the emergence of refugees. For instance, the tragedy of the attempted secession of Katanga and Biafra was well documented in the international press.³

Anticolonial warfare has been one of the major causes of refugee movements. The reluctance of the

Portuguese to follow examples set by other colonial powers in withdrawing from their possessions in Africa was responsible for large refugee movements in all three of their colonies.

Discrimination against one ethnic group by another is not uncommon in Africa, and in some cases it has reached intensities that have caused members of a particular ethnic group to flee to neighbouring states. Rwanda and Burundi stand out most clearly as countries where refugee migrations have resulted from one ethnic group's carrying out a systematic program against another.⁴ The civil wars in Nigeria, Chad, and Southern Sudan, although primarily attributed to other causes, also had interethnic tensions, distrust, or discrimination associated with them.

Refugee migrations caused by direct political persecution have possibly been the most frequent and widespread. At the beginning of 1984, there were as many as ten states in Africa where governments were fighting undeclared wars against groups of their own nationals who were in opposition to them.⁵ Here the prime causal factor is the intolerance of one political dogma towards another.

Many of the world's major migrations have been generated through religious persecution. In Africa, two refugee movements directly attributable to religious

persecution were the Lumpa Sects' move from Zambia to Zaire and the exodus of Malawian Jehovah's Witnesses to Zambia. In both cases, however, most of the refugees went back after their religious fervor cooled or their home governments adopted a more tolerant stand.

Clearly, Africa's refugee movements have been initiated by a much greater range of causes than has characterised the other major arenas of refugee movement in the world. It is also apparent that although some of Africa's movements have a single discrete centre, many are in response to a variety of factors.

1.3 ZAMBIA'S CONTACT WITH THE REFUGEE PROBLEM

Since its independence in 1964, Zambia has been faced with the problem of refugees from neighbouring countries under the control of white minority racist regimes and also refugees running away from civil wars and rebel activities. The first influx of refugees was from Mozambique in December 1965 and these were victims of the conflict between Liberation and Portuguese forces in the Tete District of North-Western Mozambique.⁶ Since then there have been several occasions when refugees from Angola, Zaire, Namibia and Zimbabwe have crossed into Zambia in large numbers. The recent influx of more than 730 refugees from Mozambique into

Zambia following a fresh outbreak of fighting between the Mozambican Armed forces and MNR rebels illustrates this point.

Presently, Zambia has over 45,000 refugees, most of them spontaneously settled and scattered in the border areas of Western, North-Western, Copperbelt and Lusaka Provinces.⁷ Some of these people have been in Zambia for over ten years and are settling into a well organised and self-reliant community with common language, cultures, religions and accepting a long term indefinite stay in Zambia.

But we have to be realistic about the refugee problem in Zambia. With the attainment of independence in Zimbabwe, there has been a sign of relief for the country in that the number of refugees has been reduced considerably following the repatriation of Zimbabweans to their homeland. But people in Namibia and South Africa are still struggling for independence, to free themselves from the oppressive and brutal minority regimes. Naturally, an influx of refugees may be expected in Zambia.

As a result the government of the Republic of Zambia has adopted a generous "open-door" asylum policy⁸ towards anyone seeking refuge. This cooperation has been a realisation on the part of the government and the general public that refugees are victims of forces beyond their control. What has happened to them could

happen to any of us. The way in which refugees look to us for succour may be the way we ourselves will tomorrow be looking to others.

1.4 REFUGEE STATISTICS

- Total approximately 144,981 as of March 1989.⁹
- About 94,000 Angolan refugees in Western and North-Western Provinces of who 15,500 are in organised settlement (at Maheba and Mayukwayukwa), 78,630 are spontaneously settled and who started coming to Zambia since the late sixties and up to the present time.
- 27,730 Mozambican refugees in Eastern Zambia - who started arriving in Zambia in early June 1985, settled at the new Ukwimi settlement in Petauke.
- 9,000 Zaireans - mostly from Shaba Province where conflicts erupt from time to time. They are settled in Northern, Luapula and North-Western Provinces, including 600 at Maheba and few urban refugees.
- 7,300 Namibians - about 5,000 of whom are in the Swapo Health and Education Centre at Nyango, Western Province, while the rest are mostly urban refugees and found in Lusaka and other major towns.
- 3,000 South Africans - scattered over major Zambian towns, mostly supporters of ANC and live in Lusaka.
- 1,000 of different nationalities, including 450 M Malawians who came in 1964, 150 Ugands who mostly came

in October 1985 with former President Obote, and 50 Zimbabweans who came in Zambia following elections in June 1985 in Zimbabwe (Matebeleland). Fewer numbers from other nationalities are also registered as refugees.

But the refugee situation in Zambia is highly dependent on the political realities of the Southern African region. The central issue, that of majority rule in South Africa and Namibia, holds the primary key to stability in the region. As the struggle for greater freedom continues in these two countries, it is inevitable that shock waves will continue to reverberate. It appears certain that Zambia will continue to receive significant numbers of new refugees who are fleeing their homes because their lives are at risk and who require at least temporary asylum and assistance from the Zambian government, from UNHCR, and from the many professional non-governmental agencies which are rendering aid.

1.5 CONCLUSION

The introductory chapter set out to familiarize the reader with some of the major dimensions of Africa's refugee problems and to place the Zambian experience into a broad African context. It is clearly that Zambia has been receiving large influxes of refugees since independence.

Within Zambia are represented refugee migrations arising from a variety of causes. In sum, it is suggested that in many ways Zambia's experience can be seen as a microcosm of Africa as a whole.

NOTES

1. John R. Rogge, Too Many, Too Long. Sudan's Twenty-Year Refugee Dilemma, (Rouman and Allanheld, New Jersey, 1985) p.1.
2. Zambia Episcopal Conference: Commission for Relief and Development, A monthly Review on Refugees (Catholic Secretariat, Lusaka, May 1983) p.10.
3. John R. Rogge, Ibid p.8.
4. Ibid p.9.
5. Loccit.
6. Louise W. Holborn. Refugees: A Problem of Our Time Vol. II. (The Scarecrow Press Inc. Metuchen, N.J. 1975) p.1300.
7. According to statistics in the Office of the Commissioner for Refugees Ministry of Home Affairs, March 1989.
8. The Voice of the Refugees, Refugee Magazine (Catholic Secretariat, Lusaka June 1987) p.5.
9. See Note 7.

CHAPTER TWO

THE REFUGEE CONVENTIONS

2.1 THE INTER-RELATION BETWEEN THE CONVENTIONS

The Convention relating to the status of Refugees of 1951, here referred to as the Geneva Convention, the Protocol relating to the same subject of 1967 and the OAU Convention Governing Specific Aspects of the problem of refugees in Africa of 1969, are all related to each other. For a country like Zambia, which has ratified all three instruments, it is a matter of applying a connected system of rules. These Conventions confer upon the individual refugee a distinct legal status in order that he may lead a normal life.

However, the Geneva Convention proved to be narrow in scope in that it applied only to persons who became refugees due to events occurring in Europe before 1st January 1951.¹ The deadline in the Convention was due to the historical fact that in the late 1940's almost all African countries were still under colonial rule and refugees were considered a West European phenomenon in the political and ideological climate of the cold war. It was not until the adoption of the 1967 Protocol relating to the status of refugees that the time limit was removed and the Geneva Convention extended to refugees in Africa and elsewhere, nota bene in countries who acceded to the protocol.

Although the protocol eliminated the geographical limitations, the refugee definition in the Geneva Convention reflects essentially West European ideas and conditions. The definition which strongly presupposes the determination of refugee status on an individual basis, is impracticable if not impossible in most cases in Africa. African refugees are too numerous and developing countries encounter a great deal of difficulty in establishing the necessary proceedings. There are several other areas where the Geneva Convention fails to meet the specific requirements of the realities in Africa and other refugee - burdened parts of the world, particularly developing regions. In fact, the Geneva Convention, in spite of its world-wide importance as the Universal refugee instrument is also inadequate to deal with the presence in Europe and elsewhere in the industrialised world of many refugees from such poor countries.² This has in fact caused the problem of the so-called de facto refugees, that is, persons not recognised as refugees by law but who nevertheless, for political reasons are unable or unwilling to return to their country of origin.

As the number of refugees in Africa continued to rise, it was felt that collaboration between the OAU and the United Nations High Commissioner for Refugees (UNHCR) should be more effective in order to implement more efficiently the measure stipulated in the Geneva

Convention and the 1967 Protocol. As a result, the OAU Convention was adopted at Addis Ababa in Ethiopia on September 10th 1969. The OAU Convention therefore is a valuable regional compliment to the Geneva Convention and the Protocol with provisions that were made to cover the specific problems that had arisen in Africa relating to refugees.³ The OAU Convention marks a considerable step forward in refugee law, improving the Geneva Convention in several ways, a few of which shall be mentioned here.

2.2. DEFINITION OF REFUGEE

We have been hearing on radio, in books and from people talking about refugees but we have never sat down to think deeply who a refugee is. To start with, a refugee is a person who has been forced to flee from his country because of floods, famine, war or political persecution. Looking closely at a refugee in trying to understand him, we realise that it is easy to pronounce the term "refugee" while not weighing his status dignify and sufferings.

The first part of the refugee definition in the OAU Convention is closely modelled on the Geneva Convention and reads as follows:

... the term "refugee shall mean every person who, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country...

This part of the definition mentions nothing of war, civil war, guerilla activities, colonialism or apartheid as generators of refugees. However, the second part by referring specifically to such causes, expands the basis for permitting refugee status, reading:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁴

We could note that this part of the definition does not speak of subjective fear of the individual but of objective criteria, that is, unbearable and dangerous conditions which set entire populations on the move. The phrase "events seriously disturbing public order", is designed to adequately cover a variety of man-made conditions which do not permit humans to reside safely in their countries of origin. This certainly is the legal basis for admitting refugees upon the group determination of their status.

The Geneva Convention does not provide for a special eligibility procedure and not all countries, parties to the Convention have such procedures. Those countries who have developed a certain procedure have taken it upon themselves to determine who is a refugee and what should be considered well founded fear of persecution. Therefore, the OAU Convention enlarges upon categories of individuals to be accorded refugee status by including individuals generally seeking refuge from violence of any kind or foreign occupation whether or not in fear of persecution.

2.3 ASYLUM

The first and most important need of a person who leaves his country of origin or nationality due to any of the reasons we have elaborated above, is asylum i.e. to be authorised to reside in another country and given refuge there. The Institute of International Law defined "asylum" as the protection accorded by a state in its territory or at some other place subject to certain of its organs to an individual who comes to seek it.⁵ The question to consider is whether the right of asylum must be interpreted as a recognised prerogative of a state in the exercise of its sovereignty or as a right attaching to the individual who enjoys it. This question was considered by the International Court of Justice in the

COLUMBIAN - PERUVIAN ASYLUM CASE.⁶ The court found that the right of a state to grant territorial asylum implies "only the normal exercise of the territorial sovereignty", and needs no further justification.

There is, therefore, no express obligation on a state to admit refugees to its territory. But the Conference of Plenipotentiaries which adopted the Geneva Convention recommended that governments continue to receive refugees in their territories and to act in concert in a true spirit of international co-operation in order that the refugees may find asylum and the possibility of resettlement.⁷

The OAU Convention has strengthened the individual's right to territorial asylum by obliging the signatory states to use their best endeavours to receive refugees and to secure settlement for them. The Convention deems the granting of asylum as a legal obligation of states and stipulates in Article II(2) that the grant of asylum to refugees is a peaceful and humanitarian act and should not be regarded as an unfriendly act by any member state.

Because of the fact that states are under no legal obligation to grant asylum, no Convention on asylum has been adopted at the Universal level. However, the General Assembly of the UN unanimously adopted on 14th December 1967, a Declaration on Territorial Asylum.

Although the Declaration is not binding on any state, it was meant as a means of promoting respect for the right of territorial asylum as a humanitarian measure, without modifying existing rules of international law.⁸

2.4 PROTECTION AND NON-REFOULEMENT

There is a well-established relation between asylum and protection - the rule of non-refoulement on the one hand and the non-extradition on the other. It is almost a general principle of international law that extradition of a person to a country where he risks being persecuted or punished for a political crime, is forbidden. The principle of non-refoulement which is designed to protect refugees is laid down in Article 23(1) of the Geneva Convention. According to this provision a refugee should not be forcibly returned to the frontiers of a territory, where he will risk harsh persecution threatening his life and freedom. The OAU Convention repeats the principle in a more flexible form protecting the refugee from measures which would compel him to return or to remain in a territory where not only his life and liberty but also his physical integrity would be threatened.⁹

The OAU Convention further pays special attention to the protection of refugees and for security by prescribing in Article 11(6) that refugees should be settled as far as possible at a reasonable distance

from the frontier of their country of origin. Permanent settlements should be located at such distances that they cannot easily be reached from the other side of the border.

Both the Geneva Convention and the OAU Convention prohibit refugees from engaging in subversive activities against the country of origin and the country of asylum. A person who has shown himself to be a dangerous criminal is excluded from refugee protection and privileges otherwise granted him. The prohibition of subversive activities lays duties on the refugee towards the most country which regards the obligation to conform with its laws, regulations and measures taken for the maintenance of public order. A refugee who is guilty of a common offence is not exempted from legal sanctions. If he commits a crime in his country of asylum, he should be tried and if found guilty be punished according to the law of that country. If he is a fugitive of justice and cannot be extradicted because of the principle of refoulement, he can also be prosecuted in the country where he finds himself, provided that the country in question has jurisdiction in the case according to its laws.

2.5 VOLUNTARY REPATRIATION

According to the UNHCR, voluntary repatriation is the best and most desired solution for refugees. It involves

the return of refugees to their country of origin. Article V. of the OAU Convention gives detailed rules about the facilitation of the refugees without risk and that no refugee should be repatriated against his will. He can only be forcibly returned following a decision reached in accordance with the law if circumstances in connection with his being recognised as a refugee have ceased to exist. In Africa however, repatriation of large numbers of refugees especially to countries like Angola, Mozambique and Namibia depends on the easing of tensions among the fighting factors in these countries.

2.6 OTHER PROVISIONS

Refugees lawfully in the country of asylum are entitled to Travel Documents for the purpose of travel outside their territory. Article 28 of the Geneva Convention and Article VI of the OAU Convention both stress the obligation that contracting states should issue Convention Travel Documents to lawfully residing refugees unless compelling reasons of national security or or public order require otherwise.

It is interesting to note that the Geneva Convention provides in Article 26 that the contracting state should accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject only to regulations

applicable to aliens generally in the same circumstance. This provision is very important in that it gives to refugees freedom of movement. Unfortunately the provision does not find expression in the OAU Convention.

Since the adoption of the OAU Convention in 1969, there now exists a framework which governs the rights and duties of states in Africa. One such concern is the necessity of aiding countries of asylum to resolve the difficult problems of refugees by sharing the economic and social burdens among all African countries in a spirit of solidarity and regional co-operation.¹⁰ This too stands out as an African progress in refugee law, although its implementation has so far failed.

2.7 CONCLUSION

The purpose of this chapter was to discuss the international Conventions dealing specifically with refugees, that is the Geneva Conventions the 1967 Protocol and the OAU Convention. The adoption of these instruments marked the attempt towards a search for a permanent system to protect refugees. There was need for a comprehensive legal backing to enforce certain rights and obligations on nation states and by so doing to protect the refugees from further suffering. These international instruments together form a body of refugee legislation as advanced as any. We have seen from our

discussion the responsibilities which lie upon state parties to the Conventions and the obligations which lie on the refugees. Other international instruments dealing with refugee rights are discussed in the following chapter.

NOTES

1. Geneva Convention UNTS Vol. 189 p. 137. Art.I(2).
2. Peter Nobel, Refugee Law in the Sudan (The Scandinavian Institute of African Studies, Uppsala 1982) p.8.
3. The OAU Convention came into force upon deposit of instruments of ratification by one third member states of the OAU. See Art XI.
4. See Article I of the OAU Convention.
5. Atle Grahl Madsen, Territorial Asylum (Oceana Publication, Inc. New York. 1980) p.1.
6. ASYLUM CASE (1950) I.C.J. 266.
7. Madsen Atle Grahl, Territorial Asylum p.140.
8. Ibid p.161.
9. See OAU Convention Art II(3).
10. OAU Convention. Art II(4).

CHAPTER THREE

OTHER INTERNATIONAL INSTRUMENTS

The refugee Conventions presented in the previous chapter form the central part of the international rules focussed on the status, rights, protection, obligations and other problems of refugees. These are international instruments which deal specifically with the status of refugees, and it is obviously essential to promote wider knowledge about this body of laws. However, some of the fundamental rights of refugees are also included in other instruments of international humanitarian law. The various international instruments relating to refugees stem from the international community's will to concern itself generally with the protection of fundamental Human Rights. Awareness of the existence of all these instruments, if not precise knowledge of all their rules, is necessary for the development and strengthening of refugee law, humanitarian law, Human and Peoples' Rights. Knowledge of the various other instruments is necessary because in the everyday work with large numbers of refugees there may arise particular situations and problems, for which the proper solutions may be found by the person with easy access to a treaty, resolution by an international body or a similar document, aiming at exactly the situation in question..

A few remarks on various categories of international

legal instruments with implications for refugees are given below

The very first article of the Geneva Convention defines a refugee as any person who has been considered a refugee under various older international agreements dating from 1926 to 1939, Art. 1A(1). And in the preamble to the 1969 OAU Refugee Convention the member states expressed their dependency on earlier instruments of international law and thereby their own principal and ideological point of departure in making the new international law embodied by the Convention.¹ It is important to note, however, that some of these earlier instruments are legally binding while others impose only a moral obligation. But together they contain important information for the interpretation of the Convention. Principles such as are contained in preambles, international resolutions, recommendations, declarations and the like, although they are not legally binding, often bear testimony of penetrating thought, honest intention or carefully balanced political negotiation. They often form the basis for legal, moral and political argument.²

As practice at international law shows, if a principle is repeatedly quoted or referred to in all seminars and conferences on the subject matter it takes on a certain dignity, that is, the value of

general acceptance and if undisputed, the force of customary law. Thus the OAU Convention not only recognises the 1951 Geneva Convention but above all bears in mind the basic principles of the Charter of the United Nations and the Universal Declaration of Human Rights. It further recalls the Declaration on Territorial Asylum.³

3.1 REFUGEE RIGHTS AS HUMAN RIGHTS

According to the Universal definition, a refugee is briefly described as being outside his country of origin because of a well founded fear of persecution. However, the concept "persecution" is not defined in the Geneva Convention and the interpretation of that criterion has caused some difficulties. A solution close at hand would be to relate the concept of 'persecution' to basic human rights as they have been defined in existing international instruments.⁴ A person must be considered to be persecuted when he is denied or seriously prejudiced in the exercise of his human rights. We need only to look at the situation in South Africa where human rights violations is at its highest. In Southern Africa, for example, 2.5 million people have been forced to flee their homes, two-thirds of them being displaced within their own countries due to South African distabilisation policies. In addition more than 100,000 South African and Namibian nationals

have fled their countries in search of refuge. Within South Africa itself 4 million people have been displaced and dislocated as a result of apartheid and have been forcibly removed to the so-called bantustans.⁵

As pointed out in the previous chapter, not every human rights violation gives rise to refugees, of course, but there are no refugees without some violation or denial of human rights. The importance of the human rights backdrop to refugee issues is increasingly being recognised. In 1986 a report by a Group of Governmental Experts identified "Coerced movements" as sufficiently reflecting the rationale for refugee flight. The refugees are forced to flee from their countries and seek refuge in neighbouring countries and beyond. It is compulsion in a wide sense including war and armed conflict which induces flight for fear of life, liberty and security.

3.2 AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

To ensure the importance of human rights in Africa the heads of states at the OAU Summit held in Nairobi in June 1981 adopted an African Charter on Human and Peoples' Rights. The Charter states in the preamble that it is essential to pay particular attention to the right of development and that civil and political rights cannot be dissociated from economic, social and cultural rights. The charter recognises that fundamental rights

stem from the attributes of human beings, which justifies their international protection and that the reality and respect of people's rights should necessarily guarantee human rights. The African states parties to the charter have a duty to promote and protect human rights and freedoms taking into account the importance traditionally attached to those rights and freedoms in Africa. The African countries have recognised that human beings are inviolable and that every human being is entitled to respect for his life and the integrity of his person and no one is to be arbitrarily deprived of this right.

From the refugee lawyer's point of view, it is also of interest to note Art. 12 of the Charter, which gives to every individual the freedom of movement and residence within the borders of a state. The individual is further given the right to leave a country including his own, and to return to his own country. This right can only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality. Every individual also has the right, when persecuted to seek and obtain asylum in other countries in accordance with their laws and international conventions.

Further still the Charter gives every individual the right to work under equitable and satisfactory conditions and to receive equal pay for equal work. In addition the individual has a right to enjoy the best

attainable state of physical and mental health while the state parties must see to it that the health of their people is protected and to ensure that they receive medical attention when they are sick.

Of further interest is Art. 17 which gives every individual the right to education as well as the right to freely take part in the cultural life of his community, while the state must protect and promote moral and traditional values of the individual.

On the other hand, the individual has the duty under Art. 23, once granted asylum not to engage in subversive activities against his country of origin or any other OAU member state party to the Charter.

The above mentioned articles give the individual the rights to enjoy his fundamental human rights and applies to every person the refugee inclusive.

But from what we have discussed in this paper it is clear that the refugee is not accorded the rights stipulated for not only in the African Charter but also in other international instruments such as the Universal Declaration of Human Rights. True as Art. 12 provides every individual has a right to seek and obtain asylum but once admitted are the other rights recognised? The fact that one is a refugee implies that his liberty and integrity have been violated. As for the right of freedom of movement the refugee's movements within the host country are restricted. In most cases, the refugees are confined to refugee settlements and can only go out

upon production of a pass. The situation is not different with respect to the right to work. In most countries refugees need to have work-permits before they can be employed in any enterprise. Unfortunately for the refugees they are not granted the same education facilities as the nationals of the host country. All these instances show that the refugees are denied the rights which are rightly theirs as human beings and this is contrary to the spirit of the African Charter.

3.3 THE ARUSHA CONFERENCE

As pointed out above, though not legally binding recommendations by an International body or Conference do form the basis for the interpretation of basic instruments relating to refugees. In May 1979, the will of the OAU member states to search for a lasting solution to the refugee problem was made concrete through the holding of a Pan-African Conference in Arusha, Tanzania. The recommendations passed by that Conference, at present, constitute the best working document for ensuring an adequate implementation of the OAU Convention and can pave the way for lasting and even a final solution to this problem.

The Conference reaffirmed the principle embodied in the preamble to the 1951 Geneva Convention that human beings must enjoy fundamental rights and freedoms without

discrimination, and emphasized the need for the legal problems of refugees to be viewed in the wider context of respect for Human Rights. The Conference appealed to all African governments to make every effort to fully implement the basic instruments relating to Human Rights, namely, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both of 1966,⁸ and to include the provisions of these instruments in their national legislation.

The recommendations of the Conference have been adopted by the OAU and the UN General Assembly⁹ and, therefore, certainly carry a specific weight in the development and interpretation of refugee law, not least in Zambia. They may be said to be one of the non-binding but politically and morally obliging sources of the international refugee law, which should be of great guiding value. Zambia entered no reservations to any of the recommendations of the Conference.¹⁰

The Arusha Conference certainly did not see refugees, the causes of their situation. On the contrary, it advocated the effective involvement of refugees in intergration and development, stressing in many ways the links between refugee issues, international solidarity and African human rights.

3.4 CONCLUSION

The Chapter set out to inform the reader of other international instruments with some bearing on refugee rights. Refugees are generally driven to seek asylum by violation of Human Rights, and the governments themselves are largely responsible for these violations. To improve the situation all African governments should make every effort to adhere to and to implement fully the basic international legal instruments concerning human rights and, even more importantly, must include the relevant provisions from international conventions dealing with Human Rights and refugee problems in national legislation. The rights of the refugees cannot be isolated from human rights and indeed, refugee rights are a part of human rights.

NOTES

1. Peter Nobel, Refugee Law in the Sudan (Scandinavian Institute of African Studies, Uppsala, 1982) p.16.
2. There are examples of Conventions lacking sufficient implementation on one hand and recommendations with a considerable impact on the other. These were discussed at the UNITAR Uppsala Seminar on International Law and Organisation for a New World Order, June 1981.
3. Paragraphs 6 and 7 of the Preamble to the OAU Convention. See also in general A. Grahl - Madse Madsen, Territorial Asylum, 1980.
4. See Universal Declaration of Human Rights, African Charter on Human and Peoples Rights.
5. "Human Rights Bias Exposed", Times of Zambia, Saturday, March 4, 1989, p.3.
6. "Refugee Rights - Human Rights", Refugee Magazine No. 38, February 1987, p.5.
7. Zambia Episcopol Conference, Quarterly Review of Refugees No. 16 1st June, 1983.
8. UNTS Vol. 993 p.3 ratified by Zambia 10/4/84
UNTS Vol. 999 p.171 ratified 10/4/84 respectively.
9. L-G. Erickson, An Analysing Account of the Conference on the African Refugee Problem, Arusha, May 1979 (Uppsala, 1981) p.68.
10. Zambia was represented by:
H.E. Hon. E. Mulenje M.P. (Snr Chieftainess Nkomeshya, Minister of State for Home Affairs).
H.E. Mr. W.K. Mayondi (Zambia High Commissioner to Tanzania).
Mr. E.H.B. Simukulwa (Under Secretary Ministry of Home Affairs).
Mr. E.H. Sikazwe (Commissioner for Refugees).

CHAPTER FOUR

THE NATIONAL REFUGEE LAW

In the last chapter, we discussed how the rights of the refugees have been enhanced by international instruments other than the three International Conventions dealing with the status of refugees. In the present chapter, we will critically analyse the Zambian refugee law as stipulated in the Refugee (Control) Act.¹ We will look into the legal status of refugees in Zambia and this concerns the issue of their rights, the basis of these rights, how these rights have been affirmed or denied and what recourse is open to the refugees against the denial of their rights. We will finally consider how adequately the Act provides for refugees in the country and how (if at all) the situation could be improved upon.

4.1 REFUGEE POLICY AND LEGISLATION

First and foremost, we have to concede the fact that the refugees in Zambia are primarily a Zambian problem and a Zambian responsibility. Zambia has recognised the plight of the refugees and has taken upon itself the task of sharing the refugees' burden with other OAU and UN member states. As a result Zambia is a party to the UN 1951 Convention, the 1967 protocol and the 1969 O.A.U Refugee Convention²

Zambia pursues an "open-door" asylum policy, meaning that all persons with a genuine fear of persecution for

reasons of race, beliefs, religion, nationality, membership to a particular social group or political origin, made to flee their countries of origin, may be admitted as refugees.³

Initially, the government's policy towards refugees was shaped by the Country's economic and military position in the region coupled with a growing sense of isolation in the face of South African military might. This meant that the government was most careful with admitting refugees, especially from the hostile territories to the South. And following the declaration of self-government by the Smith regime in Southern Rhodesia (Zimbabwe) in 1965 the government was to be more cautious with the granting of refugee status as political shock-waves from UDI were also felt in Zambia. However, following Zambia's accession to both the 1951 Geneva Convention and the 1967 Protocol as well as the 1969 OAU Convention, the government had to change its policies towards refugees. The next step in the government's policy was the enactment of its own refugee law.

4.2 THE ZAMBIA REFUGEE (CONTROL) ACT

The Refugee (Control) Act No. 40 of 1970 was adopted by the National Assembly on 28th August, 1970, in order to implement some of the provisions on refugees as stipulated in the 1951 Convention and the 1967 Protocol.

The Act is principally concerned with the determination of who is a refugee and with the control and regulation of refugee movements and activities within the country's borders. However, the Act, does not provide for use of the definition of refugee contained in the International Conventions on the status of refugees. The Act instead provides for the Minister of Home Affairs to declare, with certain limitations, that broad categories of aliens within the country are refugees on the basis of their nationality or country of origin.

Once the Minister has declared any group of persons to be refugees, authority is then delegated to special refugee officers to implement the declaration of the Minister by issuing permits to remain to persons who fall within the category of refugee. Under the provisions of section 11 of the Act, if a refugee fails to obtain a permit to remain in the country within seven days of his arrival his presence would be unlawful and he would either face deportation or imprisonment. Each authorised Officer is also given the power to refuse to issue a permit within his discretion and without stating the reasons for his decision. However, the refusal to issue a permit is prohibited in all cases where, in the opinion of the officer, the result would be that the refugee would be returned to a country where he would face political prosecution or physical persecution.

Section 6 of the Act provides for the issuance of identity cards to all refugees but does not make clear the relationship between the issuance of this card and the permit to remain. Further, the Act seems to be intended to group all refugees into settlements. Section 12 provides for the establishment of refugee settlements and the promulgation of rules for the safety, orderly and administration of the welfare of refugees in the settlements.

Of great interest is Section 7 which prohibits every refugee from acquiring or retaining firearms or ammunition while in the country. A question then arises whether the ANC freedom fighters within the country do not fall under the definition of refugees. My argument here would be that the ANC cadres are refugees since they are outside their country of origin for fear of persecution. The interesting point is that the ANC cadres are fighting for freedom and as such are permitted to acquire firearms. This goes to show that there are exceptions to the general rule that refugees are prohibited from acquiring or retaining firearms or ammunition while in the country. This point is of interest because of recent developments where the ANC cadres have been involved in shootings and killings. The cadres were going to be disarmed but the Minister of Defence has said despite the incidents the ANC cadres will not be disarmed. Another interesting point is that unlike the other refugees, freedom fighters

fall under the Ministry of Defence. This is so because the Ministry of Defence deals with matters relating to defence and security of the nation. And it is this Ministry which is more able to monitor freedom fighters than the Ministry of Home Affairs which deals with non combatants.

Further, the refugees are prohibited from owning immovable property, their cattle may be detained or slaughtered for health reasons, and they may neither retain nor acquire any vehicle without the written permission of an authorised officer.

The Act provides also for powers of deportation of refugees to the country from which they entered Zambia. This power is, however, followed by the proviso that no such order should be made if the refugee might be subjected to prosecution or persecution in the territory to which he would be returned. The Act only provides for a right of appeal to the Minister against a deportation order made by other authorities in the case of refugees who have been in the country for more than three months, as provided for in Section 10. But there is no provision for detention of refugees in the Act. In law this means that the government of Zambia have no right whatsoever to detain any refugee. In practice however, and as affirmed by the Commissioner for Refugees, Mr. Simumba, there have been cases where refugees have been detained by the government for security reasons.

What we have been discussing in this Chapter so far are the provisions of the Refugee (Control) Act and this comprises refugee law in the country. We mentioned earlier in the chapter that the purpose of enacting the Act was to implement some of the provisions on refugees as stipulated in the Geneva Convention, the 1967 Protocol and the OAU Convention. But from what has been discussed above we can clearly see that the scope of the Act is very limited. It must be seen as having a very narrow purpose that of preserving national security in the face of a continuing influx of large numbers of aliens. Very little if anything is said concerning the rights of refugees recognised by the international conventions. For this reason, the full implementation of Zambia's international responsibilities towards refugees undertaken upon becoming party to the Geneva Convention and the 1967 Protocol is contingent upon further legislation.

4.3 SHORTCOMINGS OF THE ACT

There are many areas where the law has failed to bring out the refugees' exact rights and the nation's responsibilities towards the refugees. The first point of argument is the question of what exactly happens if a national rule or decision of a national court or authority is in conflict with an international instrument ratified by the state in question. At International Law,

conflict may arise between an international agreement and national law which comes into operation after the agreement has become binding on a state party. This happens when some provisions of the national law are contrary to the spirit of the international agreement. In practice, a state which gives effect to a conflicting rule of municipal law would be in violation of international law. The reason for this practice is that a state cannot use a contrary rule of its municipal law to justify its failure to obey an international agreement.

As we will soon discover the Zambia Refugee (Control) Act has completely failed to implement or enhance the provisions of the international instruments relating to refugees. The Act could have avoided contravening the international conventions by obliging the competent authority to give due consideration to any treaty regulating asylum to which Zambia is a party and also to give such treaty priority in the application of the Act. This could have ensured that the refugee rights stipulated in conventions would prevail over conflicting national legislation.

(i) DETERMINATION OF REFUGEE STATUS

Section 3 of the Act empowers the Minister to declare any class of aliens to be refugees, on the basis of their nationality or country of origin. One would consider

this procedure inadequate. While it is true that definitions based on nationality or country of origin go back to those used in International instruments, and reflect an "open-door" asylum policy, there is another side to the coin. The purpose of the Act seems to be to regulate and control refugees to whom asylum has been granted. But the more general the definition used, the more easily the government can ensure that it has the authority to control the presence and activities of aliens within the country in defence of its national security. The onus is therefore, upon the individual to prove that he is not a refugee and therefore immune from the application of the Act rather than that he is a refugee as might be the case where the purpose of the law was to accord rights or benefits to refugees. What the Act could have done was to incorporate some though not all central elements in international refugee law. It could have, for example, contained all the requisities of the definition in the OAU Convention instead of the Minister declaring aliens refugees or not refugees every time there is an influx. A standard definition could have been more appropriate. We should also consider the issuance of permits to remain as provided for under Section 11 of the Act. As pointed out above, every refugee is required to obtain a permit to remain within seven days of his entry into the country or face deportation or imprisonment for being unlawfully in the country. This requirement would work injustice to

refugees who fail to obtain permits to remain through no fault of theirs. In practice, however, and according to the Commissioner for Refugees,⁵ there has never been a situation when a refugee was deported or imprisoned for being unlawfully in the country after failure to obtain a permit. If such a situation were to arise the UNHCR would come in to save the refugee from being deported or imprisoned in those circumstances.

But to ensure protection of the refugees the Act should have given the refugee a temporary right of asylum which could be automatically prolonged in the absence of a decision in the refugee's care. There should also have been a deadline for the deciding authority so that any individual refugee entering Zambia as a member of a large group of refugees would be allowed to stay in the country if not otherwise decided. This way the Security of the refugees would be ensured if the asylum - granting authorities do not find time or possibility for any particular reason to pay attention to the specific asylum seeking individual.

I further contend that by leaving such broad discretion to issuing officers as to whether to issue or refuse permits to remain, limited only by a very narrow requirement as to circumstances under which a permit cannot be refused, the Act makes possible a much narrower "open-door" asylum policy.

(ii) FACILITATING REFUGEE MOVEMENT

Section 12 of the Act requires that refugees reside within a reception area or refugee settlement. But whether imposed for reasons of security, politics or economics, this requirement affords the government the means of controlling the extent and manner in which refugees mix with the rest of the population. In fact I feel that one of the reasons why rural settlements have appealed to some asylum governments is that they keep refugees together in remote areas of the country separated from other elements of the population. Certainly the responsible bodies are urged to encourage the elimination of special restrictions on refugee movements. It is hoped that the law would be amended so as to bring it into line with the spirit of principles of the Geneva Convention Article 26 which makes provision for freedom of movement of refugees, subject only to regulations applicable to aliens generally in same circumstances.

(iii) ENHANCING ECONOMIC AND SOCIAL RIGHTS

It has strongly been argued that if refugees are socially and economically intergrated into the life of the host country, they need not be a burden for the country of asylum.⁶ Indeed, skilled refugees can contribute to

the host country's economic strength while rural refugees can become a focal point for rural development. In order to facilitate the process of refugee intergration, the international community has attempted to define certain rights in the economic and social field for refugees, which by reason of the special dependence of refugees upon the countries of asylum, must often be more extensive than those rights enjoyed by ordinary aliens. The African Charter on Human and Peoples' Rights contains a number of individual social rights including the right to work, the right to an education, to social security, and to security in the extent of lack of livelihood in circumstances beyond his control. The right is one belonging to "everyone as a member of society", and not simply to every national. The Refugee (Control) Act does not however, stipulate these rights. The government could uphold these rights of the refugees by specifically incorporating them into the national refugee law.

We concede that the passage of laws, no matter how generous, does not of itself achieve permanent solutions to the problems of refugees. Refugee unemployment, as well as national unemployment is a pressing problem in Zambian urban areas. But the significance of social legislation favouring refugees lies in the fact that it assures them that as the country's economy and infrastructure develop, they would not be legally impeded from playing their part in the process.

(iv) NATURALISATION

One other important issue that should be considered is the question of how long a refugee remains a refugee. In the case of post-war Europe, refugees were generally given citizenship of an asylum state within a relatively short time span. Refugees from South-East Asia and Latin America who have recently settled in North America or Europe have had similar access to citizenship after a few years.⁷ In Africa however, and Zambia in particular, most refugee communities remain indefinitely as aliens even their children born in exile also become refugees. This situation to some extent reflects wide spread belief that exile is but a temporary phenomenon. The Commissioner for Refugees,, Mr. Simumba was able to recall the case of one refugee who was born in Zambia in 1920 of refugee parents and who is still a refugee today after sixty-nine years residence in Zambia. But as many of the refugee movements take on long term or even permanent dimensions, the government should begin to address itself realistically to this issue. Long-term refugees are still regarded as aliens even though it is apparent that many of them or their children, are unlikely ever to be able or willing to be repatriated to their country of origin. Hence they become refugees in legal terms only, not in material circumstances or their psychology.

The responsible bodies should urge the government

to take steps to incorporated into the Act a section dealing with grant of citizenship to refugees after a certain number of years. Most refugees especially in Urban areas are highly qualified. We have doctors, lawyers, teachers etc. These refugees constitute a Latent manpower resource, and since they are highly educated and possess skills and qualifications applicable to the Urban milieu, their potential to become productive and self-supporting is very great. And when these people are given citizenship they would settle in the country and provide their skills which we badly need. There is therefore need for the national refugee law to provide for grant of citizenship to refugees who have been in the country for a long time and have no hope of ever going back to their countries of i origin. Naturalisation is an ideal solution.

4.4 CONCLUSION

We have seen in this chapter how the Refugee (Control) Act has failed to uphold the rights of the refugees as stipulated in International Instruments to which Zambia is a party. We have tried to point out the inadequacies of the Act and to suggest ways of improving the situation. The question remains whether after the passage of the African Charter on Human and People's Rights in June 1981, the government would not take steps to review its refugee

law so as to incorporate into the Refugee (Control) Act the refugee rights recognised by the various international instruments discussed in this paper. Even international instruments to which Zambia is not a party could give guidelines on how legal provisions should best be understood and applied.

NOTES

1. Act No. 40 of 1970.
2. Geneva Convention by Succession on 24th
1967 Protocol] August 1969.
3. The Voice of the Refugee Magazine No. 22 June 1987
(Catholic Secretariat, Lusaka) p.5.
4. Section 3 of the Act.
5. Commissioner for Refugees in the Ministry of Home
Affairs Mr. Musyani Simumba.
6. Louise Holborn, Refugees: A Problem of Our Time
Vol. I (Scarecrow Press Inc. N.J. 1975) p.310.
7. John R. Rogge, Too Many, Too Long. (Rowman and
Allanheld, New Jersey, 1985) p.6.

CHAPTER FIVE

CONCLUSION

This paper has attempted to bring out the refugee rights stipulated in the international Conventions on refugees to which Zambia is a party, vis a vis the 1951 Geneva Convention, the 1967 Protocol, the 1969 OAU Convention and various other international instruments with some implications on refugees. We have seen from the above Conventions the responsibilities which Zambia put upon herself on becoming party to the Conventions. Zambia, however, went ahead and enacted its own refugee law. The Zambia Refugee (Control) Act 1970 is concerned with the determination of who is a refugee and with the control and regulation of refugee movement and activities within the country. We have discussed the provisions of the Act and came to the conclusion that the Refugee (Control) Act has a very narrow purpose. Its main aim was to preserve the security of the nation in the face of a continuing influx of large numbers of aliens rather than providing for the refugee rights recognised by the International Conventions. Therefore, in order to fully recognise its international responsibilities, Zambia's refugee law is contingent upon further legislation.

It is our contention that the Refugee (Control) Act has been overtaken by events and has lost its importance.

Our suggestion is that the present Act should be repealed and a new Refugee Act be enacted in its place. Unlike the present Act which only controls and regulates refugee movements and activities, the new Act should aim at according rights or benefits to the refugees.

Although a state will be held to be bound, at an international level, by provisions of instruments it has acceded to, the ideal situation is to make the provisions of international instruments part of national law. These would make the international Conventions more effective although implementation through national law would have to be done in accordance with the Constitutional system of the state.

In relation to Article 26 of the Geneva Convention the Zambian government reserved itself the right to choose a place of settlement for the refugees and this is provided for in the Act. The making of reservations is considered to be a sovereign right of a state and as such the government has a legal right to restrict the movements of refugees. However, we should realise that refugees are human beings who need freedom to go wherever they would like to. We have to think of closing the camps and giving a chance to all of the refugees to be free men and women. Prolonged existence in refugee camps, such as they are, is unworthy of

human beings. This could be achieved through facilitating the assimilation and naturalisation of the refugees.

It is hoped that the law will be amended in this respect so as to bring it in line with Art 26 which provides for freedom of movement, subject only to regulations applicable to all aliens.

The government further considers itself not bound to accord to refugees the same treatment with respect to elementary education as is accorded to nationals. I feel that refugee children should be accorded the same treatment as the nationals. The government should ensure that these children are given access to secondary and technical education. Only by educating them can they serve and benefit the country of asylum. Alternatively, there is need to involve them in projects so as to make them self-sufficient. Opportunities for intergration into their new society should involve plans and programmes to bring out the special needs of children and infants. This, however, depends on additional educational as well as employment facilities being made available. These would in the long run benefit both the refugees and the nationals.

The ideal of free human beings enjoying civil, political, social, cultural and economic rights, freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his rights. The legal

framework already exists and finds expression in the relevant articles of the Geneva Convention and OAU Convention. It is now up to the government to carefully consider the matter and make adequate provisions in the law for the facilitation of free movement both internally and externally. It is for the government to review the law and bring it into line with the international instruments especially the OAU Convention.

In concluding, two quotations will be given from the conclusions and recommendations from the joint UNHCR, UNESCO and UN Symposium on the promotion, dissemination and teaching of fundamental human rights on refugees, held in Tokyo in December 1981:

"In the case of large-scale influx situation the country of refuge and the country of asylum should be regarded as acting on behalf of the international community. International solidarity should be manifested promptly in effective and concrete measures. It should be seen as applying to all aspects of refugee situations, including the defence of the rights, safety and well-being of refugees, support to states in protecting and assisting refugees, the search for satisfactory durable solutions and the support for international bodies with responsibilities for protection and assistance.

It is essential that the fundamental human rights of refugees are taken into account in the consideration of the concept of the right to development, so that provision is made for the satisfactory intergration of refugees in the country of asylum".¹

I will end by recommending

- the attachment of a legal advisor to the Office of the Commissioner for Refugees to assist in matters related

to the protection of refugees; and

- that the same office disseminate information on the rights, and duties of refugees and calls on all UN agencies, the government and voluntary agencies to assist in carrying out this task.
- that the government should as far as possible facilitate the assimilation and naturalisation of refugees. In particular to make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.

It is in the spirit of trying to help to preserve and promote the rights of refugees that I have undertaken this research on refugee law in Zambia.

NOTES

1. Summary Report, UNHCR, Geneva in January 1982, p.18.

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