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A COMPARATIVE ANALYSIS OF THE LAW AND PRACTICE RELATING TO REFUGEE PROTECTION IN TANZANIA AND SOUTH AFRICA.

" Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of masters of laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses"

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LIST OF ABBREVIATIONS

AJIL	-	American Journal of Refugee Law
BANJUL CHAPTER	-	African Charter on Human and peoples rights
BYIL	-	British Year Book of International Law
ECOSOC	-	Economic and Social Council of the United Nations.
ECHR	-	European Convention on Human Rights.
GA	-	General Assembly of the United Nations
ICCPR	-	International Convention on Civil and Political Rights.
ICJ	-	International Court of Justice
ICLQ	-	International and Comparative Law Quarterly
ILM	-	International Legal Materials
IRO	-	International Refugee Organisation
JRS	-	Journal of Refugee Studies
LNTS	-	League of Nations Treaty Series
LQR	-	Law Quarterly Review
OAU	-	Organisation of African Unity
OJ	-	Official Journal
PCIJ	-	Permanent Court of International Justice
RC	-	Regional Commissioner
RCA	-	Refugee Control Act
UDWR	-	Universal Declaration of Human Rights
UK	-	United Kingdom
UN	-	United Nations
UNDOC	-	United Nations Document
UNGA. RES.	-	United Nations General Assembly Resolutions
UNHCR	-	United Nations High Commissioner for Refugees
UNRPA	-	United Nations Relief and Rehabilitations Administration.

LIST OF TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

1945	-	Charter of the United Nations
1948	-	Universal Declaration of Human Rights
1949	-	Geneva Convention on the protection of Civilian persons in times of War.
1950	-	European Convention of Human Rights
1950	-	Statutes of the United Nations High Commissioner for Refugees.
1951	-	Convention Relating to the Status of Refugees
1963	-	Charter of the Organisation of African Unity
1965	-	Convention on Elimination of All Forms of Racial Discrimination.
1966	-	Covenant on Economic, Social and Cultural Rights.
1966	-	Covenant on Civil and Political Rights.
1967	-	UN Declaration on Territorial Asylum
1967	-	Protocol Relating to the Status of Refugees
1969	-	OAU Convention relating to the specific Aspects of Refugee problems in Africa.
1969	-	Vienna Convention on the Law of Treaties
1977	-	Declaration on Territorial Asylum adopted by the Committee of Ministers of the Council of Europe.
1984	-	UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or punishment.
	-	Cartagena Declaration (South America).

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Relevant Legislation Bills

Tanzania:

The Refugees Bill, No. 6, of the 25th Spetember, 1998

South Africa:

Refugees Act No. 130 of 1998

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A Comparative Analysis of the Law and Practice Relating to Refugee Protection In Tanzania and South Africa

Introduction.

The 20th Century has accurately been described as the century for refugees[1]. Africa today, is one of the biggest producers of refugees in the World. According to UNHCR, there are nearly seven million refugees in Africa, out of a world-wide total of fifteen million. There are, additionally, more than two million displaced persons out of a total of approximately five million persons. In terms of percentage therefore, Africa hosts more than 45% of the World's Refugees and more than 35% of the World's displaced people[2]. In 1997, of the ten largest refugee producing countries in the world, seven of them were located in Africa. These countries were Somalia, Rwanda, Burundi, Sudan, Sierra Leone and Eritrea. Africa has, more recently, also witnessed a large increase in the number of refugees being churned out from the Democratic Republic of Congo as a result of it's current internal conflict. All the aforementioned countries have produced mass movements of people seeking protection. Such mass movements have had
significant impacts on a number of African nations, including Tanzania and South Africa.

Tanzania stands in the unenviable position of being sandwiched between the Great Lakes region and North East Africa of which are known as "lands of refugees". Two decades ago, it's Southern border also marked the beginning of another land of refugees extending southwards into the countries that were struggling from colonial and racial domination. Tanzania is perhaps the only country in these regions which has not experienced external or internal population displacement. Instead, Tanzania hosts hundred and thousands of refugees.

South Africa is more fortunate than Tanzania in terms of her geographical positioning. Unlike Tanzania she is not surrounded by "lands of refugees" although she does receive a large number of refugees from Mozambique. Nevertheless she has

[1] Refer to Speech delivered by Deputy Minister for Home Affairs at the Proceedings of Extended Public Committee of the National Assembly Chamber on the 5th November, 1998 at 2

[2] Refer to speech delivered by the Honourable Deputy Minister of Home Affairs, Ms LN Sisulu , MP,

been experiencing an escalating problem of refugees particularly since the 1994 elections when she re-entered into the world community. She has come to be viewed as an attractive option for refugees particularly as the countries of Europe and North America are increasingly restricting the number of refugees they are prepared to grant asylum to or accommodate in resettlement programs[3]. Therefore, though she does not play host to as many refugees as Tanzania, she plays hosts to a significant proportion of refugees ranging close to fifty thousand in number[4].

Refugees are a matter of interstate obligation. The international regime for the protection of refugees is founded on the 1951 Convention on the Status of Refugees which is complemented by regional instruments such as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, as well as general international law. Between them, these sources contain five principles of refugee protection which are: the principle of asylum, non-refoulment, protection, non-discrimination, and burden sharing. The final principle is the principle of solutions which deals with finding permanent and durable methods of terminating the "refugee" status which in international law, is regarded as being temporary. The adequacy or otherwise of a national regime for refugee protection is measured by the extent to which it observes these principles.

This paper sets out to review the systems of refugee protection in both Tanzania and South Africa. It's objectives are in threefold. First, to outline and compare current Tanzanian and South African practice with regard to refugee protection. Second, to explore the international obligations which may be brought to bear upon the duty of states to treat refugees in a particular way. Third, to subject the law of Tanzania and South Africa to scrutiny under international standards and, if found wanting, to make recommendations for improvement.

Tanzania is a signatory to the 1951 Refugee Convention and the 1969 OAU Convention. However, it will be argued that her legal regime whose centre piece was

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During the Occasion of Africa Refugee Day in Berea, Johannesburg on Saturday, 20 June 1998

[3] VLA De La Hunt, *Refugees and the Law in South Africa*(1997) at 1

[4] Supra note 1 at 5 of the 50,000 asylum seekers, approximately 10,000 have been granted refugee

previously the Refugee Control Act(1966) and is currently the Refugees Act of 1998 falls short of the standards of refugee protection provided for under international law. In terms of State practice, Tanzania has a history of being one of the most generous refugee hosting nations. Between 1960 and 1990, Tanzania adopted an "open door policy" by which all persons in flight and in search for safety were permitted to enter and remain in Tanzania and many were afforded naturalisation opportunities. After the refugee crisis in the Great Lakes Region, the country adopted a more controlled approach towards the refugee problem including coerced repatriation. The combined effect of the 1966 Refugee Control Act, and Tanzania's current policy and practice towards refugees, have created a regime which falls short of the standards required by the international obligations which Tanzania has voluntarily assumed. These inadequacies are entrenched in the new Refugees Act of 1998.

South Africa, like Tanzania is a signatory to the 1951 Refugee Convention and the OAU Convention Governing Specific Aspects of Refugee Problems of 1969. However, and not unlike Tanzania, her legal regime for refugee protection, which is catered for by the Aliens Control Act of 1991 as Amended in 1995, falls short of the standards of refugee protection provided for under international law. South Africa in comparison to Tanzania, does not have a history of being one of the most generous refugee hosting nations. When South Africa was under international isolation, she administered an immigration policy that was deeply rooted in racism and anti-Semitism. Between 1960 and 1990 and in contrast to Tanzania's "open door policy", South Africa placed greater emphasis on control and exclusion rather than entry and incorporation[5]. Only those who had the ability to "assimilate into the white population" were permitted to enter and remain in the country and only such persons were afforded naturalisation opportunities[6]. With the end for the Apartheid era came an increase in the number of applications for asylum and the enactment of a new Act to deal with Aliens (refugees and asylum seekers included). The Aliens Control Act of 1991 as amended in 1995 whose purpose it is to "provide for the control of the

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status

[5] J. Crush "Immigration, Human Rights and the Constitution" in *Beyond Control: Immigration and Human Rights in A Democratic South Africa(1998)* at 2

[6] ibid. at 4

admission of persons to, their residence in, and their departure from, the Republic"[7], is restrictive and discriminatory and falls short of the required international standards with regards to refugee protection. The combined effect of the Act, Government's policy to reduce the abuse of the current determination procedure, and irregular, uncoordinated, and sometimes unconstitutional state practice, have given rise to a regime which falls short of standards required by international obligations which South Africa has voluntarily assumed. The current Refugee Act, is a fruitful attempt by government to align it's refugee policy with it's international obligations. Unfortunately the Act in it's present form has yet to meet the required international standards.

This study will be informed by a liberal perspective in an international law context. However, a socio-economic approach will be resorted to in order to have a realistic appreciation of the problems and to make viable recommendations. Justification for this study lies in the fact that Tanzania and South Africa are being exposed to an increasingly greater number of refugees as a result of the explosive situations in many African nations. The refugee policies, laws and practice these countries choose to adopt are therefore a matter of life or death for many refugees from such troubled nations. The importance of this work lies in it's potential to identify key problems that must be resolved and make proposals which would lead to a more liberal and effective refugee protection regime in Tanzania and South Africa for the benefit of refugees.

In examining the refugee problem in Tanzania and South Africa, this paper is divided into four chapters. Chapter one gives a sketch of the refugee problem and policy in Tanzania and South Africa. Chapter two looks at the international regime for refugee protection, concentrating on the relevant principles and institutional arrangements. Chapter Three is the core of the paper and it comparatively examines the law (in particular the Tanzanian Refugees Bill of 1998 and the South African Refugee Act of 1998) and state practice in Tanzania and South Africa. It will be reviewed in this Chapter that both Tanzania and South Africa's law and practice fall short of the

[7] The Preamble to the Act

required standards of refugee protection. The legality and consequences of such inadequacies shall be discussed. Additionally, the validity of the reasons given by both nations for adopting such approaches shall also be discussed (i.e. the growth of the refugee problem to such a magnitude that both Nations in their own capacity, cannot cope with the problem.) This will lead into Chapter four which will argues that while Tanzania and South Africa should amend their laws to bring them in line with their international obligations, their efforts must be accompanied by measures at the international level to rethink the entire refugee protection regime in order to cover the refugee problem more comprehensively, at the levels of prevention, response and solution. At the heart of the regime should be an adequate mechanism for the international community to share the burden more equitably.

CHAPTER ONE

THE REFUGEE PROBLEM IN TANZANIA AND SOUTH AFRICA

1.1 A Historical and Current Account of the Policy Towards Refugees Protection in Tanzania and South Africa

This paper examines the evolution of refugee policy in Tanzania and South Africa between two periods. The first is the period between 1960 and the early 1990's. The second is the period after the early 1990's.

1.1(a) The period between 1960 and the early 1990's

Tanzania

Tanzania has for a long time been regarded as a "paradise" and a "haven" for refugees. Her record of welcoming and accommodating refugees from neighbouring countries has been described by a senior UNHCR official as being second to none[8]. Such records can be dated back to the time of her independence in 1961. They indicate that in her first thirty years of independence, Tanzania played host to over 1.5 million refugees from over 13 countries[9]. Her proverbial generosity is what earned former President Julius Nyerere UNHCR's Nansen Medal for service to refugees in 1983[10].The first waves of refugees came from countries waging wars for liberation from colonial or racists rulers in various countries in Africa including South Africa, Mozambique, South West Africa, Rhodesia and Angola. Professor Peter of the University of Dar-Es-Salaam attributes the influx of refugees from these countries into Tanzania to the fact that Tanzania was the only independent country in the region and hence it was a refuge for those struggling against colonialism, racial discrimination and ethnic fighting[11]. T. Mendel adds that another reason for the great influx was because of Nyerere's beliefs in Pan-Africanism. He believed that there was

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[8] Connelly, M. (1995) *The International Response to the Refugee Emergency in Tanzania: October 1993-July 1994*. Paper Presented at the International Conference on the Refugee Crisis in the Great Lakes Region, Arusha, Tanzania, 16-19 August 1995, at 1

[9] B.P. Johnson Refugee Crisis in the Great Lakes Region: How Tanzania was affected and Her Response. Paper presented at the International Conference on the Refugee Crisis in the Great Lakes Region, Arusha, Tanzania, 16-19 August 1995, at 1

[10] T. Mendel 'Refugee Law and Practice in Tanzania' IJRL 1997 Vol.9 No.1 at 35

[11] Peter, C.M. (1995) Rights and Duties of Refugees under Municipal/ Law in Tanzania: Examining a

no wrong in accepting refugees, and it was proper to grant them citizenship en masse. His Pan-Africanist beliefs are what instigated Tanzania's involvement in other countries foreign affairs and liberation movements[12].

Around the time of independence, civil wars that erupted in Rwanda and Burundi and this resulted in another wave of refugees into Tanzania. The Refugee flows stabilised somewhat in the 1970s and 1980s as many Southern African countries gained their independence and Burundi and Rwanda achieved stable, if not quite democratic governments. Tanzania's attention during this period turned from care and maintenance to providing durable solutions to the plight of refugees including naturalisation of several thousands of Rwanda and Burundi refugees. Despite the enactment of the Refugee Control Act of 1966 whose provisions as far as refugee protection is concerned can only be described as being monstrous, and the restriction of refugees to designated areas, Tanzania continued to maintain her refugee friendly policy until the 1990's. In fact in 1979 Nyerere extended an offer of citizenship to all refugees living in camp settlements in Tanzania. It was his Governments intention that that refugees (who had been prevented from intermingling with the Tanzanian community because of their restriction to the settlement camps) be integrated with the Tanzanian society. His actions, yet again, won him much praise from the international community[13].

The refugee crisis resurfaced in the 1990s when the political crisis in the Great Lakes Region resulted in new waves of refugees of unprecedented magnitudes and complexity. At the end of 1995, Tanzania hosted slightly more than 700,000 refugees, including 500,000 from Rwanda, 180,000 from Burundi, 15,000 from the former Zaire, 5,000 from Mozambique, and approximately 3,000 from other countries.[14] At the end of 1996, most of the refugees from Rwanda were repatriated but at the same

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Proposed

[12] T. Mendel, supra note 11 at 55

[13] ibid. at 44-44. One should bear in mind that Nyerere made his offer not too long after Tanzania had attacked Uganda and removed Idi Amin from power. This in itself was an act contrary to the OAU Charter and was greatly criticised by the international community at the time despite the fact that they were content to see him (Idi Amin) gone.It has been suggested that the naturalisation offer was made to distraction attention from this event.

[14] World Refugee Survery (1996) p. 70 *World Disaster Report* (1996), at. 132

time hundreds of thousands of other refugees arrived in the country from Burundi and Zaire. The cumulative effect of all these events were that they instigated a change in Tanzania's open door policy towards refugees.

South Africa

Although South Africa (in contrast with Tanzania) did not enact legislation specifically for refugees during the period between 1960 and the early 1990's, there were enactment's of a series of legislation pertinent to migratory movements and which applied to refugees as well[15]. The term "refugees" was never attached to any group of person entering the Republic up until the early 1990's. Instead all persons, whether refugees or not were commonly termed 'immigrants'. There was much activity in the immigration arena during this period and it was a period of great unease for the Afrikaner government. The government was becoming increasingly paranoid about the long-standing movement of Africans from neighbouring States to and from South Africa[16].It was therefore cautious not to allow the entrance of any person or persons into the Republic that posed to be a threat to their Apartheid regime. South Africa during this period and unlike Tanzania did not attract influxes of refugees from African nations stricken with turmoil for a variety of reasons[17]. The reasons for a lack of an influx of refugees from neighbouring states can generally be attributed to South Africa's policy towards migratory movements.

One could say that, like Tanzania, South Africa maintained an open door policy. However, her open door policy was restricted to certain groups and categories of persons. To ensure that the correct category of persons entered the Republic, the Government maintained a non-entree regime whereby all those who did not fit the specified criteria were rejected not only at the border of the Republic, but where possible, at the countries from which they intended to begin their journeys to the

[15] i.e The Immigration Regulation Act of 1913, The Aliens Act of 1937, The Immigration and Indian Relief Act of 1927, The Immigration Amendment Act of 1931, The Aliens Registration Act of 1939, The Admission of Persons to the Union Act of 1961 etc.

[16] S. Peberdy & J. Crush 'Rooted in Racism: The Origins of the Aliens Control Act' in *Beyond Control: Immigration and Human Rights in a Democratic South Africa* edited by J. Crush at 30

[17] One of such reasons was because the 'First World Countries' had at that time, fairly lax immigration laws therefore it was much easier for refugees to flee, seek and gain asylum in such countries.

Republic[18]. South Africa's open door policy towards refugees was forged in the crucible of racial exclusion and only encoraged the immigration of certain groups. Refugees had, by law, to be "assimilable by the European population"[19]. Black refugees were simply precluded from seeking asylum. Even if they attempted to, they had no legal standing from which to challenge deportation and other official decisions[20]. If anyone, black or white, did feel inclined to take immigration authorities to court, the law greatly restricted them from doing so[21].

The 1960's witnessed an additional type of discrimination being added to the ingredients that formed South Africa's immigration policy. In addition to being hostile to Blacks and all persons who 'threatened' to dilute Afrikaner power, the Government instituted a new form of prejudice against Whites. Skilled white Europeans (refugees included) were actively encouraged to emigrate to South Africa while Southern Europeans who were less skilled and predominately Roman Catholic, were not[22]. Therefore there were two levels of prejudicial policies at work during this era: policy favouring white refugees over blacks and among white refugees, policy encouraging distinctions to be made on the basis of background, skill and religion. Once refugees fitted the required (in terms of immigration policy) criterion, they were given extensive liberties and rights comparable to those of the South African citizen. Unlike the refugee in Tanzania whose rights were extremely restricted in comparison

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[18] ibid. at 31. The Immigrants Selection Board operation in Pretoria during the 1960's, set up committees to operate inside and outside South Africa . These committees were given the power only to accept immigrant applications and applications for asylum. Any application they felt should be refused had to be referred to the main Immigrant Selection Board in Pretoria. The establishment of these committees in Europe not only shortened the application process and prevented delays, it also ensured that applicants who weren't regarded as suitable to enter the Republic were kept out.

[19] As per section 4(3)(b) of The Admission of Persons to the Republic Act of 1972. An amending Act of 1986 titled the Aliens and Immigration Laws Amendment Act of 1986 removed the definition of "European" from the Act which had required all immigrants to be "assimilable" with the European population. The removal of the word 'European' and the yardstick of assimilability meant that for the first time, black people could officially immigrate to South Africa. This racial restriction, long the cornerstone of immigration policy, was gone. The reason for it's removal was more a political one than a moral one. South Africa's homelands needed to benefit from a growing brain drain of black skills from the rest of Africa. The amendment opened the door for skilled Africans to come legally to South Africa.

[20] D. Omar 'Preface' *Beyond Control: Immigration and Human Rights in a Democratic South Africa* edited by J. Crush(1998) at *iv*

[21] The 1972 Admission of Persons to the Republic Regulation Act stated that "except on points of law, no court of law could have "any jurisdiction to quash, reverse, interdict," or "interfere with" any proceeding, act, order or warrant of the Minister or board, passport control officer, or master of a ship carried out under the act".

[22] supra note 17 at 31

with the Tanzanian citizen and who upon entry was confined to a settlement camp (unless he/she had permission to do otherwise), the refugee[23] in South Africa was not restricted in his movement to a designated area. The government continued to maintain it's 'control orientated' and restrictive immigration laws so as to ensure that persons from the unwanted categories could not enter the country.

In the 1970's it granted asylum to many Portuguese fleeing Mozambique into South Africa and Angola into what was South-West Africa. However it refused to grant asylum to or recognise black Mozambicans fleeing from the civil war into South Africa as 'refugees'[24]. Hence many of the Mozambican refugees that were fortunate enough to enter the Republic[25], resided there illegally. A comparatively small number of Mozambicans came in as legal migrant workers as they had before. The government, determined to keep unwanted migrants out of the Republic, arrested and deported thousands Mozambicans at the time. It did however, consent to treating 'some' Mozambican refugees in the homelands as 'visiting relatives' and it afforded them a measure of protection by refraining from arresting and repatriating them[26]. Though these refugees were not as vulnerable to deportations and arrests as refugees in 'white' South Africa, the possibility of being deported was not eradicated completely. Reports indicate that many of these refugees especially from Kwa Zulu Natal were frequently arrested and deported[27]. In this regard, South Africa yet again differed from Tanzania. Once refugees in Tanzania had entered the country, and been settled in a designated area (settlement camps), they were not subjected to summary arrests and deportations on the grounds that they were illegally present in the country, if they remained in those camps. However in South Africa, one sees that despite remaining in a designated area (the Homelands) as a prescribed 'visiting relative',

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[23] the reader should remeber that as mentioned previously, there was no distinction (at the time) between immigrants on the basis of their reasons for wanting to immigrate to the country. There was no policy of forced Migration.

[24] VLA De La Hunt, *Refugees and the Law in South Africa* 1997 at 2

[25] Many Mozambicans died trying to cross the 63 km long electrified border fence. The most reliable estimate of the number of people killed while attempting to cross the fence was in the region of two hundred a year (Refer to VLA de la Hunt, ibid. at 3) Many of those who tried to cross through Kruger National Park died of dehydration or were killed by wild animals

[26] This was the result of a negotiation between the South African government and the Gazankulu. government . Through this negotiation, emergency aid was also provided to such persons, but at no stage were they regarded as refugees. However and as VLA de la Hunt points out, this regime applied only to some 37,000 Mozambicans.

refugees were still prone to summary arrests and deportation for being illegally present in the country.

The mounting pressures on South Africa from hostile neighbouring countries and the rest of the world did not prevent the government from continuing to maintain a policy towards migratory movements that served their racial imperatives. It's focal aim was to ensure (by all means) the extension of absolute powers of the state. South Africa carried her policies through to the early 1990's. The Apartheid government introduced it's only major piece of immigration legislation in 1991, the Aliens Control Act. Like much legislation passed in the dying years of Apartheid, the Act attempted to entrench the policies of the past and set the parameters within which reform and reconstruction would take place[28]. Many of the Act's provisions were inherited from legislation passed during the height of the Apartheid era. For example it entrenched the 'two gate' policy which distinguished between white and black immigrants[29]. The new clauses it introduced tightened the control of the State over immigrants and further eroded the rights of legal and illegal immigrants and migrants. The act was not drafted with asylum seekers in mind and no mention is made of terms such as 'refugees' or 'asylum'. Instead asylum seekers and refugees are dealt with as a class of 'prohibited persons'[30]. In sum it's provisions clearly manifested the government's policy at the time: racial exclusion, domination, and absolute state power unfettered by democratic checks and balances.

1.1(b) The Period After the early 1990's

Tanzania

The influx of hundreds of thousands of refugees from Rwanda, Burundi and Zaire (especially after the Rwandese genocide of 1994) put an end to Tanzania's open door policy[31]. The catastrophic consequences of such a large influx were well described by

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[27] VLA de la Hunt, supra note 23 at 2

[28] S. Peberdy & J. Crush, supra note 17 at 33

[29] Section 41 retained the exemption clauses that allowed white farmers and the mining industry to recruit migrant labour outside the country under special dispensation.

[30] VLA de la Hunt, supra note 23 at 5 This began at the end of 1993

[31] In 1993 more than 250,000 Burundian Refugees fleeing the Military Coup, fled to Tanzania. In 1994 more that 450,000 Rwandese refugees fleeing the civil war fled to Tanzania, In 1995 more than 90,000 Rwandese and Burundian refugees fled to Tanzania after killings in refugee camps in Burundi, and Zaire. Refer to T. Mendel, supra note 11 at 37

the then Minister for Foreign Affairs and International Co-operation, Hon. J. Rwegasira when he said,

> "The influx of such large numbers of refugees...brought population pressures in the border districts sheltering the refugees, environmental and ecological destruction, depletion of stocks, havoc to social services and infrastructure insecurity and instability in the border areas particularly in Karagwe and Ngara districts.."[32]

Refugees continue to stream into Tanzania even today. As the current Minister for Foreign Affairs and International Relations, Hon. J. Kikwete pointed out in a speech delivered to the United Nations General Assembly (UNGA) in September 1998,

> "The instability in the Great Lakes Region continues to be the source of refugees in the region. Tanzania has hosted thousands of them and it seems we will continue to do so because of the deterioration of the political situation in some countries.....With the outbreak of civil strife in the Democratic Republic of Congo,.....new refugees are once again streaming into Tanzania. In the two months of the new conflict in Democratic Republic of Congo, we have already received about 10,000 new refugees"[33].

Tanzania made and continues to make appeals to the international community to assist her to cope with the refugee problem. However the assistance she has received has not been considered to be adequate. Tanzania has therefore abandoned her open door policy because of the impact of refugees on the country and the failure of the international community to provide adequate assistance. This abandonment was brought to light by the Hon. Rwegasira when he said,

> "...the country has to counsel itself that enough is enough. Let us tell the refugees that the time has come for them to return home and no more should come."[34]

The Hon. J. Kikwete implicitly confirmed the abandonment of Tanzania's 'open door policy' in his speech to the UNGA by saying,

> "As part of the international community, and a responsible member of the United Nations, Tanzania will continue to meet its international obligations of hosting...refugees. BUT (emphasis my own) we must confess that for various circumstances, our perseverance is wearing out and our hospitality should not

[32] J. Rwegasira, Guest of Honour's Speech at the International Workshop on the Refugee Crisis in the Great Lakes Region, Arusha Tanzania, 16-19 August 1995, p.1

[33] Speech delivered to the United Nations General Assembly during it 53rd session in New York on September 8th, 1998 at 4

[34] The Guardian (T) July 1995:1

be considered open-ended."[35]

The continued flows of refugees into the nation have led the Tanzanian government to conclude that their past policy of receiving and settling refugees was probably wrong[36]. This opinion was made clear in the observation made by Hon. J. Rwegasira when he said,

> "In the past Tanzania has always approached the refugee crisis with the seriousness it deserves by receiving all those who had fled their countries and providing them with shelter. The Government even gave them land and several were granted citizenship, for which Tanzania was praised.....Experience has proved that such measures as granting permanent refugee status, permanent settlement are not a formula for a permanent solution to the refugee crisis. The solution indeed lies in the countries of origin rather than in the countries of asylum which are burdened with obligations of refugees.[37]"

The former Minister also stated that the government was of the opinion that to maintain an 'open door policy' would be to reward countries for their "deliberate policy of off-loading onto other countries of the Region, their unwanted extra population,...a bad practice which perpetuated [the refugee] crisis"(*id*). Wehter the Minister meant that Tanzania's open door policy has encouraged instability remains unclear. What is clear is that he viewed refusal of refugees is seen as one way of stopping this practice.

As a result of it's new policy towards refugees, Tanzania has been adopting measures which are extremely restrictive to the rights of the refugee. The country on ocassion closed its borders with Rwanda and Burundi to prevent Refugees from seeking refuge in Tanzania[38]. Refugees have been ordered to remain in overcrowded camps and to observe a host of regulations. Among the sanctions applied for leaving camps without permission or for a serious breach of regulations, is expulsion from Tanzania back to the country of origin which of course is a breach of non-refoulment. In December 1996, Tanzania decided to forcibly repatriate all Rwandese and some Burundian

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[35] supra note 31

[36] B. Rutinwa *Responding to the Arrival of Asylum-Seekers. The end of Asylum? The Changing Nature of Refugee Policies in Africa and other Developing Regions*. Paper presented at The Technical Symposium on International Migration and Development at the Hague, Netherlands between 29 June-3 July, 1998 at 10

[37] supra note 30 at 5

refugees. On the 22nd of January 1997, the President of Tanzania told the delegation from Amnesty International, lead by Ms Flora MacDonald, former Canadian Foreign Minister, which had visited him to plead for the forced repatriation exercise to stop that Tanzania did not expel refugees but it was the refugees who failed to observe the law. In other words the refugees had been expelled for breaching the law of Tanzania. The government's determination to stick to it's new policy and it's unwillingness to tolerate the influx of large numbers of refugees into the country is manifested in the new Refugees Act of 1998. Says the Act in part,

> "Tanzania, being one of the countries hosting a large number of refugees, the presence of such persons affects the country, economically, socially and at time politically. Therefore there is a need to curb such developments through legislation....."[39]

The Act essentially intensifies controls for refugees seeking entry into the country. According to the East African Newspaper of November 2-8, 1998, many of the provisions in the Act were drafted in a hurry, and amid mounting fears that Tanzania could be besieged by refugees so soon after completing a protracted repatriation programme for the displaced from Rwanda, Burundi and the Democratic Republic of Congo[40].

As will be seen in chapter three, Tanzania's recent practices and legislation are in line with her policies.. This factor brings into sharp focus the question whether and the extent to which Tanzania is complying with the dictates of the five major principles of international refugee law which she is obliged to observe.

South Africa

South Africa's movement out of international isolation in the 1990's brought about significant changes as regards refugee protection. South Africa like Tanzania, has witnessed a greater number of refugees flocking to the country although for different reasons and in much smaller numbers. Since the April 1994 elections, South Africa has come to be seen as an attractive option for asylum seekers[41], particularly as the

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[38] B. Rutinwa, supra note 34 at 7

[39] The Refugees Act, Act No. 6 of 1998 at 102

[40] http://www.nationaudio.com/News/East Africa/0211/Regional/Regional4.html

[41] The influx of asylum seekers has also been from countries other than Mozambique. These include Angola, Somalia, Zaire, Ethiopia, Rwanda, Burundi, Nigeria, Liberia, and other countries. In May 1995 3,664 applications for asylum had been received by the Department for Home Affairs. By December

countries of Europe and North America increasingly restrict the number of refugees who are granted asylum in the first instance or accommodated in resettlement programmes[42].

In consequence to the formation of a new rights-based legal regime, the new democratic government became more accommodating to forced migration in that it signed an agreement with UNHCR in 1993 to establish procedures for the determination of refugee status and to grant asylum to certain refugees. South Africa also agreed to partake and assist in the repatriation of exiled refugees from apartheid to South Africa and in the voluntary repatriation of Mozambican refugees to Mozambique[43].

The South African government, like the Tanzanian, has continued to be more restrictive in it's policy towards refugees. It can no longer be said that South Africa maintains any form an open door policy towards refugees (even whites). However there is evidence to indicate that refugees in the Republic continue to be handled in a racially discriminatory way[44]. Although the government made substantial amendments[45] to the Aliens control Act of 1991 in 1995[46], the bulk of the Act remained an inheritance from South Africa's racist past. The Act's focal aim remained to provide for "the control (emphasis my own) of, the admission of persons to, their residence in, and their departure from, the Republic"[47]. Furthermore, the Act continued to be characterised by the very wide discretion given to the Minister and the extensive powers which he or she was able to delegate to immigration officers and other state officials.

1996, 21,425 people had applied for asylum. Refer to VLA de la Hunt, supra note 23 at 4

[42] VLA de la Hunt, supra note 23 at 1

[43] While many people who were voluntarily repatriated of forcibly deported remain in Mozambique, thousands have returned. the voluntary repatriation programme has not been an absolute success. in early 1996, President Mandela announced a cabinet decision to grant amnesty from prosecution and deportation as illegal immigrants to certain Mozambicans. Refer to VLA de la Hunt supra note 23 at 4

[44] J. Crush "Migrancy: The Colour of Alienation" Democracy in Action 10 (6). According to Crush people are stopped and questioned, and even arrested , on the basis of skin colour, vaccination marks (or scars where a vaccination mark might have been) and according to one report "because the person walked like a Mozambican". Not only refugees, but South African citizens risk being deported.

[45] It removed some of the more blatant violations of rights of undocumented immigrants i.e. the removal of the ouster clause that deprived courts of the jurisdiction to preside over matter relating to such undocumented migrants

[46] the amended Act is titled The Aliens Control Act Amendment Act, 1995 (Act No. 76 of 1995)

The Act was the subject of much criticism[48]. The provisions of the current South African Constitution[49] have made the Act unconstitutional in a variety of ways[50]. South Africa's signing and ratification of the OAU Convention Governing Specific Aspects of Refugee Protection in Africa and the UN Convention Relating to the Status of Refugees, also caused the Act's provisions to be contrary to the dictates of international refugee law. The aforementioned factors, the fact that the government of a democratic and non-racial state continued to promulgate and implement legislation which was so deeply rooted in policies who purpose (inter alia) was racial exclusion, and the fact that the government was becoming increasingly aware of the growing xenophobic reactions[51] towards refugees, is what prompted the enactment of a new Refugee Act.

The great tension between meeting the needs and expectations of South Africans and the obligations towards refugees had not been resolved because of a lack of a political will to do so. Though the government makes attempts to bring refugee legislation in line with it's obligations under international refugee law, like the Tanzanian government, it has not shown any signs of becoming lenient in it's restrictive policy towards refugees. Therefore though the new Act intends to assist genuine refugees, it also intends to combat the abuse of the asylum system by those who seek refugee status but simply have no basis in law or fact to claim the protection of South Africa[52]. The government, in addition, has ensured that not too broad a definition of refugees is adopted. This was pointed out by The Hon. Mangosuthu Buthelezi, the Minister for Home Affairs when he said,

> "It has been argued that the South African refugee policy should enable victims of poverty and other social and environmental disasters to be considered as refugees and to be treated accordingly. However, while

[47] The Preamble to the Aliens Control Act,(Act no. 96 of 1991)

[48]The Act has been heavily criticised because the lack of transparency in the implementation of the Act did nothing to allay the perceptions that immigrants, legal or illegal, from outside Africa are treated more favourably than immigrants from within Africa. Refer to VLA de la Hunt, supra note 23 at 5

[49] Act no. 8 of 1996

[50] especially with regards to detention and deportation

[51] Many South Africans resent foreigners laying claim to limited resources and the perception exists, as it does elsewhere in the World, that asylum procedures are abused by economic migrants and criminals, such as drug and arm dealers

[52]Speech by the Deputy Minister for Home Affairs to EPC National Assembly Chamber on 5th Nov. 1998 at 5

we believe that the Government will remain alert to those situations where movements of people on apparent social, or economic grounds may in reality be rooted in those causes recognized in the refugee definitions, it does not accept that refugee policy should be cast so widely as to include victims of poverty and other social or economic hardships, environmental disasters, or other factors not directly or secondarily recognized in refugee obligations."[53]

Also in line with it's restrictive policy, is the fact that government has also quashed any existent notions that because many South Africans were refugees in the era of apartheid, the country has a duty to reciprocate. In the words of The Hon. L.N. Sisulu, Deputy Minister for Home Affairs,

> "Ladies and Gentlemen, the refuge that other countries provided to South Africans, was based on their commitment to the eradication of apartheid. When we give asylum to refugees, we do so because of our constitutional and international obligations. We do so as a matter of principle, and not for reasons of goodwill.....Thus let us put an end to this cheap type of emotional blackmail" [54]

In consequence to South Africa's restrictive policy towards refugees, and the governments attempts to strike a balance between the needs of the South African, the obligations towards the bona fide refugee, and the need to deal with the wide range of abuse of the asylum system, the new Refugee Act (like the new Refugee Act in Tanzania) falls short of dictates of international refugee law which South Africa is obliged to follow. As shall be seen in Chapter three, the state practice despite the enactment of a new Refugee Act, continues to contravene international refugee law.

This chapter has indicated that both Tanzania and South Africa have adopted restrictive policies towards refugee protection. Though different circumstances surround the adoption of such policies in each country, there are four common reasons shared by both countries to justify their restrictive policies. The first reason is the magnitude of the refugee problem. The refugee problem in each country has grown in magnitude and complexity. The second reason is insecurity. Both countries have experienced security problems as a result of hosting such refugees i.e. an increase in crime and violent activity instigated by xenophobic nationals etc. The third reason is the impact of refugees on the host countries in terms of depletion of

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[53] Address by the Minister for Home Affairs, Min. Mangosuthu Buthelezi at the launching of the Draft Refugee White Paper on and the Draft Refugee Bill: Pretoria: 18 June 1998

[54] supra note 1 at 6

resources by they financial, ecological etc. The final reason is the growing xenophobia. The economic hardships experienced by the local population in both nations have incentivised nationals to look upon refugees with great disfavor. This is especially the case when they witness refugees utilizing resources which they regularly use or which they believe they would have used had such resources not been put to use by the refugees. Many nationals feel deprived because of the presence of refugees in their country.

Refugees are a matter of interstate obligations and are governed by certain international norms. Before discussing the inadequacy of refugee law and practice in Tanzania and South Africa in the light of such norms, it is important to discuss what those norms are. The following Chapter outlines these international norms in order to set the stage for a more detailed examination of the law and practice in Tanzania and South Africa relating to refugee protection.

CHAPTER TWO

THE INTERNATIONAL PROTECTION OF REFUGEES

2.1 The Evolution of the International Regime

The history of refugees goes back as far as the known history of mankind.[55] Population displacement has always been an inherent feature of social and or economic differentiation. The causes of displacement have historically varied from persecution of ethnic or religious minorities or clan groups and wars, to economic or social deprivations. In most cases, displaced persons, especially in the period immediately following displacement, were in a disadvantaged position. Most societies except where slavery was practised, had built-in informal institutions such as conventions and codes of behaviour that governed interactions between strangers and members of their own communities. Prof. T. Maluwa writes that these institutional constraints provided an informal framework which defined the rights and duties of strangers and the responsibilities of the members of the host societies towards such strangers.[56] Nevertheless, an awareness of the responsibility of the international community to provide for the protection of refugees, and to help them solve their problems, only dates back to the time of the League of Nations.

The first demonstration of this international solidarity emerged after World War I to deal with mass movements linked mainly to the revolution in Russia and the collapse of the Ottoman Empire. Prof. Hathaway linked the impact of such mass movements to the evolution of refugee law by writing,

> "The social crisis brought on by the *de facto* immigration of so many refugees convinced governments that their laws would have to recognise the reality of forced immigrants on the basis of national advantage alone. Hence they were obliged to yield in such circumstances: indeed, in some instances, the nation concerned had no practical power to control the flow of humanity. Refugee law was designed to effect a compromise between the reality of this largely

[55] Atle Grahl-Madsen, *The Status of Refugees in International Law*(1966), vol. II at 1

[56] T. Maluwa, *Refugees in the International System,* Refugee Law(1997), Handout 1: Part B, Refugee and Immigration Law, University of Cape Town

unstoppable flow of involuntary migrants across European borders and the broader policy commitment to restrictionism in immigration."[57]

The international commitment to addressing the refugee problem led to the formation of offices and posts to deal specfically with refugee issues and problems. For example, after in 1921 after World War I, the League of Nations in a quest to deal with the crisis of refugees from Russia elected Fridtjof Nansen as High Commissioner for Russian refugees. His tasks were to define their legal status; to organise their repatriation or 'allocation' to countries able to receive them; and to undertake relief work with the aid of 'philanthropic agencies'.[58] His mandate was later extended in 1924 to cover the Armenian Refugees. it was further extended in 1928 to cover Assyro-Chaldean and Turkish refugees. Members of the Leagues of Nations agreed to the recommendation that the services normally rendered to nationals abroad by consular authorities should be discharged on behalf of refugees by representatives of the High Commissioner unless such services were within the exclusive competence of national authorities[59]. All these processes set the international refugee regime in motion. All the agreements made by various States through the initiation of the League of Nations, are proof of the fact that the refugee regime is characteristically a 'negotiated order'. Prof. Maluwa points out that this order was designed to generate patterned behaviour and to stabilise expectations among actors such as states, inter-governmental organisations, non-governmental organisations and refugee based organisations.[60]

The turbulent decade preceding the outbreak of World War II resulted into several more developments in the international refugee protection regime. Many of these developments were attributable to the fact that States assumed the right of exclusion to be inherent in their sovereign powers. Consequential, the institution of refugee status was devised and used to spell out what individual states were prohibited from doing or under what conditions they could be permitted to undertake certain acts against those persons who crossed into their territories in search of a safe haven and

[57] J.C. Hathaway, *The Law of Refugee Status* (1997) at 2
[58] P. Weis 'The International Protection of Refugees' 48 *AJK* 193-221, 207-8[1954]
[59] Arrangements concerning the extension to other categories of refugees of certain measures taken in favour of Russian and Armenian Refugees. 30/6/1928: 89 LNTS no. 2006.

succour[61]. After Nansen's death in 1930, the Assembly of the League of Nations established the Nansen's Office to undertake humanitarian activities on behalf of refugees, and entrusted protection to the Secretary-General. In 1933, the duties of the Secretary General were assumed by a German High Commissioner following Hitler's rise to power. Nansen's office was liquidated in 1938.

In July 1938, the Intergovernmental Committee on Refugees was created as a result of the thirty two nation Asian conference on the question of involuntary emigration from Germany and Austria[62]. The Committe was charged with providing political and legal protection, superintending the entry into force of the relevant conventions, co-ordinating humanitarian assistance, and assisting governments and private organisations in their efforts to promote emigration and permanent settlement;[63] The work of this committee was extended in the course of War II to all refugee groups. It was replaced in 1947 by the International Refugee Organisation.

In 1943 and during World War II, the United Nations Relief and Rehabilitation [UNRPA] was created by the Allies to assist and eventually repatriate those displaced by the conflict, but it had no competence especially with regard to refugees. In 1946, however, the United Nations recognised the fundamental principle that no refugees with valid objections to returning to their countries of origin should be compelled to do so[64], and later that year it created the International Refugee Organisation (IRO)[65]. The IRO was the first international Agency to deal comprehensively with every aspect of refugee problems: registration, determination status, repatriation, resettlement, legal and political protection.[66] Due to the heightening tension between the East-Western blocks, the IRO was attacked and it had to wind up operations on the 28th Feb. 1952 after the UN had acknowledged the need for a successor organisation.[67].

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[60] T. Maluwa, supra note 2 at 3

[61] ibid. It was in response to these changing State attitudes and behaviours that the principle of non-refoulment was codified to limit the rights of states to refuse entry to those persons who fleee in search of safety, security, and liberty.

[62] A Study of Statelessness [1949]: UN doc. E/1112 and Add. 1, 116-18.

[63] League of Nations, OJ special supplement no. 189 (1938)36

[64] GA Res. 8(1), 12 Feb. 1946

[65] GA Res. 62(1) 15dec. 1946

[66] Art. 2, Constitution of the IRO

[67]GA Res. 319 (IV), 3 Dec. 1949

Synonymous with the aforementioned developments in the administrative arena of the international refugee regime, were the developments in the approaches to defining refugees. In the period between 1920 and 1950, three discernible approaches were used to define refugees. These three approaches were the juridical, social and individualist approach[68]. The juridical approach was dominant between 1920 and 1935. During this period, refugees were defined in juridical terms i.e. they were treated as refugees by virtue of belonging to a group of persons who were deprived of the formal protection of the government of their state of origin[69].

The social approach was dominant between 1935 and 1939 in which a social approach to the refugee definition was adopted and protection and assistance was accorded to people displaced by broad social and political upheavals like the one which resulted from the ascendance of the National Socialists to power in Germany. This definition was therefore devised in response to the large scale displacements that took place during World War II. Between 1939 and 1950, an individual status determination prevailed over group status determination. This marked a break from the old practice in the sense that refugee status was granted on the basis of the validity of each individual applicant's claim to a refugee status and not by virtue of belonging to distinct ethnic, territorial, political or social categories. This new practice was a prelude to the definition of refugee status adopted in the 1951 Convention and in most of the subsequent regional and national instruments relating to the status of refugees.[70]

The 1951 UN Convention Relating to the Status of Refugees

In 1951, the United Nations adopted the Convention Relating to the Status of Refugees of 1951[71] as the first comprehensive and universal instrument for dealing with the refugee problem. This instrument has been the source of a lot of criticism because of it's restrictive approach to defining the refugee[72]. In order for individuals

[68] J. C. Hathaway, supra note 3 at 2
[69] T. Maluwa, supra note 2 at 4
[70] ibid.
[71] 189 U.N.T.S. 2545, entered into force on April 22, 1954 (hereinafter 'the 1951 Convention')
[72] The Convention defines a refugee as any person who: ....*as a result of events occuring beofre 1*

to qualify for refugee status, they have to satisfy stringent requirements[73]. The instrument applied only to events happening in Europe before 1951 and as such was not applicable to refugees from other regions, or to refugees wherever they came from if the events that led to their flight had happened after that cut off date. The 1951 Convention also underpins the presence of "well founded fear" of "persecution"[74] as a key element to refugee status. However meeting the aforementioned criteria alone did not entitle a person to refugee status. Refugee status was available only to those who met the aforementioned criteria and who, at the same time, were outside the country of their nationality. The Convention requires individual determination of refugee status because it's major focus is the individual.

The aforementioned limitations came to be removed by the 1967 Protocol Relating to the Status of Refugees[75]. The coverage of the Convention was widened to include territories previously excluded by it. Such developments were the result of various UNGA resolutions that were passed requesting the UN High Commissioner to extend his "good offices" to the meet the protection and material assistance needs of the new categories of refugees whose emergence was either not envisaged or excluded

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Janauary 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of protection of that country; or who, not haivng a nationality and being outside the counry of hsi former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it (Article 1A(2))

[73] It has been argued that the reason for such stringent requirements was because of the strategic conceptualizationa dn Eurocentric focus that characterized and underpinned the 1951 Convention. (J.C. Hathaway, supra note 3 at 6). The stragetic conceptualization emanates from the fact that only persons whose flight was "motivated by pro-Western political values" were entitled to seek protection. This was done by placing emphasis on the concept of 'persecution' hence causing the institution of asylum to serve as an instrument of Western foreign policy especially with regards to the Soviet Bloc. The Eurocentric focus emanates from the fact that the Convention facilitated the condemnation of the Soviet Bloc in international law. It did so in two ways: first, the concept of 'fear of persecution' was applied to accept Soviet dissidents. Secondly, the emphasis on disenfranchisement by one's state on the basis of race, religion, nationality, membership of a particular social group, or political opinion to the neglect of deprivations emanating from lack of socio-economic human rights clearly suggest that the Convention's refugee definition was carefully designed to serve Western strategic interests.

[74] Zolberg, Surke, Aguayo Escape from Violence (1988) at 25 According to the aforementioned authors, the selection of "persecution" as the key operational criterion was in keeping with the desire of the international community to make the status of refugees exceptional, so as to preclude overwhelming numbers. In consequence to this, those who fled their countries of origin due to either man made or natural disasters were not and are not, according to the definition of the Convention persons entitled to refugee status. They are considered to be migrants falling outside the purview of the international refugee regime.

[75] 606 U.N.T.S. 8791, entered into force on October 4, 1967 (hereinafter 'the 1967 Protocol')

deliberately by the States that ratified the Convention.[76]

Despite the changes made to the Convention by the Protocol, the Convention continues to be criticised for having too narrow a definition of refugees[77]. Prof maluwa points out that the Convention only affords refugee status to those who have crossed an international border.[78] This express condition excludes persons who are often referred to as IDP's (internally displaced persons). To accommodate such IDP's into the refugee definition, would make refugee protection, at least in practice, an extremely difficult task to administer. As it is, countries are straining to cope already grappling with the various problems brought about by the large influxes of persons who are attempting to seek refugee status as provided by the current narrow definition. The 1951 Convention affords fairly significant entitlements to refugees. Once an individual has been determined to fall within the scope of the definition, he or she is entitled to a wide range of benefits provided under in the 1951 Convention[79].

The 1969 OAU Convention on Specific Issues Relating to Refugee Protection in Africa

Overtime, the 1951 Convention and 1967 Protocol were complemented at the regional level by other arrangements including the 1969 OAU Convention on Specific Refugee Issues Relating to Refugee Protection in Africa[80]. The OAU Convention was born out of a reality by African nations that the 1951 Convention was inadequate to deal with the very significant and specific refugee problems in Africa, and the realisation that Africa could not rely on the international community to deal with it's problems[81]. Though the OAU Convention was specifically designed to complement the 1951 Convention, it went a step further than the 1951 Convention by adopting a

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[76] i.e. in 1958 the UNGA adopted Resolution 1286(XIII) requesting the High Commissioner to extend his 'good office' to assist the Algerian refugees in Tunisia and Morocco. In 1963 the UNGA passed resolution 1500(XV) and 1672(XVI) requesting the High Commissioner to assist he returnees and the internally displaced inside Algeria.

[77] T. Maluwa, supra note 2 at 18

[78] Refer to Art. 1A(2)

[79] for furthur detail, refer to T. Mendel supra note at 48. Also refer to oncloming Chapter 3

[80] U.N.T.S. 14691, entered into force June 20, 1974 (hereinafter the OAU Convention)

[81] Additionally, the African States were not satisfied with the 1951 Convention becuse it's narrow definition of a refugee could not encompass the victims of colonial oppression and domination whom they (the African States) wanted to make the responsibility of the international refugee regime so that on the one hand, they would be entitled to material assitance, and on the other, the strain caused by the

much more broad definition of the refugee based on the specific African experience, which was characterised by mass displacements resulting from the political instability and social unrest.

It adopted (in Article 1[1]) the definition of the 1951 Convention but added,

> 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 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. (Article I (2))

Two new features are notable in this the definition. First, it replaces the subjective and therefore individual requirement of a 'well-founded fear of persecution' with the objective test of 'compelled to leave'. This opened up the possibility of group determination[82] and is therefore more suited to Africa's needs. Secondly, the definition establishes a number of new potential causes for flight in addition to individual persecution thus significantly expanding the class of persons covered. Although this expanded definition is in accord with the initiatives of the UN and in particular the UNHCR[83], and is applied by the latter in their protection activities in Africa, the efforts to have this expanded definition apply outside of Africa have been only minimally successful.[84] The presence of refugees belonging to this category is tolerated, in many European countries. However, at least, this practice is based on humanitarian considerations and not compelling reasons[85].

Notwithstanding the positive response to the expanded definition of refugees, the 1969 Convention is subject to a few criticisms. These criticisms relate to the reasons for termination of and exclusion from refugee status as laid down in Art. 1, para 4 and 5 of the Convention . It is strange that according to Art. 1, para. 4(f) of the Convention, persons loose their refugee status if they commit a serious, non-political

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their presence on the receiving countries infrastructure would be offset.

[82] T. Mendel adds in support of this feature that subsection 6 of the same article, leaves the question of status determination up to the State of Asylum rather than a presumably individually-actuated judicial process.

[83] G. Goodwin-Gill, *The Refugee in International Law* (1983) at 14

[84] R. Hoffman, 'Asylum and Refugee Law' in J. Frowein/T. Stein (eds), *Die Rechtsstellung von Auslandern nach staatlichem Recht und Volkerrecht* (1987) at 2026

[85] the supporting arguments in R. Hoffman, ibid.

crime outside the country of asylum after asylum has been granted . The rationale for this provision is illogical[86]. If refugees commit such a crime in their country of asylum, they do not lose their right to protection under asylum according to the 1969 OAU Convention. If the crime is committed in a country other than the country of asylum, the extradition of the person concerned to the country where the crime was committed is not prohibited by the 1951 Convention. A complete denial of refugee status, with the result that the refugee could be extradited to a country where he or she is politically persecuted, would completely contradict the 1951 Convention.

The second criticism is with regard to a further reason for loss of refugee status. A person may not have the protection of the 1969 Convention if they have seriously violated the principles and purposes of the Convention. Such a wide interpretation, which could undermine the nature of refugee law , and could certainly violate the intentions of the framers of the 1969 Convention who gave the right to refugee status very high priority[87].

Other than the fact that the 1951 Convention's definition of 'refugee' is more narrow than the definition of 'refugee' under the 1969 Act, other differences exist between the two pieces of legislation that are brought to the forefront when comparing the two instruments. The 1951 Convention contains a large number of social and political guarantees for the benefit of refugees. These guarantees are the overall goal of the 1951 Convention[88]. The 1969 Convention contains none of these guarantees. For the 1951 Convention provides for both freedom of movement and employment within the country of asylum, subject to some restrictions. The OAU Convention provides neither and certain provisions suggest that neither is contemplated[89]. The 1951 Convention prohibits non-refoulment where return might threaten the life or freedom of a refugee , but subject to derogation in case of a threat to national security. The 1969 Convention also prohibits non-refoulment in the context of a threat to life, physical integrity or freedom, but to the much broader group of refugees, as defined

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[86] R. Rainer,

[87] This provision would only make sense if interpreted in such a way as to mean that based on this principle of protection any political activities on the part of the refugee undesirable to the country of asylum could result in the loss of refugee status.

[88] T. Mendel supra note at 56

by it and without derogation. With regards to freedom of movement and employment

T. Mendel in comparing the two instruments made the following observations. The 1951 Convention may be described as guaranteeing extensive benefits, tending towards residence rights, to a narrowly defined class of individuals. The 1969 Convention on the other hand, provides for relatively limited benefits, broadly consistent with maintenance in camps, to those fleeing a wide range of situations and contemplates objective, group refugee status determination.[90] He pointed out that in Africa, compliance with the 1969 Convention has been far more consistent than compliance with the provisions with the 1951 convention especially with regard to the economic and social benefits to be afforded to the refugee. Such incompliance he argues, is attributable to the fact that poor states experience large influxes. They therefore in practice, cannot apply an 'individual-oritentated' instrument and extend all the benefits under the 1951 Convention to all the refugees. Hence Mendel comes to the conclusion that although the 1969 Convention is meant to compliment the 1951 Convention, they are actually incompatible. Instead, they establish different schemes for the protection of refugees, hence compliance with one, in practice if not in theory, implies in-compliance with the other[91].

Whether Mendel's argument (i.e.that compliance with one instrument means incomplaince with the other) is correct, is debatable. What is certain, is that poor African nations receiving mass influxes of asylum seekers have been more compliant with the provisions of the 1969 Convention than with the provisions of the 1951 Convention[92]. For practical reasons therefore, it would be logical to agree with Mendel, that the 1951 Convention may not be the right instrument for poor countries hosting large numbers of refugees. The OAU Convention on the other hand, and because of it's suitability to the conditions of the developing world, has become the basis for the most influential conceptual standards for refugee status. In the words of Hathaway, "it has provided the basis for enhanced UNHCR activity in Africa...and has inspired liberalisation of a variety of regional and national accords on refugee

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[89] ibid.
[90] ibid.
[91] ibid.

protection".[93]

The 1984 Cartagena Declaration

Overtime, the 1969 OAU Convention was complimented by other international arrangements including another regional instrument known as the Cartagena Declaration[94]. It was adopted in 1984 by ten Latin American States who were dissatisfied with the inadequacy of the 1969 Convention to accommodate those persons who were displaced due to generalised violence. They were therefore looking to create a definition that was more suited to the situation of their region. In consequence therefore, the definition of refugee as provided for under the 1969 Convention, was therefore extended to include people who flee foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.[95] However the Cartagena Declaration provides that applicants for asylum have to show that "their lives, safety or freedom have been threatened by generalised violence". Those who flee serious disruption of public order are not automatically covered by this definition.[96]

Other Instruments Important to International Refugee Protection

Other instruments which are of relevant significance to refugee protection are the human rights instruments of which the Universal Declaration of Human Rights of 1948[97], the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966[98], and the International Covenant on Civil and Political Rights (ICCPR) of 1966[99]. There are also regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the African Charter on Human and Peoples' Rights (1981)[100]. The UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or

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[92] because of a lack of finacial and economic capacity

[93] J. Hathaway, supra note 3 at 19

[94] See Annual Report of Inter-American Commission on Human rights 1984-85, OEA/Ser.L/II.66,doc.10,rev.1, at 190-193

[95] Annual Report of Inter-American Commission on Human Rights 1984-1985

[96] T. Maluwa, supra note 2 at 14

[97] U.N.G.A. Res. 217A(III), December 10, 1948 (hereinafter the UDHR)

[98] U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force January 3, 1976

[99] U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force March 23, 1976.

[100] 21 *ILM* 58 (1982)

Punishment of 1984[101] is also relevant particularly to claims of asylum on the grounds of torture.

2.2 The Office of the United Nations High Commissioner for Refugees

The UNHCR was established through the adoption of it's statute by the UNGA on December 14, 1950[102]. It is a subsidiary organ to the General Assembly. It is meant to 'discharge it's statutory functions under the guidance of its parent organ, the Economic and Social Council [ECOSOC] and a further subsidiary body of the ECOSOC, the Executive Committee of the High Commissioner's Programme'[103]

The functions of UNHCR encompass 'providing international protection' and 'seeking permanent solutions' to the problem of refugees by way of voluntary repatriation or assimilation into new communities.[104] Its work is classified as 'entirely non-political' humanitarian and social and it relates to groups and categories of refugees. The High Commissioner is obliged to follow the policy directives of the General Assembly and the Economic and Social council [ECOSOC]. [105] The High Commissioner's protection work includes: (I) promoting the conclusion of international Conventions for the protection of refugees, supervising their application and proposing amendments thereto;[106] (ii) promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; and (iii) promoting the admission of refugees. The UNHCR is a temporary institution. It was originally established for a period of three years. Thereafter it was extended for a successive period of five years up to the present time. Specific authority to involve itself in the protection of refugees has been accorded to the office by States party to the 1951 Convention and / or the 1967 Protocol relating to the status of refugees though the UNHCR is not party to those instruments.

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[101] U.N.G.A. Res. 39/46, 10 December 1984
[102] U.N.G.A. Res. 428 (V) of December 14, 1950
[103] M. Zieck, *UNHCR and Voluntary Repatriation of Refugees: A legal Analysis*, 1997 at 69
[104] Statute of UNHCR per 1
[105] Ibid. para 2 and 3

The work that the UNCHR conducts in the countries where it's offices are, is dependent upon the mandate given to the Organisation by the State in which it's offices are found as well as the gravity of the refugee problem within that state. When comparing UNHCR's work in South Africa to it's work in Tanzania, significant differences are to be found.

The UNHCR's mandate in Tanzania is essentially to play a co-ordinative and facilitative role . It facilitates programmes such as repatriation and assists the Government in caring for and maintaining the large numbers of refugees in the refugee camps (i.e. through the distribution of food and health amenities etc.). In terms of co-ordination, it has co-ordinated and continues to co-ordinate several ventures and schemes between the Tanzanian government and other Governments as well smaller NGO's. For example, on the 16th of February 1998, Mrs Ogata, the United Nations High Commissioner for Refugees, announced that President Buyoya and President Benjamin Mkapa had agreed to establish a tripartite mechanism with the UNHCR to facilitate the voluntary return of Burundi Refugees from Tanzanian Camps. She stated that the agency would act as 'go-between for the establishment of the tripartite commission.[107]. The UNHCR also played a co-ordinative role in repatriating 3,400 Congolese refugees after a tripartite agreement between itself, the DRC[108] and Tanzania was signed on the 21 of August 1997[109].

The UNHCR's mandate in South Africa has, to a certain extent, been similar to her mandate in Tanzania. Like in Tanzania, she has facilitated and co-ordinated repatriation programmes. In fact, her original mandate in South Africa was to assist in the repatriation of apartheid exiles into the country. This mandate was born out of an agreement between UNHCR and the South African Government that she (South Africa) would co-operate with UNHCR in the repatriation process.[110] UNHCR also facilitated and co-ordinated the voluntary repatriation of Mozambicans from South Africa to Mozambique.

When the voluntary repatriation programme ended in 1995, UNHCR stayed on in

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[106] Art. 35 Refugee Convetion 1951

[107] J. Sarvary, *Facilitating Repatriation Movements on Tanzania-A Furthur Devlopment if the UNHCR's Mandate in an African Context?* (1998) at 69

[108] Democratic Republic of Congo

[109] ibid at 79

South Africa but with an extended mandate as agreed between itself and the government. It's new mandate was essentially a 'building capacity one'. It was to train government officials, the police and other defence officials on the rights of the refugee under international refugee law and the obligations of the state under the same regime. It was given the mandate to assist in policy formation towards refugee in South Africa and to assist in the formation of the current Refugee Act. It was also to extend advice to the relevant bodies dealing with the revision of legislation so as to bring them in line with the international refugee law regime[111].

Unlike Tanzania, the UNHCR's mandate in South Africa is not the caring and maintenance of refugees and asylum seekers. Mr. Yussuf Hassan, Senior External Relations Officer for UNHCR Pretoria attributed this difference in mandates to two factors. First, there is a huge difference in the magnitude of the refugee problem in the two countries. Tanzania hosts a lot more refugees than South Africa and does not have the capacity to care for and maintain all of them. Because of her incapacity to do so, her admittance of refugees into the country is dependant upon the assistance given to her by NGO's (UNHCR included) and the international community. UNHCR's primary mandate is therefore caring and maintenance. Secondly, asylum seekers in Tanzania, do not enjoy freedom of movement and employment. The majority of them are confined to refugee camps because of their large numbers. They therefore cannot earn a living and care for themselves. In contrast to Tanzania, refugees in South Africa are privileged enough to enjoy freedom of movement and employment. They can therefore can seek employment and earn wages that will enable them to maintain themselves when in the country.[112]

The following part looks at the standards of treatment derived from international law and treaties starting with those which are of universal application and later the regional ones in the case of the OAU Convention.

2.3 Principles of Refugee Protection

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[110] VLA de la Hunt, supra note 3 at 3

[111] telephonic interview conducted with Mr. Yussuf Hassan, Senior External Relations Officer, UNCHR Pretoria on 11 December, 1998

There are six principles of refugee protection derived from the aforementioned instruments plus a number of other treaties, declarations, rules and general international law[113].

2.3.1. The Principle of Asylum[114]

The element of protection granted to a foreign national against the exercise of jurisdiction by another state lies at the heart of the institution of asylum. Asylum is defined as protection which a state grants on its territory or in some other place under the control of certain of its organs[115] to a person who comes to seek it[116].

There are differing views as to the question whether there is a right to be granted asylum in international law. A right is to be understood in relation to its jural correlative; a duty. A right exists if a duty is placed on another that can be enforced by the holder of the former.[117] The traditional view holds that the right of asylum is no more than the right of each state to grant asylum to a fugitive alien. In part this view is based on the premise that international law gives rise to rights and duties only between states and in part on the premise that states are free to exclude aliens from their territories.[118]

Thus if allowed in, it would be a matter of grace and the individual would be the holder of a mere revocable privilege, unenforceable against the state.[119] This view was reinforced by the US Federal Court which held that 'Asylum necessarily means absolute immunity form the jurisdiction of another state, subject to the will of the state of asylum and it must be borne in mind that the right of the state is sovereign and unlimited, except in so far as it imposes limits on itself.[120] Likewise it was held in *Knauf v. Shaughhnessy* that "it has long been the practice of states to give asylum.

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[112] ibid
[113] The arrangement of this part follows Goodwin-Gill, *'The Principles of International Refugee Law'* in Asylum Parliamentary Assembly (1995) pp. 11-42.
[114] For detailed treatment of this subject, see Grahl-Madsen, *Territorial Asylum* (1980)
[115] could be an embassy in a foreign territory
[116] Defintion by the Institute of Intenrational Law 1950
[117] Hohfeld, 23 Yale L.J. at 28-51
[118] Weis 30 *BYIL* 478, st 481; 64 *LQR* 97, 63 *LQR* 438
[119] Geoffret S. Gilbert; Right of Asylum; a change of direction, 32 *ICLQ* at 634
[120] US, exp. *Dorrelly v. Mulligan*, US Marshal 74 F.2d. 220 at 233

But the right is that of the state voluntarily to offer asylum, and not that of the fugitive to insist upon it".[121]

The original draft of the UDHR on asylum provided for everyone's right to seek and be granted, in other countries, asylum from persecution[122] but this was opposed among other states, by the United Kingdom because she believed that it would violate state sovereignty.[123] Thus it was amended to substitute the word granted with the word enjoy.[124] However, this change was of little significance to the traditionalists who still maintained that the UDHR, not being an international instrument, was outside international law.[125]

As a follow up to art. 14(1) UDHR, the UN Declaration on territorial slum provides that no one entitled to invoke art. 14 should be subjected to measures such as rejection at the frontier or if he has already entered the territory, expulsion or compulsory return to any state where he may be subjected to persecution.[126] Therefore it is clear that the right of asylum in art. 14 is the right of the individual person.[127] Hence the question as to whether a refugee is a subject of international law is contingent on the status of the individual person as a subject of international law.

A subject of law is that entity which under a legal system is endowed with rights and duties. Under the European Convention on Human Rights, any person has a right to petition the Commission (now the European Court of Human Rights) for violation of Human Rights[128]. Furthermore, it was recognised in *Handysides case* that individuals have rights and liabilities in international law[129]. However, without domestic legislation enacting these rights, they can not be enforced in municipal courts by the individual[130]. The fact that international law imposes rights and obligations on

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[121] 338 US at 542
[122] UN Doc A/C3/285. Rev.1 (1948); then art. 12.cf: 74 UN DOC.
[123] Richard Plender, Intenrational Migration Law at 397
[124] Now art 14(1) UDHR
[125] Lauterpacht 25 BYIL at 369
[126] UNGA Res. 2312(XXII) of 14/12/1967
[127] Weiss 25 BYIL at 398
[128] ECHR, though this is not a direct law stand to the court
[129] 1976 *Yearbook of the European Commission on Human Rights* at 506
[130] Oppenheim (8th edition) at 637

indivduals is proof of the fact that individuals are subjects of international law. With regards to rights, the individual as a bearer of human rights is entitled against indiscriminate treatment in a foreign country against his person and property;[131] With regards to obligations the individual as a bearer of international duties can be held responsible for war crimes, genocide, crimes against humanity, crimes against peace, slavery or blockade running;[132] The third prong relates to is the locus standi of the individual The fact that an indivudal has locus standi before international tribunals[133] is also proof of that the fact that individuals are subjects of international law.

Therefore the rights and obligations of individuals under international law could be used to argue that refugees (being individuals) are subjects of international law, and therefore have rights (and duties) including the right to asylum. At the end of the day however, it will be for the International Court of Justice to pronounce art. 14(1) of the UDHR as a rule of customary law the consequence of which will confer a legal duty on states to grant asylum.[134] What is more certain is that refugees have a right to seek and enjoy asylum.

2.3.2 The Principle of Non-Refoulment

The principle of non-refoulment states, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or danger to life or freedom". This principle was first embodied in the 1933 Convention relating to the international status of Refugees where it was provided, "...in any case not to refuse entry to the refugees at the frontiers of their country of origin."[135] The principle source of the norm of non-refoulment is found under Article 33, paragraph 1, of the 1951 Convention which provides:

> "No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life of freedom would be threatened on account of his race, religion, nationality, membership of a

[131] ICCPR article-; see also the right of individuals to petition in UN mandated territories, ILO Convnetions; Article 55 and 50 of the UN Charter; the UDHR etc.
[132] The Statute of the UN Tribunal on Yugoslavia War Crimes, ILM
[133] Cf: the Nuremberg Trials-F. Krtnz ' Refugees as subjects of International Law' 15 *ICLQ* 90
[134] P. Bertrand, "An Operational Approach to International Refugee Protection" 26 *Cornell INTL L. S.* 497; Reisman 84 *AM J INTL Law* p. 867; 15: *ICLQ* 109
[135] 159 LNTS No. 3663

particular social group or political opinion."

Other instruments providing for non-refoulment include the 1984 Convention Against Torture;[136] the Geneva Convention Relating to the Protection of Civilian Persons in Times of War[137], the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa[138], the 1981 African [Banjul] Charter of Human and Peoples' Rights[139]; the 1968 American convention on Human Rights[140]; the 1950 European Convention on Human Rights[141].

The principle of non-refoulment has also been expressed in important declarations and resolutions such as the 1967 Declaration on Territorial Asylum (Art 3(1)),[142] the Principles Concerning Treatment of Refuges adopted by the Asian-African Legal Consultative Committee in Bangkok in 1966 (Art.III(3)), the 1985 Cartagena Declaration which reiterates that non-refoulment and non-rejection at the frontier is a 'corner-stone' of the international protection, having the status of *jus-cogens*; the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions endorsed by the General Assembly in 1989 and the 1992 General Assembly Declaration on the Protection of All Persons from Enforced Disappearance (art 8(1)).

According to Goodwin-Gill, "the evidence relating to the meaning and scope of non-refoulment in its treaty sense also amply support the conclusion that today the principle forms part of general international law"[143]. He also asserts, rather

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[136] Whose article 3 provides 'No state shall expel, return (refouler), or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

[137] Under Article 45 which provides: Protected Persons shall not be transferred to a power which is not a party to the Convention...In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

[138] Article II(3)

[139] Article 12(3)

[140] Article 22(8)

[141] Article 3

[142] Tunkin observes that even though the UN General Assembly unanimously adopted the Declaration on Territorial Asylum, it has no direct legally binding force but rather may create some expectation of observance in good faith, what finally matter is not the text of the declaration but what actually states do in observance of the same. Tunkin, *The Theory of International Law* (1974) at 165-176

[143] Goodwin-Gill, supra note 29 at 167

equivocally, that the principle is binding on all states.[144] A similiar view (i.e. that the norm of non-refoulment is progressively acquiring the status of customary international law) is shared by a growing body of opinion of considerable authority.[145]

The normative[146] aspect of non-refoulment in international law makes the legality of entry an irrelevant criteria in the determination of refugee status under municipal law. Most often refugees who flee have no time to gather proper garments or undergo the correct immigration formalities. Penalties on account of illegal entry or presence can not be imposed on refugees coming directly from a territory where their life or freedom was threatened....provided they present themselves without delay....and show good cause for their illegal entry or presence[147]. Furthermore, the Convention requires that refugee be permitted to remain....until their status in the country is regularised or they obtain admission to another country.[148]

The principle of non-refoulment is not absolute. Derogations on grounds of national security, public order and serious crimes may be justified.[149] The question as what constitutes a serious crime or public disorder is vague thus it (non-refoulment)remains vulnerable to discretionary abuse by host states.

2.3.3 The Principle of Protection

The principle function of refugee law is to provide surrogate protection[150] to persons who have lost the protection of their own states. Part of the role of refugee law is to determine the content of protection and the persons who deserve that kind of

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[144] ibid.

[145] See e.g. D.J. Harris, Cases and Material on International Law 3rd ed. p. 405; Report of the International Law Association's committee on Enforcement of Human rights Law (Final Report on the Status of the Universal Declaration of Human Rights in National and International Law By Prof. Hurst Hannum) 1994, at 22-23 and S.R. Chowdhury, Op. Cit. at 104-105

[146] No reservation may be made in respect of article 33 of the 1951 Convention

[147] as per art. 42 of the 1951 Convention

[148] art. 31 of the 1951 Convention

[149] ibid, para. 2

[150] The word *protection* has many facets. It may essentially refer to the act of protecting individuals or groups by guaranteeing their fundamental rights, among them, the right of every human being to life, libertu and security. It's content is implicitly defined by international human rights instuments. In this sense the primary obligation to afford protection rests with the home country. But if a state is nonetheless unable or unwilling to afford fundamental protection to particular individuals or groups, it has for long been recognised that ultimate responsibility for the protection of refugees rests with the international community, hence, the related concept of 'intenrational protection'. Refer to Goodwin-Gill

protection. The persons who deserve protection have been defined under the various international instruments as 'refugees'.[151] It must be noted, that the recognition of refugee status is simply a declaratory and not the constitutive factor of refugeehood. It simply is an acknowledging of the existence of factors which entitle a person to seek refuge in other states under refugee law. Similarly, cessation of refugee status can only take place on legally recognised grounds under the cessation clauses of the 1951 Convention. Accordingly, attempts to deny refugees of that status by simply re-classifying them as illegal immigrants is illegal under international law[152].

The content of protection is found under the provisions of the 1951 Convention which deal with various rights to be enjoyed by refugees. These include non-refoulment (Art 33), non-discrimination (art.3), freedom to practice religion (art.4), right to personal status (art.12), right to favourable treatment with respect to acquisition of movable and immovable property (Art. 13), protection of their industrial property (art.14), right of association (art.15); access to courts (art.16), most favourable treatment as regards the right to engage in wage-earning employment (art.17), self-employment (art. 18) and practical liberal professions (art.19), welfare: the right to receive same ration as national where rationing exists (art.20), favourable treatment with respect to housing, same treatment as nationals with respect to education (art.22), public relief (art. 23), protection under labour legislation and social security law (art.24), right to receive administrative assistance (art.25), freedom of movement (art. 26), right to be issues with identity papers (art. 27) and travel documents (art. 28), equal treatment with respect to taxation (art. 29), right to transfer property(art. 30), protection from penalty for unlawful entry or presence on the host country (art. 31) or expulsion except on grounds of national security or public order (art. 32) and opportunity for naturalisation (art.34).

Refugees are also entitled to enjoy fundamental human rights which recognise no distinction between national and non-nationals when in comes to basic standards of treatment, particularly non-derogable rights which include freedom from slavery or

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'The Language of Protection' 1 *IJRL*, (1989) at 1

[151] refer to art. 1(a) (2)of the 1951 Convention; art. 1(2) of the 1969 Convention and Art. III(3) of the Cartagena Declaration

racial discrimination, the right to recognition as a person before the law, and the right to freedom of conscience, thought and religion.

2.3.4 The Principle of Non-Discrimination

One of the central aspects of refugee law is the principle of non-discrimination. Discrimination in the country of origin is the principle ground for granting refugee status. Thus, all five relevant grounds of persecution found under Article 1(A)(2) have, to various degrees, been developed in the international human rights field of non-discrimination . At the level of application for refugee status, the essence of the non-discrimination norm is that "no refugee or asylum seeker is prejudiced in his or her search for refuge and protection by reason of factors irrelevant to status."[153] The norm of non-discrimination applies also to refugees after they have been admitted by virtue of article 3 of the 1951 Convention which provides that "The contracting states shall apply the provisions of this Convention without discrimination as to race, religion or country of origin". This provision is also buttressed by several provisions of human rights instruments prohibiting discrimination[154] which apply to all persons including refugees.

2.3.5 The Principle of Burden Sharing

In the arena of forced migration, the term 'burden-sharing' refers to the responsibility to provide assistance to refugees from outside the concerned countries of asylum.[155] Burden sharing is an obligation of result, requiring nations of the worlds to provide material assistance to, and where necessary, the removal of excessively burdensome refugee populations form the countries of first refuge.

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[152] On cessation of refugee status see J. Hathaway, supra note 3 at 189-229

[153] Goodwin-Gill, supra note 29 at 27

[154] e.g. art. 2 of the UDHR; article 1 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination; Article 2 of the 1966 Covenant on Civil and Political Rights; article 2 of the 1966 Covenant on Economic, Social, and Cultural Rights; article 14 of the 1950 European Convention on Human rights; Article 1, para. 1, of the 1969 of the American convention on Human Rights and art. 2 of the 1981 African Charter.

[155] Kibraeb, G, *The State of the Art Review of Refugee Studies in Africa*, Uppsala Papers in Economic History, Research No. 26, Department of economic History, Uppsala, 1991 at 29

The principle of burden sharing is expressed in several norms on refugee protection. The 1951 Convention recognises that "...the grant of asylum may place unduly heavy burdens on certain countries..." and calls for "....international co-operation" in bearing these burdens.[156] Article 11(4) of the 1969 Convention reads: "where a member state finds difficulty in continuing to grant asylum to refugees, such member state may appeal directly to other member states and through the OAU, and such other member states shall, in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of their member granting asylum". There are several UN Resolutions in which the notion of burden sharing appear. The most important, perhaps is the UNGA Declaration on Territorial Asylum of 1967[157] whose article 2(2) provides that "where a state finds difficulty in granting or continuing to grant asylum, states individually or jointly or through the UN shall consider, in a spirit of international solidarity, taking appropriate measures to lighten the burden on that state".

The norm of burden sharing can also be inferred from human rights instruments which call upon states to assist and cooperate with, each other with a view to achieving the full of the rights recognised. These include the ICSECR[158], and the African Charter on Human and Peoples Rights[159]. The repeated reference to the principle of international co-operation in the various instruments cited above demonstrates that the principle is an integral part of the working principles governing refugee policy at the UN level.[160]

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[156] The UN 1951 Convention, Preamble

[157] UNGA Res. 2312(XXII)

[158] Article 2 provides that: 1. Each state party to the present Covenant undertakes to take steps, individuall and through international assistance and co-operation,especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate menas, including particularily the adoption of legislative measures.
Article 11 furthur provides that: 1. The State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including food, clothing and housing, and to the continuous improvement of living condition. The State party will take appropriate steps to ensure the realization of this right, recognising to this effect the essential importance of intenration co-operation based on free consent.

[159] Article 23(2) provides that 'the state shall have the duty, individually or collectively to ensure the right to development'.

[160] Fonteyne, J.L.P. 'Burden-sharing: An Analysis of the Nature and Function of Internatioanl Solidarity in Cases of Mass Influx' 10 *Australian Yearbook if Innternational Law* 162 at 191

2.3.6 The Principle of Solutions

As pointed out by the UNHCR,

> 'the purpose of international protection is not...that a refugee remain a refugee forever, but to ensure the individual's renewed membership of a community and the restoration of national protection, either in the homeland or through integration elsewhere.[161]

The three 'durable solutions' under international refugee law are voluntary repatriation in safety and dignity, integration into a local community in the country of first asylum and resettlement in third states. These solutions are implied in the Statute of the UNHCR under which the principle responsibility of the UNHCR is to provide international protection to refugees and to seek 'permanent solutions for the problem of refugees by assisting Governments and, subject to approval of the Governments concerned, private organisations to facilitate the voluntary repatriation of refugees, or their assimilation within new national communities'.[162] The UNHCR is also authorised to 'engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine'.[163] Voluntary repatriation is viewed as the most desirable long-term solution.

As Goodwin-Gill points out, all the above solutions generally fall outside the area of legal obligation[164]. Voluntary repatriation requires certain conditions to be fulfilled in the country of origin but there is no mechanism for compelling the State to fulfil them. Local integration remains a discretion of the relevant state subject only to the requirements of the non-refoulement principle. Similarly, there is no norm of international law requiring states to offer refugees opportunities for resettlement. A mandatory rule of resettlement would run contrary to the right of states under international law to decide who they would admit and, or, allow to remain on their territories.

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[161] UNHCR Handbook, *Voluntary Repatriation: International Protection*(1996) at V
[162] Statuteof the UNHCR, para. 1. UNGA Res. 428(V)
[163] UNHCR Statute, para 9
[164] Goodwin-Gill-supra note 29 at 269

2.4 Weaknesses of the Current International Protection Regime

The first major weakness of the regime for refugee protection is its narrowness. The 1951 Convention is still restricted to victims of political persecution which today accounts for the minority of refugees. The 1969 Convention attempts to remedy this situation by adopting a wider definition of a refugee. However, the adoption of a wider definition was premised on states committing themselves to share the refugee burden. Unfortunately, state practice in this regard has been disappointing.

The second weakness of the current regime is that it focuses on the obligations of the host states most of which are poor developing countries. The regime has no solid norms nor mechanisms for enjoining all members of the international community to address the problem of refugees.

Third, the regime is confined to the treatment of refugees who have fled their country of origin and ignores the reason for their flight or conditions which can promote their return. The responsibility of the country of origin is overlooked. While this was understandable in the context of the Cold War when the regime was adopted, it is no longer so today. As will be seen in the following chapter, weaknesses of the international regime do influence municipal legislation and state practice in countries hosting refugees.

CHAPTER THREE

REFUGEE LAW AND PRACTICE IN TANZANIA AND SOUTH AFRICA

Being countries affected by forced migration, Tanzania and South Africa have had, since colonial times, to enact laws to deal with this phenomenon. At independence, both countries inherited an immigration regime which more or less mirrored the Colonialists approach to immigrants (refugees included[165]) and which included measures adopted during the Second World War to control the movement of aliens into both countries. Since independence, Tanzania and South Africa have enacted a number of laws which are generally relevant to refugee protection. Specific laws governing refugee issues have also been enacted. These are, in Tanzania, the Refugee Control Act of 1966 which will soon be replaced by 'The Refugees Act' of 1998, and in South Africa, the Aliens Control Amendment Act of 1995 which has now been replaced by the 'Refugees Act' of 1998.

3.1 General Laws Relevant to Refugees

Legislation which is generally relevant to refugees in Tanzania include the Citizenship Act (1995)[166], the Immigration Act (1995)[167], and the Constitution of the United Republic of Tanzania of 1984. In South Africa, legislation which is generally relevant to refugees, include the Immigration Control Act of 1996, the Citizenship Act of 1996 and the Constitution of the Republic of South Africa.[168] In both countries, the immigration and visa laws restrict entry and residence of non-citizens into the territories of these countries and apply to all aliens including refugees except if specifically exempted. The Constitutions on their part and in each country contain the 'Bill of Rights' which make provisions for certain fundamental rights that citizens as well as aliens can claim.

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[165] Although in South Africa at the time, the term 'refugee' was not ascribed to any category of immigrants.
[166] Act No. 6 of 1996
[167] Act No. 7 of 1995
[168] Act. no. 8 of 1996

3.2 Legislation Specific to Refugees

The Refugees Act of 1998[169]

In Tanzania, the most recent piece of enacted legislation specifically applicable to refugees is the Refugees Act of 1998[170]. The Act defines a 'refugee' to be any person who:

(a) is outside the country of his nationality or if he has no nationality, the country of his former habitual residence, because he has or had a well founded fear of persecution by reason of his race, religion, nationality membership of a particular social group or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the Government of the country of his nationality, or if he has no nationality, to return to the country of his former habitual residence.

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of his 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;

(c) belongs to a group of persons which by notice in the Government Gazette has been declared to be refugees for the reasons set out in paragraphs (a) and (b) above. [171]

In general, the function of law specific to refugees is to remove the refugee from the ambit of general law which limits the rights of aliens[172]. Legislation specific to refugee is meant to ensure that refugees and asylum seekers are granted the protection which they can no longer claim from their government. The Refugee Act in Tanzania however, is not geared towards refugee protection as such. Like the previous Act before it (the Refugee Control Act of 1966), the Refugees Act focuses more on controlling refugees rather than extending to protection and rights to them. The element of 'control' comes across strongly in the objective of the Act which states as follows:

> The object of this Bill is intended to repeal and re-enact the Refugees Act to make provisions for developments in refugees matters, which took place since 1966 when the present legislation came into force. Such developments resulted from violations of human rights which is a major reason for the influx of refugees world-wide.

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[169] Act No. 6 of 1998

[170] from hereonwards 'RAT'

[171] The Refugee Act, No. 6 of 1998 at 11

[172] Goodwin-Gill, The Refugee in International Law, at 148

> Tanzania being one of the countries hosting a large number of refugees, the presence of such persons affects the country socially, economically and at times politically. therefore there is a need to curb such developments through legislation which is consistent with existing international conventions which Tanzania accredited[173].

Refugees Act of 1998

In South Africa, the most recent enacted legislation specifically applicable to refugees is the 'Refugees Act'of 1998[174]. The Act defines a 'refugee' to be:

Any person who has been granted asylum in terms of the Act. [175]

A refugee 'in terms of the Act' is therefore a person who according to the authorised bodies in the Act,[176] qualifies for refugee status. This Act unlike the one in Tanzania, was founded by an approach that was individual rights oriented so it offers the refugee greater protection especially when compared to it's counterpart in Tanzania. The element of a 'rights approach' is brought out clearly in the objective of the Act which provides (inter alia) the following:

> The Objects of the Bill are to introduce a substantive refugee regime for the Republic that is rights and solutions orientated.[177]

Although the objectives of both Acts clearly express the commitment of both nations to enacting and enforcing legislation that is consistent with international refugee law, the provisions of both Acts fall short of the required international standards. Evidence of these sub-standards are brought to light when subjecting the law and practice in both Nations to assessment under each of the six principles of international refugee protection.

3.2.1 Asylum

3.2.1(a) The Law

In Tanzania, the RAT makes provision for the principle of asylum. It defines it to mean:

shelter granted by the Government to persons qualifying for refugee status in

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[173] The Refugees Act, supra note 7 at102
[174] from hereonwards 'RAS'
[175] Refugees Act, B135B-98, section 1(xv) at 6
[176] ibid. Chapter 2. These bodies including the Standing Committees for Refugee Affairs and the Refugee Appeal Boards.
[177] ibid, at 26

accordance with the provisions of the Act. [178]

The Act defines an asylum seeker to mean:

a person seeking refugee status in accordance with the provisions of this Act and in accordance with other International Conventions relating to refugee matters of which Tanzania has accredited;[179]

In South Africa, the RAS also makes provision for the principle of asylum. It defines asylum to mean:

refugee status recognised in terms of the Act[180]

It defines an asylum seeker to mean:

a person who is seeking recognition as a refugee in the Republic[181]

Though the definition of 'asylum seeker' under both Acts is not as extensive as the UNHCR's definition of an asylum seeker[182], it is clear that both countries give cognisance to the principle of asylum. Despite this fact however, both pieces of legislation do not comply with the required international standards in a number of ways.

As seen in the previous chapter, international refugee law dictates that individuals have a right to seek and enjoy asylum. The right to seek asylum has been curtailed in both the RAT and the RAS. In the RAS, the curtailment of the right is found in it's 'exclusion from refugee status' section.[183]. This section provides (inter alia) that a person is excluded from seeking refugee status if he or she has:

"committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment;"(emphasis my own)

This aforementioned subsection is not in full compliance with international law. The addition of the underlined part causes the subsection to be more restrictive than the 1951 UN Convention's equivalent provision which refers only to *a -serious- non*

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[178] The Refugee Act. Supra note 7 at 8
[179] ibid.
[180] supra note 11 at 6
[181] ibid.
[182][182] The UNHCR defines asylum seekers to include: individuals whose application for refugee status has been rejected, where the rejection is on purely formal grounds (i.e. the receiving government decides that the individual can seek asylum in a safe third country); or on substantive grounds that the UNHCR would not consider sufficient; or following a process for determination or refugee status that is not procedurally fair. Refer to *the UNHCR'sGuidelines on the Detention of Asylum Seekers*, paragraph 11
[183] The Refugee Act, supra note 11, section 4(b)

political crime. Many crimes punishable by imprisonment in South Africa are not in fact very serious and would not justify refusal of refugee status[184].
The Tanzanian RAT in comparison, also disallows those who have committed a serious non-political crime from seeking refugee status but it does not go as far as it's South African counterpart by incorporating into its provisions the above underlined. The RAT therefore, and in this regard is, more in line with international law than the RAS.

The RAS denies refugee status to a person who enjoys the protection of any other country in which he or she has taken up residence[185]. Similarly the RAT denies refugee status to an individual who already been granted refugee status or asylum in another country prior to his entry to Tanzania[186]. These provisions are inadequate for they are not grounds for exclusion from refugee status under international law (even though they may determine where refugee status determination takes place). The RAS and RAT need to ensure that asylum seekers are never returned to countries where there are inadequate refugee status determination procedures, where there is inadequate protection against refoulment, or where they are not safe. The RAT in Tanzania, attempts to remedy this situation by adding an exception to it's aforementioned provision. This exception allows refugee status to those who have already been granted asylum elsewhere, if they qualify for resettlement or family reunification in accordance with the provisions of the Act, or if they are arriving from a territory where there has been a serious breach of peace[187]. The RAS has a somewhat correlative provision, which provides that regardless of the provisions of the Act, no individual may be refused entry into the Republic or returned to another country if he or she may be subjected to persecution on the basis of a number of reasons[188], or if his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination etc.[189]. Even though

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[184] Refer to Human Rights Watch *Submission to the Parliamentary Portfolio Committee on the Refugee Bill*, 14 October 1998, at2
[185] section 4(1)(d)
[186] section 4(4)(d)
[187] ibid.
[188] section 2(a) these reasons include race, religion, nationality, political opinion, or membership of a particular social group
[189] section 2(b)

these provisions may go a long way in assisting an individual from being returned to a country where he has been granted asylum but is still not safe, the existence on the statute book, of provisions that refuse asylum on the basis of it having been granted elsewhere, will continue to inhibit a person from excercising his right to seek asylum.

The right to seek asylum has also been curtailed, in both countries and under both Acts[190], by the fact that the UNHCR can only volunteer information to the bodies that determine the status of asylum seekers. It is up to such bodies to decide whether or not they shall take into consideration the representations made by the UNHCR on behalf of the asylum seeker. This may be regarded as a serious curtailment especially if one takes into consideration the fact that it is imperative that asylum seekers not only be provided with relevant information at the time of seeking asylum, but also that they receive the best possible assistance and representation in the completion of their application. The assistance given to asylum seekers and the representations made on their behalf by UNHCR could make or break their case. Without a guarantee that such representations will be taken into consideration, it cannot be said that the asylum seekers will have excercised their right to seek asylum effectively.

Another factor that inhibits the asylum seeker from exercising his/her right to seek asylum effectively is the fact that neither the RAS or RAT make provision for the mandatory availability of interpreters to assist individuals in their attempts to seek asylum. When accurate communication cannot be conveyed from the asylum seeker to the body granting asylum because of an existing communication barrier, the process of seeking asylum becomes almost feckless. Room is created for inacurracies in the application and abuse of the procedure by government officials. The efforts made by the asylum seekers in their applications for asylum, if they cannot be understood, may be relegated to being futile.

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[190]The RAT in section 9(6)(b) provides that The Committee shall: if deemed appropriate investigate and seek all relevant information from appropriate sources within and outside the country.....(d) if deemed necessary call any other person to appear before it and *may* consider any other relevant or written submissions.
The RAS in section 24(1)(b) provides that Upon receipt of an application for asylum, the Refugee Status Determination Officer-where necessary, *may* consult with and invite a UNHCR representative to furnish information on specified matters.

International law makes no distinction between temporary and permanent asylum when it comes to the right to enjoy asylum. The RAS and RAT are, in certain ways, inadequate in observing the right to enjoy asylum. The RAT is inadequate in the sense that it allows for the confiscation of the asylum seekers vehicle[191], and animals[192] by an authorised official for a limited period or permanently. The RAS does not contain such drastic provisions. In fact it provides that those granted asylum (i.e. temporary asylum), can be given conditions as to how they shall sojourn in the Republic but such conditions mustn't conflict with international law or the Constitution[193]. However, and like the RAT it curtails an individuals right to enjoy asylum by empowering the Minister to order that a refugee/asylum seeker be removed from the Republic on grounds of national security and public order. The lack of clarity as to what constitutes 'national security and public order' could result in the curtailment of a right to enjoy asylum thorough the abuse of discretionary powers widely vested in the Minister under the Act.

The RAT in Tanzania also requires that the provisions of the Constitution and the relevant international Conventions be paid regard when orders are given as to how the asylum seeker shall sojourn in the Republic, but this is only required when such orders and conditions are likely to affect the life or status of the person claiming refugee status.[194] The implication is that regard need not be had to the Constitution and relevant international law when dealing with other matters affecting the individuals right to enjoy asylum if they are not related to the life or status of the asylum seeker or refugee in the country. This provision is therefore too narrow.

Another factor that infringes upon the right to enjoy asylum in Tanzania, is that individuals according to the provisions of the RAT may not only be ordered to reside in 'designated areas'[195], but may also be ordered or directed by a settlement officer, to work or perform any duty necessary for the maintenance of essential services within the designated area.[196] Additionally, individuals may not, without a permit, leave a

[191] section 14
[192] section 13
[193] section 22(1)
[194] section 21(2)
[195] section 17(1)
[196] section 18(2)(b)

designated area[197] nor may they conduct themselves in a manner prejudicial to good order and discipline[198] regardless of whether such 'good order' and 'discipline' contravene norms of international refugee law and international human rights law. If an asylum seeker or refugee is found guilty of a disciplinary offence, he/she may be punished by way of confinement in a settlement or camp lockup for a period not exceeding three days or by being fined a sum not exceeding five hundred thousand shillings.[199] These provisions contravene norms such as freedom of movement and right to liberty enshrined in international instruments and the Bill of Rights in the Contitution of Tanzania.

In contrast to the RAT, the RAS in South Africa, has no correlative provisions similar to the ones mentioned above[200]. Upon the granting of temporary asylum (or an asylum seekers permit), an individual is free to move around within the Republic[201] and is not compelled to be employed within a designated area. In fact, an asylum seeker may to venture outside the Republic if he or she has the permission of the Minister[202].An asylum seeker could face the penalty of confinement (i.e. imprisonment) or a fine if (like in Tanzania) he/she does not comply with the conditions of how he/she will reside in the Republic[203]. However, and as mentioned previously, the conditions as to how an individual shall sojourn in the Republic cannot be in conflict with the Constitution or international law[204]. To a larger extent therefore, the provisions of the RAS are more effective than the RAT in allowing the individual to exercise his/her right to enjoy asylum.

3.2.1(b) State Practice

Tanzania, as discussed in Chapter One, has had a history of being generous towards asylum seekers. Until the Rwanda Emergency of 1995, Tanzania was the shining

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[197] section 17(3)(c)
[198] section 18(c)(3)
[199] section 18(4)
[200] except in the case of mass influxes(section 35) but even then asylum seekers are not obliged to live in he designated areas nor comply with rules similar to those under the RAT
[201] section 22 (5) provides that a permit lapses if the holder departs from the Republic without the consent of the Minister.
[202] ibid.
[203] section 37(d)
[204] section 22(2)

example of "the open door policy" under which asylum was granted to all persons in flight and who were in search of safety.[205] More recently however, a change in the Tanzanian governments policy towards refugees has caused a derogation from and the erosion of the principle of asylum. An example of such a derogation, was when Tanzania closed and sealed her border with Burundi on the 30th March 1995.[206] This action was based on the accusations made by the Burundian government that Tanzania was hosting rebel factions in her refugee camps. The action was also based on the request for assistance made by the Tanzanian regional authorities in Kigoma to the government to control the trans-border movements which were getting out of hand. As a result of this action, millions of people facing persecution in Burundi were apprehended and prevented from seeking asylum, and 126 Burundian individuals were prevented from enjoying asylum because they were returned to Burundi after having been granted refugee status[207]. To ensure that the border remained impermeable the Tanzanian government militarised the area so that anyone who attempted to cross over would face the risk of loosing his/her life. This non-entree approach has acted as a deterrent to many who may have, had they given the opportunity to seek asylum, qualified for refugee status.

South Africa, like Tanzania has also taken on a non-entree approach to refugees and asylum seekers (especially those hailing from Mozambique). This approach has also caused the abrogation of the principle of asylum Unlike Tanzania, South Africa did not completely seal her borders with neighbouring refugee producing nations for it has been possible for refugees to come into the Republic from surrounding Nations via the legal ports of entry. However she has greatly impeded the process of seeking asylum by resurrecting an electrical fence to prevent illegal migrants from crossing over into the Republic[208]. Unfortunately, the fence also prevents asylum seekers who have the potential to be granted refugee status (but who have no means of entering the country through the proper ports of entry), from entering the Republic. Many asylum seekers who have attempted to use other methods to enter the Republic, have (as in the case of Tanzania) risked loosing their lives. Others have actually lost their lives in

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[205] B. Rutinwa, 'Tanzania's Response to the Rwanda Emergency' 9*JRS*(3) (1996) 291 at 296
[206] World Disaster Report 1997, at 32
[207] Amnesty International News Release <http://www.amnesty.org.news 199715600197.htm>

a number of ways including dehydration and to wild animals when attempting to cross Kruger National Park[209]. In addition to being inhibited at the border from seeking asylum, asylum seekers have also been known to be prevented from approaching the relevant authorities in order to apply for asylum when already inside the Republic. Ofili Chucks from Nigeria, was arrested at the South African/ Mozambiquan border when attempting to enter the Republic to seek asylum on November the 19th,1997. He was taken into detention and there have been no reports indicating his release since. He made the following statement to *Human Rights Watch* when in detention,

> "I came to South Africa on the 19th November, I told them at the border that I wanted refugee status. So the Police brought me here. Home Affairs never came to talk to me. The police tell me to go back, but I can't go back to Nigeria.....we have been waiting for Home Affairs. So we are just working, working. Everyday we are working, we do construction, we wash the policemen's cars, we clean the toilet. They just call us to work....They just tell me "there is no war in Nigeria, no war in Nigeria, just go home," *but they don't let me tell my story."* (emphasis my own)

Clearly therefore, state practice in both Tanzania and South Africa have yet to meet the required international standards pertaining to the principle of asylum. The South African Government has indicated it's keenness to impart knowledge about asylum seekers and their rights to other bodies dealing with asylum seekers including the police and immigration officials[210]. The Tanzanian government needs to do the same so that the required international standard for the treatment of asylum seekers and the observance of their rights to seek and enjoy asylum.

3.2.2 Non-Refoulment

3.2.2(a) The Law

The RAT and RAS which do not specifically provide for the principle of non-refoulment, contravene the principle in a number of ways. The RAT in Tanzania contravenes the principle of non-refoulment by allowing for the deportation of asylum seekers and refugees (including those who are thought to be dangerous to the security of the State) to the territories from which they arrived[211]. The Minister or any other

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[208] VLA de La Hunt Refugees and the Law in South Africa (1997) at 3
[209] ibid.
[210] Information obtained from an interview with Victor Frylinck, Legal Officer for the Refugee Department, Home Affairs, Cape Town, on January 15th, 1999
[211] section 28(1)(a)

competent authority who have been vested with the power to order such deportations, may order that the deportations be effected by a prescribed means and via a prescribed route[212] The RAT only prevents the Minister, a competent authority or a court from making these orders if they are of the opinion that such persons, upon their return, will be tried or punished for an offence of a political character, or if such persons are likely to the subject of physical attack in such a territory. The problem with this exception is that it gives the Minister, the competent authority or the court, complete discretion to decide whether or not the conditions in the country or origin of the asylum seeker are suitable for the asylum seekers return. No guidelines are given or obligations placed upon them to follow the dictates of international refugee law. Furthermore, their decision not to refouler a refugee can only be based on a smaller category of the types of persecution that can qualify individuals for refugee status under international refugee law[213].

Other conditions which could, according to the provisions of the RAT, cause the refoulment of a refugee or asylum seeker include:

(i) when asylum seekers fail to present themselves (unless they can show reasonable cause for delay), seven days after entry into the Republic, to the nearest authorised officer, village authority, or a justice of peace and apply for recognition as a refugee[214]. Failure to do results in the categorisation of the asylum seekers as illegal immigrants and their subjection to deportation under the Immigration Act of 1995.

(ii) when asylum seeker application for refugee status has been rejected in accordance with section 9 which deals with determination of refugee status. Asylum Seekers are then deemed to be illegal immigrants and liable to deportation in accordance with the provisions of the Immigration Act of 1995 unless such persons have been accorded mandate refugee status by the UNHCR pending their relocation to other countries within specified periods.[215] The lack of specification as to the mode, method, and manner used

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[212] section 28(1)(b)

[213] the 1951 Refugee Convention for example, refers not only to persecution on the basis of political opinion, but also on the basis of race, religion, nationality, membership of a particular social group

[214] section 9(1)

[215] section 9(9)

to determine the status of an asylum seeker means that an asylum seeker could face deportation even if his/her status has been determined by procedures which are not in line with international refugee law.

(iii) when asylum seekers or refugees fail to comply with the terms or conditions annexed to their permits to remain in the country or issued to them in writing by the Director of Refugee Services[216]. Although the RAT does not specify what conditions or terms could be given to the asylum seekers and refugees, it would not be farfetched to assume that asylum seekers and refugees could face deportation for the most trivial incompliances and offences in the same way that they did under the Refugee Control Act of 1966.[217]

The courts can also order that an asylum seeker or refugee convicted of an offence under section 28[218] of the RAT be removed from the Republic to the territory from which the individual entered Tanzania or any other country of the individuals choice.[219]

The above mentioned provisions give a clear indication of the fact that asylum seekers and refugees in Tanzania are not protected against refoulment as is required by international refugee law. The possibility of refoulment is heightened by the fact that not only the Minister and the court, but also the Director of Refugee Services and a "competent authority" may order that an individual be refouled. Section 3 defines "competent authority" to mean a "Regional Commissioner.....and it includes a District Commissioner". This means that all refugees and asylum seekers in a given area are at the mercy of such persons who may, at their own discretion, order for the deportation of such refugees or asylum seekers. There are no mechanisms in place to ensure that such officers will comply with the mandates of international refugee law. In fact, the RAT goes as far as protecting such officers and their decisions by providing that 'No person who does or omits to do anything in the execution of his duty under this Act shall be subject to any personal liability whatsoever if the same

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[216] section 12(1)(b)

[217] refer to sections 6 & 15 of the Refugee Control Act of 1966. Under these sections, a refugee could be convicted of trivial offences such as failure to obey orders of the camp commandant to serious ones such as failure to surrender firearms

[218] this section provides for (inter alia) the deportation of asylum seekers who have not qualified to be granted refugee status and refugees who are dangerous to the security of the state

[219] section 28(2)

act or omission was bonafide. '[220]

Like the RAT in Tanzania, the RAS in South Africa makes provision for the possible return of refugees or asylum seekers on grounds of national security and public order.[221] Although the RAS goes a step further than the RAT by providing that 'such removals may only be ordered by the Minister with due regard to the rights set out in section 33 of the Constitution and the rights of the refugee under international law'[222], the possibility of unwarranted refoulment is not ruled out. In order to reduce the possibility of such unwarranted refoulment in Tanzania and South Africa, the aforementioned provision must be strictly construed. The reasons for removal must be made more specific. A threat to "national" security should mean a threat to the very existence of the nation, and not merely an administrative political or logistical burden to the country or locality where a port of arrival is situated. Nor may states invoke this rational to justify the removal of refugees simply on the basis of their political opinion or national or ethnic origin. The power to remove refugees on the grounds of public order should not be used to limit the rights of refugees to exercise their internationally recognised rights to freedom of assembly, association and speech. Expulsion is a very serious measure which should only be applied when the threat to national security and the public interest is of the greatest magnitude.[223] UNHCR advises that when it comes to the removal of a refugee/asylum seeker from a country on the basis of 'national security' or 'public order', a proportionality test should be applied so that the danger posed to the refugee when refouled is balanced with the danger posed to the community in the host country. [224]

In the same way that the RAT in Tanzania allows for the removal of asylum seekers if they fail to comply with the conditions of their permits[225], the RAS indirectly does the same. Section 22(6) specifies the conditions for the withdrawal of an asylum seekers permit and one of the conditions for such withdrawal is when an asylum seeker

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[220] section 29(1) take note that bonafide is not defined under the RAT
[221] section 28(1)
[222] section 28(2)
[223] Refer to Human Rights Watch, *Submission to the Parliamentary Portfolio Committee on the Refugee Bill,* October 1998 at 9
[224] UNHCR Memorandum, Comments on the Draft White Paper, 20th July 1998, at 5
[225] refer to section 12(1)(b)

contravenes the conditions endorsed on his/her permit.[226] Like section 12(1)(b) of the RAT, Section 22(6) contradicts the norms and practices contained within the principle of non-refoulment. The withdrawal of an asylum seekers permit from a person who may have contravened any conditions thereto, even unintentionally, goes beyond prosecution and may amount to deportation and exposure to danger[227]. This is becuase an asylum seeker if caught without a permit, could be deemed an illegal immigrant and hence be subject to deportation. Therefore and in this way, section 22(6) of the RAS and section 12(1)(b) are similar in that they contravene non-refoulment. According to international refugee law and protection principles, a refugee who does not abide with the laws and regulations of the host nation should be prosecuted accordingly, but only within a fair, impartial administrative procedure.

3.2.2(b) State Practice

There is evidence to indicate that state practice in both Tanzania and South Africa, do not conform to the requirements of the principle of non-refoulment.

In Tanzania, the principle of non-refoulment has been abrogated in a number of incidents. The governments change in policy since the Rwanda emergency of 1994 resulted in flows of refugees into Tanzania beyond her ability to cope.[228] After this emergency, Tanzania closed her border with Rwanda and Burundi and forcefully repatriated a significant number of refugees. The then Minister for Foreign Affairs declared the following openly, *"we are saying enough is enough. Let refugees go home and no more should come"*.[229] This marked the beginning of a more restrictive approach towards the refugee problem in Tanzania.

In November 1996, the Kigoma Regional Commissioner (RC) ordered a group of Zairean refugees to return to the DRC against their wishes. Supposedly, this group of individuals had made gestures against a number of individuals including the Regional Commissioner himself. Ordering their expulsion, the RC told the refugees, *"Since*

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[226] section 22(6)(a)

[227] Although section 22(7) only mentions fines and imprisonment as possible penalties for incompliance with the conditions of a permit, it does not expressly rule out the possibility of deportation (refoulment) to the country of origin or any other nation where the asylum seeker may face persecution

[228] See B. Rutinwa, "Tanzania's Response to the Rwanda Emergency" *Journal of Refugee Studies* Vol,9 No.3 1996

[229] J. Rwegasira, supra note

you have failed to appreciate the government's gesture of accommodating you, you are ordered to be repatriated to our country of origin (Zaire)". The RC also instructed the UNHCR to stop receiving further refugees from Zaire[230]. On the 6th December 1996, Tanzania jointly with the UNHCR, issued a declaration requiring all refugees to leave the country and return back to Rwanda[231]. This order was eventually implemented with the help of the military. Over 500,000 refugees were sent back to Rwanda. For example it was reported in the Guardian newspaper of December 17th 1996 that,

> "Tanzanian soldiers entered the vast Benaco camp 17 miles inside Tanzania, on Sunday and ordered the Rwandans out. Refugees told Reuters that a brief resistance crumbled under a flurry of blows by determined soldiers and exodus began."[232]

Following an incident near Kitali Camp in Ngara in which opposing armed groups of Burundi refugees engaged in a battle against each other causing several deaths, the government sent away over 100 refugees to Burundi, most of whom were alleged to have been killed immediately upon their return[233]. In 1997, the Tanzanian Government announced that some 100,00 refugees in Tanzania from the DRC should go home because it was safe to do so. Although as many as 40,000 plus have registered for the repatriation programmed co-ordinated by the UNHCR[234], many have not done so because of the uncertainty of their security once on the other side. The Tanzanian government has remained adamant about the repatriation of these people. Therefore depending on the views taken by the refugees themselves on the repatriation, this could be another instance of refoulment.

State practice in South Africa, like in Tanzania, has caused the abrogation of the principle of non-refoulment in a number of incidents. In April 1996 Researchers from

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[230] Reported by Lucas Liganga in *The Guardian*,(T) 27 November 1996. The order was later revoked at the intervention of higher government levels in Dar-Es-Salaam.
[231] See "Tanzania Wants Rwandan Refugees Out" in *Daily News* (T), 6 December 1997 at 4
[232] 'Border Stays Open as the Hutus Flood back to Rwanda' in *The Guardian* (T.) December 17, 1996. See also 'Dar Acts to Control Rwandese Refugees' in *Daily News* (T) December 12, 1996; 'Refugees Must Return to Camps' in *The Guardian* (T), December 14, 1996; 'Troops Seal-Off Roads, Refugee Camps' in *The Guardian* (T), December 16, 1996.
[233] See 'ELCT Wants Burundi Refugees to Observe Rule of Law' in Sunday News(T) January 26, 1997 and 'Mkapa Denies Expelling Refugees' in *The Guardian*(T) January 27, 1997
[234] "Tanzania begins Repatriations to the Democratic Republic of Congo" *The Guardian*, 20 October, 1997

the University of Witswatersrand managed to interview a series of Mozambican refugees who had been refouled to Mozambique in contravention of the rules of international law[235]. One of the refugees known as Armando Ubisse gave reason for his refoulment by saying the following,

"When we went to work we were arrested and deported because we were in favour of the ANC (African National Congress). This is why we were arrested. They said we had to go back and fight for our own government"[236].

A lack of sufficient knowledge about the rights of refugees and the abuse of discretionary powers on the part of government officers including the police, has also contributed to the abrogation of the principle of non-refoulment. During a raid at one refugee camp in Pretoria known as *Ga'Rankuwa*, the Police and Army acting on behalf of the Department of Home Affairs and in complete disregard of the inhabitants basic human rights, removed four Zaireans from the camp. The four individuals were later "repatriated" to Zaire including one woman named Marie Noel who, upon he return to Zaire, was killed in the on going civil war.[237]

These factors cumulatively indicate that Tanzania and South Africa have yet to comply with the obligation of non-refoulment which they undertook to observe when signing the relevant international instruments.

3.2.3 Protection

As noted in the previous chapter, the principle of protection entails recognition of refugee status(i.e. who deserves protection) and the standards of treatment of asylum seekers and refugees (i.e. the content of protection). The RAS and RAT are inadequate in terms of effectively providing for these two aspects of protection encapsulated in international law.

3.2.3.1 *Entitlement to Protection*

As mentioned previously, both the RAT and the RAS define who asylum seekers and refugees are. They also incorporate procedures for determining the status of asylum

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[235] N. Johnston & C. Simbine 'The Usual Victims: The Aliens Control Act & the Voice of Mozambicans' in *Beyond Control: Immigration and Human Rights in a Democratic South Africa* edited y J. Crush at160

[236] ibid. at 162

[237] Human Rights Interview with Thomas Jing, a Cameroonian refugee, Ga'Rankuwa Refugee Camp,

seekers. Entitlement to refugee status and protection is predicated upon the outcome of such determination procedures. Therefore, the effective functioning of the administrative system created by such determination procedures, and its compliance with the dictates of international law, is of crucial importance to the asylum seeker.

Under the RAT, the procedure for the determination of refugee status is divided into four administrative levels. Each level deals with a different process in the determination set-up. The first section is handled by any of the following administrative officers[238]:

1. *village authority*
2. *an authorised officer*[239]
3. *a justice of peace*

The duties of these officers are to accept and register application forms and register the asylum seeker within the local area of his/her point of entry. These officers must interview all applicants and reduce their interviews to writing. They must read the transcripts of such writings to the applicants who may make corrections before the transcripts are signed by both the interviewing officer and the applicants[240]. Applicants are however not obliged to sign the transcript provided they indicate their reasons for not doing so. The officers are then obliged to transmit the transcript, the application forms and any other statements made by the asylum seekers to the an authorised officer at the next level in the administrative structure of the determination procedure. The next level in the determination process is handled by:

The Director for Refugee Services[241].

The duties of the Director include receiving all applications and informing the UNHCR representative in Tanzania of the presence of any person claiming to be a refugee and informing such a person of his right to contact the UNHCR office in Tanzania[242]. The Director is also saddled with the duty of transferring the application

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Pretoria, December 3, 1997

[238] refer to section 9(1)

[239] section 3 defines an authorised officer to mean the Director for Refugee Services, a Refugee Officer (who is an officer responsible for refugee matters and answerable to the Director for Refugee Affairs), a settlement officer (who is a person appointed to be in charge of a designated area), or an immigration officer.

[240] section 9(5)(a)-(c)

[241] section 9(5)(d) as appointed under section 5 of the Act

[242] section 9(5)(e)

and all attached documents to the an authorised body at the next level in the administrative structure of the determination procedure. The next process in the determination procedure is handled by:

The National Eligibility Committee(NEC)[243].

The duty of the NEC is consider all the information presented to it by the Director including the application forms, statements, transcripts and any additional information previously given by the applicant to the authorised officer and the UNHCR representative in Tanzania.[244] The NEC has the mandate to seek and obtain any other information that it may deem relevant to the applicants cause. It may do so by conducting interviews with the applicant or other persons and sources within and outside the country[245]. It shall then make recommendations which will be carried to the next level of the administrative structure for the determination of refugee status. The person dealing with refugee issues at this level is the:

Minister[246]

The Minister must, without delay make a decision on whether to grant or deny an asylum seeker refugee status. His decision 'may' be based on the recommendations of the NEC. Once the decision is made, the applicant is informed of such a decision through the Director.

Where refugee status has been denied, the Director is obliged to inform the asylum seeker of his right to petition for review to the Minister within seven days from the day he/she is informed of the decision[247]. The provision for a petition for review to the Minister is not limited to the applicant alone. All individuals who are dissatisfied with the decision of the Minister have the locus standi to petition for review[248]. The decision given by the Minister after such petitions have been submitted, is final. Any person whose application for refugee status and asylum has been rejected, shall then

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[243] section 9(6) this Committee comprises of the following members: The Director , Not less that 6 other members appointed by the Minister from the following departments in consultation with their respective Ministers; (i) The Director of Public Prosecutions who is the chairman (ii) the President's Office (iii) the Prime Minister's Office (iv) The Ministry of Foreign Affairs (v) The Inspector General of Police (vi) The Director of Immigration Services

[244] section9(6)(a)

[245] section 9(6)(a)-(d)

[246] minister is defined to mean the Minister for the time being responsible for refugee matters

[247] section 9(6)(g)

[248] section 9(7)

be deemed to be an illegal immigrant.[249]

The procedure for the determination of refugee status under the RAS in South Africa, is similar to that of the RAT in that there are a number of administrative levels in the determination set-up. Like in the case of the RAT, each of these levels comprise of a group of people who exact different functions in the process of determination. The first of such groups of persons at the first level of the determination procedure are the: Refugee Reception Officers.[250]

Like the authorised officers, village authorities, or justices of peace under the RAT, the Refugees Reception Officers under the RAS have the duty of accepting the application forms of asylum seekers and ensuring that the form is properly completed. Where it is necessary, the officers must assist the applicants in this regard.[251] Unlike the RAT, the RAS does not make it mandatory that both the Refugee Reception Officer and the Applicant sign the application forms. Although the RAS, unlike the RAT, does not specifically provide that an applicant must be interviewed, it does make provision for a refugee reception officer to make enquiries with an applicant, if he/she deems it necessary, so as to verify the information furnished in the application[252]. A Refugee Reception Officer is under an obligation to issue to the applicant, an asylum seeker permit in the prescribed form so as to allow the asylum seeker to sojourn in the Republic temporarily until his/her status has been determined[253]. The RAS differs from the RAT in this regard. A village authority, authorised officer, or justice of peace does not have the mandate to issue a permit to an asylum seeker. Instead it is the Director for Refugee Service who has the duty of ensuring that an applicant for refugee status is not ordered to leave the country before his claim for refugee status has been decided upon.[254] The RAS and RAT are similar in the sense that at the initial stage of the application procedure, i.e. when a form is being submitted to the relevant authorities as well as statements taken, there is no provision for the invlovment of the UNHCR. It is only after the application forms and any other documents have been received and transferred to the next level that room is

[249] section (9)
[250] section 8
[251] section 21(2)(b)
[252] section 21(1)(c)
[253] section 22(1)

created for UNHCR's involvement. The next process in the determination of status set-up is handled by:

Refugee Status Determination Officers[255]

The duties of a refugee status determination officer are a combination of the duties of a Director for Refugee Services, the NEC, and the Minister under the RAT. A Refugee Status Determination Officers duties are similar to those of the Director under the RAT, in that he/she initialises the contact with UNHCR. Whereas it is mandatory that the Director under the RAT contact the UNHCR to inform them of the presence of a person claiming to be a refugee and to inform the refugee of his right to contact UNHCR, it is not mandatory that the Refugee Status Determination Officer under the RAS contact the UNHCR. Nor is it mandatory that the Refugee Status Determination Officer inform an asylum seeker of his/her right to contact the UNHCR. All a Refugee Status Determination Officer 'may' do where necessary, is to consult with and invite a UNHCR representative to furnish information on specified matters[256]. The Refugee Status Determination Officer may also (with the permission of the asylum seeker) provide the UNHCR with such information as may be requested.[257]

The duties of a Refugee Status Determination Officer are similar to those of the NEC in that he/she must consider the application and not merely transfer it to the next level of the determination set-up. However, the duties of the NEC and a Refugee Status Determination Officer differ in that the NEC can only make recommendations based upon their considerations. They cannot grant of refuse to grant asylum. The Refugee Status Determination Officer, on the other hand, can after considering the application, grant asylum, refuse asylum, or refer any questions of law concerning the application, to a body known as the Standing Committee[258]. There is no correlative provision under the RAT, probably because, one of the members of the NEC is the Director of Public Prosecutions[259] and would therefore be in a position to deal with any legal questions that may arise.

The Refugee Status Determination Officers job is similar to that of the Minister in

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[254] refer to section 5(2)(b)
[255] section 8
[256] section 24(1)(b)
[257] section 24(1)(c)
[258] section 24(3)

that, like the Minister, the Officer must decide whether or not to grant refugee status to an individual. Unlike the Minister who is only obliged to inform the applicant of his decision, the Refugee Officer must provide written reasons to the applicant for the rejection or the referral. The Refugee Status Determination Officer in deciding whether or not to grant asylum, is obliged to have due regard to the Constitution and is obliged to ensure that the applicant fully understands the procedures, his/her rights, and the evidence presented[260]. There is no correlative obligation imposed on the Minister under the RAT.

Should the Refugee Status Determination Officer decide that an application is manifestly unfounded, abusive or fraudulent, then the application must be reviewed by a body at the next level of the determination set-up[261]. Under the RAT, the provision for review is not limited to applications that are manifestly unfounded, abusive or fraudulent. Any individual, whether an applicant or not, may petition to the Minister for review if they believe that their interests have been aggrieved.[262] In contrast to the RAT where the same body that made a decision not to grant asylum, reviews his own decision (i.e. the Minister), a review under the RAS cannot be conducted by the Refugee Status Determination Officer. Instead it is conducted by a body at the next level of the determination set-up known as the:

Standing Committee[263]

Unlike the Minister under the RAT who is not compelled to follow any rules when reviewing an application, the Standing Committee must review an application with due regard to the Constitution and must ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.[264] The RAS provides a series of guidelines that the Committee 'may' choose to follow before reaching a decision but none of these guidelines are compulsory. The

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[259] section 6(1)(b)(1)
[260] section 24(1)(c)
[261] section 25(1)
[262] section 9(6)(g) &(9)(7)
[263] section 9&10. The Standing Committee consists of: (a) a chairman (b) such number of other members as the Minister may determine having regard to the likely volume of work to be performed by the Committee. At least one member of the standing committee must be legally qualified. A Person cannot be a member of the Standing Committee if he or she is: (a) not a South African citizen (b) has been sentenced to imprisonment without the option of a fine during the preceding four years
[264] section24(1)(c)

Committee must however, decide on any questions of law refereed to it by the Refugee Status Determination Officers. Like the Minister under the RAT who must inform the Director of his decision[265], the Standing Committee must also inform the Refugee Status Determination Officer of their decision within a prescribed time[266]. The Committee must also refer back to the Refugee Status Determination Officer any decisions made on questions of law with directives as are necessary and the Refugee Status Determination Officer must decide an application in terms of those directives.[267] Under the RAT, a decision made by the Minister on a petition for review would be final and would mark the end of the procedure for the determination of refugee status. This is also the case under the RAS for applications that are decided to be manifestly unfounded, abusive, or fraudulent by Refugee Status Determination Officers.

Where an application is found to be 'unfounded' by a Refugee Status Determination Officer, then the aggrieved applicant may lodge an appeal against the finding with a body at the next and final level of the determination set-up which is the:

Appeals Board.[268]

The duties of the Appeal Board include (a) hearing and determining any question of law referred to it in terms of the Act (b) hearing and determining any appeals lodged to it (c)advise the Minister or Standing Committee regarding any matter which they may have refereed to it.[269] As mentioned previously, the Appeal Board may only hear appeals from individuals whose applications have been found to be 'unfounded' and not individuals whose applications have been found to be 'manifestly unfounded, fraudulent, or abusive'. The only way the Appeals Board would entertain applications that are 'manifestly unfounded, fraudulent, or abusive' is if the Standing Committee were to refer such an application to the Board for advice on matters including those pertaining to those on questions of law. The Appeal Board, can only advise the Standing Committee on how to decide on the application. It cannot make a decision

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[265] section 9(6)(e)
[266] section 25(4)
[267] section 25(5)
[268] refer to section 12,13, &26. The Appeals Board must comprise of a chairperson and at least two other members appointed by the Minister with due regard to their suitability to serve as a member by virtue of his or her experience , qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly. At least one member of the Appeal Board must be legally qualified.
[269] section 14(1)

on the application itself. When it can make a decision, i.e.(in cases of unfounded claims), it must do so after a hearing where the applicant is given an opportunity to place his/her case before the Board[270]. The Board must allow legal representation upon request of the applicant.[271] A series of guideline have been provided by the RAS that the Board 'may' follow before reaching a decision but they are not compulsory. The decision given by the Appeals Board marks the end of the application procedure for applications that are decided by the Refugee Status Determination Officer as being 'unfounded'.

The major difference in the determination of status procedure between the RAT and RAS is that the RAT (unlike the RAS) does not create separate procedures for applications that are found to be 'unfounded' from those that are found to be 'manifestly unfounded, abusive, or fraudulent'.

As mentioned previously, an inadequate procedure or set-up for the determination of refugee status has a tremendous bearing on the principle of protection because such procedures determine who qualifies for refugee protection. There are several flaws in the procedures provided under the RAT and RAS which could have a detrimental effect on those seeking protection by way of claiming refugee status. They include the following:

(i) *Both the RAT and RAS create room for too much discretion.* Under the RAT, the Minister who is empowered to decide whether or not to grant asylum, is not obliged to give reasons for his decision to the applicant, nor is he obliged to the indicate the procedure or method that he used to come to his decision. The Minister is not compelled under any provision to observe the rules laid out in the Constitution pertaining to the rights of all individuals (especially those relating to administrative justice) and the rules of international law (in particular, international refugee law).This is so despite the fact he must inform the applicant of his right to petition for review. Such wide discretion is very dangerous especially if one takes into consideration the fact that the Minister may not be well informed on the rights and obligations of refugees under international refugee law. The situation is made worse by the fact that he need not refer any questions he has (be they of law or otherwise) to

[270] section 26(2)

any knowledgeable body for advice.

The RAS guarantees better protection than the RAT in a number of ways. It makes provisions for the training of officers who deal with refugees and asylum seekers on refugee matters and it also requires that at least one officer must be legally qualified amongst those who have a say in whether an individual should be granted refugee status or not (i.e.Refugee Determination Status Officers, Standing Committee Officers and members of the Appeal Board). This may allow for greater adherence to the laws governing refugee protection. The RAS also dictates that individuals seeking refugee status be furnished with reasons as to why their applications were determined in the negative. Unlike the RAT, the RAS makes provisions for appeals from decisions given by the Refugee Status Determination Officers. It also allows individuals to have legal representation before their status is determined by the Appeal Board. Having said all this however, the RAS like the RAT still creates too much room for discretion.

Although it (the RAS) provides that an individual must be furnished with written reason as to why his application for refugee status was rejected or referred, like the RAT, no indication is given as to what procedure or method is used to come to that particular decision. The RAT does give a series of guidelines that a Refugee Status Determination Officer[272], the Standing Committee[273], or the Appeal Board[274] could use before deciding on an application. However, they are not obliged to use such guidelines. Instead they have the discretion to determine whether or not do so. This is unfortunate for if such bodies were compelled to use the provided guidelines prior to making their decisions, they could obtain important information that could stand to be of acute benefit to the asylum seeker's case. The compulsory use of such guidelines would also assist in ensuring that the legally correct procedures (i.e. those in-line with the international law relating to refugee protection) are used to determine a case.
It is commendable that the RAS provides that the Standing Committee and the Appeal

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[271] section 26(4)
[272] section 24(1)(a)(b)&(c)
[273] section 25(2)(a)(b)(c)
[274] section 26(3)(a)(b)(c)(d)(e)

Board must function without bias and must be independent[275] However, the fact that the Minister has the sole discretion to appoint members of the Standing Committee and the Appeal Board is contrary to the spirit and letter of an 'independent body'[276]. Given the nature and requirements of the post, and to ensure their independence from political influence, an independent structure should be charged with selection[277] and appointment members of the Standing Committee and the Appeal Board. Names of the successful candidates could then be forwarded to the Minister for ratification.

(ii) *The UNHCR is inadequately involved in the Determination of Refugee Status Process in Both Countries.* Both the RAS and RAT boast inadequacies with regard to the involvement of the UNHCR in their determination processes. Under both documents, the UNHCR is not given an opportunity to partake in the application procedure unless called upon. Furthermore, the assistance of the UNHCR may only be availed to the individual after he/she has submitted his application for asylum to the Refugee Reception Officer and passed on to the Refugee Status Determination Officer in the case of the RAS, and after they have been submitted to the Village authority, justice of peace, or authorised officer and passed on to the Director of Refugee Services in the case of the RAT. The presence and assistance of the UNHCR at the time of filling in an application form and when the asylum seeker is verbally volunteering information to the Refugee Reception Officer is of crucial importance. It reduces the possibility of incorrect information being written down (especially if the Officer cannot understand all that the individual says or perhaps becomes slightly negligent after having interviewed over 50 refugees within the space of 4-5 hours)[278]. The presence of the UNHCR would also enable the individual to be informed of his rights and obligations and the importance of the facts volunteered in the interview or on the application form. In many instances, asylum seekers never fully appreciate the importance of the information volunteered to the Officers at that stage nor are they

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[275] section 9(2) and section 12(3) respectively.
[276] This is so despite the fact that the Minister is obliged to make such appointment with due regard to these persons experience, qualifications, and expertise, as well as their capability to perform their functions properly (section 10(2) and section 13(1)
[277] Cape Town Refugee Forum recommends a strong independent body like the Judicial Services Commission (Refer to their Recommendations to the Portfolio Committee in October 1998)
[278] As is the case with the Refugee Department in Cape Town. Refer to interview with Mr Fylinck, January 15,1999

made to understand the implications of what they say. Therefore they may omit to mention facts that may be of crucial importance to their case.

(iii) *There are no mandatory provisions to ensure that all applicants are availed the assistance of Interpreters when necessary.* The RAT provides that in dealing with an application for refugee status, the asylum seeker may be permitted to bring along a competent interpreter if necessary.[279] The RAS provides that the Minster may make regulations relating to the provision of interpreters at all levels of the determination process;[280] None of these provisions place a mandatory obligation on the Ministers to ensure that asylum seekers are given the opportunity to obtain the assistance of interpreters when necessary. Without such guarantees, it cannot be said that an individual in need of such assistance will have fully excercised his/her constitutional right to be heard. The information provided on the application form determines whether or not refugee status will be granted. It is therefore important that it be accurate. Without the provision of interpreters, such accuracy cannot be guaranteed.

Refugee Conventions do not require countries to form any institutions or adopt particular procedures for refugee determination. However, the absence of institutions that function adequately and the absence of an effective determination procedure, will result in asylum seekers and genuine refugees, not being able to have their claims properly adjudicated. As such, a nations standards could fall short of the standards of treaty law which, while not requiring parties to treaties to adopt any particular form of implementing the obligations assumed, nevertheless require effective implementation of obligations.

3.2.3.2 *Standards of Protection*

(a) Freedom of Movement

<u>The Law</u>

The standard of treatment of refugees under the RAS and the RAT and in practice fall short of what is required under the international instruments. For example, Article 26 of the 1951 Convention guarantees freedom of movement for refugees while Article

[279] section 9(6)(h)

12 of the ICCPR of 1966 also provides 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."

Freedom of movement is an important right for refugees for it is typically a pre-requisite to the enjoyment of other refugee rights such as employment, education, association, etc. Unfortunately, this freedom is not properly guaranteed nor extended to Refugees in Tanzania. Section 16(1) empowers the Minister to declare any part of Tanzania to be a designated area for the reception and residence of refugees or categories thereof. Sub-section 2 empowers the Director for Refugee Services to appoint a settlement officer to be in charge of such refugee settlements or of such reception, transit, or residence area for asylum seekers and refugees. Several refugee settlements have been established in the past in Tanzania including Katumba, and Mishamo, in Sumbawang and Ulyankulu in Tabora. With the influx of Rwandese-Burundian refugees, camps were also established in areas like Mtabila, Karembwa, Mtandeli and Nyarugusu in Kigoma.[281] Sections 17(1)&(2) empowers the competent authority to toss refugees around[282]. He may order that refugees be moved from one place to another. Failure to comply with such orders constitutes an offence hence the refugee or asylum seeker may be liable to fines or imprisonment as the case may be.[283] These provisions are not affected by Article 17 of the Constitution of Tanzania which guarantees freedom of movement only to citizens.

Section 27 allows the Minister or any person appointed by the Minister on that behalf, to order the detention of any refugee whom they are satisfied is acting in a manner prejudicial to peace and good order or is prejudicing the relations between the relevant Government and any other Government. This provisions not only threatens refugees with infringements on their right to freedom of movement, it also may scare them from exercising freedom of expression particularly by speaking out against the evils in their countries of origin which led to their flight, if the countries of origin

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[280] section 38(1)(f)

[281] B. Rutinwa, "Beyond Durable Solutions: An Appraisal of the New Proposals for the Prevention and Solutions of the Refugee Crisis in the Great Lakes Region' *Journal of Refugee Studies*, Volume 9 No. 3, 1996 at 12

[282] section 17 pertains to the "requirement to live in a designated area".

appear to be in good relations with the host state(s). Further, the Minister or any other competent authority may detain individuals in prison if it appears that they have not been punished in the country where that wrong doing was committed. Once an order has been made, the Refugee may be held in custody pending or during his transportation to prisons and the Refugee in custody is held as an unconnected prisoner until the Minister decides to order his release.[284]

In South Africa, there are no provisions within the RAS that confine the movement of asylum seekers and refugees within so called 'designated areas'. The RAS provides that the Minster may after consultation with the UNHCR, and the premier of the Province concerned, designate areas, centres or places for temporary reception and accommodation of asylum seekers or refugees or any specific category or group of asylum seekers or refugees who entered the Republic on a large scale, pending the regularisation of their status in the Republic[285]. However and unlike the RAT, asylum seekers or refugees are not compelled to reside within those area. Furthermore, the Minister only designates such areas in cases of mass influx. In all other instance asylum seekers while awaiting the determination of their status, are given permits to move around freely so as to enable them to earn their daily sustenance. The only provision within the RAS that impinges upon the asylum seeker/refugees right to freedom of movement is the provision pertaining to the detention of such individuals. The RAS points out that an individual must be detained in a manner and place determined by the Minister with due regard to 'human dignity'. No explanation is given as to what constitutes 'human dignity' therefore the phrase remains vague. There are other defects of the provision relating to detention and these were articulated by Human Rights Watch in their Submission to the Portfolio Committee on the Refugee Bill[286]

Human Rights Watch pointed out that because an asylum seeker can be detained for contravention of the conditions endorsed on the asylum seeker permit[287], the

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[283] section 17(3)
[284] section 27(3)
[285] section 35(2)
[286] Human Rights Watch, *Submission to the Portfolio Committee*, October 14th,1998 at 6
[287] section 22(6)(a) and section 23

conditions of the permit should be clearly defined in the RAS or its accompanying regulations so as to avoid possible abuse and to avoid the detention of asylum seekers. Section 29 of the RAS requires that the detention of an asylum seeker be reviewed after thirty days. Human Rights Watch believes that administrative detention orders allowing for the detention of a person for thirty days are inconsistent with international law and the South African Constitution[288]. Asylum seekers who have not been convicted or even accused of any crime, should at the minimum be granted the protection of article 35 of the Constitution, which requires that any arrested person be brought before a court as soon as possible, and not later than forty eight hours after arrest. Any extension of detention should be judicially approved and supervised. Detention should be subject to periodic review and should be subject to a maximum time limit. Human Rights Watch rightly concluded by saying that the current provisions of the RAS, leaving the place, manner and length of detention to the discretion of the minister, are unacceptable in the absence of clearly defined norms.

State Practice

In Tanzania and according to an official in the Ministry of Home Affairs, refugees are in practice, free to move within the country provided they get permission from their settlement officer. The Officer provides the refugee with travel documents that will facilitate the refugee in his or her journey. If the refugee wants to remain out of the camp for a period of more than two weeks, he must obtain permission from the Ministry of Home Affairs Headquarters. This, the official claimed, had to do with the security of both the refugee and the nation. Apart from that, the Official insisted that refugees are free to move about at all times. The Official also claimed that the granting of more than 10 permits per day was the norm. She further claimed that if refugees had friends or family or both who are prepared to take them in temporarily or on a permanent basis i.e. for as long as they were in the country, the government would allow the refugee to go and reside with such friends and family.[289]

In South Africa, the existence of a certain factor (more visible amongst South

[288] refer to HRW Submissions to the Portfolio Committee on October 14, 1998

[289] Information received from an interview with Mrs. C. Mchome, a Government Official in the Refugee Section at the Ministry of Home Affairs on Friday the 18th April,1997

Africans than Tanzanians), has caused the violation of the right of refugees and asylum seekers to free movement within South Africa. This factor relates to the xenophobic attitudes of South African nationals towards asylum seekers and refugees. Many South Africans have taken 'the law' into their own hands in trying to combat the 'insurgence' of foreigners into the informal trading sectors. Human Rights Watch observed that local hawkers (many of them asylum seekers) have been viciously attacked and have had their property looted[290]. Such events have occurred in areas such as central Johannesburg, Yeoville, Gemiston, and Hilbrow. A South African Hawker was quoted to have said, *"Foreigners flocked here after the elections and took out businesses. We won't rest until they are gone*[291]*"* An attack on the 18th August 1997 on foreigners (including asylum seekers) at the Kerk Street Mall in Johannesburg, resulted in the severe beating of one asylum seeker known as Papa Demba from Senegal. Though the Police arrived at the scene, only a single attacker out of a group of 30 was arrested. Fear for their lives and property, and an awareness of the fact that the local police may not provide protection against such attacks has restricted asylum seekers form moving about freely. Instead they have confined themselves to certain 'safe' areas from which they conduct trade. Iwad Mohammed, a Somalian asylum seeker interviewed by Human Rights Watch is quoted to have said, *"We were hawking in Kempton Park. When we went to out storage space, all our stuff was gone. Gangs took everything....No more Somalis are hawking in kempton Park because we are afraid."* [292]

(b) Right to Property

The Law

Another area where Tanzanian law falls short of the required international standards is with respect to protection of the property of refugees. Under Article 24 of the Constitution of Tanzania, every person has, subject to relevant laws of the land, "the right to own hold any property lawfully acquired". However, under the RAT, refugees upon entry into the country, may loose their control and rights over their property. This is clearly indicated in the various sections of the RAT. The RAT does not give

[290] Human Rights Watch, "Prohibited Persons: Undocumented Migrants, Asylum Seekers and Refugees in South Africa" 1998 at 152

[291] D. Fuphe "Hawkers Rampage" *Sowetan* 14th August 1997

justification for the provisions that deprive refugees of their control over such property apart from section 14 which specifies that refugees' vehicles can be confiscated for the use of "moving refugees or any stores or equipment for the refugees use". under section 11(4), the RAT ascribes what is meant by arms and ammunition to the definition provided for in the Arms and Ammunition Ordinance, CAP 223 and carefully points out that failure to comply with such regulations shall be punishable by imprisonment for a period of not more than two years. Under section 13 the Competent Authority may direct that animals imported into the country of Refugees be confiscated or that they be slaughtered or otherwise disposed of. Although the Act provides that the proceeds from the sale of the animals should come to the possession of the refugees there is no guarantee that the money will returned to the asylum seeker/refugee. A Competent authority could decide to appropriate those funds knowing that the provisions of section 29(2) which provides that *"no compensation shall be payable and no action brought against any person acting in the execution of his duty under this Act for any damage done or loss occasioned by, the detention or slaughter of any animal under the powers conferred by section 13, or the dentition or use of any vehicle"*.

The RAS does not contain any of the above-mentioned mostrous provisions.

State Practice

In practice, there is no evidence indicating that the Tanzanian government has confiscated property belonging to refugees. In Rwanda Emergency of 1994, many refugees who took refuge in Tanzania brought with them property including cows, goats and vehicles and all were allowed to keep them despite the severe space constraints in refugee camps. No vehicles belonging to refugees were requisitioned for general use in the refugee camps. However, the fact that there is no historical evidence to support the belief that these provisions will not be used, does not however, make them of less concern. The lesson learnt with the forcible repatriation Burundian and Rwandes refugees between 1996 and 1997 in accordance with the provisions of the Refugee Control Act of 1966, is that bad provisions could be dusted off and put to use when it is convenient to do so. The best scenario would be to clear such provisions from the statute book.

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[292] Interview by Human Rights Watch conducted in Johannesburg on November 27th, 1997

Although the RAS does not contain any of the abovementioned monstrous provisions pertaining to the property of asylum seekers or refugees, asylum seekers (as was seen in the account of the "Hawkers Rampage in Johannesburg" and the statement of Iwad Mohammed) continue, in practice, to have their rights to property violated.

3.2.4 Non-Discrimination

The RAT is silent on the principle of non discrimination. In practice though, Tanzania does not discriminate against refugees, neither with respect to admission, determination of refugee status nor standards of treatment. As already noted, Tanzania's policy has been to admit all persons in flight for safety. Recently the government has ordered selective repatriation of refugees from particular countries.[293] However, this cannot be regarded as discrimination against refugees as the repatriation decisions have been based on the conditions in a particular country. Like the RAT, the RAS in South Africa, is silent on the principle of non-discrimination other than providing in section 27(b) that A refugee enjoys full legal protection, which includes the rights set out in Chapter Two of the Constitution. Enshrined within Chapter two is the right to equality and non-discrimination.[294] In practice, the principle of non-discrimination is not adhered to for refugee protection procedures are administered in a discriminatory way.[295] The manner in which asylum is granted appears to be largely country specific, based on the assumption that certain countries are 'refugee generating countries'. This practice results in some categories of asylum seekers being granted virtually 'automatic' asylum status (such as those from Somalia and Angola) while other applicants must wait up to two years or longer before any determination is made. Others have almost automatically been refused asylum. One immigration official insisted that someone from Zanzibar must by definition be an 'illegal alien' hence he ordered that he be summarily deported. The basis of his decision lay in his belief that Zanzibar is not a 'refugee generating'

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293 http://www.notes.reliefweb.int/files/rwdomino.nsf/480fa8736b88bbc3c112564f6004c8ad5/95celcccc00928885264ce0068f2bf

294 section 9 of the Constitution of the Republic of South Africa, Act no. 8 of 1996

295 J. Crush, "Migrany: the Colour of Alienation" Democracy in Action vol. 10 at 6

area[296]. Jonathan Crush in observing that discrimination continues to exist in the enforcement of immigration law, pointed out that if one is going to violate South African immigration law, it is a whole lot better to be white than black and certainly not to be black Mozambican."[297]

3.2.5 Burden Sharing

The RAT is also silent on the principle of burden sharing. However, it must be recalled that the latter principle does not normally appear in domestic legislation, for in essence, it is addressed to other members of the international community and as such it is best addressed providing for inter-state relations (treaties). Tanzania however regards burden sharing as one of the important factors, if not a precondition for granting refugee status in situations of mass influx. This perhaps, might be the reason why she refuses (under section 4(3)(d)&(e)) to consider a person as a refugee if:

(d) he has already been granted refugee status or asylum in another country prior to his entry to Tanzania.....
(e) prior to his entry into Tanzania he has transited through one or more countries and is unable to show reasonable cause for failure to seek asylum in those countries, provided that a person who has transited through a country or countries where there is a serious breach of peach will not be prevented from seeking refugee status in the country.

One of the main reasons for Tanzania's recent abandonment of the open door policy was lack of international support towards supporting refugees in Tanzania.[298]
Unlike the RAT in Tanzania, there are no provisions under the RAS in South Africa relating to 'Third Safe Countries'. However, it would not be too farfetched to assume that South Africa is keen on the concept of burden sharing especially since she determined not to be burdened with refugees simply because a lot of South Africans were hosted as refugees by other Nations during the Apartheid era[299].

3.2.6 The Principle of Solutions

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[296] J. Crush "Immigration, Human Rights and the Constitution" *Beyond Control: immigration and Human Rights in a Democratic South Africa*(1997) at 12
[297] ibid
[298] Refer to speech delivered by the Hon. J. Rwegasira at the International Conference on the Refugee Crisis in the Great Lakes Region
[299] refer to the *Proceedings of the Extended Public Committee of the National Assembly*, on 5th

As noted in Chapter Two, the solutions to the problem of refugees are local settlement into host communities, third country settlement, and repatriation. All these solutions have been explored with respect to refugees in Tanzania and to a lesser extent, in South Africa.

3.2.6.1 Local Settlement and Naturalisation

The RAT in Tanzania provides for local settlement in section 36(2). Although it does not provide specifically for naturalisation, Tanzanian immigration law allows for naturalisation provided that the refugees follow the prescribed legal channels. Without following these channels, a refugee is not guaranteed of naturalisation although in 1978 a Presidential directive allowed enmasse naturalisation of Rwandese refugees. The reason behind the mass naturalisation was that it was a durable solution at that particular point in time for that particular group of refugees. It was an exceptional situation and not the norm. More recently, the official government position has moved from permanent settlement to admitting refugees into the country on a temporary basis pending repatriation. The government participates fully in attempts to create a conducive environment where the refugees fundamental human rights are protected in their country of origin[300].

The RAS in South Africa also makes provision for local settlement. In section 27 the RAS goes further than the RAT by specifying what rights a refugee entitled to local settlement has. The rights include, a formal recognition of refugee status in the prescribed manner, full legal protection, entitlement to apply for an immigration permit subject to the prescribed conditions, and identity document, a South African Travel document, the right to seek employment, and an entitlement to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

The RAS like the RAT, makes no mention of naturalisation, however, it is possible for refugees to be naturalised if they comply with the correct immigration procedures and requirements.

3.2.6.2 Third Country Settlement

November 1998 at 7

The RAT provides in section 36(1) that a refugee residing in Tanzania shall have the right to resettle in any other country outside Tanzania and may apply in writing to the Minister for the same at any time. The Government maintains that it co-operates 100% and participates thoroughly in attempts to help a refugee who wants to move to a third country. The Government communicates with the third country and negotiates with it at its own expense. It is quick to point out that it is not for them to allow the refugee to enter the third country. Instead, it is for the third country to grant the refugee permission to enter its borders and it is the third country or the UNHCR that provides the refugee with documents required for the journey i.e. ticket, passport, etc. At times, the third country of asylum may give its own criteria for admission i.e. it may look at individuals with specific qualifications in terms of profession. In recent times hundreds of refugees based in Tanzania but hailing form Somalia have been granted permission by the Scandinavian countries to enter their borders. When such countries are not prepared to grant permission the role of the Tanzania government is extremely limited[301].

The RAS, unlike the RAT, makes no provision for third country settlement. However, in an interview conducted with the legal officer for the Refugee Department in Cape Town, it was pointed out that the Refugee Department does not engage itself financially or other wise in assisting a refugee to settle in a third country. Such ventures must be entered into by the refugee on his own accord and at his own expense.[302]

3.2.6.3 Repatriation

The RAT in Tanzania makes provision for voluntary repatriation in section 34(1). The Government is in support of a refugees inalienable right to return home. Though the government acknowledges the fact that it has received opposition from various international bodies relating to refugees returning home, it insists that all who go home do so voluntarily. The government maintains that it has complied with the international requirement for voluntary repatriation to the best of its ability. The government undertakes to taking a group of refugees back to their country or origin so that they can come back and tell their compatriots the truth about what the situation is

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[300] refer to interview with Home Office Official in Dar-Es-Salaam, on April 17th 1997

[301] ibid.

[302] interview conducted with Mr. Victor Frylinck, Refugee Department, Home Affairs Cape Town on

like back in their homes and about how good or bad the security is. Sending a refugee or refugees back to their countries of origin to see what the situation really is like is the best way of convincing refugees that they can go back home and are guaranteed safety.

The RAS in South Africa makes no mention of voluntary repatriation however it is obvious that it too supports voluntary repatriation. This was made clear when it engaged itself in efforts to repatriate Mozambican refugees with the assistance of the UNHCR in 1995.

3.3 Conclusion

The inadequacies of the Tanzanian and South African Regime for the protection of refugees and asylum seekers are essentially two.

First, the legal regimes are narrow and do not make adequate provision for refugee protection as required under the obligations which both countries assumed under international law.

Second, some of the provisions of the RAS and RAT (the principle laws specific to refugees in each of the countries), contravene the principles of international refugee law found under instruments to which both countries have subscribed. The following Chapter will explore measures that can be taken to strengthen the regime.

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the 15th of January 1999.

CHAPTER FOUR

IMPROVING THE REGIME FOR THE PROTECTION OF REFUGEES IN TANZANIA AND SOUTH AFRICA

4.1 A Comprehensive National Approach to Refugee Protection

The first step, which needs to be taken by the governments of Tanzania and South Africa, is to enact more comprehensive refugee *'protection'* legislation, which would incorporate all the essential elements of refugee protection as, found under the 1951 Convention on refugees. The governments need to ensure that within such laws, a balance is struck between the rights of refugees and asylum seekers on one hand, and the obligations of refugees and asylum seekers on the other. At the moment, the legislation in both countries is tilted more towards obligations then it is towards rights.

As a matter of law, a state, which has ratified a Convention, has a general duty to ensure that its domestic law is in conformity with its international obligations there assumed.[303] However, unless expressly required by a particular treaty, general international and treaty law impose on states an obligation to achieve results rather than obligations of adopting particular means to achieve them. Like most treaties, the 1951 Convention contains no provision requiring legislative incorporation or any other formal implementing step. Indeed, Article 36, which obligates states to provide information on national legislation, refers only to such laws and regulations as States 'may' adopt to ensure the application of the Convention. There is nothing in the Convention regarding procedures for neither refugee status determination nor identification of those who are to benefit under the Convention. This means that the 1951 Convention does not require obligations of means but the specific results outlined thereunder. Even if legislation was the most effective way of achieving desired results, it is still not obligatory on States to adopt that mode of

[303] McNair *The Law of Treaties* (1961) 78-9; Brownlie, *Principles of Public International Law*; *Treatment of Polish Nationals in Dazing* PCIJ Se. A/B no.44 at 24; *Greco-Bulgarian Communities* PCIJ, ser.B no. 17 32; Free Zones PCIJ ser.A, no.24,12; ser.A/B, no. 46, 167; art 27, 1969 Vienna

implementation of international treaties. As Goodwin-Gil points out,

> ...though legislation may be considered appropriate, even essential, it is evidently only one way in which the internationally required results can be obtained. It is not so much the law, which counts, as that compliance with international obligations assured. [304]

By the same logic, even the adoption of obtrusive measures (e.g. enactment of obtrusive legislation) is not a breach of international obligations as such, provided that their application and enforcement is compatible with the required result.[305] The only question is one of effective or efficient implementation of the treaty provisions, in fact, and in the light of the principle of effectiveness of obligations.[306]

While it is formally correct to say that there is no obligation to enact legislation specifically for refugees where Convention obligations are already covered in existing laws, there are practical reasons why such legislation may be important as a matter of the principle of effectiveness of implementation. First as Goodwin-Gill has noted, while law may be adequate at the time of adopting a particular Convention, both may subsequently undergo changes in such a way as to allow conducts falling short of the results required under the treaty. Secondly, in many countries, which have not enacted laws to implement the 1951 Convention, it has been difficult to apply the Convention without supplementing it with judicious use of administrative discretion, both to avoid the application of general law and to secure appropriate benefits. It is recommended that Tanzania and South Africa, revise their current refugee legislation and adopt new legislation without provisions that may stand to compromise or abrogate the principles and requirements of international law i.e. non-refoulment, standards of treatment, solutions etc. Instead the provisions and regulations made thereunder should effectively provide for these requirements and principles.

Convention on the Law of Treaties.

[304] Goodwin-Gill, supra note at 143

[305] Goodwin-Gill, ibid. and judgment of the Court in *Ireland v. United Kingdom* (application 5301/71) paras. 236 ff. 17 *ILM* 680 (1978)

[306] ibid. See also Lauterpacht, *The Development of International Law by the International Court* (1958) 257, 282 ff; art. 31(1), 1969 Vienna Convention on the Law of Treaties; McNair, *Treaties* 540-1

As B. Rutinwa[307] recommended to the Commonwealth Countries in a similar situation like Tanzania and South Africa, a comprehensive refugee law should, at least, contain the following:

(i) A Clear definition of a refugee which accords to international and relevant regional instruments. The definition could also give due consideration to gender based persecution and address categories not covered by existing instruments, such as environmental refugees.

(ii) An adequate procedure for judicial determination of refugee status, including provisions for appeal and review

(iii) Establishment of competent and independent institutions for administration of the refugee protection regime.

(iv) Substantive rights of recognised refugees and asylum seekers, as outlined under international instruments particularly non-refoulment.

(v) Durable solutions, including a framework for co-operation and burden sharing mechanisms with the UNHCR and other refugee protection organisations.

When comparing the RAS in South Africa with the RAT in Tanzania, it becomes clear that the RAS's provisions are more in line with the above recommendations than the RAT. This is so particularly so with regard to the fact that South Africa has a more comprehensive framework for the determination of refugee status than Tanzania and a refugee regime that is rights oriented in comparison to Tanzania's which is control oriented. Despite this fact however, both countries possess refugee regimes that are commonly weak in the following ways:

(i) the regimes are reactive in they are concerned with asylum and pay no attention to the causes of forced migration nor are their provisions for solutions adequate. This kind of approach is in line with the philosophy of the present international refugee protection regime, and is inadequate to address the refugee problem.

(ii) there is a wide difference between admission procedures and standards of protection under the law and practice of both countries[308]. An unintended consequence of such differences is that asylum seekers may choose asylum

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[307] B. Rutinwa, *The Law Relating to Refugees and Internally Displaced Persons in the Commonwealth, Paper Prepared for the Commonwealth Intergovernmental Group on Refugees and Internatlly Displaced Persons, February* 1997, at 12

countries on the basis of the level of protection offered. This could result in refugees seeking asylum in some countries and not others even if asylum and protection could have probably been provided more cheaply in the latter. It can also encourage irregular movements of refugees as persons receiving protection in less generous countries as persons receiving protection in less generous countries try to move on into more generous ones within the region.[309] These weaknesses can be overcome, not only by measures at the national level (i.e. revision and re-enactment of municipal legislation) but also through concerted efforts at the regional and international levels.

4.2 Comprehensive Regional Approaches to Refugee Protection

The problems encountered by countries in Southern Africa and elsewhere in coping with the problems of involuntary migration generally and refugee movements specifically within the region, are to a great extent a result of the weakness of the present system of refugee protection. The thrust of the legal regime for refugee protection within the region has been to prescribe the relationship between a refugee and the host state, defining their respective rights and duties vis a vis each other.[310] The changes in the nature and magnitude of the refugee problem over the decades have overwhelmed the present system and a consensus is emerging that a new system is required which takes a more comprehensive approach to the problem. The comprehensive approach involves addressing the problem at all levels including the levels of prevention, response and solution.[311]

At the level of prevention, there is a need to address the current root causes of forced migration which include armed conflict and civil strife (principal causes of refugee flows in Africa), ethnic intolerance, the abuse of human rights on a massive scale; the monopolisation of political and economic power, refusal to respect democracy or the results of free ad fair elections, resistance to popular participation in governance, and

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[308] This is more the case in Tanzania than it is on South Africa

[309] B. Rutinwa, *Towards a Comprehensive Regional Approach to the Problem of Involuntary Migration in Southern African Development Community (SADC)* (1998) at 12

[310] ibid.

[311] ibid. at 14

poor management of public affairs.[312] An external factor, which contributes to forcible population displacement in African countries, is the inequitable international economic system, which has left many African States very poor.

Trying to prevent the problem of refugees is the most natural and logical way of dealing with the problem. Preventing the problem requires a political and economic agenda aimed at eliminating ethnic strife and conflict; curtailing the arms trade; establishing a firm foundation for democratic institutions and governance; respect for human rights; and the promotion of economic development and social progress.[313] Refugee flows are a result of deliberate actions taken by States and individuals, which sometimes have population displacement as their very purpose. The only way to deal with this cause is to hold those States and individuals accountable for their actions under the doctrine of State responsibility and the emerging principles of individual criminal responsibility under international law.[314]

At the level of response, there is a need to raise the principle of international burden sharing from the level of an aspiration to a principle of law on all binding States. Mechanisms should also be established to give effect to the principle. As recommended in the *Addis Ababa Document* "Donor countries, relevant inter-governmental and non-governmental organisations, should provide financial, material, and technical assistance to the African asylum countries hosting refugee populations. In the case of large scale influxes, such assistance should necessarily be provided on a timely basis and in order that lives are not lost"[315] and to ensure that host countries are not forced to close their borders to prevent further influx of refugees. Burden sharing should also extend to redressing the negative impact of refugees on host communities. All costs and damages which host countries would not have suffered but for refugees should appropriately be seen as a joint responsibility of the international community. This is not only just; it is essential if public opinion

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[312] *The Addis Ababa Document* to mark the 25th Anniversary of the 1969 OAU Convention (1994) at 8-9

[313] ibid. at 268-269

[314] B. Rutinwa, *Responding to the Arrival of Asylum-Seekers: The end of asylum? The changing Nature of Refugee Policies in Africa and Other Developing Regions*,(1998) at 15, Technical Syposium on International Migration and Development , The Hague Netherlands

[315] the Addis Ababa document, supra note 10

towards refugees is to remain positive.[316] Hence burden-sharing is the most important piece on the jigsaw of the sub-system of response in the proposed comprehensive system for dealing with the refugee problem.

At the level of solutions, all the three durable solutions (repatriations, local integration, and resettlement of refugees in third countries should all ideally be available at the disposal of the refugees. However, the best solution is, and should remain repatriation. There is nothing more natural than a person returning to his or her roots, where they are uprooted, to be reunited with their land, property and their entire social and spiritual milieu. However, repatriation as a principle, should be descriptive and not prescriptive. Refugees should not be forced to return to their countries until conditions for genuine repatriation have been established. In the case of refugees fleeing persecution, this means ensuring that the country of origin has abandoned its persecutory policies while in the case of civil wars, peace should be re-established.

At the level of solutions (that is solution to the "refugee problem" as opposed to solution to "the problem of refugees), States need to concern themselves with finding durable solutions to displaced persons either through repatriation, local integration or resettlement. Solutions should also address the consequences of forced migration in host countries and to the migrants themselves. The sub-system of solutions should ensure that the damage done in host countries by the presence of refugees is repaired while refugees are compensated for their losses. As a matter or international law, the duty of reparation to host countries and compensation to refugees rests on the country, which was responsible for the outflow of the refugees,[317] (which is normally the country of origin). However, it is also true that the operation of this principle may not always bear any practical results because many refugee producing states lack the means to make restitution.[318] Moreover it may be morally incorrect to request countries of origin to make such reparations (i.e. it would be morally inappropriate to

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[316] B. Rutinwa, supra note 12 at 16

[317] C. Beyani 'State Responsibility for Prevention and Resolution of Forced Population Displacement in International Law' *in International Journal of Refugee* Law (Special Issue, July 1995) at 130-148

[318] J. Garvey, *'Towards a Reformulation of International Refugee Law'* 26 Harvard International Law Joural (1985) at 482

ask Rwanda to pay reparation to countries who hosted its refugees after the 1994 Emergency as to do so would be tantamount to asking the victims and survivors of the genocide to pay for the actions of those who sought to exterminate them). Therefore, and for practical reasons, the international community as a whole should bear residual responsibility for whatever damage to host countries and refugees, which the country of origin is unable to meet. The basis of this responsibility is the principle of burden sharing, expressed in part in Article 1(3) of the UN Charter which calls upon member States to cooperate in solving international problems of an 'economic, social, cultural, or *humanitarian character*

The problems of security within the host states must also be addressed. Rutinwa recommends that refugees be settled at a reasonable distance from their country of origin, that host states refrain from providing bases for refugees to launch attacks, and that refugees be disarmed.[319] In most instances host states are willing to take the necessary steps to address the security problems that arise in the course of refugee protection. However, the problem is a lack of the required resources. The *Addis Ababa Document* therefore recommends that the international community, the UN, the UNHCR and other relevant organisations provide material, finical, and technical assistance in this regard[320]. Once again, the need for burden sharing comes across strongly.

The UNHCR Advisory Group on Refugee Policies in the African Region, in support of a comprehensive regional approach that incorporates the three aforementioned approaches (i.e.prevention, response, and solution) recently remarked that " the best framework within which to pursue [prevention, and solution] would be the sub-regional organisations, such as ECOWAS[321] and the SADC[322] which are taking increasing interest in matters of regional security, human rights and good governance."[323] The Advisory Group pointed out that regional cooperation could

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[319] Rutinwa, supra note 12 at 15

[320] *The Addis Ababa Document*, supra note 10, recommendation 8(iv)

[321] The Economic Community of West African States

[322] Southern African Development Community whose members are Tanzania, South Africa, Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Zambia and Zimabwe

[323] UNHCR, *Report of the Advisory Group on Refugee Policies in the African Region*, Geneva, May 1996 at 5

provide an opportunity for member States to enhance their individual capacity to provide asylum through joint programmes and actions aimed at establishing or strengthening mechanisms, procedures, and institutions at the national level for the provision of protection and assistance to refugees.[324] In its Conclusion on Comprehensive and Regional Approaches within a Protection Framework[325] the Executive Committee of the UNHCR outlined the principle elements of a protection-based comprehensive regional approach to particular problems of displacement as:

(i) the protection of all human rights including, the right to life, liberty and the security of the person, as well as to freedom from torture or other cruel, inhuman or degrading treatment or punishment; the right to leave one's own country and to return; the principle of non-discrimination, including the protection of minorities; and the right to nationality.

(ii) Promotion of the rule of law through national, legal and judicial capacity-building.

(iii) respect for the institution of asylum, including the fundamental principle of *non-refoulment*, and ensuring international protection to all that need it.

(iv) measures to reinforce international solidarity and burden sharing

(v) support for long-term sustainable development

(vi) intergration of development approaches into the relief stage by strengthening national capacitates

(vii) support for rehabilitation, reintegration, and reconstruction measures, which will underpin the sustainability of repatriation

(viii) public information to raise awareness about refugee and migration issues in both host countries and countries of origin, particularly with a view to countering xenophobia and racism.

(ix) the establishment and fostering of mechanisms designed to avoid or reduce the incidence of conflict, as conflict may result in population displacements

(x) reconciliation measures where necessary and possible, notably in post-conflict situations, to ensure the durability of solutions

(xi) education for peace and human rights, including at the community level, in

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[324] ibid.

[325] the 47th Session of the UNHCR Executive Committee (Octiber 1996), Conclusions on International Protection and Related Issues, *Report of the 47th Session of the Executive Committee of the High*

both countries of origin and countries of asylum

The SADC in addition to other regional organisations,[326] has commendably entered into arrangements for adopting a comprehenisve regional approache to the refugee problem. SADC signed a Memorandum of Understanding with UNHCR in July 1996 as a staring point for addressing the refugee problem in the region in a more holistic manner. The Preamble to the SADC-UNHCR Memorandum notes that SADC has established a regional mechanism for promoting democracy, good-governance, respect for the rule of law, the observance of human rights, regional security, conflict prevention, and management resolution. This makes it desirable for SADC to work together with the UNHCR whose mandate is to provide international protection and assistance to the refugees, returnees and other persons of concern, and to seek durable solutions for them. SADC and UNHCR are jointly charged with the duty of implementing the Memorandum[327] . Article IV provides that the SADC and UNHCR shall:

1. Address the social, economic, and political issues in the region, particularly those which have a bearing on the root causes of forced population displacement, refugee protection, provision of humanitarian assistance and the search for durable solutions.
2. Establish or strengthen mechanisms, procedures and institutions at national, regional and international level, in order to create sustainable local capacity for the provision of protection and assistance to refugees and to give effect to the concept of burden sharing.
3. Promote accession to international instruments relating to refugees, and encourage SADC countries to amend, or enact as appropriate, their national legislation affecting refugees.
4. Monitor and respond to the challenges of refugee and migratory movements in the region.
5. Initiate and support training for Government and Non-Governmental and other Organisations on refugee and migratory issues.
6. Promote public awareness and proper understanding of refugees, forced

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Commissioner's Programme: UN doc. A/AC.96/878, 11) October 1996, paras 21-24, 26-27

[326] for furthur detail, refer to B. Rutinwa, supra note 7 at 14&15

[327] Article III

population and migratory movements, and the need for protection.

7. Encourage and support academic research and studies on refugee and migratory issues.

8. Strengthen national and regional emergency preparedness mechanisms so as to respond effectively to humanitarian emergencies in the region.

9. Collaborate with non-governmental and other organisations at national and regional levels to support the attainment of the objective of this memorandum of Understanding.

At its meeting in Maputo, Mozambique between 28 and 29th January 1998, the SADC Council of Ministers showed commitment to fulfilling their duties under the abovementioned Memorandum. The Ministers reviewed the problem of refugees in the region and noted in particular the arrival of refugees for the war torn Great Lakes region and the implication of their presence for the security of the SADC region. The Ministers reiterated that the cornerstone of SADC was the need to support the most vulnerable people through regional integration based on the promotion of democracy, good governance and respect for human rights. Thus the Council approved the root cause approach to the refugee problem. The Council also recognised that preventive measures are not a substitute but a complement to protective measure by reaffirming its awareness of the need for establishing a regional mechanism for safeguarding the human rights of refugees.[328]

4.3 Comprehensive International Approaches to Refugee Protection

As was seen in the above section on Comprehensive Regional Approaches to Refugee Protection, no meaningful reforms can be made to domestic law (which falls in the region of response), without something being done to stem or at least reduce the flow of refugees and to distribute the refugee burden fairly among members of the international community. There is, therefore, a need for a change to the approach of refugee protection, which looks at the 'refugee problem' in its totality (i.e. not just from a regional perspective, but also from an international perspective). As Professor Sadako Ogata, the High Commissioner for Refugees put it,

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[328] B. Rutinwa, supra note 7 at 18

> The refugee problem is multifaceted in its causes and effects and cannot be treated in isolation from the major political and economic challenges facing the international community. Consequently, there is a growing recognition for a broad response which takes into account the totality of the problem form its root causes to its solution, and includes the rights and obligations of the refugees, the receiving countries, the countries of origin, third countries and international organisations. It is only through such a comprehensive approach which includes all parties and all aspects of the problems that an effective strategy can be developed[329].

Therefore, comprehensive approaches adopted at the international level, must (like at the regional level) include measures such as proactive action in the potential refugee generating states to remove the root causes of refugee flows ('the root cause approach'); in-country protection of victims of humanitarian emergencies where this is possible and the safety of victims and humanitarian intervenors is guaranteed ('preventive protection'); effective protection in host states (asylum) and durable solutions.

Only within this bigger framework will it be feasible for countries like Tanzania and South Africa to adopt and apply domestic refugee laws that guarantee effective and efficient protection to the refugee and asylum seeker.

4.4 Conclusion

Tanzania and South Africa are both refugee-hosting nations. Like numerous other African nations, their regimes for refugee protections indicate their unwillingness to maintain an 'open door policy' towards refugees. Their regimes are therefore characterised by (inter alia) restrictive determination policies; possible expulsion of refugees to places where they face persecution, and lack of visible commitment to durable solutions.

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[329] Sadako Ogata, UN High Commissioner for Refugees, Key Note Address, Problems and Prospects of Refugee Law, Colloquium Organised by the Graduate Institute of International Studies in Collaboration with the Office of the UNHCR, Geneva, 23 and 24 May 1991 (1992) at 1

The laws relating to refugee protection in Tanzania and South Africa need to be revised in order to reflect Tanzania and South Africa's international obligations. However, the ultimate solution lies in a comprehensive approach to the refugee problem, which deals with prevention, response and solution of forced migration. The sooner these measures are taken, the more likely it will become for Africa to make a new commitment to refugee protection.

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