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The institution of asylum in Malawi and international refugee law: A review of the 1989 Refugee Act

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I. Introduction

Studies on the refugee situation in Malawi to date have largely focused on the 1980's Mozambican refugee influx into the country.[1] As noted by one legal commentator, the refugees issue is otherwise, dealt with mostly through unpublished reports or conference papers.[2] This is despite the fact that Malawi continues to host diverse populations of refugees owing to conflicts in Rwanda, Burundi, Democratic Republic of Congo (DRC), Ethiopia and Somalia. The different caseloads have required different status determination procedures and reconsideration of the durable solutions for these diverse and protracted refugee situations. The Refugee Act[3] is the primary domestic legislation. However, it was enacted in 1989 when Malawi was still a one-party state and before the advent of democracy. Some of provisions are obsolete and unconstitutional and thus need reform. It falls short of international law obligations and the Republic of Malawi Constitution.[4]

Legislative and administrative frameworks for the management of claims to asylum such as exist today in Malawi have evolved as a necessary response specifically to enable the government to meet its obligations towards persons who have a genuine claim to international protection while stringently controlling

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[1] T. Maluwa, *International Law in Post-Colonial Africa*, Kluwer Law International, 1999, Ch.8, p. 203; J.Nunes and K. Wilson, *Repatriation to Mozambique: Current Processes and Future Dilemmas*, a paper presented at the UNRISD Symposium on Social and Economic Aspects of Mass Voluntary Return from one Africa country to another, Harare, Zimbabwe, 12-14 March 1991.R. Masur, The Political Economy of Refugee Creation in Southern Africa: Micro and Macro Issues in Sociological Perspective, *2 Journal of Refugee Studies 442,* 1989, C. Morna, Malawi: Shouldering the Refugee Burden, 33 *Africa Report* 51, 1988; A. Ager, *A Case Study of Refugee Women in Malawi*, Report for the United Nations High Commissioner for Refugees, Malawi, 1991; A. Callamard, "Refugees and local hosts: a study of the trading interactions between Mozambican refugees and Malawian villagers in the district of Mwanza," 7 *Journal of Refugee Studies1*, 1994

[2] *Ibid.* Maluwa cites the following works: R. Mponda, *Some Perceptions on the Development of Refugee Law in Malawi* and K. Mhone, *Malawi's Humanitarian Approach to Refugees*, unpublished papers presented at the Legal Protection Seminar held in Liwonde, Malawi, 17-20 May 1988; M. Machika, *The Status of Refugees in Malawi*, unpublished seminar paper, (University of Malawi, Zomba, 1988)

[3] The Refugee Act 1989, Cap. 15:04 of the Laws of Malawi

[4] Republic of Malawi (Constitution) Act, 1994

abuse or attempted abuse. This paper is flags some of the challenges which policy and decision makers are confronted with as they seek to maintain that difficult balance. As noted, there are manifest problems in the Refugee Act itself which affect its effective implementation. Secondly there appears to be a general unwillingness and inability on the part of the government to prioritize refugee issues in its policy decisions.

The paper will begin by giving an overview on the history of asylum in Malawi and set out the legislative framework governing asylum procedures in the country. This will involve a critical analysis of the provisions of the Refugee Act and government policy using international refugee and human rights law, and human rights standards contained in the Malawi Constitution as benchmarks. Next the paper will analyse the implementation of durable solutions in the country, in particular local integration in relation to the rights refugees have under international law as it is the most controversial in the country today. The eight reservations which the government attached to the 1951 United Nations Convention Relating to the Status of Refugees have had the effect that the law does not provide for refugee rights to work, engage in business or receive education.[5] In particular, there will be a discussion on the desirability of insisting that refugees and asylum seekers (except those that meet certain criteria) live in designated camps. This will involve a comparative analysis of policies in Zambia, which also has both urban and camp based refugees, and South Africa whose refugee population is completely urban-based. The paper will conclude by making some recommendations for reform. It is important that Malawi's legislation and jurisprudence develops a legal framework to accommodate a status of refugee protection that is compatible with its treaty obligations and human rights law as this is mandated by the integrity of the its developing human rights dispensation.

[5] See generally *Declarations and Reservations made by States parties to the 1951 United Nations Convention and the 1967 Protocol Relating to the Status of Refugees (Country by Country)* UNHCR, Geneva (1988) [hereinafter referred to as *Declarations and Reservations*]

As background, it is relevant to note that a significant amount of the researcher's country specific information on practice and policy is drawn from her own experiences working in the field being researched. While wide ranging research was conducted on the subject, there is very limited objective country information. It is conceded that the limited resources available entail a possibility of skewed perspectives. Despite this, all other resources and materials have been thoroughly reviewed all available materials relevant to provide a comprehensive and reliable account of the situation in the country.

II. History of asylum in Malawi

The refugee phenomenon in Malawi as in other parts of Africa is mainly a result of wars of liberation from colonial and racial rules, and civil wars.[6] In addition, individuals have sought refuge from a number of source countries including South Africa, Mozambique, Zambia and Zimbabwe.[7] At the beginning of the 1960's, many refugees fled from the Portuguese colony of Mozambique to escape the impact of armed struggles for independence. This exodus reached alarming levels in the 1980's with the advent of civil war in Mozambique. The civil war led to Malawi hosting over a million Mozambican refugees.[8] The Mozambican influx actually gave Malawi 'one of the largest refugee populations in the world in early 1993, totaling more than 10 per cent of the country's population'.[9]Although the end of civil war Mozambique in 1992[10] led to the repatriation of virtually all refugees from that country between 1992 and 1996[11],

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[6] See generally B. Rutinwa, Asylum and Refugee Policies in Southern Africa: A Historical Perspective, in *A Reference Guide to Refugee Law and Issues in Southern Africa*, Refugee and Asylum Seeker Project Report, Legal Resources Foundation, Zambia 2002, at pp.1-10

[7] T. Maluwa, Refugees, Law and Politics: The Evolution of Refugee Policy in Malawi, in *International Law in Post-Colonial Africa*, (note 1 above), at pp. 203 -205

[8] UNHCR, The State of the World's Refugees, 1993, at 155 where Malawi was ranked first in the global ranking of countries according to the ratio of refugee population to total population and the relation of the refugee population to GNP.

[9] United States Committee for Refugees, *World Refugee Survey*, 1994, at p. 59

[10] The Mozambique Peace Accord, signed on October 4, 1992, brought an end to open hostilities

[11] K. Koser, Information and Repatriation: The Case of Mozambican Refugees in Malawi, 10 *Journal of Refugee Studies 1*, 1997, 1 at pp. 5-6

Malawi continued to experience a significant rise in the number of new refugees. Somalis started arriving in the country fleeing indiscriminate violence arising out of the Hawiye/Darod ethnic strife, lawlessness and banditry.[12] Half of the population of refugees that remained in the country after the Mozambique's influx was predominantly Somali.[13] Although not on the same scale as the Mozambican caseload, refugees continued to arrive from other parts of the continent. These included those fleeing from conflicts in Rwanda Burundi and the Democratic Republic of Congo (DRC).

The first flow of refugees from Rwanda was associated with the battle for power between the Hutu majority and Tutsi minority, which dates back to the late 1950's and culminated in the 1994 genocide. The 1994 genocide occasioned mass influx of refugees into Tanzania with the estimated number of Rwandese entering the country estimated at 700,000. At the same time there was marked deterioration of the situation in Burundi, which led to another exodus. This group included Rwandese that had originally sought asylum in Burundi. Initially all these caseloads fled towards Tanzania. However, unable to cope with the massive influx, Tanzania closed its borders at the end of March 1995. Most of these refugees thus found their way to other countries including Malawi. At the same time, new Congolese and Burundian refugees fled civil wars, and hearing of Tanzania's new "closed door policy" proceeded straight to Malawi to seek asylum. Many refugees also moved to Malawi from camps in Tanzania where officials were pressuring them to go home.

Recently, Malawi has seen a high rise of Ethiopian asylum seekers who claim to have fled because they fear arrest and ill-treatment by the EPRDF authorities for imputed opinion.[14] The Ethiopian case load is the most controversial in the country today owing to its open refusal to live in the

[12] UNHCR, The State of the World's Refugees, 1996
[13] M. Kingsley-Nyinah, Reflections on the Institution of Asylum, Refugee Criteria, and Irregular Movements in Southern Africa, 7 *International Journal of Refugee Law* 2, 1996, 291 at p. 297
[14] The Ethiopian caseload is not new to Malawi having first arrived on the scene in the mid-1990's. See Kingsley-Nyinah, Reflections on the Institution of Asylum, Refugee Criteria, and Irregular Movements in Southern Africa, at 299

designated camp and demonstrated intention to leave the country to seek asylum elsewhere. This phenomenon present Malawi with its long-term challenge of irregular movers dealt with in more detail below. Currently Malawi continues to receive refugees from the DRC, Ethiopia and Somalia. At the same time many of the Burundi and Rwanda refugees are still reluctant to return to their countries of origin despite the cessation of hostilities in whole or parts of these countries. This is mostly owing to the fact that these countries continue to be a source of refugee populations fleeing from human rights abuses that lead to individual and targeted threats to life and liberty concerned. At the end of 2008, there were approximately 11,600 refugees residing in Malawi.[15]

The development of refugee law and policies in the country has been slow. Initially refugee matters were treated as part of general immigration law and policy and there was no specific legislation governing the issue.[16] The Immigration Act[17] is silent on crucial matters relating to refugee protection such as how refugees should be defined, protection from *refoulement* and standards applicable in the treatment of refugees. Despite this Malawi was one of the countries well known for the 'proverbial African generosity towards refugees' when it came to the Mozambican caseload.[18] From the mid-1980s to the mid-1990s, up to a million Mozambicans found a genuine degree of safety in Malawi. This was despite the proximity and brutality of the war in their homeland and the limited land and other resources available to them in their country of asylum.[19] Malawi established a reputation as a country, which treated refugees in a

[15] United States Committee for Refugees, *World Refugee Survey*, 2009

[16] Section 12(c) of the *Immigration Act* 1964 [Cap. 15:03] excludes the following from the definition of prohibited immigrants: 1) those who have entered the country pursuant under any convention with the Government of a neighbouring territory or state; or 2) in accordance with any scheme of recruitment and repatriation approved by the Minister, and who complies with such conditions as may be fixed by the Minister

[17] Immigration Act 1964 [Cap.15:03]

[18] Opening Statement by the United Nations High Commissioner for Refugees at the Forty-sixth Session of the Executive Committee of the High Commissioner's Programme, 16 Oct. 1995: UN Doc. A/AC.96/806, Annex, 31.

[19] See A. Ager, A Case Study of Refugee Women in Malawi (note 1 above); A. Callamard, "Refugees and local hosts: a study of the trading interactions between Mozambican refugees and Malawian villagers in the district of Mwanza," 7 *Journal of Refugee Studies 1*, pp. 39-62

relatively generous manner.[20] Many refugees enjoyed reasonably secure living conditions and were able to benefit from a range of legal, social and economic rights. Refugees were provided with land and encouraged to become self-sufficient. The principle of voluntary repatriation was broadly respected.[21] The 1987 accession to the 1951 UN Refugee Convention[22] and the 1969 OAU Convention[23] resulted in the enactment of 1989 Refugee Act, which operates alongside the Immigration Act. Recently however, Malawi has not been too accommodating and there are multiple reasons for this.

The Government initially hesitated to take on the responsibility of a new refugee population, in part due to popular resentment that UNHCR support allowed refugees a lifestyle unattainable to many Malawians.[24] Subsequently, the Government initiated plans to relocate the new refugees to a camp, converting a former prison for this purpose.[25] The main problem, however, lies in the perception that refugee inflows are temporary. This is largely attributable to Malawi's experience with Mozambican refugees who repatriated *en masse* at the end of the civil war. As noted, the refugee populations that arrived in the country post the Mozambican conflict followed different crises in the Great Lakes Region and the Democratic Republic of Congo (DRC). It was therefore expected that once these conflicts end, refugees from these countries should repatriate just as readily as the Mozambicans did. The prevailing view among the general populace, especially in relation to Rwandese and Burundian refugees is that since conflicts have ceased, there is no longer a need for asylum in Malawi. There is thus

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[20] *Ibid.*

[21] See K. Koser, Information and Repatriation: The Case of Mozambican Refugees in Malawi, 10 *Journal of Refugee Studics* (1), 1997, for a discussion on the process of repatriation of Mozambicans from Malawi after the end of civil war.

[22] *The Convention Relating to the Status of Refugees*, was adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951 [hereinafter *The 1951 Convention*]

[23] *The Convention Governing the Specific Aspects of Refugee Problems in Africa*, was adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 10 September 1969 [hereinafter *The OAU Convention*]

[24] J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge (2005) p. 697; Kingsley-Nyinah, Reflections on the Institution of Asylum, Refugee Criteria, and Irregular Movements in Southern Africa, at 299.

[25] Dzaleka Refugee Camp remains the only camp in country and designated area for refugees to reside.

growing pressure to repatriate these populations as the circumstances, which led to their flight are believed to no longer exist.[26] This pressure grows as other countries hosting Burundians are facilitating large scale voluntary repatriation. For instance, the Mtabila camp in Kasulu district in north-western Tanzania - the last remaining camp hosting Burundian refugees in the country - was scheduled to close on 30 June, 2009 and all of its residents were expected to voluntarily repatriate.[27] This view however, fails to take account of the complex nature of refugee caseload in Malawi which entails reasons for flight that go beyond the existence of civil war or conflict. These reasons pertain to the targeted persecution of individuals on the basis of recognized grounds such as political opinion, race and membership of a particular social group discussed further below when analyzing the refugee definition. The complexity is exacerbated by the facts that while genuine refugees with such fear of persecution exist, Malawi grapples with the secondary/irregular movers from Tanzania whose claims to asylum may not be so genuine. The irregular movers' phenomenon is discussed in more detail below.

The less accommodative attitude can also be partially attributed to the perception that exiled populations constitute a threat to social stability and political security. For instance, on 28th January, 1998, the Southern African Development Community (SADC) Council of Ministers met in Maputo, Mozambique to review the problem of refugees from the Great Lakes Region and was particularly concerned about the implications of their presence on security in the SADC region.[28]. Refugees are frequently associated with problems such as

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[26] See for instance, UNHCR, *Rwandan refugees in Malawi encouraged to return after 'go-and-see' visit*, 28 December 2005 available at http://www.unhcr.org/43b263dd4.html [accessed 5 March, 2005]

[27] On 20th June, 2009 the Government of Tanzania announced that the 36,000 Burundian refugees still remaining in the camp would have more time to voluntarily repatriate. However it is envisaged that who fled to Tanzania to escape the ethnic violence in Burundi in the last 16 years will return at the end of the year. See, UN News Service, *UN lauds Tanzania's decision to give refugees more time to return home*, 30 June 2009, available at: http://www.unhcr.org/refworld/docid/4a572bb51e.html [accessed 5 July 2009]

[28] See *Communiqué from the 1998 SADC Summit*, 14th September, 1998 available at http://www.sadc.int/archives/read/news/235 [accessed 14th April, 2009]

crime, banditry, prostitution and drugs.[29] This is worsened by the fact that in all cases, these refugees have crossed one or two other countries before seeking asylum in Malawi. The reasons why these refugees choose seek refuge in Malawi is generally difficult to accept or understand by the ordinary Malawian.[30]

Political developments also affect policies and attitudes towards refugees. Prior to the 1990s, the authoritarian government and one-party state was relatively free to offer asylum to large refugee populations as it considered such a policy to be consistent with its own interests. Recently the refugee question has assumed a new degree of political importance. As in the industrialized states, both government and opposition parties are prone to encourage nationalistic and xenophobic sentiments, by blaming the country's ills on the presence of refugees and other foreigners.[31] In a country where large numbers of people are living below the poverty line and where income differentials are wide such messages can have a potent appeal, irrespective of their veracity.

Donor states have also exacerbated the situation by making it increasingly clear that they are no longer prepared to support long-term refugee assistance efforts in different African countries.[32] Programmes which have already been in existence for a number of years, are encouraged to be brought to an end quickly. For instance in October 1996, donor states informed UNHCR in very certain terms that they wished to see a speedy end to the assistance programme for Rwandan refugees in Tanzania and the DRC.[33] The following month, saw the

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[29] ReliefWeb, Malawi*: Xenophobia on the rise*, 10 November, 2000, available at http://www.reliefweb.int/w/rwb.nsf/9ca65951ee22658ec125663300408599/307b10c61d0e724385256993007469fb?OpenDocument [accessed 1 July 2009]

[30] Most refugees claim ill treatment in Tanzania and the proximity to their country of origin as a reason why they opted for Malawi.

[31] See IPS, "Foreign Traders Are Taking Our Jobs", 19 December, 2008 available at www.ipsnews.net/news.asp?idnews=40534 [accessed 24th April, 2009]

[32] See generally, B. Rutinwa, The end of asylum? The changing nature of refugee policies in Africa, *New Issues in Refugee Research*, No. 5, UNHCR, Geneva 1999; J. Crisp,'No solutions in sight: the problem of protracted refugee situations in Africa', *New Issues in Refugee Research*, No. 75, UNHCR, Geneva, January 2003, at p. 3

[33] See J. Crisp, Africa's refugees: patterns, problems and policy challenges, *New Issues in Refugee Research*, No. 28, UNHCR, Geneva, August, 2000, at P. 5

expulsion of close to half a million Rwandese refugees from Tanzania, with hardly any objections from governments or the United Nations.

II. Legal Framework

Malawi is party to two major treaties regulating the institution of asylum in Africa. The 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol[34] was ratified on 10th December, 1987 while the 1969 OAU Refugee Convention was ratified on 4th November, 1987. In addition to treaty obligations, states are obliged to respect the customary law principle of *non-refoulement*. It is widely accepted that the prohibition of *refoulement* is part of customary international law.[35] This means that even States that are not party to the refugee conventions must respect the principle of *non-refoulement*. This principle, in its most basic form, prohibits states from forcibly returning a person to a country where they would face persecution, other ill-treatment or torture.[36] It is an exception to the principle of State sovereignty which entails that no country is obliged to allow foreigners onto its territory and may therefore decide if and how it will permit non-citizens to enter. Despite the major differences in the two refugee schemes[37] both refugee Conventions contain an obligation of *non-refoulement*.[38] In the 1951 Convention no exceptions may be made to the *non-refoulement* obligation.[39]

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[34] *The Protocol Relating to the Status of Refugees*,1967

[35] G.S. Goodwin-Gill, *The Refugee in International Law*, (3rd ed., 2007, Oxford, Clarendon Press) at 201

[36] See, Goodwin-Gill, *The Refugee in International Law*, at 346 who argues that "there is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent."

[37] For instance, the range of social, economic and political rights guaranteed under the 1951 Convention is broader than those provided for under the OAU Convention. However, owing the criteria to be met to be recognized as a refugee, these rights are conferred to a narrower group of refugees while the OAU Convention applies to a significantly broader category.

[38] Article 33 of the 1951 Convention (Prohibition of expulsion or return ("*refoulement*")) provides "No Contracting State shall expel or return (" *refouler* ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; While Article 2(3) of the OAU Convention provides '...no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return

The right to seek and enjoy asylum is recognized in international human rights law and is critical for protecting refugees. It derived derives directly from Article 14(1) 1 of the Universal Declaration of Human Rights and is among the most basic mechanisms for the international protection of refugees.[40] Malawi is signatory to the UDHR and has ratified a number of other international and regional human rights instruments that are relevant. These are the International Covenant on Civil and Political Rights (ICCPR)[41]; the International Covenant on Economic, Social and Cultural Rights (ICESCR)[42]; The Convention Against Torture[43] (CAT); the Convention on the Rights of the Child (CRC)[44] and the African Charter on Human and Peoples' Rights (ACHPR).[45] Some of these human rights law instruments also set out the obligation not to return someone to danger. For instance CAT prohibits expulsion or return to a place where there is a substantial danger of torture[46]. The *non-refoulement* provision of CAT is absolute, unlike the *non-refoulement* provisions of the 1951 Convention, which requires that protection be linked to a fear of persecution based on a specific ground. Most importantly, the rights contained in all these human rights instruments apply to all human beings including refugees. Malawi's obligations under both refugee conventions will be discussed in the next part of this section. The discussion will

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or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I paragraphs 1 and 2'

[39] Article 42(1) provides "at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.'

[40] See, United Nations High Commissioner for Refugees (UNHCR) Executive Committee Conclusion N° 28 (c). UNHCR's Executive Committee (ExCom) Conclusions form part of the framework of the international refugee protection regime. They are based on the principles of the Refugee Convention and are drafted and adopted by consensus in response to particular protection issues. ExCom Conclusions represent the agreement of more than 50 countries that have great interest in and experience with refugee protection. These and other countries often refer to ExCom Conclusions when developing their own laws and policies.

[41] GA Resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976

[42] GA Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976

[43] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Resolution 39/46 of 10 December 1984, entry into force 26 June 1987

[44] GA Resolution 44/25 of 20 November 1989, Entry into force 2 September 1990,

[45] Adopted on June 27, 1981 and entered into force October 21, 1986

[46] Article 3 provides: '1. No State Party 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.'

outline the basic scheme envisaged by each of the Conventions and compares it with the Malawi Refugee Act which seeks to implement the conventions into national law.

A. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees

The Convention relating to the Status of Refugees entered into force on 21 April 1954. It is the most specific international instrument regarding the rights of refugees and is applicable to persons who are refugees as defined in Article 1 thereof. The 1951 Convention read together with its 1967 Protocol contains three types of provisions: provisions giving the basic definition of who is a refugee and who, having been a refugee, has ceased to be one; provisions that define the legal status of refugees and their rights and duties in their country of refuge; and provisions dealing with the administrative implementation of the instruments. [47] According to Article 1A (2) of the 1951 Convention a "refugee" is any person who:

> "owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. The state party in whose territory asylum is sought determines whether that criterion is met.[48] The provisions of the

[47] Article 35 of the 1951 Convention and Article 11 of the 1967 Protocol contain an undertaking by Contracting States to co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions and, in particular, to facilitate its duty of supervising the application of the provisions of these instruments.

[48] In certain instances however UNHCR determines whether those criteria have been met

1951 Convention defining who is a refugee consist of two other parts, which have been termed cessation (Article 1C) and exclusion clauses (Articles 1D,E,F) . The cessation clauses indicate the conditions under which a refugee ceases to be a refugee.[49] The exclusion clauses stipulate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the of the refugee definition.[50] Article 33 dealing with *refoulement* is among the Articles to which the Contracting States, according to Article 42, may not make any reservation. Article 33 applies to any Convention refugee who is physically present in the territory of a Contracting State, irrespective of whether his presence in that territory is lawful or unlawful.

The 1951 Convention affords a very broad set of rights to persons who meet the refugee criteria. The refugee criteria have been criticized as being too narrow as it requires a person 'to have a well-founded fear of persecution.[51] There is general consensus that the focus on the subjective reasons for flight is prejudicial to persons who leave their countries of origin on the basis of factors external to themselves, for instance civil war.[52] The Conventions provision of broad rights reflects the notion that once refugees have been displaced, asylum states should facilitate their permanent residence. Thus Article 34 obliges states to facilitate as far as possible the assimilation and naturalization of refugees.[53] In this

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[49] Article 1C of the 1951 Convention, which provides for the ending of refugee status because it is no longer necessary or justified provides that the 1951 Convention shall cease to apply to a refugee if "(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily reacquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution."

[50] These are defined in Articles 1D, 1E and 1F of the 1951 Convention. Under Article 1E and 1F means that an individual who fulfils the criteria for inclusion under Article 1A (2) of the 1951 Convention cannot benefit from refugee status because he or she is not in need, or not deserving, of international refugee protection. Article 1D, on the other hand, applies to a special category of refugees, who like other refugees are in need of international protection, but for whom separate arrangements have been made to receive protection or assistance.

[51] See, Goodwin-Gill, The Refugee in International Law,

[52] Ibid.,

[53] Article 34 provides: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings".

spirit the 1959 Convention grants social and political benefits in a significant number of its substantive provisions. Rights include housing, property, access to courts, elementary education, public relief and labour legislation articles in the convention.

Malawi entered eight reservations when it ratified the 1951 Convention.[54] Generally, these reservations mean that Malawi considers the Articles to be mere recommendations and is not bound to provide refugees with any conditions that are more favourable than those accorded to aliens generally.[55] The reservations had an impact on the drafting of the Refugee Act as all of the affected 1951 Convention provisions were not incorporated. The OAU Convention on the other hand was ratified without reservations and largely incorporated into the Refugee Act. There rationale for this is easily explained. As noted above in the section on the history of asylum in Malawi, the refugee problem Malawi at the time of the Mozambican influx was viewed as a temporary situation hence the 1951 Convention was not desirable owing to its connotations of permanence. Since the Refugee Act was enacted in response to the Mozambican crisis, the OAU Convention, as will be shown in the next part of this section, was more relevant to the Malawian context than the 1951 Convention. The reservations have posed challenges to the Malawi government and stakeholders as they have been used to justify the thwarting efforts towards implementing local integration activities including wage earning, freedom of movement, employment, and the proper conduct of refugee businesses in urban centres which is also frustrated by authorities. This is discussed in more detail below in the section on the rights of refugees.

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[54] When ratifying the Convention, the Government of Malawi made the following reservations: Article 7 (exemption from Reciprocity), Article 13 (Movable and Immovable Property), Article 15 (Rights of Association), Article 17 (Wage Earning Employment), Article 19 (Liberal Professionals), Article 22 (Public Education), Article 24 (Labour Legislation and Social Security), Article 26 (Freedom of Movement), and Article 34 (Naturalization). See *Declarations and Reservations supra* note 5

[55] *Declarations and Reservations supra* note 5

B. The 1969 OAU Convention

As noted earlier, the conflicts that accompanied the end of the colonial era in Africa led to a succession of large-scale refugee movements. These population displacements prompted the drafting and adoption of the 1969 *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*. The OAU Convention arose out of the need to fill in the lacuna created by the 1951 Convention whose refugee criterion were inadequate to deal with the refugee problems created by instances of generalized violence. By definition the 1951 Convention requires targeted or individualized persecution based on the listed grounds. However this resulted in many people deserving international protection failing to satisfy the stringent criteria and hence could not be protected under the instrument. Thus the Preamble to the OAU Convention states that the Convention '...shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees'. The 1969 is, to date, the only legally binding regional refugee treaty. It contains a definition of the term "refugee", consisting of two parts: the first part is identical with the definition in the 1951 Convention. The second part applies the term "refugee" to:

> "Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

This means that persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in States that are parties to this Convention, regardless of whether they have the well-founded fear of persecution required under the 1951 Convention. The determination of who is a refugee is again left up to the Contracting State. The OAU Convention provides: "For the purposes of this Convention, the Contracting State of asylum shall determine whether an applicant is a refugee".[56] Articles 1(4) and (5) also contain cessation

[56] Article 1(6)

and exclusion provisions. Despite the narrow scope of rights provided for in the OAU Convention, it is widely regarded as promoting "the humanitarian grant of asylum while emphasizing eventual return to the country of origin".[57] Thus unlike the 1951 Convention, African states including Malawi were more willing to incorporate the OAU convention into their national legislation.

Another important aspect of the OAU Convention definition includes persons who flee 'events seriously disturbing public order in either part or the whole of" their country of origin. This has the effect that a person will meet the refugee criteria regardless of the fact that they did not seek asylum in safer parts of their country of origin. This is in marked contrast to the situation under the 1951 Convention which requires a person to first pursue an 'internal flight relocation alternative' before fleeing their country of origin.[58] The practical relevance of this distinction is that Malawi, which has incorporated both Convention definitions, is that the internal flight relocation alternative is not applicable.[59] In addition Article 2(4) and (5) of the OAU compel member states to appeal to each other when a state cannot continue to give asylum to a refugee. States are obliged to take measures to find alternative countries of asylum for the refugee or grant temporary residence pending resettlement to a third country

Strictly speaking compliance with both treaty obligations would require either an individual status determination process in each case or an extension of

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[57] Mendel, T.D., Refugee Law and Practice in Tanzania, at 54; See also generally G. Okoth-Obbo 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa *Refugee Survey Quarterly* Vol. 20 No 1 2001; Anais Tuepker On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice in *Journal of Refugee Studies* Vol. 15 No 4 2002

[58] See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Re-edited version) Geneva, 1992, pp.21-22 [hereinafter *Handbook on Procedures and Criteria for Determining Refugee* Status] which reads "A person will not be excluded from refugee status merely because he could have sought asylum in another part of the same country if under all circumstances it would not have been reasonable to expect him to do so.

[59] See also, De la Hunt, L. & Kerfoot, W., Due Process in Asylum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act, in Advancing Refugee Protection in South Africa, Handmaker, J., *et al* (eds.), Berghan, New York: Oxford, 2008, at p. 113 fn 14

the rights under the 1951 Convention to all OAU Convention Refugees. Some legal commentators have noted that this is impracticable in the case of poorer countries hosting large numbers of refugees.[60] In such instances, they argue, the 1951 Convention is "essentially an inappropriate instrument and one which is substantially ignored in practice".[61] This argument is validated to the extent that the law and practice in many African countries, including Malawi, complies largely with OAU Convention obligations as opposed to those mandated by the 1951 Convention. For instance, Botswana's Refugee Act[62] has been criticized as being too vague as it refers to refugees under its definition as political refugees. Botswana also attached reservations to articles 7 (exemption from reciprocity), 17(wage-earning employment), 26 (freedom of movement), 31 (refugees unlawfully in the country), and 34 (naturalization) of the 1951 Convention. Hence these issues are not addressed in the Act. In contrast the act complies with the OAU Convention in all regards for the fact that it does not incorporate the obligation to issue travel documents or grant temporary residence while making an effort to find another country willing to admit the refugee in instances where he claim to status has been rejected. Similarly, Kamanga notes that the Refugees Act, 1998 of Tanzania may be said to pursue the objective of bringing the existing legislation (the former Refugees (Control Act) of 1966) in conformity with the country's new obligations under the OAU Refugees Convention, 1969.[63] The former Refugees Control Act had been enacted to comply with Tanzania's obligations under the 1951 Convention to which it made no reservations. It was enacted prior to Tanzanian's ratification of the OAU Convention. Despite this Mendel notes that Tanzania's overall treatment of refugees suggests that compliance with the 1951 Convention 'is mixed'.[64] On the other hand,

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[60] See generally, Mendel, T.D., Refugee Law and Practice in Tanzania, 9 *IJRL* 1, 35 (1997)
[61] *Ibid.*, at 36-37
[62] Refugees (recognition and Control) Act of 1968
[63] Kamanga, K., The Tanzania Refugees Act of 1998: Some Legal and Policy Implications, 18 *Journal of Refugee Studies* 100, 2005 at p. 104
[64] Mendel, T.D., Refugee Law and Practice in Tanzania, at 58; Tanzania hosts the largest number of refugees in the region having over 400,000 refugees. See, *UNHCR Global Report* 2007 - United Republic of Tanzania, 1 June 2008

compliance with the OAU Convention is 'more consistent'.[65] Mendel attributes Tanzania's and other African countries' failure to the large number of refugees hosted.[66] However, it is the contention of this paper that the numbers argument is insufficient justification for Malawi's current situation whose refugee population though constant has reduced significantly since the days of the Mozambican influx. Currently the refugee population in Malawi is pegged at 11,600[67] making it almost negligible in a country whose population is now estimated to be 13 million people.[68] This is marked contrast to refugee populations in other countries which range between 200,000 and 500,000.[69]

C. UNHCR ExCom Recommendations

Although both Conventions provide criteria that need to be fulfilled for a person to be termed a refugee, neither of them provide for the procedure for refugee status determination. This is left up to the state party's discretion. However, UNHCR's Executive Committee (ExCom) has recommended certain Basic Requirements which every state party should fulfill in the status determination procedure. ExCom Conclusions form part of the framework of the international refugee protection regime. They are based on the principles of the Refugee Convention and are drafted and adopted by consensus in response to particular protection issues. ExCom Conclusions represent the agreement of more than 50 countries that have great interest in and experience with refugee protection. These and other countries often refer to ExCom Conclusions when developing their own laws and policies. Following the Basic Requirements

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[65] Ibid.
[66] Ibid., at 49
[67] This number is merely indicative of the actual refugee population as it includes all persons currently identified of concern to UNHCR (i.e. asylum seekers and rejected asylum seekers residing in the country). Thus the actual refugee population is significantly less.
[68] *Engendering the Malawi Population Census 2008*, National Statistics Office, Malawi, 2009, available at http://unstats.un.org/unsd/censuskb/article.aspx?id=10553 [accessed 9 April 2009]
[69] Zambia hosts over a 100,000 refugees, see UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Zambia*, December 2007.

recommendation, a handbook was published in 1979 to guide governments.[70] The Handbook has since grown in legal stature and is cited in different refugee law texts and relied on in legal proceedings.[71]Being mere recommendations state parties are not legally bound to follow them. Also relevant is the Pan-African Conference held in May, 1979 in Arusha, Tanzania, on the "Situation of Refugees in Africa". The conference drew up sixteen recommendations which have since been "fully endorsed" by the OAU Council of Ministers and by the United Nations General Assembly.[72] Recommendation 2 deals specifically with the definition of refugee and refugee determination status and recognizes the refugee definition as stated in Article 1 of the OAU Convention. The recommendation also appeals to African states to apply the Basic Requirements Specified by UNHCR Excom in 1977.

D. The Refugee Act

The Refugee Act incorporates both refugee conventions in its provisions dealing with the definition of a refugee and the principle of *non-refoulement.*[73] The Act also establishes institutions for the administration of the Act and makes provisions for group refugee status determination including appeals. However as mentioned, the act makes no substantive provisions with regards to the rights of refugees. As has been noted by one legal commentator, the Act "is perhaps more notable for what it did not contain than what it provided for".[74] The Act is conspicuously silent on all other important aspects of refugee protection found in the 1951 Convention. This in part is attributable to the eight reservations Malawi attached to the 1951 convention. The reservations have had the effect that the law does not provide for refugee rights to work, engage in business or receive

[70] *Handbook on Procedures and Criteria for Determining Refugee Status, 1979 (re-edited 1992)*
[71] See *Cannas-Segovia v. INS*, 902 F.2d 717, 729 (9th Cir. 1990).
[72] *The Recommendations from the Arusha Conference in African Problem*, 1981, p 42. GA 34/61, Nov 1979 (General Assembly Official Record: Thirty-Fourth Session Supplement No.46 (A/34/46) endorsed in July and November, 1979 respectively.
[73] The 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol Relating to the Status of Refugees* and The 1969 *Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*
[74] B. Rutinwa, Asylum and Refugee Policies in Southern Africa: A Historical Perspective, p. 4

education. The omissions are also attributable to the fact that the Act was prompted by the massive influx of Mozambican refugees in the mid-1980. Thus some of its provisions were clearly intended to address the problems peculiar to the Mozambican case load which were, as noted above, regarded as temporary.[75] This is discussed in more detail below.

(i) The Refugee definition and determination procedures: Sections 2(1) and 7

In establishing the criteria to be met for a person to be considered a refugee, the Refugee Act has incorporated the definitional elements provided for under both the 1951 Convention and the OAU Convention. Under, Section 2 (1) of the Refugee Act: "refugee" means a person who-

(a) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to that country: or
(b) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This is a positive aspect of the Refugee Act as it takes cognizance of the fact that conflict and persecution can exist side by side. At the same time it also stays true to the purpose of the OAU Convention which was to complement the 1951 Convention. It is often the case that conflict is the very method chosen by the persecutor to repress or eliminate certain groups.[76] This was the situation leading up to the Rwandese genocide in 1994. Experience shows that people who are

[75] See also T. Maluwa, The Domestic Implementation of International Refugee Law: A Brief Note on the Malawi Refugee Act, 1989, 3 *International Journal of Refugee Law*, 1991 at 505
[76] UNHCR *Handbook on Status Determination Procedures* p.5

fleeing from armed conflict may also fit within the definition of a refugee found in the 1951 Convention by having a well-founded fear of persecution because of their race, religion, nationality, membership of a particular social group, or political opinion.

The 1990 Refugee Regulations enacted in 1989 provide for the procedure to be followed by an individual person when making a claim for asylum. Further to this, the Minister under section 7 of the Act 'may, by notice published in the Gazette, direct that, with respect to any group of foreign nationals specified in the notice, seeking refugee status in Malawi, the Committee[77] shall apply such group determination procedure as may be prescribed'. Group determination refers to the situation where refugees are recognised as a group on the basis of the situation in the country of origin. Such refugees are accorded "*prima facie*" status. Although not specified in the Act, group determination is normally employed in situations of mass influx.[78] The Refugee Act however does not provide for the criterion to be applied by the Minister in declaring that *prima facie* recognition of status should be applied. Similarly the Committee is given broad discretion with regard to the procedure to for determining group status recognition. This is unlike individual status determination where the procedure is specifically outlined in the Refugee Regulations. This is paradoxical considering that the Act was enacted to respond to the Mozambican influx, which at the time entailed group status determination. During the Mozambican influx, the procedure followed in practice was fairly easy. Once the Government was satisfied that the situation as existed at the time warranted persons in Mozambique to flee, it declared all asylum seekers

[77] The Refugee Committee created under section 3 of the Act and discussed further below in the section on "Administration under the Act"

[78] See, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951*, at p.13. The prima facie concept refers to the *provisional* consideration of a person or persons as refugees without the requirement to complete refugee status determination formalities to establish definitively the qualification or not of each individual. Its essential purpose is not directed to the question of refugee status as such. It is, rather, a means to enable urgent measures to be taken under circumstances where the protracted attention which conclusive refugee status determination would otherwise require cannot be afforded. As explained by UNHCR, it is a facility which is particularly useful in cases where it is necessary to provide life-saving measures on an emergency basis.

arriving from such a country from a specified date to be *prima facie* refugees.[79] The implication was that when a person presented himself or herself from Mozambique and claimed asylum, the competent officers merely had to verify the nationality of the person who would then be registered as a refugee.

More recently however, the procedure and circumstances under which *prima facie* status recognition would be applied is not so clear. Some legal commentators have contended that the broader refugee concept under the OAU Convention (section 2(1) (b) of the Refugee Act) can have important technical advantages in these large-scale influx situations.[80] The ability to consider entire groups as refugees is also highlighted as one of the features that set that definition apart from the one contained in the 1951 Convention. However, as has been ably argued elsewhere, refugee status granted to groups under the OAU definition and the *prima facie* device, are not the same thing.[81] The OAU Convention in fact deals with neither of the two. In this regard Okoth-Obbo notes "...several factors are lumped together here in such a way that the incorrect similation as one and the same thing of a legal question (refugee status), a methodology for decision-making (prima facie), numeric factors (groups) and the imperative to save lives, is practically impossible to avoid".[82] Persons assisted under a *prima facie* framework still await the conclusive determination of their refugee status. However, the there are currently no methodologies and legal standards in international refugee law for purposes of the conclusive determination of refugee status for groups. This includes both the OAU and the 1951 Conventions.

The question that arises in Malawi is why the prima facie approach is not being adopted in relation to Somali and Congolese asylum seekers who continue

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[79] A. Callamard, Malawian Refugee Policy, International Politics and the One-Party Regime, *Journal of International Affairs*, Vol. 47, 1994

[80] See I. Jackson, *The Refugee Concept in Group Situations*, Martinus Nijhoff Publishers, The ague/London/Boston, 1999 at p. 473

[81] G. Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa, *Refugee Survey Quarterly*, Vol. 20, No. 1, 2001 at p. 119

[82] *Ibid.*

to arrive in significant numbers. The countries of origin just like Mozambique are marked by several years of generalized strife and conflict. This, for instance, is the approach in South Africa. It is important to note however, the South African approach for determining prima facie status has also been criticised for erroneously applying the OAU definition by excluding 1951 definitional elements from its scope.[83] The problem in Malawi is partly, lack of guidelines for establishing the objective criteria in the country of origin on the basis of which to grant *prima facie* status. Secondly, in relation to the Congolese case load, arrivals are in small family groups or individuals which do not warrant a group determination procedure. The individual status determination procedure allows for a more thorough case by case determination which ensures due process of asylum claims. Further and this also applies to the Somali case load, the individualized procedure warranted because they are secondary movers from several other countries. There is thus need to ensure that there is no abuse of the system which would not be detected in a *prima facie* determination scenario as applied previously. More significantly, the perception is that the current Somali/Horn of Africa caseload poses significant national security risks necessitating rigorous scrutiny. This concern is warranted in light of the profile of this particular group of asylum seekers. Asylum seekers arriving in the country from Somalia (and Ethiopia) – usually in groups of 10 – are all men aged between 18 and 40 years. They usually do not present themselves to the competent authorities and only declare their claim to asylum when apprehended for illegal entry. The concern is that they may be either current or former combatants and persons to whom exclusion clause is applicable. Thus Malawi continues to be faced with the mixed and intractable flows and both the Refugee Act and Immigration Act are unequipped in providing the legal framework for refugee status determination in these kinds of situations. The Somali/Ethiopian caseload is discussed in further detail under the sections on arrest and detention of asylum seekers and irregular movers. For present purposes however, the above illustration shows that, there is

[83] See generally L. De la Hunt, Refugee Law in South Africa: Making the Road of the Refugee Longer?, pp 34-39 in *A Reference Guide to Refugee Law and Issues in Southern Africa*

lack of clarity on how many numbers would constitute a group for the purposes of making a determination under section 7. There is thus need to clearly define what constitutes mass-influx.

(ii) Cessation, Cancellation, Revocation and Exclusion from Refugee Status

The Refugee Act, also in accordance with both Conventions identifies certain conditions under which a person ceases to be a refugee. The Act incorporates, almost verbatim, the 1951 and OAU Convention clauses dealing with the cessation of refugee status in section.[84] Cessation can come about in two ways: through act of the refugee e.g., voluntary return or when circumstances that gave rise to the recognition of status have ceased to exist.[85] The cessation clauses are applied very restrictively as it entails that refugee is no longer entitled to international protection. In Malawi it has been applied once in 1996 in relation to Mozambican refugees.[86] Following the signing of the Rome Peace Accord in October 1992, Mozambique enjoyed uninterrupted peace and stability for four years. As a result, 1.7 million refugees returned in safety and dignity to their places of origin, and re-integrated into Mozambican society.[87] These developments, as well as their broad international recognition and appreciation, were indicative of the fundamental nature and durability of the changes which had taken place in Mozambique. Former refugees who remain outside Mozambique after that date will not normally be entitled to international protection, and their continued stay in the asylum country will depend upon the authorization of the Governments concerned. However in accordance with basic principles of refugee law, reaffirmed by the UNHCR ExCom in Conclusion No. 69 (XL111) (1992) on Cessation of Status, section 12 provides that the cessation clause should not apply

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[84] Section 12
[85] *Ibid.*,
[86] UNHCR, *Applicability of the Cessation Clauses to Refugees From the Republics of Malawi and Mozambique*, 31 December 1996, available at:
http://www.unhcr.org/refworld/docid/4165775d4.html [accessed 5 July 2009]
[87] UNHCR, *Applicability of the Cessation Clauses to Refugees From the Republics of Malawi and Mozambique*

to refugees who continue to have valid grounds for claiming a well-founded fear of persecution.[88] Thus, individual members of the group may request reconsideration on the basis of special circumstances justifying maintenance of their refugee status. For instance in August 1997 refugees from Rwanda were told that they could choose to go home voluntarily or they would be required to demonstrate fear of persecution on an individual basis. By mid-September 57 Rwandans had registered their willingness to repatriate, and a screening process begun for those unwilling to repatriate.

The Act gives the Refugee Committee broad power to grant, deny, revoke and cancel refugee status. While the import of the words grant and deny is easily discernible, the same cannot be said of the 'revoke' and 'cancel'. The terms are not provided for in either of the two conventions and are not defined in the Act. Thus regard must be had to international jurisprudence and UNHCR for guidance. According to the UNHCR Handbook, cancellation may be invoked when there is evidence that indicates that a person should never have been recognized as a refugee in the first place, that is, if it subsequently appears that refugee status was obtained by a misrepresentation of material facts. In such cases, the decision by which he was determined to be a refugee will normally be cancelled.[89] Revocation on the other hand is invoked where the exclusion clauses apply to the conduct of a refugee subsequent to the recognition of status.[90] The Refugees Act identifies categories of persons who do not deserve international protection and who therefore cannot be considered or treated as refugees in section 8.[91] Generally, those people with respect to whom there are serious reasons for considering that they are war criminals or have committed a serious non-political

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[88] Section 12 'shall not apply to a person who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country of nationality or return to the country of his former habitual residence, respectively.'

[89] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status p.19*

[90] The difference between the two concepts is addressed in para. 117 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*

[91] These include people who have committed a crime against peace, a war crime or a crime against humanity; people who have committed serious non-political crimes before entering another country; and people who have been guilty of acts which are contrary to the purposes and principles of the United Nations and the OAU

crime are excluded from the outset. This is in line with the accepted exceptions to the principle of *non-refoulement* as provided for in both the UN and OAU Conventions. However, its is only when the refugee commits acts that constitute war crimes, crimes against humanity and crimes against peace and acts contrary to the United Nations or the OAU that his status would be revoked. This is because the category of serious non-political crimes must be committed outside the country of asylum prior to entry into the asylum country.[92]

Malawi jurisprudence indicates that, status will be revoked on grounds of national security. Of particular relevance is the 2005 Malawi High Court Decision in the *Kambiningi* Case where the applicants' refugee status had been revoked on the grounds of national security and they sought judicial review of the Refugee Committee's decision to revoke and deport them.[93] The refugees had allegedly been unruly and caused problems in the camp. In addition they had been writing letters to foreign embassies and NGO's accusing the Malawi government of being corrupt and abusing human rights. In dismissing the claim of the applicants the court states:

> "... the court could have been assisted if counsel for the defendant had considered and submitted on the 1951 Geneva Convention relating to the Status of Refugees and its 1967 New York Protocol... The Convention is a tool for the administration of refugees and the protection of rights...Article 32 of the Convention, 1951 makes provision for expulsion of a refugee...States shall not expel a refugee lawfully in their territory save on ground of national security or public order... it is abundantly clear that the plaintiffs posed a great threat to national security and public order in Malawi. I will not go into detail because even the first citizen was threatened by some of these plaintiffs in writing. The assumption I make

[92] Section 8 (b) Refugee Act
[93] *Kambiningi Khazi Jones & 14 Others vs. The Refugee Committee* (The Attorney General) Miscellaneous Civil Cause No. 313 of 2005 (unreported)

is that the plaintiffs were properly striped off their refugee status and repatriated to Mozambique."[94]

While the court's reference to the Convention is welcome, it could have gone further by engaging in the question instances of when revocation is permitted under the Refugee Act. Article 32 of the 1951 Convention deals with expulsion of refugees generally and not revocation or exclusion. The omission is explained in part by the fact that the court was not asked to address the issue. Further there was no appearance by the applicant's legal representative owing to material misrepresentations of fact by the applicants themselves.[95] Arguably, threatening the Head of State is an act contrary to the purposes of the UN and OAU.[96] However, in light of the wide discretion given to the Refugee Committee, there is need to specify within the Act the circumstances under which revocation would be invoked. For instance, some countries specifically provide for the revocation of refugee status if a refugee engages in conduct which comes within the scope of one of the exclusion clauses of Article 1F of the 1951 Convention.[97]

(iii) *Non-refoulement* under the Refugee Act

Section 10 of the Act provides that a person shall not be expelled or returned to the borders of a country where his life or freedom will be threatened on account of his race, religion, nationality or membership of a particular social

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[94] Ibid., p. 4

[95] The applicant's did not disclose to the court that the defendant had already carried out the deportation order and declared them illegal immigrants. The applicant's then re-entered the country illegally, then obtained an ex parte injunction staying the implementation of the deportation order. At a time when they were 'no longer refugees but illegal immigrants' applied to the court for an order restraining the defendant from carrying out a decision that had already been carried out. In the court's view this amounted to material non-disclosure resulting in refusal of grant to move for judicial review

[96] Article 1 of the United Nations Charter, 1945 includes as one of the UN's purposes the maintenance of international peace and security; similarly one of the purposes of the OAU under Article 2 of the OAU Charter, 1963 is to promote the unity and solidarity of the African States. Both of these are compromised if threats are made against the Head of State

[97] For example in Austria under s. 14 (1) 4 of the Asylum Act and Spain under s. 20(1)(b) of the Law No. 5/1984 of 26 March 1984.

group or political opinion. The prohibition against *refoulement* also extends to people or external aggression, occupation, foreign domination or events seriously disturbing the public order as provided for under the OAU Convention. The Act therefore incorporates the principle of *non-refoulement* under Article 33[98] of the 1951 Convention and the wider ambit found in the OAU Convention found in Articles 1(2) and 2(3).[99] Section 10 further prohibits expulsion of an asylum seeker during the period that his or her application is still being determined by the Refugee Committee.[100]

In line with the 1951 Convention protection from *refoulement* also extends to asylum seekers who enter the country illegally for the purpose of seeking asylum provided they report to a competent officer[101] within twenty hours of such of such entry or 'such longer period as the competent officer may determine officer may consider acceptable in the circumstances'.[102] Article 33(1) of the 1951

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[98] Article 33 - Prohibition of Expulsion or Return ("*Refoulement*")
1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.

[99] Article II(3) of which provides: " No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2" [Article I concerns the persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].

[100] Under section 10(2) "A person claiming to be a refugee shall be permitted to enter and remain in Malawi for such period as the Committee may require to process his application for refugee status."

[101] Defined under section 2 as an immigration officer, police officer, border or security officer

[102] Section 10(4) of Refugee Act states that: " such person shall not be detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the committee has considered and made a decision on his application for refugees"; Under Article 31 of the 1951 Convention :
"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Convention prohibits 'expel or return ('*refouler*') . . . in any manner whatsoever'. The evident intent is to prohibit any act of removal or rejection that would place the person concerned at risk. *Non-refoulement* is available even to those who have not been formally recognized as refugees. This is because the term shall apply to any person who fit the set criteria for recognition. Refugees who enter and are present in the territory of a State illegally will, almost inevitably, not have been formally recognized as refugees by the State concerned. Article 31 of the 1951 Convention also prohibits the imposition of penalties on such persons. Therefore, to the extent that Article 31 applies regardless of whether a person who meets the criteria of a refugee has been formally recognized as such, it follows, that the same should apply to the operation of Article 33(1) of the Convention. The *refoulement* of a refugee would put him or her at much greater risk than would the imposition of penalties for illegal entry. It is inconceivable, therefore, that the Convention should be read as affording greater protection in the latter situation than in the former.[103]

In the past, Malawi consistently respected the principle of *non-refoulement* in relation to admission of asylum seekers regardless of the manner of entry. When immigration officers arrest a person for illegal entry and then such a person claims to be a refugee, they normally refer the person to the Office of the Commissioner for Refugees (OCR). Every immigration officer is, by virtue of section 1 of the Refugee Act, a "competent officer" and is accordingly obliged to register every applicant for asylum and forward him to the OCR. The problem however lies in the wide discretion given to these officers to determine whether an application should be received under section 10(4). There have been sporadic

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2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

[103] UNHCR, Executive Committee, *Conclusion No. 6, (XXVIII)* 1977 at para. (c); Executive Committee in *Conclusion No. 79 (XLVII)* 1996 and *Conclusion No. 81 (XLVIII)* 1997; UNGA Resolution 52/103 of 9 February
1998,

incidents in which the principle of *non-refoulement* with respect to illegal entry was not respected. In August, 1999 the Government denied the UNHCR access to a group of 25 Eritreans in detention for attempting to enter the country, reportedly as tourists, with fraudulent visas. Police allegedly shot and killed one detainee in their custody. The Government forcibly returned the remaining 24 Eritreans to Ethiopia.[104] The misinterpretation of the law is partly due to the fact that border officials are not given any special guidance regarding handling refugees and asylum seekers. Although there has been training of immigration officers on refugee law, it is at a very superficial level.

Asylum seekers as well as recognised refugees are sometimes arrested with threat of deportation for illegal presence for failure to produce identity cards to prove their status. The authorities claim that unless the refugee has an identity card indicating that he or she is a refugee or asylum seeker the person is considered to be an alien. The issuance of identity cards by the government is inconsistent as it has to rely on UNHCR to provide these. UNHCR in turn relies on its Pretoria office to print these out resulting in significant delays in issuance. As of April, 2009, 1500 new asylum seekers that arrived in the country in 2008 had not yet received their identity cards.[105] Asylum seeker and refugee identity cards take long to be issued as the cards are currently printed in Pretoria, South Africa at the UNHCR office.[106] From mid-2005 until mid- 2008 no identity cards were issued at all. During this period newly arrived asylum seekers and recognoised refugees found themselves in the precarious situation where they had no way to show their identity which was compounded by the over-lengthy asylum process. Malawi is currently in the process of enacting a new National Registration Bill.[107] The Bill mandates the carrying identity cards for all Malawi

[104] See also, United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 1999 - Malawi* , 25 February 2000, available at: http://www.unhcr.org/refworld/docid/3ae6aa6f14.html [accessed 5 August 2009]
[105] Information provided by the UNHCR office, Lilongwe, Malawi, 19th April, 2009
[106] According to information from UNHCR, the Malawi office is currently unable to print cards due to lack of equipment.
[107] The National Registration Bill, 2005

nationals and residents.[108] The Bill will have implications for refugees and asylum seekers. There is currently no provision in the Bill for the issuance of identity documents to asylum seekers. It is therefore imperative that Malawi should ensure that refugees without a valid travel documents are promptly issued with identity papers which are in conformity with relevant standards or requirements of the new legislation. There is also need to harmonise the new legislation with the Refugee Act.

In practice, the courts uphold the provision against imposing penalties on asylum seekers for illegal entry. For instance in the case of *The Republic vs. Abdul Rahman and Others*[109], the Lilongwe Magistrate's Court had to deal with the sentencing of 10 Somalis that had entered the country illegally contrary to section 5 of the Immigration Act. The Somalis had pled guilty to the charge but pleaded the fact that they were seeking asylum in mitigation to their sentencing. The court found that Section 10(4) applied even though the Somalis had failed to present themselves to any officer and had instead chose to "obtain asylum through the backdoor" by residing illegally in the city for a significant period of time before being apprehended by the authorities.[110] The court concluded: "the reading of the Section 10(4) of Refugee Act is to the effect that so long the person has sought asylum he should not be imprisoned or detained by reason of illegal entry. Illegal entry of any person for purpose of seeking asylum does not disqualify the applicant to become a refugee". Similarly in *Aden Abdihaji & 67 others v The Republic* the court dealt with the arrest, detention and fining of Somali refugees. The refugees had entered the country illegally and had failed to produce identity documents.[111] In the first instance, the Somalis pled guilty but argued the fact that they were asylum seekers in mitigation of their sentence. On appeal, the court found that the two sections in themselves did not create any offence. The court further noted that when the asylum seekers pled their status as asylum seekers in

[108] Section 5
[109] Criminal Cause No. 26 of 2006 (Lilongwe District Registry, unreported)
[110] *Ibid.*, at 3
[111] Contrary to Section 5(a) of the Immigration Act read with section 39(a)

mitigation the court a quo should have referred the to the relevant Ministry dealing with refugees or referred the matter to the High Court with the relevant observations made. Failure to do so was a violation of section 10(4) of the Refugee Act. The detention and fines imposed were set aside. The court also noted that the prosecution not given any evidence of issues of national security that would be at risk as a result of the continued stay of the appellants in the country, which would have justified the deportation order in terms of Article 32.

(iv) Administration of the Act

a) The Refugee Committee

Under the Act, refugee claims are considered by the Refugee Committee.[112] The Committee has been functioning since the early nineties and has created its own operating procedures. The vesting of powers of the Refugee Committee is arguably another indication of the OAU convention influence. Its members are comprised of very senior specified heads of Government Departments, suggesting that the determination of status is more of a political/policy decision than legal one.[113] Under Section 6 (1) the Committee has the power to grant, deny, cancel or revoke refugee status. It also has powers to review cases of refugees under section 6(2). Section 5 gives broad power to the Refugee Committee to determine "its own procedure". This is reflective of the fact that both refugee conventions give no indication of procedures to be adopted for the determination of refugee status. It is left to each Contracting State to establish the procedure that it considers the most appropriate, in conformity with its particular constitutional and administrative structure.

The functioning of the committee is particularly problematic with regard to determinations of status in cases where individual claims of persecution are

[112] Section 3 of the Refugee Act.

[113] The Secretary to the President and Cabinet; The Attorney General; The Chief Immigration Officer; The Inspector General of Police; The Secretary for Community Services; The Secretary for Foreign Affairs; The Secretary for Health. The Secretaries may nominate a Delegate; which is what they have done since the commencement of the Committee.

made. As noted above, Malawi's current caseload from the Great Lakes Region, DRC, Somalia and Ethiopia is processed through an individual status determination procedure. To deal with the phenomenon, the Refugee Committee has developed a largely unregulated set of administrative practices for processing individual asylum claims. Initially, the Refugee Committee created a Technical Committee whose task was to assess individual cases. The Technical Committee comprised of representatives of the various Ministries making up the Refugee Committee and was tasked with interviewing asylum seekers and making recommendations to the Refugee Committee for a final decision. The system had many inadequacies, the most noted of which was the intimidating nature of the hearing, since an asylum seeker had to present his or her case to the seven or so members of the Technical Committee that would interview him or her. The second significant failing was the fact that the members of the Technical Committee had no knowledge of refugee law and hence decisions were made on the basis of factors unrelated to the refugee definition. The country thus had a recognition rate of 99%. In this instance, the Refugee Committee decision appears to have been a mere rubber stamp approval of the Technical Committee's recommendations. This could also be argued to be symptomatic of the influence of the OAU Convention whose definition, as noted above, is unclear as to what constitutes 'events seriously disturbing public order'. Refugees status appears to have been recognized more on proof of country of origin and general situation therein rather than individual claims of persecution.[114]

In 2005 the system was revised. The current procedure set up by the Committee in collaboration with UNHCR includes the establishment of a Refugee Status Determination Unit (RSD Unit). The unit comprises Eligibility Officers to conduct individual RSD interviews and make recommendations to the Refugee Committee regarding recognition of refugee status on its behalf. The Refugee Committee bases its decision on the recommendations of the Eligibility Officers.

[114] There are cases of Rwandese asylum seekers entering the country long after the civil war had ended whose status was recognised based on their claim that they had heard that other Rwandese people were fleeing the country, though no instances of persecution could be discerned.

The Committee can either grant or refuse an application of refer a matter back to an Eligibility Officer for clarification. UNHCR monitors the RSD Unit, and provides advice and support to the Refugee Committee. Rejected applicants can appeal directly to the minister in charge of refugees within 14 days, whose decision is final.

Neither the Refugee Act nor its regulations make provision for the establishment of the eligibility officers. The setting up of these panels may not be legally problematic because the Refugee Act gives the Refugee Committee discretion to 'determine its own procedure' and it does not describe how he should exercise this discretion The Refugee Committee has thus chosen to use panels to advise it in this regard, which is within this mandate.Arguably, the work of the previous Technical Committee and current RSD Unit falls within the broad discretionary power given to the Refugee Committee. The functions of the eligibility officers are mere internal administrative arrangements for the purposes of practicability and efficient discharge of the Refugee Committees duties. Since the Refugee Committee still takes the final decision, it has not delegated its function. However, while the current system allows for individualised case processing, the practicability and desirability of such a system is questionable as practice indicates that there have been undue delays the status determination procedure. As noted the Refugee Committee comprises senior heads of government departments or their designates. Ideally members need to convene regularly for the purpose of taking a decision, however this has proved impracticable. There are too many members with other arguably more pertinent functions to discharge. The result is that at most two meetings are convened in any given year leading to undue delays in case processing.

b. The Sub-Committee on Urban Refugees

Like other legislation, the Refugee Act provides for the making of rules and regulations for the purposes of operation of the Act. However, to date, regulations have only been promulgated once in 1990. This has contributed to the

inconsistent application of the provisions of the Act. In addition to the Refugee Act, there is the Immigration Act which also governs certain aspects of refugee protection. One of the consequences of multiple legislation affecting refugees is that there are different ministries and government departments that impact on refugees whose lines of authority are not always clear. As per the Refugee Act, the Refugee Committee is the principal institution responsible for refugee matters. At the same time however there is the Office of the Commissioner for Refugees and the National Coordinator for Refugee Affairs institutions currently operating under the Ministry of Home Affairs which is not provided for in either legislation. Both are answerable to the Minister who bears ultimate responsibility in refugee matters. Similarly there is a Sub-Committee on Urban Refugees created to a deal with issues pertaining to refugee that live outside the camp. The Sub-Committee was set up in response to the growing number of requests by refugees to live outside the camps after having obtained work permits, for medical reasons or for educational. The requests regarding work and education purposes arose from the government's relaxation of the reservations it made with regard to rights to work and elementary education.

The current procedure is that the Sub-Committee receives applications for permits to live outside the camp and decides whether to authorise such urban residence. However, as there is no mechanism in the Refugee Act or Regulations for Refugees to live in and outside the camps, there is no statutory basis for the Sub-Committee or its functions. As was noted in *Ex Parte Frodvard Nsabimana* and 83 Others (2006 unreported) there is no provision in the Refugee Act which empowers the Refugee Committee to grant permits to refugees to reside outside camps making the exercise of such powers *ultra vires*. This entails that the current delegated function of the sub-committee is also unlawful. The court was of the opinion that the power was better vested in the Immigration Department or on the basis that it issues various permits related to non-citizens' residence in the country. The problem with the Honourable Judge's suggestion is that neither the Immigration Act nor its regulations have any provisions regarding the residence

of refugees in the country. The provisions deal with aliens generally. Therefore, the notion of an urban residence permit for refugees is quiet alien to the immigration law regime. There is need to amend the Refugee Act and the Immigration Act to regulate the functions of the Sub-Committee especially since it appears that the government is unwilling to implement a general policy allowing refugees to reside where they choose.

(v) Appeals to the Minister

Section 11 of the Act provides for appeals of the decisions of the Refugee Committee to the Minister (currently Home Affairs). Section 11(2) provides:

> " (2) The decision of the Minister made pursuant to subsection (1) shall be final and shall not be subject to appeal to, or review or question by, any court and the Minister shall not be required to assign any reasons for such decision."

This provision is clearly unconstitutional as it violates the right to fair and just administrative action enshrined in the Republican Constitution. The Constitution states explicitly "every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues."[115] Further, the Constitution vests the High Court with original jurisdiction to review any law, and any action or decision of the Government, for conformity with the constitution.[116] The procedure for appeals is also arguably unfair in that there is no time limit within which the Minister must determine an appeal. In terms of the Constitution, everyone is entitled to a lawful and procedurally fair administrative action, "*which is justifiable in relation to reasons given*". The lack of a time limit could arguably be remedied by practice. However, at the time of writing, there were 400 cases from 2007 that pending an appeal decision by the Minister which have yet to be adjudicated.[117]

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[115] Section 41(2)
[116] Section 108 of the Constitution
[117] Information obtained from the Ministry of Home Affairs

(v) Safe Third Country, Irregular Movers and Section 10(3)

The safe third country notion is premised upon the question of whether a person passed through another safe country before arriving in the country of asylum. It is used in relation to 'irregular movers' who fall into two broad categories. Irregular movement refers to people that choose not to apply for asylum in a third safe country as well as those that move through different places even though are on record as registered asylum seekers or recognised refugees in other countries. These movements are usually motivated by a desire to seek better living conditions in countries that are not the first country of asylum. Such practices among asylum seekers are discouraged. The rationale behind this is to ensure that people do not 'shop for asylum' by applying for status in various countries thereby undermining the asylum system. The argument against shopping for asylum is that such people profit and clog the asylum system at the expense of people who are really in need of protection. Thus persons are discouraged from moving beyond a country that can protect them from *refoulement* and allows them to remain in the country in safety and dignity.[118] The safe third country principle has found expression in different contexts. The most notable is the *Dublin Convention* which first introduced the 'first country of asylum' within the context of the European Union. [119] Under ExCom Conclusion No. 58 the "country of first asylum" may be considered as the State where a person has 'already found protection'.[120] This has been interpreted to mean as the State where the person is

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[118] This basically entails that a refugee is given permission to remain in that safe third country in accordance with recognised basic human rights standards until a durable solution is obtained. See Section f of UNHCR ExCom. Conclusion 58(XL) , *Problem of Refugees and Asylum Seekers who move in an irregular manner from a country in which they had already found protection*, 1989

[119] Under the *Dublin Convention*, individuals must make their application for asylum in the first EU country that they enter. *The Dublin Convention* was signed in Dublin, Ireland on 15 June 1990, and first came into force on 1 September 1997 for the first twelve signatories (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom), on 1 October 1997 for Austria and Sweden, and on 1 January 1998 for Finland. Recently, the treaty has been extended to some countries outside the Union. Switzerland has become a signatory to the *Dublin Regulation* (adopted in 2003, ostensibly replacing the *Dublin Convention*) and on the 5th June 2005 voted by 54.6% to ratify it; it came into effect on 12 December 2008.

[120] UNHCR ExCom. Conclusion 58(XL) , *Problem of Refugees and Asylum Seekers who move in an irregular manner from a country in which they had already found protection*,

on record as a registered asylum seeker or recognised refugee.[121] It is therefore the case that genuine asylum seekers who are not on record in previous countries should not be considered as irregular movers as they have not previously made an application for asylum.

There are exceptions to principle. Under ExCom Conclusion 58(g) "it is recognised that there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection. Such cases should be given favorable consideration by the authorities of the State where he requests asylum". Similarly under the Dublin Convention, an asylum seeker can challenge the application of the principle if it is established that the State in question uses a more restrictive interpretation of the 1951 Convention and is hence not a 'safe third country'. For instance the majority of Burundian and Rwandese asylum seekers claim that Tanzania's proximity to Burundi makes it unsafe. The claim is that Tanzanian towns and camps are infiltrated by the agents that caused their flight from their country of origin.[122]

The safe third country notion has significant implications for Malawi's refugee protection policy. Currently all refugees originate from other parts of Africa that do not share borders with Malawi. Asylum seekers from both the Great Lakes Region and the Horn of Africa pass through Kenya and Tanzania respectively before seeking asylum in Malawi. The Government is increasingly wary of those who travel long distances to seek asylum in Malawi. Initially in December, 1996 the Government decided that no further applications for asylum

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[121] See Geddo, B., Durable Solutions to the Refugee Problem: UNHCR's Regional Strategy for Southern Africa, in *Perspectives on Refugee Protection in South Africa*, Handmaker .J., et al (eds), Lawyers for Human Rights, 2001, pp 65 – 72, at p. 69

[122] For instance in 2001 there were unconfirmed reports that Hutu rebels abducted 107 Burundian children from refugee camps in Tanzania, two of whom managed to escape, presumably to coerce the children into joining their forces. Further, although UNHCR denied mounting claims that armed rebels are hiding in the refugee camps of western Tanzania news paper reports showed that police in the Kasulu district of Kigoma had impounded 55 firearms and 1,212 rounds of ammunition from refugees residing in the camp. See BURUNDI: CNDD-FDD angry over Ndadaye sentences, IRIN Update 673 for 18 May [19990518] available at http://www.africa.upenn.edu/Hornet/irin673.html [accessed 10th May, 2009]

from Rwandans and Congolese would be considered. The Government also invoked the principle of first country of asylum, as many of the Rwandans and Congolese either had requested asylum in another country or had the opportunity to do so.[123] Normally these other safe countries do not accept these persons back. Further proving irregular movement is expensive and time-consuming. The implementation of procedures to return 'irregular movers' is, therefore, usually impractical. At the same time ExCom Conclusion No. 30 requires full processing of refugee applications even when they are manifestly unfounded or abusive by the national authority empowered to determine status.[124] This therefore precludes Malawi from rejecting such asylum seeker claims without first subjecting them to a full determination their status. This has not always been the case in practice. There was a sharp increase in the number of Rwandan and Congolese asylum seekers during December 1996 and the first quarter of the year. The Government is increasingly wary of those who travel long distances to seek asylum in Malawi. In February the Government decided that no further applications for asylum from Rwandans would be considered. The Government also invoked the principle of first country of asylum, as many of the Rwandans and Congolese either had requested asylum in another country or had the opportunity to do so.

Currently however, the fact that a person passed through a third safe country is not used to bar application for asylum in Malawi. Cases are examined on merit and asylum is granted if it is determined that the person meets the refugee definition as provided for in the Refugee Act. The problem however, is that there is ample evidence of dishonest and fraudulent behaviour on the part of asylum seekers and refugees. Authorities once retrieved a map from a group of

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[123] Reports indicates that in that month, although nine Rwandan refugees were intercepted and returned to Tanzania after illegally crossing into Malawi, hundreds more succeeded in making their way into the refugee camp. See United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 1997 - Malawi*, 30 January 1998, available at: http://www.unhcr.org/refworld/docid/3ae6aa3118.html [accessed 5 August 2009]

[124] See UNHCR, Conclusion No. 30 (XXXIV), The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or for Asylum, *Conclusions on the International Protection of Refugees*, p.68 which provides that 'the manifestly unfounded or abusive character should be established by the authority normally competent to determine refugee status'

Ethiopian 'asylum seekers' that showed the road through Malawi to Mozambique, complete with each police roadblock in the country suggesting highly organised movement and possible human trafficking.[125] Most of the asylum seekers in that group and other asylum seekers from the Horn of Africa disappeared soon after arriving in the southern camp which has since been closed owing to its proximity with the Mozambican border.[126] Examples include Somali applicants who claim to have directly from Mogadishu and Kismayu and yet speak fluent Swahili suggesting prolonged residence in a Swahili speaking country like Tanzania or Kenya. There has also been evidence of asylum seekers who have at the time of application assumed in different names and nationalities in previous countries. Further the general profile of asylum seekers from the refugee generating countries is common knowledge among those populations. Thus it is very easy for people to create claims that easily fit within the refugee criteria. In this regard Kingsley-Nyinah notes: "the inherent difficulties in the accurate assessment of credibility are compounded by the relative ease with which perfect refugee claims may be fabricated, and by the convincing, sometimes passionate conviction with which refugee stories are told".[127] The less restricted criteria under the OAU Convention are even easier to establish. One merely has to show familiarity or knowledge of the country where there are 'events seriously disturbing public order'. Factors taken into account in determining credibility include knowledge of the language, geography, history and customs of the country which can easily be learned by an enterprising 'asylum seeker'. In the absence of any evidence to the contrary it can be easily concluded that such a person is a national or was ordinarily resident in the concerned country. Thus the determination procedure is

[125] J Redden, Fears that Horn of Africa migrants abuse asylum system to reach South Africa, Reuters, 15 Dec 2006 available at http://www.alertnet.org/thenews/newsdesk/UNHCR/2dec359b0a75089496a9fa9469981bb7.htm [accessed 15th June, 2009]

[126] Luwani Refugee Camp in Mwanza was closed in September, 2007 following a presidential order to that effect and all refugees were transferred to Dzaleka Refugee Camp, currently the only refugee camp in the country.

[127] 7 *International Journal of Refugee Law*, 302, 1995

not always successful in establishing non-credibility creating a drain on already strained resources posing significant challenges to Malawi's protection agenda.[128]

The second problem Malawi is confronted with arises from irregular movers from its own borders. Under section 10(3) of the Act an asylum seeker is entitled to apply for admission into Malawi for the purpose of proceeding to another country where he or she intends to seek asylum as a refugee. In terms of this section a competent officer at the border is entitled to allow such entry upon such "conditions as may be determined by the Committee either generally or locally". This provision clearly provides for a situation where an asylum seeker transits through Malawi for the purpose of seeking asylum elsewhere. However, the provision is rarely adhered in practice. A range of political and economic factors are responsible for this. A case in point is the current controversial situation of Ethiopian and Somali asylum seekers who pass through Malawi with the intention of proceeding to South Africa. South Africa is an attractive destination owing to its lack of restrictions on residence and arguably economic activity.[129] The problem is that once persons declare that they are asylum seekers, they are transported to the refugee camp pending a determination of their status. However, many such asylum seekers are often apprehended when they try to leave the country to proceed on their journey and forced back to the camp.[130] The problem Malawi faces is that its neighbouring countries do not provide for what will be referred to in this paper as 'transit asylum'. Thus when the asylum seekers present themselves to the Mozambican authorities for instance they are referred back to Malawi as the 'safe country' where they should have applied for asylum. Similarly in South Africa, before the enactment of the new immigration law in 2002, the new Bill was noted as creating "... the context that South Africa is about to be swamped by thousands of unwashed illiterate immigrants and

[128] In this regard Kingsley-Nyinah notes: "the inherent difficulties in the accurate assessment of credibility are compounded by the relative ease with which perfect refugee claims may be fabricated, and by the convincing, sometimes passionate conviction with which refugee stories are told".

[129] See Redden, Fears that Horn of Africa migrants abuse asylum system to reach South Africa, 16th December 2006

[130] Ibid.,

everybody must be mobilised against them. It even says education programmes will be conducted in other countries to discourage people from coming here [South Africa]."[131] Malawi therefore finds itself in the difficult position of being accused of facilitating irregular movement.

The question therefore is how best to provide transit asylum in line with the Refugee Act. Geddo notes that the spirit of Conclusion 58 'elicits some flexibility in dealing with irregular movers who have left their country of first asylum due to lack of viable durable solutions in that country'.[132] Thus, for instance in a situation of refugees with an urban socio-economic background who wish to move to countries where they can put their skills to good economic use. In such a situation forcing them to return to a country where they will be forced to live in a camp will do more than deny them their human rights to economic activity and freedom. Such a course of action will also not solve the problem as such persons are prone to move irregularly again to another country. They will often pursue illegal means to do this and end up subjecting themselves to further vulnerabilities. International protection extends to allowing refugees to lead a dignified life that goes beyond dependence on handouts from the country of asylum. Section 10(3) is therefore consistent with the above. However, in practice the spirit of the section appears elusive to attain.

(vi) Failed/rejected asylum seekers

As noted above any asylum procedure must take account of the humanitarian standards in protecting against the *refoulement* of persons at risk of persecution. The obligation upon a failed asylum seeker to leave the receiving country rests on and is a consequence of a full and inclusive application of the Refugees Act definition and a full and fair procedure. In some countries removals

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[131] See IRIN, South Africa: Long Awaited Bill nears Completion, quoted in Asylum and Refugee Policies in Southern Africa, *A Reference Guide to Refugee Law and Issues in Southern Africa*, at p. 76

[132] Asylum and Refugee Policies in Southern Africa, *A Reference Guide to Refugee Law and Issues in Southern Africa, p* 69

are not enforced and/or are suspended if there is reason to believe a prospective returnee will face a risk of serious human rights violation.[133]

The practice Malawi is that when an asylum seeker is rejected they receive a letter informing them of this fact and advising them on the procedure for appealing the decision to the Minister. Those asylum seekers who chose not to appeal within the 14 days limit or whose appeals are unsuccessful are considered illegal immigrants and subject to deportation to their countries of nationality. However currently practically all rejected asylum seekers since the new status determination procedure started operating in 2006 are still residing in the refugee camp and receiving UNHCR/WFP assistance. There have been no attempts to deport the failed asylum seekers as the Ministry of Home Affairs cites cost constraints on a deportation exercise. UNHCR justifies its continued support by arguing that despite the rejection these are still persons of concern falling within its protection mandate. However, under the UNHCR protection mandate the persons of concern are: asylum seekers, refugees, stateless persons, the internally displaced and returnees. Rejected asylum seekers only become person of concern to UNHCR if it is of the opinion that despite the states rejection, they should still be refugees.[134] UNHCR may subsequently recognise them under its mandate or put in place other protection measures. This has not been shown by UNHCR's reasoning in continuing of offer assistance. Further the problem with the current situation is that both failed asylum seekers, i.e. persons determined not to be in

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[133] In the *Conclusion on the Return of Persons Found Not to be in Need of International Protection* (No 96 (LIV) – 2003), UNHCR's Executive Committee reiterated the following core propositions, principles and concerns in relation to failed asylum seekers: the efficient and Expeditious return of persons found not to be in need of international protection is key to the international protection system as a whole, as well as to the control of irregular migration and prevention of smuggling and trafficking of such persons; the obligation of states to receive back their own nationals, as well as the right of states, under international law, to expel aliens while respecting obligations under international refugee and human rights law; the term "persons found not to be in need of international protection" is understood to mean persons who have sought international protection and who after due consideration of their claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection in accordance with other international obligations or national law;

[134] UNHCR, Protecting Refugees: Questions and Answers, October 2005

need of international protection are living among genuine refugees and receiving in effect the same protection and material assistance. Apart from creating an unnecessary drain on already scarce resources, it makes the whole asylum process superfluous and undermines the legitimacy of the system altogether. Malawi therefore needs to come up with a policy on how to deal with failed asylum seekers. One possible method is to stop offering the same assistance as that given to recognised refugees and those for whom the determination of status is pending. It may also be desirable for failed asylum seekers to be required to reside elsewhere other than the designated camp to avoid possible conflicts that may arise owing to the effects of rejection of the claim.

IV. The Rights of Refugees

Asylum is based upon the principle that people should be able to leave their own country when they are confronted with serious threats to their life and liberty, and that they should enjoy protection and security in the state which has admitted them to its territory. This protection entails that as far as possible, refugees should enjoy the same rights as accorded to citizens in the country of asylum. This section will examine the extent to which international instruments and legal rights contained therein have found practical expression in the national legislation and practice of Malawi with particular reference to the right to freedom of movement, the right to work and naturalization provided for under the 1951 Convention and other human rights instruments applicable to Malawi.

A. Encampment Policy and Freedom of Movement

The right to freedom of movement is contained in Article 26 of the 1951 Convention and Malawi attached a reservation to this. Broadly the article provides for the right of refugees to choose where to live in the asylum country and the

right to move freely within its territory.[135] Refugees shall still be subject to conditions that aliens generally have to comply with in the country.[136] Freedom of movement and the right to choose residence are also provided for in other internal human rights treaties like the UDHR[137], ICCPR[138] and the African Charter on Human and Peoples' Rights[139] to which as noted above, Malawi has not made any reservations. The rights in these instruments apply to 'every individual' meaning that it applies to everyone, including refugees within the contracting states territory without discrimination provided they abide by the law. The requirement to abide by the law applies to everyone and not just refugees. Article 27(2) of the African Charter places a restriction on this right to the extent that it can only be exercised with due regard to the rights of others, collective security, morality and common interests. Arguably therefore Malawi is obliged to extend the right to freedom of movement and residence to refugees.

Section 39(1) of the Malawi Constitution provides broadly that 'every person shall have the right to freedom of movement and residence within the borders of Malawi.'[140] The only limitation permitted is where a law of general application prescribes so it must be 'reasonable, recognized by international human rights standards and necessary in an open and democratic society'.[141] However, refugees are forced to live in camps and yet neither the Malawi Refugee Act nor regulations or constitution have clauses requiring refugees to live in Designated Areas. This is in contrast to the Tanzanian Refugee Act 1998, for instance, which makes residence in designated areas mandatory. Similarly the Refugee Control Act, 1970 of Zambia requires refugees to reside in areas designated by the

[135] Article 26 provides: "Each contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances."
[136] Ibid.
[137] Article 13(1) of the Universal Declaration of Human Rights, 1948
[138] Article 12(1) of the International Covenant on Civil and Political Rights, 1966
[139] Article 12(1) which provides that "Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law."
[140] Republic of Malawi (Constitution) Act, 1994
[141] Section 43 (2) of the Malawi Constitution

Commissioner for Refugees.[142] Article 22 of the Zambian Constitution further restricts freedom of movement of aliens by permitting laws to impose 'restrictions upon the freedom of movement of any person who is not a citizen of Zambia'. Similarly the South African law and practice makes no provision for refugee camp settlements. The only exception to this is in instances of mass influx. However, it has been noted by some commentators that although in principle the South African approach is desirable, 'it means that refugees are cast into the local economy to sink or swim, with precious few resources to spare for their basic and particular needs'.[143] Thus unlike the situation of camp based refugees where medical services and food are provided for, refugees in urban based situations have to fend for themselves. The xenophobic incidents that have befallen refugees and aliens in South Africa have been reported globally. It is suggested that because of the long history of political isolation, South Africans do not distinguish between refugees and economic migrants and all are seen as competing with locals for limited resources.[144] Refugee abuse is therefore easy within South Africa because refugees are spontaneously within communities making it difficult to monitor and protect asylum seekers.

Despite the lack of a legal framework, refugees are often apprehended if found outside the camps without necessary permits, which as noted above have no legal basis, and forced to return to the camps. The Malawi High Court has recently refused to declare this policy unconstitutional. The court held that that forcing refugees to live in camps "is a sound administrative measure to ensure certainty of their population, provision of basic necessities, communication of information, protection of their persons or property..."[145] The High Court reasoning finds support in the practice of other African states with encampment policies. All these countries state that the reasons for this practice is to facilitate

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[142] Section 12 of the Refugee (Control) Act, 1970

[143] L. De la Hunt, Refugee Law in South Africa: Making the Road of the Refugee Longer?, pp 34-39 in *A Reference Guide to Refugee Law and Issues in Southern Africa*, at p. 38

[144] Ibid.

[145] *Ex parte Frodovard Nsabimana and 83 Others v The State & The Department of Poverty and Disaster Management Affairs and The Commissioner for Disaster Preparedness, Relief and Rehabilitation*, Miscellaneous Civil Application No. 19 of 2006 (unreported)

catering and for the purpose of control. In Zambia the need to restrict free mobility of refugees has been justified by the need to control their activities in the interest of public safety.[146] According UNHCR, most countries attached reservations to Article 26 to safeguard the security of refugees and also for national security. Arguably therefore, the practice is a justifiable restriction as that envisaged in Article 27(2) of the African Charter where collective security considerations are accommodated. It should be noted that the implementation of an encampment policy in Malawi is different from other countries like Tanzania and Zambia. In both these countries refugees are kept in settlements according to their countries of origin to create a 'country of origin semblance'.[147] Refugees who are deemed to be former fighters are also kept in separate camps to ensure security of the other refugees. This settlement pattern has also been noted to make it easy to repatriate refugees. In the Malawian context, all refugees and asylum seekers regardless of background are kept in one camp. Arguably the small refugee population does not justify having several camps and it is administratively expedient to have one camp. However, with a population of over 11,000 the capacity of Dzaleka is already being questioned. Further, although there have been few reports; there have been incidences of conflict among the populace owing to cultural differences.

Further, the desirability of the practice of encampment in the situation of prolonged refugee situations is questionable. Being restricted to a specific living area has been noted to contribute to the incidence of irregular movement as refugees try to find other solutions to their problems in other countries. During 2008, police arrested hundreds of refugees[148] for leaving Dzaleka camp without the necessary permits, generally holding them for a week before returning them to the camp. Freedom of movement is fundamental to the full realisation of the

[146] G. Mulenga, The Legal and Factual Situation of Refugees and Asylum Seekers in Zambia, pp 17-33, in *A Reference Guide to Refugee Law and Issues in Southern Africa*, Legal Resources Foundation, Zambia, 2002 at p. 22

[147] Asylum and Refugee Policies in Southern Africa: *A Reference Guide to Refugee Law and Issues in Southern Africa*, p. 99

[148] It is important to note however that most of these refugees are Somalis and Ethiopians discussed under the section on irregular movers above.

human potential. In practice refugees are allowed to move freely in urban centres with the permission of the camp administrator.

B. The right to work

Articles 17-19 of the 1951 Convention regulate the right to work.[149] Under Article 17(1) 'The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. Article 17(2) obliges contracting states to exempt refugees from the restrictions imposed on the employment of aliens. Malawi attached a reservation to this article refusing to accord more favourable treatment to refugees in relation to other aliens. International human rights instruments that contain the right to work include the UDHR[150] and ICCPR[151]. The African Charter of Human Rights provides for the rights to equitable and satisfactory conditions of work.[152]It therefore does not afford the right to be employed. Rather it confers rights to people that are already employed. The rights conferred in the African Charter are only relevant in so far as the refugees are employed. In this regard, there is no extension of the rights under Article 17 of the Refugee Convention. Section 29 of the Malawi Constitution 29 gives every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi. Section 30(2) further obliges the state to take all necessary measures for

[149] Article 17 makes provisions with regards to refugee rights to wage-earning employment; article 18 (self-employment) provides: ' (1)the contracting states shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies; and article 19 (liberal professions) provides ' (1)each contracting state shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that state, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

[150] Article 23

[151] Articles 6 to 8. Here state parties do not only declare but also recognize each person's right to work.

[152] Article 15 of the Africa Charter provides "Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for work".

the realization of the right to development. These measures include equality of opportunity for all in their access to education and employment.

Despite this framework, the law (owing to the reservations) does not accept refugees for permanent resettlement and does not permit them to work or study. However, while no legal framework exists, the Government routinely allows refugees to seek both employment and educational opportunities. UNHCR, NGOs, and the Government collaborate to provide children in refugee camps with access to education and permit some refugees to set up business ventures. Refugees must obtain Temporary Employment Permits (TEPs) to work for wages legally, but are generally unable to do so because of the high cost of the permits and the restrictions on their residence.[153] Refugees are thus frequently employed in the informal sector and are subject to exploitation. Refugees themselves can run businesses legally, but this is generally only possible in Dzaleka camp. At the same time however, the Malawian government is resisting calls for refugee self-reliance and the local integration of some 300 refugees who have lived in the country for many years, citing legislation barring refugees from engaging in business or practicing their skills.[154] This is exacerbated by the fact that local authorities and press have accused refugees of illicit business deals, taking over Malawian markets, and threatening national security.[155] Authorities also closed more than 50 shops operated by refugees and forced their owners back to the camp.[156] Thus the reservations attached to the 1951 Refugee Convention remain an obstacle to long-term local integration.[157]

C. Naturalisation

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[153] The current cost of processing a Temporary Employment Permit is US$820

[154] See UNHCR overview of operation in Malawi http://www.unmalawi.org/agencies/unhcr.html

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[156] *World Refugee Survey 2009 - Malawi*, 17 June 2009, available at: http://www.unhcr.org/refworld/docid/4a40d2ac58.html [accessed 27 July 2009]

[157] United Nations High Commissioner for Refugees (UNHCR) Global Report 2004, Southern Africa: Regional Overview – Malawi, accessed http://www.unhcr.ch/cgibin/texis/vtx/template?page=publ&src=static/gr2004/gr2004toc.htm

Article 34 of the 1951 Convention provides:

> 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.'

This does not entail that refugees have the right to be naturalised. The article specifically states that the Contracting States merely undertake to facilitate the process of naturalisation. This usually applies in as situation where it is not possible for refugees to return to their home countries. The article envisages a situation where such refugees may apply for citizenship thereby obtaining rights as the citizens of that country. Malawi attached a reservation to this article. However this does not mean that a refugee cannot apply for naturalisation. In Malawi the issue of citizenship is dealt with under the Citizenship Act of 1966. A person can acquire citizenship either through birth or naturalisation.

Under section 4 and of the Citizenship Act a person is considered to be a citizen by birth if:

1. He or she was born in Malawi after the 5th day of July 1966 shall and one of his parents is a citizen of Malawi and is a person of the African race';
2. He was born outside of Malawi and his father or mother is a citizen of Malawi by birth and is a person of the African race.

This means that children whose parents are both refugees cannot acquire citizenship. A child will however obtain citizenship if one of his parents is a Malawian. The question is whether the children in the former category, would be termed stateless. Arguably even if they could claim citizenship of their parent's country of origin, they would in fact lack that country's protection as their parents fled from it. Malawi is not party to any of the Conventions dealing with statelessness.[158] However, section 18 of the Citizenship Act makes provision for the registration of stateless persons as citizens of Malawi. However, most refugee children would be unable to meet these requirements. To qualify a person must: 1)

[158] *Convention Relating to the Status of Stateless Persons*, 28 September 1954; *Convention on the Reduction of Statelessness*, 30 August 1961,

be aged twenty one years and above; 2) show that he or she has always been stateless; and that he was born in Malawi or than one of his parents was a Malawian citizen at the time of his birth; that he is ordinarily resident in Malawi and has been residing in the country for three years immediately preceding the application. Such children would also have difficulties obtaining citizenship as they would only be able to do so when they are of full age and after showing that they have resided in the country for seven years.[159] Further to this adults who wish to apply for naturalisation must in addition to the seven year residence requirement, show that he is financially solvent. Owing to the current limitations on movement and wage earning employment imposed on refugees many would not be able to meet this threshold. According to section 18 of the Citizenship Act, the decision of the Minister is final and cannot be subject to appeal or review in any court. It is therefore not easy to be integrated through naturalisation in Malawi and the reservation to Article 34 exacerbates the situation. As noted above, the current refugee situation indicates that refugees are likely to continue living in the country for a considerable period of time. For those whom resettlement to another country is not a viable option, the prospect of permanent residence in Malawi increases is appealing. Since 1994 there has been a second generation of refugees who have no real bond to their countries of origin and would find it easier to integrate in Malawi but are ineligible for citizenship. The fact that some of these refugees are secondary movers from other countries of asylum makes it more likely that they have not been in their own country of origin for an even longer period of time.

V. Other aspects of refugee protection: The Role of NGOs

The Government bears the primary responsibility for refugee protection. In Malawi, the primary roles of the government are to determine refugee status, enforce refugee law and to administer law and order in the refugee camps. The

[159] Section 21 of the Citizenship Act; Note that the same naturalization procedures do not apply to Commonwealth citizens. As Malawi's current caseload is from the Great Lakes and Horn of Africa (non-commonwealth) the provisions therein do not apply.

role of the UNHCR is to discharge its mandate under its Statue by mobilising resources for refugee protection and overseeing refugee operations. UNHCR also has operating and implementing partners assisting its operations. Under their own mandates, operating partners like the WFP mobilise their own resources for refugee assistance. Implementing partners are those organisations or institutions which, under agreement with, and with funding from the UNHCR, run specific assignments such as camp management and community services, environment etc. Current implementing agencies include Malawi Red Cross and the Jesuit Refugee Service. Some of these depend wholly on UNHCR funding and others raise their own funds to complement UNHCR funded activities. This system of refugee protection is problematic. The implementing agencies are predominantly of foreign origin. The concentration of refugee relief work with foreign agencies is a disincentive to the establishment of local relief capacity. This is compounded by the low capacity of the government in the operations. The principal organ dealing with refugee matters is the Office of the Commissioner for Refugees located in the Ministry of Home Affairs. The operation expenses of the Commissioner's Office are met primarily by UNHCR. In the absence of UNHCR funding, the Commissioner's Office has insufficient resources to properly fulfill its mandate. This has adverse effects in the way that refugee policy is formulated and implemented as the result is that refugee issues are not treated as a priority. The efficiency of current policies and systems like the RSD Unit for instance is wholly dependent on continued UNHCR funding and advocacy.

VI. Conclusion

Since 1997, the Malawi government and UNHCR have been in the process of reviewing the Refugee Act, with the aim of eliminating some reservations made to the Act, particularly, on some aspects of local integration. The Refugee Act needs to amended to incorporate the gaps identified above the impact on its effective application. The process has been indefensibly slow. The review is necessary to ensure that the legal framework is in conformity with practice and policy. This paper has attempted to provide some recommendations on how this

can be achieved. Current practice shows that, despite the reluctance, authorities have become increasingly receptive to issues pertaining to local integration. This is evidenced by the flexible attitude on access to public schools by refugees, work opportunities for qualified refugees and small-scale trading outside the camps. The capacity of the Dzaleka camp has raised several concerns with regard to the total number of families now being hosted. This signals that more and more refugees will need self-sufficient opportunities, necessitating residence outside the camp. Malawi like other African countries has two options: continue with the law and order approach and ineffective policing which contributes to high levels of xenophobia. Alternatively, it could adopt a more sensitive human rights approach which takes cognisance of the creative ways in which migrants contribute to the local economy. The reservations filed by Malawi along with its accession to the UN Refugee Convention allow the Malawi government to impose restrictions on human rights of refugees. However, the country is signatory to other human rights instruments that make these reservations inconsistent with those other obligations and the country's own constitution. As mentioned above, Malawi is party to the Universal Declaration of Human Rights (UDHR) of 1948 and the International Convention on Civil and Political Rights of 1966 to which it has filed no reservations. The right to freedom from discrimination is a guiding principle in both these instruments and the Malawi Constitution.[160] Further under Article 3 of the UN Refugee Convention parties are obliged to apply the Convention without any discrimination on grounds of "race, religion, or country of nationality". The adoption of national refugee legislation that is based on international standards is key to strengthening asylum, making protection more effective and providing a basis for seeking solutions to the plight of refugees. Incorporating international law into national legislation is particularly important in areas on which the Refugee Convention is silent.

[160] Article 26 of the ICCPR; Articles 1 and 2 of UDHR; Section 20 of the Republic of Malawi (Constitution) Act, 1994,

BIBLIOGRAPHY

Articles and Chapters

Ager A., *A Case Study of Refugee Women in Malawi*, UNHCR Background Paper, 1991

Callamard A., "Refugees and local hosts: a study of the trading interactions between Mozambican refugees and Malawian villagers in the district of Mwanza," 7 *Journal of Refugee Studies 1*, 39, 1994,

Callamard A., Malawian Refugee Policy, International Politics and the One-Party Regime, *Journal of International Affairs 47*, 525, 1994

Crisp J.,'No solutions in sight: the problem of protracted refugee situations in Africa', *New Issues in Refugee Research*, No. 75, UNHCR, Geneva, January, 2003

Crisp J., Africa's refugees: patterns, problems and policy challenges, *New Issues in Refugee Research*, No. 28, UNHCR, Geneva, August, 2000

De la Hunt L., Refugee Law in South Africa: Making the Road of the Refugee Longer?, pp 34-39 in *A Reference Guide to Refugee Law and Issues in Southern Africa*

De la Hunt, L. & Kerfoot, W., Due Process in Asylum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act, in Advancing Refugee Protection in South Africa, Handmaker, J., *et al* (eds.), Berghan, New York: Oxford, 2008

Geddo, B., Durable Solutions to the Refugee Problem: UNHCR's Regional Strategy for Southern Africa, in *Perspectives on Refugee Protection in South Africa*, Handmaker .J., et al (eds), Lawyers for Human Rights, 2001, pp 65 – 72,

Goodwin-Gill G.S., *The Refugee in International Law*, 3rd ed., 2007, Oxford: Clarendon Press

Hathaway J.C., *The Rights of Refugees under International Law*, (2005), Cambridge

Jackson J., *The Refugee Concept in Group Situations*, Martinus Nijhoff Publishers, The ague/London/Boston, 1999

Kamanga, K., The Tanzania Refugees Act of 1998: Some Legal and Policy Implications, 18 *Journal of Refugee Studies* 100, 2005

Kingsley-Nyinah M., Reflections on the Institution of Asylum, Refugee Criteria, and Irregular Movements in Southern Africa, 7 *International Journal of Refugee Law* 2, 1996

Koser K., Information and Repatriation: The Case of Mozambican Refugees in Malawi, 10 *Journal of Refugee Studies* 1, 1997

Legal Resources Foundation, Asylum and Refugee Policies in Southern Africa, *A Reference Guide to Refugee Law and Issues in Southern Africa,* Legal Resources Foundation, Zambia, 2002

Maluwa T., The Domestic Implementation of International Refugee Law: A Brief Note on the Malawi Refugee Act, 1989, 3 *International Journal of Refugee Law*, 1991 at 505

Maluwa T., *International Law in Post-Colonial Africa*, Kluwer Law International, 1999

Masur R. , The Political Economy of Refugee Creation in Southern Africa: Micro and Macro Issues in Sociological Perspective*, 2 Journal of Refugee Studies 442,* 1989

Mendel, T.D., Refugee Law and Practice in Tanzania, 9 *International Journal of Refugee Law* 1, 35 (1997)
Morna C., Malawi: Shouldering the Refugee Burden, 33 *Africa Report* 51 (1988)

Mulenga G., The Legal and Factual Situation of Refugees and Asylum Seekers in Zambia, pp 17-33, in *A Reference Guide to Refugee Law and Issues in Southern Africa*, Legal Resources Foundation, Zambia, 2002

Okoth-Obbo G., 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa 20 *Refugee Survey Quarterly* 1, 119, 2001

Rutinwa B., Asylum and Refugee Policies in Southern Africa: A Historical Perspective, in *A Reference Guide to Refugee Law and Issues in Southern Africa*, Refugee and Asylum Seeker Project Report, 2002

Rutinwa B., The end of asylum? The changing nature of refugee policies in Africa, *New Issues in Refugee Research*, No. 5, UNHCR, Geneva 1999

Tuepker A., On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice in 15 *Journal of Refugee Studies* 4, 2002

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Re-edited version) Geneva, 1992,

Communiqué from the 1998 SADC Summit, 14th September, 1998 available at http://www.sadc.int/archives/read/news/235 [accessed 14th April, 2009]

ReliefWeb, Malawi*: Xenophobia on the rise*, 10 November, 2000, available at http://www.reliefweb.int/w/rwb.nsf/9ca65951ee22658ec125663300408599/307b10c61d0e724385256993007469fb?OpenDocument [accessed 1 July 2009]

UNHCR, *Rwandan refugees in Malawi encouraged to return after 'go-and-see' visit*, 28 December 2005 available at http://www.unhcr.org/43b263dd4.html [accessed 5 March, 2005]

UN News Service, *UN lauds Tanzania's decision to give refugees more time to return home*, 30 June 2009, available at: http://www.unhcr.org/refworld/docid/4a572bb51e.html [accessed 5 July 2009]

IPS, "Foreign Traders Are Taking Our Jobs", 19 December, 2008 available at www.ipsnews.net/news.asp?idnews=40534 [accessed 24th April, 2009]
Engendering the Malawi Population Census 2008, National Statistics Office, Malawi, 2009, available at http://unstats.un.org/unsd/censuskb/article.aspx?id=10553 [accessed 9 April 2009]
BURUNDI: CNDD-FDD angry over Ndadaye sentences, IRIN Update 673 for 18 May [19990518] available at http://www.africa.upenn.edu/Hornet/irin673.html [accessed 10th May, 2009]
Redden J., Fears that Horn of Africa migrants abuse asylum system to reach South Africa, Reuters, 15 Dec 2006 available at http://www.alertnet.org/thenews/newsdesk/UNHCR/2dec359b0a75089496a9fa9469981bb7.htm [accessed 15th June, 2009]

Legislation

The Refugee Act 1989, [Cap. 15:04] of the Laws of Malawi
Immigration Act 1964 [Cap.15:03] of the Laws of Malawi
Republic of Malawi (Constitution) Act, 1994
The Citizenship Act
The National Registration Bill, 2005
Refugees (recognition and Control) Act of 1968 of Botswana
The Refugee (Control) Act, 1970 of Zambia
The Universal Declaration of Human Rights, 1948
The International Covenant on Civil and Political Rights, 1966

Declarations and Reservations made by States parties to the 1951 United Nations Convention and the 1967 Protocol Relating to the Status of Refugees (Country by Country) UNHCR, Geneva (1988)

UNHCR, The State of the World's Refugees, 1993,
UNHCR, The State of the World's Refugees, 1996
UNHCR Global Report 2007 - United Republic of Tanzania, 1 June 2008

UNHCR overview of operation in Malawi
http://www.unmalawi.org/agencies/unhcr.html
available at: http://www.unhcr.org/refworld/docid/4a40d2ac58.html [accessed 27 July 2009]
United Nations High Commissioner for Refugees (UNHCR) Global Report 2004, Southern Africa: Regional Overview – Malawi, accessed http://www.unhcr.ch/cgibin/texis/vtx/template?page=publ&src=static/gr2004/gr2004toc.htm
United States Committee for Refugees, *World Refugee Survey*, 1994
United States Committee for Refugees, *World Refugee Survey*, 2009
United States Committee for Refugees *World Refugee Survey 2009 - Malawi*, 17 June 2009,

United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 1999 - Malawi* , 25 February 2000, available at: http://www.unhcr.org/refworld/docid/3ae6aa6f14.html [accessed 5 August 2009]
United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 1997 - Malawi*, 30 January 1998, available at: http://www.unhcr.org/refworld/docid/3ae6aa3118.html [accessed 5 August 2009]

The Convention Relating to the Status of Refugees, 28 July 1951
The Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969
United Nations High Commissioner for Refugees at the Forty-sixth Session of the Executive Committee of the High Commissioner's Programme, 16 Oct. 1995: UN Doc. A/AC.96/806, Annex, 31.
UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Zambia*, December 2007.

The Protocol Relating to the Status of Refugees,1967

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment GA Resolution 39/46 of 10 December 1984, entry into force 26 June 1987

Cannas-Segovia v. INS, 902 F.2d 717, 729 (9th Cir. 1990).

Kambiningi Khazi Jones & 14 Others vs. The Refugee Committee (The Attorney General) Miscellaneous Civil Cause No. 313 of 2005 (unreported)
Ex parte Frodovard Nsabimana and 83 Others v The State & The Department of Poverty and Disaster Management Affairs and The Commissioner for Disaster Preparedness, Relief and Rehabilitation, Miscellaneous Civil Application No. 19 of 2006 (unreported)

UNHCR Executive Committee, *Conclusion No. 6, (XXVIII)* 1977
UNHCR Executive Committee. Conclusion No. 58(XL), 1989, *Problem of Refugees and Asylum Seekers who move in an irregular manner from a country in which they had already found protection*,
UNHCR Executive Committee, Conclusion No. 30 (XXXIV), The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or for Asylum, *Conclusions on the International Protection of Refugees*,
UNHCR Executive Committee *No. 96 (LIV), 2003 Conclusion on the Return of Persons Found Not to be in Need of International Protection*
NHCR Executive Committee, *Conclusion No. 79 (XLVII)* 1996
UNHCR Executive Committee *Conclusion No. 81 (XLVIII)* 1997;
UNGA Resolution 52/103 of 9 February 1998,