

**POLITICAL PARTICIPATION OF REFUGEES AS A MEANS TO REALISE
THE RIGHT TO REPATRIATION: THE SEARCH FOR A DURABLE
SOLUTION TO THE REFUGEE PROBLEM IN AFRICA**

**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
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30 OCTOBER 2006

DECLARATION

I, **Jean-Baptiste Baribonekeza**, hereby declare that this dissertation is my original work and that it has never been previously submitted to any other institution. I also declare that any secondary information used therein has been duly acknowledged.

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DEDICATION

To my parents for your dedication to the dignity of our family

To my brothers and sisters

Especially my sister Evangeline Ndabahariye and my brother Bede Ngaruko

To all those whose refugee status prevents from enjoying their political freedoms

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May God, Who made all this possible, extend His blessings.

LIST OF ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Report
AU	African Union
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NGO	Non Governmental Organisation
OAU	Organisation of the African Unity
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGMENTS.....	iii
LIST OF ACRONYMS AND ABBREVIATIONS	iv
TABLE OF CONTENTS	v
CHAPTER 1: INTRODUCTION	1
1.1 Background and rationale to the study	1
1.2 Research questions	3
1.3 Literature review	3
1.4 Methodology	4
1.5 Scope of the study	5
1.6 Overview of chapters	5
CHAPTER 2: REFUGEES IN AFRICA: DEFINITION, STATUS AND INTERNATIONAL PROTECTION	6
2.1 Definition of a refugee from an African perspective	6
2.2 Refugee status	8
2.2.1 Refugee status determination	8
2.2.1.1 General	8
2.2.1.2 Practical approaches to refugee status determination	9
2.2.2 The temporary nature of the refugee status	10
2.3 International protection	11
2.3.1 The meaning of protection	12
2.3.2 Protection mechanisms	12
2.3.2.1 States' responsibility: the principle of burden sharing	13
2.3.2.2 The role of UNHCR	15
2.3.2.3 AU protection mechanisms	16
2.4 Summary conclusion	17

CHAPTER 3: CRITICAL ANALYSIS OF THE TRADITIONAL DURABLE SOLUTIONS TO THE REFUGEE PROBLEM	18
3.1 General: A changing context	18
3.2 Local integration	21
3.3 Resettlement	23
3.4 Voluntary repatriation	25
3.5 New approaches: preventive and solution-oriented protection	26
3.6 Summary conclusion	26
CHAPTER 4: USING POLITICAL PARTICIPATION TO REALISE THE RIGHT TO REPATRIATION	28
4.1 The legal basis for the right to repatriation	28
4.1.1 Readmittance of nationals	29
4.1.2 Admittance of nationals coming for the first time	31
4.1.3 Readmittance of non-nationals	31
4.1.4 The question of long-term refugees: impact of time on the bond of nationality	32
4.2 Significance of political participation of refugees for the realisation of the right to repatriation	33
4.3 Obstacles to political participation of refugees	35
4.3.1 The location of refugees at ‘a reasonable distance’	36
4.3.2 The confinement into camps	37
4.3.3 The prohibition of subversive activities	38
4.4 Modalities for political participation of refugees: A proposal	39
4.4.1 Ensuring freedom of expression	39
4.4.2 Strengthening, and elaborating on, associational rights	40
4.4.3 Lobbying and diplomatic action: the role of the international community ..	41
4.4.4 Liaising with the authorities and communities of their countries of origin ...	42
4.4.5 Voting rights	43
4.5 Summary conclusion	44
CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS	45
BIBLIOGRAPHY	48

CHAPTER 1: INTRODUCTION

1.1 Background and rationale to the study

At the start of the year 2006, the UNHCR estimated the global refugee population at 8, 4 million, of which more than 2, 5 million were in Africa.¹ The refugee situation is doubly problematic. On the one hand, refugees live most of the time in precarious, vulnerable and uncertain conditions, both materially and legally. Especially, refugees in camps live in a critical humanitarian situation. Also, the refugee status constitutes only a transitional and partial title, which prevents refugees from the full enjoyment of certain political rights, in particular, their freedom of movement and residence and their right to political participation.

On the other hand, refugees constitute a financial burden for the international community. Resources that would have been invested in development initiatives are diverted to the assistance of refugees. Refugee camps also contribute to the degradation of the environment. What is more, refugees sometimes engage in criminal activities or activities that otherwise compromise the security of states or of other people. Lastly, massive refugee inflows in a country can give rise to social problems such as xenophobia, which finds some explanation in the competition between nationals and non-nationals over scarce resources.

The conditions of refugees, both in their legal status and material living conditions necessitate critical examination, in order to find the most suitable responses to those issues. Must solutions be only based on a humanitarian approach, or do they have to be formulated in terms of clear legal entitlements, especially when it comes to the need to ensure their repatriation as a durable solution to flight?

Thus far, the approaches adopted do not yield the expected results, since refugees continue to constitute and experience the same challenges. Thought must therefore be given to a lasting response to the refugee problem.

¹ UNHCR *2005 Global Refugee Trends: Statistical overview of population of refugees, asylum-seekers, internally displaced persons, stateless persons, and other persons of concern to UNHCR* (2006) 3; available at: <http://www.unhcr.org/statistics/STATISTICS/4486ceb12.pdf> (accessed 26 October 2006). It could be noted that UNHCR global refugee statistics do not include an estimated 4,3 Palestinian refugees under the protection of UNRWA. Likewise, the figures for Africa exclude refugees from North Africa, who are under the responsibility of the UNHCR Bureau for Central Asia, South West Asia, North Africa and Middle East (CASWANAME).

For a long time, refugee protection has constituted one of the major concerns of the international community. The refugee issue led to the creation, in 1950, of a United Nations High Commissioner for Refugees (UNHCR), and the adoption, in 1951, of a Convention Relating to the Status of Refugees ('UN Refugee Convention'). The 1951 Convention was to be complemented later by a Protocol Relating to the Status of Refugees (1967), the purpose of which was, as will be seen, to remove the temporal and geographical limitations put by the said Convention on the definition of a 'refugee'. All these efforts were aimed at improving the international regime of refugee protection.

Regional arrangements have also been made in order to deal with the refugee problem. For example, the adoption of the Convention Governing the Specific Aspects of Refugee Problems in Africa ('the OAU Refugee Convention'), in 1969, was motivated by the desire to find 'ways and means of alleviating their misery and suffering as well as providing them with a better life and future'.² Thirty-seven years on, the issues relating to refugees remain unresolved and a study of those issues is still relevant. Africa still has among the largest refugee populations.³ This is due in part to the numerous conflicts that the continent has been experiencing since as early as the years of struggle for independence in the 1950s and the 1960s, most of which have never been properly settled. Armed conflicts in many African countries provoked massive flows of populations out of their countries. In certain cases, the lack of suitable repatriation policy or favourable conditions for return to the country of origin contributed to exacerbate anger and frustration among refugees.

As will be seen, the OAU Refugee Convention contains many provisions which, if not properly construed, might lead to a great curtailment of refugees' political rights. Yet the right to participate in the government of one's country is guaranteed by a number of international human rights instruments.⁴ In any case, when people are forced to leave their country of origin, it is simply natural for them to seek the means whereby they could go back to their country of origin. For example, writing on the problem of forced displacement in the Great Lakes Region, Rutinwa observes that 'the invasion by refugees of their home countries is sometimes in pursuit of legitimate rights such as securing the right to return to one's own state, which are wrongly denied by the government of the day'.⁵ Besides, not only voluntary repatriation is generally regarded as the most desirable solution to the refugee problem, but also it has been observed that a successful

² Preamble of the OAU Refugee Convention.

³ UNHCR (n 1 above).

⁴ See, for example, article 25 of the ICCPR and article 13 of the African Charter on Human and Peoples' Rights.

⁵ B Rutinwa 'Forced displacement and refugee rights in the Great Lakes Region' (1998) 1 *African Journal of International Affairs* 34.

return is dependent upon the political conditions in the country of origin.⁶ It will be argued that refugees should be allowed and assisted to play a proactive role in order to create a political environment propitious to their return.

1.2 Research questions

This study seeks to discuss the following questions. Do refugees have the right to repatriation or right to return to their home country? If so, can their participation in the political life of their country of origin serve as a means to realise that right? How best can political participation of refugees in the political life of their country of origin be ensured, keeping in mind the security concerns of both refugees themselves and states?

1.3 Literature review

Many studies have been conducted on the refugee problem. The right to seek and enjoy asylum, the concept of refugee, the refugee status and the procedure thereof, the principle of *non-refoulement*, international protection, and other refugee-related topics have been properly discussed by a number of scholars. As far as Africa is concerned, however, the legal literature at hand does not contain an updated comprehensive study of the plight of refugees and the responses thereto. Aiboni's *Protection of refugees in Africa*, for example, dates back to 1978, at a moment where the many refugees on the continent were those resulting from the struggle against colonialism and apartheid. It points out the causes of forced displacement at that time, and describes the role played by the UNHCR, the OAU, national authorities as well as NGOs in the protection of refugees. It highlights the contributions of the OAU Refugee Convention towards a better protection of refugees. Today, however, the issues have evolved; the causes of forced displacement are no longer the same; the roles of different actors have changed; other solutions must be sought.

As to the issue of refugee political activities, authors such as Grahl-Madsen discuss them in relation to the responsibility of the host country.⁷ In his analysis, Grahl-Madsen discusses the extent to which refugee political activities, including those directed to the country of origin, are to be allowed by the host state from an international law perspective. This paper focuses on the participation of refugees in political activities in their country of origin.

⁶ JC Hathaway & RA Neve 'Making international refugee law relevant again: A proposal for collectivised and solution-oriented protection' (1997) 10 *Harvard Human Rights Journal* 131

⁷ A Grahl-Madsen 'Political Rights and Freedoms of Refugees' in G Melander & P Nobel (eds) *African Refugees and the law* (1978) 92.

In 2005, Hathaway published *The rights of refugees under international law*, a thoroughly commented catalogue of the rights of refugees as set out in the UN Refugee Convention, linking them to other international human rights standards, as well as refugee law jurisprudence. Edwards discusses the right 'to enjoy asylum' proclaimed in Article 14 of the Universal Declaration of Human Rights (UDHR), with specific regard to the refugee's right to family life and right to work in the country of asylum.⁸ The underlying idea of this paper is that asylum can hardly be enjoyable, hence the need to seek durable solutions aimed at putting an end to the refugee status.

Rutinwa looks at the current trends in country refugee policies and concludes that 'the institution of asylum is on the decline in Africa'. Then he suggests that it be reinvigorated.⁹ Similarly, Hathaway and Neve look at the effectiveness of international refugee law as compromise between the right of states to decide on who to admit on their territories and who not, on the one hand, and the need to protect refugees, on the other hand. They reach the conclusion that 'the international refugee protection system serves fewer and fewer people, less and less well, as time goes on'.¹⁰ Hathaway and Neve then propose 'a rights-regarding' and 'solution-oriented temporary protection' designed at ultimately leading to repatriation as 'a reasonable and principled compromise between the needs of refugees and the migration control objectives of host governments'.¹¹ This paper argues for the right to return from the perspective of the refugee and the responsibility of the state of origin.

The right to return, as a component of the right to freedom of movement, has been discussed by authors such as Goodwin-Gill, Nowak and Adelman, who contemplate it in relation to the link of nationality between an individual and a state. Building on the same findings, this paper goes ahead putting forward proposals for the realisation of that right through political participation.

1.4 Methodology

The study is mainly a library-based research. However, in order to corroborate the literature found in library collections and on the internet, hands-on information has been sought by means of interviews with different stakeholders, including 20 refugees from across the continent and living in Cape Town (South Africa), a Legal Adviser at the South African Department of Home Affairs, a

⁸ A Edwards "Human Rights, Refugees and the Right 'To Enjoy Asylum'" (2005) 17 (2) *International Journal of Refugee Law* (2005) 302.

⁹ Rutinwa 'The end of asylum? The changing refugee policies in Africa' (1999) UNHCR Working Paper No 5 *New Issues in Refugee Research* 21.

¹⁰ Hathaway & Neve (n 6 above) 137.

¹¹ As above 140.

senior officer at the UNHCR Regional Office for Southern Africa, and officers of NGOs working on refugee issues in South Africa.

1.5 Scope of the study

The study intends to look at the refugee issue at the continental level. However, most examples are drawn from the main refugee sending regions, such as the Great Lakes Region, the horn of Africa and Sudan. The study is also limited to recognised refugees, as opposed to asylum seekers and other 'persons of concern'. The focus on refugees is justified not only by the fact that other categories of persons of concern are hardly definable and identifiable, but also because the uncertainty of their legal status in international law would be likely to lead to unbalanced conclusions.

1.6 Overview of chapters

The first chapter is a general presentation of the study, its background, the research questions, the literature review, the methodology and the limitations to the study. The second chapter deals with the problems related to the refugee status and international protection. It is a presentation of the big picture of international refugee protection, with a focus on Africa. From an African point of view, it looks at the definition of the term refugee, the refugee status and the available protection mechanisms. The third chapter discusses the traditional durable solutions to the refugee problem, as well as the new approaches in refugee protection. It discusses the availability, effectiveness and shortcomings of traditional solutions, and highlights repatriation as the most suitable solution to the refugee problem. The fourth chapter is a reflection on the right to repatriation and the extent to which political participation of refugees can be used to realise that right. This chapter examines the legal foundation of the right to return, the significance of political participation to that right, highlights the major obstacles to political participation of refugees, and puts forward ideas that might serve as guidelines for enhanced participation of refugees in the political life of their country of origin. The last chapter is a summary presentation of the conclusions and recommendations drawn from this study.

CHAPTER 2: REFUGEES IN AFRICA: DEFINITION, STATUS AND INTERNATIONAL PROTECTION

In order to set the scene for the discussions in Chapter 3 and Chapter 4, this chapter aims at providing an overview of the plight of refugees in Africa, their impact on receiving states and the existing protection mechanisms. But, to begin with, it is worth defining the category of persons we are dealing with, and looking at the process that leads to a person being recognised as a refugee, thereby qualifying for international protection.

2.1 Definition of a refugee from an African perspective

The first attempt to give the term 'refugee' a general definition was made in the Statute of the UNHCR and the 1951 UN Refugee Convention.¹² According to the 1951 UN Refugee Convention and its 1967 Protocol, a refugee is

any person who... 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 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... is unable or, owing to such fear, unwilling to return to it.¹³

The UN Refugee Convention was adopted in the aftermath of World War II and was clearly designed to deal with European refugees.¹⁴ It also appeared from that definition that the drafters of the UN Refugee Convention considered the refugee issue as a temporary one.¹⁵ There was no possibility to add new categories of refugees within the Convention's scope.¹⁶ Yet, as early as the late 1950s, the struggle for independence in Africa and elsewhere revealed the limits of that definition. Accordingly, a Protocol was adopted in 1967, aimed at removing the temporal and geographical limitations to the definition of a refugee.¹⁷ The 1951 UN Refugee Convention and its 1967 Protocol are the main international instruments benefiting refugees, and their definition has

¹² SA Aiboni *Protection of refugees in Africa* (1978) 30.

¹³ Article 1(A)(2) of the 1951 UN Refugee Convention read together with Article 1(2)& (3) of the 1967 Protocol Relating to the Status of Refugees.

¹⁴ The reading of Article 1(B)(1) of the Convention shows that it was primarily aimed at dealing with persons whose situation was a result of 'events occurring in Europe before 1 January 1951'; see also R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 187.

¹⁵ P Kourula *Broadening the edges: Refugee definition and international protection revisited* (1997) 60.

¹⁶ As above 62.

¹⁷ Aiboni (n 12 above) 5.

been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognised refugees.¹⁸

However, as Aiboni observes, the refugee definition in the UN Refugee Convention 'is not universal and creates certain problems when it comes to its application to new refugees from new areas and notably in the Third World'.¹⁹ Thus African countries decided to expand the definition to those people compelled to flee on account of 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [their] country of origin or nationality'.²⁰ It has been written that this expansion was motivated by the need to protect freedom fighters and people fleeing from areas under colonial domination.²¹

The breadth of the definition of the term refugee is one of the main features of the OAU Refugee Convention. In that way, a much larger category of persons are offered protection under the OAU Refugee Convention than under the UN Refugee Convention.²² As Aiboni puts it:

[w]ith the inclusion of the additional category of refugee in the OAU [Refugee] Convention, all persons who are compelled to flee across national borders to escape violence of any kind or even foreign domination generally, and whether or not in fear of persecution, will be entitled to the status of refugee in States Parties to the OAU [Refugee] Convention.²³

A generous interpretation of that provision has led to the extension of protection to categories of persons, such as 'individuals and large numbers of people fleeing public disorder', including for example those fleeing natural disasters, although these categories were not originally intended to be covered.²⁴

¹⁸ GS Goodwin-Gill *The refugee in international law* 2nd edition (1996) 20.

¹⁹ Aiboni (n 12 above) 30.

²⁰ Article 1(2) of the OAU Refugee Convention.

²¹ Murray (n 14 above) 189.

²² Aiboni (n 12 above) 35.

²³ As above.

²⁴ Murray (n 14 above) 188.

2.2 Refugee status

2.2.1 Refugee status determination

2.2.1.1 General

The determination of the refugee status is the application of the definition of a refugee to concrete situations. It is a very important stage in the protection of refugees, since persons whose refugee status claims fail will not be accorded protection from UNHCR or the receiving government.²⁵ The 1951 UN Refugee Convention does not provide any guidance on refugee status determination procedures, and it has been inferred that the establishment of such procedures is the responsibility of states.²⁶ The OAU Refugee Convention also leaves the procedure for refugee status determination to the discretion of states.²⁷

However, while it is for States Parties to the Refugee Convention and the Protocol to determine refugee status under those instruments, it is for UNHCR to determine refugee status under its Statute.²⁸ A refugee within the competence of UNHCR according to its Statute, or according to specific General Assembly resolutions is generally referred to as 'mandate refugee', while the one within the meaning of the UN Refugee Convention is a 'Convention refugee'.²⁹

Ideally, asylum seekers should be afforded all the guarantees for a fair and speedy determination of their status. The UNHCR Executive Committee ('ExCom') recommends that refugee status determination procedures should conform to a number of basic requirements, including respect for the principle of *non-refoulement*, providing applicants with guidance and the assistance of a competent interpreter if applicable, the opportunity to contact a representative of UNHCR and to appeal against a decision rejecting an application of refugee status, including recourse to judicial review.³⁰

²⁵ G Wachira 'Refugee status determination in Kenya and Egypt', LLM dissertation 2003 10.

²⁶ Kourula (n 15 above) 85.

²⁷ Article I(6) of the OAU Refugee Convention provides that 'the Contracting State of asylum shall determine whether an applicant is a refugee'.

²⁸ Goodwin-Gill (n 18 above) 32.

²⁹ As above 33.

³⁰ ExCom Conclusion No 8(XXVIII) Determination of Refugee Status (1977); available at: <<http://www.unhcr.org/publ/PUBL/41b041534.pdf>> (accessed 26 October 2006).

However, those safeguards are not always available in practice. For instance, a study conducted by Human Rights Watch in 2005 at the Johannesburg Refugee Reception Office (South Africa), revealed that there were no officially recognised interpreters.³¹ Refugees resort therefore to informal networks of interpreters, who are unfortunately reported to serve as intermediaries facilitating corruption.³² Likewise, in countries where there is no domestic mechanism for refugee status determination, that task is conferred on UNHCR, a situation which makes the latter judge of refugee status and the protector/provider at every stage of the process.³³ That may amount to a denial of the opportunity to appeal, since UNHCR is immune from domestic jurisdiction.³⁴

2.2.1.2 Practical approaches to refugee status determination

One of the methods of examining the applicability of the refugee definition is to split it into specific components and to look at each of them thoroughly.³⁵ The procedure consists mainly in applying the definition of a 'refugee' to individual claimants, on a case-by-case basis.³⁶ That method is called 'sliver approach' due to its essentially fragmentary nature.³⁷ The elements of the UN refugee definition are therefore examined one by one.³⁸

However, the rapid arrival of large numbers of asylum-seekers may overwhelm the state's capacity to administer applications on an individual basis.³⁹ In those cases, it might be challenging to strike a balance between the right of the state to regulate and manage admission of foreigners into its territory, on the one hand, and respect for principles of refugee law, on the other.⁴⁰

³¹ Human Rights Watch *Living on the Margins: Inadequate protection for refugees and asylum seekers in Johannesburg* (2005) 20.

³² As above.

³³ That is the case, for example, in Egypt and Kenya; see Wachira (n 25 above) 38.

³⁴ Wachira (as above).

³⁵ Kourula (n 15 above) 87.

³⁶ As above 88.

³⁷ As above 87.

³⁸ Questions that arise concern, for example, what is persecution; when fear is well founded; the reason(s) why the person is persecuted, which may be race, religion, nationality, membership of a particular social group or political opinion; and so forth.

³⁹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees; Reedited version (1992); para. 44 at 13; HCR/IP/4/Eng/REV.1; available at:

<<http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>> (accessed 26 October 2006).

⁴⁰ Kourula (n 15 above) 102.

One of the main mechanisms that have been developed to overcome that challenge is group determination of refugee status on a *prima facie* basis.⁴¹ Group determination on a *prima facie* basis means in essence a procedure whereby the competent authority “examines only the ‘objective’ situation in countries of origin, without really examining objective and subjective elements of an individual applicant’s story”.⁴² According to Rutinwa, its purpose is ‘to ensure admission to safety, protection from *refoulement* and basic humanitarian treatment to those patently in need of it’.⁴³

The latter approach has been criticised because, for example, it might be difficult to distinguish between bona fide refugees and those who, hiding among the refugees, do not deserve international protection.⁴⁴ This might have serious consequences in practice, for example with donors hesitating in providing assistance to a refugee population containing criminal elements, or governments rejecting refugees en masse for fear of the consequences of hosting criminal elements among refugees.⁴⁵ The *prima facie* approach, which is mainly based on the refugee definition in the OAU Refugee Convention has also been said to be likely to lead to discrimination, with countries granting refugee status to those asylum seekers coming from ‘objectively’ sending countries, and denying the same status to individual refugees coming from countries that are deemed to be safe.⁴⁶

2.2.2 The temporary nature of the refugee status

There is no international duty upon states permanently to admit refugees.⁴⁷ States have only the obligation ‘to host refugees for so long as return presents a risk of persecution, and to honour human rights during the risk-defined period of asylum’.⁴⁸ In other words, the refugee status is supposed to last only until the situation that led to flight has changed. If a refugee left his or her country because of civil strife, any substantive improvement in the security situation of that country runs against his or her status to be withdrawn. As Hathaway observes, the refugee protection

⁴¹ UNHCR (n 39 above), para. 44 at 13.

⁴² I van Beek ‘Prima facie asylum determination in South Africa: A description of policy and practice’ in Lawyers for Human Rights *Perspectives on refugee protection in South Africa* (2001) 28.

⁴³ Rutinwa ‘Prima facie status and refugee protection’ (2002) 69 *New Issues in Refugee research: UNHCR Working Papers* 1Rutinwa 1.

⁴⁴ These might be, for example, armed elements among a group of refugees. See Rutinwa (n 43 above) 11.

⁴⁵ As above 12.

⁴⁶ van Beek (n 42 above) 28.

⁴⁷ Hathaway ‘Temporary protection of refugees: Threat or Solution?’ in Lawyers for Human Rights *Perspectives on refugee protection in South Africa* (2001) 42.

⁴⁸ As above.

system is 'a palliative regime that protects desperate people until and unless a fundamental change of circumstances makes it safe for them to go home'.⁴⁹

In principle, refugee protection is not about immigration. It is intended to be a situation-specific human rights remedy: when the violence or other human rights abuse that induced refugee flight comes to an end, so does refugee status.⁵⁰

The willingness of states to grant asylum is largely dependent upon that premise. Otherwise states might be even more reluctant to grant refugee status if the latter becomes a 'back door' route for immigration flows motivated by purely economic reasons or personal convenience.

According to a senior UNHCR official:

protection should be seen as a temporary holding arrangement between the departure and return to the original community, or as a bridge between one community and another. Legal protection is the formal structure of that temporary holding arrangement or bridge.⁵¹

2.3 International protection

The institution of asylum is an exception in international law. Typically, the protection of citizens is the responsibility of the state, deriving from the link of nationality between a state and its citizens. As Kourula says, '[p]rotection is at the heart of the bond between individuals and their state of nationality'.⁵² Even when they are abroad, individuals are normally protected by their state of nationality, which has the right to exercise diplomatic protection on their behalf.⁵³ The need to resort to international protection presents, therefore, a situation of exception in international law, 'a scandal' – to use Dillon's word⁵⁴ –, resulting from a rupture of the link between the state and its citizens.⁵⁵

⁴⁹ As above 44.

⁵⁰ Hathaway & Neve (n 6 above) 117.

⁵¹ G Arnaout (1989) cited by Hathaway *The rights of refugees under international law* (2005) 915 (at that time, Arnaout was the Director of the Division of Law and Doctrine of UNHCR).

⁵² Kourula (n 15 above) 203.

⁵³ *Nottebohm Case (Liechtenstein v. Guatemala)* ICJ (6 April 1955) (1955) ICJ Reports 4.

⁵⁴ Dillon cited by D Warner 'The refugee state and state protection' in Nicholson, F & Twomey, PM (eds.) *Refugee rights and realities: evolving international concepts and regimes* (1999) 258.

⁵⁵ Kourula (n 15 above) 204.

2.3.1 The meaning of protection

Refugee protection is an integral part of human rights protection in general. In a fundamental sense, protection means to secure the enjoyment of basic human rights and to meet the primary humanitarian needs.⁵⁶ It is, as Warner says, ‘an extension of human rights protection taken in very specific and exceptional situations’.⁵⁷

Protection comprises elements such as ensuring the refugees’ access to safety and security against forcible return to danger (*non-refoulement*), the substitute protection of a state other than the country of origin and the international community, and treatment in accordance with recognised legal principles and standards regarding personal safety as well as social, economic and civil rights.⁵⁸ As will be seen, contemporary approaches to protection extend, not only to material assistance and human rights protection, but also to finding solutions and addressing root causes of refugee flows through what has come to be known as ‘preventive protection’.

2.3.2 Protection mechanisms

Murray observes that one of the main reasons why the approach to refugees and their rights in Africa has been incoherent could relate to the lack of clarity in the definition of responsibilities.⁵⁹ The 1951 UN Refugee Convention contemplated states as the primary protectors of refugees. However, unlike their northern counterparts, countries of the South have long been unable to afford refugees the necessary protection by themselves.⁶⁰ The overwhelming magnitude of refugee flows compelled governments of poor countries to allow the UNHCR ‘to take over status assessment, protection, and material assistance within their borders’.⁶¹ Likewise, ‘*effective* protection demands a purposeful degree of cooperation, by no means limited to states or international organisations’.⁶² Although the scope of this study does not allow a detailed analysis of their contributions, the role of non-governmental organisations in refugee protection cannot be overemphasised.⁶³

⁵⁶ AC Helton ‘UNHCR and protection in the 90s: Editorial’ (1994) 6 *International Journal of Refugee Law* 1.

⁵⁷ Warner (n 54 above) 264.

⁵⁸ Kourula (n 15 above) 206.

⁵⁹ Murray (n 14 above) 227.

⁶⁰ Hathaway ‘The meaning of repatriation’ (1997) 9 *International Journal of Refugee Law* 552.

⁶¹ As above.

⁶² Goodwin-Gill (n 18 above) 229 (emphasis in original).

⁶³ For instance, the UNHCR Regional Office in Pretoria, which covers, not only South Africa, but also Mozambique, Botswana, Lesotho, Swaziland, Namibia and the Indian Ocean Islands makes extensive use of NGOs as implementing partners for its programme (written statement by Abel Mbilinyi, Head Protection Unit and Deputy Regional Representative; 11 October 2006). See also Goodwin-Gill (as above) 229-230. See

2.3.2.1 States' responsibility: the principle of burden sharing

(a) The burden to share: impact of refugee presence on the receiving country

As noted in the 1951 UN Refugee Convention, 'the grant of asylum may place unduly heavy burdens on certain countries'.⁶⁴ This observation is even more acute in respect of African countries, which are faced with protracted economic problems.

Firstly, it can be noted that, typically, refugees do not receive assistance from international actors upon arrival. The intervention by assistance organisations might take time. Meanwhile the host country might be obliged to spend in feeding and accommodating refugees, although, in certain cases, this task is carried out by citizens themselves motivated by their spirit of hospitality.⁶⁵ That is no doubt why Hathaway finds that 'the distribution of state responsibility towards refugees is based primarily upon accidents of geography and the relative ability of states to control their borders'.⁶⁶

Secondly, hosting refugees might lead to the diversion of international support for a country away from its development activities, aid to the host country being directed towards the welfare of refugees rather than to development initiatives in that country.⁶⁷ It has been observed that Tanzania, for example, which hosts very large numbers of refugees, could be suffering from such a problem.⁶⁸

Thirdly, the arrival of a mass influx of refugees may, in the short run, result in the increase of the market size in the areas where refugees are concentrated and an escalation in prices of basic commodities, since refugees, in their desperation, are normally ready to pay anything for their survival.⁶⁹ In fact, the large number of refugees creates an imbalance between the demand and supply. As Chambers notes, in the early stages of a mass influx, 'refugees are likely to deplete local food supplies and to drive up food prices', which may result into shortages of basic life stuff.⁷⁰

further UNHCR *NGO Partnerships in refugee protection: Questions and Answers* (2004); available at: <<http://www.unhcr.org/partners/PARTNERS/41c162d04.pdf>> (accessed 25 October 2006).

⁶⁴ Preamble of the 1951 UN Refugee Convention.

⁶⁵ FL Sesay 'Conflicts and refugees in developing countries', PhD thesis, 2004 119.

⁶⁶ Hathaway (n 47 above) 43; see also Hathaway & Neve (n 6 above) 141.

⁶⁷ Sesay (n 65 above) 119.

⁶⁸ As above.

⁶⁹ As above.

⁷⁰ R Chambers 'Hidden losers? The impact of rural refugees and refugee programs on poorer hosts' (1986) 20 *International Migration Review* 249.

In the fourth place, the presence of refugees in large numbers, may have a great impact on the environment. For instance, refugees rely on wood for cooking or building their shelters, which might lead to, or accelerate, deforestation.⁷¹ Competition over environmental resources between refugees and the local population can even degenerate into conflicts.⁷² In case of rural refugees in a protracted situation, the use of land to grow crops can also lead to erosion and overexploitation of the land they are given. The effects of such activities on the economy and the life of host communities can last for years after the departure of the refugees.⁷³

Lastly, hosting refugees exert pressure not only on the economy, but also on the host country's social cohesion.⁷⁴ Castles observes that '[m]igration, in general, inevitably leads to greater ethno-cultural diversity within nation-states, transforming identities and blurring traditional boundaries'.⁷⁵

(b) The principle of burden sharing

Burden sharing is 'the principle evoking the moral obligation of non-refugee hosting countries, or those countries with fewer refugees, towards countries with a heavy refugee burden'.⁷⁶ The notion of burden sharing has been mainly based on international comity and solidarity. It has been recognised in the 1951 UN Refugee Convention where it is considered 'that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot... be achieved without international co-operation'.⁷⁷ Burden sharing is also expressed in the OAU Refugee Convention and in the Declaration on Territorial Asylum. On a number of occasions, the OAU has also called on its Member States to take their share of the burden.⁷⁸

⁷¹ Sesay (n 65 above) 120.

⁷² For example, it has been reported that issues of grazing areas and watering cattle led to serious frictions between the local Sudanese population and refugees in the settlement of Qala en Nahal in 1976. See Rogge, cited by Chambers (n 70 above) 254.

⁷³ Sesay (n 65 above) 120.

⁷⁴ As above 121.

⁷⁵ Castles, cited by Sesay (n (65 above) 120.

⁷⁶ Sesay (n 79 above) 121.

⁷⁷ UN Refugee Convention, Preamble.

⁷⁸ See, for example, Resolution on Commission of Ten on Refugees CM/Res. 296(XX) 1973, para. 8; Resolution on the Situation of Refugees in Africa CM/Res.774(XXXIV) 1980, para. 6. Both reprinted in CH Heyns *Human Rights Law in Africa* (2004) 312 & 331.

The ideal is that African states should bear the 'primary responsibility' of refugee protection.⁷⁹ However, by application of the principles governing international cooperation, it is also acknowledged that the international community should take part of the refugee burden.⁸⁰ Murray is of the view that '[t]he widespread practice and attention to this concept by the OAU suggests that it is a legally binding norm'.⁸¹ Therefore, as Sesay points out, the principle of burden sharing also 'refers to countries in the North, who have fewer refugees, to share the burden with those in the South, which host most refugees'.⁸²

2.3.2.2 The role of UNHCR

The core protection functions of UNHCR are enumerated in Paragraph 8 of its Statute and include a wide range of activities such as the promotion of international instruments protecting refugees and monitoring their implementation, cooperation with governments and private actors dealing with refugees, assisting in the search for durable solutions.⁸³ UNHCR protection activities are complementary and supportive of the protection afforded by states.⁸⁴ However, as mentioned earlier, practical reasons can lead in certain contexts to UNHCR playing the primary role in providing international protection.

Although the UNHCR is called on to protect refugees as defined in its Statute, the frequency of large-scale refugee crises over the last decades, together with a variety of political and humanitarian considerations, has necessitated flexibility in the administration of UNHCR's mandate.⁸⁵ For example, UNHCR assists also in the implementation of the OAU Refugee

⁷⁹ Decision on Refugees CM/Dec. 574(LXXIII) 2001, para. 1; available at:

<http://www.chr.up.ac.za/hr_docs/african/docs/cm/cm7.doc> (accessed 26 October 2006).

⁸⁰ See, for example, Resolution on the International Conference on Assistance to Refugees in Africa (ICARA) and on its Follow-Up, CM/Res. 868(XXXVII) 1981; available at:

<http://www.africa-union.org/root/AU/Documents/Decisions/com/21CoM_1981b.pdf> (accessed 26 October 2006). See also Murray (n 14 above) 230.

⁸¹ Murray (n 14 above) 229; see also Goodwin-Gill (n 18 above) 291; see further Articles 1, 13(1)(b), 55 & 56 of the UN Charter on international cooperation. Compare with Hathaway's views on state responsibility towards refugees, and the basis for assistance, which, according to him, is 'a matter of charity, not obligation' (Hathaway n 47 above) 43.

⁸² Sesay (n 65 above) 121.

⁸³ Cooperation between UNHCR and governments is a very important element of international protection; in South Africa, for example, UNHCR's direct interventions assist in asylum applications, family reunification, travel documents; help protecting individuals against deportation or unlawful detention (written statement by Mbilinyi; as n 63 above).

⁸⁴ Kourula (n 15 above) 210.

⁸⁵ Goodwin-Gill (n 18 above) 9.

Convention.⁸⁶ In 2003, a Memorandum of Understanding between the African Commission on Human and Peoples' Rights and the UNHCR has been concluded, the objective of which is 'to strengthen cooperation between the African Commission and UNHCR, with the aim of more effectively promoting and protecting the human rights of refugees, asylum seekers, returnees and other persons of concerns under their respective mandates'.⁸⁷

2.3.2.3 AU protection mechanisms

The drafters of the OAU Refugee Convention had contemplated the creation of a regional High Commissioner for Refugees, but the idea was dropped due to the opposition of the UNCHR who viewed such a development as an unnecessary duplication of efforts.⁸⁸ As a consequence, the OAU Refugee Convention evolved without an implementation mechanism, a fact which has been linked to its ineffectiveness.⁸⁹

The main AU organs with a specific refugee protection mandate are the Commission on Refugees created in 1964⁹⁰, the Bureau for Refugees, Displaced Persons and Humanitarian Assistance, created in 1968⁹¹ and the Coordinating Committee on Assistance to Refugees.⁹² To those bodies located within the AU organogramme one could add the newly appointed Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons of the African Commission on Human and Peoples' Rights.⁹³ As mentioned earlier, none of those mechanisms were created under the

⁸⁶ The legal basis for the UNHCR to apply the OAU Refugee Convention is UN General Assembly Resolution 34/61 of 29 November 1979. The interest of that Resolution is that it leads to the recognition and protection of refugees under the OAU Refugee Convention. This is the case with the UNHCR Regional Office Pretoria, as confirmed by Mbilinyi (n 63 above). It is also the case in Egypt. See Wachira (n 17 above) 19.

⁸⁷ Memorandum of Understanding between the African Commission on Human and Peoples' Rights and the United Nations High Commissioner for Refugees, published in the *Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002-2003*, Annex IV, pp. 25-9; available at: <http://www.achpr.org/english/_doc_target/documentation.html?../activity_reports/activity16_en.pdf> (accessed 26 October 2006).

⁸⁸ Murray (n 14 above) 187.

⁸⁹ As above 190.

⁹⁰ As above 195.

⁹¹ For a detailed study on the historical background, the mandate, the achievements and the shortcomings of the Bureau, see generally J Oloka-Onyango 'The place and role of the OAU Bureau for Refugees in the African refugee crisis' (1994) 6 *International Journal of Refugee Law* 34.

⁹² Murray (n 14 above) 200.

⁹³ Final Communiqué of the 35th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, the Gambia 21 May-4 June 2004, available at: <http://www.achpr.org/english/communiqués/communiqué35_en.html> (accessed 5 October 2006).

OAU Refugee Convention. What is more, apart from the Special Rapporteur for whom it might be too early for assessment, all the other mechanisms have been said to make very little impact on the issues they are called on to deal with.⁹⁴

2.4 Summary conclusion

The refugee status is a temporary device aimed at protecting individuals who fled persecution or similar phenomena, and whose state of origin has been unable or unwilling to protect. Given the limbo in which it places the individual refugee and the burden it places on the receiving state and the international community as whole, the refugee status should be brought to an end as soon as possible, by means of a durable solution.

⁹⁴ See Oloka-Onyango (n 91 above); see also Murray (n 14 above) 196-201.

CHAPTER 3: CRITICAL ANALYSIS OF THE TRADITIONAL DURABLE SOLUTIONS TO THE REFUGEE PROBLEM

The three traditional durable solutions to the refugee problem are voluntary repatriation to the country of origin, local integration in the country of first asylum and resettlement to third countries.⁹⁵ Those mechanisms are regarded as 'durable' solutions because they promise an end to refugees' suffering and their need for international protection and dependence on humanitarian assistance.⁹⁶ Although in law, all three solutions are regarded as equivalent⁹⁷, their respective role and the relative priority accorded to each have changed with time.⁹⁸ The current practice favours voluntary repatriation as 'the most desirable durable solution' to the plight of refugees.⁹⁹ Moreover, there is a shift from mere protection to addressing root causes of the refugee problem, through refugee-targeted development programmes and the adoption of preventive measures.

This chapter discusses the availability, effectiveness and shortcomings of the three durable solutions in the light of international refugee law and the changing refugee policy framework. The priority accorded to voluntary repatriation is underlined.

3.1 General: A changing context

Approaches to durable solutions have changed over the years. During the Cold War and the national-liberation struggles of the 1960s and 1970s, those who fled communist regimes, colonial oppression or apartheid were granted refugee status on the assumption that repatriation was not an option.¹⁰⁰ Resettlement and local integration were generally regarded as the most viable and strategically desirable durable solutions. Refugees were generally welcomed and progressively assimilated in their host societies.

However, as Hathaway observes, '[a]ssimilation policies of this kind were embraced *not* out of a sense of international obligation, but because they were perceived to be in the interest of the receiving states'.¹⁰¹ In Northern countries, specifically, refugees were welcomed and permanently

⁹⁵ UNHCR *The state of the world's refugees: Human displacement in the new millennium* (2006) 129.

⁹⁶ As above.

⁹⁷ Rutinwa (n 5 above) 37.

⁹⁸ UNHCR (n 95 above) 129.

⁹⁹ As above 130; see also Rutinwa (n 97 above) 37.

¹⁰⁰ UNHCR (n 95 above) 129.

¹⁰¹ Hathaway (n 47 above) 42 (emphasis in original).

settled because they constituted a response to the labour force shortage in the aftermath of World War II, a factor to which was added the ideological need to make friends during the Cold War.¹⁰²

Equally favourable for the integration and assimilation of refugees in their host countries was the belief on the part of states that it was in their interest to ensure that the arrival and presence of refugees did not become a socially destabilising force.¹⁰³ That states' view was to be reflected in a UN statement on stateless people: "If he [the stateless] is not to remain in the pale of society and to become an 'international vagabond' he must be integrated in the economic life of the country and settle down".¹⁰⁴

As far as Africa is concerned, the early response by African countries to the plight of refugees was 'one of sincere hospitality and sympathy'.¹⁰⁵ In the period following the adoption of the 1969 OAU Refugee Convention, African countries implemented what Rutinwa describes as an 'open door policy', literally receiving all those in search for asylum and settling them.¹⁰⁶ During that period, refugees enjoyed relatively satisfactory levels of assistance and human rights protection.¹⁰⁷ Apart from a generalised feeling of solidarity with freedom fighters, the sympathy towards refugees was also motivated by the need in qualified personnel on the part of newly independent African countries.¹⁰⁸ Hence, for example, the engagement of the OAU Bureau for Refugees in the search for study opportunities for refugees with the expectation that qualified refugees would constitute a labour supply for host governments, and the subsequent request to each state to accept a certain quota of refugees in the name of African solidarity.¹⁰⁹

However, the context in which those solutions were contemplated in the past has dramatically changed today. The convergence of interests that motivated the assimilation of refugees in host countries has largely weathered away.¹¹⁰ In Africa, the period beginning in the late 1980s and culminating in the 1990s, was marked by a shift in refugee policies, with less incentive on the part of states to receive refugees, sometimes rejecting them at the frontier, forcibly returning them or

¹⁰² As above.

¹⁰³ Hathaway (n 51 above) 92.

¹⁰⁴ Cited by Hathaway (n 51 above) 42.

¹⁰⁵ Oloka-Onyango (n 91 above) 35.

¹⁰⁶ Rutinwa (n 9 above) 1.

¹⁰⁷ As above.

¹⁰⁸ Oloka-Onyango (n 91 above) 35.

¹⁰⁹ As above.

¹¹⁰ Hathaway (n 47 above) 42.

refusing to offer a meaningful protection to those who manage to enter their territory.¹¹¹ In the absence of an appropriate mechanism for responsibility-sharing, African receiving countries complained about a burden which they perceived neither as theirs nor as one they were able to bear alone.¹¹² In addition, unlike refugees in the 1960s who fled colonial or racial domination and apartheid, today's refugees who flee from independent countries do not enjoy the same sympathy and solidarity on the part of governments and local populations; host communities' reactions to refugee influxes are rather xenophobic.¹¹³

As for the North, states have now reached a level of technological development where they are no longer in need of substantial and indiscriminate infusions of labour.¹¹⁴ At the same time, current patterns of population flows towards developed countries are rather economically motivated and do not fit in the criteria set out in international refugee conventions.¹¹⁵ More specifically, the increase since the 1980s in migration from poor to rich countries and the growing association of refugees with migrants fleeing poverty have added to the reluctance of wealthy nations to offer resettlement opportunities.¹¹⁶ Furthermore, with the end of the Cold war, there are no more 'brownie points' to earn from the admission of refugees; instead, refugee protection is perceived to frustrate relations between receiving states and sending ones.¹¹⁷ In addition, western countries consider African refugees as an essentially African problem, and resettlement, as discussed below, is viewed as a highly expensive and long process.¹¹⁸ With the unprecedented terrorist attacks on New York and Washington, on 11 September 2001, there is even a greater decline in the willingness, and an increase in the selectiveness, of Western countries to admit refugees for resettlement.¹¹⁹ Thus, after having looked at the current trends in refugee policies, Rutinwa concludes that 'the institution of asylum is on the decline in Africa'.¹²⁰

¹¹¹ Rutinwa (n 9 above) 1. Compare to 'non-entrée' policies implemented by Western countries; see Hathaway & Neve (n 6 above) 120.

¹¹² As above.

¹¹³ As above 1. See also Hathaway (n 47 above) 16.

¹¹⁴ As above 42.

¹¹⁵ As above.

¹¹⁶ UNHCR (n 95 above) 129.

¹¹⁷ Hathaway (n 47 above) 42; see also Rutinwa (n 9 above) 16.

¹¹⁸ For a thorough analysis of the US, Australian and Canadian resettlement policies of the 1980s, see JR Rogge & JO Akol 'Repatriation: Its role in resolving Africa's refugee dilemma' (1989) 23 *International Migration Review* 187.

¹¹⁹ UNHCR (n 95 above) 148; see also Sesay (n 65 above) 121.

¹²⁰ Rutinwa (n 9 above) 21.

3.2 Local integration

Integration of refugees in the receiving countries finds its expression in Article 34 of the UN Refugee Convention.¹²¹ The OAU Refugee Convention also calls on states parties to receive and secure the settlement of refugees.¹²²

Local integration means in essence that a refugee is granted some form of durable legal status that allows him or her to remain in the country of first asylum on a permanent basis, and fully to participate in the social, economic, and cultural life of the host country.¹²³

States are called on to facilitate the assimilation of refugees in the host communities, which does not mean compelling refugees to give up their own culture and way of life.¹²⁴ According to Grahl-Madsen:

[w]hat is meant [by assimilation] is in fact the laying of foundations, or stepping stones, so that the refugee may familiarise himself with the language, customs and way of life of the nation among whom he lives, so that he – without any feeling of coercion – may be more readily integrated in the economic, social and cultural life of his country of refuge.¹²⁵

Local integration is particularly thought to be the best solution for urban refugees who are encouraged to make use of their skills, talents and ingenuity, in order to be able to lead a meaningful and dignified life and avoid dependency on handouts from assistance agencies.¹²⁶ Such is, for example, the approach taken by UNHCR with respect to refugees in South Africa.¹²⁷

However, instead of granting them an increasingly protective status, there is a tendency on the part of states to maintain refugees in limbo. This is evidenced by the attitude of the South African

¹²¹ Article 34 of the UN Refugee Convention provides:

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

¹²² Article 2(1) of the OAU Refugee Convention.

¹²³ Hathaway (n 51 above) 977. See also UNHCR Resettlement Handbook, UN Doc. EC/GC/02/6 (25 April 2002) II/7.; available at: <<http://www.unhcr.org/protect/PROTECTION/3d464bc14.pdf>> (accessed 26 October 2006).

¹²⁴ Hathaway (n 51 above) 984.

¹²⁵ Grahl-Madsen cited by Hathaway (as above).

¹²⁶ G Geddo 'Durable solutions to the refugee problem: UNHCR's regional strategy for Southern Africa' in Lawyers for Human Rights *Perspectives on refugee protection in South Africa* (2001) 70.

¹²⁷ Mbilinyi (n 63 above).

government in *Khosa v Minister of Social Development*.¹²⁸ In this case, the Constitutional Court of South Africa was called on to decide on a constitutional challenge against certain legislative provisions excluding non South African citizens from certain social assistance schemes. The applicants were permanent residents, most of whom were former Mozambican refugees, who sought refuge in South Africa in the 1980s, during the civil war in Mozambique. By application of the legislation in place, the complainants fulfilled all the requirements to qualify for social assistance but for the fact that they were not South African citizens.

They based their claim on a provision in the Bill of Rights, which guarantees the right to access to social security to 'everyone'.¹²⁹ They submitted that their exclusion from the social assistance schemes amounted to unfair discrimination. The government, on the other hand, contended that 'the state has an obligation towards its own citizens first, and that preserving welfare grants for citizens only creates an incentive for permanent residents to naturalise'.¹³⁰

Writing for the majority, Mokgoro J held that '[t]he exclusion of all non-citizens who are destitute.... irrespective of their immigration status, fails to distinguish those who have become part of our society and have made their homes in South Africa, and those who have not'. Mokgoro observed that it would not be reasonable to treat differently in relation to social assistance persons who settled in South Africa, whose families are often in South Africa, and whose children are born there; who have the right to work in South Africa and pay taxes; who even owe a duty of allegiance to the state. Recalling the provision of section 7(1) of the Bill of Rights according to which the latter 'enshrines the rights of all people in our country', Mokgoro J upheld the request by applicants and held that the word 'everyone' in section 27(1) of the Constitution included permanent residents.

As noted earlier, xenophobia can also be – and actually is – a serious obstacle to integration, with members of the host community who resist receiving and accommodating refugees.¹³¹ In other instances, integration is hampered by the clash between cultures. For instance, in the aftermath of World War II, European Jews tried in vain to assimilate to different new surroundings and found

¹²⁸ *Khosa and Others v Minister of Social Development and Others* 2004 6 BCLR 569 (CC).

¹²⁹ Section 27 of the South African Constitution Act 108 of 1996.

¹³⁰ *Khosa* (n 37 above) para. 57.

¹³¹ For a comprehensive discussion on xenophobia in the context of refugee integration, see for example, J Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2000) 38 *International Migration* 103. See also H Adelman 'The right to repatriation- Canadian refugee policy: The case of Rwanda' (1996) 30 *International Migration Review* 293.

themselves in a 'situation of anomie and unfulfilled assimilation', hence their complaint: '[w]hatever we do, whatever we pretend to be, we reveal nothing but our insane desire to be changed'.¹³²

Access to citizenship through naturalisation as provided in Article 34 of the UN Refugee Convention is predicated on a recognition that a refugee required to remain outside his or her home country should at some point benefit from 'a series of privileges, including political rights'.¹³³ At this point it could be emphasised that there is no obligation for states to naturalise refugees. Article 34 only requires states to 'facilitate the assimilation and naturalisation of refugees', 'as far as possible'. According to Hathaway, Article 34 purports 'to promote, rather than to compel access to naturalisation'.¹³⁴ What states are required to do is simply to conduct themselves in good faith when considering applications for citizenship.¹³⁵ The decision to grant citizenship remains 'absolute' and the state 'cannot be compelled to grant its nationality, even after a long waiting period, to a refugee settled in its territory'.¹³⁶

3.3 Resettlement

Resettlement in the context of refugee protection is 'the transfer of refugees from a state in which they have initially sought protection to a third state that has agreed to admit them with permanent-residence status'.¹³⁷

According to UNHCR, resettlement serves a triple function.¹³⁸ Not only it is a tool of international protection for individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge, but also it is a durable solution alongside other solutions as part of a comprehensive strategy to overcome protracted refugee situations.¹³⁹ In the third place, resettlement may be an expression of international solidarity, in the sense of a commitment by developed countries to a more equitable sharing of responsibility for protection with

¹³² Warner (n 54 above) 255.

¹³³ United Nations 'Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related problems', UN Doc. E/AC.32/2 of 3 January 1950, at 50; see Hathaway (n 51 above) 981.

¹³⁴ Hathaway (n 51 above) 990.

¹³⁵ Grahl-Madsen cited by Hathaway (n 51 above) 988.

¹³⁶ United Nations 'Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems'; UN Doc. E/AC.32/2 3 January 1950.

¹³⁷ UNHCR (n 95 above) 142.

¹³⁸ UNHCR Resettlement Handbook (2004) I/1; available at:
<<http://www.unhcr.org/protect/PROTECTION/3d464b239.pdf>> (accessed 26 October 2006)

¹³⁹ As above; see also UNHCR (n 95 above) 142.

the developing countries that host the majority of the world's refugees.¹⁴⁰ UNHCR believes also that resettlement could be used as a strategic tool for repatriation, for example, 'when a small group represents a stumbling block in the way of peace negotiations or a wider repatriation agreement'. In such cases, resettlement, even of small groups, may serve as a catalyst in leveraging other solutions.¹⁴¹

However, questions about resettlement and its relation with other durable solutions still remain. For example, it has been observed that mirroring resettlement expectations might represent a disincentive to repatriation by encouraging some refugees to remain in the host state hoping to be resettled.¹⁴² It can also be argued that resettlement might constitute unfair impoverishment of countries of origin. Usually, Northern countries admit resettlement applications only on a selective basis. They take – to use Sesay's words – 'the grains from the chaff' by separating skilled applicants from non-skilled ones and by admitting only the former.¹⁴³ As Sesay observes, '[t]his opportunism, leaves the developing countries with the less educated refugees, thereby increasing their burden, since the South is then left with the less productive members of the refugee population'.¹⁴⁴ Put in less diplomatic terms, resettlement programmes are likely to degenerate in brain-drain campaigns, thus contributing to deepening the gap between the developed and developing countries.

Moreover, resettlement has been criticised for its expensiveness. Resettlement involves a lot of expenses indeed, not least those related to organising international transportation and the initial support to help resettled refugees get used to their new milieu. To be sure, refugee protection is generally a set of highly expensive operations, such as the management of refugee camps peopled by hundreds of thousands refugees. However, resettlement processes are even more expensive and take generally a long time before being finalised. That is definitely the reason why UNHCR contemplates resettlement only for those refugees who have 'compelling reasons to be removed from their country of refuge'.¹⁴⁵

¹⁴⁰ UNHCR (n 95 above) 143.

¹⁴¹ As above 143.

¹⁴² As above.

¹⁴³ Sesay (n 65 above) 121.

¹⁴⁴ As above 121.

¹⁴⁵ UNHCR (n 138 above) I/3.

Currently, resettlement has been relegated to a purely residual role, and is to be envisaged 'only as last resort, when neither voluntary repatriation nor local integration is possible'.¹⁴⁶ In fact resettlement has never been the solution for the many refugees in protracted situations, but only for a limited number of them. In the pick of 1979, resettlement was the solution for only 5 per cent of the 5 millions of the world's refugees.¹⁴⁷ Today, resettlement serves as solution for only less than 1 per cent of the world's refugees¹⁴⁸. Those are mainly individual refugees with special protection needs, such as refugees threatened with *refoulement*, those whose physical safety is seriously threatened in the country where they have sought refuge, women at risk, minors and adolescents, disabled, elderly refugees, survivors of torture, or refugees with severe trauma who are in need of specialised treatment unavailable in the country of first asylum.¹⁴⁹

In any case, and however desirable it might be in a specific situation, resettlement is not an obligation imposed upon states. '[N]o country is legally obliged to resettle refugees', and accepting refugees for resettlement is rather viewed as '*a mark of true generosity* on the part of governments'.¹⁵⁰

3.4 Voluntary repatriation

Voluntary repatriation, as opposed to *mandated* repatriation, is meant to apply to situations where a refugee makes the free and informed choice to go back to his or her country of origin.¹⁵¹ In principle, such a choice is sovereign so long as the refugee has at his or her disposal all the information to make a genuine decision. Thus a refugee can decide to go back home even if there is no change in the circumstances that led to his or her flight.¹⁵² As will be seen in Chapter 4, the

¹⁴⁶ UNHCR ExCom Conclusion No 67 Resettlement as an Instrument of Protection (1991), para. (g); available at: <<http://www.unhcr.org/publ/PUBL/41b041534.pdf>> (accessed 26 October 2006).

¹⁴⁷ Hathaway (n 51 above) 974.

¹⁴⁸ UNHCR (n 95 above) 147.

¹⁴⁹ UNHCR ExCom Conclusion No 85 Conclusion on International Protection (1998), para. (jj); available at: <<http://www.unhcr.org/publ/PUBL/41b041534.pdf>> (accessed 26 October 2006); see also UNHCR (n 138 above) I/3.

¹⁵⁰ As above (emphasis added). See also Hathaway & Neve (n 6 above) 141.

¹⁵¹ Mandated repatriation, on the other hand, is the fact for a person to be compelled to return to his country of origin, for example, because the reasons for requiring international protection no longer exist. See Article 1(C)(5) of the 1951 UN Refugee Convention (the 'cessation clause').

¹⁵² Hathaway argues that, by so doing, the refugee is simply exercising his or her right to return to one's country. See Hathaway (n 51 above) 918.

basic principle underlying voluntary repatriation is the right to return to one's own country and the duty of states to readmit their nationals from exile.¹⁵³

The UNHCR's approach to voluntary repatriation is that it must take place in a context of safety and dignity, which means that the voluntary decision to return must be implemented 'in and to conditions of physical, legal and material safety, with full restoration of national protection the end product'.¹⁵⁴ It is therefore accurately that Hathaway views repatriation as 'a logical part of the continuum of refugee protection'.¹⁵⁵ Needless to recall, today repatriation is regarded as the most desirable solution to the refugee problem, mainly due to the criticisms raised about the two other solutions, as discussed above.

3.5 New approaches: preventive and solution-oriented protection

As mentioned earlier, today there is a progressive shift from care and maintenance to solution-oriented protection. UNHCR is aware that issues such as development, migration, peace-building and security all affect the welfare of refugees and the search for durable solutions.¹⁵⁶ Hence the development of new strategies to address those issues, which entails linking refugee protection to efforts aimed at conflict management and resolution, refugee-targeted development programmes, support to democratisation processes, to civil society organisations, development of early warning mechanisms, and so forth.¹⁵⁷ Those strategies evolve under the concept of 'prevention protection', which simply means the strive to contain or limit refugee flows, instead of waiting for them to occur and deal with them subsequently. It also entails ensuring refugee and returnee self-reliance, in order to ensure sustainable repatriation.¹⁵⁸

3.6 Summary conclusion

Countries have less and less incentive to shoulder the refugee burden. Local integration in countries of first asylum is made difficult by the lack of capacity on the part of host states, as well as xenophobic attitudes of host populations. Resettlement opportunities have become a scarce

¹⁵³ See the discussion in 4.1.1 below.

¹⁵⁴ UNHCR Resettlement Handbook (2004) II/3; UN Doc. EC/GC/02/6 available at: <<http://www.unhcr.org/protect/PROTECTION/3d464bc14.pdf>> (accessed 26 October 2006).

¹⁵⁵ Hathaway (n 60 above) 555.

¹⁵⁶ UNHCR (n 95 above) 151.

¹⁵⁷ Goodwin-Gill (n 18 above) 282; see also Murray (n 14 above) 207-8.

¹⁵⁸ UNHCR (n 95 above) 133.

resource only to be used as a last resort. The solution to the refugee problem must be sought in the sending countries as well.

CHAPTER 4: USING POLITICAL PARTICIPATION TO REALISE THE RIGHT TO REPATRIATION

The importance of repatriation as a solution to the refugee problem and the reason why it is preferred to other solutions have been highlighted in the previous chapter. This chapter discusses the legal basis for the refugee's right to repatriation or right to return to their home country. After having ascertained the existence of that right in international law, it proceeds by exploring the link between political participation of refugees and their right to repatriation. It highlights the particular significance of political participation in respect of refugees, explores the obstacles to political participation of refugees in the current normative and policy framework for refugee protection, and proposes modalities whereby political participation of refugees could be used as a tool to realise their right to repatriation.

4.1 The legal basis for the right to repatriation

Repatriation as a right can be contemplated from a triple viewpoint, at least. Firstly, repatriation can be looked at from the side of the asylum state, which would have the right to repatriate or expel refugees within its jurisdiction under certain circumstances.¹⁵⁹ Secondly, repatriation can be envisaged from the perspective of the country of origin, the latter having the right to 'recall' its nationals. A claim of this kind could be based on the right of a state not to be deprived of its active population or, more specifically in the African context, the individual duty 'to serve his national community by placing his physical and intellectual abilities at its service'.¹⁶⁰ Especially, when refugees are the result of the mistakes of a past regime, which has subsequently changed, the new government could arguably raise such a claim. Thirdly, repatriation can also be looked at from the refugee viewpoint, in the sense of the right of refugees to return to their country of origin. This paper takes the latter perspective.

As will be seen in the following sections, the right to return has been mainly interpreted as a component of the right to freedom of movement. However, the extent to which freedom of movement itself is to be guaranteed varies according to the relationship between the individual and the state. It seems therefore appropriate to look at the right to return in relation to that link between the individual and the state, which is often expressed in the form of nationality.¹⁶¹

¹⁵⁹ These circumstances might be the cessation conditions listed in Article I(C) of the UN Refugee Convention.

¹⁶⁰ Article 29(2) of the African Charter on Human and Peoples' Rights.

¹⁶¹ For purposes of the present discussion, the terms 'nationality' and 'citizenship', on the one hand, and 'national' and 'citizen', on the other hand, will be used interchangeably, although certain authors prefer to distinguish

Four interrelated questions can be raised here. The first question is whether a state is under obligation to readmit its national refugees upon their return. Corollary to that is whether the state is bound to admit its nationals who come for the first time in the country – the so-called second-generation refugees, for example. The third question is whether the duty to readmit applies only to nationals or also to other persons who might have a strong link with the country they want to return to, after having been refugees. Lastly, the question of long-term refugees, that is whether the more or less long time spent abroad may alter the bond of nationality, shall also be raised.

4.1.1 Readmittance of nationals

There is a general agreement among scholars that the individual has the right to return to the country of which he or she is a national.¹⁶² Tomuschat, for example, argues that “the ‘natural’ place for an individual is the territory of the state of nationality”.¹⁶³ Adelman also maintains that ‘a country is not permitted to cancel the membership of a citizen born in that country and refuse that person readmittance’.¹⁶⁴ Goodwin-Gill holds that ‘the right to return and the duty to admit are beyond dispute’, and that

instances where return has been denied or heavily qualified are generally part of broader contexts involving persecution, other violations of human rights, or situations in which political issues dominate legal entitlements.¹⁶⁵

Instances where the right to return has been denied, delayed or ‘heavily qualified’ exist, indeed. In 1975, the Provisional Government of Vietnam stated that it would only consider ‘repatriation *on a case-by-case basis*, stating that decisions on the readmission of its citizens were a matter falling within its sovereign rights’.¹⁶⁶ A similar case is the one of the Rwandan refugees who fled in 1959,

them. For a discussion on that issue, see, for example, J Dugard *International Law: A South African perspective* 3rd edition (2005) 283.

¹⁶² See, for example, GS Goodwin-Gill “The right to live, the right to return and the question of a ‘right to remain’” in V Gowlland-Debbas (ed) *The problem of refugees in the light of contemporary international law issues* (1996) 100. See also Hathaway (n 152 above); C Tomuschat ‘State responsibility and the country of origin’ in V Gowlland-Debbas (ed) *The problem of refugees in the light of contemporary international law issues* (1996) 61; Adelman (n 131 above) 295.

¹⁶³ Tomuschat (n 162 above) 61.

¹⁶⁴ Adelman (n 162 above) 295.

¹⁶⁵ Goodwin-Gill (n 162 above) 100.

¹⁶⁶ As above (emphasis added).

and sought refuge mainly in neighbouring countries. While promising a permanent solution to the refugees, the Rwandan government excluded the possibility of massive repatriation.¹⁶⁷

In *Rights International v Nigeria*,¹⁶⁸ the African Commission on Human and Peoples' Rights held that the fact for a person to be forced to live into exile amounted to a violation of the right to freedom of movement and residence, and his right to leave and return to his country guaranteed by Article 12(1) and (2) of the African Charter.

To be sure, the right to return, as freedom of movement in general, is not an absolute right. Article 12(4) of the ICCPR provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country'. What is prohibited, therefore, is only *arbitrary* deprivation of the right to return. Restrictions that are not arbitrary are allowed.¹⁶⁹ However, as the United Nations Human Rights Committee ('Human Rights Committee' or 'HRC') pointed out, the notion of arbitrariness must be interpreted restrictively. The Human Rights Committee emphasised:

even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.¹⁷⁰

Hathaway argues that return might be constrained, for example, 'where the destination country is faced with a massive return of refugees that it cannot immediately accommodate in a secure way, or without critical risk to the human rights of those already there'.¹⁷¹ However, Hathaway quickly qualifies his point by stressing that restrictions of such kind 'would have to be both strictly provisional, and carefully implemented'.¹⁷² From that it can be understood that restrictions due, for example, to material and logistical constraints that repatriation on a large scale might impose on the capacity of the state, are reasonable, provided they are provisional.

¹⁶⁷ In a statement attributed to the late president Habyarimana, and dated 15 January 1989, it would have been held that the extreme territorial exiguity, the scarcity of resources, the extraordinary population growth were challenges that made it impossible to contemplate a massive return of refugees. For an excerpt of the statement, originally held in French, see Adelman (n 162 above) 292.

¹⁶⁸ *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999).

¹⁶⁹ M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 219.

¹⁷⁰ HRC General Comment No 27: Freedom of Movement (Article 12); UN Doc. CCPR/C/21/Rev.1/Add.9; para. 21; available at:

<<http://www.ohchr.org/english/bodies/hrc/comments.htm>> (accessed 26 October 2006).

¹⁷¹ Hathaway (n 51 above) 956. See however, Nowak (n 169 above) 220.

¹⁷² Hathaway (n 51 above) 956.

4.1.2 Admittance of nationals coming for the first time

The Human Rights Committee has emphasised that '[t]he right to return is of the utmost importance for refugees seeking voluntary repatriation'.¹⁷³ This linkage of the right to enter one's country to *repatriation* begs the second question as to whether the state has the duty to admit nationals who come for the first time from abroad. These might be, for instance, children born of refugees outside the country, or second-generation refugees – as they are often referred to. It seems that this question must be answered in the affirmative as well. According to the Human Rights Committee, the right of a person to enter his or her own country

includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country ...¹⁷⁴

4.1.3 Readmittance of non-nationals

The other question is whether a state has the obligation to readmit permanent residents who fled or refugees who, after having been recognised refugee status in the country, were compelled to flee again to a third country. To what extent does the fact of their flight to a third country affect their permanent residence or refugee status? Do those refugees or permanent residents have to reapply for refugee status or can they simply resume the status acquired before they left for a third destination? This concern takes root in the fact that the right to return is often linked to nationality. For example, Goodwin-Gill observes that '[t]he rights to leave and to return are normally and rightly, if not exclusively, regarded as incidents of citizenship'.¹⁷⁵ The Human Rights Committee has also stressed that '[t]he right of a person to enter his or her own country recognises *the special relationship* of a person to that country'.¹⁷⁶

Here again, the answer seems to be yes, depending on the circumstances. That is the view held by the Human Rights Committee, when interpreting the phrase 'in his own country' referred to in Article 12(4) of the ICCPR. The Committee held:

[t]he scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given

¹⁷³ HRC General Comment No 27 (n 170 above); para. 19.

¹⁷⁴ As above.

¹⁷⁵ Goodwin-Gill (n 162 above) 93.

¹⁷⁶ HRC General Comment No 27 (n 170 above); para. 19 (emphasis added).

country, cannot be considered to be a mere alien [...] The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country....¹⁷⁷

Nowak is also of the view that 'the protection of Art. 12(4) extends to aliens and stateless persons who have such a strong attachment to a state that they view it as 'their own country or their home country'.¹⁷⁸ It can, therefore, be concluded that, permanent residents or refugees who, after being granted the refugee or permanent residence status in one country, are obliged to flee to a third one, have the right to return to their original country of residence or refuge. Denial of that right must be assumed arbitrary.

4.1.4 The question of long-term refugees: impact of time on the bond of nationality

A relatively long time can elapse between the departure of a refugee and his or her return to the country of origin. In the meantime, as Goodwin-Gill warns, '[t]he state of origin may seek to 'write off' those who have fled, and to ignore the link of nationality'.¹⁷⁹ This is even more likely for long-term refugees, whose traces in their country of origin might end up being completely deleted, occupations overtaken, properties occupied, and memories weakened. As seen earlier, the host state is under no obligation to grant citizenship to refugees simply on the ground that they have spent a long time in that country. What then? Do they become stateless?

In *Nottebohm*¹⁸⁰, the ICJ observed that only 'real and effective nationality' could serve as the basis for diplomatic protection. The Court mentioned that

[t]e practice of certain States which refrain from exercising protection in favour of a naturalised person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation.¹⁸¹

The court then held:

¹⁷⁷ HRC General Comment No 27 (n 170 above); para. 20.

¹⁷⁸ Nowak (n 169 above) 219.

¹⁷⁹ Goodwin-Gill (n 162 above) 101.

¹⁸⁰ *Nottebohm Case* (n 53 above).

¹⁸¹ As above.

nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.¹⁸²

Likewise, in *Islamic Republic of Iran v United States of America*¹⁸³, the Iran-United States Claims Tribunal held that it had jurisdiction over claims brought against Iran by dual Iran-United States nationals when the 'dominant and effective nationality' of the claimant during the relevant time was that of the United States.¹⁸⁴ In assessing the claimant's 'dominant and effective' nationality, the Tribunal observed that it would consider 'all relevant factors, including habitual residence, centre of interests, family ties, participation in public life and other evidence of attachment'.¹⁸⁵

Although decided in different and specific contexts, and although the issues involved were different, *Nottebohm* and *Iran v United States* can provide guidance as to the elements that make the link of nationality hold. Therefore, whether protracted refugeehood leaves intact the link of nationality under any circumstances deserves closer analysis. In certain cases, refugees spend so a long time abroad that the factual relationship with their country of origin becomes simply so weak. In such cases, one may fear that the bond of nationality, as defined by the international jurisprudence, might lose of its reality and effectiveness. However, given the scope of this study, a thorough analysis of that question will have to wait for another day.

4.2 Significance of political participation of refugees for the realisation of the right to repatriation

The importance of participation in the political life of one's country cannot be overemphasised. As the Human Rights Committee observes, the right to political participation, 'lies at the core of democratic government'.¹⁸⁶ In that sense, political participation is as important for refugees as for

¹⁸² As above.

¹⁸³ *Islamic Republic of Iran v United States of America* Case No A-18 (6 April 1984) 5 IUSCTR 251. See M Leigh 'Judicial decisions' (1984) 78 *American Journal of International Law* 912.

¹⁸⁴ As above 913.

¹⁸⁵ As above 914.

¹⁸⁶ HRC General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12 July 1996; UN Doc. CCPR/C/21/Rev.1/Add.7; para. 1; available at: <<http://www.ohchr.org/english/bodies/hrc/comments.htm>> (accessed 26 October 2006).

everyone else. There are, however, reasons that make the need to participate in the politics of their country even greater for refugees.

As mentioned earlier, refugee status is a temporary protection, which is supposed to come to an end at a certain point in time. Yet, as Hathaway and Neve observe, '[t]he ability to end temporary protection is fundamentally dependent on the promotion of meaningful and durable changes in the state of origin'.¹⁸⁷ For a successful return, political conditions must be 'truly ripe'.¹⁸⁸ The point made in this section is that refugees should be given a meaningful opportunity to ripen these conditions.

Allowing refugees to participate in the politics of their country of origin and express their concerns peacefully might be a way to prevent them from resorting to stronger means of expression. It might be a way of addressing what appears, in the eyes of Hathaway, 'to be an essentially unstoppable social phenomenon: the preparedness of refugees to risk even their safety in order to go home'.¹⁸⁹

The unavailability, impracticability or ineffectiveness of other solutions, such as local integration and resettlement may compel refugees to seek their return by all available means, may they be unlawful. It has been argued that '[w]here there is no hope of integration in the state of asylum or elsewhere, refugees may even take up arms and attempt to force their way home'.¹⁹⁰ History is full of blatant examples of refugees who did so and managed to secure their repatriation, albeit at great expense.

For instance, the creation of the Rwandan Patriotic Front (RPF), whose main objectives included securing the repatriation of Rwandan refugees, has been linked to the treatment of Rwandan refugees in Uganda and the attitude of the Rwandan government, which dragged its feet in embarking on a clear repatriation policy.¹⁹¹ Caught between the resistance of the Ugandan society fully to integrate them, on the one hand, and the lack of a clear commitment on the part of the Rwandan government to repatriate them, on the other hand, Rwandan refugees 'resolved to use force as a lever to claim the right to return'.¹⁹² The rest is history. Likewise, the formation of the Somali National Movement (SNM) in 1981, which was to wage the civil war against the Siad Barre regime in Mogadishu and declare independence of Somaliland from the Somali Republic in 1991,

¹⁸⁷ Hathaway & Neve (n 6 above) 131.

¹⁸⁸ As above.

¹⁸⁹ Hathaway (n 51 above) 958.

¹⁹⁰ Hathaway & Neve (n 6 above) 132.

¹⁹¹ Rutinwa (n 5 above) 23.

¹⁹² Adelman (131 above) 292.

came, among other things, with a refugee-related agenda.¹⁹³ Refugees, being often a product of politics, cannot be completely and rightly separated from them. There is rather a tendency among refugees to engage in political activities, sometimes, even to a greater extent than other people. Curtailing political freedoms of refugees in a particular way may also amount to a violation of human rights. Indeed, there is no provision, in international law that could be so construed as to prevent refugees from engaging in normal political activities. Needless to emphasize, the 1951 UN Refugee Convention is premised on the endeavour to assure refugees the widest possible exercise of fundamental rights and freedoms.¹⁹⁴

Moreover, not only refugee political participation is a means for the fulfilment of refugees' rights, it can also be a tool to make peace among communities and nations. As Grahl-Madsen forcefully states

it may indeed prove beneficial to adopt a liberal policy towards the political activities of refugees, as, among other things, it tends to give active people a legitimate outlet for their aspirations and passions and in the long run relieves tension.¹⁹⁵

However, while, in theory, refugees have the right and the need to engage in political activities that could contribute to the creation of an environment conducive to their return, there are many obstacles that impair the actual use of that right in practice.

4.3 Obstacles to political participation of refugees

Obstacles to refugee political activities range from the limitations set out in international refugee legal instruments to practical impossibilities resulting from policies of different host countries or refugee protection agencies. These include the obligation to locate refugees at 'a reasonable distance', thereby limiting their freedom of movement, the sweeping prohibition of subversive activities, the confinement into camps, to name but a few.

¹⁹³ M Schoiswohl *Status and (human rights) obligations of non-recognised de facto regimes in international law: The case of 'Somaliland' The resurrection of Somaliland against all international 'odds': State collapse, secession, non-recognition and human rights* (2004) 103.

¹⁹⁴ Preamble of the 1951 UN Refugee Convention. See also HRC General Comment No 25 (n 185 above); para. 3.

¹⁹⁵ Grahl-Madsen (n 7 above) 101.

4.3.1 The location of refugees at 'a reasonable distance'

Article 2(6) of the OAU Refugee Convention requires asylum countries to 'settle refugees at a reasonable distance from the frontier of their country of origin'. The OAU Refugee Convention does not define how long 'a reasonable distance' is. In practice, that distance has been estimated at a minimum of 50 kilometres.¹⁹⁶ Although the UN Refugee Convention includes no provisions concerning the distance of refugee camps from borders, UNHCR has sought to ensure that refugee camps are located at a 'reasonable distance' from internationally recognised borders.¹⁹⁷ However, there is often reluctance on the part of refugees to go far away from their country of origin. Refugees spontaneously establish camps close to borders to make it easier for them to return or to monitor the situation in their home country.¹⁹⁸

The provision of Article 2(6) has been viewed as 'an important step in maintaining good relations between countries of origin and countries of asylum'.¹⁹⁹ More specifically, the adherence of states to the provision of Article 2(6) has been said to be likely to prevent or, at least minimise, cross-border raids by bandits into refugee camps.²⁰⁰ It has also been pointed out that Article 2(6) makes it difficult for camps to be used as bases for launching attacks against countries of origin.²⁰¹

However, as much as Article 2(6) is a security tool for both refugees and countries, it can also be an obstacle for normal political endeavours on the part of refugees. As Grahl-Madsen rightly points out, the provision in Article 2(6) 'makes an inroad in the right of the state to grant refugees in its territory unconditional freedom of movement and of residence'.²⁰² Consequently, Grahl-Madsen is of the view that Article 2(6) ought to be interpreted restrictively and only be implemented in cases where there exists a real concern that the refugees in question may engage in subversive activities.²⁰³ If no such concern exists, the application of Article 2(6) might conflict with the

¹⁹⁶ K Morjane 'The protection of refugees and displaced persons' in B Ramcharan *Human Rights protection in the field* (2005) 81.

¹⁹⁷ As above 81.

¹⁹⁸ As above. See also UN Security Council *Joint report of the United Nations Organization Mission in the Democratic Republic of the Congo, the United Nations Operation in Burundi and the Office of the United Nations High Commissioner for Human Rights into the Gatumba massacre 5 October 2004* (18 October 2004) para. 30; UN. Doc. S/2004/821; available at: <<http://www.un.org/Depts/dpko/dpko/reports.htm>> (accessed 26 October 2006).

¹⁹⁹ Aiboni (n 12 above) 70.

²⁰⁰ Rutinwa (n 5 above) 33.

²⁰¹ As above).

²⁰² Grahl-Madsen (n 7 above) 94.

²⁰³ As above.

provisions of Article 26 of the 1951 UN Refugee Convention, which accords refugees freedom of movement and residence.²⁰⁴ The importance of the latter for political activity can only be reemphasised here.

4.3.2 The confinement into camps

The confinement of refugees into camps is quite common.²⁰⁵ In Kenya, for example, asylum seekers are confined to specified reception centres pending their application for asylum. Upon granting of refugee status, they are immediately transferred to camps in the north of the country.²⁰⁶ In Tanzania and Uganda, refugees stay in designated places and it is an offence for them to leave such areas without a permit from the relevant authorities.²⁰⁷

The confinement into camps has been regarded as a practical consequence of the determination of refugee status on a collective basis (*prima facie*).²⁰⁸ Often refugees are only deemed eligible for that status if they remain in certain designated places.²⁰⁹

There is a strong belief, on the part of both governments and international assistance providers that refugee camps constitute the most appropriate way for managing large refugee populations.²¹⁰ While this might be true, the grouping of refugees in camps also makes it easier for authorities of the receiving state to impose various restrictions on the rights and freedoms of refugees, and to exercise closer scrutiny over refugee political activities, including legitimate peaceful meetings and expression of opinions.²¹¹ The isolation of refugees in camps and other forms of settlements also limits their right to access to information, as well as their right to communicate their concerns and views to the outside world, both of which are very important components of the right to political participation.²¹²

²⁰⁴ As above 94.

²⁰⁵ UNHCR (n 95 above) 129.

²⁰⁶ Rutinwa (n 5 above) 25.

²⁰⁷ As above.

²⁰⁸ R Carver 'Voices in exile: African refugees and freedom of expression' *Article 19 Global Campaign for Free Expression* April 2001 5.

²⁰⁹ As above.

²¹⁰ As above.

²¹¹ As above.

²¹² As above.

4.3.3 The prohibition of subversive activities

Subversive activities have been the object of a number of OAU instruments,²¹³ among which Article 3(1) of the OAU Refugee Convention, which prohibits refugees from engaging in subversive activities against any member state of the OAU.²¹⁴

Yet the OAU Refugee Convention and other subsequent instruments fail to define what is meant by 'subversive activities', which may have far-reaching implications on the political freedoms of refugees. This is all the more likely since Article 3(2) puts an explicit limitation to refugees' rights to freedom of expression. The reference to 'any activity likely to cause tension between Member States' in conjunction with 'through the press, or by radio' has been viewed to imply that 'refugees are denied the right to articulate any political expression that is hostile to the government of the country of origin, or any other OAU member state'.²¹⁵

The notion of subversion would probably date back to the colonial period when the vague and yet powerfully stigmatic labels of 'seditious' or 'subversive' were often used to describe any activity that could undermine the colonial authority and to justify repression.²¹⁶

Grahl-Madsen notes that a state is not under international obligation to prohibit refugee political organisations.²¹⁷ According to Grahl-Madsen

[t]he activities of political organisations are of no interest from the point of view of the international law of coexistence, unless they are 'activities with external effects'; that is to say activities directed to have effect in a country whose government the refugees would like to see changed, notably their country of origin. Such activities with external effect include propaganda, paramilitary activities, acts

²¹³ See, for example, Article 3(5) of the OAU Charter (1963); reprinted in Heyns (n 78 above) 111. See also Declaration on the Problem of Subversion (1965); OAU Doc. AHG/Res. 27 (II); available at: <<http://www.africa-union.org/root/au/Documents/Decisions/hog/cHoGAssembly1965.pdf>> (accessed 24 October 2006); also reprinted in Heyns (as above) 225.

²¹⁴ Article 3(1) of the OAU Refugee Convention reads:

Every refugee has duties to the country in which he finds himself, which require in particular that he conform with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.

²¹⁵ Carver (n 208 above) 14.

²¹⁶ As above 13.

²¹⁷ Grahl-Madsen 'Human rights for refugees' in G Melander & P Nobel (eds) *African Refugees and the law* (1978) 82.

of violence, and infiltration into the refugees' country of origin, using the country of asylum as a base'.²¹⁸

It can therefore be concluded with Grahl-Madsen, that prohibited subversive activities are not any kind of activity directed against the government of the country of origin, but only those that are offensive.²¹⁹ Governments should not put a blanket prohibition over refugee activities of a political nature, simply because they are directed towards a specific government.

4.4 Modalities for political participation of refugees: A proposal

Once the point is made on the existence of the right and the need for refugees to participate in the politics of their country of origin, and the obstacles that impede the exercise of that right pinpointed, the remaining question is how those obstacles may be overcome. In other words, what could be the practical modalities whereby refugees, sometimes located far away from their home country, could contribute to the political life of the country that rejected them? The question cannot have a single answer that fits in all situations. Modalities for participation of refugees in the politics of their country must be contextualised and will vary according to the specific refugee population concerned or the country in question. They might not be the same for rural and urban refugees, for refugees settled in a neighbouring country and those who live in a faraway country, and so forth.

4.4.1 Ensuring freedom of expression

One of the possible ways for refugees to influence the political processes in their country is to be given the opportunity to speak out, express their concerns, criticise the political leadership, including the government if the opportunity might arise, advance their proposals concerning the way they think fit for the governance of their country, and so forth.

The modalities of expression cannot be enumerated here, but they may include all lawful means of expression and information, such as newspapers and other media. In this respect, refugees do not differ from any other category of persons. Amisi and Ballard, for example, have included demonstrations and even the resistance of refugees to assimilation as a form of expression, asserting that '[r]efusing to assimilate or conform is itself a kind of politics'.²²⁰ Comparing a refugee to the Certeau's migrant in Paris, Amisi and Ballard quote:

²¹⁸ As above 82.

²¹⁹ As above 83.

²²⁰ B Amisi & B Ballard 'In the absence of citizenship: Congolese refugee struggle and organisation in South Africa' *Johannesburg: Forced Migration Studies Programme* (2005) 18.

Without leaving the place where he has no choice but to live and which lays down its law for him, he establishes within it a degree of *plurality* and creativity. By an art of being in between, he draws unexpected results from his situation.²²¹

According to Carver, there is an assumption by host governments that letting refugees express their views about their country of origin might compromise the relations between the two governments.²²² That leads countries to adopt very restrictive policies in respect of expression of political opinions by refugees, thereby compelling refugees to shut up even when they have grievances to express or proposals to put forward.²²³ For example, fear of state repression or deportation is reportedly one of the reasons why refugees in South Africa refrain from vehement expression of their disagreement on political questions in their countries of origin.²²⁴

Those kind of policies or practices fall short of recognised human rights standards. There is no basis for curtailing refugees' freedom of expression in a specific way, for refugees have the same right with the rest of the human family.

4.4.2 Strengthening, and elaborating on, associational rights

The UN Refugee Convention accords refugees the right to participate in non-political and non-profit making organisations.²²⁵ Those rights, together with the rights protected under other human rights instruments, may be used to further enhance political participation of refugees.

According to the Human Rights Committee

[c]itizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly and association.²²⁶

The right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs has been said to be 'an essential adjunct to the rights protected by article 25 [of the ICCPR]'.²²⁷ Likewise, the Human Rights Committee

²²¹ Certeau cited by Amisi & Ballard (as above).

²²² Carver (n 208 above) 18.

²²³ As above.

²²⁴ Amisi & Ballard (n 220 above) 7.

²²⁵ Article 15 of the UN Refugee Convention.

²²⁶ HRC General Comment No 25 (n 186 above) para. 8.

²²⁷ As above para. 26.

observed that '[p]olitical parties and membership in parties play a significant role in the conduct of public affairs and the election process'.²²⁸

Grahl-Madsen warns that from the fact the UN Refugee Convention only speaks about non-political and non-profit making organisations and trade unions we may not conclude that states parties thereto have the obligation to exclude refugees from participating in political associations.²²⁹ There is nothing wrong with a state authorising political associations and political activities of refugees. According to Grahl-Madsen, problems of international law may only arise when 'a political refugee organisation directs its activities towards a country whose government the refugees would like to see changed (in particular their country of origin), and also if the methods employed go beyond certain bounds'.²³⁰

What is relevant, therefore, is not the existence of a refugee organisation with a political mandate, but rather the nature of activities the organisation carries out. Activities such as acts of violence, military incursions, intelligence and other paramilitary activities are obviously excluded. What is required of asylum states is, therefore, no more than being able to curb such kind of activities.²³¹ There can be no exhaustive list of what kind of activities are allowed and which not. All will depend on the specific circumstances, and the authorisation, control or prohibition of an activity will have to be determined on a case-by-case basis. For example, it may be possible to forbid the use of the host state's territory for military training or as a base for launching attacks against the country of origin, while the publication of a newspaper is allowed.²³²

4.4.3 Lobbying and diplomatic action: the role of the international community

For a meaningful political participation, refugees should be allowed to seek support from the international community. The possibility to intervene in peace processes, thereby assisting refugees opening up their way to go home is not without precedent in the work of UNHCR and the international community. As mentioned earlier, the traditional protection paradigm has shifted from downstream response to the prevention of refugee flows, which involves the engagement in the settlement of political conflicts. Counting its experience, UNHCR is of the view that

²²⁸ As above.

²²⁹ Grahl-Madsen (n 7 above) 94.

²³⁰ As above.

²³¹ As above 95.

²³² As above.

[a]s was the case in 1989, when UNHCR helped to nurture comprehensive agreements relating to Indochina and Central America, achieving political agreements to overcome particular protracted refugee situations will require strong individual and institutional leadership, and a willingness to engage in political facilitation.²³³

As for governments, it has been observed that the attitude of governments towards refugees' political activities is rarely neutral. Instead, governments tend to allow more freedom to refugee groups that correspond with their own political objectives and restrict the activities of those who do not.²³⁴ A government will thus permit all kinds of activities, including violent ones for groups whose aims it supports.²³⁵ Ironic as it is, this is the harsh reality refugees are and will probably still have to be faced with: lack of support for peaceful initiatives, while less peaceful ones are strongly encouraged.

4.4.4 Liaising with the authorities and communities of their countries of origin

The idea of refugees keeping contact with the government of the country that rejected them might look strange. However, a distinction should be made between refugees who fled persecution by the government of their country per se, and those who left their habitual residence following, for example, a random attack launched by a rebel group on a village, compelling all the villagers to flee their homes. While it could prove hard for the former to keep in touch with the government that they fled, it seems more logical for the latter to maintain their links with the government of their home country, which might have been unable, but not unwilling, to protect them.

In any case, the notion of liaison between refugees and the authorities of their country of origin is not new. In its General Conclusion on International Protection, the UNHCR ExCom

[a]cknowledge[d] the usefulness, in appropriate circumstances, of visits by representatives of the countries of origin to refugee camps in countries of asylum within the framework of information campaigns to promote voluntary repatriation [and] request[ed] UNHCR, in cooperation with the countries of asylum concerned, to facilitate such visits.²³⁶

²³³ UNHCR (n 95 above) 150.

²³⁴ Carver (n 208 above) 21. See also Grahl-Madsen (n 7 above) 94.

²³⁵ This criticism has been expressed, for example, in relation to president Charles Taylor of Liberia supporting the Revolutionary United Front (RUF) in Sierra Leone or president Yoweri Museveni of Uganda backing the Sudan People's Liberation Army (SPLA). See Carver (n 208 above) 21.

²³⁶ UNHCR ExCom Conclusion No 74 'General Conclusion on International Protection of refugees' (1994); para. (z); available at:
<<http://www.unhcr.org/publ/PUBL/41b041534.pdf>> (accessed 24 October 2006).

Hathaway and Neve also proposed, as part of the ‘solution-oriented protection’ paradigm, that contact between refugee communities and communities left in the home country be promoted.²³⁷ They took from the proposal by Gorman and Kibreab that early efforts be made to organise meetings between representatives of refugee communities, stayees and internally displaced to start the process of reconciliation, healing, confidence building, and settlement of property rights.²³⁸ They proposed that collective bodies representing the diverse interests of refugee, stayee and internally displaced communities be formed, and that meetings be held between those representatives, including, where appropriate, government officials. Hathaway and Neve argue that apart from preparing for return, such a process might contribute to the resolution of the root causes of flight themselves.²³⁹ Hathaway further proposes that representatives of the refugee population be assisted to undertake ‘look-see’ visits to the home country and report back on the conditions there to the exiled community.²⁴⁰

If purposively employed, that model might be useful. Meetings between refugees and the authorities and communities of their country of origin might arguably be the opportunity to discuss political issues as well. They might also assist refugees having accurate information on the situation prevailing in their country of origin and dissipate fears and biases that might be generated by a long stay away.

4.4.5 Voting rights

In modern democracies, where participation in the public affairs is mainly through the election of representatives, the right to vote is the most important political right.²⁴¹

The notion of refugees being invited to participate in an election taking place in their country of origin might appear unorthodox. Perhaps this is the most far-reaching and most complex proposal in the range of rights that refugees should have.²⁴² However, instances of activities of a political nature taking place between refugees and their country of origin are quite common. An example

²³⁷ Hathaway & Neve (n 6 above) 178.

²³⁸ Gorman & Kibreab, cited by Hathaway and Neve (n 6 above) 179.

²³⁹ As above.

²⁴⁰ Hathaway (n 51 above) 959.

²⁴¹ Nowak (n 196 above) 443.

²⁴² Among the 20 refugees asked the question whether refugees have the right to vote in their country of origin, 15 responded by ‘No’ (while 5 responded by ‘Yes’). This contrasts with the perceptions about other political rights, which 8 out of the 20 think that they have (while 12 do not).

could be the meeting between refugees and the head of state of their country of origin during a visit to the country of refuge.

Under Article 25 of the ICCPR, States are required to take effective measures to ensure that all persons entitled to vote are able to exercise that right.²⁴³ As Nowak further emphasises:

[c]itizens have not only the right but also the ‘opportunity’ (‘la possibilité’) to take part in the conduct of public affairs. This sets up a duty on States Parties to guarantee with *positive measures* that all formally eligible persons have the actual opportunity to exercise their political rights. For instance, it is not enough to extend formal eligibility to all citizens, including the aged, the sick, prisoners and pretrial detainees, persons abroad, etc., when it is not simultaneously ensured that these citizens are truly able to make use of their right to vote.²⁴⁴

Since international law does not contain any provision preventing refugees from voting, and that it is in the shared interest of refugees and the international community as a whole in its strive to establish democratic governance, the current factual exclusion of refugees from electoral processes taking place in their countries of origin should arguably be reviewed.

4.5. Summary conclusion

Refugees have the right to repatriation and their participation in the political life of their country of origin could be a way of realising that right. Obstacles to political participation of refugees should be removed. In particular, the placement into camps should be contemplated only where there is a serious threat for security. The phrase ‘subversive activities’ should be given a legal definition in order to prevent possible abusive curtailment of refugees’ political freedoms.

²⁴³ HRC General Comment No 25 (n 186 above) para. 11.

²⁴⁴ Nowak (n 169 above) 439 (emphasis in original).

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

This paper sought to discuss the questions whether refugees have the right to return to their country of origin and whether their participation in the political life of that country may be used as a means to realise their right to return.

The starting point of the discussion was a depiction of the refugee phenomenon from an African perspective. Thus Chapter 2 presented the refugee as defined by the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention. At this level it was mentioned that the OAU Refugee Convention extends protection, not only to persons fleeing persecution per se, but also to other categories of persons, fleeing, for example, civil strife or natural disasters. The chapter also analysed the refugee status in its content and highlighted its temporary nature. The burden that refugee hosting imposes on receiving countries also got our attention. Existing protection mechanisms, their strengths and shortcomings were finally analysed. The chapter highlighted the low impact made by African protection mechanisms and the primary role played by UNHCR in practice, due to the limited capacities of receiving states. The role of NGOs in protection has been mentioned without thorough analysis. A study on that issue would therefore be welcome.

The third chapter discussed the available durable solutions to the refugee problem. Those solutions are mainly the integration of refugees in their country of first asylum, their resettlement to third countries and voluntary repatriation. After having observed that countries, in Africa, as well as in the west, have become more reluctant to admit refugees on a permanent basis, the chapter highlighted that voluntary repatriation is currently regarded as the most desirable solution to the refugee problem. This led to the conclusion that, since receiving countries are hostile to the permanent settlement of refugees, solutions have to be sought in sending countries as well. This chapter also mentioned the developments that tend to address root causes of refugee influxes and to ensure sustainable repatriation.

The right to repatriation and its relation to political participation were analysed in Chapter 4. Much as it has not been always respected by states, the right for national refugees to go back to their home country is recognised in international law, as a component of the right to freedom of movement. International law also extends the right to return to persons other than nationals, such as permanent residents, who might have a strong link with the country they want to return to. The question whether a long time spent in exile may affect the link of nationality has been raised, but the scope of the study did not allow reaching a conclusive answer. It is recommended that other researchers take up that question.

The fourth chapter then proceeded by stressing the significance of political participation for refugees. It was stated that refugees are generated by politics and constitute in fact a political phenomenon. The call for their participation in the politics of their home country finds justification in the need for them to create an environment conducive to their safe return. Failure to do so exacerbates frustrations and may lead to the situation where refugees resort to an armed response to their plight. Yet it was shown that many impediments to a meaningful engagement of refugees in political activities exist. The requirement to settle refugees far away from the frontier of their country of origin, the prohibition of subversive activities without defining them, the confinement of refugees in the limbo of camps, are but some tools that states resort to in order to curtail political rights of refugees. It is recommended that an effort towards a legal definition of the phrase 'subversive activities' be made and that refugees be placed into camps only where there is strict necessity for reasons of security.

This paper also puts forwards a number of ideas, which are not necessarily new, but which might be refined and developed in order to fit to the refugee-specific situation. These include a generous interpretation of the normative provisions likely to hamper political rights of refugees, a large construction of the associational rights set forth in the UN Refugee Convention in order to extent them to associations with a political mandate, access to diplomatic means of actions in order to seek support from the international community, liaising with the authorities and communities of their country of origin, and even participating in electoral processes if the opportunity should arise.

This study ventured in a very tricky field. Political participation in Africa remains a remote dream many people, even those citizens whose bond with the state is not affected by the refugee status. Although no African country claims to be a dictatorship, the will of the people is still far from being the engine that drives political affairs. Efforts to democratisation have already been engaged, but they have yet to yield results. The point made in this paper is that refugees should also be embarked on the democratisation process. They have the right and the need to do so. Acting otherwise would contribute to foster biases and the marginalisation of so an important component of the continent's population, and to exacerbate tensions. Much as it might appear strange within the overall international protection regime, political participation is likely to maintain or re-establish the bridge between refugees and their home countries and the relations between nations. For the refugee problem lies at the heart of world peace and security. Since it cannot be logically excluded from the legitimate aspirations of refugees; and since it might further contribute to tackling the refugee problem in its genuine form, the right to political participation should be brought back into the continuum of international refugee protection.

Finally, it is hoped that this study raised other issues for further research in the search for durable solutions to the refugee problem.

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