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WORKING PAPER ON NAMIBIA'S

REFUGEE LEGISLATION

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WORKING PAPER ON NAMIBIA'S REFUGEE LEGISLATION

INTRODUCTION

Situated on the Western coast of Southern Africa Namibia is one of the most sparsely populated countries in the world. With a surface area of 823,145 square kilometres a population, of merely 2.1 million people, is largely nucleated around the major settlements.¹

Namibia has a rich history, recording that the Ovambo and Herero ethnic groups migrated to the area in 14th Century AD, joining the San, who are thought to be the earliest inhabitants.² In 1878 the United Kingdom annexed the port city of Walvis Bay, incorporating it into the Cape of Good Hope in 1884.³ The year prior, the remaining coastal region was claimed by Germany, thus ushering in the beginning of colonial rule. Following the end of WW1, South Africa undertook administration of South West Africa (as Namibia was known then).⁴ Despite having its mandate revoked by the UN General Assembly in 1966, and the International Court of Justice confirming the illegality of South African rule over Namibia in 1971, South Africa refused to follow the European trend of granting independence to their colonies.⁵

During the struggle Namibia was a refugee producing country. The first group of political exiles fled the country in 1960 following riots in Windhoek.⁶ Throughout the 1960s and 70s Namibians continued to leave Namibia to seek refuge elsewhere, many of them joining the Liberation Movement.⁷

Under increasing international pressure, coupled with the on-going armed struggle against the South West Africa People's Organisation (SWAPO), independence was finally achieved on 21 March 1990.⁸ During the transition period, which preceded independence, roughly 42,000 Namibian refugees returned with the assistance of UNHCR.⁹

¹ 2008 Projection cited by the U.S. Department of State Bureau of African Affairs, available at <www.state.gov/r/pa/ei/bgn/5472>.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Mwase N.R.L. 'The Repatriation, Rehabilitation and Resettlement of Namibian Refugees at Independence' *Community Dev J.* 1990: 25, 113 at 114.

⁷ Ibid.

⁸ See U.S. Department of State Bureau of African Affairs supra note 1.

⁹ Ibid.

The development of Namibia's sources of law has mirrored the successive colonial developments outlined above.¹⁰ Running parallel to these colonial sources is a wide acceptance of customary law.¹¹ With the transition to independence Namibia inherited these various legal influences. However, the existing laws would then be tested against the newly adopted Namibian Constitution.¹² Having lived under the draconic rule of apartheid laws for many years the Namibian constitutional dispensation dedicated itself to the rule of law and respect for fundamental rights.¹³

This chapter will discuss the Namibian refugee rights framework, giving an overview of the domestic legislation, before critically discussing the rights of refugees in the country.

In brief, Namibia has history of successive colonial rule and oppressive regulation by the South African apartheid regime. Through the course of a 23 year armed struggle for independence Namibia produced many thousands of refugees. However, with the achievement of independence and the implementation of a new constitutional dispensation, Namibian refugees were permitted to safely repatriate and the country was transformed into a refugee accepting nation. In accordance with its international obligations the Namibian State has implemented a structured legislative refugee framework, which operates within a broader human rights regime.

OVERVIEW OF REFUGEE RIGHTS FRAMEWORK APPLICABLE IN NAMIBIA

Following independence, and the inception of new constitutional dispensation, Namibia acknowledged its status as an independent international actor by became a member of the UN on 23 August 1990, joining a number of international organizations and undertaken various obligations.

Among the instruments to which Namibia is now a signatory state is the 1951 Convention Relating to the Status of Refugees, to which it became a party on 17 February 1995. However, the state reserved the right to designate the place for principal reception and

¹⁰ United Nations Institute for Namibia *Toward a New Legal System for Independent Namibia* (1981) at p. 22.

¹¹ For a detailed discussion see Ibid at pp. 61-64.

¹² The Constitution was adopted by the Constituent Assembly on 9 February 1990 and came into force on Independence day, 21 March 1990.

¹³ Diescho J. *The Namibian Constitution in Perspective* (1994) at p. 9.

residence or to restrict their freedom of movement whenever considerations of national security make it advisable.¹⁴ This reservation has permitted the Namibian authorities to opt for a camp structure.

In addition to the 1951 Convention Namibia has also joined other SADAC states by acceding to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa on 2 September 1994.

Furthermore Namibia is also a party to various other human rights instruments, which directly impact on the rights of refugees within the country, thereby building onto the basic refugee rights framework.

On 28 November 1994 Namibia ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As a result Art. 3 prevents the Namibian state from returning any person to a state where there are substantial grounds for believing that the person would be in danger of being subject to torture.

More generally, Namibia has ratified, *inter alia*, the International Covenant on Economic, Social and Cultural Rights,¹⁵ the Convention on the Rights of the Child,¹⁶ and the International Covenant on Civil and Political Rights.¹⁷

Many of the provisions of these various obligations have been incorporated into the Namibian constitution. However, in addition s 144 of the Constitution provides that the above discussed international agreements are self-executing in Namibian law, unless the context indicates otherwise. As a result Namibia has an extremely broad body of human rights law, which is applicable within its domestic sphere.¹⁸

¹⁴ See UN Treaty Section, available at <<http://treaties.un.org>>.

¹⁵ Ratified on 28 November 1994.

¹⁶ Signed on 26 September 1990 and ratified on 30 September 1990.

¹⁷ Ratified on 28 November 1994.

¹⁸ Namibia is also a party to: the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (approved by parliament on 17 May 2000); the African Charter for Human and People's Rights (ratified on 16 August 1992); the African Charter on the Rights and Welfare of the Child (ratified 26 August 2004).

OVERVIEW OF NAMIBIA'S REFUGEE LEGISLATION

Within the broader human rights frameworks, Namibia has abided by its obligations, under the 1951 Refugee Convention, by enacted refugee specific domestic legislation. The Refugees (Recognition and Control) Act (henceforth referred to as "the Act"),¹⁹ came into force on 22 September 2000, with the aim of creating a structure for the recognition of refugees and regulation of their occupancy within the country.

Furthermore, from a Constitutional perspective, an individual who reasonably fears persecution on the UN Convention grounds, has a constitutional right to seek Asylum in Namibian.²⁰

The Act operates in parallel with the Immigration Control Act²¹, which regulates and controls entry and residence of individuals who do not fall within the ambit of the humanitarian obligation owed to refugees. The acquisition of Namibian nationality is governed by the Citizenship Act,²² and the Citizenship Special Conferment Act.²³ The latter is product of Namibia's history as a refugee producing country, in that this Act provides for the conferment of citizenship on certain descendants of persons who left Namibia because of persecution by the colonial governments.

The Act furthermore operates in conjunction with the agreement between the Namibian government and the office of the UN High Commissioner for Refugees (henceforth referred to as "UNHCR"), which has an office based in the Namibian capital Windhoek and plays an active role in the administration and running of the Osire Refugee Camp.²⁴

The majority of refugees residing in Namibia, in terms of the Act, live in Osire Refugee Camp, which was designated as an official settlement for refugees in 1992.²⁵ The camp is located roughly 225km from Windhoek and at the peak of Angolan war it provided

¹⁹ Act 41 of 1999.

²⁰ Article 97 of the Namibian Constitution, supra note 12.

²¹ Act 7 of 1993,

²² Act 14 of 1990. In terms of ss 2 – 6 citizenship may be acquired by decent, marriage, registration, naturalization, or by honorary conferral. As a result Namibian nationality is based on a combination of the principles of *jus sanguinis*, *jus domicilli* and naturalization processes.

²³ Act 14 of 1991.

²⁴ Osire camp was only established in 1992 by the Government of Namibia. For a detailed discussion on the camp see UNHCR & WFP *Joint Assessment Mission, Assistance to Refugees and Asylum Seekers in Osire Camp, Namibia* (2006) available at <<http://documents.wfp.org/stellent/groups/public/documents/ena/wfp115217.pdf>>.

²⁵ *Ibid.* at p. 8.

shelter to 23, 000 people.²⁶ UNHCR reports that by January 2009 the camp population has decreased to 6,600 individuals.²⁷

Since 2006, UNHCR has been negotiating with the Government to allow long term refugees to locally integrate.²⁸ Although most Refugee Status Determination registration, health care, education, and other social provisions are currently undertaken by UNHCR it is hoped that the Namibian institutions will be in a position to assume full responsibility in the near future.²⁹

In sum, the Namibian government, as a signatory to the UN and OAU Refugee Conventions, passed the domestic legislation to recognize and regulate Refugees within its borders. However, unlike Angola and South Africa, UNHCR plays a very active role in both the implementation of the Act and in the care of the individuals who fall within the ambit of the Act. When Namibia became a signatory to the UN Convention it filed a reservation to Art. 26 thus permitting the state to designate the Osire camp as the principal place of residence for refugees within the country and to further restrict their freedom of movement beyond the camp perimeter. As a result the implementation of the Act is largely premised on the demands and challenges of the camp structure.

ANALYSIS OF RIGHTS OF REFUGEES IN NAMIBIA

The rights of refugees afforded to refugees in Namibia is set out in ss 18(a)(i) and (ii) of the Act, which provides that every recognised refugee and protected person is entitled to the rights conferred by the UN and OAU conventions. However, this is subject to the further reiteration of the convention provisions relating to rights in Schedule 1 of the Act. What the schedule expressly does is expressly provide that the listed convention rights have the full force and effect of law in Namibia.

These various provisions will be discussed in more detail below. However, it is imperative that these rights are understood to operate within the broader human rights

²⁶ Ibid.

²⁷ UNHCR “Namibia” available at <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48588a7b>>.

²⁸ Ibid.

²⁹ Ibid.

framework established by the Namibian constitution and the various self executing conventions to which Namibia is a party.

Categories of refugees

The “gateway” clause to the rights provisions of the Act is s 3, which recognizes three distinct categories of Refugee.

Section 3(a) incorporates the classic UN Convention definition verbatim, into the Act. The provision includes all of the convention grounds for status. However the Drafters have adopted a more modern gender inclusive style.

Section 3(b) provides that a person qualifies as a refugee if that individual, not having a nationality and being outside the country of his or her former habitual residence, is unwilling or unable to return. A similar phrase can be found in Art. 1 of the UN Convention definition. This provision is regarded as relating to stateless refugees.³⁰ This definition, however, requires that the stateless person be outside his or her country of former habitual residence for reasons indicated in the Convention definition. Failing which, such an individual will not qualify as a refugee.³¹

Section 3(c) then incorporates the OAU Convention definition, thus providing for serious circumstances in the individuals country which compels that individual to remain outside his or her habitual place of residence.

The Act then mimics the UN Convention by proceeding to an exclusionary dimension of the enquiry. However, unlike the UN Convention the Drafters of the Act have expressly included definitions of “crimes against peace, war crimes and crimes against humanity”, “political offences”, “non-political offences”, and “serious non-political crimes”.³² Of concern, however, is the Drafters choice to include two additional grounds for exclusion.

Section 4(1)(a) provides that a person who has more than one nationality, and who is able to seek the protection of that country, will be excluded from status in Namibia unless he or she can advance valid reasons, based on refugee related grounds.

³⁰ See the discussion in UNHCR *Handbook on Procedures and criteria for determining Refugee Status* reedited (1992) at paras 101 – 105.

³¹ *Ibid.* at para 102.

³² Section 4(3).

Section 4(1)(c) then confers wide powers on the Minister to designate categories of persons who are not entitled to refugee status. This provision has the potential to operate in contravention of the international obligations owed to all individuals who meet the Convention definitions of a refugee. Furthermore, the return of those individuals designated by the Minister would be contrary to the principle of non-refoulement. However, at present this provision has not been utilized and therefore these criticisms remain purely academic.

The further draws an interesting distinction between a “refugee”, a “recognised refugee” and a “protected person”. Section 1 prescribes that a *recognised refugee* refers to a person who has been granted formal status, while a *refugee* means any person who meets the definition of a refugee contemplated in s 3. As a result the Act sees the conferral of refugee status as recognition of status rather than declaration. However, this distinction does potentially mean that the rights contained in s 18 are limited to those who have successfully attained formal status recognition.

Section 1 then differentiates what are termed *protected persons*. Such individuals are defined as (a) members of the family of a recognised refugee; or (b) family members of a recognized refugee who have married, or attaining the age of 18 years or who remain in Namibia following the death of the recognized refugee.³³ Section 17 then provides a structured recognition of the principle of family unity in relation to protected persons and their respective refugee counterpart. The individual is then entitled to be issued with an identity card³⁴ and the rights guaranteed in s 18. However, this approach differs from other SADAC countries which confer formal refugee status on such individuals.

Process by which refugee status is recognized

Section 13 of the Act provides for a structured, but somewhat intricate, system for refugee status determination.

³³ Section 1 defines “spouse” as including a party to a customary union, and “member of the family”, as including (a) any spouse of such refugee; or (b) any unmarried child of such refugee under the age of 18 years; or (c) any person who is related to such refugee by affinity or consanguinity and who is dependent upon such refugee.

³⁴ Section 17(2)(b).

An applicant must within 30 days of entry into Namibia apply in writing to an authorized officer³⁵ for refugee status.³⁶ This in turn triggers a reciprocal obligation on the part of the authorized officer to assist the applicant, to notify an immigration officer of the application and to transmit the application to the Commissioner, who shall in turn submit the matter to the Committee.³⁷ It is then incumbent on the Committee to consider the application and make recommendations to the Commissioner regarding the granting of status.³⁸ It is only at this stage that the Commissioner, acting on the strength of the Committee's recommendations, shall grant status or refuse the application.³⁹ The applicant is then entitled to written notice of the Commissioner's decision.⁴⁰ Should the applicant be unsuccessful s 27 provides for a right of appeal to the Appeal Board, which is constituted in terms of s 28.

However, as discussed above, the refugee status recognition procedure is currently vested entirely with the office of the UNHCR and there are, at present, only plans to phase in a state run Refugee Status Determination system.

Civil Rights

As a constitutional state and as a signatory to numerous human rights instruments refugees in Namibia should have legally enforceable civil rights. This broad human rights framework is, however, limited by certain provisions of the Refugees Act.

Under the Namibian Constitution "everybody", thereby including non-citizens, has the right to equality,⁴¹ access to a competent court if aggrieved by administrative action,⁴² and the right to culture, language tradition and religion.⁴³ These rights are further guaranteed by the Act itself.⁴⁴

³⁵ Section 29(1) provides that an "authorized officer" includes members of the Namibian Police Force, immigration officers and representatives of UNHCR.

³⁶ Section 13(1).

³⁷ Section 13(2).

³⁸ Section 13(3).

³⁹ Section 13(4).

⁴⁰ Section 13(5).

⁴¹ Article 10.

⁴² Article 18.

⁴³ Article 19.

⁴⁴ Section 18(a)(i) read with Schedule I.

The Constitution furthermore provides that no person shall be deprived of his or her liberty.⁴⁵ However, the constitutional provision contains an internal limitation which permits such deprivation if it is in accordance with established law. Furthermore, no person shall be subject to arbitrary arrest or detention, and should an individual be arrested such detention must be confirmed by a court within 48 hours.⁴⁶ This latter requirement is, however, expressly excluded from applying to any “illegal immigrant”.⁴⁷ Nevertheless, such an individual must be afforded the right to seek counsel.⁴⁸

As mentioned above, the Namibian state, when signing and ratifying the UN Convention, entered a reservation that permits the state to designate the place for principal reception and residence and to restrict its occupants’ freedom of movement. Section 19 of the Act accordingly empowers the Minister to declare any part of Namibia to be a reception and residence for recognised refugees, potential applicants, and protected persons (viz, family members). It was in accordance with this power that the Osire Refugee camp was established in 1992.⁴⁹ Subsection (3) further permits the Minister to designate an “authorized officer” to oversee the reception and settlement area and at present this function is incumbent on the UNHCR.

Section 20 then empowers the Minister to restrict the free movement of an individual by issuing a written notice to that effect. In terms of subsection (2) the authorized officer may grant an individual a permit which would permit the holder to reside in any other defined reception area or refugee settlement. However, the effect of this is limited due to the fact that such authority is limited to areas already designated as “refugee reception areas or settlements” by the Minister. Section 21 makes the contravention of s 20 a statutory criminal offence, punishable by imprisonment for a period not exceeding 90 days.

⁴⁵ Article 7.

⁴⁶ Article 11(1) read with subsection (3).

⁴⁷ Article 11(4). The Immigration Control Act uses slightly different language by defining a “prohibited person” rather than an “illegal immigrant” (Section 1 read with s 39). For the legislative treatment of such individuals see Chapter VI of the Immigration Control Act.

⁴⁸ Article 11(5). Furthermore, the courts in *Government of the Republic of Namibia and others v Mwilima and all other accused in the Caprivi Treason Trial* (2002 NR 235 (SC)), and *S v Kasanga* (2006 (1) NR 348 (HC)), have held that a fair trial requires that an accused must be informed at the outset of his right to legal representation and that he can approach the Legal Aid Board for assistance.

⁴⁹ The Minister further designated a portion of the Osire Refugee Camp to be a reception area (GN 235/2000; GG 2412).

In *S v Isaac*⁵⁰ the accused, a refugee who was authorized to reside at the Osire Camp, left the camp perimeter after having been served with a notice in to remain in the camp and without the prior permission of the authorized officer in charge of the camp. When the charge was put to the accused he plead guilty. Nevertheless, the court still felt that it was bound to enquire whether the individual had indeed been served with the written notice set out in s 20 of the Act.⁵¹ The court ultimately found that the magistrate had failed to elicit this procedural requirement from the accused when he entered his plea and therefore the court set aside the conviction and sentence.⁵²

The Namibian authorities therefore do indeed make use of their statutory powers to ensure that refugees and their families are contained within the Refugee Camp unless otherwise permitted by a competent authority. However, due to this limitation on the liberty of the individual the courts have adopted a procedurally strict approach to the determination of the guilt of the individual.

The Act goes on further to make provision for the detention or expulsion of refugees and protected persons at the discretion of the Minister so as to protect the sovereignty and integrity of Namibia, national security, public order, and decency or morality.⁵³ This provision would, however, only be invoked in extreme cases and would nevertheless be subject to the requirements of administrative fairness.⁵⁴

The restriction on a person's freedom of movement and his or her arrest and detention is undoubtedly a limitation on that individual's fundamental rights that must be conducted only within the confines of strict procedural parameters. Nevertheless, encampment as a strategy will always fall short of the full protection of the fundamental rights of the individuals within its perimeter. It would therefore be a welcome progression in the human rights framework of Namibia if the reliance on the State's reservation to the Refugee Convention be abandoned.

⁵⁰ 2004 NR 122 (HC).

⁵¹ *Ibid.* at 214 the court confirmed the findings in *S v Daniel Likeke* (unreported, case no. CR 16/04) and *S v Andries Alberto* (unreported, case no. CR 17/04), that "[i]t is clear from the language of s 21(b), read with s 20(1), that it is a *conditio sine qua non* for the commission of an offence under s 21, to prove that the person so charged was duly served with an order under s 20(1) of the Act."

⁵² *Ibid.* at 215.

⁵³ Section 24(1).

⁵⁴ Article 18 of the Namibian Constitution read with s 24(2)-(9) of the Act. Furthermore, Regulation 9 read with Annexure E thereto prescribes the form that the written notice must comply with (Namibia Refugees (Recognition and Control) Regulations GN 236/2000; GG 2412).

Enabling documents

The Act which makes provision for the issuing of an identity card to all recognized refugees and their families.⁵⁵ This document enables the holder to remain in Namibia⁵⁶ and to access the rights provisions.⁵⁷

The Act makes further provision for the Minister to establish regulations for the provision of issues of identification and UN Travel Documents.⁵⁸ Regulation 4(1) makes provision for the issuing of a of a temporary identity document to each person who has applied for refugee status. Once formal status has been conferred upon the applicant he or she will be issued with an identity card.⁵⁹

Once recognized as a refugee or protected person that individual acquires the right to apply to the Commissioner for the issuing of a UN Travel Document that entitled the holder to travel outside Namibia.⁶⁰

Recognising the vital importance of enabling documents as a means of accessing the rights afforded to refugees, the Namibian State has created a tiered system of documentation for individuals in the asylum system.

Socio-Economic Rights

Socio-economic rights are afforded to refugees and protected persons by way of the rights provisions of the Act, read with schedule containing the relevant provisions of the UN Convention, the Namibian Constitution and the broader Human Rights instruments to which Namibia is a party. Regulation 13 furthermore obliges employers to give preference to refugees and protected persons over other non-citizens if efficiency, economy and practicability permit.

However, in practice refugees and protected persons are expected to reside in Osire Refugee Camp and not to engage in economic activities outside the camp, without written permission.⁶¹

⁵⁵ Section 16(a) read with s 17(2)(a).

⁵⁶ Section 16(b) read with s 17(2)(b).

⁵⁷ Section 18(a)(i) read with Schedule I.

⁵⁸ Section 31(1)(g).

⁵⁹ Regulation 5 read with the prescribed form set out in Annexure C.

⁶⁰ Regulation 6.

Article 5 of the Namibian Constitution provides that fundamental rights and freedoms must be respected and upheld by the Executive, Legislature and Judiciary and they should therefore be enforceable by the Courts. However, this is limited by Art. 101, which precludes the judicial enforcement of the principles of State policy regarding the promotion of welfare contained in Art. 95.⁶² As a result, there have not been any reported cases in Namibia involving socio-economic rights, save for a few cases dealing with expropriation of land.⁶³

Academic commentary has furthermore pointed out that Namibia does not have a specialized Constitutional Court or an extra-judicial institutional mechanism such as the dedicated Human Rights Commission in South Africa.⁶⁴ However, the Namibian Ombudsman has extensive powers.⁶⁵ With the constitutional limitation on the judicial enforcement of socio-economic rights, the Ombudsman plays a vital role in the enforcement of socio-economic rights in Namibia. With the heavy involvement of the UNHCR in the running of the Osire camp, the field office may also potentially be an avenue for complaint and redress for refugees and protected persons. However, in practice the enforceability of these rights is potentially hampered by the utilization of a camp system, which would, by its very nature, limit access to the Ombudsman.

Right to Education

In so far as the right to education is concerned, the Namibian constitutional provision is quite comprehensive when compared to other SADAC countries. It provides that all persons shall have the right to education and that primary education should be compulsory and free of charge.⁶⁶ The Act too affords refugees and protected persons the right to favourable treatment with respect to education.⁶⁷

In practice educational services are available in the Osire Refugee camp and primary and secondary school is funded by UNHCR and the Jesuit Refugee Services. Furthermore,

⁶¹ See UNHCR & WFP *Joint Assessment Mission* supra note 24 at p. 8; For a detailed discussion see Refugees.org 'World Refugee Survey: Namibia' available at <<http://www.refugees.org/countryreports.aspx?id=2010>> .

⁶² Mubangizi J.C. 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' 2 *Afr. J. Legal Stud.* 1 (2006) 1 at pp. 10-11.

⁶³ *Ibid.* at p. 11.

⁶⁴ *Ibid.*

⁶⁵ See Art. 91 of the Constitution.

⁶⁶ Articles 20(1)-(2) of the Constitution.

⁶⁷ Section 18(a)(i) read with Schedule I.

the camp makes provision for kindergarten education to provide for the pre-school development and care of young children.⁶⁸ It is reported that the schooling within the camp is of a notably high standard.⁶⁹ Scholarships have furthermore been made available over the years to students so that they can complete their final years of secondary school outside the camp.⁷⁰ However, this has declined in recent years due to the assumption that the individuals would be repatriated to their countries.⁷¹

Due to the fact that refugee status is very often an indefinite circumstance access to education is an extremely important right. In particular if a camp system, such as the Osire Refugee Camp, is employed education of the youth is a vital factor in enabling those individuals to shed the inevitable consequence of dependence that is inherent in such a system.

Non-refoulement

Section 26 of the Act incorporates the principle of non-refoulement, thereby guaranteeing the right of a refugee, or a member of his or her family, not to be returned to a country where such an individual will face persecution for a convention ground, or to an area affected by a serious disturbance of the peace.

In accordance with the obligations under Art. 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as discussed above, s 26 ensures that no person may be refused entry into Namibia, expelled or extradited if the effect of such action would be the refoulement of that individual.

However, where the Act deviates from the Convention Against Torture is in terms of subsection (2) which limits the rights of non-refoulement. In terms of subsection (2) this right will not apply if [1] such a person is excludable from qualifying for refugee status,⁷² or [2] the Minister has order the removal of that individual on the basis that his or her activities endanger, or are calculated to endanger, the security of the State.⁷³

⁶⁸ UNHCR & WFP *Joint Assessment Mission* supra note 24 at p. 19.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Section 26(2) read with s 4(1) of the Act.

⁷³ Section 26(2) of the Act read with s 49(1) of the Immigration Control Act.

Non-penalisation for illegal entry

Section 15 of the Act incorporates a restricted form of the non-penalisation provisions contained in Art. 31 of the UN Convention.

The Act provides that no proceedings will be instituted or continued against any person, or member of their family, in respect of that person's unlawful entry or presence of Namibia. However, this is conditional on the following provisos: First, that such a person has made an application for Refugee Status or has been granted Refugee Status;⁷⁴ Secondly, the individual has not lost their rights of Domicile in terms of the Immigration Control Act;⁷⁵ Thirdly, the reasons for the persons entry into Namibia must not be for any other reason other than to seek asylum;⁷⁶ And lastly, such person's entry may be subject to the scrutiny of the Immigration Selection Board.⁷⁷

Section 15 diverges slightly from Art. 31 of the Convention in that its operation is expressly limited to the finalization of the formal adjudication of the individuals refugee claim. It is therefore likely that the intention of the drafters was to safeguard the principle of non-refoulment, discussed above, and as a recognition of the reality of refugee related migration, which rarely permits for documented entry into the country of Asylum.

Other rights

In regards to other rights afforded to refugees and protected persons a number of protections and safeguards. Amongst others, there are three that bear highlight:-

First, the Act crystallises the rights it affords by providing that its provisions will prevail if a conflict arises between any of its provisions and a provision contained in the Immigration Control Act.⁷⁸ This very progressive clause is an important provision, particularly when one considers issues such as the right of non-refoulment and non-penalisation for illegal entry. It is therefore, in a manner of speaking, a right to enforce ones rights.

⁷⁴ Sub-sections 15(a) and (b) of the Act.

⁷⁵ Section 15 of the Act read with s 23 of the Immigration Control Act.

⁷⁶ Section 15 of the Act read with s 24 of the Immigration Control Act.

⁷⁷ Section 15 of the act read with s 25 of the Immigration Control Act. See the wide powers conferred on the board by subsec 25(2)(b).

⁷⁸ Section 32.

Secondly, the Act further provides that no duties, charges or taxes of any description other than those which may be levied on Namibian nationals in a similar situation may be imposed on refugees and protected persons.⁷⁹ In so doing the State has acknowledged the special humanitarian status afforded to individuals who fall within the ambit of the Act.

Lastly, a right of oversight and accountability is contained in Regulation 16, which requires the Commissioner to periodically furnish the UNHCR with information relating to applications for refugee status, granted status, protected persons, withdrawal of status, detentions and expulsions, treatment and welfare of refugees, and implementation of the Convention. Although this is not a directly accessible or enforceable personal right, this provision is an important recognition of the role of the UNHCR in the protection of the rights of refugees and protected persons in Namibia.

CONCLUSION

During a 23 year struggle for independence Namibia produced thousands of refugees. Independence was finally achieved in 1990 permitting these Namibian refugees to again return to their country. Like several other SADAC countries, Namibia then shifted from a refugee producing country to a refugee receiving State.

The successive periods of colonial rule have resulted in the development a legal system which amalgamated the various legal influences. The new constitutional dispensation which was ushered in following independence has embraced the rule of law and respect for fundamental rights. In accordance with this commitment the Namibian State became a signatory State to several key human rights instruments. Among them being the 1951 UN Refugee Convention and the OAU Convention. These instruments have been translated into domestic legislation in the form of a comprehensive, structured Refugees Act, which came into force on 22 September 2000.

The protection of refugees in Namibia under the Act, and the conventions, is principally informed by the State's decision to reserve the right to form and utilize refugee camps. Despite a human rights orientated approach to the treatment of refugees, which in many cases is more extensive and progressive than other SADAC states, the treatment of

⁷⁹ Section 18(a)(i) read with Schedule I.

refugees and protected persons is impaired by the problems inherent in the adoption of a long term camp structure.

From an analytical perspective the Act creates an often procedurally complex structure which is aimed at the regulation of refugee status determination and the protection of recognised refugees, putative refugees and their families. However, the implementation of this structure is, in many instances, subverted by a heavy reliance on the UNHCR.

Despite these concerns the Act signifies the State's commitment to abide by its international obligations and the courts have demonstrated a wiliness to enforce the strict adherence to the Act.