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Does the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa Article III provision prohibiting “subversive activities” unjustifiably limit the freedom of expression of a refugee? : A South African answer

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“The earth is but one country and mankind its citizens.” Baha'u'llah¹

1. Introduction

Refugees are a vulnerable group of people – having fled situations of strife in their countries of origin, they face the daunting task of assimilating to a new country, negotiating access and surviving amongst a people likely to construct them as ‘outsiders’.² The rights accorded to the refugee and the extent of their protection is thus vital to the refugee to aid their process of re-definition and ‘settling in’. These rights, in a manner, normalise the lives of the refugees, affording them the dignity and protection of which they have been stripped.

The ethos underlying refugee law is the human rights approach – now the dominant approach in refugee law, it focuses on the rules as applied by states and international organisations, affecting the content and boundaries within which refugee law operates.³ The approach calls for asylum claims to be assessed and refugee law instruments to be interpreted having regard to the main aim and purpose of refugee law: to provide protection to those who are not offered any (or insufficient) protection by their country of origin.⁴ The Baha'u'llah quote encapsulates this approach: we are all citizens of the world, deserving of state protection; to lay down roots, wherever we may find ourselves.

Given the significance of the rights accorded to refugees by host States and the overarching human rights approach of refugee law, it would seem logical that refugees garner the protection of a right so fundamental that it has been described as an “indispensible prerequisite for life in society based on the principles of rationality and mutual respect for human dignity”⁵: the right to freedom of expression.

Yet, despite its importance and that fact that one of the definitional categories of refugee status is a well-founded fear of persecution based on one’s expression of a political opinion,⁶

¹ Mírzá Husayn-`Alí (Bahá'u'lláh) (12 November 1817 – 29 May 1892), Persian author

² Majid KhosraviNik conducted a critical discourse analysis of the representation of refugees, asylum seekers and immigrants in British newspapers (the RASIM group) and found that they are likely to be portrayed by the media negatively, through the use of linguistic devices like aggregation and collectivisation, they are dehumanised and cast as ‘outsiders’.

Majid KhosraviNik, ‘The representation of refugees, asylum seekers and immigrants in British newspapers’ *Journal of Language and Politics* Vol. 9:1 (2010), pp 1–28, 13

³ Helene Lambert ‘International Refugee Law: Dominant and Emerging Approaches’ in David Armstrong (ed) *Routledge Handbook of International Law* (2009) at p 24-344

⁴ Ibid.

⁵ Manfred Nowak *U.N. Covenant on Civil and Political Rights: ICCPR Commentary* (2005) 337, quoted in James C. Hathaway *The Rights of Refugees under International Law* (2005), at p 874

⁶ Article 1 A(2) of the United Nations Convention Relating to the Status of Refugees, 1951

thus the greater impetus for the refugee to have greater protection of the right (given the lack or insufficiency of protection of the right which might have prompted their flight), the right is not provided for in any international refugee instruments, nor regional. It is thus left up to the requisite host State to determine in domestic law whether to extend the right, and its ambit.

Yet, what is arguably more alarming than this exclusion is the inclusion of the provision in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”)⁷ requiring the refugee to abstain from “subversive activities against any Member State of the OAU”.⁸ This presents, *prima facie*, a regional position that the right to freedom of expression is not encouraged, rather, it is impliedly limited. The question thus prompted: is the right of the refugee to freedom of expression unjustifiably limited by this provision?

In answering this question, this paper will traverse the importance of the right to free expression (within the South African context), then specifically its importance for refugees. Next, the limitation of the right as presented by the provision of the OAU Convention will be analysed, to determine the meaning of the phrase ‘subversive activities’ and the extent to which this could limit the refugee’s right to free. Lastly, the merging of the two concepts against the backdrop of the South African legal system will require a section 36 analysis to determine whether the limitation of the right by the OAU Convention provision would be unjustifiable in terms of the South African Constitution⁹.

The argument will be made that despite the limitations on the refugee’s right to free expression, the right as realised in South Africa is one which is fiercely protected, with a well-grounded jurisprudential and high precedential backing. Although the right is limited by the OAU Convention’s Article 3 provision, this limitation is constitutionally justifiable. Further, given the breadth of the right as accorded in South Africa, the refugee’s right to free expression is not unjustly culled, but rather, can be enjoyed to an extensive degree.

⁷ 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa Adopted on 10 September 1969 by the Assembly of Heads of State and Government, CAB/LEG/24.3., entered into force on 20 June 1974 (“OAU Convention”)

⁸ Article 3 of the OAU Convention

⁹ The Constitution of the Republic of South Africa, 1996

2. The right to freedom of expression

I. What instruments provide for the right?

The discussion of this right requires that it first be textually located. The right is found at three different ‘levels’ of legal text and entrenched in legislation by most nations, reiterating the importance of its protection.¹⁰

Internationally, the right to freedom of expression is provided for in Article 19 of the Universal Declaration of Human Rights (UDHR)¹¹ and in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)¹². The ICCPR (which is based on the UDHR, hence the similarity of provisions) provides:

‘Everyone shall have the right to freedom of expression; [which] shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’¹³

Regionally, the African Charter on Human and Peoples’ Rights (ACHPR)¹⁴ provides for the right in Article 9, reiterating the texts of the UDHR and ICCPR and echoing the provisions of two regional instruments which precede it (the European Convention on Human Rights (ECHR)¹⁵ and the American Convention on Human Rights (ACHR)¹⁶). It states that ‘every individual shall have the right to express and disseminate his opinions within the law.’

Nationally, as South Africa has ratified the ICCPR and ACHPR, it is bound by their provisions and as international instruments, they provide an interpretative guideline to statute.¹⁷

The Constitution provides for the right in section 16, which states that everyone has the right to freedom of expression, including:

¹⁰ At last count, 168 states were party to the ICCPR, signifying their intent to uphold and protect the right of free expression in Article 19, though certain countries have entered into reservations on it, such as the Netherlands, and Belgium. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. Accessed on 26 May 2014.

¹¹ United Nations General Assembly Resolution 217A (III), 10 December 1948

¹² UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976

¹³ Article 19 (2) of the International Covenant on Civil and Political Rights

¹⁴ Adopted 26 June 1981, entered into force 21 October 1986

¹⁵ Adopted 4 November 1950, entered into force 3 September 1953

¹⁶ Adopted 22 November 1969, entered into force 18 July 1978

¹⁷ Section 39 of the Constitution of the Republic of South Africa, 1996

- (a) freedom of the press and other media;*
- (b) freedom to receive or impart information or ideas;*
- (c) freedom of artistic creativity; and*
- (d) academic freedom and freedom of scientific research’.*¹⁸

This initial glance reveals the breadth of the right and its many forms, its interconnectedness to other rights and the generally-couched limitations imposed on its exercise.

II. Does the right apply to refugees and when is it accorded to them?

The right to freedom of expression is classed as a civil and political right and the 1951 United Nations Convention Relating to the Status of Refugees and its 1969 Protocol (“the UN Convention”)¹⁹ is silent on the question of political activity of refugees,²⁰ save to note that such persons are required to respect the laws of the country of refuge, as refugees have duties to the country of asylum, including respect for its laws.²¹

As the UN Convention is the primary international source of refugee rights and other aspects of refugeehood, the absence of the right from this document is conspicuous, even more so given the Conventions’ definition of a refugee as including expressed political ideals.

Though the UN Convention does not expressly contain the right to freedom of expression, Hathaway argues that engagement in the process of exchange of ideas and information is often possible only where there is scope for individuals to act collectively.²² He situates the right in Article 15 of the Convention, as an adjunct to refugees’ right of association.²³

During the drafting of the Convention, it was proposed that Article 15 should state that refugees have the right to join non-profit making associations²⁴; the exclusion regarding

¹⁸ Section 16 of the Constitution of the Republic of South Africa, 1996

¹⁹ 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954 and Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force on 4 October 1967 (“UN Convention”)

²⁰ Ruma Mandal, Legal and Protection Policy Research Series: *Political Rights of Refugees*. (Accessed on 4 June 2014). Available at <http://www.unhcr.org/protect>, p 1

²¹ Article 2 UN Convention

²² Hathaway op cit at p 874-875

²³ Article 15 of the UN Convention states: As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

²⁴ Hathaway op cit at p 881

political associations was included by Switzerland to ensure that refugees did not jeopardize its position of international political neutrality.²⁵ The arguments made regarding political stability would be later echoed by the drafters of the OAU Convention.

Thus, despite the fact that the several international instruments provide that everyone has the right to freedom of expression and association, the UN Refugee Convention does not codify this, arguably falling short of the UDHR standards.²⁶ Instead, it limited the right to an extent by limiting the right to freedom of association so that it applies only to certain associations, to the exclusion of political associations – the drafters impliedly side-lined the importance of political expressions and political associations.

However, the drafters did not seek to limit purely individuated forms of political expression. The right to free expression is protected regardless of borders, so that relaying and receiving information and ideas across national borders is permitted.²⁷ During the drafting phase, arguments between representatives as to inclusion of Articles 18 and 19 of the ICCPR (relating to freedom of thought, opinion, and expression) brokered that there was no need for the specific inclusion of the articles as they apply to all humans, including refugees.²⁸

Jayawickrama criticises the article, observing that the freedoms of opinion, assembly, and association combine in practice to require the acceptance of the public airing of disagreements and the refusal to silence unpopular views.²⁹ Essentially, he argues that so intertwined are the rights that to provide for one to the exclusion of the others is counter-intuitive. This is a pivotal argument: though not expressly prohibited, the right is equally not expressly protected at the international level or regional of refugee-specific law.

Regionally, the OAU Convention is silent on the right. Hathaway argues that there is a perceived reluctance by legislators to be the first to codify the liberal standard of the UDHR, rather granting minimalist freedom rights to refugees³⁰, indicating a distancing from the more liberal standard of international and regional human rights instruments.³¹ The diminishment of the right in the OAU Convention is in the same vein as the Swiss exclusion of the

²⁵ Hathaway op cit at p 884

²⁶ Hathaway op cit at p 891

²⁷ Ibid.

²⁸ Hathaway op cit at p 891

²⁹ N Jayawickrama, *The Judicial application of Human Rights* (2002) at p 738-739

³⁰ Hathaway op cit p 889

³¹ Ibid.

allowance for refugees to join or form political associations, the preoccupation with maintaining political stability, and avoiding interstate tension.³²

The exclusion from protection at higher levels through its exclusion from these international and regional documents fails to recognise the importance of the right, particularly for refugees. That the right finds itself as a mere ‘extra’ to the right of freedom of association in Hathaway’s conception of the right is further illustrative of this point, as though the right in itself is unworthy of recognition or protection.

Although these refugee-specific international and regional instruments do not provide for the right, the international guarantee of freedom of expression contained in Article 19(1) of the ICCPR is universal in coverage³³, so that refugees fall within its scope. This is echoed by the expansive wording of the ACHPR and domestic legislation³⁴, so that the right is accorded to refugees by these international and regional non-refugee specific human rights instruments.

Yet, despite these alternate sources which provide for the right, there is an argument to be made against sole reliance on these instruments for the protection of the right. Its exclusion from refugee-specific documents is counter-intuitive, given the importance of the right in itself and further, to refugees who may have fled given the oppression experienced due to their exercise of the right. To leave the protection of the right to the discretion of domestic legislators and UDHR, ICCPR and ACHPR provisions and exclude it from another avenue of protection (refugee-specific instruments) is a glaring oversight.

Regarding when the right is accorded to refugees, the UN Convention provides that the right to association (and thus, freedom of expression, according to Hathaway’s model) is afforded to refugees who are lawfully staying. This level of attachment to the host state implies a lengthy residence, officially sanctioned, ongoing presence in the state.³⁵

A notable point is that the UN Convention states in Article 5 that ‘nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.’³⁶

³² Hathaway op cit at p 884

³³ Article 19 of the ICCPR states that ‘everyone’ is afforded the right to freedom of expression.

³⁴ Nationally, the Refugees Act 130 of 1998 provides in section 27(b) that a refugee enjoys full legal protection, including the rights in Chapter 2 of the Constitution (under which the right to freedom of expression falls). Section 16 is expansively worded and afforded to ‘everyone’, necessarily including refugees.

³⁵ Hathaway op cit ch 6

³⁶ Article 2 of the UN Convention

The South African Refugees Act³⁷, read with section 16 of our Constitution, provides that the right applies to ‘everyone’, meaning that Article 5 applies, so that the ‘lawfully staying’ requirement may not apply – there is no mention made of the class of refugee to which the right attaches. Thus, it is implied that upon receiving refugee status, the refugee would be able to enjoy the right to freedom of expression in South Africa.

Linked to the questions of to whom and when does the right extend is the question: what is the ambit of the right?

The UN Refugees Convention provides that the scope of right to freedom of association (and freedom of expression, according to Hathaway) is the ‘most favourable treatment accorded to nationals of a foreign country,’³⁸ one of the highest standards of treatment in the Convention. Whilst many of the rights in the UN Refugee Convention are afforded at the baseline level of ‘aliens generally’,³⁹ Article 7(1) combines international law norms, stating that the general principles of those laws will apply automatically to the benefit of refugees,⁴⁰ allowing a higher standard of treatment where provided in the Convention, failing which, host States revert to the ‘aliens generally’ standard.⁴¹

Hathaway’s construction of the right is not the norm and thus, the refugee’s right to freedom of expression (which is not provided for by the Convention at all, thus attaching no favourable position, but is provided for by international legal norms and therefore covered by Article 7(1)), is to be treated by host States at the lowest level of ‘aliens generally’.

However, South African law extends the right – it is afforded to everyone at the same level⁴², including refugees, rendering this provision redundant in terms of Article 5 of the Convention⁴³, extending the Convention provisions as permissible by the host State.

South African law holds the rights of refugees and asylum seekers in high regard – several cases deal with a variety of refugee rights claims. The extension of the rights in the UN Convention by national law and the protection accorded to these rights is a signifier of our

³⁷ Section 27 (b) of the Refugees Act 130 of 1998

³⁸ Article 15 of the UN Convention

³⁹ Hathaway op cit at p 229

⁴⁰ Hathaway op cit at p 230

⁴¹ Article 7 of the UN Convention: Exemption from reciprocity

Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

⁴² Section 16 of the Constitution of the Republic of South Africa

⁴³ The extension of the right(s) contained in the Convention as is allowed by the host State, Article 5 of the UN Convention

commitment to the upholding of human rights and the development of a nation built upon the foundations of ubuntu, dignity and equality⁴⁴ and our international law obligations. The following cases are examples of the manner in which South Africa has dealt with refugee rights:

In the landmark decision of *Mohamed and Another v President of The Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)*⁴⁵, the Constitutional Court dealt with an appellant facing trial in the United States of America, with a possibility of the death penalty being imposed. The rights in question: the right to human dignity⁴⁶, right to life⁴⁷ and the right not to be punished in a cruel, inhumane or degrading way^{48, 49}. It was held that the South African government's conduct in allowing the appellant's deportation was contrary to the underlying values of the Constitution and its obligation to protect the life of everyone in South Africa.⁵⁰

The Constitutional Court dealt with the refugee's right to equality⁵¹ in *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others*.⁵² The Private Security Industry Regulation Act⁵³ requires applicants registering as service providers be citizens of or have permanent residence status in South Africa.⁵⁴ The unsuccessful refugee applicants claimed the section unfairly discriminated against them based on their refugee status. Though the majority of the court found it justifiably discriminatory, a dissenting judgment held that, contrary to South Africa's international law obligations, the section was unfairly discriminatory on the basis of refugee status. The provision failed to recognise that refugees occupied a position similar to permanent residents and should therefore be entitled to admission to the industry.⁵⁵

⁴⁴ Chapter 1 of the Constitution of the Republic of South Africa, 1996

⁴⁵ 2001 (3) SA 893 (CC)

⁴⁶ s 10 of the Constitution of the Republic of South Africa, 1996

⁴⁷ s 11 of the Constitution of the Republic of South Africa, 1996

⁴⁸ s 12(1)(e) of the Constitution of the Republic of South Africa, 1996

⁴⁹ Mohamed supra note 45 above at paras [37] - [39]

⁵⁰ Mohamed supra note 45 above at para 58

⁵¹ Section 9 of the Constitution of the Republic of South Africa, 1996

⁵² 2007 (4) SA 395 (CC)

⁵³ Act 56 of 2001

⁵⁴ s 23 of the Private Security Industry Regulation Act 56 of 2001

⁵⁵ Union of Refugee Women supra note 52 above at paras [91] - [125]

III. Why the right to free expression is important

The jurisprudence of the right as presented by jurists like Richard Dworkin and Thomas Emerson illustrate the importance of the right. They argue that the right is instrumental and an end in itself, it is a right that is required in every modern legal society,⁵⁶ where citizens are responsible moral agents, capable of forming judgements and disseminating opinions.⁵⁷ Given that this right is fundamental to human nature (for all hold an opinion on issues, and all are wont to share these), the right is deserving of protection.

The right is one which is fiercely protected in South Africa, illustrated by case law. The Constitutional Court in *South African National Defence Union v Minister of Defence and Another*⁵⁸ held:

*'Freedom of expression lies at the heart of a democracy [...] The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.'*⁵⁹

In *NM and Others v Smith and Others*⁶⁰, O'Regan J expanded on this:

*'it is indispensable not only because it makes democracy possible but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy.'*⁶¹

In *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and Others*,⁶² Mokgoro J held that freedom of expression is one of a 'web of mutually supporting rights' in the Constitution⁶³ and in *National Media Ltd & Others v Bogoshi*,⁶⁴ the court held that the right is 'the indispensable condition of nearly every other form of freedom.'⁶⁵

⁵⁶ Emerson T.I 'The System of Freedom of Expression' (1970) at p 6 -7.

⁵⁷ Davis D. 'Freedom of Expression' in H. Cheadle, D.M. Davis and N.R.L Haysom (eds) *South African Constitutional Law: Bill of Rights* 2nd ed (2011)at 11-3.

⁵⁸ 1999 (4) SA 469 (CC).

⁵⁹ Ibid para 7.

⁶⁰ 2007 (5) SA 250 (CC).

⁶¹ Ibid para 145.

⁶² 1996 (3) SA 617 (CC).

⁶³ Ibid para 27.

⁶⁴ 1998 (4) SA 1196 (SCA).

⁶⁵ Ibid 1207J-1208C.

The right is especially important for refugees, as one of the reasons behind their seeking asylum is due to persecution of their political expressions.⁶⁶ This is illustrated by the number of cases of individuals seeking refuge due to persecution based on their political opinion. For example, in *Fang v Refugee Appeal Board and others*,⁶⁷ the applicant sought asylum in South Africa on the grounds of a well-founded fear of persecution due to political opinion, flowing from his involvement in the opposition movement in China's Tianmen Square protests. In *Mayongo v Refugee Appeal Board and Others*⁶⁸, the court held that the appellant did have a well-founded fear of persecution due to the persecution suffered for the expressed political opinion of his father at the hands of the Angolan government (imputed political opinion).

Given the importance of the right as illustrated, it is equally important to note that despite its importance, it is capable of limitation. The Promotion of Equality and Prevention of Unfair Discrimination Act ("Equality Act")⁶⁹ provides one such limitation, specifically on free speech (one form of free expression):

'no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds (including race, gender, religion, amongst others) against any person, that could be reasonably construed to demonstrate a clear intention to

a) be hurtful, or

b) be harmful; or

*c) propagate or promote hatred.'*⁷⁰

The right may also be limited where it unjustifiably infringes upon the right(s) enjoyed by others (this is determined by a section 36 enquiry⁷¹). One such limitation is presented by Article III of the OAU Convention.

⁶⁶ One of the definitional elements of a refugee, contained in the UN Convention, echoed in the OAU Convention and the South African Refugees Act (Article 1 of the UN Convention, Article 1 of the OAU Convention and section 3 of the Refugees Act)

⁶⁷ (40771/05) [2006] ZAGPHC 101 (15 November 2006)

⁶⁸ (16491/06) [2007] ZAGPHC 17 (4 April 2007)

⁶⁹ Act 52 of 2002

⁷⁰ Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002

⁷¹ Section 36 of The Constitution of The Republic of South Africa, 1996

IV. “Subversive activities” OAU Convention prohibition: its meaning and effect

The OAU Convention in Article III provides:

1. *Every refugee has duties to the country in which he finds himself, which require in particular that he conforms 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.*
2. *Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.*⁷²

The first paragraph of Article 3 of the OAU Convention is analogous to Article 2 of the UN Convention, requiring conformity with laws, regulations and measures for the maintenance of public order.⁷³ However, the OAU Convention extends the UN Convention provision.

No definition of “subversive”, “attacking” or “likely to cause tensions” is given in the OAU Convention and it is therefore possible, and arguably desirable, to interpret the limits on political activity set out in Article III in line with the human rights obligations of OAU States.⁷⁴ However, there is evidence that some OAU States have not adopted this narrowed, nuanced approach to the interpretation of Article III, instead reading it as prohibitory of any political activity with respect to the refugee’s country of origin,⁷⁵ or any political activity whatsoever.⁷⁶

This is the inherent danger of the provision – that it would stem legitimate, lawful expression by refugees, the legitimacy of which is left to be gauged by the host State, dependent on their interpretation of the article. Whether a host government restricts the political activities of refugees is almost entirely dependent on its own alignments and preferences.⁷⁷ Critics of the

⁷² Article 3 of the OAU Convention

⁷³ Marina Sharpe, ‘OAU and AU Engagement with Refugee Protection’ *African Journal of International and Comparative Law* 21.1 (2013): 50–94, at p 57

⁷⁴ Ruma Mandal, note 20 above, at p 2

⁷⁵ *Ibid.*

⁷⁶ An example of one such instance is where refugees have been expelled from Zimbabwe simply for criticising the regime in the host country or in their country of origin. Ruma Mandal, note 20 above, at p 20

⁷⁷ Chris J. Bakwesega, “Forced Migration in Africa and the OAU Convention” in Howard Adelman and John Sorenson, *African Refugees: Development Aid and Repatriation*, Westview/York Lanes Press, 1994, 3 at p. 94

Convention argue that the threat to the subversive refugee who remains interested in the affairs of his country contained in the provision is ‘tantamount to ensuring that the African refugee is considered as a subhuman species’⁷⁸ and makes their stay in the asylum state ‘contingent upon their passivity and silence, even though the motive behind their flight might have been the search for freedom of expression as well as the right to development’.⁷⁹ Emmanuel Opoku Awuku suggests an altogether scarier prospect: ‘the excessive use of the exclusion and cessation clauses concerning refugees who have seriously infringed the principles of the OAU or the purposes and objectives of the OAU Convention’.⁸⁰ However, George Okoth-Obbo validly argues that

*‘some of these criticisms simultaneously overstate their case while at the same time diminishing the seriousness of the devastation that can be visited upon an entire refugee situation once politicization and militarisation are allowed to take root’.*⁸¹

As there are no official *travaux préparatoires* for the OAU Convention,⁸² the determination of what is meant by this article is challenging. The term “subversive” gave rise in the past to different interpretations and the clause prohibiting any activity capable of bringing about concern between the OAU member States has been judged as ‘rather vague’⁸³, which vagueness has been attributed to an ‘intention to capture a myriad of unforeseen circumstances.’⁸⁴

In determining its meaning, some writers discuss the genesis of the OAU Convention. Micah Rankin argues that the most prominent view is that the OAU Convention was an effort to ‘Africanise’ the refugee definition because of purported deficiencies in the UN Convention.⁸⁵

⁷⁸ Etienne-R Mbaya, “Political Asylum in the Charter of the OAU: Pretensions and Reality”, Vol. 35, *Law and State*, 63 at pp. 76-77

⁷⁹ Chris J. Bakwesega, note 77 above, at p.11

⁸⁰ Emmanuel Opoku Awuku, “Refugee Movements In Africa and the OAU Convention on Refugees” *Journal of African Law* 79 (1995) 79-86, at p 83-84

⁸¹ George Okoth-Obbo, “Thirty Years On: A legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa,” 20 (2001) *Refugee Survey Quarterly*, at p 133

⁸² Marina Sharpe, “Engaging with refugee protection? The Organization of African Unity and African Union since 1963” New Issues in Refugee Research, UNHCR Research Paper No. 226. Available at http://citizenshiprightsinafrica.org/docs/Sharpe%20&%20Namusobya_Uganda_2012.pdf Accessed on 1 June 2014, at p 7

⁸³ Emmanuel Opoku Awuku, “REFUGEE MOVEMENTS IN AFRICA AND THE OAU CONVENTION ON REFUGEES” *Journal of African Law* 79 (1995) 79-86, p 83

⁸⁴ Micah Bond Rankin, “Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ Working Paper 113, UNHCR Evaluation and Policy Analysis Unit, at p 11

⁸⁵ Micah Bond Rankin, “Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ *South African Journal of Human Rights* 21 (2005), at p 407

However, this smokescreen masked the real motive behind the OAU Convention (which echoes the arguments of the UN Convention drafters regarding the exclusion of the right to freedom of expression), belied by the first drafts of the Convention, which were more limited than the UN Convention.⁸⁶ Rankin argues that chief among the motives was the

‘desire to balance Africa's traditional hospitality toward strangers with the need to ensure security and peaceful relations among OAU member states. [...] [C]oncern was based on a fear that mass population movements would prompt interstate conflict, particularly if exiles used host countries as new bases of operation for subversive activities.’⁸⁷

Okoth-Obbo also suggests that the core preoccupation was security:

‘the success of the Convention may be largely measured by its attempt to depoliticize and cohere the grant of asylum in particular, and the refugee question more generally, in the context of international relations and state security politics.’⁸⁸

In light of this emphasis on security and political stability, the alteration of the wording in Article 1 of the OAU Convention gives an interpretative guide to the phrase “subversive activities”. This section initially provided that the refugee would be one who was compelled to leave his or her place of habitual residence due to (inter alia) ‘internal subversion’.⁸⁹ It was then replaced with ‘disorder’ and eventually with ‘events seriously disturbing public order’, as ‘internal subversion’ was considered to be too ambiguous.⁹⁰

As a guide, the latter term, the final wording of the Convention provision, has been interpreted to mean ‘concerned with disturbances in the public context’. Inclusion of the term ‘seriously’ denotes an ‘indication that the gravity of the harm must be greater than emotional distress.’⁹¹ A serious disturbance of public order should be seen as a ‘class or category of events which involve violence or threats against an indeterminate number of people or to society at large’.⁹² This interpretation aids in the understanding of the term ‘subversive activities’ as ‘internal subversion’ was initially intended to convey the concept of ‘events

⁸⁶ Rankin note 85 above, at p 408

⁸⁷ Ibid.

⁸⁸ George Okoth-Obbo, note 81 above, at p 90

⁸⁹ Rankin, note 85 above, p 409

⁹⁰ Ibid.

⁹¹ Rankin, note 85 above, at p 424

⁹² Rankin, note 85 above, at p 427

seriously disturbing the public order', which Rankin suggests is a clear intention to deal with human-made threats from human activity.⁹³

Mandal adds to this in her discussion of the responsibility of the host State for conduct on the part of the refugee, where she argues that the host State is not obliged to suppress any criticism, or indeed propaganda, by individuals in its territory about other governments.⁹⁴

*However, where the refugee becomes engaged in subversive activities aimed at the violent overthrow of the government of another State, this may trigger responsibility of the host State. Insofar as a State is obliged not to take part in any activities aimed at the violent disposal of another State's regime, it is arguably under a similar duty to prevent individuals in its territory from attempting the same.*⁹⁵

In coming to this conclusion, she uses the 1970 UN Declaration on Friendly Relations⁹⁶ which states that 'no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.'⁹⁷ However, there is not yet clarity on the issue of whether the host State is merely required to refrain from assisting rebel groups or whether it is actually obliged to prevent refugees from carrying out activities injurious to their country of origin.⁹⁸

The term 'subversive activities' can thus be interpreted to mean a man-made threat of violence with the possibility of its having a gravity of harm greater than that of merely causing emotional distress. Grounded in the concepts of security and political stability, the use of terrorism, violence and armed conflict aimed at causing strife or the collapse of a regime in another Member State can thus be seen as a subversive activity.

⁹³ Rankin, note 85 above, at p 429

⁹⁴ Mandal, note 20 above, at p 11

⁹⁵ Ibid.

⁹⁶ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA res. 2625 (XXV), 24 Oct. 1970.

⁹⁷ Ibid.

⁹⁸ Mandal, note 20 above, at p 12

The consequence of the refugee's violation of the Article 3 provision is found in Article 1.4(g) of the same Convention, argue Joan Fitzpatrick and Jeffrey and Susan Brotman.⁹⁹ They state:

*Article I.4(g) [cessation of refugee status provision] is perhaps best interpreted as an implementation measure for the rule of conduct imposed by Article 3 of the OAU Convention, prohibiting subversive activities against other OAU states. Article 3 appears to envision direct control by the asylum state of certain activities by refugees (through criminalization and other limits on violent or expressive activities). Article I. 4(g) would permit cessation of refugee status as a consequence of this prohibited conduct.*¹⁰⁰

This is a harsh sentence for the offending refugee to potentially be facing, again denoting the seriousness of the claim of the commitment to security and political stability in the African region as sought by the drafters of the Convention. The harshness of the potential penalty also illustrates the degree of severity of the action itself; that it would be at such a level to lead to the termination of the refugee status of an individual and allow them to potentially be returned to their country of origin, from which they have fled and sought asylum protection elsewhere.¹⁰¹

Importantly, Okoth-Obbo points out that prohibition of subversive activities are not unique to Africa and conform to the general principles of international law, for instance as set out in the Declaration on General Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.¹⁰² Indeed, its motives take shape in domestic legislation aimed at essentially the same general maintenance of peace, security and public order: the Equality Act¹⁰³.

⁹⁹ Joan Fitzpatrick, Jeffrey & Susan Brotman, "Current Issues in Cessation of Protection Under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention". Available at <http://www.refworld.org/pdfid/3bf925ef4.pdf> Accessed on 30 May 2014

¹⁰⁰ Fitzpatrick and Brotman, note 99 above, at p 13

¹⁰¹ It should be noted that persons subject to cessation under Article 1.4(g) may be entitled to the human rights bars to refoulement. Fitzpatrick and Brotman, note 99 above, at p 14

¹⁰² Okoth-Obbo, note 81 above, at p 131

¹⁰³ The Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002

V. Conclusion

It is apparent that the right to freedom of expression is highly valued and protected, particularly in South Africa, to a certain degree. It is able to be limited in certain instances and one of these instances is arguably contained in the OAU Article III provision. To determine whether or not the right would be unjustifiably limited by the operation of the provision, it may prove useful to conduct a hypothetical section 36¹⁰⁴ limitations enquiry (this enquiry would normally be conducted on a factual, case-by-case basis).

Section 36 provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a. the nature of the right;*
- b. the importance of the purpose of the limitation;*
- c. the nature and extent of the limitation;*
- d. the relation between the limitation and its purpose; and*
- e. less restrictive means to achieve the purpose.*

It is clear that the limitations in the Equality Act¹⁰⁵ places on the right to free expression are in the same vein as the motives behind the prohibition on subversive activities in the OAU Convention. It is further clear that international norms and laws are focused on attaining the same goal as the provision, that it is a legitimate concern of all states, and the international community as a whole.

In this hypothetical theoretical section 36 enquiry, the right to free speech (which is a form of free expression) is isolated and analysed. It is arguable that the abuse of the right to free speech can amount to a subversive activity, where the speech is used to incite violence, or as a platform to spread hatred and destruction of a government or regime among a group of people.

The right to free expression is important, given its jurisprudential roots and its interconnectedness to other rights. Yet, it is still capable of limitation, as all the rights in the

¹⁰⁴ The Constitution of the Republic of South Africa, 1996

¹⁰⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002

Bill of Rights are of equal importance. The importance of the purpose of the limitations provided in the Equality Act and the OAU Convention are thus one in the same in this regard: to restrict the insurrection of violence and hate, be it against another person, group, State or government.

At its core, the prohibitory provisions aim to maintain peace and accord between citizens and nations. This is an important goal and thus limitation, essential to the fabric of society, especially in Africa, rife with intercontinental conflict and a history of “in-fighting”. The limitation in the Equality Act and OAU Convention are related to their combined purpose, and they both provide for the extreme situation, where the right to free expression (which is so wide that only certain extreme instances are excluded by legal texts) is grossly abused, to cause harm to another person or within a nation.

Given the wide range that the right to free expression can take in South Africa (artistic, academic, speech) it is clear that one’s conduct is more likely to be capable of falling under the wide umbrella of the right and being protected, than it is likely for one’s expressive conduct to fall outside of the ambit of the right and subject to limitation. The limitation is in itself so limited that it covers only the extreme of the right to free expression, leaving room enough for a multitude of conduct to count as valid, justifiable free expression.

Despite the limitation presented by the OAU Convention, the right is protected enough in South Africa, and the rights of refugees on the whole so well protected here that the limitation of the Convention would be felt only slightly. Further, the prohibition offers a justifiable limitation to the right of free expression, comparable to that of the Equality Act and thus should not present as looming a limitation as it seems.

In conclusion, the right to free expression is integral to the humanity of an individual, deserving of protection. That it is not provided for by any refugee-specific instruments internationally or regionally is an oversight, the blow of which is lessened by its provision in international and regional human rights instruments. Although the OAU Convention does limit the right, it is a legitimate, justifiable limitation, given the echoed international (and domestic) legislative and normative aims for the same purpose. The OAU Convention provision has room for abuse if widely interpreted by the host State, but this is unlikely to occur in South Africa, given our history of human rights jurisprudence.