Human Rights and Refugees in Southern Africa:

Some Perspectives on Recent Legislative Developments in Malawi

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I. The Concept of Rights: the Problem of Definition and Approach

Contemporary discourses on democracy and human rights in Africa, as elsewhere, are replete with unequivocal references and appeals to respect for "rights". This is nothing new; throughout history, arguments for democracy have always been intimately connected with, if not conceptually based upon, demands for the respect of the political and civil rights of the citizenry, although the notion of citizenry has been variously defined from one historical epoch to another, and from society to society. At least this has been the traditional focus of the Western liberal democratic tradition. The problem, however, is that often there is not much agreement on the conceptual content of these rights. What do these rights entail? Or, more specifically, what is involved in the demands for respect for democratic and human rights? What, indeed, are human rights?

Why should discourses on democracy and human rights concern themselves with such preliminary definitional enquiries? The short answer is simply that the concept of rights has always generated acute confusion and controversy, even among legal scholars and philosophers. This is particularly so with regard to the species of rights commonly known as human rights. Part of the controversy has arisen around the questions whether human rights are of a legal or moral character, whether they belong to the realm of natural law, or whether, in fact, they belong to all these groups.

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It has been suggested by some commentators that the need to clarify what is meant by human rights arises because propositions about rights in general, and human rights in particular, are equivalent to propositions about the content of rules or principles of a certain normative system. The nature of the rights referred to by the propositions will vary according to the legal, moral, or natural law character of the system to which those propositions allude[2]. It is quite clear that in certain historical contexts human rights are, or have been, conceived of as legal rights. However, where reference to human rights acquires a radical importance in evaluating laws, institutions, measures, or actions, such rights are not identified as products, or part, of the norms of positive law; rather, such legal rights are created as a result of the recognition of rights which are logically independent of the legal system. Thus, respect for human rights is demanded even in situations in which the legal system – or the state – does not recognize them, precisely because it does not recognize them. It is for this reason that, for centuries, most thinkers were inclined to defend the thesis that human rights have their origins in natural law and not in the positive legal order enacted by the state; that the criterion for the validity of human rights norms is not based on their promulgation or recognition by any particular individual or group of individuals – and certainly not the state or the political rulers – but on their intrinsic justification as moral goods that inhere in all human beings. This type of conceptualization has appeared to gain a contemporary relevance and currency as the demands for democratic reform and respect for human rights in Africa have continued to gather pace over the last few years.

It is said that a credible theory of rights must pass at least three decisive tests. At the philosophical level, the theory must meet the requirements of rational and logical standards; on an ideological level, it has to be couched in terms that are emotionally and culturally attractive, while displaying the minima of rationality; and, finally, on a legal level, the theory must be translatable into codes of enforceable action. The last requirement is usually realized by codifying rights as civil and political rights. As was noted at the outset of this discussion, this conceptualization and the codification of rights into civil and political rights – the so-called first

[2] C.S. Nino, The Ethics of Human Rights (1991), 10. Some of the more recent works in which some of the issues raised in this brief discussion have been treated in fuller detail are: N. MacCormick, Legal Right and Social Democracy (1982); J. Feinberg, Rights, Justice and the Bounds of Liberty (1980); A.R. White, Rights (1984), and M. Freeden, Rights (1991).

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generation rights – provides the bedrock of the Western liberal democratic and human rights traditions. But it is a conceptualization that has been challenged, first by the former socialist states of Eastern Europe which championed what are known as second generation rights – economic and social rights – and, later, by the newer nations of the Third World, which have largely been responsible for the conceptual recognition of what are now called third generation rights – rights pertaining collectively to peoples rather than individuals, for example the right to development[3]. This is one way of addressing the concept of rights.

However, there are alternative approaches and arguments. Not all of these can be outlined, let alone examined, in this brief discussion. But the observation by Mamdani is both apt and relevant in this connection, i.e. that most discussion on rights in Africa tends to centre around the question of their content, and that the major failure of such discussion is that it obscures issues that highlight the specificity of the African situation. He identifies one of these issues as the received notion of "the citizen as the bearer of human rights"[4]. It is instructive to quote *in extenso* Mamdani's argument regarding the assumption that rights are the prerogative of the citizen:

> This assumption was [swallowed] by African nationalists on the morrow of independence. That rights should be restricted to citizens is a presumption of both the more conventional African Charter on Human and Peoples' Rights, adopted by the 1981 OAU Summit, and its radical predecessor, the Universal Declaration of the Rights of Peoples of 1976, otherwise known as the Algiers Declaration. And yet, the equation of human rights with citizen rights is not a conclusion that can easily be drawn from a consideration of social reality in Africa. For much of Africa is a land of migrant labour. [The] outcome of migrant labour is a radical rupture between the land of one's birth and that of one's labour; as a result, between the country of one's citizenship and that of one's residence. Since "human rights" in liberal theory flow from membership of a political community ("citizenship") and not of a labouring community ("residence"), this single fact has been sufficient to strip millions of migrant labourers of their "human rights" legally[5].

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[3] This was first formally recognized by the UN Commission on Human Rights in 1977 and was subsequently endorsed by the UN General Assembly in 1986. See UN General Assembly Res. 41/128 of 4 December 1986.

[4] See M. Mamdani, Africa: Democratic Theory and Democratic Struggles, 8–9, paper presented at CODESRIA Conference on Democracy and Human Rights in Africa: The Internal and External Context, Harare, Zimbabwe, 11–14 May 1992; also forthcoming in Dissent (1992).

[5] Ibid., 15.

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I submit that Mamdani's theoretical construct here can be applied with equal validity in discourses concerning the violation, or denial, of the human rights of another category of millions of Africans who presently find themselves compelled to assume residence in foreign countries, but neither as "citizens" nor as "migrant labourers" in such countries, i.e. refugees. Like migrant labourers, refugees are people who have also suffered a radical rupture between their country of birth (and citizenship) and that of asylum (or residence); but refugees probably stand in an even more perilous position, for by definition this rupture with their country of origin is one that is forced upon them by force of political circumstance often involving a gross violation of their human rights in the country of origin.

The challenge that faces both advocates and practitioners of democratic theory and human rights in Africa is to formulate a theory of rights and demands for democratic reform that do not overlook the non-citizen (or alien) members of their societies, the refugees. The starting point, therefore, has to be an examination of the following question: what rights do refugees presently enjoy in the current political and legislative scheme of things in African countries? Are refugees equal beneficiaries, with the general citizenry, of both the customary and conventional human rights norms enshrined in the rules and principles of contemporary international law and municipal legal regimes?

One of the most profitable ways of proceeding with this type of enquiry would be to examine the legislative framework in which refugee rights operate: how, in concrete terms, is the integration between international human rights norms and refugee rights effected and reflected in the national legislative policies and political processes of African states? This is a wide question. To address it comprehensively and with a meaningful depth of analysis, in relation to the African refugee problem in its broadest context, would require an extensive discussion. Instead, I propose to limit the present discussion to one Southern African country, Malawi. And in this regard, I will limit my focus only to those aspects of the Malawian legislation which illustrate the latest legislative and political attempts by a country of first asylum to deal with an overwhelming refugee problem within the parameters determined by contemporary international human rights law.

The choice of Malawi as a case study has been predicated upon two considerations. First, with a refugee population estimated at almost 1.3 million, representing a little over ten per cent of the country's entire population, Malawi is ranked within the top five countries in the world

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with the highest proportions of refugees per total (*de jure*) population. This in itself represents an enormous demographic problem with far-reaching political, economic, social and even cultural implications. Second, the recent refugee legislation in Malawi is the latest in a long line of such national legislation in African states and, arguably, presents certain interesting aspects not hitherto incorporated in previous refugee legislation elsewhere in Africa. It may therefore offer some useful lessons for the future as African societies continue to grapple with this difficult process of reconciling the demands for democratic reform, human rights protection and respect for citizens' rights, on the one hand, and the rights of refugees (as "non-citizens"), on the other.

II. Human Rights and Refugee Rights: the Conceptual Nexus

Traditionally, some writers have tended to proceed on the assumption that human rights law and refugee law, though related in a number of ways, are really distinct areas of international law, each with its own sources and operational focus and scope[6]. It is argued that a more appropriate way of expressing this relationship is to say that the provisions of international human rights law are more extensive than the specific tenets of refugee law, but that the latter is really in essence a subset of the former.

The legal regime for the protection of refugees is always founded upon two systems: on the one hand, the rights and obligations laid down by both customary and conventional norms of international law; and, on the other hand, the provisions of any relevant domestic legislation in force in the asylum or receiving state.

The international legal regime for the protection of refugees in Africa is based on a number of international legal instruments: first, the general or universal instruments, i.e. the Universal Declaration of Human Rights of 1948[7], the 1951 UN Convention relating to the Status of Refugees, as well as the Protocol relating to the Status of Refugees of 1967[8]; second,

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[6] But see P. Weis, Human Rights and Refugees, 1 Israel Y.B. Int. L. 35 (1971), *passim*. See also R.L. Bach, Human Rights, Refugees and North-South Relations, paper presented at the Meeting of the International Research and Advisory Panel, Refugee Studies Programme, Oxford, United Kingdom, 2–6 January 1991.

[7] UN General Assembly Res. 217 (III), UN Doc. A/810 (1948).

[8] The 1951 UN Convention relating to the Status of Refugees was primarily intended to solve the refugee problem in Europe after the Second World War; it thus had a deliberate limitation with regard to its temporal and geographical scope, which precluded its applica-

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the regional instruments, i.e. the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[9] and, in a limited sense, the African Charter on Human and Peoples' Rights, concluded in 1981[10].

The principal sources of conventional international human rights law, on the other hand, are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights[11], the International Covenant on Economic, Social and Cultural Rights[12] and, for African states, the African Charter on Human and Peoples' Rights already mentioned above.

The intersection between human rights law and refugee law is not hard to find. A cursory examination of the primary human rights instruments enumerated above reveals that they generally affect all persons, including refugees and displaced persons[13]. Moreover, other related international human rights instruments, for example the Convention on the Elimination of All Forms of Discrimination Against Women[14], and the Convention on the Rights of the Child[15], while more specific in terms of subject matter, also have particular application to refugee populations. In some cases the 1951 Convention and other areas of refugee law may fail to cover relevant areas of legal protection, in which case human rights law will sometimes provide the only alternative authority by which to hold states accountable for their treatment of persons including but not limited to those displaced for reasons unrelated to war, those who have

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bility to refugee problems arising in Africa and elsewhere in the 1960s. These limitations were only removed in 1967, with the conclusion of the Protocol. Today, the 1951 Convention has been ratified by some 46 states in Africa, while two states (Cape Verde and Swaziland) are parties to the Protocol only. For a full list of the parties to these instruments see 2 Int. J. Refugee L. (1990), at 560–561. For texts of the 1951 Convention and the 1967 Protocol see, respectively, 189 UNTS 137 (No. 2545), and 606 UNTS 267 (No. 8791).

[9] OAU Doc. CM/267/Rev.1; reproduced in I. Brownlie, Basic Documents on African Affairs (1971), 18 et seq.

[10] See text in 21 ILM 58 (1982).

[11] Adopted by UN General Assembly Res. 2200 (XXI) of 16 December 1966; entered into force on 23 March 1976. See text in UNHCR, Collection of International Instruments Concerning Refugees (1979), 104.

[12] Adopted by UN General Assembly Res. 2200 (XXI) of 16 December 1966; entered into force on 3 January 1976. See text in UNHCR, ibid., 128.

[13] See Lawyers Committee for Human Rights, Briefing Paper on the Human Rights of Refugees and Displaced Persons (May, 1991), 6, quoted in A.C. Helton, The Role of Refugee, Humanitarian and Human Rights Law in Planning for the Repatriation of Kampuchean Asylum Seekers in Thailand, 3 Int. J. Refugee L. 547 (1991), at 554.

[14] Adopted by UN General Assembly Res. 34/180; 34 UN GAOR Supp. (No. 46), at 193; UN Doc. A/RES/34/180 (1980).

[15] Adopted by UN General Assembly Res. 45/20, 20 November 1989.

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not yet left their country of origin, and those who are unable to demonstrate an individualized fear of persecution. Thus, as Helton has rightly observed:

> Human rights law thus may serve refugees, asylum seekers, and displaced persons in ways that [refugee] law cannot, by providing them with broad principles upon which to establish an entitlement to protection[16].

The Universal Declaration of Human Rights provides the foundation for international human rights law. Thus, whereas under the 1951 Convention and the 1967 Protocol a number of traditional individual rights and freedoms, for example, the right to freedom of movement and residence and the right of association[17], are granted only insofar as they accord with the most favourable treatment accorded nationals of another country, under the Universal Declaration, these rights are granted unconditionally and without reservation to all persons[18]. Perhaps the most famous of all the rights granted under the Universal Declaration – sometimes characterized as the most basic human right for refugees or, more properly, potential refugees – is the right to seek asylum. I shall revert to a consideration of this right shortly.

The International Covenant on Civil and Political Rights contains what are generally termed first generation rights of general applicability; but some of these are of particular pertinence to refugees. This holds true for the following: the right to protection from torture, slavery, servitude and inhumane punishment; the right to liberty and security of person; and the right to freedom of movement, which is a prerequisite right for those forced to flee their country of origin and seek asylum elsewhere[19]. Similarly, it has also been observed that the International Covenant on Economic, Social and Cultural Rights articulates a number of rights and standards of direct or potential relevance to refugees, i.e. the right to work, the right to safe working conditions, the right to an adequate standard of living, and the right to medical treatment[20]. At least one other international human rights instrument also makes direct reference to refugees: the Convention on the Rights of the Child provides special protection for refugee children[21].

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[16] Helton, op. cit., note 13, 559.
[17] See Arts. 13 and 20.
[18] See Lawyers Committee for Human Rights, note 13, at 13.
[19] See Arts. 7, 8, 9, 10 and 12, respectively.
[20] See Arts. 6, 7, 11 and 12, respectively.
[21] Particularly for the purposes of family reunion; see Arts. 9 and 10.

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It is, therefore, fairly clear that there is a definite intersection between human rights law and refugee law, and there can be no justification for any conceptual or operational separation of the two. A violation of refugee law and refugee rights is therefore also a violation of human rights. Conversely, any meaningful attempt at securing the legitimate human rights of all persons within any given state or in the international community must embrace the recognition and protection of the rights of refugees. This is particularly important today, for we have already begun to observe that in a world that has broken away from the stalemate of a bipolar, superpower rivalry and "Cold War" rhetoric, some states – particularly those in the "North" – are increasingly turning to narrower definitions of human rights and persecution and to more rigorous and less sympathetic applications of existing law and policy doctrine, largely at the expense of refugees and asylum-seekers from the "South"[22]. Such moves clearly challenge the progress made during the last two decades to broaden the definition and acceptance of refugee law and human rights law as evidenced, for example, in the definition of the term "refugee" itself embodied in the OAU Convention[23].

III. The Right to Asylum: a Fundamental Right?

Asylum is generally understood as the protection which a state grants on or within its territory, or in some other place under the control of certain state organs, to a person who comes seeking protection[24]. Almost all commentators and legal scholars agree that asylum is a very ancient institution, probably traceable to the ancient Mediterranean civilizations, or even Biblical times, the basis of which has always been an innate human desire to guarantee liberty and to protect against oppression. In its modern conception, however, the institution of asylum is more widely concerned with the granting of refuge to persons who stand in fear of persecution for reasons of political opinion, race or religion, and have therefore had to flee their own country to seek protection in a foreign

[22] See also discussion in Bach, op. cit., note 6, at 5–7. The controversial debates currently going on in Europe regarding the need for coordinated immigration and refugee policies after 1992 are not unrelated to these considerations.

[23] See Art. 1.

[24] The literature on this subject is quite vast. A. Grahl-Madsen's Territorial Asylum (1980) is one of the most excellent monographs in this area. See also G.S. Goodwin-Gill, The Refugee in International Law (1983); S.P. Sinha, Asylum and International Law (1971).

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state. This conception informs both the 1951 UN Convention and the 1969 OAU Convention.

But the full scope or legal content of this ancient institution of asylum remains a matter for some debate, and the pronouncements of some of the leading publicists and writers have only clouded further the issues involved. In particular, there still remains the question, whether the so-called traditional right of states to grant asylum to political persecutees has now matured into a legal duty; whether, correspondingly, the refugee has acquired a right to be granted this protection.

As has been noted above, the basis for the protection of the human rights of refugees resides in the Universal Declaration, in particular Art. 14, which provides:

> (1) Everyone has the right to seek and enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

This wording, embodying at least part of the right of asylum, has been adopted, with varying degrees of change of phraseology, in the international instruments mentioned above, as well as in national legislation. However, none of these instruments in fact goes on to elaborate on the content and scope of this right.

The language employed in Art. 14 might appear to suggest that a r i g h t to asylum has been p o s i t i v e l y accorded to the individual and that, by implication, there arises a d u t y or an o b l i g a t i o n on the part of the state to give asylum. Yet this interpretation has been rejected by some commentators. Rather, it has been argued that Art. 14 merely implies that the state is free to grant or not to grant asylum, but that once a particular individual has obtained asylum he or she is guaranteed permission to stay and may not be returned to the country from which he or she fled[25]. Similar interpretations are generally placed upon the corresponding provisions of both the UN Convention and the OAU Convention.

Considerations of space do not permit me to pursue this argument here in full detail. But, as I have more forcefully and comprehensively argued

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[25] See, for example, H. K a n g e r, The UN Declaration of Human Rights (1984), 107; A. V e r d o o d t, La Naissance de la Déclaration Universelle des Droits de l'Homme (1963), 155. See also S. A g a K h a n, "Asylum – Article 14 of the Universal Declaration of Human Rights", 8 J. Int. Comm. Jur. 27 (1967).

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elsewhere[26], a proper philosophical analysis of these provisions, employing in part what I would call a Hohfeldian and Finnisian conception of "specification, assessment and qualification" of rights in various ways, enables one plausibly to argue and demonstrate that, contrary to popular scholarly opinion, there may exist a legal right *stricto sensu* – a Hohfeldian claim-right – on the part of the individual and a correlative duty on the part of the state[27]. Of course this is a proposition that is unlikely to be readily acceptable to those legal scholars who adopt a traditionalist view of the concept of asylum or to those who regard the whole issue as one grounded in moral rather than legal considerations. It is apt to quote the views of one of the few African legal commentators on this subject. Mahalu argues:

> The force, moral or legal, compelling African communities to offer safe sanctuary to refugees might not be very easily determined. It might not be conclusively regarded as being typically legal, especially in the absence of determinable and concrete sources – from which such obligations come to bind communities and their way of living in relation to refugee welfare. [It] may not be entirely misleading to state that moral values have largely been influential in creating an atmosphere of readiness to accept refugees. In short it may be assumed that the force behind the more or less humanitarian treatment extended to [refugees] is of a moral characteristic[28].

Mahalu is here attempting to explain the apparent readiness, indeed sense of obligation, felt by African states in accommodating refugees and refugee needs. Presumably because this cannot be done by way of an appeal to the existence of a legal right to asylum in favour of the individual, the argument has to be couched in the language of moral values and considerations.

This raises the further question of the moral foundation of rights and whether, and under what circumstances, legal rights and duties may or should be founded upon moral considerations and precepts. It would be tempting and simplistic to cast this debate as one between legal positivists and natural law theorists. It may nonetheless be instructive to ask whether there is anything objectionable or startling in the claim that most (or all) human rights are, in any event, founded upon what are also tradi-

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[26] See T. Maluwa, The Concept of Asylum and the Protection of Refugees in Botswana: Some Legal and Political Aspects, 2 Int. J. Refugee L. 587 (1990).

[27] Ibid., 596–601. On the question of specification, assessment and qualification of rights, see J. Finnis, Natural Law and Natural Rights (1980), 210–221.

[28] C. Mahalu, The Legal Regime for Refugees in Eastern African States, 26 Archiv des Völkerrechts 23 (1988), 38–39.

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tionally characterized as moral rights, or values, precepts and requirements. There seems to be no good reason why refugee rights, which, as has been argued in this discussion, form part of the modern conception of human rights, should be exempted from this conceptual scheme.

At any rate, it is argued here that there is an obvious need to recast the traditional conception of the right to asylum as a right belonging to the state, into one belonging to the individual, and to move from a liberty to grant asylum to a claim-right to be granted asylum[29].

IV. The Protection of Refugees in Southern Africa: the Case of Malawi

It is probably axiomatic to observe that refugees are for the most part victims of human rights abuses. And, more often than not, the great majority of today's refugees are likely to suffer a double-violation: the initial violation in their country of origin which usually underlies their flight to another country, and the denial of a full guarantee of their fundamental rights and freedoms in the receiving state. The international legal regime for the protection of refugees alluded to earlier in this discussion attempts to guarantee against such violations. Or, at any rate, these conventions prescribe duties and obligations which are incumbent upon states in their treatment of asylum-seekers and refugees.

But, of course, international guarantees for the protection of refugees are in themselves largely without effect unless supported by parallel guarantees within the domestic structures of the various states which comprise the international community. This suggests the need for a certain concordance between international law, on the one hand, and municipal law, on the other. This need is, in a sense, an acknowledgment of the fact that, as it presently stands, international refugee law largely, if not wholly, depends for its effectiveness on the willingness of states to respect and apply it to the individuals concerned. Thus, realistically, the protection enshrined in the provisions of international refugee conventions may only be enjoyed by the refugees through provisions in the municipal laws enacted by the host or receiving state.

An immediate problem may be identified here. It is a commonplace that the law-making process of the host state is discretionary and not

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[29] An early view along these lines was expressed by F. Krenz, The Refugee as a Subject of International Law, 15 ICLQ 90 (1966), at 108. See also M. Rwelamira, Some Reflections on the OAU Convention on Refugees: Some Pending Issues, 16 CILSA 157 (1983), at 178.

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generally subjected to any external interests as such. This is an incidence of the principle of sovereignty. Yet, on the other hand, it cannot be wholly denied that there may be some obligations under international law which states must comply with when formulating their own municipal laws. These could be obligations arising out of treaty arrangements to which the state in question is a party, or obligations arising generally under customary international law and regarded as binding upon all states *erga omnes*. The principle of *non-refoulement* is regarded by most international lawyers as entailing such an obligation[30]. A proper appreciation of the legal regime governing any given group of refugees must, therefore, not only involve an examination of both international law and municipal law, but must also seek to establish the extent to which the domestic legislation in question incorporates such generally binding principles as that of *non-refoulement*. The present discussion of the recent developments in the legislative framework for the protection of refugees in Malawi aims at examining this issue[31].

The legal regime for the protection of refugees in Malawi is governed by both international law and municipal law, but this has not always been the case. Malawi only acceded in late 1987 to the relevant international refugee conventions, i.e. the two UN instruments mentioned earlier, and the OAU Convention. Internally, the formal decision to accede to these instruments was taken by the Malawian authorities on 2 August 1987, but the instruments of accession were only signed on 4 November 1987[32]. The accession to these treaties was subsequently followed by the enactment of the Refugee Act on 3 April 1989.

The Refugee Act of Malawi, which entered into force on 8 May 1989, is a fairly brief piece of legislation. In line with similar refugee legislation of other countries in the region, the major aim of this Act is to make provision for the control and administration of refugees, while giving ef-

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[30] Although there is no unanimity on the issue, it has been argued by a number of scholars, perhaps the greater majority of commentators, that certain principles of international refugee law have now crystallized into peremptory norms which are binding upon all states even in the absence of specific assent. The most widely invoked principle in this regard is that of *non-refoulement*. For comprehensive accounts of this principle, see Goodwin-Gill, op. cit., note 24, esp. Chap. IV; see also G. Stenberg, Non-Expulsion and Non-Refoulement (1989), *passim*, and the extensive literature cited therein.

[31] A wider discussion of these issues has been undertaken in T. Maluwa, The Legal Regime for the Protection of Refugees in Malawi, in: G. Mhone (Ed.), Malawi at the Crossroads: The Post-colonial Political Economy (1992), 349–371.

[32] See the UN Secretary-General's Depositary Notification, 29 January 1988 (Ref. C.N.316.1987.TREATIES 02/4).

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fect to the international refugee conventions mentioned above. It is imperative to recall that this enactment was basically prompted by the massive influx of Mozambican refugees into the country which started in earnest in the mid-1980s. Accordingly, it contains some interesting characteristics, particularly with regard to the interpretation of certain concepts or principles of international refugee law which can best be described as having been intended to address the special problems arising out of the circumstances of the mass refugee influxes faced by Malawi for the better half of the past decade.

1. Mozambican Refugees in Malawi: a Brief Profile

Practically all the Mozambican refugees fleeing into Malawi over the last seven years or so have been direct or indirect victims of the long-running civil war between the Mozambican Government forces and the Mozambican National Resistance (RENAMO) rebels. A number of independent reports and studies have confirmed that a major reason for the large flows of these refugees has been the extremely high level of violence committed by RENAMO against the civilian population[33]. Furthermore, most observers have conclusively identified the South African policy of destabilization, which informed that country's "total onslaught" strategy of the 1980s, as underlying the dynamics of refugee-creation in Mozambique, in particular, and Southern Africa, in general. These views are too widespread to require specific reiteration here[34]. More recently, refugee flows are thought to have been exacerbated by the increasing economic hardship brought about by the severe drought currently sweeping the greater part of the Southern African subcontinent. The drought has already led to the worst famine in living memory in most parts of Mozambique.

As has been noted above, the history of Mozambican refugees in Malawi goes back to the mid-1980s, but it was only in late 1987 that large-scale influxes began to be observed, when refugee numbers averaged 20,000 a month[35]. Today, as was pointed out earlier, the refugee popula-

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[33] See D. Kuntz, Serving the Health Needs of Refugees in Malawi: An Integrated Approach (Refugee Studies Group Working Paper II 1990), 5.

[34] R. Mazur, The Political Economy of Refugee Creation in Southern Africa: Micro and Macro Issues in Sociological Perspective, 2 Journal of Refugee Studies 441 (1989); see also O. Ibeanu, Apartheid, Destabilization and Displacement: The Dynamics of the Refugee Crisis in Southern Africa, 3 Journal of Refugee Studies 46 (1990).

[35] Kuntz, op. cit., note 33, 5.

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tion stands at an estimated 1.3 million, well over ten per cent of the total population of the country[36]. The overwhelming majority of these refugees come from rural backgrounds and is mostly illiterate. Although precise statistics on this matter are not readily available, it has been suggested that about half of the refugee population is composed of children aged 15 and under, and that most of these minors come to Malawi unaccompanied[37].

The very first problem that any refugee faces upon fleeing into another country is that of immediate integration. This problem is particularly acute where large influxes of refugees are involved. The demographic profile of the earlier refugees arriving from Mozambique presents an interesting phenomenon in this regard. Many of the refugees belong to the same indigenous tribes or ethnic groups as the local Malawian people in the border areas in the southern part of the country, i.e. Lomwe, Sena and Yao. Moreover, there is a well-documented history of transborder commercial activities and social intermingling and marriage throughout this part of Malawi. The ease with which the earlier refugees were integrated can thus be seen in this light. As has been noted elsewhere:

> Most of the early arrivals spontaneously settled in and around Malawi villages. Traditional village headmen, using their authority over land ownership, sometimes gave or loaned parcels of land to the new-comers and thus provided them some means of subsistence, albeit very marginal. Once the villages could no longer absorb any more refugees, new arrivals were placed in camps and organized refugee settlements. [Thus], the Mozambicans were often welcomed as brothers and sisters[38].

From the outset, the Malawi Government's official position was similarly described as aiming to address this question of the immediate integration of the refugees. Thus, a government policy statement issued in 1988 stated that:

> Malawi's hospitality extends long before Mozambique was independent from Portugal. Since then there have been many Mozambicans in Malawi who sought refuge including freedom fighters. Since 1982, as a result of internal

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[36] Estimates of the total number of refugees in Malawi have tended to vary between different sources. One major difficulty is that the figures usually quoted only include such persons as are "of concern to the UNHCR" or have been registered as such. This problem is compounded by the fact that quite a lot of these refugees have fled across largely unpoliced frontiers, and most come only sporadically to reception centres. Malawi Government sources now put the total number of Mozambican refugees in Malawi at around 1.3 million.

[37] Kuntz, op. cit., note 33, 6.

[38] Ibid.

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> strife in Mozambique, small numbers of displaced persons, mainly from Zambezi and Tete Provinces, have been seeking refuge with their relatives in Nsanje, Chikwawa, Mulanje, Mwanza, Mangochi, Zomba, Ntcheu, Dedza and Lilongwe Districts of Malawi. The Government and the people of Malawi welcomed and assisted these people without external assistance. The nationals provided land, food and domestic utensils and the Government made available all its services without discrimination[39].

The great majority of the Mozambican refugees are concentrated in the southern region of Malawi, which is also the most densely populated part of the country, containing more than half of the country's entire population. The nine districts mentioned in the statement quoted above are the most heavily affected by the refugee presence, and in some of these areas the refugees are actually said to outnumber the local population[40].

It is quite correct to observe that the presence of over a million Mozambican refugees in Malawi has not led to the creation of any significant tension and animosity in the local population. But while one may not wish to deny or trivialize the claims about Malawian hospitality, it is imperative to warn against the temptation, affecting many commentators, to exaggerate certain naive assumptions about limitless African hospitality and the spirit of brotherhood attending the reception accorded to refugees. As regards the issue under discussion, a number of quick observations may be made. First, it is interesting to note that the terminology employed in the Malawian policy statement quoted above is that of "displaced persons" rather than that of "refugees". Of course, certain conceptual and policy implications arise out of this distinction. It has been noted elsewhere that it is not totally without significance that whenever occasion arose to refer to refugees, whether in the municipal context or at international fora, Malawi consistently applied the term "displaced persons"[41]. Secondly, the claim that these "displaced persons" were merely

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[39] Malawi Government's policy statement entitled: Government Interventions on the Refugee Programmes, presented at the Refugees Legal Protection Seminar, Liwonde, Malawi, 17–20 May 1988; see p. 1 para. 1 (emphasis added).

[40] See, for example, Kuntz, op. cit., note 33, 6.

[41] The question of definition is, of course, central to any discourse on refugees and forced migration, partly because the determination of refugee status and the implications of that status depend on the definitional parameters one chooses to adopt; see, for example, the discussion by Ibeanu, op. cit., note 34, at 48–53. It has been noted that in the Malawi context, a distinction seems to be drawn between refugees *stricto sensu*, namely those persons confined to camps, and displaced persons, being either that group of individuals who leave their country of origin and integrate into the local population or those who come for brief spells and return to their country of origin thereafter. It has further

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"seeking refuge with their relatives" needs to be understood within its proper historical context. The claim reflects both a conscious political sentiment and a geopolitical reality.

The demarcation of colonial boundaries in Africa often meant that ethnic groups, sometimes even families, ended up falling under two (or more) different colonial jurisdictions. The result is that even after independence, in quite a number of cases, people of the same tribe or ethnic grouping, or even family, have found themselves straddling the opposite sides of the same international boundary. Quite naturally, the tendency is thus to regard refugees fleeing across the border into one country not as refugees but merely as "brothers and sisters" or "relatives" from the other country. The danger, however, is that such arguments, even if intended merely as metaphorical expressions, may reflect a hidden desire by unsympathetic authorities or hegemonic governments to deny refugees recognition of their right to organize themselves and assert their separate political identity while in the country of asylum, for example by insisting on the fiction that they are part and parcel of the national or social formation of the country of asylum. Indeed, it is arguable that their very entitlement to legal protection as refugees, and all the rights that flow from the recognition of that status, could be jeopardized by such an approach. Some studies on the Mozambican refugees in Malawi have, in fact, identified some of these problems[42].

2. Genesis of the Malawian Refugee Legislation: the Political Framework

The Malawi Government has been quick to acknowledge that the presence of Mozambican (and other) refugees in Malawi predates the dramatic mass influxes of the mid-1980s[43]. Yet, it is also legitimate to observe that Malawi, unlike other countries in the subregion, was somewhat hesitant about formulating a well-defined refugee policy, still less enact-

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been noted that this distinction was made by the Malawian delegation during talks held with the United Nations High Commissioner for Refugees and his delegation on 23 April 1988 in Lilongwe, Malawi. Malawi is also said to have pointed out to the UNHCR that the term "displaced persons" was used for "its humane appeal rather than aversion to the term 'refugee'". See in this regard R. Mponda, Some Perceptions on the Development of Refugee Law in Malawi, 21 note 14, paper presented at the Refugees Legal Protection Seminar, Liwonde, Malawi, 17–20 May 1988.

[42] See, for example, Mazur, op. cit., note 34, 459.

[43] See note 39 *supra*.

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ing any refugee legislation, during the first quarter-century of its existence as an independent state. Moreover, and equally significantly, Malawi never deemed it desirable or expedient to accede to the relevant international instruments during this period (i.e. the 1951 UN Convention and the 1967 Protocol and the 1969 OAU Convention). The Office of the United Nations High Commissioner for Refugees (UNHCR) had no official presence or representation in Malawi prior to 1988.

In fact, Malawi initially declined to allow the UNHCR to operate in the country even as evidence of a catastrophic refugee problem was beginning to unfold in 1985. Two reasons have been suggested for this attitude. First, it would appear the government was determined to face the challenge on its own and treat the incoming Mozambicans as kith and kin rather than as refugees *stricto sensu*. Second, during this period Malawi was apparently a key player in, or at least a supporter of, South Africa's destabilization policy in Mozambique. As was noted earlier, this policy played a not insignificant role in the creation of the refugee problem. Presumably, the Malawi Government did not wish to bring international attention to a problem which, in the eyes of some commentators, it had partly helped create[44]. This is only part of the larger picture of the paradoxes and opportunistic ambivalence that have always underlain Malawi's regional politics. It is thus generally believed that the recent legislative developments were prompted by the belated realization that the growing refugee problem in the country could no longer be managed and contained on an *ad hoc* basis without a properly defined legislative framework. They are also partly a response to the external pressures engendered by the growing international sympathy towards the plight of the Mozambican refugees and *deslocados* seeking refuge *en masse* in neighbouring countries. This is in stark contrast to the approach adopted by other countries in the region, which placed refugees on their political and legislative agendas almost immediately following the attainment of their independence[45].

Thus, Malawi acceded to the UN instruments and ratified the OAU Convention on 4 November 1987, while an agreement between the Government of Malawi and the UNHCR formalizing the latter's presence in the country was signed on 28 April 1988[46]. As has been stated above, the

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[44] Kuntz, op. cit., note 33, 9.

[45] For a fuller examination of this issue see the discussion in the work cited in note 31.

[46] But, of course, the lack of any formal presence and representation for the UNHCR prior to 28 April 1988 did not mean a total denial of access by the relevant international

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accession to these treaties was subsequently followed by the enactment of the Refugee Act on 3 April 1989.

3. The Definition of the Term "Refugee" in the Refugee Act

The definition of what person or persons qualify to be refugees is central to any discourse on refugees and forced migration, since the determination of refugee status and the implications of that status depend on the definitional parameters one chooses to adopt. In a more practical sense, the definition also determines the categories of persons who may benefit from the assistance given by the UNHCR.

The statutory definition of a refugee is contained in Section 2(1) of the Act[47]. It is quite obvious that this definition is, save for a slight variation in phraseology in paragraph (a), a verbatim adoption of the definition contained in Art. I of the OAU Convention. In this regard, the Act follows the precedent set by some earlier statutes in other African countries in opting for the broadened definition enshrined in the OAU Convention. As a number of scholars have time and again observed[48], the OAU Convention goes a good deal further than previous international instruments in restating the traditional definition of a refugee. In particular, it breaks new ground in international law by embracing an additional category of persons as refugees, i.e. all those persons who are compelled to leave their country of origin in order to escape violence, regardless of whether they are in fact personally in danger of political persecution, are considered as refugees under the definition adopted in Art. I of the OAU Convention. Most, perhaps the great majority, of the Mozam-

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relief and aid organizations, including the UNHCR itself, to the refugee community, particularly after the on-set of the mass influxes of the mid-1980s.

[47] According to this provision, a refugee is any person who:

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

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refugee [sic] in another place outside his country of origin or nationality".

[48] See, for example, R. Hofmann, Refugee Law in Africa, 39 Law and State 79 (1989), at 83, 87–88.

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bicans seeking refuge in Malawi fall within this category. As has already been noted, more than half of the Mozambican refugees consist of children aged less than 15. Although most of these have tended to enter Malawi in family groups of four or five, a great many of them have turned out to be unaccompanied minors. It is fairly obvious that such refugees would have difficulty in satisfying the traditional requirements for proof of refugee status, namely the existence of a "well-founded fear of persecution" (that is, an individualized fear of persecution), and so on.

4. The Application of the Principle of Non-refoulement in Large-scale Influx Situations: Malawi's Approach

The definition adopted in the Refugee Act ties in well with other aspects which some of the earlier legislation in other African states never addressed at all, i.e. mass determination of refugee status and the application of the principle of *non-refoulement* in large-scale influx situations. It is pertinent to recognize that situations of large-scale influx of refugees pose problems and exhibit characteristics which are different from those encountered in individual or small group cases. Even where the potential asylum state is willing to accept such large numbers, the mere presence in the country of hundreds of thousands, or in Malawi's case a little over a million, refugees is bound to present serious socio-economic, political and even cultural difficulties. More immediately, the large-scale influx poses major problems of accommodation, food and health. All these problems can, in turn, endanger public order, national security, and even international peace and security. And, of course, the very process of determining refugee status in such cases presents its own peculiar problems. These are only some of the major problems that any country formulating refugee policy and legislation to cope with large-scale influxes of refugees has to address.

The Malawian Government's official position has been described as being aimed at addressing precisely the kind of problems enumerated above. But how does the Malawian legislation address the more specific issues of mass determination of refugee status and the application of the principle of *non-refoulement* in the context of the Mozambican influx situation? The content and juridical status of the principle itself have been discussed elsewhere and cannot be adequately re-examined in such a brief discus-

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sion as this[49]. It may simply be noted here that the question of individual eligibility for protection becomes largely theoretical and of little relevance when a great mass of people crosses a frontier, often suddenly and within a matter of days. It should be recalled that at the height of the influx during the first half of 1988, Mozambican refugees were entering Malawi at a rate well in excess of 20,000 per month, and this rate in fact increased toward mid-year. Thus, for example, during just one 24-hour period in June, more than 13,000 refugees crossed into Malawi's eastern district of Mulanje[50]. In such situations, mass or group determination would seem to be a more suitable and satisfactory approach than individual status determination. The Refugee Act of Malawi specifically provides for this procedure. In this regard, Section 7(3) provides:

> The Minister may, by notice published in the Gazette, direct that, with respect to any group of foreign nationals specified in the notice, seeking refugee status in Malawi, the Committee shall apply such group determination procedure as may be prescribed.

This is, to be sure, a commendable provision which does not appear in most of the statutes dealing with refugee matters in other African countries[51]. It is, of course, a provision specifically tailored to meet the special circumstances in which the Malawian legislation was conceived. The only problem which may arise here is to decide when the situation which created the refugee influx is over and, therefore, when to change to individual status determination. This would particularly be the case where large-scale arrivals continue while some of the parties involved begin to perceive the emergency as having come to an end. On an official level, Malawi's preferred solution is that of the voluntary repatriation of the Mozambican refugees as and when conditions permit.

It is generally agreed that the large numbers of Mozambican refugees are seriously taxing the administrative structure and health delivery systems in what is Southern Africa's most densely populated country, and

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[49] See note 31 *supra*; see also, *inter alia*, discussions by Goodwin-Gill and Stenberg, op. cit., note 30. As regards the application of the principle of *non-refoulement* in Africa, one commentator has aptly observed: "[Thus] the practice of States in Africa supports the conclusion that the principle of non-refoulement applies to a broad class of refugees which includes masses of people forced to move on account of political upheavals"; see C. Murray, Mozambican Refugees: South Africa's Responsibility, 2 SAJHR 154 (1986), at 160.

[50] U.S. Committee for Refugees, Refugees from Mozambique: Shattered Land, Fragile Asylum (August, 1988), 18.

[51] Zimbabwe's Refugees Act of 1983 is one of the few earlier statutes in Africa which also provides for group determination procedures.

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that the simple fuel needs of the refugees are exacerbating Malawi's deforestation problems[52]. Malawi's limited food production capacity has become even more stretched by the current drought in the country. Among the pressing social needs of the refugees are health and education services. But perhaps an even bigger problem is presented by the lack of land to allow for subsistence farming and food self-sufficiency both for the indigenous population and the refugee community. Moreover, high unemployment and limited income opportunities in what is one of the poorest nations in the world have resulted in competition for the scarce jobs that become available. Thus, it becomes quite difficult, and perhaps even politically unwise, to implement employment and development programmes for refugees which compete with local business. The more the refugee population grows, and the longer the refugees stay, the greater these problems grow. Given this context, Mazur's observation can be easily appreciated:

> In Malawi, refugees are prohibited from farming, working, or selling handicrafts because of pressures on available land and fears that they may flood the local market[53].

Morna has also reported about Mozambican refugees who, in an effort to achieve a measure of self-sufficiency, secretly cross the border back into Mozambique during the daytime to cultivate their fields[54].

All these problems virtually rule out the integration of these refugees as a viable solution. In the short term, the integration of refugees into the development process of the country remains wholly dependent on international financial assistance. But as such assistance becomes less and less available, the position of refugees becomes increasingly tenuous. The dilemma is all too clear: on the one hand, forced repatriation is not a likely option for the Malawian authorities, mainly because of the disapproval with which such a course of action would be greeted in the international community. It would also make nonsense of all the earlier claims about Malawian hospitality and the spirit of brotherhood extended to the Mozambican refugees. The Tripartite Agreement concluded by Malawi, Mozambique and the UNHCR on 21 December 1988 is partly designed to forestall recourse to such forced repatriation. On the other hand, voluntary repatriation, or even so-called spontaneous repatriation, will only

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[52] See note 50, *supra*, 18–19; see also Kuntz, op. cit., note 33, *passim*.

[53] Mazur, op. cit., note 34, 459.

[54] C. Morna, Malawi: Shouldering the Refugee Burden, 33 Africa Report 51 (1988), at 58.

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be possible under drastically changed conditions involving the cessation of the brutal war and acts of banditry which generated the refugee flights in the first place.

The durability of the cease-fire arrangements recently agreed between the Mozambican Government and RENAMO remains to be proved[55]. Reports of RENAMO guerrillas periodically crossing into Malawi to kidnap Mozambican refugees or to steal from them as well as from Malawians, and reports of RENAMO treatment of civilians and returnees to Mozambique did not augur well for the earlier attempts to implement repatriation programmes. Even after an effective cease-fire has been in place, it will take some time before the necessary conditions for the institution of an effective voluntary repatriation programme falls into place[56]. In the meantime, the refugees' only protective shield, from the legal point of view at any rate, is to be found in the incorporation of the principle of *non-refoulement* in the Malawian legislative scheme.

The principle of *non-refoulement* is incorporated in Section 10 of the Act. This provision stipulates that a person shall not be expelled or returned to the borders of a country where his life or freedom will be threatened on account of his race, religion, nationality or membership of a particular social or political opinion, or external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of that country. Thus, the Act embraces both the classical approach to the principle of *non-refoulement*, as reflected in Art. 33 of the UN Convention, and the wider conception of that principle as embodied in Arts. I(2) and II(3) of the 1969 OAU Convention. Section 10(2) is more specific in this regard:

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[55] Peace negotiations between the Mozambican Government and RENAMO had been going on intermittently for some two years before a cease-fire agreement brokered mainly by the Italian Government was signed in Rome on 3 October 1992. In fact the cease-fire was due to have commenced on 1 October, but last minute disagreements about details regarding its actual implementation and other transitional arrangements held up the process. It is not altogether clear to what extent these disagreements have been definitively resolved.

[56] Estimates of refugees who have been voluntarily or spontaneously repatriated vary quite significantly, ranging from 60,000 to 350,000 in the period 1987–1990. See Mazur, op. cit., note 34, 460; J. Nunes/K. Wilson, Repatriation to Mozambique: Current Processes and Future Dilemmas, 8–9, paper presented at the UNRISD Symposium on Social and Economic Aspects of Mass Voluntary Return from one African country to another, Harare, Zimbabwe, 12–14 March 1991. These figures may not adequately take into account the number of persons who move back and forth across the Malawi-Mozambique border on a regular basis.

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A person claiming to be a refugee shall be permitted to enter and remain in Malawi for such period as the Committee may require to process his application for refugee status.

Section 10(4) deals with persons who enter Malawi illegally for the purpose of seeking asylum. Such persons are fully protected against expulsion or *refoulement*, the only limiting condition being that they report to a competent officer (immigration, police, border or security officer) within twenty-four hours of such entry or "such longer period as the competent officer may consider acceptable in the circumstances". By comparison with similar legislation from other countries, even this provision is not as onerous as it might at first sight seem[57]. The provision can only have been designed to meet the realities of mass displacement and large-scale border crossings. In the nature of such things, the great majority of these crossings fails to satisfy the required immigration formalities, particularly in view of the fact that they are not effected at properly policed immigration or border posts. This is the reality that attends the continuing Mozambican refugee flows into Malawi.

It can, therefore, be seen that Section 10 of Malawi's Refugee Act represents an explicit and faithful incorporation of the principle of *non-refoulement* with all its ramifications. Needless to say, this legislation has been purposefully based more upon the OAU Convention than the UN Convention for the simple reason that the former instrument, with its more widely embracing definition of the term "refugee", is more directly relevant to mass influx situations. The actual Malawian practice for the determination of refugee status and the application of the principle of *non-refoulement* with respect to the Mozambican refugees thus appears to be within the scope of the widely accepted rules of conventional international law, as reflected in the international legal instruments referred to in this discussion.

It cannot be doubted that the post-1988 legal regime for the protection of refugees in Malawi represents a significant advance over the various other regimes established earlier in other African countries. Admittedly, some of the reservations entered by Malawi to provisions of the 1951 UN Convention may at first sight appear to detract from its commitment to

[57] Thus, while the machinery stipulated under Sections 7, 8 and 13 of the Refugees Act of Zimbabwe affords refugees and asylum-seekers protection against *refoulement* even where their initial entry was illegal, as is the case under the Malawian legislation, by contrast the Refugees (Recognition and Control) Act of Botswana does not contain any explicit provision in this regard at all, and Sections 5 and 6 of this Act cannot be said to have incorporated the principle of *non-refoulement* in its truest sense.

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respect fully the rights and status of refugees on its territory[58]. Yet, it can also be argued that none of these reservations touch upon the fundamental elements of refugee law embodied in the various international instruments, i.e. the right of asylum and the principle of *non-refoulement*. As has been argued above, the principle of *non-refoulement*, which has an especial relevance in the context of mass influxes, is now firmly enshrined in Section 10 of the Act.

The significance of the importation of such an important principle of international law into Malawi's municipal legislation cannot be overemphasized. Indeed, the recent legislative developments in Malawi may legitimately be described as a commendable attempt to give expression to the demands for the recognition and protection of the human rights of that special class of aliens or "non-citizens", the refugee community, whose most basic and fundamental right, the right to life, cannot even be guaranteed in their own country or countries of origin. On the whole, the experience arising out of the practical implementation of this legislation inclines one to the conclusion that, despite the enormity of the refugee problem on its hands and the scarcity of resources at its disposal, Malawi is succeeding in achieving these laudable objectives.

[58] The general tenor of Malawi's reservations to Arts. 7, 13, 15, 19, 22 and 24 of the UN Convention is simply that it considers these provisions merely as recommendations and not legally binding obligations; in relation to Arts. 17 (wage-earning employment) and 34 (naturalization), the essence of the reservations is that Malawi does not consider itself bound to grant refugees any more favourable facilities or treatment than are granted, in accordance with the relevant laws and regulations, to aliens generally. Reservations of this nature are not uncommon among African states parties to the Convention, and in some cases the limitations contained in such reservations have actually been embodied in the relevant municipal legislation.

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