

Refugee Status Determination and Rights in Malawi

by Levi Duma Mvula

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1.0. Introduction

Malawi has been both a producer and recipient of refugees from its neighbours in the last three decades. In the early 1960s and 1970s, followers of the Jehova's witness religion were forced to flee the country, mostly into Zambia after their religious beliefs clashed with the ruling Malawi Congress Party ideologies. Scores of people also left Malawi fleeing political persecution to neighbouring countries during the same period of one party rule under the Malawi Congress Party. On the other hand, Malawi has been receiving refugees from Mozambique, initially during the struggle against Portuguese colonial rule, and hosted over one million Mozambican refugees between the 1980s and early 1990s when the Frelimo government and Renamo opposition movement were engaged in a highly destructive civil war.¹ The influx of Mozambican refugees is believed to have forced Malawi to rush the process of ratifying the relevant international refugee instruments as well as drafting the Refugee Act, which came into force in 1989. Currently, Malawi continues to receive refugees, mainly from the Great Lakes region and the horn of Africa, and issues of refugee rights which were relevant during that period when it hosted over a million refugees remain important.

This paper highlights the situation of refugee rights in Malawi, including the refugee status determination (RSD) mechanisms and process. The first part of the paper presents an introduction including country background and a brief overview of the legal system. Section two focuses on the refugee conventions and international human rights instruments that Malawi has ratified. The section also discusses the impact of international law on the domestic legal system. The domestic refugee framework is discussed in full detail in section three. The section highlights the provisions of the 1989 Refugee Act as well as RSD mechanisms. It also discusses the impact of reservations to international instruments and the outdated Refugee Act on the enjoyment of rights by people who seek protection in Malawi. Section four submits recommendations and conclusions.

1.1. Background Information

Malawi is situated towards the east of southern Africa and is bordered by Tanzania to the north and northeast; Mozambique to the east, south and south east; and Zambia to the west. It is one of the most densely populated countries in Africa, with an average population density of 106 people per square kilometre. A national population survey conducted in 2008 put Malawi's population at 13,066,320. This population comprises of 49% males and 51% females, of which about 42% are within the reproductive age bracket of 15-49. About 45% of

¹ See Jeff Crisp & Esther Kiragu, Refugee Protection and International Migration, a Review of UNHCR's role in Malawi, Mozambique and South Africa, at 5

the total population is below the age of 15.² This makes Malawi a predominantly youthful population.

Malawi is one of the least developed countries in the world. Its economy is predominantly agro-based, largely depending on maize as a staple crop while tobacco is the main cash crop, accounting for more than 70% of agricultural exports.³ Many of its people are generally under-resourced,⁴ and are unable to meet their daily basic needs.⁵ For those living below the poverty line, their situation is dire in the sense that their ‘living conditions prevent them from living a long, healthy and decent life worthy of self respect.’⁶ The above scenario does not need emphasis on the struggle for minimum resources such as land and economic opportunities amongst Malawians themselves and those from “outside” who seek protection in Malawi.

Malawi is a multiparty representative democracy. The executive, legislature and judiciary have separate functions, but are all bound by the Constitution.⁷ Furthermore, the Constitution entrenches the principle of democracy and states that the authority to govern ‘derives from the people of Malawi as expressed through universal and equal suffrage.’⁸ This authority is re-affirmed by the holding of periodic elections. To understand the significance of these two provisions, reference must be made to the period before 1994, when the Constitution was adopted, when Malawi experienced 30 years of autocratic rule under its first president Dr Hasting Kamuzu Banda. The experiences that many Malawians endured during that period, including political persecution, necessitated a democratic government that that was transparent and accountable to all people, respected their human rights and provided space for their participation in the affairs of the state.

1.2. The Malawian Bill of Rights

The 1994 Constitution, unlike its predecessors, contains a whole chapter dedicated to human rights. The list of protected rights is comprehensive, encompassing both civil and political rights, some economic, social and cultural rights and the third generation right to development. Sadly, it must be noted that while the protection of civil and political rights is

² Republic of Malawi, *The 2008 Population and Housing Census*, The National Statistical Office, Zomba, 2008 at 2.

³ *Ibid* at 7.

⁴ While poverty is widespread, deep and severe in the country, ‘some groups are disproportionately affected, due to the dynamics of marginalisation and vulnerability.’ For instance, women, children and the rural peasants are mostly affected by poverty. It is reported that about 90% of poor people in Malawi live in the rural areas and households in urban areas have an average income of almost three times higher than rural households. See generally, Gloppen and Kanyongolo, in ‘Courts and the poor in Malawi: Economic Marginalisation, vulnerability, and the Law’ at 261.

⁵ Danwood Chirwa, *A Full Loaf is Better Than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi*, in *Journal of African Law*, Vol. 49, No. 2 (2005), pp. 207-241, at 213.

⁶ Siri Gloppen and Fidelis Edge Kanyongolo, *Courts and the poor in Malawi: Economic marginalisation, vulnerability, and the Law*, I.CON, Vol. 5 No. 2, 2007, pp. 258-298 at 260.

⁷ See article 4, Malawi Constitution.

⁸ See article 6, Malawi Constitution.

quite extensive, less focus has been given to economic, social and cultural rights within the Constitution. The few socio-economic rights that have been included in the Bill of Rights are the right to family protection and marriage, labour rights, the right to education, the right to property and the right to economic activity, which entails that they can be enforced in the courts of law. However, some rights belonging to the conventional category of socio-economic rights are enshrined as principles of national policies and are as such non-enforceable in courts. These include the right to health, the right to food, the right to education and socio-economic principles concerning rural communities, children and the elderly, the disabled and other marginalised groups. It needs no emphasis that the Malawi Constitution clearly failed to give full effect to the principle of the indivisibility and interdependence of all rights as recommended by the Vienna Declaration on Human Rights.⁹

Despite some of the limitations identified above, the Malawian Constitution contains many features that can be employed to achieve greater protection of human rights including refugee rights. Critical among these are principles of interpretation, which emphasise the role of public international law and comparable foreign case law when interpreting constitutional provisions.¹⁰

1.3. Overview of the Legal System

Malawi's legal system is largely based on English common law with some influence of customary law. Section 9 of the Constitution states that the judiciary shall have the responsibility of interpreting, protecting and enforcing the Constitution and that it shall be independent and impartial. The court structure consists of a Supreme Court of Appeal, a High Court and subordinate courts (Magistrate's courts). The Chief Justice is appointed by the president and confirmed by two-thirds of the members of the National Assembly.¹¹ The Constitution makes provisions for a Judicial Service Commission that appoints judges.¹² Notably, the president appoints the five-member Judicial Service Commission.¹³

Despite providing for the independence of the judiciary, government adherence to judicial decisions has been inconsistent. A comprehensive study undertaken by the AfriMAP and the Open Society Initiative for Southern Africa on Malawi's justice sector and the rule of law

⁹ See Centre for Human Rights & Rehabilitation Annual Report, 2007, available on www.chrrmw.org.

¹⁰ Malawi Constitution, section 11(2)(c).

¹¹ See section 111 of the Malawi Constitution.

¹² Section 116, Malawi Constitution.

¹³ This is provided in Section 117 of the national Constitution. It states that the five members are the chief justice, chairman of the Civil Service Commission (who is appointed by the president), a judge designated by the President in consultation with the Chief justice and a legal practitioner or magistrate designated by the president after consultations with the chief justice.

revealed that Malawi government tends to disregard court orders that are politically inconvenient.¹⁴

In addition to the above judicial structure, the Malawi Constitution provides for quasi-judicial bodies such as the Office of Ombudsman and the Malawi Human Rights Commission.¹⁵ The Constitution provides for extensive investigative and recommendatory powers for both of these oversight bodies but unfortunately, they do not receive adequate state resources to effectively conduct their responsibilities. Thus the institutions lack capacity and are unable to fulfil their constitutional mandate.¹⁶

1.4. Overview of the Refugee Situation

According to the submission of the Office of United Nations High Commissioner for Refugees (UNHCR) to the review of Malawi under the universal periodic review, Malawi, as of March 2010, was hosting 5,285 refugees and 6,150 asylum seekers, whose asylum applications were pending a decision at either the first or second instance. Out of the total population of 11,435 individuals, 53.6% were male and 46.4% were female. As a matter of Malawi's policy, persons in need of international protection are required to reside in the only designated refugee camp in the country, Dzaleka Refugee Camp, which is managed by the Ministry of Internal Affairs and Public Security.

It is worth pointing out that Malawi initially had two refugee camps, namely Dzaleka and Luwani. However, the latter was closed down in May 2007 without warning citing security concerns triggered by asylum seekers from the horn of Africa who were suspected of involvement in human trafficking.¹⁷ The camp held 300 refugees at the time of its closure and the refugees were transferred to Dzaleka camp. Notably, Dzaleka was already holding 5,000 refugees and the addition of the new refugees put a huge strain on the already limited resources at the camp. For example, the primary school at the camp, which also catered for locals, had its enrolment increase sharply from 1,200 to 1,900, prompting the authorities to introduce learning in shifts and to hold classes in tents.¹⁸ Expectedly, the transfer also sapped medical resources at Dzaleka. UNHCR's Malawi office conceded that the transfer had created a situation that was very difficult to deal with.¹⁹ In November 2007, Malawi and UNHCR embarked on a registration exercise to take stock of all refugees in the country, 'a

¹⁴ AfriMAP and OSISA, *Malawi Justice Sector and the Rule of Law*, 2006 at 106.

¹⁵ See chapters X and XI of the Constitution of Malawi.

¹⁶ OSISA, *Constitutional Review and Reform: and the Adherence to Democratic Principles in Constitutions in Southern African Countries*, 2007 at 110.

¹⁷ UN News Centre, 'UN agency rushes to help refugees in Malawi after government closes camp,' 25 May 2007.

¹⁸ Marcus Muhariwa, 'Dzaleka Refugee Camp overload,' *The Daily Times*, 9 July 2007.

¹⁹ *Ibid.*

step considered by both to be critical in improving the protection, management and assistance to refugees and asylum seekers in the country.’²⁰

2.0. International Legal Framework

2.1. Overview of International and Regional Refugee Instruments

Malawi is a state party to both the 1951 UN Convention relating to the Status of Refugees (1951 Convention) as well as its 1967 Protocol²¹ and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).²² More recently, it ratified the 1954 Convention relating to the Status of Stateless Persons. However, Malawi has yet to accede to the 1961 Convention on the Reduction of Statelessness. Despite a broader legal framework providing for the rights of refugees as evidenced by the above ratifications, refugee rights are to a limited extent affected by the nine reservations²³ that Malawi entered to the 1951 Convention.²⁴ The reservations were entered against rights such as the rights to naturalisation, health, education, freedom of movement and the right to engage in economic activity. Some of the articles affected by the reservations include:

Article 7: exemption from reciprocity

Article 13: the right to moveable and immovable property

Article 15: the right of association

Article 22: public education

Article 24: labour legislation and social security

In respect of article 17 of the 1951 Convention, Malawi excepted to the undertaking to grant to refugees rights of wage earning employment more favourable than those granted to aliens generally. In respect of article 26, Malawi reserved the right to designate the place or places of residence of the refugees and to restrict their movements whenever considerations of national security or public order so required. In respect of article 34, the state entered a reservation to the obligation to grant refugees any more favourable naturalisation facilities than are granted, in accordance with the relevant laws and regulations, to aliens generally.

²⁰ UNHCR, UNHCR and Malawi register all refugees and asylum seekers, 22 November 2007, available on <http://www.unhcr.org/4745bbc74.html>, accessed 4 November 2010.

²¹ Acceded to the Convention on 10 December 1989.

²² Ratified on 4 November 1987.

²³ A reservation is defined as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State. See Article 2(2)(d) of the Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980; see also Blay, S & B. Tsamenyi, ‘Reservations & Declarations Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, *International Journal of Refugee Law*, Vol. 2 No. 4.

²⁴ Malawi has indicated that it considers these provisions as recommendations only and not legally binding. See UNHCR Submission to the Human Rights Council, submitted in preparation of the review of Malawi under the Universal Periodic Review, available on http://lib.ohchr.org/HRBodies/UPR/Documents/session9/MW/UNHCR_UPR_MWI_S09_2010_United%20nations%20high%20commissioner%20for%20refugees_revised.pdf. See also CHRR Annual Human Rights Report, 2007 available on www.chrrm.org.

The impact of these reservations on the rights of people seek international protection is discussed later in the paper.

2.2. The Application and Relevance of International Human Rights Law in Malawi

In addition to ratifying the above-mentioned refugee conventions, Malawi is also party to a number of international human rights instruments. These include the International Covenant on Civil and Political Rights (ICCPR);²⁵ the International Covenant on Economic, Social and Cultural Rights (ICESCR);²⁶ the Convention on the Rights of the Child (CRC);²⁷ the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW);²⁸ and the African Charter on Human and People's Rights (African Charter),²⁹ among others. Notably, international law is relevant in Malawi in two ways: it can be used both as a source of law and as a basis for interpreting provisions of the constitution. Since Malawi is a dualist jurisdiction, for treaties to form part of Malawian law they need ratification through parliament. In other words, an international treaty can be invoked in a court of law only if it has been domesticated through an act of parliament.³⁰ This rule applies in respect of all treaties entered into after the Constitution took effect.

Notwithstanding the foregoing, the Constitution provides differently for treaties that entered into force before the Constitution became operational in 1995. Section 211(2) of the Constitution states 'that binding international agreements entered into before the commencement of the Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.' In this regard, it is possible to argue that the international agreements intended to have continued binding effect on Malawian courts are only those that were incorporated into Malawian law through a legislation process. Such strict interpretation of this provision would mean that treaties like the ICCPR, ICESCR, CRC, CEDAW and African Charter, which has not yet been given domestic effect through an Act of Parliament, cannot be binding in Malawian courts. The problem with this interpretation is that the Constitution does not make any specific provisions for the application of the ratified before the 1994 but not domesticated by legislation.³¹ On the other hand, customary international law, unlike treaties, does not need to be incorporated into Malawian law through an act of parliament. Rather, it forms part of domestic law unless it is inconsistent with an act of parliament.³²

²⁵ Ratified on 22 December 1993.

²⁶ Ratified on 22 December 1993.

²⁷ Ratified on 2 January 1991.

²⁸ Ratified on 12 March 1987.

²⁹ Ratified on 17 November 1989.

³⁰ Section 211(1), Malawi Constitution.

³¹ See a review by AfriMAP and OSISA on the Malawi Justice Sector and the Rule of Law, 2006 at 4. See also CHRR Annual Human Rights Report, 2007 available on www.chrrmw.org.

³² Article 211(3), Malawi Constitution.

As noted above, Malawian courts are also enjoined to have regard to international law and comparable foreign case law when interpreting constitutional provisions.³³ This is particularly interesting as it means that courts may look at all sorts of international law, including binding and non-binding sources, for inspiration. Unfortunately, the court's jurisprudence on refugee rights remains underdeveloped. The agreement between Malawi and Rwanda to repatriate Rwandan refugees infuriated some refugees who still fear persecution in their home country and threatened to approach the courts. The agreement remains unimplemented. It is not clear if the non-implementation is due to Malawi's realisation of its obligation under international law and on *non-refoulement* or due to administrative challenges. Nevertheless, there are very few cases that have been handled by the courts related to issues of people who seek international protection.

3.0. Domestic Legal and Policy Framework

As indicated above, Malawi is a party to the 1951 Convention and its Protocol as well as the OAU Convention, which generated an obligation to enact appropriate legislation to make these instruments enforceable within the national legal framework. In addition to the above obligation, the influx of Mozambican refugees during the mid 1980s necessitated a legal framework to guide the processes and administration of refugees. As such, Malawi enacted its first refugee specific legislation, the Refugees Act of 1989, on 3 April 1989. The main aim of this legislation is to make provisions for the control and administration of refugees.³⁴ Notably, the refugee definitions of the 1951 Convention and the OAU Convention are incorporated into this 1989 Refugee Act. The Refugee Act defines a refugee as a person who:

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

The above definition is broad and mostly similar with the definitions provided in the refugee conventions. Ideally, it should be more accommodating for refugees. Surprisingly, the Act does not proceed to highlight basic refugee rights as is the case with the 1951 Convention. This can be attributed to various reasons. Firstly, Malawi was at that time (1989) under a one party state and its Constitution did not have a bill of rights. As such, it was not possible for a

³³ See Section 11(9)(c), Malawi Constitution.

³⁴ Tiyanjana Maluwa, 'The Domestic Implementation of International Refugee Law: A Brief Note on Malawi's Refugee Act of 1989', *International Journal of Refugee Law*, Vol. 3 No. 3 at 3.

State which denied its citizens enforceable rights to guarantee the same to refugees. Secondly, Malawi had taken a large share of Mozambican refugees. It is reported that over one million Mozambicans were in Malawi between 1989 and 1991, resulting in a situation where one of every six people in Malawi was a Mozambican refugee. This resulted in pressure over land and other resources. To minimise the pressure from its own people, the government placed restrictions on freedoms including on movement and economic activities. Thirdly, the reservations which Malawi entered to the 1951 Convention might also have played a role in terms of how the Refugee Act was drafted. It was unlikely that Malawi would enter reservations which it indicated were mere recommendations³⁵ and in the contrary guarantee the same in its own Act.

However, there are also other crucial provisions in so far as refugee rights are concerned. Many of the rights incorporated into the Act are procedural rights. For instance, Article 10 of the Act prohibits expulsion of refugees to the borders of a country where his or her life or freedom will be threatened, ensuring the fulfilment of the principle of *non-refoulement*. Significantly, the Act allows a person claiming to be a refugee to enter and remain in Malawi while the committee process his application for refugee status.³⁶ The law also allows refugees seeking the rights of passage going to a country where he or she intends to seek asylum as a refugee. Crucially, the Act also allows people who enter Malawi illegally for purposes of seeking asylum as a refugee to present themselves before a competent officer within twenty four hours of their entry or within such longer period as the competent officer may consider acceptable in the circumstances. The Act further guarantees such persons protection from being detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.³⁷ This is in line with the 1951 Convention, which prohibits sanctions for illegal entry.³⁸ However, the media has been awash with cases of police arresting persons from the horn of Africa in the northern districts of Malawi which borders Tanzania on charges of illegal entry. Many are serving sentences on such charges.

3.1. Refugee Status Determination and the Procedure for Seeking Asylum

Since 2006, Malawi with assistance of UNHCR, has established a full time RSD unit in the Office of the Commissioner for Refugees under the Department of Poverty and Disaster

³⁵ According to the UNHCR, the practice varies from a liberal translation of the reservations to the strict implementation in the process impacting on some basic rights of refugees. See UNHCR submission to the universal periodic review available on http://lib.ohchr.org/HRBodies/UPR/Documents/session9/MW/UNHCR_UPR_MWI_S09_2010_United%20nations%20high%20commissioner%20for%20refugees_revised.pdf, accessed 5 November 2010.

³⁶ See article 10(2), Malawi Refugee Act 1989.

³⁷ See article 10(4), Malawi Refugee Act 1989.

³⁸ See article 31, 1951 Convention.

Management Affairs to deal with eligibility issues. According to the UNHCR (Malawi), the RSD unit was initially staffed with eligibility officers but in 2009 it brought on board a legal advisor and an appeals officer. Procedurally, asylum seekers declare themselves at any entry point where they are required to register with the police or immigration before proceeding to the refugee camp. Each refugee application is lodged to the Office of the Commissioner for Refugees in the Department of Poverty and Disaster Management Affairs, interviewed individually and the decision is taken on the merits of each application. The RSD unit interviews the applicants and make recommendations to the Refugee Committee. The Refugee Committee, which was established by the Refugee Act of 1989, makes the final decision. However, the law provides for the right to appeal by any person who is dissatisfied with a decision of the Committee. However, the refugee law declares that the minister's decision is final and is not subject to appeal, review or question by any court. The Minister is also not required to assign any reasons for such decision.³⁹

There are still challenges in so far as status determination is concerned. The main challenge facing RSD in Malawi is largely human and financial resources. The unit has faced high staff turnover resulting in lengthy in delays in procedures, which undermines the procedure. Furthermore, financial constraints have also limited the refugee committee's meetings. Decisions to grant or deny status are made at one to two meetings per year. On the other hand, legal representation during the application process and subsequent processes including during interviews as well as during the appeals processes is severely limited, if not non-existent. Nevertheless, the UNHCR believes that the establishment of the RSD unit has improved the status determination and reduced the number of persons awaiting a decision on their asylum applications.⁴⁰ UNHCR provides technical support to government including trainings and supports exchange visits to other countries with well developed RSD systems.

3.2. Refugee Rights in Malawi

3.2.1. The Right to Education

The Refugee Act does not guarantee the right to education in Malawi. In addition, Malawi entered reservations to Article 22(1) of the 1951 Convention, which calls on contracting states to 'accord to refugees the same treatment as is accorded to nationals with respect to elementary education'. Malawi considers the provision only recommendatory and imposing no legal obligations.⁴¹ However, this reservation can be said to have been rendered obsolete. In fact, there is a full primary school within the camp offering free education which also

³⁹ See article 11(2). See also UNHCR Malawi webpage available on <http://www.unmalawi.org/agencies/unhcr.html>, accessed 5 November 2010.

⁴⁰ See note 29.

⁴¹ Samuel K Blay & Martin Tsamenyi, *supra* note 20.

serves pupils from the villages surrounding the camp. In addition, the camp has a secondary school which has more modern equipment than most government schools. Many of the students who have done very well during their high school education have been offered scholarships to study abroad, especially in Canada. In 2008, a girl was offered a scholarship to study in China, where she is studying pathology, and was granted a Malawian citizenship. Malawi only has two pathologists. However, it must be pointed out that while it is easier for refugee students to access primary and secondary school education, it is very difficult to access university education. Young people selected to the national university are expected to pay higher fees just like any other international students. Unfortunately, many cannot afford to pay the cost.

3.2.2. The Right to Health

Dzaleka camp has a health centre which provides most of the health services not only for the refugee population but the surrounding communities as well. A total of six villages use the health facility. It also has a well equipped maternal health section. However, it must be pointed out that although the government supplies medicine and staff to the health facility, UNHCR provides salaries for the health workers. Furthermore, sometimes the health facility runs out of drugs, just like many primary healthcare facilities, in which case, UNHCR supplies the stock in order to ensure that health services and goods are continuously provided to the refugee population. Serious cases are referred to the district hospital in Dowa.

3.2.3. Freedom of Movement

The Refugee Act expressly restricts the movement of refugees in Malawi. Furthermore, Malawi has also entered reservations on the freedom of movement of refugees. As a result, Malawi designated the Dzaleka refugee camp where all refugees are supposed to live. During the one party state Dzaleka was a notorious prison where alleged political dissidents were held. The prison was closed during the dawn of political pluralism. The facility was originally planned to take up to 5,000 people but currently it is holding about 10,000. According to the reports from the UNHCR, there are almost 100 applicants for refugee status which means that the population will continue to grow. The restriction on freedom of movement also has an impact on the right to engage in economic activity.

3.2.4. The Right to Engage in Economic Activity

As highlighted above, refugees are not allowed to engage in any economic activity beyond the camp. As a result, refugees cannot engage in any business except within the camps. Due to restrictions on movement, many cannot move out of the camp without risking arrest. Furthermore, this also has implications on the size of the market as they can only serve a

small sector of the population. Freedom of movement and the right to engage in economic activity also have implications for farming in that most refugees cannot grow crops as they cannot leave the camp to seek land. The land within the camp is not sufficient to cater for all the people living there. Originally, the land was for prisoners, who grew crops.

Furthermore, there are many well-qualified people who are not able to work due the restrictions, despite possessing valuable skills. However, there are some refugees who have managed to acquire citizenship through marriage and are applying their trade within the towns and cities in Malawi. Regardless of their citizenship status, they are still frowned upon by some local people and are seen as illegitimate competitors by other small scale businesses. After the 2008 xenophobic attacks in South Africa, some people with business permits were attacked and had their groceries attacked. The attacks were purely based on the hatred of black foreign investors, who are seen to be fiercer competitors than those of other races, otherwise known as negrophobia.

3.2.5. The Right to Naturalisation

Malawi entered a reservation to the 1951 Convention on naturalisation. Officially, there are isolated cases where the government has granted citizenship to refugees. A high profile example involved a young Rwandan girl Kwaigaikira, who was selected to go to a public university but could not go due to high school fees she was supposed to pay.⁴² The girl was granted citizenship and received a Chinese scholarship where she is pursuing studies in pathology. Regardless, some refugees have attained the citizenship status through marriage and are accorded the full rights. The refugee population in Malawi is currently very small, just above 10,000. If Malawi was committed to reducing the refugee problem in the country, it could have done so by providing the citizenship status. The example of Tanzania whereby it awarded citizenship to over 162,000 refugees of Burundian origin should be an inspiration to countries within the region.⁴³

3.3 Detention of Refugees and Asylum Seekers

Malawi has religiously been following up on some reservations it entered to the 1951 Convention. For instance, on freedom of movement, many refugees and asylum seekers have been detained for illegal entry and currently over 300 asylum seekers were convicted and are

⁴² Theto Lungu, Rwandan refugee awarded Chinese scholarship, 18 April 2010, available on <http://survivorsnetworks.blogspot.com/2010/04/rwandan-refugee-awarded-chinese.html>, last accessed on 8th November 2010.

⁴³ Rachel Pollock, [Tanzania naturalizes 162,000 and gives hope to refugees around the world, 29 April 2010](http://www.mediaglobal.org/article/2010-04-29/tanzania-naturalizes-162000-and-gives-hope-to-refugees-around-the-world), available on <http://www.mediaglobal.org/article/2010-04-29/tanzania-naturalizes-162000-and-gives-hope-to-refugees-around-the-world>, accessed 9 November 2010.

serving sentence contrary to the Refugee Act of 1989.⁴⁴ Recently the government issued very strict measures against Ethiopians seeking asylum, requiring them to obtain visas before traveling to Malawi. Government sources attribute the change to security concerns. Government officials now claim that fears against security issues, especially terror attacks, required the government to be careful regarding who it admits to stay in its territory. To a limited extent, it may be speculated that authorities react emotionally to stories about refugees. Many do not understand the current flow of refugees in contrast to refugees from Mozambique, who engaged in direct warfare inside Malawi. Furthermore, many refugees from the horn of Africa are not Bantus; unlike the Mozambican refugees, they do not look like the local population and are easily identified by a population that does not fully trust foreigners. Secondly, many refugees are economic refugees. People still do not understand why Malawi should receive refugees from countries such as Ethiopia, Burundi and Eritrea, which do not currently have full blown conflict. The need for more capacity building for relevant authorities cannot be overemphasized.

3.4. Mixed Migration

Mixed migration involving the movement of people from the horn of Africa and the Great Lakes region transiting through Malawi has also posed challenges for the Malawi authorities. According to Jeff Crisp and Esther Kiragu, these movements include ‘people with a valid claim to refugee status as they are fleeing from persecution, armed conflict and political violence in their countries of origin; refugees who have previously been accommodated in campus or urban centres in neighbouring and nearby countries; vulnerable migrants who are moving in response to poor governance and harsh economic circumstances; people who are seeking better livelihoods, income generating and educational opportunities; as well as those whose ultimate aim is to make their way to Europe or North America.’⁴⁵ Many of them use the Dzaleka refugee camp as a cooling point on their way to South Africa.⁴⁶ To this effect, many young men of Somali and Ethiopian origin have disappeared without a trace in camps after staying for only a few days. For instance, government claims that in 2009, of 500 refugees of Somali origin, only 50 were still in the camp within a week of their admission, the rest having disappeared. As a result, Malawi has difficulties in identifying new arrivals who are in need of protection and ensuring they are granted asylum. In the past year, police have arrested and prosecuted cases involving Malawians who were part of an international smuggling syndicate assisting asylum seekers to pass through Malawi on their way to South Africa, as well as asylum seekers who are found along the borders even if they claim that

⁴⁴ Masozi Kasambala, *Court Convicts 27 Ethiopians*, 26 October 2010, available on http://www.zodiakmalawi.com/index.php?option=com_content&view=article&id=1225&catid=1225.

⁴⁵ Jeff Crisp & Esther Kiragu, *supra* note 1.

⁴⁶ CHRR, *2007 Annual Human Rights Reports*, 2007, available on www.chrrmw.org.

they were to present themselves to authorities within 24 hours. Sadly, this trend is having a negative impact on those who are really in need of international protection.

4. Conclusion/Recommendations

In conclusion, it is clear that the main challenge for refugee rights in Malawi is the unfavourable legal framework for the implementation of the rights of refugees in the country. The Refugee Act, while providing a broad definition of a refugee, does not address the basic rights that refugees have under international law. According to the UNHCR, it is outdated and insufficient to cater for the refugee population in Malawi. Secondly, the reservations entered to the 1951 Convention have also impeded efforts to implement local integration activities for refugees including wage earning employment and freedom of movement. In this regard, the paper submits the following recommendations:

- Review the Malawi Refugee Act of 1989 and ensuring that its provisions are consistent with the International Refugee Law.
- Vacate the nine reservations entered to the 1951 Convention in order to guarantee basic rights for refugees in Malawi including freedom of movement and the right to economic activity, among others.
- Consider local integration of refugees in order to reduce congestion in the camps, as well as reducing the burden on the State and other agencies.
- UNHCR and Malawi need to continue building the capacity of the RSD unit to ensure speedy status determination; similarly, government needs to ensure adequate resources to the unit and the Refugee Committee.

5. Bibliography

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