

# Advancing refugee protection in Botswana through improved refugee status determination

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## Summary

*Botswana's Refugee (Recognition and Control) Act has been in force since 1967. It was promulgated before Botswana became a state party to the UN Refugee Convention and its Protocol and before its accession to the OAU Refugee Convention. Refugee status determination (RSD) procedures should reach human rights standards in procedural fairness as enunciated in the Universal Declaration on Human Rights. The United Nations High Commissioner for Refugees (UNHCR) has issued several documents concerned with procedural fairness in RSD. This article takes a critical look at RSD procedures in Botswana, measuring them against human rights standards and UNHCR recommendations for fair and effective RSD procedures. The article recommends that RSD procedures be improved in order to ensure procedural fairness and reduce the risk of refoulement in deserving cases.*

## 1 Introduction

Botswana has been admitting refugees for almost half a century. In their study on migration and refugee policy in Botswana, Oucho and

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Campbell describe Botswana as a 'country of migration'.<sup>1</sup> Rutinwa notes that the influx of refugees into Botswana can be linked to wars of liberation from racist minority rule in South Africa, South West Africa and Southern Rhodesia, and the struggle for independence in neighbouring countries, particularly Angola.<sup>2</sup> This view is echoed by Tshosa, who also observes that the refugee problem appears to have lessened in intensity with the independence of all the countries in the Southern African region.<sup>3</sup> Currently, refugee numbers in Botswana are just over 3 000 – mainly from East Africa and neighbouring Southern African countries.

There are a number of scholarly articles and papers on the refugee situation in Botswana. Maluwa comments on the general legal and political situation of refugees in Botswana.<sup>4</sup> Zetterquist writes on refugee experiences and support systems in Botswana.<sup>5</sup> Rwelamira and Buberwa remark on the social demographics of refugees in Botswana.<sup>6</sup> Tshosa comments on the scheme of the Refugee (Recognition and Control) Act 1967 making recommendations for law reform.<sup>7</sup> However, there has been no consideration of the important legal question of refugee status determination (RSD) procedures in Botswana. This article aims to fill that gap by providing an overview of the RSD process and analysing its fairness and effectiveness against human rights standards and United Nations High Commissioner for Refugees (UNHCR) recommendations.<sup>8</sup>

The article situates the reader by giving an overview of Botswana's refugee law framework and the sources of information on Botswana's RSD procedures. The article outlines the sources of procedural standards in RSD in human rights law and UNHCR recommendations. This is followed by a restatement of the significance and importance

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- 1 JO Ouchou & EK Campbell 'Changing attitudes to immigration and refugee policy in Botswana' in J Crush (ed) *Migration policy series No 28* (2003) 1.
  - 2 B Rutinwa 'Asylum and refugee policies in Southern Africa: A historical perspective' <http://www.sarpn.org.za/documents/d0001212/rutinwa/rutinwa.pdf> (accessed 7 July 2011).
  - 3 O Tshosa 'National refugee laws in the light of international standards: Some reflections on the Refugee (Recognition and Control) Act 1967 of Botswana' (2007) 5 *University of Botswana Law Journal* 49.
  - 4 T Maluwa 'The concept of asylum and the protection of refugees in Botswana: Some legal and political aspects' paper presented at the 2nd International Refugee Advisory Panel Conference, Oxford, 1991.
  - 5 J Zetterquist 'Refugees in Botswana in the light of international law' <http://uir.unisa.ac.za/bitstream/handle/10500/1256/02thesis.pdf?sequence=3> (accessed 6 July 2011).
  - 6 M Rwelamira & LG Buberwa 'Refugees in Botswana, Lesotho and Swaziland: Some preliminary notes on their magnitude, characteristics and social support systems' paper presented at the Africa Refugees Seminar, organised by the African Refugee Centre, University of Dar es Salaam, Arusha, Tanzania, 30 July-3 August 1990.
  - 7 Tshosa (n 3 above).
  - 8 This article is the result of an unpublished workshop paper presented by E Macharia-Mokobi and J Pfumorodze entitled 'Procedures for granting refugee status in Botswana in the light of international refugee law' Refugee Law Workshop, University of Botswana, 11-12 June 2009, Gaborone, Botswana.

of procedural fairness in the RSD process. An analysis of the implementation of RSD in Botswana follows. The article concludes by making policy and law reform recommendations.

## 2 Botswana's refugee law framework

### 2.1 Sources of information about Botswana's refugee status determination procedures

Most of the data for this article was collected from a desk study of refugee law and international treaties relevant to Botswana. The authors' particular interest was to examine status determination procedures in Botswana with a view to making policy and law reform recommendations. The authors held discussions with UNHCR officers regarding their practical experience of the implementation of RSD procedures in Botswana. The comments of officers interviewed have been incorporated into the article. One limitation on the collection of data on practical implementation of the RSD legislation in Botswana is that the process is not open to the public. Unlike in other countries, there are no publicly available records of status determination interviews or hearings that may be reviewed for scholarly purposes. The UNHCR has observer status in RSD hearings and officers interviewed gave the authors insights into the practical workings of the system. While comments from the UNHCR helped to provide a window onto RSD in Botswana, the article as a whole still expresses only the views of the authors.

### 2.2 Accession to refugee law treaties

Botswana is a state party to the 1951 UN Convention on the Status of Refugees (1951 Convention) and its 1967 Protocol,<sup>9</sup> as well as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention).<sup>10</sup>

Botswana has entered several reservations to the 1951 Convention.<sup>11</sup> The first reservation is to article 7 on reciprocity.<sup>12</sup> The effect of the reservation on reciprocity means that Botswana is not obliged to offer refugees the same treatment as that accorded generally to non-citizens who are in Botswana. This is so, despite the

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9 Botswana became party to these instruments on 6 January 1969.

10 Botswana acceded to this treaty on 16 May 1995.

11 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3d9abe177&query=reservations> (accessed 8 July 2011).

12 The exemption to reciprocity is defined as follows in the *Handbook on refugee protection: A guide to international refugee law* 11 as follows: 'Where according to a country's law, the granting of a right to an alien is subject to the granting of similar treatment by the alien's country of nationality, this will not apply to refugees. The notion of reciprocity does not apply to refugees since they do not enjoy the protection of their home country.' [http://www.ipu.org/pdf/publications/refugee\\_en.pdf](http://www.ipu.org/pdf/publications/refugee_en.pdf) (accessed 25 November 2010).

fact that refugees cannot avail themselves of the protection of their home state.

Botswana has also made a reservation to article 12(1) of the Refugee Convention in respect of personal status, which provides that the personal status of a refugee shall be determined by his country of domicile and if he has no domicile, by his country of residence.

Botswana further entered reservations to article 17 on wage-earning employment that requires that refugees be afforded the most favourable treatment accorded to nationals of a foreign country as regards the right to work. Article 17 also provides for exemption for refugees from restrictive measures employed for the protection of the national labour market. Botswana's motivation for the reservation on wage-earning employment is the high unemployment rate and the need to protect what jobs were available for citizens.<sup>13</sup> The effect of this reservation is that Botswana does not provide any special exemptions to refugees seeking employment. Botswana treats refugees who are able to find work in the same way as other non-citizens seeking employment in the country by requiring them to apply for and obtain work permits and residence permits.<sup>14</sup>

Article 26 of the Refugee Convention provides that refugees shall be afforded the right to choose their place of residence and move freely within the territory of the country. Botswana has entered a reservation to this article. This reservation was entered for reasons of national security because, as Makhema notes, some refugees coming into Botswana in the 1960s were members of liberation movements and reasons of security necessitated this reservation.<sup>15</sup> Refugees have been able to move freely in the country in the past. However, in recent years Botswana has adopted the encampment policy. Refugees are now settled at the Dukwi refugee camp where they are expected to reside upon being granted refugee status.<sup>16</sup> Whilst encampment policies are not desirable in terms of international refugee law, a study has shown that 46,5 per cent of Botswana citizens favour the encampment of refugees.<sup>17</sup>

Botswana has made a reservation to article 31, which prohibits the imposition of penalties on refugees unlawfully in the country of refuge, and to article 32, which prohibits expulsion of refugees except on grounds of national security or public order. These reservations

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13 M Makhema 'Social protection for refugees and asylum seekers in the Southern Africa Development Community (SADC)' SP Discussion Paper 0906, Social Protection and Labour, The World Bank 10 16 <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0906.pdf> (accessed 25 November 2010).

14 Makhema (n 13 above) 29.

15 Makhema (n 13 above) 16.

16 Makhema (n 13 above) 28.

17 Oucho & Campbell (n 1 above) 27-28.

were also motivated by reasons of national security, given the unstable political situation in Southern Africa in the 1960s.

Finally, Botswana has made reservations to article 34 of the Refugee Convention on the naturalisation of refugees. Makhema notes that this reservation was entered due to concerns about a potential change in the balance of power between ethnic groups in Botswana should significant numbers of people from neighbouring countries be naturalised.<sup>18</sup> Botswana's population is small, being estimated at approximately 1,9 million people in 2010. The concerns expressed by Makhema would have been very real in the 1960s and 1970s when Botswana's population was significantly smaller.

As mentioned previously, Botswana's accession to the 1951 Convention and the OAU Convention came after the promulgation of Botswana's municipal refugee legislation in 1967, entitled the Refugee (Recognition and Control) Act (Act).<sup>19</sup> There is therefore a disconnect between Botswana's international obligations in terms of the 1951 UN Convention and the OAU Convention and Botswana's municipal law. The scheme of the Act is discussed below.

### 2.3 The Refugee (Recognition and Control) Act 1967

The Refugee (Recognition and Control) Act of 1967 is control-oriented and not protection-oriented.<sup>20</sup> Botswana's Refugee Act suffers from the problems plaguing similar control-oriented statutes which were the norm in the region in the 1960s and 1970s. Rutinwa characterises these problems as follows:<sup>21</sup>

The first notable aspect of the above laws [control-oriented statutes] is that that they were not comprehensive refugee legislation. Rather, they addressed selected aspects of the refugee problem. Second, the selected aspects did not so much relate to protection of refugees. Rather, as the long titles connote, they were mainly aimed at *controlling* refugees. The laws vest wide and discretionary powers to determine who is a refugee in the relevant Minister.

Status determination procedures in the Act can fairly be described as basic. An individual seeking asylum under the Act in Botswana is required to declare his intention to apply for asylum at the earliest possible opportunity.<sup>22</sup> This may be done at a border post upon initial entry, by appearing at a police station, or at the UNHCR offices in the capital city Gaborone. At the time of making the initial claim for asylum, the applicant is immediately referred to the police, immigration officers or UNHCR for an initial interview. At this

18 Makhema (n 13 above) 16.

19 Cap 25:01.

20 For more on control orientation versus protection orientation, see Rutinwa (n 2 above) 53-57.

21 Rutinwa (n 2 above) 54.

22 This information is derived from discussions with UNHCR, Botswana. It is based on their experience and knowledge of the status determination process before an application is placed before the RAC.

interview, his details are taken and he is required at this stage to inform the interviewer of his reasons for fleeing his country. An interview may also be conducted by an intelligence officer for security purposes should this be deemed necessary.

After his application has been received, an asylum seeker will then be transferred to the Centre for Illegal Immigrants in Francistown.<sup>23</sup> He or she will reside there pending the determination of his or her status as a refugee. In the meantime, the asylum seeker's application is forwarded to the Refugee Advisory Committee (RAC), the body established under section 3 of the Act charged with status determination.

The asylum seeker is then summoned by the RAC for a status determination inquiry where he or she is required to inform the RAC of the circumstances surrounding potential flight and establish that he or she has a well-founded fear of persecution upon return to the country of nationality.<sup>24</sup> This inquiry is held in private.<sup>25</sup> The RAC has powers to summon to give evidence any individual who may shed light on the case before it.<sup>26</sup> The UNHCR participates as an *ad hoc* member of the RAC providing relevant country information and advice on how similar cases were treated in other countries. Upon completion of the inquiry, the RAC then prepares a report for the Minister.<sup>27</sup>

The Act vests the Minister with the power to recognise a person as a refugee or deny the individual such recognition.<sup>28</sup> In the event that the individual receives recognition as a refugee, he or she is then transferred to the Dukwi settlement<sup>29</sup> where they will be required to reside for as long as they remain refugees. In the event that an individual is denied recognition, she then becomes subject to the immigration law of Botswana. She is classified as an illegal immigrant and will be removed from Botswana if she no longer has a legal basis to remain under Botswana's immigration laws.<sup>30</sup> There is no requirement in the Refugee Act not to *refouler* an asylum seeker whose application for asylum has been rejected. However, in terms of the Act, an asylum seeker who is detained pending the outcome of her application may leave Botswana to enter some other country if she satisfies an immigration officer that it is lawful for her to enter such a country and that she possesses the means and in fact intends to enter

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23 This is a government-run centre for detention of undocumented immigrants who are usually deported under immigration laws.

24 Secs 4 & 5 of the Act.

25 Sec 5(2) of the Act.

26 Sec 5(1)(d) of the Act.

27 Sec 4(3) of the Act.

28 Sec 8(1)(a) of the Act.

29 A refugee camp located in the village of Dukwi, 154 kilometers north of Francistown, Botswana's second-largest city.

30 Sec 8(1)(b) as read with sec 8(2) of the Act.

that country. The asylum seeker choosing this route will not be granted a right of re-entry into Botswana.<sup>31</sup>

The Act has several obvious limitations. The Refugee Act contains no requirement that the report prepared by the RAC and the reasons for the decision taken by the Minister be provided to the asylum seeker. The Refugee Act contains no right of appeal against the decision of the Minister. The Minister does have the power in appropriate cases to direct the committee to re-open the inquiry or make a further report.<sup>32</sup> In practice, however, refugees who receive a negative decision write letters to the Minister to request a review of the negative first-instance decision. All remain detained at the Centre for Illegal Immigrants in Francistown pending final determination of their request for review of the Minister's decision. The Refugee Act makes no provision for group determination, providing no mechanism for status determination in cases of mass influx of refugees of a particular category.

The status determination procedure outlined above is basic and antiquated. While much is done in practice to augment the bare bones provided by the Act, much remains to be done to improve the RSD procedures.<sup>33</sup> Consideration of developments on the international stage in the area of status determination would be instructive when seeking to amend the Act to bring it in line with international human rights standards.

### 3 Significance of refugee status determination and importance of fair procedures

RSD is the procedure whereby the UNHCR and states decide whether an individual is entitled to protection under the 1951 Convention or under national refugee laws.<sup>34</sup>

Status determination is an essential and definitive stage in refugee law. Hathaway<sup>35</sup> points out that refugee rights are defined by virtue of status alone. He remarks that a refugee must be respected as such by host states unless and until a negative determination of the refugee's claim is rendered. This is because refugee status arises out of

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31 Sec 7 Refugee Act.

32 Sec 8(1)(c). This cannot amount to a true appeal as the same decision maker that took the first decision must then reconsider its own decision.

33 Eg, the UNHCR has an *ad hoc* presence on the RAC and provides much-needed country reposts to the RAC.

34 M Albert 'Governance and *prima facie* refugee status determination: Clarifying the boundaries of temporary protection, group determination and mass influx' (2010) 29 *Refugee Survey Quarterly* 61.

35 JC Hathaway *The rights of refugees under international law* (2005) 278.

her predicament rather from a formal determination of status. The UNHCR in its *Refugee handbook* reiterates this view, stating that<sup>36</sup>

[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him one. He does not become a refugee because of recognition, but is recognised because he is a refugee.

The 'criteria' alluded to in the handbook are found in the 1951 Convention's definition of a refugee. In terms of the 1951 Convention, the term 'refugee' is defined in article 1(2) as any person who<sup>37</sup>

owing to a well-founded fear of being persecuted by reason of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality or is unable, or owing to such fear is unwilling to avail himself of the protection of that country.

There is of course a wider definition found in the OAU Convention. In order to address the problem of refugees in the African context, and to cater for the deficiencies of the 1951 Convention definition, the OAU Convention defines a refugee to include persons fleeing their country of origin due to external aggression, occupation, foreign domination, or events seriously disturbing public order in either a part or the whole of the country of origin or nationality.<sup>38</sup>

Status determination is crucial as it is in some instances directly linked to accessing humanitarian assistance, residence or work permits, identity documentation or resettlement.<sup>39</sup> It is interesting to note, however, that the 1951 Convention does not contain RSD procedures. States determine their own RSD procedures, ideally guided by the imperative to respect human rights and UNHCR recommendations on RSD norms and procedures. States have concerns regarding procedures that are complicated, expensive and non-responsive to the specific refugee problem they face. States also have concerns about the misuse of the asylum system and unequal distribution of responsibilities.<sup>40</sup> These concerns inform the scheme of RSD procedures devised by states.

There are two types of RSD, individual and *prima facie*. Individual status determination involves a state or the UNHCR making a decision on whether to recognise an individual asylum seeker as a refugee in

36 UNHCR *Handbook on procedure and criteria for determining refugee status under the 1951 and the 1967 Protocol Relating to the Status of Refugees* HCR/IP/4/Eng/Rev1 (1992) 28.

37 Art 1(A)(2).

38 Art 1(2).

39 A Edwards 'Refugee status determination in Africa' (2006) 14 *African Journal of International and Comparative Law* 204 206.

40 UNHCR Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures) 31 May 2001 EC/GC/01/12 <http://www.unhcr.org/refworld/docid/3b36f2fca.html> (accessed 9 October 2012) 2.

terms of the 1951 Convention after receiving their application and being satisfied that the individual meets the Convention's criteria discussed above. Albert notes that individual status determination is often costly and a common site of friction between states and the UNHCR and that, as a result, the UNHCR often becomes the primary source of RSD administration and expense.<sup>41</sup>

*Prima facie* RSD, which is also known as group or mass influx determination, occurs where a host state, at its own discretion, decides to afford refugee status in situations where its capacity to conduct individual status determination is surpassed. In such instances, the host state affords *prima facie* refugee status to all individuals who enter from a particular place over a given period. This decision is based on objective information known to the host state about conditions in that particular place over the given period. The host state, therefore, assumes that every claimant from that particular place can prove all the elements of the 1951 refugee definition.<sup>42</sup>

As previously stated, international refugee law does not prescribe any specific procedure to be followed by countries in the determination of refugee status. The means and processes of status determination are left to the discretion of each state. One may at the outset assume that any procedure established by a state that achieves the desired aim of distinguishing between genuine cases for recognition and other non-deserving cases would be sufficient. Indeed, state practice with regard to status determination differs depending on the nature of the refugee problem and the general efficiency of the particular state's courts and administrative systems. Further, the UNHCR has observed that the methods used to decide whether to recognise someone as a refugee vary around the world, reflecting a variety of legal traditions, local circumstances and national resources.<sup>43</sup>

In spite of this apparent *carte blanche* states hold to devise their own status determination procedures, each state is in fact subject to international standards. In ensuring the effective implementation of international refugee law, each state must have 'some form of procedure for the identification of refugees, and some measure of protection against laws of general application governing admission, residence and removal of refugees'.<sup>44</sup>

The standards to be upheld by states in RSD are derived from general principles of administrative and human rights law on the

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41 Albert (n 34 above) 63.

42 As above.

43 K Jastram & M Achiron *Refugee protection: A guide to international refugee law* <http://www.unhcr.org/3d4aba564.html> (accessed 7 July 2011).

44 G Goodwin-Gill & J McAdam *The refugee in international law* (2007) 528.

guarantee to a fair hearing as well as the UNHCR advice to governments on fair and efficient RSD procedures.<sup>45</sup>

## 4 Sources of procedural standards in refugee status determination

### 4.1 Human rights standards

International human rights instruments have provisions that apply to and protect refugees. The protection afforded by these instruments is premised on the principles of universality, equality and non-discrimination. The UN system has a plethora of legal instruments protecting human rights. Some of these instruments are non-binding and some are only binding for those states that ratify or accede to them. These instruments can be categorised into two groups. The first category consists of instruments that are regarded as constituting the international bill of human rights. These are (i) the Universal Declaration of Human Rights (1948) (Universal Declaration); (ii) the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); (iii) the International Covenant on Civil and Political Rights (1966) (ICCPR); (iv) the Optional Protocol to the International Covenant on Civil and Political Rights; and (v) the Second Optional Protocol to the International Covenant on Civil and Political Rights.

The second category consists of instruments that are regarded as core international human rights instruments and their monitoring bodies.<sup>46</sup> Some of these treaties have optional protocols that address specific issues.<sup>47</sup>

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45 M Kagan 'Assessment of refugee status determination procedure at UNHCR's Cairo office 2001-2002' Forced Migration and Refugee Studies Working Paper 1 5-6 <http://www.aucegypt.edu/GAPP/cmrs/reports/Documents/RSDReport.pdf> (accessed 9 October 2012).

46 These include (i) the International Convention on the Elimination of All Forms of Racial Discrimination 1965; (ii) the International Covenant on Civil and Political Rights 1966; (iii) the International Covenant on Economic, Social and Cultural Rights 1966; (iv) the Convention on the Elimination of All Forms of Discrimination Against Women 1979; (v) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; (vi) the Convention on the Rights of the Child 1989; and (vii) the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990.

47 These include (i) the Optional Protocol to the International Covenant on Civil and Political Rights 1966; (ii) the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty 1989; (iii) the Optional Protocol to the Convention on the Elimination of Discrimination Against Women 1999; (iv) the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000; (v) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000; (vi) the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 2002; and (vii) the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Apart from UN instruments, there are also African Union (AU) instruments that deal with human rights issues at the regional level. These include (i) the African [Banjul] Charter on Human and Peoples' Rights (African Charter); (ii) the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; (iii) the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; (iv) and the African Charter on the Rights and Welfare of the Child (African Children's Charter).

The focus of this article is on international human rights instruments relating to the right to a fair hearing which asylum seekers are entitled to during the status determination process. Under international human rights law, asylum seekers have due process, that is, access to fair and effective procedures for the examination of their claims. This means that the basic procedural safeguards enshrined in human rights instruments must always be respected. These procedures must include an appeal mechanism. The nexus between international human rights instruments and refugee law was succinctly captured by the UNHCR in the following words:<sup>48</sup>

While the 1951 Convention, which sets minimum standards for the treatment of persons who qualify for refugee status, predates the major international human rights mechanisms by over a decade, it is generally accepted that the provisions found in those human rights instruments complement the Convention and so offer greater protection to all persons of concern to UNHCR.

It should be noted that the 1951 Refugee Convention was preceded by the Universal Declaration. Article 10 of the Universal Declaration provides for the right to a fair hearing,<sup>49</sup> whilst article 14 provides for the right to seek asylum.

The International Covenant on Civil and Political Rights provides individuals, including asylum seekers and refugees, with extensive rights relating to a fair trial in the determination of a 'criminal charge' and of a person's 'rights and obligations in a suit at law' (article 14). The right to a fair hearing in a 'suit of law' may cover refugee status determination procedures. Similarly, article 7(1) of the African Charter provides for the right to a fair trial. The African Commission on Human and Peoples' Rights (African Commission) has determined that expelling refugees, either individually or *en masse*, without granting them the opportunity to have their cases heard, violates article 7(1) of

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48 UNHCR *Human rights and refugee protection self-study* Module 5 Vol I 15 December 2006, [http://www.hrea.org/erc/Library/display\\_doc.php?url=http%3A%2F%2F&www.unhcr.org%2F45a7acb72.html&external=N](http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2F&www.unhcr.org%2F45a7acb72.html&external=N) (accessed 28 October 2012) 23.

49 For other international human rights instruments which enshrine the right to a fair hearing, see art 14 of ICCPR; arts 5 & 6 of CERD; arts 6 & 7 of Protocol 7 of the European Convention; arts 8 & 25 of the American Convention; arts 7 & 12(3) of the African Charter; Inter-American Court, Advisory Opinion OC-17/02 on juridical condition and human rights of the child, 28 August 2002.

the African Charter.<sup>50</sup> It may be argued that this provision is applicable also in the proceedings for the determination of refugee status. Thus, this discussion has demonstrated that human rights instruments are also applicable in refugee law generally, and in status determination procedures specifically.

## 4.2 UNHCR recommendations

The UNHCR has been instrumental in providing a benchmark for RSD by publishing general guidelines on minimum standards for RSD procedures through statements made by its Executive Committee.<sup>51</sup> The UNHCR issued its first guidelines on RSD in 1977. In 1980, a set of guidelines for Africa, called the OAU-UNHCR Guidelines For National Refugee Legislation and Commentary, was issued by the Executive Committee. The Fair and Expeditious Asylum Procedures followed in 1994, and were the benchmark until 2001, when the UNHCR issued a comprehensive guide entitled Fair and Efficient Asylum Procedures.

### 4.2.1 The 1977 UNHCR Executive Committee recommendations<sup>52</sup>

In 1977, the Executive Committee of the UNHCR noted that only a limited number of states had established procedures for the formal determination of refugee status under the 1951 Convention and its 1967 Protocol. The Committee encouraged states to adopt rules of status determination based on the seven basic procedural requirements that are outlined below.<sup>53</sup>

First, the Executive Committee recommends that the applicant must address himself to a competent official at the border. It recommends that such an official should have clear instructions on dealing with persons claiming protection relevant to international instruments. This official must act in accordance with the principle of *non-refoulement* and immediately refer the case to higher authorities. Second, the Executive Committee recommends that applicants should receive the necessary guidance as to the procedure to be followed. Third, it suggests that there should be a clearly-identified central

50 See *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996); and *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996), which are discussed in UNHCR (n 45 above).

51 The Executive Committee of the High Commissioner's programme was created on 1 January 1959 by Resolution 672 (XXV) of 1958, under para 4 of the 1950 Statute of the Office of the UNHCR under the auspices of the Economic and Social Council. It consists of 20 to 25 member states of the UN and serves as an advisory committee on refugees.

52 Conclusions Adopted by the Executive Committee in the International Protection of Refugees 1975-2009 (Conclusion 1-109). See Conclusion 8 9, <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (accessed 9 October 2012).

53 28th session of the Executive Committee of the High Commissioner's Programme 1977 as cited in Goodwin-Gill & McAdam (n 44 above) 530.

authority that bears the responsibility of examining refugee requests and taking a decision in the first instance. Fourth, applicants should be given the necessary facilities, including the services of competent interpreters, for submitting their case to the authorities concerned and be informed and given the opportunity to contact a UNHCR representative. Fifth, applicants recognised as refugees should be informed accordingly and given documentation certifying refugee status. Sixth, applicants not recognised should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or a different authority, whether administrative or judicial and, lastly, applicants should be allowed to remain in the country pending decisions on the initial request unless it is deemed abusive to the protection process, and to remain in the country pending an appeal.

#### 4.2.2 1980 OAU-UNHCR Guidelines<sup>54</sup>

The OAU-UNHCR working group on national refugee legislation to provide for entry, recognition and status of refugees in order to define their rights and duties adopted the 1980 Guidelines for National Refugee Legislation.<sup>55</sup> The purpose of these Guidelines is to assist African governments to implement the recommendations of the 1979 Pan-African Arusha Conference on African Refugees, by formulating possible rules relating to the admission of asylum seekers and procedures for determining refugee status under the UN Refugee Convention, its 1967 Protocol and the 1969 OAU Convention on Refugees.<sup>56</sup>

The Guidelines recommend the use of the 1951 UN Refugee Convention definition of a refugee as well as the OAU Convention definition of a refugee.<sup>57</sup> The Guidelines also promote the ideal of legal representation for refugees, arguing that legal representation benefits the refugee as well as the standing refugee body of any country.<sup>58</sup> Legal representation gives the refugee an opportunity to present her case fully and the standing refugee body a chance to examine the applicant regarding the facts invoked in support of her claim.<sup>59</sup> The Guidelines also recommend that the standing refugee body takes into account the views of the UNHCR representative in the country where this would be helpful in arriving at a determination.<sup>60</sup> The Guidelines promote the right to an appeal coupled with the

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54 UNHCR 'Guidelines for national refugee legislation, with commentary' 9 December 1980, HCR/120/41/80/GE.81-0013 <http://www.unhcr.org/refworld/docid/3ae6b32610.html> (accessed 9 October 2012).

55 n 54 above, 1.

56 n 54 above, 7.

57 n 54 above, secs 1-2.

58 n 54 above, sec 3(2).

59 n 54 above, 10.

60 n 54 above, sec 3(2).

requirement for a separate standing refugee appeal body.<sup>61</sup> The Guidelines provide that the standing refugee body informs the asylum seeker of the rejection of her application and the grounds for such a rejection.<sup>62</sup> The Guidelines provide that each state should have specific rules prohibiting *refoulement* in their national legislation and recommend that individuals entering the country seeking asylum should not be classified as prohibited immigrants and detained, imprisoned or penalised.<sup>63</sup> The recommendations are that all African countries give asylum seekers documentation on their status and avail to them the right to remain pending determination of their applications for asylum and decisions on appeal.<sup>64</sup>

#### 4.2.3 2001 UNHCR recommendations<sup>65</sup>

The 2001 UNHCR Recommendations on Fair and Efficient Asylum Procedures are aimed at seeking to establish a common understanding of asylum procedures and the need to identify core procedural standards that are necessary to preserve the integrity of the asylum regime as fair and efficient.<sup>66</sup>

The Recommendations note:<sup>67</sup>

Asylum procedures are guided by or built around responsibilities derived from international and regional refugee instruments, notably the 1951 Convention relating to the Status of Refugees, its 1967 Protocol, international human rights law and humanitarian law, as well as relevant Executive Committee Conclusions. National judicial and administrative law standards also determine the form and content of these procedures.

Recognising that the 1951 Convention does not incorporate procedural guidelines for status determination, the UNHCR Recommendations state that fair and efficient procedures are essential to the full and inclusive application of the Convention.<sup>68</sup> The 2001 UNHCR Recommendations list a raft of recommendations on fair and efficient procedures, which include recommendations for the assessment of the admissibility of claims, recommendations regarding reception of asylum seekers at borders, procedures for dealing with manifestly unfounded claims, undocumented and uncooperative asylum seekers and asylum seekers from safe countries of origin and the appeals process. The document also makes recommendations for enhancing the protection of special women and unaccompanied children.

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61 n 54 above, sec 3(3).

62 n 54 above, sec 3(4).

63 n 54 above, secs 6(2) & 7(1).

64 n 54 above, sec 8.

65 UNHCR (n 40 above).

66 UNHCR (n 40 above) 2.

67 As above.

68 As above.

## 5 Case for full implementation of the 1951 Convention and 1969 OAU Convention in Botswana

As mentioned above, the Refugee Act in Botswana is antiquated. The Act should be reviewed in order to bring its provisions in line with Botswana's international obligations in terms of the OAU Convention. Botswana is a dualist state, whereby international law and municipal law are treated as separate spheres of law.<sup>69</sup> In order for international obligations undertaken by states by way of treaty to form part of national laws, dualism propounds that the international law rules would have to be transformed into national law rules through the use of enabling legislation.<sup>70</sup> Enabling legislation simply gives effect to the international rules on a municipal level, creating enforceable rights and duties. In order for international treaties that Botswana has ratified to form part of Botswana's national laws, domestication is required.<sup>71</sup> Tshosa characterises the ratification of a treaty in a dualist country as a 'purely executive act'.<sup>72</sup> The domestication of treaties gives the legislature the opportunity to endorse the treaty rules that will, from the point of domestication onwards, affect the rights and liberties of individuals in the jurisdiction.<sup>73</sup>

The status of undomesticated treaties in Botswana is that they have no force of law. In *Kenneth Good v The Attorney-General*,<sup>74</sup> Tebbutt JP stated:

Botswana ... is a signatory to a number of international treaties ... it is trite and well recognised that signing such a treaty does not give it the power of law in Botswana and its provisions do not form part of the domestic law of this country until they are passed into law by parliament ... those treaties do not confer enforceable rights on individuals within the state ...

It is recommended that Botswana review the Refugee Act and legislate on the following points: the definition of a refugee and *non-refoulement* with a view to abiding by its international obligations.

### 5.1 Definition of a refugee

The definition of a refugee forms the basis upon which a country grants refugee status to a person seeking asylum. If an individual meets the requirements of the definition, then they are entitled to recognition as refugees. Botswana, like most countries, has adopted the definition of a refugee found in article 1 of the 1951 Geneva

69 OB Tshosa 'The status and role of international law in the national law of Botswana' in CM Fombad (ed) *Essays on the law of Botswana* 230.

70 Tshosa (n 69 above) 234-235.

71 237.

72 234.

73 235.

74 Botswana Court of Appeal 2005 (2) BLR 337 (CA) 345-346.

Convention as read with its 1967 Protocol. In Botswana a person may be given recognition as a political refugee if they are a person who<sup>75</sup>

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

This definition does not take account of the 1969 OAU Convention, and in particular the broader definition given to a refugee in the African context. The OAU Convention adopts the 1951 Refugee Convention definition above. It goes further to provide under article 1(2) that the definition of a refugee

shall also apply to every person who, 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 UNHCR Guidelines recommend that a broader definition of refugees be adopted by states. This is in order to extend protection to all. It is submitted that a broader definition of a refugee is more suited to the realities of the African continent. As a state party to the OAU Convention, Botswana should give effect to it and amend its laws to include this definition. Many Zimbabwean nationals may have qualified for refugee status under the OAU Convention definition during the Zimbabwean political and economic crisis on the grounds that the events in Zimbabwe seriously disturbed public order in the country. Instead, many were forced to flee and ended up in Botswana as undocumented illegal immigrants enjoying almost no legal protection.

## 5.2 *Non-refoulement*

The principle of *non-refoulement* provides that an asylum seeker or refugee should be allowed to enter and remain in the territory and should not be expelled back to a country where she is likely to face persecution or death. This principle is expressly provided for in the 1951 UN Convention and the 1969 OAU Convention, as stated above. However, this principle is not adequately covered by the Act.

Section 6 of the Act restricts the removal from Botswana of an immigrant who may be a refugee pending the determination of her status. The right of refugees to enter and remain in Botswana is not expressly stated or guaranteed. The protection from removal only comes at a later stage when the case is being determined or where refugee status has already been granted.

Given that *non-refoulement* is a principle of customary international law, Botswana is duty-bound to respect it. The OAU-UNHCR Recommendations promote the idea that states should have a specific

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<sup>75</sup> See Schedule to Refugee Act.

clause encompassing the principle of *non-refoulement*. There is a need for legislative reform to enshrine the principle of *non-refoulement* into Botswana's legislation.

It is noted that the Refugee Act has no express requirement that immigration officers at a border post inform an asylum seeker of the procedures to be followed by her in order that the relevant status determination authority in Botswana hear the case. Since the right to such information is not guaranteed, it is entirely possible that the principle of *non-refoulement* is at risk of being breached repeatedly by officers who, through ignorance or a lack of diligence, fail to refer deserving cases to the designated authority for determination.

## 6 Achieving effective refugee status determination standards in Botswana: The right to a fair hearing

Status determination procedures in Botswana lag behind the UNHCR Recommendations for a robust RSD process. This is not to say that Botswana does not recognise the right to a fair hearing and the guarantees of due process that accompany this right. Botswana's Court of Appeal has pronounced on the importance of safeguarding this right on many occasions. In *Phala v Director, Public Service Management and Another*,<sup>76</sup> the Court of Appeal noted the importance of a fair hearing as follows:

It is instructive to note, as courts have so often held, that the rules of natural justice have their origins in ancient times. As was said in *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 4 SA 427 (SCA), these rules, of which *audi alteram partem* is one, 'facilitate accurate and informed decision making, secondly they ensure that decisions are made in the public interest; and thirdly, they cater for certain important process values ...' In *Botswana Housing Corporation v Rabana* [1997] BLR 106 CA at pp 121-122, this Court said the following *per* A Tebbutt JA (as he then was): 'What is required is that in reaching its decision the employer must apply its mind honestly to the issue and that its procedures must be fair. Fairness in turn requires that the employee should be given an opportunity of meeting the case against him.'

Without case preparation facilities, rules of procedure, written decisions and the right to appeal and the right to legal representation, the asylum seeker finds the decks stacked against her. She is unable to present her case effectively. It is submitted that these facilities be afforded to asylum seekers. This would be in the interests of the asylum seeker who would have an opportunity to present her circumstances in the best manner as well as that of the RAC, which would be able to make its decision with all relevant information at hand.

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76 2007 (1) BLR 499 (CA) 504-505.

### 6.1 Case preparation facilities

The 1977 UNHCR Recommendations propose that asylum seekers be given the necessary facilities to prepare their case. This includes the provision of services of competent interpreters for submitting their case to the authorities concerned.<sup>77</sup>

The Refugee Act is silent on the provision of case preparation facilities to an individual claiming asylum. Indeed, the right to a fair hearing encompasses within it the right to information on the procedure for lodging and application. This information ought to be provided in a language the refugee understands.

The absence in the Act of a requirement for assistance in case preparation and for interpretation facilities where necessary is lamentable. An individual seeking refugee status may be illiterate or indigent and so unable to secure competent assistance in preparing an application. It is proposed that the law be amended to provide, as a protection to all asylum seekers, the right to assistance in case preparation. This amendment should include access to interpretation services.

### 6.2 Rules of procedure

The UNHCR Executive Committee's Recommendations propose that applicants for recognition as refugees should receive the necessary guidance as to the procedure to be followed.<sup>78</sup>

In contrast, section 4 of the Refugee Act provides that proceedings of the status determination be conducted 'in such a manner as the RAC may determine'. Nowhere in the Act is there a requirement that the rules of procedure be made available to the applicant. The UNHCR in Botswana reports that the current practice in Botswana is that all applicants for asylum are accorded an initial interview at the UNHCR or by a police or immigration official during which a statement is taken and forwarded for attention to the Refugee Advisory Council. It is at this stage that individuals are advised of the procedure to make their application and presumably be given a copy of the UNHCR/Ditshwanelo *Handbook*.

It is submitted that the absence of a requirement to avail and explain the procedure to be followed and the rights and obligations flowing therefrom to the individual claiming protection is a serious deficiency. The effect of this gap in the law is that a person seeking protection has no control over his case and is not certain of the sort of case he should mount, and the sort of evidence he should produce in order to make a sound case for the granting of refugee status. He

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77 Para iv.

78 Para ii.

cannot make informed decisions regarding the manner to best advance his cause.

In the procedure as it stands, there is certainly a risk that the individual's fundamental human right to a fair hearing, where his rights and obligations are at stake as guaranteed by the Constitution, may be compromised.<sup>79</sup> A hearing premised on a lack of information in procedure is unfair as it stacks the cards heavily against the applicant and creates an unequal playing field, increasing the likelihood of failure in the application for asylum.

It is therefore recommended that rules of procedure should not be available to the Refugee Advisory Council alone. The rules of procedure should be legislated and available to all applicants at the outset to enable them to adequately prepare their applications.

### 6.3 Reasons for the decision

Whilst the claimant has the right to make representations to the Refugee Advisory Council,<sup>80</sup> there is no requirement that the Council avail its report to the applicant. In practice, the UNHCR confirms that the report is not given to the applicant but is given to the Minister alone.<sup>81</sup> Reasons for the Minister's decision to recognise the applicant as a refugee or to reject his application are also not given to the applicant.

All UNHCR Recommendations on status determination provide that the asylum seeker be availed with written reasons for a negative decision. It is submitted that this reflects international law. The requirement to provide reasons for a decision is a fundamental part of due process. It ensures that the inquiry process is meaningful and assures the applicant that his representations have been given due consideration and a decision was taken on the factual and legal merits of his application. An added benefit of written decisions would be that they allow the country to develop jurisprudence in this area of the law. The absence of this duty on the part of the Refugee Advisory Council should be remedied to bring it in line with the UNHCR recommendations and human rights standards of a fair hearing.

### 6.4 Right to an appeal

The UNHCR Executive Committee recommendations require that applicants not recognised as refugees 'be given a reasonable time to appeal for a formal reconsideration of the decision either to the same or a different authority whether administrative or judicial, according to the prevailing system'.

The Act contains no right of appeal against a negative decision. The closest thing to an appeal is a reconsideration, as captured by section

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79 Art 10 Universal Declaration.

80 Sec 5(2).

81 Sec 4(3).

8(c) of the Act, which provides that upon receiving the report, the Minister may order the Refugee Advisory Council to reopen the inquiry or to make a further report on the matter.

This provision cannot be termed a true appeal for the following reasons: First, the Minister is not obliged to refer every negative decision he makes for reconsideration by the Council. It is the Minister's prerogative to order or not to order a reopening of the case and there are no guidelines as to what circumstances should prompt a reopening of the case. Second, the applicant has no role to play in requesting a reconsideration of her case. Third, a true appeal is considered by a different body from that making the initial determination.

It is recommended that the Act be amended to allow of a right to appeal to a separate body. This right should be exercised at the instance of the applicant. This will give the process fairness, transparency and objectivity.

### **6.5 Right to legal representation**

The Botswana Refugee Act is silent on the right to legal representation. Yet, the right to an attorney is a fundamental element of a fair trial and is recommended by the UNHCR. The presence of an attorney helps not only the asylum seeker to present his case in a dispassionate and considered manner, but also assists the decision-making body to better understand the asylum seeker's case.

A sound case may be made for the provision of some legal assistance to applicants, for example in the event of a negative decision. This will further strengthen the fairness of status determination procedures in Botswana.

## **7 Proposals for reform of the Refugee Advisory Council**

### **7.1 Composition of the Refugee Advisory Council**

Due process denotes that an asylum seeker receives notice of his hearing, an opportunity to be heard and the right to defend her rights before a court or orderly proceeding; in short, that she receives a fair hearing. This right is also enshrined in Botswana's Constitution.<sup>82</sup> A fair hearing must above all be overseen by an adjudicator who has the competent knowledge and experience necessary to make sound decisions.

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<sup>82</sup> See art 10(9): 'Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognised by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.'

The composition of the Refugee Advisory Council created under section 4 of the Act merits comment. The Council consists of the District Commissioner, Francistown, the Botswana Police Divisional Commander (North), the Settlement Commander Dukwi Refugee Settlement, The Officer Commanding, Special Branch (Northern Division), and the Regional Immigration officer (North).

When commenting on the composition of the RAC, Tshosa notes that the Act has no requirement that members have knowledge or experience in international refugee law.<sup>83</sup> He cites this as a serious drawback. Investigations with the UNHCR have revealed that training is offered on an ongoing basis to the members of the RAC in principles of international refugee law by UNHCR officials.

It is submitted that the Act ought to be amended to require that officers appointed to the RAC have a minimum standard of legal training and some experience or knowledge in international refugee law. This will ensure that Botswana's convention obligations are respected and adhered to.

The Refugee Advisory Council draws its membership from senior officers in the Police Service, District Administration and Immigration Departments. By virtue of their high office in the various departments, these individuals already have numerous other duties to fulfil and the Council is therefore not their core responsibility. The UNHCR reports that for these reasons, regular meetings are difficult to arrange. This leads to delays in status determination, which in turn lengthen the period of detention of refugees. A case may be made for the appointment of commissioners who can work solely, independently and speedily on status determination matters in order to expedite the process.

## 7.2 Decision-making power of the Refugee Advisory Council

The 1977 UNHCR Executive Committee Recommendations and the 1980 OAU-UNHCR Recommendations require that states establish a clearly-identified central authority which bears the responsibility of examining refugee requests and taking a decision in the first instance.<sup>84</sup>

It is submitted that the Refugee Advisory Council is deficient in this respect. The law provides (under section 4(3)):<sup>85</sup>

After holding an inquiry in terms of this section, the RAC shall report thereon to the Minister and further that when the Minister receives the report of an inquiry held under section 4 he may, if he is of the opinion that the person who has been subject to the enquiry is a political refugee, declare that he recognises such a person as a political refugee. If he does not hold the opinion that the person is a political refugee or he considers

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83 Tshosa (n 7 above) 61-62.

84 Para iii, 1977 recommendations and sec 3(3) 1980 OAU-UNHCR recommendations.

85 See secs 8(1)(a) & (b).

that there is no or insufficient evidence to treat him as a political refugee, he may declare that he does not recognise the person as a political refugee.

In terms of the Act, the Refugee Advisory Council prepares a report for the Minister. The Minister then makes a determination whether or not to recognise the individual as a refugee. There are several concerns that emerge from this procedure. First, it is submitted that this provision effectively emasculates the Refugee Advisory Council, transferring its decision-making power to the Minister. Where the Minister upholds the findings of the Refugee Advisory Council, the process cannot be faulted. However, where the Minister disagrees with the determination of the RAC and withholds recognition from the refugee, the process is immediately problematic. This is because a negative decision would have been made without hearing any evidence or representation from the affected party by the Minister tasked with making a decision. This may be criticised as being arbitrary. It is recommended that the body seized with adjudicating on the merits of the application take a decision on the facts and on the law.

Experience has shown that there are delays inherent in this two-tier system. The reports from the Refugee Advisory Council have to be considered and acted upon by the Minister who has other duties to attend to. The UNHCR reports that this has led to some delays in reaching a final decision. Perhaps the time has come to consider the decentralisation of the status determination process in the interests of an expeditious status determination process.

In instances where the Minister's decision runs contrary to the RAC's recommendations, the inquiry process is unnecessary and lacks in predictability. In order for this process to inspire the confidence of refugees and the international community alike, it should be streamlined to give the Council decision-making powers with a right to an appeal vesting in the Minister or another body.

### **7.3 Increased capacity of the Refugee Advisory Council**

As the law stands today, there is only one five-man committee which sits at Francistown that is tasked with the determination of refugee status.<sup>86</sup> In 2005, the UNHCR reports that Botswana had just over 3 000 refugees, mainly from Namibia, Angola, Somalia, DRC and Burundi. The UNHCR reports that in 2008, there was an influx of applications from Zimbabwe in the region of about 850, which was a massive increase from figures seen previously. Large numbers of applications have also been received from Somalia and the Great Lakes region. The number of refugees received has most certainly increased and it seems unlikely that a single commission will be able to meaningfully address these numbers. A larger Refugee Advisory

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<sup>86</sup> See Refugees (Recognition and Control Order) Statutory Instrument 92 1993.

Council, sitting in more than one committee, may be advisable in order to make status determination more efficient.

#### 7.4 Role of the UNHCR

The UNHCR encourages the participation of its officials in status determination. The rationale for this is the need to allow the UNHCR to monitor closely matters of status, the entry and removal of refugees, and participation in the identification of those who should benefit from refugee status<sup>87</sup> and the provision of up-to-date information regarding the general situation in an applicant's country of origin.<sup>88</sup>

Asylum seekers should not be denied the opportunity to communicate with the UNHCR.<sup>89</sup> The UNHCR should also be afforded the right to present its view in the exercise of its supervisory responsibility to any competent authority regarding individual applications for asylum at any stage of the procedure under article 35 of the 1951 Convention.<sup>90</sup>

Although the Act is silent on this, the practice on the ground is that applicants for refugee status received by the UNHCR are provided with an initial interview with a protection officer. The UNHCR also has *ad hoc* representation in the Refugee Advisory Council. The role of the UNHCR in the Refugee Advisory Council is to sit as an *ex officio* member and advise on refugee law and provide up-to-date information in so far as is possible on an applicant's country of origin. The UNHCR reports that this partnership with the Refugee Advisory Council works remarkably well. It is submitted that the Act should be revised to formalise participation by the UNHCR in the status determination procedure.

### 8 Matters concerning the reception and assistance of asylum seekers

#### 8.1 Group determination

The Act is silent on group determination. There are two ways of determining the status of refugees, namely, the individual determination procedure and the group determination procedure. The former is suitable where refugees trickle into the host state at a low rate and have different bases for seeking protection. However, this method is not suitable where there is a mass influx of refugees from one state to another. For example, where a group of asylum seekers seek protection from a host state at the same time, it would be time

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87 Goodwin-Gill & McAdam (n 44 above) 532.

88 Art 8(2)(b) 1951 Convention.

89 Art 10(1)(c) 1951 Convention.

90 Art 21(1)(c) 1951 Convention.

and resource consuming to consider their cases individually instead of dealing with the group as a whole.

Part Two of the Act, which deals with the status determination procedure, is limited to an individual status determination process. There is a need to amend the Act to include group determination in the Act in order to expedite the determination of group asylum claims.

## 8.2 First country of asylum policy

This policy provides that genuine asylum seekers should seek refugee status in the first safe country that they reach upon fleeing their country.<sup>91</sup> The rationale of this policy is to prevent the secondary irregular movement of refugees and asylum seekers.<sup>92</sup> The first country of asylum policy is currently being applied in Botswana although it is not specifically provided for in the Act.

The use of the first country of asylum policy militates against abusive claims. However, applying this principle presents some difficulties. There are instances where protection in the first country of asylum is not available to the individual concerned. There may be instances where protection may be available but is not effective.<sup>93</sup> The first country of asylum policy often ignores the fact that refugees have hopes and aspirations for a better life that may not be realisable in the first country of safety.

There is a need for the Act to contain specific rules regarding the admissibility of applications from individuals who have passed through third countries or who already have protection from another country. This includes procedures for undocumented and unco-operative asylum seekers as well as the imposition of time limits for making an application for asylum.

## 8.3 Competent and trained border officials

The UNHCR Recommendations of 1977 provide that the refugee must address himself to a competent official at the border who must have clear instructions on dealing with cases that might be within the purview of the relevant international instruments. The recommendations suggest that the official should be required to act in accordance with the principle of *non-refoulement* and immediately refer the case to higher authorities.<sup>94</sup>

The aforementioned standards require that border officials receiving applicants have some training in international refugee law. This training would enable them to effectively identify cases for referral to the refugee determination authority. Training would also ensure that

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91 UNHCR (n 40 above) 3.

92 As above.

93 As above.

94 Para (i) UNHCR Recommendations 1977.

*refoulement* is not inadvertently occurring at the border post due to a lack of knowledge of the relevant international law instruments.

Botswana's immigration officers may lack competence in international refugee law. The Botswana Auditor-General lamented to journalists that immigration officers were inexperienced with regard to their academic background and had only one to two weeks' training. He noted, for instance, that only 6 per cent of Botswana's junior immigration officers received relevant training to assist them with document assessment.<sup>95</sup>

The UNHCR in Botswana reports that it has mounted one-day training workshops on refugee law for mid-level government officials from the Immigration Department, the Police Service and Security Intelligence Services. It has further prepared a guide for refugees and asylum seekers in association with Ditshwanelo<sup>96</sup> that is available to all asylum seekers to inform them of current asylum procedures in Botswana. There is no 'quick-fix' solution to the problem of lack of training of immigration officers. It is recommended that a mandatory course in the basic principles of refugee law should be available to officers who operate border posts at regular intervals. This would go a long way to ensure that applicants for refugee status are identified quickly and assisted properly.

#### **8.4 Detention of asylum seekers**

As noted above, Botswana entered a reservation to the 1951 Convention on both the freedom of movement of refugees and their right to work. In practice, asylum seekers are detained at the Centre for Illegal Immigrants pending the determination of their status. Asylum seekers and illegal immigrants share the same facility. The lack of a separate facility for asylum seekers is not desirable. Some asylum seekers, traumatised by the experience of flight, need specialised facilities such as counselling and psychological support. Such facilities are not available in the detention centre. It is argued that asylum seekers should be accommodated separately from illegal immigrants, and that special regard be given to their unique position.

In the event that refugee status is granted, refugees are removed from the Centre for Illegal Immigrants to the Dukwi refugee camp. This camp is in a rural and remote setting and the economic activity of refugees is therefore severely curtailed. This increases the amount the state spends on these refugees who could have engaged in

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95 Report by G Toka entitled 'Immigration officers' poor training, low morale undermine national security' *Sunday Standard* 20 April 2009: 'The Auditor-General, in his Performance Audit Report 9, 2008 on Management of Illegal Immigrants by the Department of Immigration, has expressed concern at this state of affairs. DIC is one of the government departments which, at most, work with minimum experienced officers in terms of academic background, and who, upon entry, were offered 1-2 weeks on the job training, which would anyhow be considered inadequate.'

96 A human rights NGO watchdog in Botswana.

meaningful economic activity. Thus, it is recommended that Botswana should reconsider its reservations on the freedom of movement and the right to work clauses of the 1951 Convention to allow refugees to enjoy these rights.

## **9 Refugee status determination in Botswana: Looking forward**

The aim of this article is to assess the effectiveness of RSD in Botswana, measured against human rights standards of a fair hearing and the UNHCR Recommendations on Status Determination. This assessment is important to achieve a fair and effective procedure in Botswana. This is an opportunity to assess how well Botswana has given effect to its international law obligations under the 1951 Convention, its 1967 Protocol, and the 1969 OAU Convention.

The assessment revealed that Botswana's Refugee Act is a relic of the past. It is control-oriented and lacks many protections considered necessary by the UNHCR in the status determination process. From the above discussion it is apparent that the procedure for the determination of refugee status in Botswana falls short of the UNHCR Recommendations. Thus, there is a need for reform.

Specific recommendations that may be considered in order to implement convention obligations are the expansion of the definition of a refugee to include the broader definition found in the OAU Convention, a provision prohibiting *refoulement*. In order to improve the status determination process, there is a need to avail case preparation facilities, to provide legal representation, require the provision of a written decision by the RAC whether the asylum seeker's application is rejected, and provide a right to appeal. With respect to the RAC, it is recommended that the government reconsiders its structure and creates an independent central authority capable of hearing refugee applications and taking final decisions at the initial stage. Other recommendations include the provision of group determinations, regular training of border officials in refugee law and the provision of separate holding arrangements for asylum seekers pending the determination of their applications. The government is also encouraged to consider granting freedom of movement to refugees in Botswana and to do away with the encampment policy.

The implementation of the above-mentioned recommendations will go a long way to ensure that Botswana's status determination procedure supports the basic rights of asylum seekers and refugees.