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## ***Asylum and refugee policies in Southern Africa: A historical perspective***

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### **1. Introduction**

The Southern African region<sup>1</sup> has had a long experience with the phenomenon of forced migration. Forcible population displacement is known to have taken place in the region even in pre-colonial and colonial times. In modern times, this phenomenon may be traced in the early 1960s when wars of liberation in countries like South Africa, Namibia , Mozambique, Angola and Zimbabwe forced thousands of people from these countries into neighbouring countries and beyond. In the 1970s and 1980s, many more persons were forced to flee as civil wars in places like Angola and Mozambique became another cause of population displacement. In the 1990s, the region continued to experience the refugee problem, but this time mainly as a host of refugees from within and outside the region.

Asylum and refugee polices in Southern Africa may be said to have gone through three generations. The first generation refugee policies were characterised by the absence of refugee specific laws, with refugee matters being addressed under general immigration laws. This approach was taken during the colonial period but it continued in some countries even thereafter.

The second generation refugee policies were marked by the introduction of refugee specific laws but which were mainly intended to control rather than protect refugees. This approach was dominant throughout the 1970s and 1980s. However, despite patently refugee unfriendly legislation, refugee practice in the region during this period was generous.

The third generation of asylum and refugee policies begun in the 1980s, and was characterised by the introduction of protection oriented refugee legislation which approximated the international instruments on refugees. Currently, most countries in the region have comparable refugee protection statutes which incorporate the basic principles of a sound refugee regime including provisions on the definition of a refugee which accorded with the relevant international instruments, institutions and procedures for refugee status determination, non-refoulement and standards of treatment. A number of statutes also allude to solutions to the plight of refugees.

The introduction of comparable refugee legislation in the region is a positive step towards addressing the refugee problem in the region. However, it is only the first step. It must be followed regulations to implement the substantive provisions and other measures aimed at addressing other issues in refugee policy such as the uneven distribution of the refugee burden and elimination of root causes of forced

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<sup>1</sup> For the purposes of this paper, the Southern African region is conceived as the member states of the Southern African Development Community (SADC). Its current membership comprises the states of Angola, Botswana, Democratic Republic of

migration. These measures must be conceived in the context of relevant regional and continental initiatives such as the Southern African Development Community (SADC) and New Partnership for Africa's Development (NEPAD).

## **2. The Refugee Problem in Southern Africa**

The refugee phenomenon in the Southern African region can be attributed to main reasons namely wars of liberation from colonial and racial rules, and civil wars. At the beginning of the 1960s, thousands of refugees fled from Portuguese colonies of Angola and Mozambique to escape the impact of armed struggles for independence. Refugees from Angola moved mainly into Congo, Zambia and Botswana while the main destinations of Mozambican refugees were Malawi, Southern Tanzania and Zambia.

The second cause of refugee flows in the Southern African region was wars of liberation from racist minority rules in the Republic of South Africa, South West Africa and Southern Rhodesia. The main host countries for these refugees were Botswana, Zambia, Tanzania and later Mozambique when it attained independence in 1975. Some refugees moved further afield to other African States, Europe and North America.<sup>2</sup>

In the 1980s, civil wars in Angola and Mozambique led to the flight of persons in the region on even on a greater scale than wars of liberation. In more recent times, civil war in the Democratic Republic of Congo, a new Member of the Southern African Development Community (SADC), has been the major course of forcible population displacement into the region.

The attainment of independence in the entire Southern African region and end of the civil war in Mozambique led to the repatriation of virtually all refugees from the relevant countries. However, the region has continued to experience a significant refugee problem as a result of the continuing conflict in Angola and the Democratic Republic of Congo. Moreover, the region continues to host refugees from countries outside the region such as Burundi, Somalia, Sudan, and Uganda.

According to the *UNHCR 2002 Global Appeal* some 1,115,651 refugees and asylum seekers were projected to be in the Southern African region as of January 2002. The countries of asylum (with the number of refugees in bracket) were Angola (12,000), Botswana (5,000), DRC(337,100), Malawi (8,000) Mozambique (3,362), Namibia (25,875); South Africa (70,000); Swaziland (1,014), Tanzania (495,100), Zambia 149,800 and Zimbabwe (8,500).<sup>3</sup> In most of these countries, the number was expected to raise by the end of the year 2002. As with all refugee figures, the above numbers must be taken to be estimates and the actual figure of asylum seekers is likely to be much higher. In addition, there are

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Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Zambia and Zimbabwe.

<sup>2</sup> UNHCR, *The State of the World Refugees 2000*, p. 44.

<sup>3</sup> UNHCR, *Global Appeal 2002*, pp. 116-127.

millions of internally displaced persons, the leading producers being Angola with 1,100,000 to 3,800,000 and DRC home to 1,800,000<sup>4</sup> IDPs.

A number of observations can be made about refugee figures in the Southern African region. First, the number of refugees and asylum seekers in the region is very high. It is about a third of the total number of refugees in the whole of Africa, which stood at 3,346,000 at the end of 2000.<sup>5</sup>

Secondly, data from other sources<sup>6</sup> indicate that the overwhelming majority of refugees in the region come from within the region, with two countries alone, Angola and DRC, accounting for over half of its refugee population.

Third, the refugees burden in the region is distributed very unevenly. For example the two countries of Tanzania and the Democratic Republic of Congo account for almost 75% of the refugee population in the region. And these two countries with Zambia account for 88% of the refugees in the region. The fact that these major host countries share borders with the countries of origin indicates that the refugee burden falls mainly on first countries of asylum.

Finally, the presence of forced migrants in the Southern African region has had serious security, political, economic and social consequences. It is against the background of these challenges that refugee policies in the region that have been formulated from time to time must be understood.

### **3. *The Evolution of Refugee Policies in the Southern African Region***

The development of refugee policies in the Southern African region, as reflected in the legislation of its member States, may conveniently be categorised into three generations. The first generation policies, which characterised most of the colonial period was to treat matters relating to refugees as an integral part of immigration policy and law without need for a separate refugee specific laws. Under this generation of policies and laws refugee provisions tended to concern themselves mainly with entry and residence by refugees while remaining silent on other aspects of refugee protection. The second generation of refugee laws constituted of refugee control laws which operated alongside immigration laws to regulate selected aspects of refugee protection. The third generation refugee laws was characterised by comprehensive refugee legislation governing all aspects of refugee protection in accordance with the relevant international legal instruments.

#### **3.1 Addressing Refugee Matters Under General Immigration Laws**

Up to the early 1960s, the approach taken by many jurisdictions in Southern Africa with respect to refugee matters was what I have elsewhere called the “traditional Common Law approach”<sup>7</sup> whereby

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<sup>4</sup> US Committee for Refugees, *World Refugee Survey 2001*, at p. 6

<sup>5</sup> Id, p. 2.

<sup>6</sup> Ibid.

refugee matters are addressed under general immigration laws. A good example of this approach is South Africa which actually continued with this approach until early 1990s. Until 1998, refugee matters in South Africa were governed by the Aliens Control Act<sup>8</sup>, the same statute which governed immigration generally. As the name suggests, the Aliens Control was mostly concerned with control of immigration into South Africa. The central element of this system of control was the concept of “a Prohibited person”. Prohibited persons included, among others, persons who are not South African citizens who enter South Africa without a valid passport and visa<sup>9</sup> as well as those who left South Africa without a valid residence permit. Asylum applicants and refugees were either granted temporary permits to enter the country under section 41, or granted exemption from the entry and residence requirements of the Act on grounds of “special circumstances” under section 29.

This approach had at least two main shortcomings. First, addressing refugee matters under immigration laws meant that the regimes were silent on crucial matters in refugee protection such as how refugees were to be defined, whether asylum seekers and refugees were protected from refoulement, by what standards refugees were to be treated and how their plight was to be resolved. Second, the reliance on ordinary immigration law in dealing with the refugee problem was problematic particularly in situations of mass influx. As Faris pointed out “The problem of the refugee is totally unrelated to immigration law and to the law relating to ordinary aliens. [To] classify the refugee as an ordinary alien evades the problem. Immigration law is intended to cope with the admission of individuals and not a mass influx [of people]”.<sup>10</sup> One of the consequences applying ordinary immigration laws to refugees was the tendency to label all potential refugees as illegal immigrants with the attendant consequences.<sup>11</sup>

It was partly due to the inadequacies of the above approach that when the UNHCR came into South Africa to facilitate the repatriation of Mozambican refugees, the Basic Agreement between South Africa and UNHCR of 1993 had to be signed which, among other things, addressed the question of how to identify refugees.

### 3.2 The Refugee Control-Oriented Approach

From the mid-sixties, countries in Southern Africa enacted laws, over and above the immigration laws, which were mainly aimed controlling refugees. The oldest progeny of this generation was Tanzania’s *Refugee Control Act* of 1966 whose purpose was stated in its title as “... to make provisions for the control of refugees and connected matters”<sup>12</sup>. In 1968, Botswana followed suit with the enactment of

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<sup>7</sup> See Rutinwa, B. *Review the Law and Policies Relating to Refugees and Internally Displaced Persons in Commonwealth Countries*, Consultancy Report Commissioned by the Constitutional and Legal Division, Commonwealth Secretariat, London for the Summit of the Commonwealth Heads of States and Governments, Edinburgh, June 1997.

<sup>8</sup> Act No. 96 of 1991.

<sup>9</sup> Section 11(1) of the Aliens Control Act.

<sup>10</sup> Faris, J.A., ‘The Angolan Refugees and South Africa’ 2 *South African Yearbook of International Law* 176 (1976) at 185. Quoted in Maluwa, T. *International Law in Post-Colonial Africa*, (Kluwer Law International, 1999, p. 200).

<sup>11</sup> Maluwa, T., *Id.*, at 183-184.

<sup>12</sup> Refugee control Act (1966), Long Title.

the *Refugee (Control and Recognition) Act*<sup>13</sup>. Two years later, Zambia introduced *The Refugee (Control) Act* in order “... to make provisions for the control of refugees; and for matters connected thereto”<sup>14</sup>. Next was Swaziland which, in 1978, promulgated *The Refugee Control Order (1978)*, “[a] King’s Order-in Council to establish better control of refugees entering Swaziland.”<sup>15</sup>

The first notable aspect of the above laws is 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 . These laws vest wide and discretionary powers to determine who is a refugee in the relevant Minister.<sup>16</sup> The Acts of Swaziland , Tanzania, and Zambia permitted expulsion of refugees back to counties of origin in a manner that could amount to refoulement.<sup>17</sup> The laws of these countries also permitted, in slight variations, the confiscation and slaughter of animals belonging to refugees<sup>18</sup> and the detention and use of vehicles belonging to refugees for refugee work,<sup>19</sup> without a guarantee for compensation. The laws of all four countries in this category also permitted restriction of movement of refugees.<sup>20</sup> These laws did not address themselves to the solution of the plight of refugees.

Although the laws of this era can be legitimately be described as draconian, the actual practice on the ground in most countries was different. As a matter of fact, the practice in most countries was exemplary. Despite the absence of proper definition of a refugee under these instruments, countries of the region admitted virtually all persons in flight, even liberation fighters who a significant segment of the international community was reluctant to regard ,and assist, as refugees. Equally, even though the statutes made no provisions for non-refoulement, refugees were hardly even rejected at the frontier or returned to countries where they might face persecution except when compelled to do so by military and economic pressure from Apartheid South Africa.<sup>21</sup> With the assistance of the international community, the standards of treatment for refugees were very reasonable.<sup>22</sup>

Countries in the sub region also practised some degree of intra-regional burden sharing. For example, in the 1970s and early 1980s, when Botswana, Lesotho and Swaziland came under intense pressure from South Africa for hosting South African refugees, they sought and obtained resettlement for these

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<sup>13</sup> Refugee (Recognition and Control) Act, (1968).

<sup>14</sup> Refugee (Control) Act 1970., Long Title

<sup>15</sup> The Refugee Control Order (1978), Long Title.

<sup>16</sup> Sections 8 of the Botswana Act and identical section 3 of the Swazi, Tanzanian and Zambian Acts .

<sup>17</sup> See section 10 in the Zambian Act and identical section 5 in the Swazi and Tanzanian Acts.

<sup>18</sup> See section 7 of the Tanzanian Act and identical section 8 in the Swazi and Zambian Acts.

<sup>19</sup> See section 8 of the Tanzanian Act and identical section 9 in the Swazi and Zambian Acts.

<sup>20</sup> Sections 9 of the Botswana Act and identical section 12 in the Swazi, Tanzanian and Zambian Acts.

<sup>21</sup> Maluwa, T., ‘The Concept of Asylum and the Protection of Refugees in Botswana: Some Legal and Political Aspects.’ Paper Presented at the 2<sup>nd</sup> International Refugee Advisory Panel (IRAP) Conference, Oxford, 1991, p. 30.

<sup>22</sup> See B. Rutinwa, *The End of Asylum in Africa? The Changing Policies of Refugee Protection in Africa*. In New Issues in Refugee Research, Working Paper No 5., UNHCR, Geneva, 1999., pp. 4-8.

refugees in Tanzania, Zambia and Zimbabwe.<sup>23</sup> Refugees were also offered limited opportunities for naturalisation.<sup>24</sup>

#### **4. Towards a protection-oriented approach**

From the early 1980s, a new breed of laws begun to emerge in the region which were modelled on the international refugee instruments and which were much more about protection of refugees. The first legislation in this category was Zimbabwe's *Refugees Act* of 1983<sup>25</sup> and a very similar Act of Lesotho, with identical name and of the same year.<sup>26</sup> These laws adopt an extended definition of a refugee which is based on the 1951/67 regime and the 1969 OAU Convention,<sup>27</sup> establish institutions and make provisions for refugee status determination including appeals.<sup>28</sup> They also expressly prohibit refoulement of refugees.<sup>29</sup> Refugees are entitled to enjoy the rights and are subject to the duties as defined under the 1951 Convention, the 1976 Protocol and the 1969 OAU Convention.<sup>30</sup>

In 1989, Malawi enacted the *Refugee Act* of 1989<sup>31</sup> which is perhaps more notable for what did not contain than what it provided for. The Act defined a refugee, established various institutions for the administration of the Act and outlined their functions, and made provisions for non-refoulement and procedures for refugee determination, appeals and cessation of refugee status. The Act was silent on all other aspects of refugee protection. But it should be noted that on acceding to the 1951 UN Convention, Malawi entered reservations on the following provisions: Articles 7 (exemption from reciprocity); 13 (acquisition of property by refugees); 15 (right of association); 17 (wage-earning employment); 19 (practice by refugees of liberal professions); 20 (access to public education); 22 (labour legislation and social security); 26 (freedom of movement) and Article 34 (on naturalisation and assimilation of refugees)<sup>32</sup>.

Next in line were the *Refugee Status Act* of Angola of 1990<sup>33</sup> and the *Refugee Act* of Mozambique of 1991<sup>34</sup>. These Acts make ample provisions for the definition of a refugee<sup>35</sup> and fairly reasonable and detailed provisions on the procedures for refugee status determination.<sup>36</sup> Through the cross-reference

<sup>23</sup> Rwelamira, M & Buberwa, L.G., '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<sup>rd</sup> August 1990, pp 67-68.

<sup>24</sup> Id, pp. 65-70.

<sup>25</sup> Refugees Act 1983, Act No. 13 of 1983.

<sup>26</sup> The Refugee Act 1983, Act No. 18 of 1983.

<sup>27</sup> Identical section 3 of the Refugee Act of Lesotho and the Refugee Act of Zimbabwe.

<sup>28</sup> Identical section 7 of the Lesotho and Zimbabwe Acts.

<sup>29</sup> Sections 11 and 13 of the Lesotho and Zimbabwe Acts respectively.

<sup>30</sup> Sections 13 and 12 of the Lesotho and Zimbabwe Acts respectively.

<sup>31</sup> The Act entered into force on 8<sup>th</sup> May 1989.

<sup>32</sup> See Government of Malawi, Statement Presented at the First Meeting of the Commonwealth Inter-governmental Group on Refugees and Displaced Persons, London, 2<sup>nd</sup> - 3<sup>rd</sup> October, 1996, Appendix 1b.

<sup>33</sup> Refugee Status Act (No. 8/90)

<sup>34</sup> Refugee Act, (No. 21/91).

<sup>35</sup> Refugee Status Act, Angola, ss 1-9 and Refugee Act, Mozambique, Articles 1-2.

<sup>36</sup> Refugee Status Act, Angola, ss 10-20 and Refugee Act, Mozambique, Articles 3; 7-11.

technique, both Acts make the provisions of the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the OAU 1969 Convention on refugees applicable to refugees in Angola and Mozambique.<sup>37</sup> Several other rights are expressly provided for under both the Angolan and Mozambican Acts.<sup>38</sup>

In 1998, two more protection oriented Acts were enacted in the region. One of these was the Tanzania's *Refugees Act*, 1998.<sup>39</sup> This Act repealed and replaced the *Refugee Control Act* of 1966 and sought to align refugee law in Tanzania to international and regional refugee instruments. Unlike its predecessor, the Refugees Act is more comprehensive. It makes provisions for the definition of a refugee which more or less corresponds to the definitions found under international instruments,<sup>40</sup> establishes institutions and procedures for refugee determination,<sup>41</sup> and provides for limited number of rights of refugees.<sup>42</sup> Although this law is a significant improvement on its predecessor, it still retains some of the restrictive aspects of the former law such as the requirement for all refugees to reside in designated areas (read camps)<sup>43</sup> and vesting wide ranging powers on authorities such as the powers to detain and slaughter animals belonging to refugees,<sup>44</sup> possess and use vehicles belonging to refugees for refugee related work without compensation<sup>45</sup> and deportation of refugees.<sup>46</sup>

The other law is South Africa's *Refugees Act* of 1998.<sup>47</sup> This Act also makes provisions for the definition of a refugee, which more or less follow the definitions found under international instruments,<sup>48</sup> establishes institutions for refugee status determination/adjudication<sup>49</sup> and lays down the procedures to be followed in this regard.<sup>50</sup> The statute also makes provisions for the rights of refugees.<sup>51</sup>

In 1999, Namibia enacted the *Namibia Refugees (Recognition and Control) Act*<sup>52</sup> which, as its name connotes, combines both elements of protection as well as control. Like other refugee legislation in this generation, the Namibian Act adopts a definition of a refugee which encompasses both persons covered

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<sup>37</sup> Refugee Status Act, Angola, Article 21 and the Refugee Act, Mozambique, Article 5.

<sup>38</sup> For example, the Angolan Act provides for the right of non-refoulement (Art. 4) and right to work, education and health assistance (Art. 8). The Mozambican Act expressly provides for family reunion (Art. 4), non-refoulement (Art. 14) and quite uniquely, the enforceable right to naturalisation to refugees who meet the conditions of nationality (Art 12).

<sup>39</sup> The Refugees Act, No. 9 of 1998.

<sup>40</sup> The Refugees Act, No 9 of 1998, Section 4.

<sup>41</sup> See Part II of the Act, ss 5-8.

<sup>42</sup> E.g education (s. 31) and work (s. 32).

<sup>43</sup> Section 17 of the Act.

<sup>44</sup> Section 13 of the Act

<sup>45</sup> Section 14 of the Act.

<sup>46</sup> Section 28 of the Act.

<sup>47</sup> The Refugees Act, No. 30 of 1998.

<sup>48</sup> Sections 3-5 of the South African Act.

<sup>49</sup> See Chapter 2.

<sup>50</sup> See Chapters 3 & 4.

<sup>51</sup> See Chapter 5.

<sup>52</sup> Act No. 2 of 1999.

by the 1951 UN Convention and the 1969 OAU Convention on refugees.<sup>53</sup> The Act also establishes institutions for refugee administration, their terms and conditions of tenure, their powers, duties and functions as well as the procedures to be followed in processing applications for refugee status<sup>54</sup> including appeals.<sup>55</sup> Also provided for are the rights of refugees and asylum seekers including protection from *refoulement*<sup>56</sup> and general rights enjoyable by refugees under the 1951 UN refugee Convention and the 1969 OAU Convention on refugees.<sup>57</sup>

Like Tanzania's *Refugees Act* of 1998, (and unlike the majority of legislation of this generation) the Namibian Act contains many of the features reminiscent of the refugee control oriented generation. Thus, the Act permits the designation of areas (read camps) for reception and residence of refugees and empowers the Minister to require asylum seekers, refugees and the members of their families to reside in such areas. Failure to obey the order of the Minister is an offence punishable with imprisonment of up to 90 days. It is prohibited to enter designated reception area or refugee settlement without permission and non compliance is an offence punishable with a fine of N\$2,000 or imprisonment for a period of up to six months or both.<sup>58</sup> The Act also permits the detention or expulsion of recognised refugees and protected persons.<sup>59</sup>

The above recent developments have resulted in the countries in the Southern African region having similar laws which approximate to the standards found under the main international instruments on refugee law. However, at the same time, there is an observable tendency towards more restrictive practices towards refugees. Many traditionally hospitable countries such as Tanzania are increasingly taking the view that would-be refugees must be protected in their countries of origin.<sup>60</sup> In some cases, measures have been taken to avoid the refugee burden which amount to refoulement or burden-shifting. Thus, a paradoxical conclusion follows that when the Southern Africa had draconian refugee laws, it had the most liberal practice but now that it adopted liberal laws, the practice has become more restrictive.

## **5. Policy Implications and The Tasks Ahead**

The enshrinement of common principles of refugee protection in national legislation is a positive development. However, it is not enough to deal with the challenges created by the refugee phenomenon outlined above including the uneven distribution of the refugee burden and the impact of refugees on individual countries as well as the region as a whole. If it is to make any difference, it must be followed

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<sup>53</sup> Sections 3-5.

<sup>54</sup> See Sections 6-15.

<sup>55</sup> Sections 27 & 28.

<sup>56</sup> Section 26.

<sup>57</sup> Section 18.

<sup>58</sup> See sections 19-22.

<sup>59</sup> Section. 24.

<sup>60</sup> For the most recent reaffirmation of this position see Intervention by The President of the United Republic of Tanzania, His Excellency Benjamin William Mkapa, at the Symposium on the Great Lakes Region, Nile International Conference Centre, Kampala, Uganda, 10<sup>th</sup> April 2002, pp 3-4.

by at least three concrete measures: The promulgation of Regulations to implement specific provisions of the legislation; the harmonisation of procedures and standards of protection and the institution of mechanism for burden sharing.

## 5.1 Promulgation of Regulations

Like other Acts of Parliament, the refugee Acts noted above, enact mainly principles which require detailed rules and regulations to be operationalised. Often times, the specific actions and results to be achieved are left to detailed regulations and rules to be made later, by the authority identified by the Acts, usually by the Minister responsible for refugee matters. And, as the saying goes, the devil is always in the detail. Depending on how these regulations are made, they could actually restrict the enjoyment of rights seemingly provided for under the principal legislation. Indeed, in South Africa, it is the Regulations made under the Refugee Act, and not the substantive provisions of the Act itself, which have generated litigation in court and in many cases their legality has been successfully challenged.<sup>61</sup>

Accordingly, it is imperative that countries in the Southern African region should enact Regulations for the implementation of the principal legislation and these regulations should facilitate and not restrict the enjoyment of the substantive rights provided under the legislation.

Further, such regulations must take into account the need to harmonise the practice in each country with the rest of the countries in the region.

## 5.2 Harmonisation of Admission Procedures and Standards of Treatment

Unlike the first and second generation refugee legislation, the third generation refugee polices and laws are being promulgated in a particular context of post-apartheid Southern Africa which, among other things seeks to achieve regional integration through the Southern African Development Community (SADC).<sup>62</sup> The main objectives of SADC are to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration. In order to achieve these objectives, SADC aims at harmonising the political and socio-economic policies and development plans of member states.

As has been rightly pointed out, the refugee problem has immense political, economic and diplomatic implications for the on-going initiatives and projects in regional cooperation and integration.<sup>63</sup> Accordingly, the refugee problem requires a concerted regional approach of all States in the region. This may be achieved through harmonisation of key aspects of the refugee regime.

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<sup>61</sup> See van Garderen & Jaichand, V., ‘Perspectives on Refugee Protection in South Africa’ Preface to Handmaker *et al*, *Perspectives on Refugee Protection in South Africa* (LHR, 2001), pp. 1-8, at 6-7.

<sup>62</sup> Treaty of Southern African Development Community, Windhoek, August, 1992.

<sup>63</sup> Maluwa, T., *International Law in Post-Colonial Africa*, Op. Cit p. 195.

The first main area where harmonisation is imperative is procedures for admission of asylum seekers. This is particularly important in order to deal with the problem of irregular movement of asylum seekers. Southern African countries experience the problem of refugees who move in an irregular manner from countries in which they have already, or could have, found protection. It is also alleged that some countries within the region encourage and assist asylum seekers to move on to territories of other countries in the region. As the Executive Committee of the UNHCR has observed, such movements have a destabilising effect on structured international efforts to provide appropriate solutions for refugees.<sup>64</sup> The practice of conducting refugees to territories of other states also amounts to burden-shifting.

To deal with this situation, some countries, including Tanzania<sup>65</sup> and South Africa<sup>66</sup>, have sought to apply the concept of “third safe country” whereby they would reject asylum seeker who have transited through countries considered to be safe. However, the application of the concept of safe third country has its own legal and policy implications. From a legal point of view, the refusal to admit to asylum procedures persons who have transited through a third state effectively denies them the right to seek asylum and makes them automatic “illegal immigrants.”<sup>67</sup> Moreover, such refusal could result in *refoulement* of such asylum seekers. In the case of South Africa, the unilateral practice of the safe third country could result in the violation of Section 2 of the Refugees Act which prohibits *refoulement* of asylum seekers and refugees.

At the level of policy, the refusal by one Southern African country to admit refugees who have transited through another Southern African country regarded to be safe means that some countries in the region which border troubled countries will bear the blunt of the refugee burden, while those fortunate enough not to share borders with such countries can maintain a “refugee free zone” status. This would run contrary to the principle of burden sharing. This is particularly so in Southern Africa where, as was noted earlier, over 80% of refugees are found in just three countries bordering the countries in Conflict within and outside the region.

These problems could be avoided through the harmonisation of refugee admission procedures which would take into account the need for sharing the refugee burden within the region.

The other area that requires harmonisation is the standards of treatment for asylum seekers and refugees. As noted above, most legislation in the third generation make provisions for the rights of refugees. However, the typical way these rights are provided for is as follows:

“Subject to the provisions of this Act, every recognised refugee and every protected person...

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<sup>64</sup> UNHCR Executive Committee, Conclusion No 58(XL) on the Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from a Country in which they had Already Found Protection, para (a).

<sup>65</sup> Section 4(4)(e) of the Refugees Act, 1998 excludes from refugee status a person who “prior to his entry into Tanzania ha has transited through one or more countries and is unable to show reasonable cause for failure to seek asylum in those countries....”

<sup>66</sup> See van. Beek, I., ‘Prima Facie Asylum Determination in South Africa: A description of Policy and Practice’ in LHR, *Op. Cit.*, pp. 14-40, at 20-21.

- (a) shall be entitled to the rights conferred, and subject to the duties imposed, by
  - (i) the provisions of the UN Convention on Refugees, 1951, which are set out in Part I of the Schedule to this Act;
  - (ii) the provisions of the OAU Convention on Refugees, 1969, which are set out in Part II of the Schedule to this Act.
- as if the references therein to refugees were references to recognised refugees and protected persons (under this Act)<sup>68</sup>

There are at least two problems with this approach to providing for rights of refugees. First, the above formulation assumes that the instruments referred to above provide an exhaustive list of rights and needs of refugees when they actually do not. For example, none of the above instruments provides for the right to life or protection from acts like sexual attacks. Second, the rights related provisions under the international instruments are couched in such broad terms which allow a wide margin of discretion as to the extent which certain rights are to be provided. For example, when it comes to self-employment and practice of liberal professions by refugees, the 1951 UN Convention requires refugees to be accorded “treatment as favourable as possible.”<sup>69</sup> But what does that phrase exactly mean? Who is possible and what is not?

The end result is that different countries may apply the above provisions in their acts and still offer different sets of rights to refugees or same sets of entitlements but with different degrees of treatment. This situation could contribute to refugee forum shopping and the related phenomenon of irregular movement of refugees and asylum seekers.<sup>70</sup> This has been already witnessed in the Great Lakes region of Africa, where refugees have been moving from first countries of asylum to other countries such as Uganda and Zambia where much larger portions of land are alleged to be allocated to refugees for agricultural purposes.

For a region like Southern Africa that is seeking to integrate this is an unwelcome situation which must not be allowed to develop. This should be achieved through joint standard setting with regard to core rights of refugees such as food, shelter, education, and employment and harmonisation of related practices. It is not suggested here that the treatment of refugees in these matters must be exactly the same in all countries. Rather, minimum standards must be set which should be enjoyed by all refugees irrespective of where in the region they happen to be. A country that is unable to meet those standards should be assisted by others through the mechanisms of burden sharing.

<sup>67</sup> Id. p. 21.

<sup>68</sup> Article 18 of the Namibian Act, which is very identical to Article 12 of the Zimbabwe Act and similar to Articles 13 and 5 of the current Lesotho and Mozambican refugee legislation.

<sup>69</sup> Articles 18 and 19 of the 1951 UN Convention on refugees.

<sup>70</sup> This is acknowledged by para (b) EXCOM Conclusion No 58 (XL) on the problem of irregular movement of refugees which states that “Irregular movements of refugees and asylum-seekers who have already found protection in a country are, to a large extent, composed of persons who feel impelled to leave, due to the absence of educational and employment possibilities and the non-availability of long-term durable solutions by way of voluntary repartition, local integration and resettlement.”

## **6. Intra-regional burden-sharing**

The other area that remains to be addressed is the question of burden sharing. Traditionally, the concept of burden-sharing has been conceived as the measures taken to relieve the burden of hosting refugees on countries of first asylum by either extending financial and material assistance to them or through relocation of some refugees to third states. This kind of burden-sharing was premised on the post 1951 paradigm of refugee policy which addressed itself only to the plight of refugees rather than dealing with the refugee problem in a holistic manner. The kind of burden-sharing is conceived here is as joint measures to address the refugee problem in holistic manner from prevention of refugee flows by addressing the root causes, to responding to refugee flows and solutions.<sup>71</sup> And, under this approach, the focus should be on addressing the root causes of refugee flows so as to stem further flows of refugees and to enable those in exile to return home. This approach, which was endorsed by the Executive Committee of the UNHCR at its October 1998 sitting (at which many refugee hosting countries in Southern Africa are represented), is increasingly finding support in both scholarly works as well as in inter-governmental initiatives at sub regional and continental levels.

Thus, according to one renown scholar in the region, South Africa, as a former refugee generating country, has a historical responsibility to host refugees particularly those from other African countries. However, this does not mean that the country should accommodate the ever growing masses of bona-fide refugees and illegal immigrants streaming accross its borders unchecked. Rather, “coordinated effort to examine and root out the causes of these continuing refugee and migration flows is the only way to go.”<sup>72</sup>

A holistic approach to the refugee problem has also already found support at inter-governmental level within the Southern African region. In July 1996, SADC signed a Memorandum of Understanding with the UNHCR in July 1996 whose Article IV enjoins SADC and UNHCR, among other things, to:

1. Address the social, economic, and political issues in the region, particularly those which have a bearing on the root causes of forced population displacement, refugee protection, provision of humanitarian assistance and the search for durable solutions.
2. Establish or strengthen mechanisms, procedures and institutions at national, regional and international level, in order to create sustainable local capacity for the provision of protection and assistance to refugees and to give effect to the concept of burden sharing.

At its meeting in Maputo, Republic of Mozambique, between 28 and 29 January 1998, the SADC Council of Ministers reviewed the problem of refugees in the region and noted in particular the arrival of refugees from the war torn Great Lakes region and the implications of their presence for the security of

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<sup>71</sup> On this conception of burden-sharing see Rutinwa, B., Legal Responsibilities of Countries of Origin and Third States in Refugee Situations under Public International Law, D.Phil Thesis, Oxford University, Michaelmas 1999, Chapter III, pp. 35-46.

<sup>72</sup> Maluwa, T., ‘The Refugee Problem in Post-Apartheid Southern Africa, *Op. Cit.*, p. 195.

the SADC region. The Ministers reiterated that the cornerstone of SADC was the need to support the most vulnerable peoples through regional integration based in the promotion of democracy, good governance and the respect for human rights. Thus, the Council approved the root cause approach to the refugee problem. The Council also recognised that preventive measures are not a substitute but a complement to protective measures by reaffirming its awareness of the need for establishing a regional mechanism for safeguarding the human rights of refugees.

As a practical measure to implement a comprehensive regional approach to the problem of refugees in the SADC region, the Council urged Member States to adopt measures towards the harmonisation and unification of procedures and criteria for the protection and provisions of social support of refugees. The Council also set up a working group of nine countries which it directed to come up with proposals on how best the problems of refugees can be addressed in the SADC region and to draw up a Declaration on Refugees for consideration by the Summit of SADC at its next sitting in September 1998. However, this initiative seems not to have come to fruition.

Also notable development in this regard is the recently introduced New Partnership for Africa's Development (NEPAD).<sup>73</sup> Under the Chapter on "Peace and Security Initiative" NEPAD calls for efforts to build Africa's capacity to manage all aspects of conflict to focus on the means necessary to strengthen existing regional and sub-regional institutions, especially in the areas of prevention, management and resolution of conflicts; peacekeeping, peacemaking and peace enforcement; post-conflict reconciliation, rehabilitation and reconstruction; and combating the illicit proliferation of small arms, light weapons and landmines. Although these measures have a broader aim of creating conditions for development in Africa, they can, incidentally, also stem or minimise the flow of refugees and create conditions for return of those who have already fled.

The degree of success of the measures aimed at addressing the root causes of refugee flows may render burden-sharing at the level of response unnecessary or at least not as pressing, if the number of asylum seekers and refugees in individual countries remain within the capacity of individual states to manage.

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<sup>73</sup> For details see [http://www.uneca.org/eca\\_resources/conference\\_Reports\\_andOther\\_Documents/nepad](http://www.uneca.org/eca_resources/conference_Reports_andOther_Documents/nepad)