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THE REFUGEE AND THE  
RIGHT TO AN EFFECTIVE  
REMEDY IN INTERNATIONAL  
LAW: A CASE STUDY OF  
UGANDA

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# Preface

The dilemma faced by refugees seems to be somewhat more aggravated today than it was years back when States came up with the concept of refugee protection through international refugee law. Whereas then, States were more humanitarian and willing to provide temporary protection to refugees, today the trend has become one of restricting entry through the tightening of border controls, enactment of restrictive migration and asylum laws, thus making it difficult for refugees to secure asylum. Nevertheless, the problem of refugees still persists and refugee protection failing to provide a satisfactory solution, it becomes pertinent that other ways of dealing with the problem of refugees and the problems faced by refugees are explored.

International law, particularly human rights law, does seem to offer some alternatives. Firstly, States should endeavour to abide by their human rights obligations in good faith. By doing this, States would in effect be striving to prevent the situations that cause or give rise to the refugee problem. Each State should therefore ensure that each and every person within its territory and under its jurisdiction does enjoy all human rights and fundamental freedoms recognised under international law and which the State has undertaken to respect, protect and fulfil without discrimination on any of the various grounds enumerated under the various instruments. Secondly, where a person's rights are violated, infringed upon or abused, the State should ensure that there is a remedy available to sufficiently redress the violation suffered. Where citizens have confidence in the human rights protection system of their State, there is no reason for them to flee in search of refuge in another country.

While this may appear rather too idealistic, as it might seem with all human rights norms, what is required is that steps are taken by each State to attain the objectives set forth by international human rights law. If each State did its part in good faith, the problem of refugees would be abated to a great extent. This thesis aims to examine the legal protection accorded to

refugees, both under international law and domestic law. It has oftentimes been said that the way States treat the marginalized members in their society is an indicator of their level of human rights respect and protection. Similarly, with regard to refugees (who also usually belong to the marginalized groups), it has been said that the way States deal with refugees does say a lot about their human rights health and their tolerance for ethnic and racial minorities. This could be said not only of States, but the international community as a whole as we shall see in the ensuing thesis.

Before, I delve into the substance of the thesis I would like to heartily thank all the people that have been a part of this thesis, in one way or another, big or small. Without mentioning any names (so as not to be accused of discrimination afterwards), I am conscious of all the people that have been of assistance through out the process, right from the inception of the topic, throughout the research and writing to the point of the defence. It was not as easy a task, but your assistance, support, encouragement and attentive listening and reading through my work, and making time for recreation and diversion from the thesis, made it a whole lot easier and for this I am eternally grateful. Once again a big THANK YOU to ALL and May God abundantly bless you.

# Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CESCR	Committee on Economic, Social and Cultural Rights
CIP	Comprehensive Implementation Plan
CSR	Convention Relating to the Status of Refugees
ECOSOC	Economic and Social Council
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	Internally Displaced Persons
LC	Local Council
NGOs	Non-Governmental Organisations
OAU	Organisation of African Unity
RAB	Refugee Appeals Board
REC	Refugee Eligibility Committee
RLP	Refugee Law Project
RSD	Refugee Status Determination
UDHR	Universal Declaration of Human Rights
UGX	Uganda Shillings
UHRC	Uganda Human Rights Commission
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
USD	United States Dollars

# 1 General Introduction

International human rights law and international refugee law seem to have been conceived as separate branches of international law and yet the latter is in fact a branch of the former as re-affirmed in the Vienna Declaration and Programme of Action<sup>1</sup>. This thesis seeks to reinforce the correlation between refugee law and human rights law, how the latter augments the former with particular regard to ensuring that refugees do obtain redress when their human rights are violated, that refugees just like other human beings do have the right to an effective remedy guaranteed under international law. The thesis seeks to address the following questions:

- i). What exactly is meant by the right to an effective remedy under international law?
- ii). To what extent does refugee law provide for the right of a refugee to an effective remedy?
- iii). How is a refugee's right to an effective remedy respected and protected in practice in both domestic and international law?
- iv). Whether refugees do in fact enjoy the right to an effective remedy when their human rights and freedoms have been violated.

## 1.1 Hypothesis

For every human right guaranteed or provided for by law, there should be a remedy. Just as all rights are for each and every individual, without any discrimination, so should remedies be. This may not, however, necessarily be the case for some of the most vulnerable and disadvantaged groups of people in our world, such as the refugees. It is the proposition of this thesis that rights do exist for all and the law does seek to protect all, at least in theory but the practice or reality does not necessarily match the rhetoric.

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<sup>1</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Article 23.

## 1.2 Definitions of Key Words

*Refugee*: the internationally accepted definition of a refugee is that of a person, who owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership to a particular social group or political opinion, is outside the country of his or her nationality and is unwilling or unable to avail himself or herself to the protection of that country<sup>2</sup>. In Africa, however, this definition is broadened to include 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 seek refuge in another country<sup>3</sup>. In Uganda, the definition of refugee embraces both of these definitions and also goes further to include among the grounds for persecution, sex and failure to conform to gender discriminating practices. For the purposes of this thesis, the term ‘refugee’ shall be all inclusive of these definitions, depending on the context within which it is used, with the key factor being that a person cannot avail himself or herself to the protection of his or her country of origin or nationality.

*Remedy*: the term ‘remedy’ is often used synonymously with ‘redress’ or ‘reparation’. However for the purpose of this thesis, the word ‘remedy’ is preferred as it is the term employed in most of the human rights instruments that we shall look at. Remedy, as defined in Black’s Law Dictionary<sup>4</sup>, refers to the means by which a right is enforced or the violation of a right is prevented, redressed or compensated. It also refers to the means employed to enforce a right or remedy; or it could mean any remedial right to which an aggrieved party is entitled with or without resort to a tribunal. More shall

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<sup>2</sup> *Convention Relating to the Status of Refugees* adopted on 28 July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950, entered into force on 22 April 1954, Article 1(2). While this Convention placed geographical and temporal limits on the definition of a refugee, these were removed by the 1967 Protocol to the Convention.

<sup>3</sup> *Organisation of African Unity (OAU) Convention on the Specific Aspects of Refugees in Africa* adopted on 10 September 1969 and entered into force on 20 June 1974, Article I (1) and (2). The African Convention was intended to address more the large flow of refugees in Africa, which was a result of Africa’s colonial occupation and national liberation wars than the persecution on an individual basis. See Lawyers Committee for Human Rights, *African Exodus*, (Lawyers Committee for Human Rights, New York, 1995) p. 29.

<sup>4</sup> *Black’s Law Dictionary*, 6<sup>th</sup> edition (West Publishing Co., St. Paul, Minn., 1990).



be said about remedies in the next chapter, but without prejudice, depending on the context within which it is used, the word ‘remedy’ may refer to any or all of the above meanings.

### **1.3 Scope of the Thesis**

The right to an effective remedy, just like all other rights, pertains to each and every person whose rights have been violated, abused or infringed upon. This thesis shall focus on the applicability of the right to a special and vulnerable group of persons, the refugees who are, oftentimes, victims or a product of gross human rights violations and even in places where they obtain asylum or refuge, their rights might continue to be violated *albeit* on another scale. The thesis shall examine the applicability of the concept of the right to an effective remedy to refugees, mainly in the country where they manage to obtain asylum. The country to be examined shall be Uganda, for reasons that shall be explained shortly. It is pertinent that some space and time is allocated to examining whether international human rights law and refugee law in particular, adequately provides for an effective remedy to refugees (particularly those on the African continent) considering that they are victims of gross or serious human rights violations, which ordinarily should be redressed. The thesis shall thereby stretch from a perusal of a selection of relevant normative international and regional human rights standards regarding the right to an effective remedy, to an examination of the domestic application of those standards, and how this is reinforced by international and regional mechanisms in an attempt to examine how effectively these standards are being implemented in order to achieve their objective with particular regard to refugees.

### **1.4 Background Information**

*Ubi jus, ibi remedium*, ‘where there is a right, there is a remedy’ is a well-established principle of general international law<sup>5</sup> enunciated under various

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<sup>5</sup> T.A. Thomas, ‘Congress’ Section 5 Power and Remedial Rights’, *34 U.C. Davis L. Rev.* 673, 689-90 (2000) explaining that the notion of a remedy as a necessary part of any legal

systems of law. In elucidating this principle, the Chief Justice in *Ashby v. White*<sup>6</sup> stated thus:

“If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal... Where a man has but one remedy to come at this right, if he loses that he loses his right.”

Ziegler, in accord, expresses that without remedies, rights are mere ideals, promises or pronouncements that may or may not be followed<sup>7</sup>. The importance of a remedy can therefore not be overstated: a remedy, rather the right to a remedy does become a legal entitlement or right when it is embodied in law.

International human rights law does lay out a number of human rights and fundamental freedoms, the subject of which encompasses civil and political rights, economic, social and cultural rights as well as group rights. It lays down the minimum standards that would enable all human beings to realise their inherent dignity and worth as such and it is these standards or rights that international human rights law seeks to remedy in case they have been violated. It has been contended that the question of judicial remedies has generally been regarded as peripheral to the main study of international law with attention being centred mainly on the substantive rules with little consideration of the consequences of their violation<sup>8</sup>, and yet the right to a remedy is also a fundamental right that is necessary for the realisation of the other rights<sup>9</sup>.

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substantive right is not a new idea. *See also* T.A. Thomas, ‘Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process’, *41 San Diego L.Rev.* 1633, p.2.

<sup>6</sup> 92 Eng. Rep. 126 K.B. 1703.

<sup>7</sup> D.H. Ziegler, ‘Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts’, *38 Hastings Law Journal*, 1987, p. 678.

<sup>8</sup> *See* C. Gray, *Judicial Remedies in International Law* (Clarendon Paperbacks, Oxford, 1990) p.1. This is not to say, however, that there are no studies at all regarding remedies; there are quite a number of studies on the subject. But compared to studies done regarding other rights and freedoms, the right to a remedy is given less attention, which is in deed Gray’s contention.

<sup>9</sup> *See* T. A Thomas, *Ubi Jus, Ibi Remedium*, *supra* note 5.

The obligation to ensure that all individuals enjoy their human rights and fundamental freedoms as set forth under international law lies with the State, which is the primary subject of international law. An-Na`im explains that “[b]y virtue of its juridical sovereignty under international law, the nation state is the universally acknowledged medium of policy formulation, decision-making and action. In short, it is the embodiment of national sovereignty as the supreme political organ of society”<sup>10</sup>. As a sovereign, the State is then responsible for the well-being and protection of all people that are within its territory or under its jurisdiction<sup>11</sup>, as human rights law correctly emphasises. When a State fails to accord this protection that is due to its citizens or nationals when they are subject to violations of their human rights and fundamental freedoms, it is not only breaching its obligations which, of course, include the right to an effective remedy, but is also rendering the people particularly vulnerable, unprotected, and much in need of alternative protection, which is the case with refugees.

A refugee’s vulnerability is best captured in the words of a former Latina refugee who commented:

“A feeling which never leaves you when you are a refugee is the feeling of being ‘nothing’, of your overwhelming ‘nothingness’”<sup>12</sup>

The state of being a refugee goes against all that the human rights standards and norms stand for, it in a way rips off one’s inherent dignity and worth as a human being, placing him or her in a much disadvantaged position that is far from the notion of equality of all human beings.

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<sup>10</sup> A. A. An-Na`im, ‘Possibilities and Constraints of Legal Protection of Human Rights Under the Constitutions of African Countries’ in A. A. An-Na`im (ed.), *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa* (INTERIGHTS/Afronet/GTZ, London, 1999) p. 9.

<sup>11</sup> Agamben argues that there is a distinction between rights of man and rights of citizens in order to show that the rights of man separated from citizenship are inconceivable in a world of nation states, and that one must be a citizen of somewhere to enjoy one’s fullest rights. Quoted in D. Warner, ‘The Refugee State and State Protection’ in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, Cambridge, 1999) p.254.

<sup>12</sup> Quoted by M. Domanski, ‘Insight from Refugee Experience’ in J. C. Hathaway (ed.), *Reconceiving International Refugee Law* (Martinus Nijhoff, The Hague/Boston/London, 1997) p. 31. Domanski tries to express the “feeling of overwhelming powerlessness and insignificance which most refugees in camps are doomed to experience”.

### 1.4.1 Why Uganda?

Majority of the world's protracted refugee situations are on the African continent in the sub-Saharan region<sup>13</sup>, thus making it the host of over two million of the world's refugee population<sup>14</sup>. Uganda is a landlocked country that lies in the Eastern part of Africa and is one of the countries of the Great Lakes region<sup>15</sup>, which region has been plagued by a number of armed conflicts with attendant serious and gross human rights violations. As such there is a high number of refugees in the region and by virtue of its location amidst conflict-prone countries, Uganda has been a State of asylum for many refugees<sup>16</sup>.

Uganda is a developing country, as are most of the countries in Africa, with a total population of approximately 30.2 million people. According to the 2006 Human Development Report<sup>17</sup>, Uganda is ranked 145 out of 177 countries in the development index with its per capita Gross Domestic Product estimated at USD 1,478. Majority of the population lives in the rural areas depending mainly on subsistence farming. Uganda is therefore representative of many an African country which are struggling to cater for its own population or citizens in economic and social terms and are at the same time taking on an additional burden of peoples who have been displaced by war or armed conflicts from the countries that should be providing for them and offering them protection.

On the legal front, Uganda is a dualist and common law country with the Constitution being the supreme law of the land. All laws, policies and customs should be in accordance with the Constitution or else they are

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<sup>13</sup> According to the UNHCR, 22 out of the 38 protracted refugee situations are in Africa-UNHCR research Paper No.126 (July 2006), 11.

<sup>14</sup> UNHCR, 2006 *Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons* available at <http://www.unhcr.org/statistics.html> visited on 6 November 2007.

<sup>15</sup> The Great Lakes region in Africa comprises of the following countries: Burundi, Democratic Republic of Congo (DRC), Kenya, Rwanda, Tanzania and Uganda.

<sup>16</sup> It should also be noted that even Uganda has at one point been a large producer of refugees in the region.

<sup>17</sup> UNDP, *Human Development Report 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis* available at <http://hdr.undp.org/en/reports/global/hdr2006/chapters/> visited on 6 November 2007.

void<sup>18</sup>. The Constitution of Uganda contains a Bill of rights that encompasses most of the human rights laid out in the international instruments and as such it provides a good study of the implementation of international human rights standards in the domestic arena.

Uganda has been hosting refugees since the 1950s and it would therefore make an interesting study on how it has developed its policies and laws regarding the treatment of refugees and how it upholds or protects their rights. Worthy to note, is that Uganda also has its own population of Internally Displaced Persons (IDPs), estimated at about 1.5 million<sup>19</sup> whose living conditions in camps have been criticised as greatly lacking and quite deplorable<sup>20</sup>. One then wonders, how the refugees are treated when the IDPs who are citizens are not being adequately provided for and protected in terms of human rights and fundamental freedoms.

Uganda would thus make an appropriate study of the domestic implementation of the right to an effective remedy with regard to refugees for the reasons stated above.

## 1.5 Research Methodology

Most of the study was conducted through review of available literature regarding the right to an effective remedy and refugees, which included looking at a selection of the relevant international and regional human rights instruments, examining relevant jurisprudence and various commentaries and texts. The Internet also proved a very useful source of research material. With regard to the domestic implementation of the right to an effective remedy in Uganda, a few interviews were carried out in Uganda mainly with officials from the National Human Rights Institution and also from the Judiciary. There were, however, no structured or set questions employed for

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<sup>18</sup> Constitution of the Republic of Uganda, 1995 as amended, Article 2 (2).

<sup>19</sup> UNHCR, *2006 Global Trends*, *supra* note 14. The number should, however, have reduced by now as some IDPs have returned to their homes.

<sup>20</sup> *See generally*, L. Hovil and M.C. Okello, *Only Peace Can Restore the Confidence of the Displaced*, Report commissioned by the Norwegian Refugee Council and the International Displacement Monitoring Centre, October 2006 available at <http://www.refugeelawproject.org/resources/papers/others/index.htm> visited on 6 November 2007.

the purpose. A lot more information was also obtained through the annual reports of various relevant institutions in Uganda.

## **1.6 Layout of the Thesis**

With this chapter having provided an overall insight into the aim of the thesis, the next chapter shall focus on the right to an effective remedy in international law: its content, applicability and scope. Chapter three shall examine the applicability of the right to an effective remedy under refugee law and also examine whether refugee law adequately provides for this right. In Chapter four, we shall see the implementation of the right to an effective remedy with regard to refugees in a domestic setting using Uganda as a case study. In this Chapter we shall see whether Uganda fulfils its international law obligation to ensure that refugees in its territory enjoy the right to an effective remedy. Supposing that a State does not fulfil this obligation towards refugees, chapter five shall examine what mechanisms are available at the international and regional levels to ensure that a State does indeed fulfil its obligations and whether these mechanisms are effective when it comes to ensuring that an individual, particularly a refugee, does eventually obtain an effective remedy when this right has been violated by a State. Chapter six shall be the conclusion in which it is hoped that all questions that the thesis set out to answer shall be satisfactorily addressed.

## 2 The Right to an Effective Remedy in International Law

In the light of the *ubi jus, ibi remedium* principle, it is pertinent that a human rights protection regime not only sets down the rights it seeks to protect but also ensure that in case of a violation of any of those rights, there is an ensuing remedy. As such there is a series of international human rights instruments establishing the right to an effective remedy, which we shall examine in this chapter. The Chapter seeks to examine the content of the right to an effective remedy as laid down in International Bill of Rights, comprising of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two optional Protocols<sup>21</sup>. These instruments lay down the standards upon which all other human rights instruments, both international and regional are tailored. On the regional level I shall look at the African Charter on Human and Peoples' Rights in particular, but in examining the jurisprudence and interpretation of the meaning of the right to an effective remedy recourse shall also be had to the jurisprudence of the European Court of Human Rights and interpretation of the right under the European Convention on Human Rights. The Chapter shall conclude with a summary enumerating the contents of the right to an effective remedy in international law and under what circumstances violation of the right may be invoked.

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<sup>21</sup> The First Optional Protocol to the ICCPR on individual communications shall further be looked at in Chapter five, while the second optional Protocol on the abolition of the death penalty is not of particular relevance to this study.

## 2.1 The International Bill of Rights

### 2.1.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR)<sup>22</sup> is considered the mother of all human rights instruments and in yet another instance is referred to as the ‘*Magna Carta* for all humanity’<sup>23</sup>. Although not a legally binding instrument, the Declaration complements the human rights provisions of the Charter of the United Nations (UN)<sup>24</sup> which are binding on all its member States<sup>25</sup>. The UDHR serves as a ‘common standard of achievement for all peoples and all nations’<sup>26</sup> and contains a statement of rights, encompassing all categories of human rights, which all Member States of the UN are obliged to respect<sup>27</sup>.

Article 8 of UDHR provides for the right to an effective remedy as follows:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or by law”.

Møse explains that Article 8 has to be viewed in relation to other articles of the UDHR including Article 2 on non-discrimination, Article 9 concerning the protection from arbitrary arrest, detention or exile and Article 10 on the right to fair trial which includes a fair hearing before an independent and impartial tribunal<sup>28</sup>.

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<sup>22</sup> United Nations, *Universal Declaration of Human Rights*, General Assembly Resolution 217A (III), 3rd Session, Part 1, Resolutions, p.71 adopted on 10<sup>th</sup> December 1948.

<sup>23</sup> Office of the High Commissioner for Human Rights, [www.unhchr.ch/udhr/miscinfo/carta.htm](http://www.unhchr.ch/udhr/miscinfo/carta.htm), visited on 25 September 2007.

<sup>24</sup> Adopted on 26 June 1945: Article 55(c) calls for the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. This should be read together with Article 56 which enjoins all Member States to ‘take joint and separate action for the achievement of the purposes set forth in Article 55.

<sup>25</sup> *Ibid*, Article 2(2).

<sup>26</sup> Preamble to the UDHR, *supra* note 22.

<sup>27</sup> H. Lauterpacht, *International Law and Human Rights* (Archon Books, Hamden, 1968), p. 34.

<sup>28</sup> E. Møse, ‘Article 8’, in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Nijhoff Martinus Publishers, The Hague/Boston/London, 1999) p.195.



Owing to the nature of the UDHR, that is, its being a Declaration and hence, not legally binding, there has been no opportunity by any monitoring or enforcement body under international law to elucidate on its provisions. Hence, one has to look elsewhere for more guidance on the interpretation of Article 8. In the *travaux préparatoires* to the UDHR, it transpired that one of the reasons for the insertion of Article 8 was to ensure judicial review, including *habeas corpus*, of administrative acts and decisions which violated one's fundamental constitutional rights and freedoms<sup>29</sup>. Hence, its proponents<sup>30</sup> looked at it more as a procedural aspect to a desired end. What was not, however, clear from the *travaux préparatoires* was whether the national tribunals referred to were of a judicial nature. During the discussions, it was proposed that the word 'judicial' be inserted but due to mixed feelings about it, it was deleted from the final provision. From what inspired Article 8 as can be deduced from the discussions, it could rightly be assumed that the drafters had 'judicial' remedies at the back of their minds.

Møse in his commentary on article 8 opines, "the exact contents of the various provisions on effective remedies still remain vague and their full potential has probably not yet been explored"<sup>31</sup>. This could be largely true with regard to the interpretation of Article 8 in particular, but there is a variety of jurisprudence in other international law instruments, which we shall look at shortly, that attempt to explore the contents of the right to an effective remedy.

To reaffirm what is stated above regarding the binding nature of the UDHR, the instrument is now taken to constitute customary international law thus binding all States. This is quite evident from the fact that it was adopted unanimously and this was reaffirmed in 1993 by all UN member States when adopting the Vienna Declaration. It is also a referral instrument

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<sup>29</sup> Official Records of the third session of the General Assembly, Third Committee, Summary records of Meetings 21 September 1948- 8 December 1948, pp.229-248. See also, E. Mose, *Ibid*, pp.188-193.

<sup>30</sup> These were mainly Latin American States (Mexico, Chile, Uruguay, Cuba, Venezuela) who, according to Møse, based it on the principle of *amparo*, which was 'a speedy, simple procedure aimed at the restoration of the citizen's constitutional rights but had later been transformed into the remedy of last resort for the review of all legal proceedings in Mexico'. *Ibid*, pp. 196-197.

<sup>31</sup> *Ibid*, p.188.

in all subsequent international human rights treaties, particularly the ICCPR and the ICESCR, and the International Court of Justice seems to have developed a similar view. In one of the Advisory Opinions it was stated that “although the affirmations of the Declaration are not binding *qua* international convention...they can bind the states on the basis of custom...whether because they constituted a codification of customary law...or because they have acquired the force of custom through a general practice accepted as law...”<sup>32</sup>.

It therefore seems to be incumbent on all States to ensure that every individual whose rights have been violated enjoys the right to an effective remedy as laid down in the UDHR.

## **2.1.2 The International Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>33</sup> is a legally binding document in international law and so all States parties<sup>34</sup> to it are obligated to fulfil its provisions in good faith<sup>35</sup>. Article 2(1) of the ICESCR lays down the general obligation of States to ensure the effective implementation and enjoyment of the covenant rights by all persons in their territory. The Article stipulates:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate

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<sup>32</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, separate opinion of Vice-President Ammoun, p. 76.

<sup>33</sup> Adopted by UNGA Resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

<sup>34</sup> Currently there are 156 States parties to the ICESCR.

<sup>35</sup> Vienna Convention on the Law of Treaties, 1969, Article 26.

means, including particularly the adoption of legislative measures.”

This Article is not exactly assertive in the sense that it does not impose an explicit and unambiguous obligation on States parties to recognise and respect the rights set forth in the Covenant. Its language is generally weak, especially when compared to a parallel provision in its sister covenant on civil and political rights, as we shall see below. As a result of this, it has often been argued that economic, social and cultural rights are not justiciable in nature<sup>36</sup>, they are too vague to be subject to judicial adjudication and further, if the courts adjudicated upon these rights they would be making policy which falls in the realm of the executive and legislative arms of government<sup>37</sup>. This interpretation of Article 2(1) would in effect mean that in case of a violation of any of the economic, social and cultural rights, there cannot be an effective remedy that could be obtained from the courts of law or any other quasi-judicial tribunal or body; the only available remedy would be purely administrative or even political governed by State policy and programmes. When interpreted in the light of Article 8 of the UDHR such an interpretation that negates the right to an effective remedy for this category of rights would be going against the spirit of the UDHR, which does not distinguish between the various categories of rights and upon which the ICESCR is modelled<sup>38</sup>.

The Committee on Economic, Social and Cultural Rights (CESCR or ‘the committee’), which is responsible for overseeing the implementation of the covenant<sup>39</sup> by States parties, has endeavoured to elucidate the meaning of Article 2(1). In its General Comment on the nature of State parties’ obligations<sup>40</sup> the committee has stated that “among the measures which might be considered appropriate, in addition to legislation, is the provision

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<sup>36</sup> M. Scheinin, ‘Economic and Social Rights as Legal Rights’ in A. Eide et al (eds.), *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 2001), p.10.

<sup>37</sup> E.G. Vierdag, ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’ Vol.9 *Netherlands Yearbook of International Law* (1978), p.103.

<sup>38</sup> ICESCR Preamble, Para. 3.

<sup>39</sup> More will be said about the CESCR in chapter five.

<sup>40</sup> CESCR, *The Nature of States Parties Obligations (Article 2, Par. 1): 14/12/90, CESCR General Comment 3.*

of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable”<sup>41</sup>.

The committee emphasises the need of States to adopt laws aimed at the realisation of the covenant rights and further urges them to show “whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realised”<sup>42</sup>.

Having affirmed that the right to an effective remedy and the ensuing obligation on States parties to ensure the same does indeed exist under Article 2(1) of the ICESCR, the committee in yet another general comment<sup>43</sup> details out the nature of that right. It stresses that “...appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place”<sup>44</sup>.

The committee further re-affirms the connection between Article 2(1) and Article 8 of the UDHR by mentioning the right to an effective remedy in the latter Article as one of the principles in light of which the domestic application of the covenant must be considered and that “a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show that such remedies are not “appropriate means” ...or that, in view of other means used, they are unnecessary...”<sup>45</sup>.

Unlike the UDHR which does not specify the nature of the ‘national tribunals’ from which one may seek an effective remedy, the committee has stressed that “the right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies would also be adequate if the responsible authority took into account the requirements of

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<sup>41</sup> *Ibid*, Para. 6. In fact the committee goes on to list a number of articles in the covenant which would be “capable of immediate application by judicial and other organs in many national legal systems. This Articles are 3 on equality, 7(a)(i) on fair remuneration, 8 on the right to form and join trade unions, 10(3) on protection of children and young persons, 13(2)(a) on the right to compulsory primary education, (3) and (4) on liberty of parents and guardians to choose their children’s schools and 15(3) on respect for freedom for scientific research and creative activity.

<sup>42</sup> *Ibid*, para. 7.

<sup>43</sup> CESCR, *The Domestic Application of the Covenant*:. 03/12/98, CESCR General Comment 9, E/C.12/199824.

<sup>44</sup> *Ibid*, para. 2.

<sup>45</sup> *Ibid*, para. 3.

the Covenant in their decision-making”<sup>46</sup>. However such remedies would have to be *accessible, affordable, timely* and *effective* and it would be most appropriate if there were an “ultimate right of judicial appeal from administrative procedures of this type”<sup>47</sup>.

Although there are no cases when the application of this provision (Article 2(1) of the ICESCR with regard to the right to an effective remedy) has been brought into issue<sup>48</sup>, some attempts have been made to expound on this right. The Maastricht guidelines provide that any person or group whose economic, social and cultural rights have been violated should have access to effective judicial or other appropriate remedies that accord them “adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition”<sup>49</sup>. There is also a variety of jurisprudence from national courts, other international and regional bodies in which violations of economic, social and cultural rights have been alleged and remedies have been obtained. Such remedies have included declaring that a violation of a right has occurred and ensuring that a given result is achieved<sup>50</sup>, ordering injunctive relief<sup>51</sup>, ordering the creation of a regulatory regime in which measures are actually specified as

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<sup>46</sup> *Ibid*, para. 9.

<sup>47</sup> *Ibid*.

<sup>48</sup> The CESCR does not currently have the mandate to receive complaints of violations of the covenant rights, however discussions of adopting an Optional Protocol to the ICESCR are underway, which if successful, would enable individuals to raise complaints before the CESCR.

<sup>49</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, 22-26 January 1997, paras. 22 and 23. Available at <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.html>. Visited on 1 October 2007.

<sup>50</sup> *Minister of Health and Others v. Treatment Action Campaign and Others* in which a violation of the right to health was found and the Court ordered the Government to implement a comprehensive programme to realise progressively the rights of pregnant women and their children to have access to health services including HIV testing and counselling. Available in Vol. 97, *American Journal of International Law* (2003) p.675.

<sup>51</sup> *Ibid*. See also, *Olga Tellis and Others v. Bombay Municipal Corporation and Others* (AIR, 1986, SC 180) available at [www.elaw.org/resources/text.asp?ID=1104](http://www.elaw.org/resources/text.asp?ID=1104) visited on 4 October 2007. The Court ordered the non-removal of slums until a stated date and even then the removal should be in accordance with the Court’s judgment.

being necessary to solve a defined and concrete problem<sup>52</sup> and reparation or payment of compensation<sup>53</sup>.

From the above discussion, it is clear that States parties to the ICESCR have the obligation to ensure that all persons within each State's jurisdiction enjoy the right to an effective remedy when a violation of any of the economic, social and cultural rights occurs and that arguments such as non-justiciability or non-self-execution of those rights would not stand. They would actually go against the general principle of *ubi jus, ibi remedium*.

### **2.1.3 The International Covenant on Civil and Political Rights**

The provision on the right to an effective remedy under the International Covenant on Civil and Political Rights (ICCPR)<sup>54</sup> is quite clearer, more elaborate and more specific when compared to similar provisions in both the UDHR and the ICESCR. Article 2(3) of the ICCPR provides:

“Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authorities provided for by the legal system of the State, and to develop the possibilities of a judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted”.

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<sup>52</sup> *Campaign for Fiscal Equity et al v. the State of New York et al* (719 NYS 2d 475, 2001) available at [www.cfequity.org/background.html](http://www.cfequity.org/background.html) visited on 4 October 2007.

<sup>53</sup> *Gaygusuz v. Austria*, 16 September 1996, ECHR 39/1995/545/631, Reports of Judgments and Decisions 1996- IV, para. 63. Though the case was basically on discrimination, the discrimination affected the complainant's right to emergency assistance, an economic and social right.

<sup>54</sup> Adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

The importance of this Article cannot be overstated. It provides a vital guarantee to the rights stated in within the ICCPR and it is therefore “essential to the Covenant’s object and purpose”<sup>55</sup>. It reinforces the position of both the UDHR and the ICESCR that the provision of remedies is primarily a domestic matter. Commenting upon a similar provision in the European Convention on Human Rights (ECHR)<sup>56</sup>, the European Court of Human Rights (hereinafter ‘the European Court) has stated that the Article gives direct expression to the States’ obligation to protect human rights first and foremost within their own legal system and that it establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights<sup>57</sup>. Hence, States must ensure that they put in place such remedial institutions and procedures to which victims of violations of human rights may have access<sup>58</sup>. More specifically, the availability of a remedy must not be hindered by the acts or omissions of the State<sup>59</sup>. The Human Rights Committee (HRC)<sup>60</sup> has emphasized that Article 2(3) obliges States parties to ensure that “individuals have accessible and effective remedies to vindicate” the Covenant rights<sup>61</sup>. It goes on to state that such remedies can be “effectively assured by the judiciary, administrative mechanisms, and national human rights institutions”<sup>62</sup>. Therefore a remedy need not be judicial to satisfy the standard of effectiveness required under Article 2(3). Nonetheless, it has been observed

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<sup>55</sup> Human Rights Committee (HRC), *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, General Comment No. 24*, UN Doc. CCPR/21/Rev.1/Add.6 (1994), Para.11.

<sup>56</sup> Article 13 of the ECHR provides “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

<sup>57</sup> *Kudla v. Poland*, 26 October 2000, ECHR no. 30210/96, Reports of Judgments and Decisions 2000-XI, p.237, para.152. See also *Aydin v. Turkey*, ECHR no. 57/1996/676/866, Reports of Judgments and Decisions 1997-VI, p.1895, para.103.

<sup>58</sup> D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, Oxford/New York, 2005) p. 8.

<sup>59</sup> *Aydin case*, *supra* note 57, para.103.

<sup>60</sup> This is a body established under Article 28 of the ICCPR composed of 18 independent experts with a mandate to monitor the implementation of the ICCPR by its States parties. More shall be said about the work of the HRC in Chapter 5.

<sup>61</sup> HRC, *General Comment No. 31[80] Nature of the General Obligation Imposed on States Parties to the Covenant: 26/05/2004*. CCPR/C/Rev.1/Add.13. (General Comments) para. 15.

<sup>62</sup> *Ibid.*

that “decisions made solely by political or subordinate administrative organs do not constitute an effective remedy within the meaning of paragraph 3(b)” and that “States parties are obligated to place priority on judicial remedies”<sup>63</sup>. This is clearly illustrated in the decision of the HRC in *Vicente et al v. Colombia* where it was stated, “in case of violations of basic human rights, in particular, the right to life, purely administrative and disciplinary measures cannot be considered adequate and effective”<sup>64</sup>.

Upon interpreting Article 2(3), Schachter is of the view that it “imposes a requirement of independence and objectivity in the conduct of public officials responsible for granting remedies to individuals whose rights have been infringed”<sup>65</sup>. This then brings into play the procedural guarantees provided for under Article 14 on the right to a fair trial. Chief among the elements stated in Article 14(1) is that everyone is entitled to a fair hearing before a “competent, independent and fair tribunal established by law”. In fact the European Court has stated that in most cases Article 6(1) of the ECHR (equivalent to Article 14(1) of the ICCPR) is deemed to constitute *les specialis* in relation to Article 13 of the ECHR (the equivalent of Article 2(3) of the ICCPR)<sup>66</sup>. It therefore seems that a remedy that is afforded by a body that complies with the provisions of Article 14, particularly Article 14(1) of the ICCPR will in most cases meet the requirement of effectiveness under Article 2(3).

The element of availability of remedies goes hand in hand with that of accessibility. This calls to mind Article 2(1) of the ICCPR which prohibits discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This provision is very important for the vulnerable members of society, for instance, refugees in case they need to have access to an

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<sup>63</sup> M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel Publisher, Kehl/Strasbourg/Arlington, 1993) p. 59. See also *R.T. v. France*, Communication No. 262/87, para. 74, in which the HRC clearly indicates its preference for judicial remedies when determining whether local remedies have been exhausted.

<sup>64</sup> *Vicente et al v. Colombia*, Communication No. 612/1995, para. 5.2.

<sup>65</sup> O. Schachter, 'The Obligation to Implement the Covenant in Domestic Law', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) p.331.

<sup>66</sup> *Kudla case*, *supra* note 57, p.235, para.146.



effective remedy. The HRC has decided that failure of a State to provide legal aid interferes with the right to pursue legal remedies in violation of Article 14(3)(d) in conjunction with Article 2(3) of the ICCPR<sup>67</sup>. The point on accessibility shall be further dwelt upon in the following chapters.

Although no particular remedies are mentioned in Article 2(3), there are quite a number of remedies that are envisaged under the ICCPR in case of a violation of any of the rights. In particular, Article 6(4) provides for the right to apply for pardon, amnesty or commutation of a death sentence; the rights to *habeas corpus* and judicial review under Articles 9(3) and (4); the right to a remedy against expulsion under Article 13; the right to an enforceable right of compensation in case anyone has been unlawfully arrested, detained or convicted under Articles 9(5) and 14(6). In addition to these remedies, the HRC has provided a non-exhaustive list of possible remedies which includes reparation<sup>68</sup> - this could involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non- repetition and changes in relevant laws and practices<sup>69</sup>, as well as bringing to justice the perpetrators of human rights violations. The HRC has insisted upon the latter remedy in a number of cases such as *Hugo Rodriguez v. Uruguay*<sup>70</sup> where the respondent State had granted amnesty to alleged torturers without conducting any investigations. The HRC ruled that failure to carry out investigations, prosecute and punish the alleged perpetrators violated the right to an effective remedy<sup>71</sup>. Similarly the European Court has held that “the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification

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<sup>67</sup> *Thomas v. Jamaica*, Communication no. 321/1988, U.N. Doc. CCPR/C/49/D/321/1988 (1993).

<sup>68</sup> *Ibid*, paras. 16, 17 and 18.

<sup>69</sup> This point was underscored in *Stalla Costa v. Uruguay*, Communication no. 198/1985, U.N. Doc. CCPR/C/OP/2 at 221 (1990) in which a reparations law providing preferential treatment to reinstatement for civil servants dismissed by the military government for political reasons constituted an effective remedy against the violation of Article 25 of the ICCPR.

<sup>70</sup> Communication no.322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

<sup>71</sup> See also *Bautista v. Colombia*, Communication no. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995), para. 10.

and punishment of those responsible and including effective access by the complainant to the investigatory procedure”<sup>72</sup>.

It, however, needs to be made clear that success before a national body is not a necessary condition for the remedy to be effective<sup>73</sup>. The requirement is that there is a remedy which could be granted, even if it was not granted in the particular case. The critical inquiry is whether the remedy is capable of scrutinising the substance of the complaint<sup>74</sup>. As such the European Court has considered judicial review an effective remedy especially where a country’s courts can “effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate”<sup>75</sup>.

Most decisions of the HRC seem to indicate that Article 2(3) may be focussed on ‘repressive’ as opposed to ‘preventive remedies’. This was highlighted in *C.F. et al v. Canada* where it was stated “[t]he Covenant provides that a remedy shall be granted whenever a violation of one of the rights guaranteed by it has occurred; consequently, it does not generally prescribe preventive protection, but confines itself to requiring effective redress *ex post facto*”<sup>76</sup>. In some cases, however, such *ex post facto* remedies have been considered ineffective in which case preventive remedies would be the most effective<sup>77</sup>. The HRC has also deemed provisional or interim measures to be necessary in order to avoid continuing violations as a requirement of an effective remedy in some instances<sup>78</sup>. This is more so in cases involving the protection of the right to life.

All in all as to whether or not a particular remedy is effective will depend on the circumstances of each particular case taking into consideration the respective national legal system and the special features of

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<sup>72</sup> *Aydin case*, *supra* note 57, para.103.

<sup>73</sup> *Vilvarajah and others v. the United Kingdom*, 30 October 1991, ECHR no. 45/1990/236/302-306, Reports of Judgments and Decisions 214-220, para.122.

<sup>74</sup> N. Blake and R. Husain, *Immigration, Asylum and Human Rights* (Oxford University Press, New York, 2003) p. 238.

<sup>75</sup> *Vilvarajah case*, *supra* note 73, paras. 123-126.

<sup>76</sup> Communication no. 113/1981, U.N. Doc. CCPR/C/OP/1 at 13 (1980), para. 6.2.

<sup>77</sup> See: *Chief Ominayak and the Lubicon Lake Band v. Canada*, Communication no. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990); and also *Hammel v. Madagascar*, Communication no. 155/1983, U.N. Doc. CCPR/C/OP/2 at 11 (1990).

<sup>78</sup> *General Comment 31*, *supra* note 61, Para.19.

the subjective right concerned<sup>79</sup>. Hence, what may be effective in one case may not necessarily be the effective remedy in another case with regard to a particular right.

Nonetheless, the HRC has insisted that the remedy ought to be effective in fact not just in theory. In its General Comment it has stated that even where its legal system is formally endowed with the appropriate remedy, a State should provide information on the obstacles to the effectiveness of the existing remedies<sup>80</sup>. In its Guidelines on State Reporting, the UN has also lent its voice to that of HRC by calling upon States to “describe the effective remedies that are available to any individual through national tribunals for acts violating the fundamental rights granted by the constitution or by law. In addition, States should indicate what procedural guarantees exist to ensure the rights are respected and enforced by an independent tribunal in a fair hearing”<sup>81</sup>.

This brings us to the last element of an effective remedy embodied in Article 2(3): enforcement. Where a remedy is granted, but not enforced, there shall be a violation of Article 2(3) as was found in *Graciela Baritussio v. Uruguay*<sup>82</sup> in which case, the complainant was kept in prison for years after a release order had been signed. Nowak explains that the type of enforcement will depend on the character of the right violated and the type of remedy afforded<sup>83</sup>. Whereas in some cases direct enforcement, that is, by execution of an enforceable judgement, will be most appropriate, in some cases it may be by rescission of an offending law, by an order, an administrative act or some other action by the responsible organ<sup>84</sup>.

Article 2(3) is supplementary to Article 8 of the UDHR and Article 2(1) of the ICECSR and so its interpretation and application does indeed elaborate on the right to an effective remedy under the latter two instruments, and read all together, one can then clearly come up with what is

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<sup>79</sup> Nowak, *supra* note 41, p.63, para. 62.

<sup>80</sup> General Comment 31, *supra* note 61, Para. 20

<sup>81</sup> United Nations, *Harmonised Guidelines on Reporting Under International Human Rights Treaties Including Guidelines on an Expanded Core Document and Treaty-Specific Targeted Documents: Report of the Secretariat*, HRI/MC/2005/3, 1 June 2005, para.47.

<sup>82</sup> Communication no. 25/1978, U.N. Doc. CCPR/C/OP/1 at 136 (1985).

<sup>83</sup> Nowak, *supra* note 63, p. 64.

<sup>84</sup> *Ibid.*

meant by the right to an effective remedy in international human rights law. In order to get a more complete and fuller picture on what is meant by an effective remedy, it is necessary at this point to have a look at the interpretation of the right under the African regional system since Africa, and Uganda in particular, is the main focus of this study.

## 2.2 The African Charter on Human and Peoples' Rights

Unlike the international bill of rights, the African Charter on Human and Peoples' Rights (ACHPR or 'the Charter')<sup>85</sup> does not contain a specific provision on the right to an effective remedy. Instead the right is derived from Article 7 which provides for the general right of everyone to have his or her cause heard, read together with Article 26 which provides for the duty of States to "guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed in the Charter". The African Commission on Human and Peoples' Rights (hereinafter 'the Commission')<sup>86</sup> has, in order to address this glaring lacuna in the Charter, come up with Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>87</sup>, in which it has clearly laid out the components of a fair trial synonymous with and in fact more elaborate than those under the ICCPR. With regard to the right to an effective remedy, the principles clearly provide for this right to include access to justice, reparation for the harm suffered, and access to the factual information regarding the violation<sup>88</sup>. Under the principles, States are obligated to ensure that any person whose rights have been violated has an

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<sup>85</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. The Charter has since been adopted by the African Union (AU), which reconstituted the Organisation of African Unity (OAU).

<sup>86</sup> Established under Article 30 of the Charter with a mandate to promote and ensure the protection of human and people's rights in Africa.

<sup>87</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, available at

[http://www.achpr.org/english/declarations/Guidelines\\_Trial\\_en.html](http://www.achpr.org/english/declarations/Guidelines_Trial_en.html) visited on 14 November 2007.

<sup>88</sup> *Ibid*, Para. C.

effective remedy by a competent judicial body<sup>89</sup> and that the remedy shall be enforced by competent authorities. Furthermore, in its guidelines on State reporting<sup>90</sup> the Commission has stated that each State party to the Charter is expected to report on “what judicial, administrative or other authorities have jurisdiction affecting human and peoples’ rights” and “on what remedies are available to an individual whose rights are violated”.

Turning to the jurisprudence of the African Commission, for the right to an effective remedy to be fulfilled, three criteria<sup>91</sup> should be met: the remedy must be available, effective and sufficient as stated in *Jawara v. the Gambia*<sup>92</sup>. In this case the complainant, a former Head of the respondent State alleged that the military junta that ousted him had *inter alia* abolished the Bill of Rights under the 1970 Gambia Constitution by Military Decree and also ousted the competence of the courts to examine or question the validity of any such decree. Explaining the three criteria, the Commission stated “a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint”<sup>93</sup>. The Commission on the issue of effectiveness of local remedies decided that:

“...remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant. Therefore in a situation where the jurisdiction of the Courts has been ousted by decrees whose validity cannot be challenged or

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<sup>89</sup> Although emphasis is on judicial body, administrative or legislative authorities are taken cognisance of a competent. See *ibid*, para. C

<sup>90</sup> General Guidelines Regarding the Form and Contents of Reports from States on Civil and Political Rights, Part One (ii, iii and iv) in R. Murray and M. Evans (eds.), *Documents of the African Commission on Human and Peoples’ Rights* (Hart Publishing, Oxford and Portland, Oregon, 2001) p. 51.

<sup>91</sup> The three criteria are not distinct from the other and from the decisions of the Commission, it is quite clear that they do overlap. See also N.J. Udombana, ‘So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights’, Vol. 97:1, *The American Journal of International Law* (2003), p. 21.

<sup>92</sup> African Commission on Human and Peoples’ Rights, Communication Nos. 147/95 and 149/96 (2000) para.31.

<sup>93</sup> *Ibid*, para. 32.

questioned...local remedies are deemed not only to be unavailable, but also non-existent”<sup>94</sup>.

In *Constitutional Rights Project (CRP) v. Nigeria*<sup>95</sup> where a Decree was passed prohibiting courts to issue writs of *habeas corpus*, the Commission decided that there were as such no available remedies in Nigeria for the complainants who had been detained for a long period without charges.

In a position similar to that of the HRC, the Commission has stressed that the lack of legal aid services in Africa precludes the majority of the African population from asserting their human rights<sup>96</sup> in which case this would greatly lead to an infringement on the right to an effective remedy where human rights have been violated as recognised under international law.

As regards the effectiveness of a remedy, the Commission has decided that if the success of a remedy is not sufficiently certain, it will not meet the requirements of availability and effectiveness<sup>97</sup>. This position of the Commission at first instance seems to depart from that of the European Court that ‘success before a national body is not a necessary condition for effectiveness’. However, when one looks at the complaints before the African Commission in which such a position has been held, then the difference between the two positions seems to disappear. For instance, a local remedy has been found to be ineffective where there is no option to the applicant for a formal appeal<sup>98</sup> or even where the court’s jurisdiction as been ousted (as illustrated in the cases above), such that the complainant’s entire pursuit of his right to a remedy seems futile. Hence, while the African

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<sup>94</sup> *Ibid*, para. 34.

<sup>95</sup> *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, African Commission on Human and Peoples’ Rights, Communication no.148/96 (1999).

<sup>96</sup> Conclusions and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples’ Rights in the Internal Legal Systems in Africa, para. 6(c) (26-30 October 1992), in R. Murray and M. Evans (eds.), *supra* note 90, pp. 270 and 272.

<sup>97</sup> *Jawara case supra* note 92, para. 35.

<sup>98</sup> *Amnesty International and others v. Sudan*, African Commission on Human and Peoples’ Rights, Communication no. 48/90, 50/91, 52/91, 89/93 (1999) para.37. It was stated herein that “[a]n effective appeal is one that, subsequent to the hearing by a competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice”.

Commission looks at the element of success from the procedural point of view, the European Court looks at the substantive part of it.

Concerning the sufficiency of a remedy, in *Constitutional Rights Project v. Nigeria*, one of the allegations made was that the Robbery and Firearms Act enacted by the respondent State made it impossible for the complainants to pursue an effective remedy. According to the Act, special tribunals were set up and the ordinary courts could not handle any appeals arising from decisions of the tribunal. Instead, the power to confirm or disallow a conviction of the Special tribunal lay with the Governor of a state. In its finding that such a remedy was insufficient, the Commission said, “[t]he object of the remedy (provided under the Act) is to obtain a favour and not to vindicate a right. It would be improper to insist on the complainants’ seeking remedies from sources which do not operate impartially and have no obligation to decide according to the legal principles. The remedy is neither adequate nor effective”<sup>99</sup>.

Having looked at some of the jurisprudence of the Commission, one can rightly say that it re-affirms in many ways the position under the International Bill of rights on what amounts to an effective remedy. It clearly shows the link between the right to an effective remedy as provided for under the various Articles in the International Bill of Rights and the right to a fair trial. Indeed, it is the jurisprudence of the Commission that has filled in this gap in the Charter, which as mentioned above, lacks a specific provision on the right to an effective remedy.

One quite remarkable feature of the ACHPR, which is missing from the jurisprudence of the other bodies<sup>100</sup> owing to their circumscribed mandate and which could have been the stance under the UDHR, had it been legally binding with a monitoring body, is that the African Commission handles all rights in a holistic manner, treating them as indivisible, interdependent and interrelated<sup>101</sup>, as indeed they should be. In its decision

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<sup>99</sup> African Commission on Human and Peoples’ Rights, Communication no. 87/93 (1995), para.8.

<sup>100</sup> The HRC can be said to have looked at some cases on Economic, Social and Cultural Rights but not the substance of the rights, rather with regards to Article 26 of the ICCPR on equality of all persons before the law and the right to equal protection of the law.

<sup>101</sup> *Vienna Declaration*, *supra* note 1, Article 5.

in *Social and Economic Rights Action Center v. Nigeria*, the Commission asserted “...collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa...and there is no right in the African Charter that cannot be made effective”<sup>102</sup>. This decision reaffirms both the justiciability of economic, social and cultural rights on the same standing as civil and political rights as well as the principle *ubi jus, ibi remedium*.

## 2.3 Chapter Conclusion

The international law on the right to an effective remedy can well be deduced from the international bill of rights, general comments of treaty-monitoring bodies<sup>103</sup> and the jurisprudence of both international and regional bodies.

Having explored the meaning of the right, one can conclude that the right contains both a procedural and a substantive aspect. The procedural is that which encompasses the availability and accessibility of an effective remedy hence, establishing the link with the right to fair trial or hearing provided for under Articles 10 of the UDHR, 14 of the ICCPR and 7 and 26 of the ACHPR. The remedy will be deemed available if there is in place competent, independent and impartial judicial, administrative or other tribunals or bodies established by law to which one can seek redress for a human rights violation, they will be accessible, for instance, if their availability is not hindered by the acts or omissions of the State such as enactment of laws that oust the courts’ jurisdiction or any other such instances or where, in the case of indigent persons, there is no provision of legal aid services.

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<sup>102</sup> African Commission on Human and Peoples’ Rights, Communication no. 155/96 (2001), para. 68.

<sup>103</sup> Though not the focus of this work, major international treaties that provide the right to a remedy include the International Convention on the Elimination of all Forms of Racial Discrimination (Article 6), The Convention on the Elimination of all Forms of Discrimination against Women (Article 2(c)) and the Convention against Torture (Article 14) to mention but a few.



The substantive aspect of the right refers to the outcome of the proceedings<sup>104</sup>; the nature of the remedy obtained as well as enforcement of implementation of the remedy. The list of remedies that could be obtained is non-exhaustive and would depend on the nature of the right violated and the specific circumstances of each case. It should be noted, however, that even the remedy obtained could be a procedural guarantee such as *habeas corpus* applications, judicial review or an appeal, or it could be a substantive remedy such as an order for reparation, compensation *etc.* The remedy has got to be effective in the sense that it sufficiently redresses the violation that has occurred and as such it must be enforced.

It is at this point necessary to consider whether or not there are any limitations to the right an effective remedy. The HRC has recognised that a State cannot make reservations to Article 2(3) of the ICCPR as this would nullify the human rights guarantees of the Covenant<sup>105</sup>. Even in cases of emergency, the right to an effective remedy has been recognised as a treaty obligation inherent in the covenant as a whole and as such the State shall still be required to comply with this fundamental obligation<sup>106</sup>.

Finally, important to note is that the right to an effective remedy applies primarily at the domestic level as opposed to international or regional level. This is clear from the fact that the right to an effective remedy under both the ICCPR and the ICESCR appears under the part on States parties' obligations and not under the part on the substantive rights. It is the obligation of each State to ensure that all persons in its territory enjoy the right to an effective remedy. As such, a violation of the right to an effective remedy can only be claimed after a violation of another right has occurred and no effective remedy is forthcoming within the complainant's State. This was very clearly explained by the European Court in *Klass and Others v. Germany* where it said:

“...a person cannot establish a “violation” before a national authority unless he is first able to lodge with

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<sup>104</sup> D. Shelton, *supra* note 58, p.7.

<sup>105</sup> HRC, *General Comment No. 24*, *supra* note 55, para. 11.

<sup>106</sup> HRC, *General Comment No. 29: States of Emergency (Article 4)*, 31/08/2001. CCPR/C/21/Rev.1/Add.11, para. 14.

such an authority a complaint to that effect.... In the Court's view, Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order to have both his claim decided and, if appropriate, to obtain redress"<sup>107</sup>.

Having examined the meaning of the right to an effective remedy in international human rights law, we shall now look at its application and how it is catered for under international refugee law.

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<sup>107</sup> Judgment of 6 September 1978, Series A no. 28, Reports of Judgments and Decisions 25-29, para. 64.

### 3 Protection of Refugees’ Rights Under International Refugee Law

In the previous chapters we have seen that the responsibility, or rather, the obligation to ensure that all individuals enjoy the rights and freedoms guaranteed under the various human rights instruments lies primarily on the State. Refugees, owing to their particular circumstances, need protection from States other than their own. It is, however not automatic that a refugee will be granted protection by another State, despite the concept of asylum being referred to as a humanitarian act. It is to fill in this protection void that international refugee law comes into play to ensure that a State does indeed accord a refugee the required protection. As it was once most aptly put, “[i]nternational refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only when that protection is unavailable, and then in only certain situations”<sup>108</sup>. In this chapter we shall examine whether refugee law accords any effective legal remedies to refugees since in most cases they are victims of human rights violations and even in countries where they may obtain asylum, violations may still continue. We shall focus particularly on the Statute of the United Nations High Commissioner for Refugees, the Convention Relating to the Status of Refugees and its additional Protocol, and also the refugee protection regime under the African regional system. The conclusion shall be an analysis on the adequacy of the protection provisions and mechanisms with regard to a right to an effective remedy under refugee law.

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<sup>108</sup> *Canada v. Ward* (1993) 2 S.C.R. 689 available at <http://scc.lexum.umontreal.ca/en/1993/1993rcs2-689/1993rcs2-689.html> visited on 16 October 2007.

### 3.1 Refugee Protection Vis-à-vis Legal Protection

A refugee, fleeing persecution from his or her country as defined under international law, or civil war or armed conflict, as recognised under the African refugee protection regime, becomes “an object of international concern under refugee law<sup>109</sup>, where the circumstances are such that he or she has lost or been deprived of protection under law in his or her country of origin, and is in need of another source of protection”<sup>110</sup>. Owing to the principle of State sovereignty, it does not automatically follow that a refugee will obtain protection of another State. In fact international law generally does not explicitly recognise the right to obtain asylum<sup>111</sup>, but it recognises the principle of *non-refoulement*, which shall be expounded upon shortly. There is thus a gap from when a refugee flees his or her country to when he or she is formally accepted or granted asylum in another State. In order to fill in this gap, the international community created the Office of the United Nations High Commissioner for Refugees (UNHCR) with a specific mandate to “provide international protection to refugees and to seek permanent solutions to the problem of refugees by assisting, primarily, Governments to facilitate the voluntary repatriation of refugees, or their assimilation in new national communities”<sup>112</sup>.

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<sup>109</sup> Although international refugee law does not recognise persons fleeing armed conflicts as refugees, these have come to be included within the UNHCR’s protection mandate under the category of ‘persons of concern’ as persons who are unable to return to their country of origin owing to serious and indiscriminate threats to life, physical integrity of freedom resulting from generalised violence or events seriously disturbing public order. See UNHCR, *UNHCR and International Protection: A Protection Induction Programme* (UNHCR, Geneva, 2006) p. 22.

<sup>110</sup> A.C. Helton, ‘What is Refugee Protection? A Question Revisited’ in M. Steiner, M. Gibney and G. Loescher (eds.), *Problems of Protection: The UNHCR, Refugees and Human Rights* (Routledge, New York and London, 2003) p.20.

<sup>111</sup> The UDHR in Article 14 provides for the right to seek and enjoy asylum, however neither the ICCPR nor the Convention relating to the Status of Refugees recognise the right to asylum, more so the right to enjoy asylum.

<sup>112</sup> UN, *Statute of the Office of the United Nations High Commissioner for Refugees*, U.N. General Assembly Resolution 428(V) of 14 December 1950, Article 1.

Having defined the term ‘refugee’<sup>113</sup>, whom it includes and whom it excludes, the Statute of the UNHCR in Article 8 lays down the elements of the nature of the protection that the UNHCR shall accord to refugees. These are: a) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; b) promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees, and to reduce the number requiring protection; c) assisting governmental and private efforts to promote voluntary repatriation or assimilation within new communities; d) promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States; e) endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement; f) obtaining from Governments information concerning the number and conditions of refugees on their territories, and the laws and regulations concerning them; g) keeping in close touch with Governments and inter-governmental organizations concerned; h) establishing contact in such manner as he may think best with private organizations dealing with refugees questions; i) facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

The above-stated protection functions of the UNHCR do not, however, seem to come strictly within the ambit of legal protection, which as explained by Helton“ must be associated with entitlements under law and, for effective redress of grievances, mechanisms to vindicate claims in respect of those entitlements”<sup>114</sup>. Thus, legal protection is in fact synonymous with the right to an effective remedy.

It is thus apparent that refugee law accords another kind of protection, which we shall now closely examine. A refugee, as previously defined is a person in flight away from his or her country of origin or nationality (that is no longer able to provide the necessary protection,

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<sup>113</sup> The Statute defines a refugee in almost similar terms as the Convention relating to the Status of Refugees, but it goes further than the five conventional criteria to include ‘reasons other than personal inconvenience’ which may make one unable or unwilling to avail oneself of the protection of one’s country.

<sup>114</sup> A.C. Helton, *supra* note 110.

including legal protection) and is in search of a safe haven, away from that persecution or any other life-threatening situation that may have caused him or her to flee and it is protection from this that refugee law provides through the principle of *non-refoulement*. This principle is enshrined in Article 33 of the Convention relating to the Status of Refugees, paragraph 1 of which provides that a Contracting State shall not “expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. This principle is the cornerstone of refugee protection, and refugee law for that matter, and it has been endorsed as ‘generally accepted by States’<sup>115</sup> and also said to be ‘acquiring the character of a peremptory rule of international law’<sup>116</sup>. The principle of *non-refoulement* has arguably acquired the status of customary international law<sup>117</sup>.

Helton enumerates some aspects of refugee protection, in practical terms, as including: fair and non-discriminatory status determination in a country of protection, provision of protection and respect for the fundamental individual rights for refugees, especially those held in camps following flight from persecution, and respect for the principle of *non-refoulement*<sup>118</sup>. He sums it all up by saying that, “in a fundamental sense, protection means to ensure the enjoyment of basic human rights and to meet primary humanitarian needs. Granting asylum is a very effective way to protect a refugee in flight...”<sup>119</sup>. It is this protection that the UNHCR, in carrying out its protection mandate, tries to ensure in its day-to-day dealings with States by, *inter alia*, responding to emergencies, relocating refugee camps away from border areas to improve safety, re-uniting separated families, providing information to refugees on conditions in their home

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<sup>115</sup> UNHCR, *Executive Committee Conclusion No. 6 (XXVIII)* (1977) at <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html> visited on 16 October 2007 .

<sup>116</sup> UNHCR, *Report of the 33rd Session*, UN Doc. A/AC.96/614, para. 70.

<sup>117</sup> See UNHCR, *Advisory Opinion on the Extra-Territorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 15. UNHCR RefWorld, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4> visited on 21 November 2007.

<sup>118</sup> A.C. Helton, *supra* note 110, p.23.

<sup>119</sup> *Ibid.*

country so they can make informed decisions about return, documenting a refugee's need for re-settlement to a second country of asylum, visiting detention centres, and giving advice to Governments on draft refugee laws, policies and practices<sup>120</sup>. These functions, however, need to be carried out with the consent of the host State and as such UNHCR will employ diplomatic means such as negotiations or the use of good offices in order to effectively fulfil its mandate.

Protection obtained from the asylum country that is considered safe for a refugee where he or she can once again enjoy his or her basic human rights, is the remedy or solution that refugee law has to offer with regards to addressing the refugee problem. Hathaway does, indeed, explain refugee law as a “remedial or palliative branch of human rights law”<sup>121</sup> and more specifically refers to it as a “situation-specific human rights remedy”<sup>122</sup>. However, in view of what legal protection or a human rights remedy should entail, as previously discussed, refugee protection does not amount to legal protection hence, applying the word ‘remedy’ to it would be using the term in its broadest sense. It is more of a solution to a problem rather than the remedy to it, especially when one considers that refugee protection was conceived as temporary protection. If the aim of refugee law were to redress the violations that occasion flight from one's home and this was in fact reflected in international law, then one would argue that it does accord legal protection. Thus, for as long as no redress is provided under refugee law in terms of attempting to ensure effective remedies for refugees, then refugee law only provides the second best alternative by ensuring that States respect the principle of *non-refoulement*.

Having seen that protection of refugees from *refoulement* is the primary mandate of the UNHCR, with the asylum State bearing the rest of the responsibilities, specifically having its human rights obligations extended to cover refugees, it is pertinent to look at whether, in such circumstances, the right to an effective remedy as clearly laid down under

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<sup>120</sup> UNHCR, *Refugee Protection: A Guide to International Refugee Law, Handbook for Parliamentarians*, No.2 (UNHCR, Geneva, 2001) p.21.

<sup>121</sup> J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) p. 5.

<sup>122</sup> *Ibid*, p. 998.

human rights law, is provided for. In this regard, we shall look mainly at the Convention relating to the Status of Refugees as the main law in this area.

### **3.2 The Right to an Effective Remedy Under the Convention Relating to the Status of Refugees**

The Convention relating to the Status of Refugees (hereinafter referred to as ‘the Convention’ or the CSR)<sup>123</sup>, besides providing the definition of a refugee in international law, also provides for the treatment of refugees in countries of asylum. It has been referred to as a “statement of the minimum rights of refugees”<sup>124</sup>. It provides for a myriad of rights, civil, political, economic and social, that a State should ensure to refugees. However, unlike under the International Bill of rights, the Convention does not contain an express provision on the right to an effective remedy in case any of the rights provided therein are violated. Hence, there is no express obligation on States to ensure the right to an effective remedy under the CSR. Nonetheless, the Convention in Article 16 (1) provides: “[a] refugee shall have free access to the Courts of law on the territory of all Contracting States”.

Much as the provision seems to be stated in absolute terms, the Convention, unfortunately does not give any details on how this access to courts can be ensured in practical terms. Nonetheless, applying the interpretation of ‘access’ under the right to an effective remedy, it could mean that a refugee’s access to a court of law must not be hindered by acts or omissions of the State, or by the enactment of laws that oust the jurisdiction of courts with regard to refugees’ rights hence, making the effective remedy unavailable and therefore inaccessible. It also means that the State should go a step further and provide legal aid services to

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<sup>123</sup> *Supra* note 2.

<sup>124</sup> G.S. Goodwin-Gill, *The Refugee in International Law*, 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 1996) p.296. Also in accordance with Article 5 of the CSR, a State may grant more rights or benefits than those provided for in the CSR.



refugees<sup>125</sup>, since most of them, especially those in refugee camps, cannot afford legal services, in case they need to access the courts. The need to provide legal assistance to refugees was reiterated by the Secretary-General when he asserted that the refusal by States to grant refugees the benefit of legal assistance makes the refugee's right to sue and be sued illusory<sup>126</sup>.

By interpreting Article 16(1) of the CSR in terms of the criteria of the right to an effective remedy under international law, it follows that the CSR does in a way provide for the right to an effective remedy, though to a much less extent than that envisaged under international human rights law. The Convention presumes the availability of courts and their competence to handle refugee-related matters and as such, as Hathaway argues, where the court lacks subject matter jurisdiction to entertain claims of the kind being advanced by refugees, Article 16(1) does not afford refugees a remedy<sup>127</sup>. Furthermore, the Convention, though acknowledging the special circumstances of refugees, does not state how the access to courts shall be ensured in practice. Hathaway explains: "to the extent that the State is willing, UNHCR may... provide direct assistance to refugees to enforce their rights in the asylum country"<sup>128</sup>. In fact in some cases the UNHCR has intervened to secure the release of illegally detained asylum-seekers and also visited detention centres to monitor treatment and recommend improvements<sup>129</sup>. However, it cannot be said to provide legal aid services, but it uses its good offices to ensure that the State fulfils its obligations towards refugees.

The Convention also fails to adequately address the requirement of a fair hearing by a competent authority in Article 16. However, in Article 32, which deals with the expulsion of a refugee on grounds of national security or public order, it is provided that such an expulsion decision shall be

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<sup>125</sup> The provision of legal aid, however, seems to be mandatory under Article 16 (2) for refugees with habitual residence in the Contracting State only to the extent granted to citizens of that State.

<sup>126</sup> Secretary-General, 'Memorandum' at 30 in J.C. Hathaway, *supra* note 121, p.906.

<sup>127</sup> J.C. Hathaway, *ibid*, p. 647.

<sup>128</sup> *Ibid*, p.992-993.

<sup>129</sup> United Nations, *Note on International Protection: Report of the High Commissioner* (A/AC.96/1038, 29 June 2007) para. 15.

<http://www.unhcr.org/doclist/excom/3b54444912.html> visited on 15 October 2007.

reached in accordance with due process of law and that “except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authorities”<sup>130</sup>. This provision, which is similar to Article 13 of the ICCPR, is the only one in the Convention that links the right of a refugee, in this case, the right not to be arbitrarily expelled, to the fair hearing guarantees that are part and parcel of the right to an effective remedy. As regards, other rights, which do not fall within the ambit of Article 32, in case of redress, a refugee has to resort to the general provisions of Article 16, and this will depend on the legal and judicial regime in each individual State. As Hathaway aptly explains: “under the decentralised implementation structure envisaged by the CSR, it is Governments themselves which ultimately remain responsible to ensure that refugees are treated as the Convention requires”<sup>131</sup>.

The protection of the right to an effective remedy under refugee law does not seem to be as compelling as under the international Bill of Rights and as such, a State’s obligation to ensure the observance and respect of this right will depend on whether the State has ratified the other binding human rights instruments that adequately provide for the right to an effective remedy.

### **3.3 Refugee Protection Under the African System**

The African refugee protection system has its legal basis in the OAU Convention on the Specific Aspects of Refugees in Africa (hereinafter the ‘OAU Convention’)<sup>132</sup>. This instrument is only complementary to the CSR and only seeks to address specific refugee problems in Africa<sup>133</sup>.

The OAU Convention re-affirms the principle of *non-refoulement* in even greater detail than the CSR. It specifically prohibits rejection at the

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<sup>130</sup> CSR, Article 32(2).

<sup>131</sup> J.C. Hathaway, *supra* note 121, p. 993.

<sup>132</sup> *Supra* note 3.

<sup>133</sup> *Ibid.* Preamble, para. 9 and also Article VIII (2).

frontier and also explicitly provides for the grant of temporary asylum where a refugee is denied refugee status<sup>134</sup>. This provision coupled with Article 12 (3) of the ACHPR, which explicitly provides for the right to seek and obtain asylum in other countries, offers very strong protection for refugees.

Despite the strong protection from *refoulement*, the OAU Convention does not enumerate the rights that refugees enjoy as contained in the CSR. It only emphasises non-discrimination<sup>135</sup>, voluntary repatriation<sup>136</sup> and the issue of travel documents<sup>137</sup>. It does not impose an obligation on States to ensure the right to an effective remedy to refugees nor does it in the least provide for the right to access to courts as in the CSR. Since the OAU Convention is only complementary to the CSR and actually recognizes it as the basic and universal instrument relating to the status of refugees, the rights stipulated in the latter instrument do apply in the former.

Furthermore, in contrast to the international refugee protection regime, the African system lacks a general supervisory or monitoring body akin to the UNHCR making the OAU Convention and its strong provisions on refugee protection into, more or less, a paper tiger. In order to address this glaring gap, the UNHCR together with the African Commission on Human and Peoples' Rights came up with a Comprehensive Implementation Plan (CIP)<sup>138</sup>, which included proposals to strengthen refugee protection in Africa. This CIP was later endorsed by both the OAU Council of Ministers<sup>139</sup> and the OAU Assembly of Heads of States and Governments<sup>140</sup>, which directed that the UNHCR conclude an agreement with the African Commission with one of the aims being strengthening the African Commission's monitoring capacity and programme of work with respect to human rights of refugees and asylum-seekers. Pursuant to the

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<sup>134</sup> *Ibid.* Article II (2) and (3).

<sup>135</sup> *Ibid.* Article IV.

<sup>136</sup> *Ibid.* Article V.

<sup>137</sup> *Ibid.* Article VI.

<sup>138</sup> Adopted by the Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the Occasion of the 30<sup>th</sup> Anniversary of the OAU Convention in Conakry, Guinea on 29 March 2000.

<sup>139</sup> Endorsed by the 72nd session of the OAU Council of Ministers Meeting in Lome, Togo,

<sup>140</sup> 37th Session of the OAU Assembly of Heads of States and Governments in Lusaka, Zambia, July 2001.

ensuing Memorandum between the African Commission and the UNHCR, the African Commission established the position of the Special Rapporteur on refugees, asylum-seekers and Internally Displaced Persons (IDPs) in Africa.

The Special Rapporteur's mandate<sup>141</sup>, with regard to refugees, involves: a) to seek, receive, examine and act upon information on the situation of refugees; b) to undertake studies and research to examine appropriate ways to enhance protection of refugees; c) to undertake fact-finding missions, investigations and visits to refugee camps; d) to assist Member States of the AU to develop appropriate policies, regulations and laws for the effective protection of refugees; e) to co-operate and engage in dialogue with Member States and other stakeholders; f) to develop and recommend strategies to better protect the rights of refugees; g) to raise awareness and promote implementation of refugee law instruments; h) to submit reports to the African Commission on the situation of refugees in Africa. This mandate is even much narrower than that of the UNHCR since it caters more for promotional and supervisory activities rather than protection activities. In fact from the reports of the Special Rapporteur to the African Commission, most of his activities involve attending conferences and writing to respective Governments to comply with their international obligations<sup>142</sup>. The African Commission will in turn make a report to the African Union (AU) Heads of States and Governments<sup>143</sup>. The wide mandate of the Special Rapporteur that covers refugees, asylum seekers and IDPs in Africa seems to be too onerous a task for one person to handle considering the great extent of the problem in Africa and that the Rapporteur in his capacity as a Commissioner also has other duties to handle. This burdensome work is aggravated by the fact that no additional resources

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<sup>141</sup> African Commission on Human and Peoples' Rights, *Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa*, 36<sup>th</sup> Session held from 23 November – 7 December 2004, Dakar, Senegal. Available at [http://www.achpr.org/english/info/rdp\\_res\\_1.html](http://www.achpr.org/english/info/rdp_res_1.html) visited on 16 October 2007.

<sup>142</sup> See Reports of the Special Rapporteur on Refugees, Asylum Seekers and IDPs to the African Commission on Human and Peoples' Rights, 40th and 41st Sessions of the African Commission, available at [http://www.achpr.org/english/info/rdp\\_intersess.html](http://www.achpr.org/english/info/rdp_intersess.html) visited on 16 October 2007.

<sup>143</sup> ACHPR, *supra* note 85, Articles 53 and 54.

appear to have been allocated to the Commission for the additional task of monitoring the OAU Convention<sup>144</sup>.

The African Commission, has nonetheless, received complaints filed on behalf of refugees seeking to vindicate their rights<sup>145</sup>. In the case of *RADDHO v. Zambia*, the Commission reaffirmed that the ACHPR “imposes an obligation on the Contracting State to secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals”<sup>146</sup>. In this case it found a violation of ACHPR, Article 2 (non-discrimination), Article 7 (1) (a) (right to have one’s cause heard) and Article 12 (5) (prohibition of mass expulsions). The African Commission, however, only urges States to remedy the violations that have been occasioned, thus authenticating the human rights norm that States are primarily responsible for implementing the right to an effective remedy.

### 3.4 Chapter Conclusion

From our examination of protection accorded to refugees under international refugee law, it is inferable that the main aim of international refugee law is to ensure that persons fleeing persecution for any of the grounds specified in the respective instruments do obtain temporary protection. Refugee law as such does not in any way attempt to provide for legal redress for refugees, and tends to ignore the fact that these people are, undoubtedly a product of

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<sup>144</sup> R. Murray, ‘Refugees and Internally Displaced Persons and Human Rights: The African System’, Vol. 24, Issue 2, *Refugee Survey Quarterly*, (2005), p. 62.

<sup>145</sup> *Organisation Mondiale Contre la Torture v. Rwanda*, African Commission on Human and Peoples’ Rights, Communication Nos. 27/89, 46/91, 49/91, 99/93 (1996) in which a violation was found of Articles 4 (right to life and integrity of the person), 5 (Freedom from torture, cruel, inhuman, degrading punishment or treatment), 6(Right to liberty and security of the person), 7 (right to have one’s cause heard), and 12 (3,4 and 5) (right to asylum and prohibition of arbitrary and mass expulsions). In *Union Inter Africaine des Droits de l’Homme and others v. Angola*, African Commission on Human and Peoples’ Rights, Communication No. 159/96 (1997), there was found a violation of Articles 2, 7, 12 (4 and 5), 14 (right to property) and 18 (right to work). However there are some cases that have been rendered inadmissible mainly due to the non-exhaustion of local remedies. *See, for example, Institute for Human Rights and Development (on behalf of Jean Simbarakiye) v. Democratic Republic of Congo*, African Commission on Human and Peoples’ Rights, Communication No. 247/2002 (2003), and also *Mouvement des Réfugiés Mauritanien in Senegal v. Senegal*, African Commission on Human and Peoples’ Rights, Communications No. 162/97 (1997) and No. 254/2002 (2003).

<sup>146</sup> *Recontre Africaine pour la Defense des Droits De l’Homme (RADDHO) v. Zambia*, African Commission on Human and Peoples’ Rights, Communication No. 71/92 (1996) para. 22.

human rights violations, some of which could amount to gross or serious violations of both international human rights and humanitarian law. This could be a manifestation of a lack of will on the part of States to act as each other's human rights monitor, otherwise they would have sought to ensure that the refugee-producing State stopped the violations that occasioned flight of its nationals to seek protection elsewhere. This failing, refugee law provides the next best alternative or solution by imposing an obligation on States, not of guaranteeing asylum (except under the African system), but rather the obligation of *non-refoulement* to ensure that the refugee is safe and that he or she can once again enjoy his or her most basic human rights.

With regard to ensuring legal protection for refugees in the asylum State, refugee law, unlike international human rights law, does not provide for the right to an effective remedy, but only obliges States to provide refugees with free access to courts and nothing further. As we saw previously, access to courts is only but one aspect of the right to an effective remedy and as such refugee law does not look into the availability, effectiveness and enforcement of the remedies. Of course, the State is expected to fulfil its obligations in good faith, but where it fails to do so, refugee law does not provide any enforcement mechanism. Although the UNHCR is supposed to supervise the application of the Convention, it will only urge States to comply with their obligations and nothing more. Hathaway suggests that the UNHCR should be empowered, just like the pre- Second World War supervisory body before it, to undertake quasi-consular representation on behalf of refugees, which would greatly assist in vindicating their rights, but then this proposal was not tabled with States much preferring that they assume the basic responsibility to facilitate the exercise of rights by refugees<sup>147</sup>. Therefore, in order to ensure effective protection and enjoyment of the right, recourse would have to be made to the other international human rights instruments, such as the international Bill of Rights and the monitoring mechanisms there under depending on whether the respective State has ratified the relevant instruments.

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<sup>147</sup> J.C. Hathaway, *supra* note 121, p. 633-634.

Although the African system provides rather strong protection for refugees in terms of law, the practical protection and implementation of the refugee protection provisions is not as strong. More shall be said about this in chapter five of this thesis.

In a nutshell, refugee law does not adequately cater for the right to an effective remedy. It leaves the implementation of the right solely in the domain of each State and the mandate of its oversight mechanism, the UNHCR, is such as not to compel States to ensure this right as say would the Committees under the ICCPR and the ICESCR. This being the position, we shall now take a look at the how a refugee's right to an effective remedy is implemented in the domestic arena, and whether the State does comply with its obligations in good faith as expected under international law.

## 4 Implementation of the Right to an Effective Remedy in a Domestic Setting: A Case Study of Uganda

The effective implementation of the right to an effective remedy in municipal law could depend on whether or not a particular State has ratified the relevant international instruments. Uganda has ratified most of the international human rights instruments, of particular importance; it has ratified the two international Covenants and the relevant international and regional instruments relating to refugees<sup>148</sup>. Uganda operates as a dualist State and so all international instruments that it has ratified would have to be domesticated as law before they can apply. Uganda boasts of its open-door policy and hospitality towards refugees. Currently the estimated number of refugees in the country is 216,731, with the largest percentage being refugees from Sudan followed by Congo, Rwanda, Burundi, Somalia, Ethiopia and others<sup>149</sup>. In this chapter we shall look briefly at the situation of refugees in Uganda with particular focus on those in settlements and then proceed to examine how Uganda fulfils its obligation to ensure the right to an effective remedy towards refugees in terms of availability, accessibility, the actual remedies that can be obtained and the enforcement of such remedies. Considering that refugee protection or the grant of asylum is a special remedy for refugees under international refugee law, we shall also briefly look at the refugee protection or status determination procedures and how effective these are.

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<sup>148</sup> Uganda acceded to following instruments on the following dates: the ICESCR on 21 January 1987, the ICCPR on 21 June 1995, the CSR and its 1967 Protocol on 27 September 1976, the ACHPR on 10 May 1986 and the OAU Convention on 27 July 1987.

<sup>149</sup> M. Mubangizi, 'Refugees Sharpen Photo Taking Skills', *The Weekly Observer*, 28 June 2007. Depending on the source, the numbers vary but this could be explained by the fluctuations, as refugees keep moving in and out of the country. Some voluntarily return, while others return to their countries then come back and yet others are fresh arrivals.



## 4.1 The Protection and Treatment of Refugees in Uganda

### 4.1.1 Legal Regime Governing Refugees

Under the Constitution of Uganda (hereinafter referred to as ‘the Constitution’), there is no specific mention of refugees, be it in the National Objectives and Directive Principles of State Policy (hereinafter referred to ‘National Objectives’) nor the substantive part of the Constitution. However, in chapter four of the Constitution, which deals with the protection and promotion of fundamental and other human rights and freedoms, Article 21(1) provides for the equality of all persons before the law and for the equal protection of the law. Paragraph 2 goes further to stress that no person shall be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability. The Article therefore extends to refugees who are entitled to all the rights provided for in the Constitution.

For a long time, the law on refugees in Uganda was the Control of Alien Refugees Act (CARA)<sup>150</sup> enacted in 1960 by the colonial Government. This Act did not reflect the international standards on the protection and treatment of refugees as enshrined in the CSR; its main aim was to control the large numbers of foreigners who, it was feared, could threaten the stability and development of Uganda<sup>151</sup>. The CARA also failed to define who a refugee was, and as such the law was very difficult to enforce; it was very much considered “retrogressive and archaic and not in accordance with international law and practice”<sup>152</sup>. Nonetheless, it remained the applicable law until recently in May 2006 when a new Refugees Act<sup>153</sup> was passed by Parliament. In comparison to the CARA, this law is very

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<sup>150</sup> Cap. 62, Laws of Uganda.

<sup>151</sup> UHRC, *Annual Report 2000-2001* (UHRC, Kampala, 2001), p.43.

<sup>152</sup> Interview by the Deputy Director of the Directorate of Refugees, ‘Refugees are Still Human Beings Entitled to Human Rights’ in UHRC Monthly Magazine, *Your Rights: The Exodus, The Rights of People Fleeing Conflict and Persecution*, Vol. III, No. 1 (UHRC, Kampala, January 2000), p.11.

<sup>153</sup> *The Refugees Act, 2006*, Laws of Uganda Act No. 21 of 2006.

much in accordance with international norms relating to refugees as well as the Constitution, and rather than imposing new practices, it codifies what the practice has been, which the respective government departments adopted in order to fill in the gaps in the CARA. Relevant provisions of this new law shall be looked at in the ensuing sections.

#### **4.1.2 Refugee Protection and Status Determination**

Section 3(2) of the Refugees Act clearly stipulates that the Government of Uganda has the sovereign right to grant or deny asylum or refugee status to any person, which reinstates the principle of State sovereignty. Refugee status determination (RSD) in Uganda is by two ways: the *prima facie* determination, where there is a mass influx of asylum seekers in Uganda and the Minister in charge of refugees may declare them as refugees and issue an order permitting them to reside in Uganda without requiring their individual status to be determined<sup>154</sup>. The other way is by individual status determination.

The Refugees Act entrusts refugee affairs including protection, provision of welfare services, maintenance of law and order in refugee settlements, advising government of its obligations relating to refugees, etc, to the Office of Refugees,<sup>155</sup> which is under the Office of the Prime Minister. Under the Office of Refugees, is the Refugee Eligibility Committee (REC), which is responsible for the consideration of applications for refugee status, reviewing or revising cases dealt with by it, recommending expulsion or extradition, cessation of refugee status, just to mention a few. In short, it is the REC with the ultimate power to grant or deny refugee status. The REC is composed of nine members, six of whom are from Government Ministries or departments and three of whom are from the security and intelligence organs. The UNHCR representative is an *ex officio* member who attends meetings in an advisory capacity. This

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<sup>154</sup> *Ibid*, Section 25(1-3).

<sup>155</sup> *Ibid*, Sections 7 and 8.

composition of the REC has been criticised as purely political in which case it could enhance possibilities of arbitrary decisions of denial of asylum<sup>156</sup>.

Upon entering Uganda, a refugee is required to make a written application to the REC within thirty days and the REC has ninety days within which to make its decision. In practice, however, a refugee is required to do more than write an application: he or she has to go through a series of interviews and interrogations with the UNHCR and the Special Branch of the police, before his or her application can be determined. The REC may approve or deny the application and in the case of the latter, one may make an appeal to the Refugee Appeals Board (RAB)<sup>157</sup>. The powers of the Board are, however, limited to confirming or setting aside the decisions of the REC, or order a re-hearing, or dismiss the appeal. In any case, the RAB cannot make a decision granting refugee status<sup>158</sup>, which makes it more of a review than an appeal mechanism, and its decision is final<sup>159</sup> hence, it cannot be appealed against in an ordinary court of law. This provision, depending on how independent and impartial the RAB is, could come into conflict with the right to an effective remedy as seen from the *Amnesty International and Others v. Sudan* case<sup>160</sup>. It also seems to contravene Article 42 of the Constitution, which provides that any person appearing before an administrative tribunal or body shall have the right to apply to a court of law in respect to any administrative decision taken against him or her. Furthermore, during the hearing of the application and at the appeal the refugee is entitled to legal representation, but this is at his or her cost<sup>161</sup> and considering that most of the refugees cannot afford costs of hiring a lawyer, then failure by the State to provide legal aid services could infringe on one's right to have an effective remedy<sup>162</sup>.

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<sup>156</sup> Refugee Law Project (RLP), *Critique of the Refugees Act (2006)* available at <http://www.refugeelawproject.org/resources/legalres/> visited on 19 October 2007.

<sup>157</sup> Established under Section 16 of the *Refugees Act* and it is composed of five members appointed from among persons with knowledge or experience in refugee law or matters relating to immigration, foreign affairs, national security, local administration, human rights and refugees generally.

<sup>158</sup> *Refugees Act*, Section 17.

<sup>159</sup> *Ibid*, Section 21 (4).

<sup>160</sup> *Supra* note 98.

<sup>161</sup> *Refugees Act*, Sections 21(3) and 24(3).

<sup>162</sup> *Thomas v. Jamaica*, *supra* note 67.

Where an application is rejected, the refugee is given another ninety days to enable him or her to seek asylum elsewhere and at the expiration of this period, the refugee shall be expelled or deported. The refugee may however, apply to the Minister to extend this period<sup>163</sup>.

Where the application is accepted, the refugee is either sent to a refugee settlement<sup>164</sup> of his or her own choice or one may opt to live in a city, in which case he or she would have to look after themselves without assistance from either Government or UNHCR. The living conditions in each settlement will vary one to the other.

### **4.1.3 Economic, Social and Cultural Rights in Refugee Settlements**

The Refugees Act lays out a number of economic, social and cultural rights that recognised refugees are entitled to and these include the right to education, right to engage in agriculture, industry, commerce, etc, the right to practice one's profession, the right to have access to employment opportunities and engage in gainful employment, the right of association as regards non-political associations, including trade unions, and protection of intellectual property rights. Some of these rights are to be enjoyed on the same standing as nationals while others are enjoyed on the same standing as aliens generally.

In practice, Uganda has got a Self-Reliance Policy in place for refugees in settlements, which is intended, among others, to make refugees self-sufficient in food production and sell the surplus as a means of generating revenue. Once in a settlement, the refugee is given a piece of

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<sup>163</sup> *Refugees Act*, Section 23(2-4).

<sup>164</sup> In Uganda the use of the term 'settlement' is preferred to 'camp' as the latter term connotes "an enclosure where everything is provided by UNHCR", which the Uganda government sees as different from its settlement policy. See interview by Deputy Director, Directorate of refugees, *supra* note 127, p.9. The UNHCR currently caters for at least eleven settlements in Uganda, which accommodate about ninety percent of the total refugee population in Uganda. See UNHCR, *UNHCR Global Report 2006*, Uganda, June 2007. UNHCR RefWorld, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=country&docid=466d19a42> visited on 21 October 2007.

land<sup>165</sup> to cultivate crops or rear animals, if they are pastoralists. At the start, refugees receive food rations provided especially by the World Food Programme (WFP), but after about three years they cease to be dependant on international aid and are presumed to be self-reliant.

With regard to the right to education, this is highly respected<sup>166</sup>. Some settlements have schools built and supported by donors, while other refugee children attend Government schools, which provide free primary education, or Universal Primary education, as it is popularly known. Most camps also offer adult literacy programmes. However, the available schools are understaffed<sup>167</sup> and lack scholastic materials. The quality of the education received thus comes into question.

With regard to the right to health, refugees have access to health services<sup>168</sup>. Just like the schools, most of these health facilities are built by and supported by donors. However, there are problems such as understaffing and while some may be well-stocked, others have a limited supply of drugs. The conditions do indeed vary from settlement to settlement. Some of the settlements are really congested, thus overstressing the available facilities, the sanitary conditions are also generally not good resulting into many cases of diarrhoea, there are also rampant cases of malaria, which in turn affect other rights such as education, and also some cases of malnutrition and sexually transmitted diseases.

On the whole, in the Ugandan context, the economic, social and cultural rights of refugees are quite respected and in some places the refugees are so much better off than the indigenous population, which has created some tensions<sup>169</sup>. This is because of the international assistance in the settlements, which the local communities may not be privy to, and which are not under the direct control of the Government. Otherwise in

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<sup>165</sup> The piece of land allocated will vary in each settlement. For example in Nakivale settlement, each refugee family is given one hectare of land, while in Kyaka II, each family is given a piece of land 50x100m.

<sup>166</sup> UHRC, 7th Annual Report, 2004 (UHRC, Kampala, 2005), p.123.

<sup>167</sup> In one school, for example, with a population of 777 pupils, there were only two teachers, that is the headmistress and her deputy. *Ibid.*

<sup>168</sup> *Ibid.*, p.123.

<sup>169</sup> See N. Byamukama, 'IDPs Should be Treated as Refugees' in *Your Rights*, *supra* note 152.

some instances, where the Government is responsible such as the right to work, there have been some complaints of discrimination<sup>170</sup>. In addition, refugees have to obtain work permits, which is cumbersome and also once in a settlement it is difficult to get out to seek employment elsewhere. The major responsibility of the Government is therefore to provide the land, administer the settlements and co-operate with international agencies, which do most of the provision of facilities.

#### **4.1.4 Civil and Political Rights in Refugee Settlements**

The Refugees Act provides for the following civil and political rights: the right to be issued with an identity card, the right to remain, the right to property (on the same standing as aliens), the right to have free access to courts, including legal assistance, and the freedom of movement, subject to restrictions. Although a few civil and political rights appear to be specified, Section 28 of the Act generally makes applicable all other rights contained in the CSR, the OAU Convention and other human rights Conventions or instruments to which Uganda is party.

The civil and political rights of refugees in settlements do not seem as much respected as the economic, social and cultural rights. There are some instances where the lives and security of refugees have been at stake, especially in the settlements in Northern Uganda where an armed conflict has been raging for the last twenty or so years<sup>171</sup>. Refugees are also usually subjected to torture, cruel, inhuman or degrading treatment or punishment<sup>172</sup>; illegal detentions and infringements on their right to

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<sup>170</sup> In some settlements, some refugees are employed as teachers, medical workers, counsellors etc., but are paid less than Ugandans working in the same capacity. See UHRC, *Annual Report 2000-2001*, *supra* note 153, p.43.

<sup>171</sup> In its Annual Report 2000-2001, the UHRC reported that camps had on occasion been attacked by the Lord's Resistance Army rebels and that the Sudanese Peoples' Liberation Army was also known to forcibly enter the camps and recruit refugees into rebel ranks, *supra* note 153, p. 44. See also, UHRC, *7<sup>th</sup> Annual Report*, *supra* note 166, p. 122. Also, E. Bagenda and L. Hovil, 'Sudanese Refugees in Northern Uganda: From One Conflict to the Next' in *Forced Migration Review*, Issue 16, (Refugees Studies Centre, University of Oxford, January 2003), pp. 14-16.

<sup>172</sup> The African Centre for the Treatment and Rehabilitation of Torture Victims (ACTV) has received a number of complaints from refugees, though some of these are committed in their home countries, but there are also cases of torture in Uganda. See Redress, *Torture in*

personal liberty<sup>173</sup>; delays in status determination which means that they do not get any assistance from either government or UNHCR; deprivation of property<sup>174</sup>; and the most common complaint, an affront to personal dignity, domestic violence, especially towards women and children<sup>175</sup>. They have also been reported cases of *refoulement*<sup>176</sup>, in contravention of the law, which apparently guarantees the right to remain.

The violations of civil and political rights in refugee settlements seem to be more rampant than those of economic, social and cultural rights. One possible explanation for this could be that there are quite a number of international agencies involved in the implementation of the latter rights, while the former are solely within the domain of the Government of Uganda. It is therefore appropriate at this point to examine what mechanisms the Government has put in place to address cases of human rights violations with regard to refugees in these settlements. In other words, how and to what extent is the right to an effective remedy for refugees in Uganda respected and protected?

## 4.2 The Refugee and the Right to an Effective Remedy in Uganda

### 4.2.1 Availability

Article 50 (1) of the Constitution states,

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*Uganda: A Baseline Study on the Situation of Torture Survivors in Uganda*, [http://www.redress.org/www.redress.org/www.redress.org/country\\_uganda.html](http://www.redress.org/www.redress.org/www.redress.org/country_uganda.html) pp. 19-20, visited on 21 October 2007. There have also been instances of corporal punishment and flogging inflicted by camp commandants on refugees. See also U.S. Committee for Refugees and Immigrants, *U.S. Committee for Refugees and Immigrants World Refugee Survey 2007- Uganda*, 11 July 2007. UNHCR RefWorld, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=country&docid=4696388e1e&skip=&:oi=UGA> visited on 21 October 2007.

<sup>173</sup> Refugee Law Project, *Annual Report 2005* (Refugee Law Project, Kampala, 2006) p. 4.

<sup>174</sup> There has been an on-going conflict in one of the settlements in western Uganda whereby the local population, encouraged by politicians has encroached upon the land allocated to refugees claiming that they can now repossess it, and the government has been rather slow in resolving the conflict. See UHRC, *Annual Report, 2001-2002* (UHRC, Kampala, 2002), p. 27

<sup>175</sup> UHRC, 7th Annual Report, *supra* note 166, p. 122.

<sup>176</sup> H. Onyalla, '3000 Rwandan Refugees Denied Asylum', *New Vision*, 26 June 2007. See also, U.S. Committee for Refugees and Immigrants, *supra* note 172.

“Any person who claims that a fundamental right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress...”.

In paragraph 3 of the same Article, provision is made for an appeal to the appropriate court where one is aggrieved by the initial decision. In addition, the Constitution in Article 51(1) establishes the Uganda Human Rights Commission (hereinafter referred to as ‘UHRC’) with a mandate that includes investigation of violations of human rights; inspecting jails, prisons and places of detention and; recommending to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights<sup>177</sup>. The UHRC is also bestowed with powers to summon any person before it and order the production of any documents or records relevant to any of its investigations; to question any person in respect of an investigation and require any relevant disclosures<sup>178</sup>. The Commission has utilised this mandate and powers to establish a tribunal, a quasi-judicial body that conducts hearings and makes decisions regarding human rights complaints before it. The Commission consists of seven members who are appointed by the President with the approval of Parliament and the Commission’s independence is guaranteed under Article 54, which explicitly states that the Commission shall not be subject to the direction or control of any person or authority.

Chapter 8 of the Constitution establishes the judiciary with the Supreme Court being the highest appellate court, followed by the Court of the Appeal and then the High Court, which has got unlimited original jurisdiction. These courts are considered the superior courts of record and below them are Magistrates’ courts (Grade I and II) and then the Local Council (LC) courts. Article 128 of the Constitution guarantees the independence of the judiciary and further prohibits interference with the courts or judicial officers in the exercise of their functions.

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<sup>177</sup> Constitution of Uganda, 1995, Article 52(1) (a), (b) and (d).

<sup>178</sup> *Ibid*, Article 53(1).



In the settlements there are Refugee Welfare Committees (RWCs), which settle disputes among the refugees, and then the camp commandant as the overall seer of the settlement also settles disputes as well. However, these RWCs have oftentimes abused their authority and exercised powers far and above their jurisdiction, such as imposing high fines and detaining refugees for up to 48 hours even when they clearly lack the authority to do so<sup>179</sup>.

However, for purposes of this work, we shall focus more on the UHRC and the High Court as the institutions with unquestionable authority to handle human rights cases.

The UHRC has its headquarters in the capital city and seven regional offices operating in various parts of the country. The tribunal, which is usually presided over by one member of the Commission, holds circuit hearings in the various regions. Each regional office serves an average of about ten districts<sup>180</sup>. The High Court, on the other hand, runs about twelve circuits all over the country, with only thirty-one judges. This indicates that there are few offices serving a rather big population, which in turn affects the efficiency of the institutions<sup>181</sup>. Moreover, the tribunal hearings as well as other activities of the UHRC are funded by donors and not Government, hence, if donors withdraw their support and Government does not meet the deficit, then the UHRC could be rendered redundant.

Nonetheless, both the UHRC tribunal and the High Court do operate independently and are seen to be impartial when carrying out their functions<sup>182</sup>. Most of the hearings in both institutions are public except where it is in the interests of justice not to make them so, which is in accordance with the ICCPR and as enshrined in Article 28 of the

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<sup>179</sup> U.S. Committee for Refugees, *supra* note 172.

<sup>180</sup> Yet there are about three permanent member of staff and two volunteers in each regional office to do all the work, that is receiving complaints, monitoring, inspections, carrying out investigations, mediations and human rights education.

<sup>181</sup> Both the UHRC and the High Court have a backlog of cases, which could be due to the few number of officers and inadequate funding, which affects the institutions ability to dispose of cases as fast as possible. See UHRC, *8<sup>th</sup> Annual Report* (UHRC, Kampala, 2005) pp. 117, 131-135.

<sup>182</sup> So far there have been no reported cases of bias or impartiality as well as lack of independence, except for some instances, usually political cases where the government has interfered with the judiciary by having its security operatives raid the High Court premises in order to defy Court orders.

Constitution. In all cases, both parties have the opportunity to be heard and equality of arms is usually ensured. Where a party is aggrieved by the decision of the UHRC, they can appeal to the High Court and appeals can lie from the High Court up to the Supreme Court.

All in all, as regards, availability of channels of redress in case of human rights violations, it is my opinion, that Uganda would meet the requirement of availability of competent and independent tribunals or bodies which abide by the procedural guarantees of a fair hearing and can provide effective remedies. Even where at the lower levels, such as RWCs and LC courts, the authorities are not so competent, with the possibility of an appeal this can be remedied at the higher levels.

#### **4.2.2 Accessibility**

The Constitution makes leeway for anyone whose rights are violated to present their complaint to a competent court and the Refugees Act also provides for the right to “free access to courts, including legal assistance under applicable laws of Uganda”<sup>183</sup>. Despite these enabling provisions, there is quite a negligible number of complaints by refugees that make it either to the UHRC or to the High Court<sup>184</sup> and these are mainly from urban refugees, not those in settlements. The following are some of the factors that hinder refugees’ access to the UHRC and to courts despite the rampant human rights violations that they may face.

- a) *Restrictions on the freedom of movement*: Section 30 of the Refugees Act provides for the freedom of movement for recognised refugees, but then again it greatly curtails that freedom when it provides:

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<sup>183</sup> *Refugees Act*, Section 29(1)(h).

<sup>184</sup> The registrar, High Court admitted that they are almost no cases presented by refugees and that if there are, then they are really few. Interview with Registrar, High Court held at the High Court Premises on 21 August 2007. There are some cases that before the enactment of the *Refugees Act* were presented to the High Court for review of the REC’s decision denying an asylum application, for instance *Tesfaye Shiferwa Awala v. Attorney General*, High Court of Uganda, Miscellaneous Application No. 668 of 2003. The UHRC also receives very few complaints from refugees and these are mainly to do with delays in processing applications, which are usually referred to the Refugee Law Project: Interview with Regional Human Rights Officer, UHRC central regional office held at UHRC Offices, Kampala on 26 July 2007.

“The freedom of movement of a recognised refugee in Uganda is subject to reasonable restrictions specified in the laws of Uganda, or directions issued by the Commissioner, which apply to aliens generally in the same circumstances, especially on grounds of national security, public order, public health, public morals or the protection of rights and freedoms of others.”

One could perhaps, say that this section contravenes the Constitution in which the provision on the freedom of movement does not contain any such restrictions, but then the freedom of movement under the Constitution applies to only Ugandans<sup>185</sup>. This restriction is applied religiously in all settlements whereby a refugee must obtain a permit from the camp commandant whenever he or she wants to set foot out of the settlement and even then it is sometimes not easy to obtain the permission<sup>186</sup>. The refugee has to specify the destination, purpose, number of days of travel and the date of return. Much as this practice and policy seems to contravene even the Refugees Act itself, making the Act self-defeating in a sense, it still prevails making the supposed ‘free access to courts’ almost impossible, especially where the complaint by the refugee is against the administrators of the settlement.

- b) *Location of settlements in remote areas*: most of the settlements are situated in remote areas, far away from the appropriate institutions that provide redress, which are usually located in the towns. Refugee settlements are located as far as sixty miles from towns<sup>187</sup> and even then, the road infrastructure to and from settlements is usually bad and the means of transport poor. In addition to the law and policy not being in favour of the refugees’ movement, the physical location also poses a great difficulty for a refugee’s access to courts.
- c) *Lack of legal assistance*: instituting a case in a court of law is generally costly and yet poverty is one of the major problems faced by refugees,

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<sup>185</sup> Unlike other human rights provisions under the Constitution which apply to ‘every person in Uganda’ or ‘all persons’, Article 29(1) is specific; it provides: “Every Ugandan shall have the right to move freely throughout Uganda...”.

<sup>186</sup> UHRC, 7th Annual Report, *supra* note 166, p. 126.

<sup>187</sup> U.S. Committee for Refugees, *supra* note 172.

in settlements especially. Complaints to the UHRC are, however, not subject to any fees whatsoever. Although Section 29(1)(h) makes provision for “legal assistance under the applicable laws of Uganda”, there are no such laws in existence yet and neither does the Government have any legal aid programme in place, not even for the nationals<sup>188</sup>. In addition, the Government of Uganda made a reservation to Article 16(2) of the CSR to the effect that it would not provide refugees with more legal assistance than it gave to foreigners generally. Considering that presently there is no such legal assistance to foreigners, in effect there is none for refugees. Provision of legal aid is usually be NGOs<sup>189</sup>, the most notable of which is the Refugee Law Project (RLP), which helps refugees with their applications and making appeals to the REC, intervening and handling cases of human rights violations. However, the RLP has only got one office in Kampala and a small number of legal staff and they can only reach a few settlements, a few refugees and handle few cases<sup>190</sup>. Moreover, the Constitution does allow for any person or organisation to bring an action on behalf of a victim of a human rights violation. This provision could enable NGOs to present cases on behalf of refugees, but save for the RLP, there are not many organisations that have done so on behalf of refugees<sup>191</sup>.

- d) *Ignorance*: this ignorance is on the part of both refugees and those who are supposed to assist them, say in the course of accessing justice, for instance the members of the RWCs. Most refugees are not aware of the channels available to them when their rights have been violated. Although the UHRC has a mandate to conduct human rights education and awareness programmes, so far it has not carried out any for

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<sup>188</sup> Under the Advocates Act of Uganda, all advocates are required to offer *pro bono* services, but this provision is yet to be implemented. *See also*, J.C. Hathaway, *supra* note 121, p. 911.

<sup>189</sup> Most of these legal aid providers do not specifically deal with refugees, though if they do, it is not clearly documented. Most of them handle general cases or human rights cases generally.

<sup>190</sup> *See* <http://www.refugeelawproject.org/about/lac/index.htm> visited on 21 October 2007.

<sup>191</sup> There is an instance where the UNHCR has presented a case to UHRC Fort Portal regional office to assist refugees on committal who had spent a long time on remand and their families risked being repatriated. The UHRC intervened with the Deputy Registrar, High Court in Fort Portal and their cases were heard. Interview with Regional Human Rights Officer, UHRC Fort Portal held at UHRC Offices, Kampala on 8 August 2007.

refugees<sup>192</sup>. The RLP has provided some education to refugees in the city and not for those in settlements. On the part of officials, the RLP has provided some training in refugee law to members of the legal profession as well as immigration officers<sup>193</sup>. However, there are few judicial officers knowledgeable in matters of refugee law<sup>194</sup>.

- e) *Poor litigation culture*: there is a poor culture of litigation in Uganda, and African countries generally, even where the individual's rights are being blatantly abused. This is more so in rural than in urban areas. It could be attributed partly to the ignorance of people of their rights as well as the technicalities and bureaucracy involved in litigation, which frighten away possible litigants, particularly if they are poor and illiterate. In Uganda, only about 18.2% of the people in rural areas are able to access a magistrate's court within a distance of less than five kilometres, compared to an overwhelming 56% in urban areas<sup>195</sup>. For a refugee, who is on the one hand grateful to the State for having granted him or her asylum and on the other hand is limited by other factors such as poverty and those discussed above, litigation is not the obvious option in case of a human rights violation.

### 4.2.3 Remedies Available

In case a refugee does manage to get his case heard and is successful, there are various remedies available depending, of course, on the nature of the right violated. The Constitution provides for some specific remedies including: compensation<sup>196</sup> where one has been unlawfully arrested,

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<sup>192</sup> In one instance in Fort Portal where a group of Congolese refugees requested the UHRC to offer human rights education to members of their association, the Office of the Prime Minister discouraged this saying that it was divisive with potential to cause conflict in the settlement. Hence, it was never held: Interview, *ibid*.

<sup>193</sup> *Supra* note 190.

<sup>194</sup> G.W. Kanyeihamba, 'Overview: Comment on Refugee Issues' paper presented at the *Judicial Seminar on Refugee Issues and Asylum*, Makerere University, Kampala, 15-18 April 1999.

<sup>195</sup> Justice, Law and Order Sector, *A Study on Gender and Access to Justice*, available at <http://www.jlos.go.ug/reports.php> visited on 21 October 2007.

<sup>196</sup> Under Article 50(1) compensation is mentioned as one of the available remedies; under Article 53(2)(b), one of the remedies the UHRC can order is payment of compensation, Article 126(2)(e) also provides that courts shall award adequate compensation to victims of wrongs.

restricted or detained<sup>197</sup>; the right to an order of *habeas corpus*, which is inviolable and one of the non-derogable rights under the Constitution<sup>198</sup>; and Article 42 allows for judicial review to a court where one is aggrieved by a decision of an administrative authority or body, though this does not seem to be the case with refugees' status determination decisions. The UHRC also has powers to order, in addition to payment of compensation, the release of a detained or restricted person, and any other legal remedy<sup>199</sup>. The Commission has used this power extensively to order remedies ranging from cautions, payment of damages and other common law remedies as are appropriate in each case.

Using its power of investigation, the UHRC has managed to investigate some serious violations of human rights normally committed by government security agencies, and had the tribunal hear the cases. One barrier to the effective performance of the UHRC's investigation of such cases is with regard to access into army detention places and to 'safe houses', where it has often been alleged that serious violations occur. Although the UHRC should, going by its mandate, have free and unhindered access to all places of detention, it is required to give at least forty eight hours notice before it can inspect army detention centres<sup>200</sup>, while it has virtually no access to 'safe houses' as their location is largely unknown<sup>201</sup>. The inability of the UHRC to carry out impromptu investigations in army detention houses or safe houses does adversely affect the right to an effective remedy, especially for refugees who are really vulnerable to illegal arrests and detentions<sup>202</sup>.

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<sup>197</sup> Constitution of Uganda, Article 23(7)

<sup>198</sup> *Ibid.*, Articles 23(9) and 44(d).

<sup>199</sup> *Ibid.*, Article 53(2). The UHRC tribunal has handled some complaints from refugees, although these are not so common. Interview with Director, Legal and Tribunals Directorate, UHRC held at UHRC Offices, Kampala on 6 August 2007.

<sup>200</sup> This 48-hour notice requirement is a recent development; otherwise before 2004 UHRC had no access at all to such places. The UHRC prefers that this notice requirement be waived in order for it to operate effectively- see UHRC, *8<sup>th</sup> Annual Report*, *supra* note 181, p. 112-113.

<sup>201</sup> *Ibid.*, p. 120. The army also admits that they do have 'safe houses' which are usually transitory, however they deny that any torture takes place there, quite contrary to the allegations from complaints received.

<sup>202</sup> See Redress, *Torture in Uganda*, *supra* note 172, pp. 19-20.

The courts of law in Uganda apply the common law system and do avail a range of remedies, both common law and equitable remedies. The courts would be the most appropriate channel to stay the expulsion or *refoulement* of refugees, but then these powers lie with the Minister and the REC<sup>203</sup>.

#### **4.2.4 Enforcement of the Remedies**

Where a complaint is against a private individual, then enforcement shall be by execution of the judgement by, for example, attachment of property, attachment and sale, arrest and detention. The situation is different where the Government is the respondent and yet most cases of serious human rights violations are against the Government. The UHRC has time and again complained that the Government has not expedited honouring compensation to victims and yet the law does not permit executions to be carried out against Government. By 2004, of the UGX784,000,000 due to victims of violations, Government had so far only managed to pay UGX93,280,428 over a period of about seven years<sup>204</sup>. Repeated calls for the Government to honour its obligations are not yielding any substantial results. The Ministry of Justice also reports that awards from courts are also pending and the reason given for this non-payment of awards is that they are not budgeted for initially<sup>205</sup>, which is rather a lame excuse considering that some of these awards have been pending for years.

As for remedies, other than compensation, such as the release from detention, the respondent state organs usually comply with such orders, except again in cases of army detentions where the army may at times delay in complying. As far as ordering prosecution of perpetrators of human rights violations is concerned, the UHRC has recommended to the Attorney-General, who is vicariously liable for acts committed by Government officials, to ensure that such individuals are brought to justice. So far there are neither reports nor indications that this has been done, although at times security agencies take internal disciplinary measures against the individuals

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<sup>203</sup> *Refugees Act*, Sections 39 and 40.

<sup>204</sup> UHRC, *8<sup>th</sup> Annual Report*, *supra* note 181, p. 112.

<sup>205</sup> *Ibid.*

responsible. This, however, could fail to meet the standard of an effective remedy as was clearly stated by the HRC in *Bautista v. Colombia*<sup>206</sup> that purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies in the event of particularly serious violations of human rights.

### 4.3 Chapter Conclusion

The right to an effective remedy, generally speaking, is well-catered for under the Constitution and laws of Uganda. Going by the Constitutional provisions, any person, refugees included, wishing to vindicate their rights has access to competent, independent and impartial institutions that will hear his or her case and where, a violation is established, then provide an appropriate remedy. Thus far, the Government of Uganda is very much in compliance with its obligation to ensure the right to an effective remedy to all persons within in its territory and under its jurisdiction, without discrimination, as provided under international human rights law.

When it comes to the practical implementation of these human rights and constitutional guarantees, then the right appears to be rather illusory particularly for refugees in settlements. The law provides for their free access to courts, but at the same time it greatly restricts their movement. This is worsened by the practice and other factors, as seen above, which in effect negates refugees' access to courts and any other institutions which would vindicate their rights. Moreover, these institutions do not go 'knocking at peoples' doors' looking for violations; it is the people to go to them. The UHRC has the mandate to inspect and monitor human rights situations in such places and it usually does monitor the settlements and has documented the human rights violations that take place there, but other than making recommendations to Government, it does not seem to take on such cases for hearings<sup>207</sup>.

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<sup>206</sup> *Supra* note 71, para. 8.2.

<sup>207</sup> Interview with Human Rights Officer, Monitoring and Inspections Directorate held at UHRC Offices, Kampala on 22 August 2007.



Though the remedies are available in case one's complaint is successful and a violation is found, for as long as Government does not meet the awards made against it, the remedy is rendered ineffective as seen in the case of *Baritussio v. Uruguay*<sup>208</sup> thus amounting to a violation of the right to an effective remedy.

As far as refugee protection is concerned, the right is to a great extent respected, though there are some cases of *refoulement* as seen above. The Refugees Act does establish procedures for the withdrawal of refugee status and expulsion, but effectiveness of such procedures in order not to amount to a human rights violation will, to a great extent, depend on the impartiality and independence of the bodies or authorities vested with such power, namely the REC and the Minister for refugees.

Recognised refugees in Uganda may be well provided for and protected, though this varies from settlement to settlement, but they also continue to be vulnerable to human rights abuses and violations where they should be protected. The situation is even worse for asylum seekers whom the human rights provisions under the Refugees Act does not apply to, making them one of the most vulnerable groups among the vulnerable. Some of the violations are occasioned by private individuals, including the refugees themselves, while some are occasioned by government officials. Avenues do exist for providing redress for rights violations, but for refugees accessing such competent institutions is not as easy as provided for under the law. Even where there is access and the case is successfully heard, having the remedy enforced may take quite a long while, especially if it is against the Government, which is usually the case. Without access and enforcement of the remedy, two of the vital aspects of the right to an effective remedy, enjoyment of the right becomes elusive and in such circumstances it would be difficult to argue that a State is indeed complying with its obligation to ensure the right to an effective remedy to all persons within its territory and under its jurisdiction.

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<sup>208</sup> *Supra* note 82.

## 5 Ensuring a State's Compliance with its Human Rights Obligations: Monitoring Mechanisms

An examination of the right to an effective remedy in international law, with regard to one of the world's most vulnerable, the refugees would, in my view, be incomplete if one failed to look at the monitoring mechanisms at both the international and regional levels established to ensure that a State is in fact fulfilling its obligations. Although Møse explains that the right to petition to international bodies was not intended to be covered under Article 8 of the UDHR<sup>209</sup>, Schachter, on the other hand, argues that Article 2(3) of the ICCPR does not preclude remedies on the international plane if available, though it underlines the role of domestic remedies<sup>210</sup>. Shelton further stresses that the role of international (as well as regional) tribunals is subsidiary and only becomes necessary and possible when the State has failed to afford the required relief<sup>211</sup>. In this chapter we shall look at the monitoring or enforcement mechanisms at the national and regional levels and how they ensure that a State is in fact complying with its human rights obligations, specifically ensuring the right to an effective remedy, and what remedies are available if it is indeed found that a State has not fulfilled its obligation to provide effective remedies. Whereas in chapters two and three we looked at the norms relating to the right to an effective remedy both in human rights law and refugee law, in this chapter we shall focus more on the practice of the bodies established under the respective treaties to ensure, among others, that there is an effective remedy for individuals in a given State party. Since our main focus is on refugees we shall talk a little more about the UNHCR.

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<sup>209</sup> E. Møse, *supra* note 28, p. 203.

<sup>210</sup> O. Schachter, *supra* note 65, p. 325.

<sup>211</sup> D. Shelton, *supra* note 58, p. 114.

## 5.1 The United Nations High Commissioner for Refugees (UNHCR)

The UNHCR, as we saw earlier, was created to provide international protection to refugees, which protection includes ensuring *non-refoulement* and ensuring that States comply with their obligations under the CSR. However, the UNHCR lacks the mandate to examine State reports in relation to refugees rights in any given State party or to receive individual complaints from refugees looking for redress for human rights violations occasioned by the State, as most other human rights treaties establish for their special bodies. This to a great extent limits the UNHCR's protection of refugees, which should be protection in a holistic sense, that is, protection against *non-refoulement* and ensuring that a refugee obtains redress when his or her rights have been violated or abused<sup>212</sup>; and yet the UNHCR is the only body that deals exclusively with refugees. Nonetheless, UNHCR's protection officers sometimes intervene with authorities in an effort to prevent, ameliorate or redress violations using a blend of human rights monitoring, negotiation and activism<sup>213</sup>. Despite these efforts, the UNHCR has come under heavy criticism for concentrating less and less on its protection functions and more and more on providing humanitarian assistance, which could, according to the critics, be well and ably handled by other international agencies<sup>214</sup>.

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<sup>212</sup> One of the explanations for this weak mandate of the UNHCR is that States did not want to regulate in detail international obligations which would apply to the sensitive issues of entry and admission, an area still well guarded by the concept of State sovereignty. Hence, a discretionary humanitarian approach was much preferable to a binding human rights-oriented framework of norms. See V. Türk, 'The Role of the UNHCR in the Development of International Refugee Law' in F. Nicholson and P. Twomey (eds.), *supra* note 11, pp. 171-172. Hathaway also further explains that the UNHCR Statute does not grant UNHCR any clear power to champion the enforcement of refugee rights, the primary responsibility of which falls on the States. See J.C. Hathaway, *supra* note 121, p. 628.

<sup>213</sup> See A.C. Helton, *supra* note 110, p. 26.

<sup>214</sup> See N. Steiner, M. Gibney and G. Loescher (eds.), *Problems of Protection: The UNHCR, Refugees and Human Rights* (Routledge, New York and London, 2003) p. 13. Hathaway further criticizes the UNHCR for being a tacit co-conspirator with States to minimize international refugee protection since the UNHCR gets its funding, which is negligible compared to its workload, from the very States it ought to be influencing. See J.C. Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' in V. Gowlland and K. Samson (eds.), *Problems and Prospects of Refugee Law* (The Graduate Institute of International Studies, Geneva, 1992), p.11.

Under Article 38 of the CSR, where there is a dispute between States parties relating the interpretation or application of the Convention, one of the parties to the dispute may refer it to the International Court of Justice. Besides the fact that this provision has never been applied by any States parties, it clearly excludes the individuals who are most affected by a States actions and that would mean relying on a State to present their claims, which State could be the very violator of their human rights.

As such the monitoring mechanism under international refugee law is considerably very weak when it comes to ensuring the rights of refugees other than *non-refoulement*. Therefore a refugee whose right of access to court has been denied or violated cannot have recourse to the UNHCR to enforce that obligation upon the State. This then leaves the refugee with the option of seeking redress from other mechanisms established under various human rights law treaties, for example, the ICESCR and the ICCPR. Needless to say, the entire refugee protection regime would be greatly enhanced by the establishment of an independent monitoring or supervisory mechanism to provide oversight of State activities in refugee rights protection<sup>215</sup>.

## **5.2 The Committee on Economic, Social and Cultural Rights (CESCR)**

The CESCR was established in 1985 replacing the prior Sessional Working Group that had been put in place by the UN Economic and Social Council (ECOSOC), but had turned out to be ineffective<sup>216</sup>. The main work of the CESCR is to take on the main task assigned to the ECOSOC under Article 16 of the ICESCR of examining State party reports on the measures they have adopted and progress made in achieving the observance of the rights therein. Each State party to the Covenant is thus required to submit such a report within a defined period of time, which varies according to the

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<sup>215</sup> See N. Steiner et al, *ibid*, p. 16. Also J. C. Hathaway, *supra* note 121, pp. 663, 997-998.

<sup>216</sup> ECOSOC Resolution 1985/17 available at <http://www.ohchr.org/english/bodies/cescr/index.htm> visited on 29 October 2007.

CESCR although the initial report may be furnished within two years of entry into force of the Covenant for the respective State party.

The CESCR has adopted reporting guidelines,<sup>217</sup> which outline the issues to be addressed by the States parties in their reports. One of the issues to be addressed is the extent to which non-nationals are guaranteed the rights in the Covenant and also the measures in place for vulnerable or disadvantaged groups under each specific right. This would, if abided by, show the state of refugees in the State party and how they are accorded the various rights under the ICESCR.

During the examination of each report, members of the CESCR engage in a constructive dialogue with representatives of each State party in which the latter respond to issues that may be raised by the Committee. In examining each report, the committee also takes into account any other information obtained from 'shadow reports' of NGOs, both international and national, and from other international agencies. At the end of each report examination the CESCR comes up with its views known as Concluding Observations in which it lays out the positive aspects, factors and difficulties impeding the implementation of the covenant, principal subjects of concern, and then suggestions and recommendations. Lastly the Committee requests the State party to inform it in its next periodic report about the steps taken to implement its recommendations.

Where the State party fails to provide such information, repeated requests shall be made and where these are similarly ignored, the CESCR may then request the State party to accept one or two of its members for an on-site visit<sup>218</sup>. Where a State party fails to oblige the Committee, the latter will make a report to the ECOSOC with appropriate recommendations.

The success of the CESCR's recommendations and effectiveness depends much on the co-operation of the State party. Other than that, there

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<sup>217</sup> Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1991.1.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1991.1.En?Opendocument) visited on 27 October 2007.

<sup>218</sup> So far such visits have been carried out in two countries and according to the Committee the experience was a very positive one in both instances. See <http://www.ohchr.org/english/bodies/cescr/workingmethods.htm> visited on 27 October 2007.

is no meticulous or detailed procedure that the Committee can utilise to ensure that the State implements its recommendations; after all, they are only recommendations. Furthermore, the recommendations are too general in nature and appear more or less like a restatement of State policy leading to the criticism that they lack clarity, degree of detail, accuracy and specificity<sup>219</sup>.

Considering that it is States parties that prepare these reports, they may give little or no specific attention to refugees or only state the positive aspects in general terms. Hence, under the State reporting system, a refugee is only a subject, and not a specific one at that, and as such chances are less likely that the violations they suffer shall be given specific attention calling for specific recommendations the State should implement in order to improve the human rights or redress any violations of the rights of refugees especially in camps or settlements.

Suffice to note that Uganda, despite having ratified the ICESCR for twenty years, is yet to submit its initial report. Hence, as the situation stands, refugees in Uganda would not benefit from the monitoring mechanism under the ICESCR, unless the Government of Uganda does fulfil its obligation to submit a State report in which it pays specific attention to refugees and how it has implemented the right to an effective remedy for refugees in case their economic, social and cultural rights are violated.

The failure to establish an individual complaints system under the ICESCR<sup>220</sup> is a major setback in the enforcement of economic, social and cultural rights, particularly of vulnerable groups such as refugees who would greatly benefit from such a mechanism. Otherwise the mechanism in place at present is state-centric and does not provide much, by way of

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<sup>219</sup> Report of Independent Expert, Philip Alston on *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, UN Doc. E/CN.4/1997/74 (27 March 1997) paras. 109 and 122. Available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0811fcbd0b9f6bd58025667300306dea/baf7b9a3a023c88c802566d4005b817a?OpenDocument#IIC> visited on 27 October 2007.

<sup>220</sup> There is presently a draft Protocol to the ICESCR that would allow individual communications, but it is still under debate, which debate in my view, is rather protracted. Although if it passes and is adopted, it will contribute greatly as a channel of redress for violations of economic, social and cultural rights. For more on the progress of the Optional Protocol see: <http://www.ohchr.org/english/issues/escr/group.htm> visited on 27 October 2007.

redress, to individuals who have suffered violations of their economic, social and cultural rights.

## 5.3 The Human Rights Committee (HRC)

The HRC, unlike the CESCR, is established directly under the ICCPR (Article 28) and therefore does not operate directly under the auspices of a political body. The HRC monitors the ICCPR mainly through examination of State reports and examination of individual complaints.

### 5.3.1 State Reporting

The examination of State reports by the HRC is very much the same as that of the CESCR whereby the State submits its report and there is a constructive dialogue ultimately leading to the Concluding Observations, which are the same as those of the CESCR, but with regard to rights under the ICCPR. Just as under the CESCR, the State report examination has been said to have become unwieldy, routine, repetitious and overlapping<sup>221</sup>. The recommendations contained therein, even when they contain strong statements indicating that the treaty has not been complied with by the State, do not amount to condemnation for non-fulfilment of treaty obligations<sup>222</sup>.

Uganda submitted its initial State report in February 2003 after a seven years delay and under the right to an effective remedy it reported that remedies can be obtained from the courts of law and from the UHRC, further stating that victims are normally awarded monetary compensation. No further details were provided. Regarding the rights of refugees it admitted that refugees have no right to choice of residence, freedom of movement and the right to engage in employment<sup>223</sup>. In its concluding observations, the HRC recommended that the Government ensure that the decisions of the UHRC are fully implemented concerning awards to victims

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<sup>221</sup> A. Zayas, 'The Examination of Individual Complaints by the UN Human Rights Committee under the Optional Protocol to the ICCPR' in G. Alfredsson, J. Grimheden, *et al* (eds.), *International Human Rights Monitoring Mechanisms* (Martinus Nijhoff Publishers, The Hague/Boston/London, 2001) p. 73.

<sup>222</sup> V. Dimitrijevic, 'State Reports' in G. Alfredsson, J. Grimheden, *et al*, *ibid*, p. 198.

<sup>223</sup> CCPR Human Rights Committee, *Initial Report: Uganda* (CCPR/C/UGA/2003/1), para. 378.

of violations and prosecution of human rights offenders<sup>224</sup>. However, the Concluding Observations were silent on the treatment of refugees in Uganda.

Generally speaking, all shortcomings that apply to the State reporting mechanism under the ICESCR equally apply under the ICCPR and as such refugees do not expect much of a remedy through this mechanism.

### 5.3.2 Examination of Individual Complaints

Under the first Optional Protocol to the ICCPR (hereinafter referred to as ‘the optional protocol), the Human Rights Committee may receive written complaints or communication from individuals alleging a violation of any of the human rights contained in the ICCPR. There are, however, a number of requirements that must be fulfilled for a communication to be considered admissible and thus be heard on its merits: the communication should not be anonymous; it should be submitted by the victim or his or her representative; it should not be an abuse of the right to submission; it should not be incompatible with the ICCPR; it should not be under examination by another international procedure and; the victim should have exhausted all available domestic remedies<sup>225</sup>. For our purposes, focus shall be on only three of these requirements as they impact greatly on a refugee’s access to the HRC.

- a) *Submission by the victim*: it is only the victim or his or her representative that should complain to the HRC. By ‘victim’ is meant one who is actually affected by a violation,<sup>226</sup> but the concept has been extended to include family members of the actual victim<sup>227</sup> in cases where the victim cannot make the communication himself or herself.

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<sup>224</sup> CCPR Human Rights Committee, *Concluding Observations of the Human Rights Committee: Uganda* (CCPR/CO/80/UGA), para. 7.

<sup>225</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted by General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976, Articles 2-5.

<sup>226</sup> *Aumeeruddy-Cziffra and others v. Mauritius*, Communication No. 35/1978, U.N. Doc. CCPR/C/OP/2 at 226 (1990), para. 9.2.

<sup>227</sup> See *Eduardo Bleier v. Uruguay*, Communication No. R.7/30, U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982).



The HRC has on a number of occasions clarified that the procedure under the optional protocol is not open to organisations or groups of individuals or associations and that it cannot entertain *actio popularis*<sup>228</sup>.

- b) *Incompatibility with the ICCPR*: The subject of the communication must be a right within the ICCPR. Where any right raised is outside the ICCPR, but contained in other human rights instruments, for instance, the right to asylum under Article 14 of the UDHR, the communication will be inadmissible *ratione materiae*. Hence, refugee protection issues, in as far as they relate to the right to asylum, cannot be considered by the HRC, leaving the UNHCR as the only recourse. However the HRC may consider cases of *non-refoulement* under Article 13 of the ICCPR, which provides for procedural guarantees regarding expulsion of aliens; and generally consider other refugees' rights that are not under the ICCPR provided they come under the umbrella of Article 26 of the ICCPR which provides for equal protection of the law without discrimination<sup>229</sup>.
- c) *Exhaustion of domestic remedies*: it is usually in the course of looking at this requirement that the HRC will examine whether a State has complied with Article 2(3) of the Covenant. Where the available local remedies have not been exhausted then the communication would be considered inadmissible. The only exceptions to this rule are where the domestic remedies are unreasonably prolonged, are plainly ineffective or are otherwise unavailable. Thus a refugee from a settlement in Uganda would have to take his case up to the Supreme Court and if still aggrieved, may then complain to the HRC.

If a communication is considered admissible, the HRC shall proceed to hear it on its merits through written submissions from the parties to the case. Where a State is found to be in violation of a right, the HRC shall make recommendations of the specific remedies that the State should

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<sup>228</sup> See *U.R. v. Uruguay*, Communication No. 128/1982, U.N. Doc. CCPR/C/OP/2 at 40 (1990) para. 4; *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 (1984) para. 8(a); and *Aumeeruddy case*, *supra* note 226.

<sup>229</sup> See *Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (1990) paras. 12.3-13.

provide the victim. Usually these remedies were stated generally, but for the first time in 2002, the HRC upon recommending payment of compensation went ahead to establish the quantum, which would be a sum not less than the fine wrongfully imposed on the applicant<sup>230</sup>. The major shortcoming here is that the recommendations are simply recommendations and are therefore not binding on the State, making direct implementation impossible. States are simply expected to abide by their human rights obligations and undertakings in good faith.

Until 1990 that was as far as the matter went, but the need for follow up was seen to be critical to the effective implementation of the Covenant and so the function of the Special Rapporteur for follow-up on views was created<sup>231</sup> to follow up on whether or not States were implementing the recommendations. The Special Rapporteur requests States for detailed information as to the measures taken to give effect to the HRC's recommendations and where no responses are forthcoming, despite repeated reminders, the Special Rapporteur may carry out a fact-finding mission. It will ultimately depend on the goodwill or good faith of the State concerned for the entire follow-up procedure to be successful and fruitful to the victims, otherwise the HRC can only keep urging Governments and making appropriate reports to ECOSOC.

### 5.3.3 Inter-State Complaints

The ICCPR also provides in Article 41 that a State may submit communications to the HRC with regard to another State party for failure to fulfil its obligations under the Covenant. This procedure would, in my view, contribute greatly to stemming refugee causes and problems, but then it has

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<sup>230</sup> *Vladimir Petrovich v. Belarus*, Communication No. 780/1997, U.N. Doc. CCPR/C/68/D/780/1997 (13 April 2000) para. 10.

<sup>231</sup> Although the HRC does not have such a mandate, it derived its powers from the doctrine of implied powers whereby even in the absence of specific enabling powers, an international body may act in ways not specifically forbidden for the achievement of its purposes and objectives- *Certain Expenses of the United Nations*, 20 July 1962, ICJ, Advisory Opinion, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=4a&case=49&code=ceun&p3=4> visited on 29 October 2007.

never been put to use. Probably because no State is willing to ‘point a finger at the other’.

## 5.4 The UN Charter-Based Procedures

Under the UN Charter regime there are two different kinds of procedure under which individuals, groups of individuals and organisations can bring cases of human rights violation to the attention of the Commission on Human Rights, now the Human Rights Council<sup>232</sup>. Under what is called the 1235 procedure, the Commission can discuss the question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid in all countries<sup>233</sup>. In order to carry out this mandate, the Commission adopted the mechanisms of country and thematic rapporteurs and working groups. These examine a particular problem or violation and report to the Commission, which may in turn push on the matter to ECOSOC for a more general discussion.

The other procedure is what is known as the 1503 procedure, which is designed to deal with communications indicating a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms<sup>234</sup>. This procedure differs from the 1235 procedure in the sense that it is confidential and the communications are not to be publicized in any way, while the other is publicly available. Just like the 1235 procedure, the 1503 procedure is open to all, individuals and organisations, who submit complaints to the Secretary-General of the UN. The Commission upon being apprised of any violations would decide to either keep the matter under review or; to undertake further study or; to appoint a Special Rapporteur to submit a confidential report or to transfer the matter to the public 1235 procedure. The Commission would then make

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<sup>232</sup> Established by *General Assembly Resolution A/Res/60/251* of 3 April 2006 to *inter alia* address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. The Council also assumed the mandates, mechanisms and functions of the Commission on Human Rights, which it would review within one year after its establishment - para. 6.

<sup>233</sup> ECOSOC Resolution 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (1967).

<sup>234</sup> ECOSOC Resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970), para. 1.

recommendations to ECOSOC. Under both procedures, it was expected that the ECOSOC and ensuing scrutiny would put pressure on the responsible Government to take its human rights obligations seriously.

These procedures differ from the treaty-based procedures in the sense that they apply universally, without the requirement that a State is a party to a particular treaty or has formally accepted to be subjected to such procedures. They are also open to all, hence, more accessible since they have no strict admissibility requirements. However, these procedures have turned out to be too weak and ineffective since in the end they would be political procedures. Furthermore, their existence has not in anyway helped to combat refugee flow problems, which they could have done to an extent had they been quite effective.

The Human Rights Council has decided to review the Complaints procedure, by establishing another one modelled on the 1503 procedure<sup>235</sup>. The new procedure will address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. The procedure will still be confidential and is meant to be victim-oriented and conducted in a timely manner. There shall be two Working Groups to work on the communications: the Working Group on Communications (WGC) and the Working Group on Situations (WGS) with the former working on assessing the admissibility and the merits of the communication, which it shall then transmit to the latter. Basing on the information from the WGC, the WGS will make a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and make recommendations to the Council on the course of action to take. It is the Council that shall take the decision on how to address the problem<sup>236</sup>. However, this procedure, to be somewhat similar to that under the Optional Protocol to the ICCPR also has got almost similar admissibility requirements. A communication shall only be admissible if: it is not

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<sup>235</sup> UN Human Rights Council, *UN Human Rights Council: Institution Building*, Resolution 5/1 of 18 June 2007.

<sup>236</sup> See <http://www.ohchr.org/english/bodies/chr/complaints.htm> visited on 29 October 2007.

inconsistent with the UN Charter and the UDHR; it contains a factual description of the alleged violations, including the rights violated; it is submitted by the victim or victims of the violation, or by any other person or groups of persons, including NGOs acting in good faith and claim to have direct and reliable knowledge of the violations, in other words, they should reliably attest to the violations; it is not exclusively based on media reports; it is not under consideration by a special procedure, a treaty body or other UN or regional complaint procedure; and domestic remedies have been exhausted, unless where they are ineffective or unreasonably prolonged. These requirements, while streamlining the complaints mechanism under the UN Charter, they at the same time restrict accessibility, which was not the case under the both the 1235 and 1503 procedures.

Whereas this new procedure seems to be a solution to the shortcomings in both the former Charter-based procedures and the treaty-based procedures, it remains to be seen how it will function and whether it will greatly contribute to ameliorating the plight of the world's vulnerable, in particular the refugees.

## **5.5 The African Commission on Human and Peoples' Rights**

Just like the HRC, the African Commission monitors human rights implementation on the continent in three ways: examining State reports, examining individual complaints and inter-State communications.

### **5.5.1 State Reporting**

Article 62 of the ACHPR requires that each State party submit, every two years, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised in the Charter. However, the Article does not state to who the reports shall be submitted. The African Commission, broadly interpreting its powers requested the OAU Assembly of Heads of State and Government to assign this task to it and the recommendation was adopted in the latter's twenty-fourth ordinary session. The Commission also has its reporting guidelines on what States should

include in their reports. A State sends its report to the Commission, which distributes copies of the report to prominent human rights institutions, both international and local, as well as NGOs. These organisations may then send questions and queries, which shall in turn be forwarded to the State to respond to. At the session of examining the State report, the Commission shall engage in a dialogue with representatives of the State and after the question and answer session, the Commission's Rapporteur sums up and the Chairperson concludes the discussion. Follow-up to the Commission's recommendations is usually by letter to the State requesting it to provide any further information. The Commission may also transmit to the Assembly of Heads of State and Government copies of the report, its Concluding Observations and any other comments that may have been supplied by the State.

Usually most of the countries do not report as diligently as they should and of all the fifty-three States parties to the ACHPR, so far thirty-eight have submitted reports<sup>237</sup>. Uganda has so far submitted two reports with the most recent being in September 2006. In its Concluding Observations on the second report, the African Commission observed that illiteracy is high in Uganda and therefore many people suffer abuse of their rights in ignorance, while at the same time legal services are way out of reach and many an ordinary people who suffer human rights violations end up not getting any remedies as they cannot afford legal services. The Commission further observed that Uganda had not taken concrete actions to give effect to all the legal measures it had taken. However, no mention was made of refugees and their rights.

### **5.5.2 Individual Communications or Complaints**

The ACHPR does not specifically endow the African Commission with powers to receive complaints from individuals<sup>238</sup>. The Commission has

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<sup>237</sup> Information available at [http://www.achpr.org/english/\\_info/status\\_submission\\_en.html](http://www.achpr.org/english/_info/status_submission_en.html) visited on 30 October 2007.

<sup>238</sup> Article 55 of the ACHPR provides: "Before each Session, the Secretary to the Commission shall make a list of the *Communications other than those of States Parties* [*emphasis mine*] to the present Charter and transmit them to Members of the Commission, who shall indicate which Communications should be considered by the Commission".

interpreted the ‘other communications’ in Article 55 to include communications from individuals and organisations. The admissibility criteria<sup>239</sup> are similar to that under the new complaints procedure of the Human Rights Council with emphasis though on the African regional human rights instruments. The criteria also differ from that of the HRC under the ICCPR in the sense that NGOs<sup>240</sup> and groups of people may submit communications to the African Commission alleging a serious or massive violation of human rights in a country, whether or not they are representing any particular victims. The Commission shall only embark on a substantive consideration of the matter after being satisfied that the conditions of admissibility have been met, emphasis mainly on the requirement that all available local remedies have been exhausted, unless they are unduly prolonged.

Once a communication is declared admissible, both parties are accorded an equal opportunity to be heard and where a State is found to be in violation, then the Commission shall try to make the parties come to an amicable solution of the matter. It shall then submit a report together with any recommendations it deems useful to the Assembly of Heads of State and Government, which takes the final decision.

The individual complaints procedure has come under criticism on a number of grounds. Firstly, some of the Members of the Commission are not seen to be independent as they hold high government positions in their home countries at the same time<sup>241</sup>. Secondly, the recommendations are too weak-worded to sound authoritative, usually falling short of enumerating the various remedies that should be provided to the victim<sup>242</sup>. Bottiglierio clearly explains that the Commission has rarely ordered a State to pay

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<sup>239</sup> ACHPR, Article 56.

<sup>240</sup> Indeed most of the complaints to the Commission are brought by NGOs, which represent about more than half of the total complaints decided by the Commission. List of decisions available at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html> visited on 30 October 2007.

<sup>241</sup> See R. Murray, *supra* note 144, p. 62.

<sup>242</sup> For instance, in the *RADDHO v. Zambia* case, *supra* note 146, the Commission’s recommendation or decision was that the parties “continue efforts to pursue amicable resolutions”, while in the *Organisation Mondiale v. Rwanda* case, *supra* note 145, the decision was that Rwanda “should adopt measures in conformity with the decision”, that is to say, remedy the violations.

compensation or provide other forms of reparation with its role being limited to so-called 'friendly settlements' between the State concerned and the individual complainant. Unfortunately, the terms of settlement often have not been clear as concerns the duties of the State and the Commission has been unable to properly verify State compliance to the settlement<sup>243</sup>. Thirdly, it is the Assembly of Heads of State and Government that makes the final decision regarding the recommendations of the African Commission and as such the latter is absolutely powerless in seeing to the enforcement of its recommendations. The Commission also realised and decried this seemingly futile and weak procedure as eroding its credibility in addition to frustrating the victims who ultimately find themselves without any remedy<sup>244</sup>. Nonetheless, the follow-up procedure continues to be generally weak. Fourthly, under Article 59(1) of the ACHPR, all measures taken by the Commission under the Charter shall remain confidential until the Assembly of Heads of State and Government otherwise decides, thus making it difficult for one to know what actions or follow-up processes might have been taken on a non-compliant State.

### 5.5.3 Inter-State Complaints

It was mainly to receive and deal with inter-State complaints that the African Commission was set up<sup>245</sup>. However, to date no such complaint or communication has been received by the Commission despite the blatant human rights violations that have taken place and continue to take place across the continent and the fact that virtually all African countries are States parties to the ACHPR. Failure to utilise this mechanism could be due to the principle of non-interference, which traditionally was embodied in the OAU Charter and was much adhered to at the expense of other principles<sup>246</sup>. However, under the Constitutive Act of the African Union, the AU has the

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<sup>243</sup> I. Bottigliero, *Redress for Victims of Crimes Under International Law* (Martinus Nijhoff Publishers, Leiden/Boston, 2004) p. 131.

<sup>244</sup> African Commission on Human and Peoples' Rights, 'Non-Compliance of States Parties to Adopted recommendations of the African Commission: A Legal Approach 1998' in R. Murray and M. Evans (eds.), *supra* note 90, p. 758.

<sup>245</sup> I. Bottigliero, *supra* note 243, p. 129.

<sup>246</sup> O. Umozurike, 'The Complaint Procedures of the African Commission on Human and Peoples' Rights', in G. Alfredsson, J. Grimheden *et al* (eds.), *supra* note 221, p. 707.



right to intervene in a Member State in respect of grave circumstances such as war crimes, genocide and crimes against humanity, and also to restore peace and security<sup>247</sup>.

Generally, the human rights protection mechanism on the African continent remains weak. The protection of human rights on the continent, it is hoped, will be strengthened by the establishment of an African Court, which we shall now look at.

## 5.6 The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (hereinafter referred to as 'the African Court' or 'the Court')<sup>248</sup> is expected to address some of the weaknesses of the African Commission regarding the enforcement of the Charter provisions. The proceedings of the Court are open to the public, except where the Court decides otherwise and both parties may be heard in person and also adduce witnesses. The Judges of the Court are eleven experts serving in their individual capacity and are supposed to be jurists of high moral character. The independence of the Court is guaranteed under Articles 17 and 18 of the Protocol establishing the African Court. Under Article 27, the Court is empowered to make appropriate orders to remedy any violation of a human and peoples' right that it has established, which may include the payment of fair compensation or reparation. The judgment of the Court is final and binding, and can only be reviewed by the Court itself. Under Article 30, which provides for the execution of the Court's judgments, the States parties undertake to comply with the Court's judgment to which they are parties within the stipulated time and to guarantee its execution, which shall be monitored by the Council of Ministers. Where a State party fails to so comply, it shall be specified in the report of the Court

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<sup>247</sup> The Constitutive Act of the African Union, Article 4 (h) and (j), available at [http://www.africa-union.org/root/au/AboutAU/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm) visited on 30 October 2007.

<sup>248</sup> Established under the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) and entered into force on 25 January 2004.

to the Assembly of Heads of State and Government<sup>249</sup>. The remedies provisions under this Protocol seem to offer a much better and stronger prospect for victims of a State's violations of the rights guaranteed under the ACHPR.

Nevertheless, the African Court also seems to have its shortcomings, which include the too few number of judges to handle the cases from all over the continent<sup>250</sup>, and, perhaps, the major shortcoming: restriction of accessibility to the Court by individuals and organisations. According to Article 5 (1) of the Protocol only the following may submit cases to the African Court: the African Commission; the Complainant State party; the respondent State party; the State party whose citizen is a victim of a human rights violation; and African Intergovernmental Organisations. Individuals and NGOs with observer status before the African Commission may only submit cases if the relevant State parties involved have made a declaration accepting the competence of the Court to receive such cases<sup>251</sup>. This is a major stumbling block to the access of the Court by the victims of human rights violations, which in turn may adversely affect their right to an effective remedy.

However, since the Court is not yet functional as such<sup>252</sup> although it has been established and the judges appointed, it remains to be seen how many States will make such a declaration and how the enforcement of human rights and ensuring that victims of violations actually obtain effective remedies shall be upheld and protected.

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<sup>249</sup> *Ibid.*, Article 31.

<sup>250</sup> The number is few compared with the European Court on Human Rights which currently has 47 Judges: see <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Plenary+Court/> visited on 30 October 2007.

<sup>251</sup> Protocol on the African Court, *supra* note 223, Articles 5(3) and 34(6).

<sup>252</sup> Following a proposal by the then Chairperson of the AU, the AU decided to merge the African Court on Human and Peoples' Rights with the African Court of Justice, which is yet to be established as its Protocol has not yet come into force. Although it has not yet started handling cases, the Court has so far been involved in setting up its administrative structures. For more information see [http://www.africancourtcoalition.org/editorial.asp?page\\_id=16](http://www.africancourtcoalition.org/editorial.asp?page_id=16) visited on 30 October 2007.

## 5.7 Chapter Conclusion

It has been observed and it is quite evident that international human rights protection mechanisms generally lack adequate enforceability because of their limited or non-existent sanctions applicable to States which fail to comply with their obligations. This is particularly the case of international refugee law<sup>253</sup>. The UNHCR as a monitoring body is now overwhelmed by an extended mandate and much of its protection is geared towards ensuring *non-refoulement* and not so much as the protection of other refugees' rights, especially those that fall outside humanitarian assistance. Hence, a refugee should not expect any form of remedial assistance or redress from UNHCR where his or her human rights and freedoms have been violated. Nonetheless, UNHCR may intercede on his or her behalf in form of negotiations with the relevant authorities.

Using a hypothetical case of a refugee in Acholi Pii Camp in Northern Uganda who claims a violation of her rights say, freedom from torture, cruel, inhuman or degrading treatment, freedom of movement and threatened expulsion, the UNHCR, if it had the mandate would be the easiest body to access for redress in case all domestic remedies have been exhausted. This is so because the UNHCR has got a presence where the refugees are, but since it lacks the mandate, our refugee would have to resort to other channels available under the human rights treaty regime, both international and regional.

The best option for our refugee would be going for the individual complaints system which is available under the ICCPR and the ACHPR. However, she would have a problem accessing the HRC and the African Commission, if she is illiterate, poor and ignorant, as any typical African refugee in a settlement or camp. While she could access the African Commission with the assistance of an NGO, this might not necessarily be the case if she were to opt for the HRC. Furthermore, assuming that her case gets to be heard on the merits by either body and it is indeed established that

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<sup>253</sup> African Commission on Human and Peoples' Rights, *Conclusions and Recommendations of the Consultative Meeting between the African Commission on Human and Peoples' Rights and the UNHCR*, Addis Ababa, 20-21 March 2003, para. 8.

her rights were violated, these bodies can only make non-binding recommendations. Hence, the matter is thrown right back into the hands of the responsible State to ensure she obtains an effective remedy and despite any follow-up procedures there may be, it will ultimately depend on the State to carry out its obligations in good faith.

The reporting procedures are even less effective especially if no particular attention is given to refugees and their rights in either the State report or the 'shadow reports'. Even though the monitoring body may inquire into particulars of refugees, such information will normally be provided in the next periodic report, thereby "literally letting the State party off the hook"<sup>254</sup> for a number of years, depending on the periodicity of the reporting cycle.

With regard to the universal procedures, with the creation of a new complaints procedure, it is hoped that it shall be much more effective than the previous ones in ensuring redress for victims of human rights violations. However, it seems to be limited to only those cases of gross and systematic violations, in which case it is not open to an individual complainant, unless his or her complaint reveals gross and systematic human rights violations.

Nonetheless, the available channels of redress and mechanisms to ensure a State's compliance with its human rights obligations have been useful and effective in the sense that a State has been subjected to scrutiny of its human rights record and has thus been pressurized to comply therewith. The recommendations from these bodies have also at times served as a basis for action of other States parties and international organs to ensure that a State does indeed comply with its obligations. Nevertheless, much remains to be done to make the monitoring and protection mechanisms at both the international and regional levels truly effective<sup>255</sup>.

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<sup>254</sup> M.G. Schmidt, 'Follow-Up Procedures to Individual Complaints and Periodic State Reporting Mechanisms' in G. Alfredsson, J. Grimheden *et al* (eds.), *supra* note 221, p. 211.

<sup>255</sup> The UN has been criticised as often acting as a chronicler, recording on-going human rights violations and acting as a forum to express the conscience of the international community, while it has been said of the African system that its enforcement mechanism can best be addressed through the reform of the entire enforcement system. See B. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1989) p. 272; and also E. de Wet, 'The Protection Mechanism

In a nutshell, the problems a refugee encounters at the domestic level with regard to the right to an effective remedy, namely access and enforceability, seem to be replicated at both the regional and international levels. An examination of the monitoring or protection mechanisms at both levels reveals that a State is indeed in the best position to ensure the right to an effective remedy since neither the international nor regional bodies can guarantee that right. It all comes back full circle to the State fulfilling its human rights obligations without discrimination in good faith.

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Under the African Charter and the Protocol on the African Court on Human and Peoples' Rights' in G. Alfredsson, J. Grimheden *et al* (eds.), *ibid*, p. 729.

## **6 General Conclusion**

International human rights law, as mentioned in the Preamble to the UDHR, aims to ensure the equality of all people that should live with all dignity and worth inherent in all human beings without any discrimination whatsoever. The primary subjects of international law being the States, they carry the responsibility to ensure that all persons within their sovereign territory and under their jurisdiction do fully enjoy the rights guaranteed under international law and which the respective State has undertaken to respect, protect and fulfil. With regard to the obligation to protect, the State, in addition to putting in place appropriate policies and legislative measures, is specifically obligated to ensure that every person in its territory enjoys the right to an effective remedy when his or her rights have been violated. This thesis sought to look into how or whether this right to an effective remedy is realised by refugees both in domestic law and in international law generally. What follows is a sum-up of the major deductions with regard to the questions that the thesis set out to answer.

### **6.1 The Right to an Effective Remedy in International Law**

Chapter two examined the meaning of the right to an effective remedy as interpreted by various international and regional bodies, namely: the HRC, the CESCR, the European Court of Human Rights and the African Commission on Human and Peoples' Rights. Going by the way these bodies have interpreted this right, one can deduce that the right to an effective remedy implies one; procedural remedies or the means by which a victim of a human rights violation may obtain substantive redress and these should be competent, independent and impartial tribunals, not necessarily judicial which abide by the procedural guarantees as set out under human right law. Such institutions for obtaining remedies should be both available and accessible. Secondly, it implies that the remedy obtained by the victim should sufficiently redress the violation that has occurred and as such the

nature of the remedy may take various forms ranging from reparation, compensation, investigations and prosecution of individual offenders to amending offending laws. The actual realisation of the right, moreover, occurs when the particular remedy is enforced.

## **6.2 The Right to an Effective Remedy under Refugee Law**

Chapter three examined the nature of the protection accorded to refugees under international refugee law and whether this comes within the ambit of the protection that is stressed under human rights law that a victim of a human rights violation should have the right to an effective remedy. It was submitted that the protection envisaged for refugees is not remedial in the strict sense of the term in that it does not redress the violations that occasioned the refugee's flight (which is the objective of the right to a remedy), but rather seeks to provide an alternative means of redress by ensuring that refugees are temporarily protected in another State, which is under an obligation to ensure that the refugee is not returned to the country where he or she faces danger of persecution (*non-refoulement*). Nevertheless, the CSR does provide for the rights of refugees in the asylum country, among which is free access to courts. However, it goes no further than this, leaving the details into the hands of each individual and sovereign State. It was the conclusion in this chapter that refugee law does indeed fall short of providing for a refugee's right to an effective remedy and as such one would have to fall back onto the mainstream human rights law provisions for adequate guarantees of the right.

## **6.3 The Refugee and the Right to an Effective Remedy in Practice**

Chapters four and five looked at the law in practice. In chapter four we looked at the human rights situation of refugees in settlements in Uganda and the extent to which the Government of Uganda has fulfilled its obligation of ensuring the right to an effective remedy to its refugees.

The conclusion was that whereas such remedies may be readily available both in law and fact, the reality is that they are rather inaccessible by refugees in settlements, mainly because their freedom of movement is greatly restricted, but also because of other factors that were mentioned. A further hurdle to the realisation of the right to an effective remedy is the reluctance of the Government of Uganda when it comes to the actual enforcement of remedies that may be awarded by the competent bodies. The failure to enforce a remedy makes the right to an effective remedy illusory and in effect renders whichever right for which a remedy was sought illusory as well<sup>256</sup>.

There are mechanisms put in place at both the international and regional levels that monitor the implementation of the respective human rights instruments in a State party to the instrument. It is the operation and effectiveness of these mechanisms that were examined in chapter five. At this level, there are a number of ways supervision of a State's compliance with its obligations may be conducted and this is mainly through examination of State party reports and the examination of individual complaints for those bodies which have the mandate to do so. However, it was noted that as far as providing remedies or ensuring that remedies are provided to victims of human rights violations is concerned, these bodies are not quite as effective and that they rely so much on the good faith of the State to carry out its international obligations. They as such can offer no remedies to a victim of a violation, but can only recommend to and hope that the State will provide the effective remedy. Moreover, these bodies do not deal specifically with refugees and yet are far removed from refugees thus raising the question of accessibility. The only body that deals specifically with refugees, the UNHCR, lacks the mandate that would enable it ensure that when the rights of refugees are violated, the State does in fact provide the effective remedy.

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<sup>256</sup> As Justice Holmes once expressed: "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp"- *Ex parte United States*, 257 U.S. (1922) 419 at 433. See also T.A. Thomas, *Ubi Jus, Ibi Remedium*, *supra* note 5, p. 3. She further explains that "[t]he enforcement power of a remedy is the quality that converts pronouncements of ideals into operational rights".



It is therefore humbly submitted that while the right of refugees to an effective remedy is adequately provided for under both international law and in domestic law (that is, in Uganda), it is not that easily realised by a refugee, especially the kind of refugee that we have looked at. While international law and its protection or monitoring mechanisms aim to ensure that this right is available to all, they can only, in most cases, go as far as making declarations that a State has violated its obligations and that it should provide a remedy. This is even more pronounced under the African regional human rights and refugee protection system. The plight of a refugee would therefore be better redressed in a domestic setting, if the system is in fact functioning as envisaged under international human rights law, but even where it is not, the practice in international law is that the ultimate solution and enforcement of any right will depend on the good faith of the State in carrying out its human rights obligations. While States could, and sometimes do, act as a check on each other to ensure that a State complies with its human rights obligations; this is rarely done as confirmed by the non-usage of the State communication procedures under international law. The possible explanation for this could be that human rights are seen as delimiting State sovereignty<sup>257</sup> and as such their protection is not normally accepted as sufficiently compelling interest for States to risk their relations with the offending State<sup>258</sup>. When it comes to enforcing the human rights of refugees, who are more or less regarded as a burden on any State, the reluctance on the part of States cannot be overstated. As this research has endeavoured to point out, the divergence between the theory and the reality of international human rights law is strikingly apparent<sup>259</sup>, and it could not be more apparent than in ensuring that refugees do enjoy their right to an effective remedy as provided under international law.

Although the major aim of this thesis was to examine the right to an effective remedy of a refugee in a country of asylum, as I conclude I would like to ponder briefly on what would be an effective remedy for refugees

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<sup>257</sup> J.C. Hathaway, 'Reconceiving Refugee Law', *supra* note 214, p. 9.

<sup>258</sup> A.A. An-Na'im, *supra* note 10, p. 10.

<sup>259</sup> J. C. Hathaway, *supra* note 214, p. 9.

under international law other than protection from *refoulement*, which is the sort of protection provided under international refugee law.

## 6.4 Broadening the Concept of Refugee Protection

In the Vienna Declaration and Programme of Action<sup>260</sup>, States recognise that gross human rights violations, including armed conflicts, are among the multiple and complex factors responsible for the refugee situation. The UN General Assembly has also gone ahead to adopt *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>261</sup> (hereinafter referred to as ‘Basic Principles’) but then these have not yet been applied to redress refugee issues in particular. As we have seen, refugee law focuses on offering an alternative solution rather than on redressing the problem, which seems to conflict with the principle that where there is a violation of a right, there should be an effective remedy. The dilemma here is that the entity, that is, the State, which would be providing the effective remedy is unable to or unwilling to do so.

An-Na`im explains that because international human rights standards derive their validity and binding nature from treaties, as a matter of international law, a State owes its legal obligation to other States parties to the treaty<sup>262</sup>. As such it would be other States that would ensure that a deviant State actually ‘toed the line’. This would in most cases be addressed if States took the States communication procedures seriously or referred the matter to the International Court of Justice as envisaged under Article 38 of the CSR. However, as explained above, these channels are yet to be put to use.

Moreover, the States do avoid the responsibility of ensuring that refugees are accorded an effective remedy by their State of origin or

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<sup>260</sup> Vienna Declaration, *supra* note 1, Article 23.

<sup>261</sup> UN General Assembly Resolution A/RES/60/147 adopted on 21 March 2006.

<sup>262</sup> A. A. An-Na`im, *supra* note 10, p. 10.

nationality by neglecting to make such a provision under refugee law instruments, which makes Hathway's assertion, that refugee law as it exists today is concerned with the protection of powerful States rather than the vulnerable individuals<sup>263</sup>, rather persuasive. Ironically though, States do mandate the UNHCR to 'seek permanent solutions' to the refugee problem without giving it the power that would enable it ensure that States responsible for refugee outflows remedy the situation.

Coles has plausibly argued thus:

"the refugee issue should be presented, therefore, as basically not one of admission to a receiving country, or of eligibility criteria or of migration controls, but as essentially that of the adverse conditions within the country of origin which are producing the transfrontier movement. If the refugee problem is ever to be solved, the solution must be basically that of those adverse conditions"<sup>264</sup>.

Taking this approach would better ensure that refugees do obtain an effective remedy for the violations they may have suffered that occasioned their flight. What then would be the effective remedy in such instances with regard to the remedies proffered under human rights law? There are a few suggestions that could be considered:

- a) *Compensation or Restitution*: under the Principles Concerning Treatment of Refugees<sup>265</sup>, it is provided that a refugee "shall have the right to receive compensation from the State or country which he left or to which he was unable to return". This compensation would in fact seek to redress all the losses and violations an individual may have suffered<sup>266</sup>. This would seem to be a noteworthy remedy, but it has been criticised as raising problems of distributive justice; it would be unfair to those who did not flee but all the same suffered at home,

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<sup>263</sup> J.C. Hathaway, 'Reconceiving Refugee Law', *supra* note 214, p. 10.

<sup>264</sup> G. Coles, 'Placing the Refugee Issues on the New International Agenda', quoted in J.C. Hathaway, *ibid*, p.13.

<sup>265</sup> Resolution adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, Article 5 (1). Available at

<http://www.lnf.org.lb/migrationnetwork/unn10.html> visited on 7 November 2007.

<sup>266</sup> *Ibid*, para. 2. See also *Basic Principles*, *supra* note 261, Article 20.

as they would, through payment of taxes, have to bear the burden of the compensation<sup>267</sup>.

- b) *Truth and Reconciliation*: one of the ways of redressing gross human rights violations is through truth and reconciliation commissions. However, this approach taken on its own could leave many victims without full remedies and perpetrators without complete sanction<sup>268</sup>, which might defeat the purpose of justice.
- c) *Accountability/Prosecution*: as we saw earlier, human rights bodies emphasise the importance of investigating and prosecuting human rights violators as one of the effective remedies. Now with the establishment of the International Criminal Court (ICC), this may be possible for those individuals who, by their actions that amount to gross and serious or systematic human rights violations, create refugee situations. Although the ICC does not specifically deal with the issue of refugees, the fact that it deals with persons responsible for gross, serious and systematic violations of human rights would in effect enable it prosecute individuals responsible for refugee outflows.

There are other remedies provided under the Basic Principles, which include satisfaction, guarantees of non-repetition, rehabilitation and which could also be accorded to refugees. There are thus other available channels in international law that could be applied to ensure that refugees do obtain effective remedies, and these should be applied hand in hand with refugee law. The basic proposition here is that the international community should adopt a two-pronged approach to the refugee problem: one which seeks to provide an alternative and temporary solution, and the other which aims at providing redress or remedies for human rights violations suffered by the refugees.

To wrap up, States should take their international obligations seriously instead of saying one thing on paper and doing the other in practice. The

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<sup>267</sup> See C. Tomuschat, 'State Responsibility and the Country of Origin' in V. Gowlland (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1996) pp. 69-71.

<sup>268</sup> D. Shelton, *supra* note 58, p. 390.

laxity with which States in the domestic setting protect the rights of refugees is more or less that reflected at the international level. International law and practice should work towards ensuring that refugees do in fact enjoy the right to an effective remedy, that is a remedy which serves the purpose of providing redress to a victim for the wrong done. This could perhaps help remove that feeling of 'nothingness' that a refugee experiences and restore his or her dignity and worth as a human being, which is one of the objectives and principles of human rights law.

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