



FACULTY OF LAW
University of Lund

Lena Savelli

What happens to those who do not
repatriate voluntarily?

Protection and Prospects for the Residual Caseload of
Angolan Refugees in Zambia

Master thesis
20 points

Prof. Göran Melander

Refugee Law

Spring 2003

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
INTRODUCTION	5
1.1 Problems and solutions	5
1.2 Durable solutions in Africa	5
1.3 Questions at issue	6
1.4 Delimitation	7
1.5 Disposition and methodology	8
1.6 Material	8
2 BACKGROUND TO THE ANGOLAN REFUGEE POPULATION	10
2.1 Introduction to Angola	10
2.2 The conflict	11
2.3 The results of the conflict	12
2.3.1 The Angolan Human Rights Situation	12
2.3.2 Refugees and Internally Displaced Persons	13
2.4 An end to the conflict?	14
3 ZAMBIA- THE HOST STATE	16
3.1 Introduction	16
3.2 The influx of refugees from Angola	17
4 THE LEGAL STATUS OF ANGOLAN REFUGEES IN ZAMBIA	19
4.1 International and regional refugee law in Zambia	19
4.1.1 The 1951 Convention and the 1967 Protocol	19
4.1.2 The UNHCR in Zambia	20
4.1.3 The Regional Approach- the 1969 OAU Convention	21
4.2 Zambian refugee legislation and practice	22
4.2.1 Introduction to Zambian refugee legislation	22

4.2.2	The definition of refugees in Zambia	23
4.2.3	Refugee status determination in Zambia	24
4.2.3.1	<i>Prima facie</i> determination of refugee status	24
4.2.3.2	Individual status determination	25
4.2.4	The standard of treatment of refugees in Zambia	26
5	VOLUNTARY REPATRIATION IN LAW	28
5.1	The legal framework governing voluntary repatriation	28
5.2	The relationship between voluntary repatriation and the cessation clause	30
6	PROTECTION OF THE RESIDUAL CASELOAD AT THE TIME OF THE VOLUNTARY REPATRIATION OPERATION	32
6.1	Identifying the residual caseload	32
6.2	The principle of <i>non-refoulement</i>	33
6.2.1	Zambian legislation and practice	34
6.2.2	The Tripartite Agreement	36
6.3	The principle of voluntariness	37
6.3.1	The existence of the principle of voluntariness	38
6.3.2	Assessing voluntariness in Zambia	40
6.4	The principle of return in safety and dignity	42
6.4.1	The existence of a right to return in safety and dignity	43
6.4.2	The meaning of return in safety for Angolan refugees	43
7	PROTECTION OF THE RESIDUAL CASELOAD AT THE TIME OF THE APPLICATION OF THE CESSATION CLAUSE	46
7.1	The application of the cessation clause in Zambia	46
7.2	The timing of the application of the cessation clause	48
7.3	The conundrum of the Cabinda Province	49
7.4	Continued protection for the residual caseload- exceptions to the cessation clause	50
7.4.1	'Compelling reasons'	51
7.4.2	Long-stayers	52
7.4.3	Exceptions to the cessation clause in Zambian legislation and practice	53
7.5	An appropriate status for the residual caseload	54
7.5.1	Naturalization	54
7.5.2	Complementary protection	56
7.5.3	Continuation of refugee assistance	57
8	CONCLUSIONS	59
	BIBLIOGRAPHY	65

UNHCR AND UN DOCUMENTS	68
LEGAL INSTRUMENTS	71
OTHER DOCUMENTS	73
TABLE OF CASES	75

Summary

In February 2002, the UNITA rebel leader Jonas Savimbi was shot dead by Angolan Government forces, thereby putting an end to almost four decades of war in Angola. Once peace had been declared, the Government of Zambia together with the Government of Angola and the UNHCR began to make arrangements for the voluntary repatriation of the large Angolan refugee population residing in Zambia. However, due to such things as the ethnic, religious and cultural similarities of the two countries and the protracted nature of the Angolan refugee situation, many Angolan refugees no longer have any desire to return to Angola. What will happen to this group of refugees has still not been decided.

Under international and regional refugee law, there exist a few principles that can protect the refugees who wish to remain, the so-called 'residual caseload', from being forcefully returned to Angola. At the time of the voluntary repatriation operation, the cardinal principle for the residual caseload is the principle of *non-refoulement*. Two possible corollaries to this principle are the principle of voluntariness and the right to return in safety and dignity. After looking closely at the content and legal basis of these principles, the legal obligation of Zambia to respect them as well as their implementation in the present repatriation operation, the thesis came to the conclusion that they offer inadequate protection to the residual caseload.

The Refugees (Control) Act of Zambia, does not provide foolproof protection for Angolan refugees against *refoulement*, and in practice, the principle of *non-refoulement* is further undermined by the Zambian authorities' constant application of the Immigration and Deportation Act to refugees and asylum-seekers. The latter Act does not concern itself at all with the principle of *non-refoulement*. Even though the Tripartite Agreement seems to implicitly suggest that the authorities responsible for the operation consider themselves bound to respect the principle of *non-refoulement*, and even though it explicitly states that the voluntary nature of the repatriation shall be adhered to, the practical implementation of the repatriation operation suggests otherwise.

Firstly, as the future of the residual caseload was not fully decided upon prior to the intended date of the voluntary repatriation operation, there is a risk that refugees not wanting to return to Angola actually feel compelled to do so due to the uncertainty of what will happen to them should they choose to remain in Zambia. Some may even feel that they have no choice but to return. Secondly, the authorities are likely to undertake individual and systematic status determination of the residual caseload as soon as the movement phase of the voluntary repatriation operation has been completed. By making the option not to return conditional on being able to demonstrate genuine reasons for requesting continued international protection, indirect

pressure is in effect put on the refugees to repatriate. Consequently, the principle of voluntariness is at risk of being compromised and what was intended to be a voluntary repatriation of Angolan refugees from Zambia will be more similar to a safe return of the refugees to Angola. However, there has been insufficient attention devoted to the actual safety of the refugees' return because the intended key to the refugees' promoted repatriation was supposed to be their voluntary decision to repatriate. Effectively, the Angolan refugees in Zambia fall between two stools and seem to be at risk of being repatriated involuntarily to unsafe conditions in Angola. Thereby the principle of *non-refoulement* ends up being violated after all.

Following the repatriation operation, when conditions have improved further in Angola, Zambia will be at liberty to apply the cessation clause relating to change of circumstances in the country of origin in relation to Angolan refugees. When, and if, that happens, exceptions to the cessation clause can offer protection to the residual caseload from being forcefully returned to Angola. Should Zambia make arrangements for such exceptions, two groups of refugees can be eligible to stay: those who can present compelling reasons arising out of previous persecution; and, those who cannot be expected to leave due to a long stay in Zambia resulting in strong family, social and economic links there. Due to the protracted nature of the Angolan refugee situation, and on account of the high level of social and economic interaction between the Angolan refugees and their Zambian host communities, the latter group can be expected to be the largest.

At present however, Zambian domestic legislation is not very favorable to the legal integration of the residual caseload in Zambia, and what their status would be is unclear. The most appropriate legal status, which is citizenship through naturalization, is effectively precluded for refugees by the Citizenship of Zambia Act in combination with the Constitution of Zambia. The former Act does not accord citizenship to refugees born in Zambia either. Granting humanitarian status to the residual caseload present problems as the ability to do so is not properly codified in Zambian legislation. Humanitarian status would also be inferior to full citizenship as it does not grant the residual caseload the same rights and benefits accorded to ordinary Zambians. Furthermore, due to the administrative costs involved in assigning the residual caseload with a new status, there is a great risk that the residual caseload will simply end up continuing to receive refugee assistance and protection in the refugee camps and settlements of Zambia.

Preface

This thesis is the result of a two month long Minor Field Study, and a three month long internship at the United Nations High Commissioner for Refugees, both conducted in Zambia between June and November 2002. The financial assistance for both projects was provided by the Swedish International Development Agency, to which I extend my deepest gratitude.

During my Minor Field Study in Lusaka, I received invaluable assistance and support from my supervisor in the field, Dr. Alfred W. Chanda, Lecturer and Assistant Dean at the School of Law of the University of Zambia. I would also like to thank Mrs. Tembo, Administrative Assistant at the School of Law and my fellow law students Leya and Sharon for their help and kindness.

The majority of the research material for this thesis was collected during my internship at the UNHCR Branch Office in Lusaka, an opportunity that was offered to me by Mr. Machiel Salomons, Senior Protection Officer, to whom I am forever grateful. My sincerest regards also to Mr. Ahmed Gubartalla, UNHCR Representative to Zambia, and to the rest of the staff at the Branch Office.

However, many other people assisted me during my research and time of drafting. The following people should be specifically acknowledged: Mr. Arshad Abdullah Dudhia, Partner/ Musa Dudhia and Company; Mr. Bradford Machila, Partner/ Corpus Globe; Mr. Jacob Mphepo, Commissioner for Refugees/ Ministry of Home Affairs; Mrs. Towa Chaiwila, Legal Advisor to the Commissioner for Refugees; Father Michael S. Gallagher, National Policy Officer of the Jesuit Refugee Service Zambia; Mr. Enos Moyo, Representative/ Director of the Lutheran World Federation/ Zambian Christian Refugee Service; and, Professor Göran Melander, Chairman of the Board of the Raoul Wallenberg Institute of Human Rights and my supervisor in Sweden.

Finally, I would like to thank my mother Eva and my family and friends for love and support.

Abbreviations

BO	Branch Office
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
COR	Commissioner for Refugees
DRC	Democratic Republic of the Congo
ECOSOC	Economic and Social Council
ExCom	Executive Committee
FAA	Forças Armadas Angolanas
FLEC	Frente de Libertação do Enclave de Cabinda
FMU	UNITA Armed Forces (Portuguese abbreviation)
FNLA	Frente Nacional para a Libertação de Angola
GOA	Government of Angola
GRZ	Government of the Republic of Zambia
HDI	Human Development Index
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJRL	International Journal of Refugee Law
IMR	International Migration Review
JAL	Journal of African Law
JRS	Journal of Refugee Studies
LCR	Lawyers Committee for Human Rights
MPLA	Movimento Popular para a Libertação de Angola
NEC	National Eligibility Committee
NGO	Non-Governmental Organization
OAU	Organisation of African Unity
RSQ	Refugee Survey Quarterly
UNAIDS	United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNITA	União Nacional para a Independência Total de Angola
USSR	Union of Socialist Soviet Republics
UXO	Unexploded Ordnance
VRF	Voluntary Repatriation Form
ZLR	Zambia Law Reports

Introduction

1.1 Problems and solutions

In 1975, Louise Holborn wrote a classic book in which she described the problem of refugees as “one of the world’s most anguishing and persistent issues”.¹ Today, with an estimated 12 million refugees in the world,² this is perhaps even truer. While many States are willing to let asylum-seekers in and grant them asylum according to internationally established definitions of refugees, this will only provide an immediate, and very often temporary solution to the problem. It is recognised that a number of problems will persist; for example, refugees remain a problem to their country of origin, to the host community, to the international community, as well as to themselves.

In order to address these problems, the Office of the United Nations High Commissioner for Refugees [hereinafter, “the UNHCR”] has identified three durable solutions; namely, (1) voluntary repatriation to the country of origin; (2) local integration in the country of asylum; and, (3) resettlement to third countries of permanent asylum. The preference and promotion of the different solutions has varied over time, and has also depended on the particular refugee situation. However, from 1983 onwards, voluntary repatriation became promoted by the UNHCR as *the* durable solution to be pursued in all refugee situations. This was even more pronounced in 1992, which the UNHCR proclaimed ‘the Year of Voluntary Repatriation’, and then prolonged it into a decade.³

1.2 Durable solutions in Africa

One continent that has been keenly affected by the problem of refugees is the African continent; today home to about 3,5 million refugees.⁴ Most of the early refugee populations in Africa emanated from anti-colonial wars or from post-independence civil wars that were a legacy of the irrational boundaries imposed by the colonial masters. In such cases, it was generally assumed that the conflicts would be quickly resolved and that the refugee problem was only of a temporary nature. The near universal position held by African Governments, which even found expression in regional refugee instruments, was that repatriation was the natural outcome of all refugee

¹ Holborn, Louise, *Refugees: A Problem of Our Time- The Work of the United Nations High Commissioner for Refugees, 1951-1972*, Radcliffe Institute, Cambridge, 1975, p. xv.

² UNHCR, *2001 UNHCR Population Statistics (Provisional)*, UNHCR Population Data Unit, Geneva, 7 June 2002, Table 1a. Asylum-seekers, refugees and others of concern to UNHCR by UN major area, end-2001, [hereinafter, *Population Statistics (2001)*].

³ Zieck, Marjoleine, *UNHCR and Voluntary Repatriation of Refugees- A Legal Analysis*, Martinus Nijhoff Publishers, The Hague, Boston and London, 1997, p. 3f.

⁴ *Ibid.*

movements.⁵ Furthermore, it was generally assumed by most African Governments that all African refugees desired to go home.⁶

An African country that has shared this position is Zambia, one of the largest refugee hosting nations and home to one of the world's oldest refugee populations, the Angolans. Over the years, the Government of the Republic of Zambia [hereinafter, "the GRZ"] has maintained its commitment to repatriation, and has on numerous occasions tried to put it into action *vis-à-vis* the Angolans and *vis-à-vis* other refugee populations. Examples of repatriations from Zambia include Zairians (1971-1972), Angolans (1978-1979 and 1988-1989), Mozambicans (1975-1976, 1988-1989 and 1993-1994), Zimbabweans (1979-1981) and Namibians (1988-1990).⁷

Following the death of the Angolan rebel leader Jonas Savimbi in early 2002, the GRZ together with the Government of the Republic of Angola [hereinafter, "the GOA"] and the UNHCR are again promoting voluntary repatriation of the Angolan refugee population, and on the 28th of November 2002, a Tripartite Agreement governing the repatriation was signed. The repatriation is expected to begin on a large scale at the end of the rainy season in May 2003.

1.3 Questions at issue

This thesis will be looking at the voluntary repatriation of Angolan refugees from Zambia under the hypothesis that not all refugees are alike, and the refugees may not all have a desire to return to their country of origin. This group of refugees will throughout the thesis be referred to as 'the residual caseload'.⁸ The purpose of the thesis is to ascertain how the residual caseload is protected under international and regional refugee law, under national Zambian legislation and practice, as well as under the Tripartite Agreement.

The issues to be addressed will be the following: Firstly, what protection is available for the residual caseload at the time of the promoted voluntary repatriation operation? Here the thesis looks at three particular elements of voluntary repatriation: *the principle of non-refoulement*, *the principle of voluntariness* and *the right to return in safety and dignity* [hereinafter, "the principle of return in safety and dignity"], to see if they offer any legal

⁵ Rogge, John R., "Repatriation of Refugees", *When refugees go home*, Allen & Morsink (ed.), United Nations Research Institute for Social Development, 1994, p. 18.

⁶ *Ibid.* p. 31.

⁷ Rogge (1994), Table 2.1, p.18-19; and, UNHCR, *Evaluation of UNHCR's Repatriation Operation to Mozambique*, Evaluation Report, 1 February 1996, p. 5.

⁸ The term 'residual caseload' is generally used by the UNHCR in relation to the group of refugees who remain behind after a promoted large-scale repatriation. In this thesis it will be used also in reference to refugees who at the time of the promoted voluntary repatriation operation have the intention to remain in Zambia.

protection to the residual caseload at the time of the repatriation operation. The approach adopted will be to first examine the content and legal basis of these principles, as well as whether or not Zambia has a legal obligation to respect them in the present repatriation operation. Next, the thesis will examine how the principles are being implemented by Zambia in legislation and in practice.

Secondly, the thesis examines how the residual caseload will be affected, if or when, Zambia applies the cessation clause relating to change of circumstances in the country of origin in relation to Angolan refugees. Questions that will be addressed here are whether there are any exceptions to the rules of cessation of refugee status that can be invoked for the benefit of the residual caseload, and what the status would be of refugees who may be eligible to remain in Zambia.

1.4 Delimitation

It is intended that repatriation in this thesis will take the meaning of *the return of refugees to their country of origin after having spent time in exile*. The thesis will be looking at the institutionalised form of repatriation of Angolan refugees from Zambia, i.e. the repatriation operation that is being promoted and organised by the GRZ and the GOA in co-operation with the UNHCR within the legal framework of refugee law. However, generally the great majority of all refugees repatriate in the form of ‘spontaneous repatriation’,⁹ i.e. of their own accord, without waiting for an organised repatriation operation to be implemented or, without benefiting from an already existing one. Although this will most likely also be the case of Angolan refugees in Zambia, it will not be the focus of the thesis since it falls outside the legal and/or political parameters of voluntary repatriation and since the GRZ is not party to their movement.

With regard to the future of the refugees who opt not to return to Angola, the focus of this thesis will be on finding legal means and ways for them to remain in Zambia i.e. to locally integrate in the country of asylum, and not on their possibilities to be resettled to a third country of asylum. This is done for two reasons. The first reason is related to numbers, since very few refugees in Zambia, as well as in the rest of Africa, resettle to a third country.¹⁰ The second reason is related to the fact that this thesis takes the perspective of the host State, and her choice of durable solutions. Choosing resettlement as a durable solution is not a choice for Zambia to make but depends rather on the good will of the international community. In the same

⁹ Zieck (1997), p. 8.

¹⁰ Statistics show that in 2001, only 8 Angolan refugees were resettled from Zambia to a third country of asylum, (Population Statistics (2001), Table 6. Indicative refugee population and major changes by major origin and country of asylum).

vein, the thesis will not examine the protection available to Angolan refugees under the mandate of the UNHCR.

1.5 Disposition and methodology

As a starting point, in chapter 2, a brief introduction will be given to the cause of the refugee exodus from Angola as well as to various aspects of the country's ethnic, geographic and religious composition. Chapter 3 will do the same for Zambia- the country of asylum. This will enable the reader to identify similarities and differences between the two countries, which are factors that will ultimately affect the refugees' decision whether or not to repatriate.

The legal status of Angolan refugees in Zambia, the procedures for determining refugee status as well as the standard of treatment of refugees in Zambia will be examined in chapter 4. Firstly, this will provide the reader with a detailed understanding of the meaning and content of refugee status in Zambia, which is necessary in order to grasp the reality that the Angolan refugees are faced with. Secondly, through this approach the reader will get a valuable insight into the nature of Zambian refugee policy and practice. With this insight the reasoning on possible courses of action and *de lege ferenda* in the latter part of the thesis will be easier to comprehend.

Chapter 5 addresses the legal basis of the voluntary repatriation and this chapter will be followed in chapter 6 and 7 by the thrust of the thesis i.e. an evaluation of the protection available for the residual caseload. In these two chapters, the thesis will attempt to make the evaluation by studying doctrine and recommendations from the UNHCR, whilst drawing upon previous experiences in Zambia and other parts of Africa, as well as, in case there is one, upon the approach adopted for the current operation. Finally, in chapter 8, the main arguments will be summarised and conclusions will be drawn.

1.6 Material

The majority of the research material for this thesis was collected during a two month long Minor Field Study in co-operation with the School of Law at the University of Zambia, as well as during a three month long internship at the local UNHCR Branch Office- both generously funded by the Swedish International Development Agency. The material consisted mainly of articles from legal journals, statistics, court cases, newspaper articles and general background material on the two countries. However, valuable insight and knowledge was also gathered by attending relevant workshops and retreats, by participating in the meetings of the National Eligibility Committee, by discussing and interviewing activists from local NGOs involved in refugee matters, as well as through a three-day mission to Nangweshi refugee camp in the Western Province of Zambia.

As far as textbooks on voluntary repatriation of refugees are concerned, the collection is quite scarce. From a legal perspective, a most helpful book is Marjoleine Zieck's *UNHCR and Voluntary Repatriation of Refugees- A Legal Analysis* from 1997. This book provides a comprehensive account of the theory behind voluntary repatriation as well as case studies of some large-scale UNHCR repatriation operations. The emphasis of Zieck's analysis is, however, not on African refugees and their particularities. In order to get material of this kind, it was necessary to consult multidisciplinary literature like Tim Allen and Hubert Morsink's compilation *When Refugees Go Home*, and the research conducted on Angolan refugees in Zambia by Art Hansen and Oliver Bakewell.

A substantive part of the paper is based on UNHCR policy documents and handbooks, in particular the *Handbook on Voluntary Repatriation* from 1996, many of which are available on-line or on special REFWORLD CD-ROMs. Here one can also find an interesting collection of Working Papers on New Issues in Refugee Research published by the UNHCR Centre for Documentation and Research. These working papers proved very valuable to the thesis as they often addressed popular issues not previously elaborated upon, without representing the official view of the UNHCR.

2 Background to the Angolan Refugee Population

2.1 Introduction to Angola

The Republic of Angola [hereinafter, “Angola”, or “the country of origin”], which is located on the Western coast of Southern Africa, shares land borders with the Democratic Republic of Congo [hereinafter, “the DRC”] to the North, Zambia to the East and Namibia to the South. It is a large country covering approximately 1,246,700 sp. km. of fertile land, rich with natural resources, in particular oil and diamonds. It is divided into 18 provinces, one of which, the oil-rich Cabinda, is separated from the rest of the country by a sliver of the DRC.¹¹

The population of Angola has been estimated at about 13,5 million inhabitants,¹² most of which live in the rural areas and only a mere 2,250,000 live in the capital Luanda. The majority of the population is of Bantu origin divided into about a hundred sub-groups, with the most important ones being the Ovimbundu (37,2%), the Mbundu (24%) and the Bakongo (13,2%). Another 3,5% of the population, the *mestiços*, are of Portuguese ancestry. The dominant religion by far, comprising as much as 90% of the population, is Christianity, mainly Catholicism and various forms of Protestantism. However, in practice, many mix the Christian faith with traditional African beliefs, to which the remainder of the population adhere.

Despite possessing many natural resources, Angola is one of the poorest countries of the world, rated as low as 146 on the Human Development Index scale.¹³ Angola shows many of the characteristics of third world nations: undeveloped infrastructure, low literacy and education rate, insufficient food production, high infant mortality rate and a life expectancy of only 47 years.¹⁴ Most of these characteristics can be attributed to the armed conflict which has been raging in Angola, even since before its independence from Portugal in 1975, and whose effects have spread well beyond its borders.

¹¹ UNHCR, *Background paper on Refugees and Asylum-seekers from Angola*, p. 1, UNHCR Centre for Documentation and Research, Geneva, April 1999 [hereinafter, Background Paper (1999)]

¹² World Bank, *Angola at a glance*, 14 September 2002. Available at http://www.worldbank.org/data/countrydata/aag/ago_aag.pdf, (accessed on 6 May 2003).

¹³ UNDP, *Human Development Report 2001*, available at <http://www.undp.org/hdr2001/>, (accessed on 6 May 2003). The Human Development Index (HDI) is a composite index calculated on a State’s life expectancy, adult literacy and Gross National Product per capita.

¹⁴ World Bank (2002).

2.2 The conflict

The conflict in Angola began in the 50s and 60s as an uprising against the Portuguese colonial masters who had established themselves in the Angolan territory in the late 15th century.¹⁵ Like in most of her colonies, Portugal had followed a very strict and ruthless policy of favouring certain ethnic groups as well as the urban elite consisting mainly of white settlers, *mestiços* and a few educated natives. This is believed to be one of the reasons that the independence struggle in Angola saw a multitude of strong resistance groups, including first and foremost the MPLA (Movimento Popular para a Libertação de Angola) and the FNLA (Frente Nacional para a Libertação de Angola) formed in 1956 and 1962 respectively. A further nationalist movement, UNITA (União Nacional para a Independência Total de Angola), was founded in 1966 when the charismatic Jonas Savimbi broke away from the FNLA.

All three movements were based heavily along class, ethnic and regional lines, with the MPLA drawing most of its support from the urban *mestiços* and the Mbundu area in the hinterland of Luanda, and the FNLA being supported by the Bakongo of the Northern regions of the country. UNITA, on the other hand, had its ethnic backing from the dominant Ovimbundu tribe, a tribe to which Savimbi himself belonged, and claimed to be 'leading the battle of the bush inhabitants, the "true" Africa against the wealthy, cosmopolitan and educated urban elite'.¹⁶

The rivalries between the movements became even further accentuated when the superpowers chose sides and provided the competing factions with both financial and material support. The USSR and Cuba closed up behind the Marxist-oriented MPLA, the US and the former Zaire (today the DRC) supported the FNLA, while UNITA received most of its backing from South Africa and the US.¹⁷

Deep divisions and conflicts within and between the movements severely reduced their effectiveness and it was not until a *coup d'état* in Portugal on the 25th of April in 1974, and the subsequent colonial policy change that the right to self-determination of Angola was recognised. On the 11th of November 1975 the MPLA, who had established a stronghold over Luanda, unilaterally proclaimed the independence of Angola. The MPLA leader, Agostinho Neto, who became Angola's first president, established a Soviet-style one-party state and aligned himself politically with the USSR. (In 1979, Neto died and was succeeded by José Eduardo dos Santos, who is still President today.) The FNLA and UNITA refused to accept the leadership. Instead, these two movements declared 'the People's Republic of Angola' and established a coalition government based in Huambo. However, they

¹⁵ Background Paper (1999), p.3f.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

were soon driven from power by the stronger MPLA. Ever since, civil war has been raging in Angola between the MPLA government on the one side and the opposition lead by Jonas Savimbi's UNITA on the other.¹⁸

In addition, other movements, such as the FLEC (Frente de Libertação do Enclave de Cabinda), which strives for independence of the Cabinda Province, have continued to wage a small-scale, highly factionalised, armed struggle against the government.¹⁹ Numerous peace attempts, cease-fires and mediation efforts have failed, such as the Three Party Agreement of 1988 and the Bicesse Peace Agreement of 1991, or have succeeded only momentarily such as the Lusaka Protocol of 1994.²⁰ What has remained is a country in ruins where abuses against human rights and humanitarian law from both sides have been rampant and where millions of people have been forced to flee their homes.

2.3 The results of the conflict

2.3.1 The Angolan Human Rights Situation

Despite having ratified or acceded to a number of international and regional human rights conventions, most notably the International Covenant on Civil and Political Rights and its First Optional Protocol²¹, the International Covenant on Economic, Social and Cultural Rights,²² the Convention on the Elimination of Discrimination Against Women,²³ the Convention on the Rights of the Child²⁴ and the African Charter on Human and People's

¹⁸ Over the years, the FNLA became more and more insignificant in the conflict as it failed to transform itself from a military movement into a political party. Many of its leaders have surrendered to the MPLA, and although not officially dissolved, in the 1992 elections it played only a marginal role, receiving as little as 2,11% of the votes. (*Ibid.* p. 14.)

¹⁹ The separatist movement FLEC and its military wing, FLEC-FAC (Forças Armadas Cabindesas), support their claim for independence on documents indicating that the territory was administered separately from the rest of the Angolan territory by the Portuguese, and that following colonial independence in 1975 it was never legally integrated into Angola. The movement was founded in 1963 and proclaimed the unrecognised Republic of Cabinda on the 10th of January 1967. For more information on the Republic of Cabinda, see the official website at www.cabinda.org, (accessed on 5 May 2003).

²⁰ Background Paper (1999), p. 5f; and, Human Rights Watch, *Report 1999: Angola Unravels: The rise and fall of the Lusaka Peace Process*. Available at <http://www.hrw.org/reports/1999/angola/>, (accessed on 6 May 2003).

²¹ International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 999 U.N.T.S. 171, and its First Optional Protocol, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 999 U.N.T.S. 302.

²² International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 993 U.N.T.S. 3.

²³ The Convention on the Elimination of Discrimination Against Women, adopted by General Assembly resolution 34/180 of 18 December 1979, 1249 U.N.T.S. 13.

²⁴ The Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989, 1577 U.N.T.S. 3.

Rights,²⁵ Angola has throughout post-independence displayed a poor human rights record even during times of peace. According to human rights reports, things deteriorated even further when fighting resumed following the breakdown of the Lusaka Protocol.²⁶ The reports show that the Armed Forces of Angola [hereinafter “the FAA”] had a practice of extra judicial executions, forced recruitment, intimidation, harassment, physical and sexual abuse, prolonged pre-trial detention, ill-treatment of prisoners, lengthy delays in trial and restrictions of the freedom of expression. UNITA rebels, on their part, are reported to have systematically harassed, intimidated, mutilated and killed civilians, abducted children and grown-ups for forcible recruitment or labour, looted and pillaged villages and restricted freedom of movement within their territories.

During the lengthy conflict, both sides have resorted to a widespread use of land mines, a practice that continued despite the signing by Angola of the Ottawa Mine Ban Treaty in December 1997. Angola is regarded as one of the countries in the world most affected by mines and unexploded ordnances [hereinafter, “UXO”], and reports show that by the end of 2001, a total of 2,232 minefields and UXO locations had been registered, and that as many as 660 new casualties had been claimed.²⁷

2.3.2 Refugees and Internally Displaced Persons

If forced displacement of people is a good yardstick with which to measure the magnitude of a conflict, then it is safe to say that the Angolan civil war was massive. Already in 1966, a few years after the war of national liberation had begun, thousands of people were compelled to leave their homes, mostly in the Moxico, Cuando and Cubango Provinces in the Eastern part of the country.²⁸ The majority of these people chose to remain in Angola and become what is known as *internally displaced persons* [hereinafter, “IDPs”], and this has held true throughout the remainder of the conflict. Although statistics have varied extensively, since the number of IDPs alters from month to month and year to year, recent figures are as high as 3.1 million IDPs.²⁹

Others, however, chose to leave their native country and seek safety beyond Angolan borders. Reports show that by early 1967, around 303,800

²⁵ The African Charter on Human and Peoples’ Rights, adopted by the Organisation of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁶ Human Rights Watch, *World Report 1999: Angola*, p 27. Available at <http://www.hrw.org/worldreport99/africa/angola.html>, (accessed on 6 May 2003).

²⁷ Landmine Monitor, *Report 2002- Angola*. Available at <http://www.icbl.org/lm/>, (accessed on 5 May 2003).

²⁸ Hansen, Art, “Refugee Dynamics: Angolans in Zambia 1966 to 1972”, p.175-194, *IMR*, Volume 15 No. 1, 1981, p. 183.

²⁹ UNHCR, *UNHCR and internally displaced persons in Angola- a programme continuation review*, UNHCR Evaluation and Policy Analysis Unit & Department of International Protection, May 2002, p. 3.

Angolans had sought refuge outside of Angola,³⁰ and the most recent UNHCR statistics provide us with a figure of an alarming 470,630 refugees.³¹ The majority of refugees have remained in the region, mostly in neighbouring countries, with Zambia and the DRC topping the list of host countries considerably by accounting for approximately 46,5% (218,154 refugees) and 40% (186,879 refugees) of the total Angolan refugee population respectively.³²

2.4 An end to the conflict?

In 2001, it seemed like the conflict in Angola would never come to an end. All prospects of reaching a peace agreement seemed bleak given the failure of the ambitious Lusaka Protocol and the intensity of the renewed fighting. The determination of UNITA rebels to follow the lead of the enigmatic Jonas Savimbi was not diminishing and Angola's ample supply of oil and diamonds provided both warring sides with the financial capability to wage war for many more years.

But then over night it happened. On the 22nd of February 2002, Government forces killed Jonas Savimbi in combat near Luena, the capital of Moxico Province, leaving UNITA for the first time without effective leadership. As many analysts rightly pointed out,³³ Savimbi's replacement would be hard to accomplish, and on March 14, the Government began to observe a unilateral ceasefire. After several weeks of intense negotiations, the opposing armies signed a formal ceasefire agreement on April 4 2002 in Luanda. The agreement, which took the form of a Memorandum of Understanding Addendum to the Lusaka Protocol, provides for (i) the passage of an Amnesty Law for all crimes committed during the conflict; (ii) the integration of some 5,000 UNITA ex-combatants into the FAA and the national police; (iii) the demobilization of the remaining UNITA military forces [hereinafter, "FMU"] within a specified timetable; and (iv) the demobilization over the medium-term of 33,000 FAA.³⁴ Furthermore, Angola finally ratified the Land Mine Ban Treaty, which entered into force on 1 January 2003.³⁵ By August 2002, all FMU were administratively absorbed into the FAA and the FMU ceased to exist. Peace was formally declared on the 2nd of August 2002.

³⁰ Hamrell, Sven, "The Problem of African Refugees", *Refugee Problems in Africa*, ed. Hamrell, Sven, Scandinavian Institute of African Studies, 1967, Table II, p. 16.

³¹ Population Statistics (2001), Table 5- Indicative refugee population and major changes by origin.

³² Population Statistics (2001), Table 6- Indicative refugee population and major changes by major origin and country of asylum. Other countries, which host large Angolan refugee populations, are Namibia (30,881 refugees) and Congo- Brazzaville (17, 745 refugees).

³³ See for example, Beaumont, Peter, "UNITA to die with Savimbi", *The Guardian Unlimited Observer*, Sunday, February 24, 2002.

³⁴ Chapter II, Article 2(1), 3(6), 3(8) and 3(10) of the Cease Fire Agreement Between the Government of Angola and UNITA, signed in Luanda, Angola on the 4th of April 2002; and, Annex 4 of the Lusaka Protocol, signed in Lusaka, Zambia on the 15 November 1994.

³⁵ Landmine Monitor (2002).

Despite this optimistic picture, the transition was not as smooth as the above seems to indicate. In its 2002 Country Report, Human Rights Watch reported that following the cease-fire, and up until the last months of the war, UNITA abuses against civilians continued, including extrajudicial killings, mutilations and looting, resulting in massive displacement.³⁶ Hit-and-run attacks and reprisals against civilians who were believed to support the Government were common. The FAA and the Angolan National Police also contributed to the displacement of civilians, with their brutal 'cleansing' operations. Under the pretense of securing the countryside from UNITA soldiers, the FAA routinely subjected suspected UNITA supporters to harsh and abusive treatment, including harassment, indiscriminate beatings and sexual abuse.³⁷ Despite minor improvements, non-conflict related human rights violations continued to be prevalent, in particular prolonged pre-trial detentions in inhuman and degrading conditions, restrictions on the freedom of expression, intimidation and harassment from government officials against members of the press etc.³⁸

Moreover, there were suspicions about the genuineness of UNITA's disarmament, given that by October 2002 only some twenty-six thousand light weapons, equivalent to one weapon for every three UNITA soldiers, had been handed over to the FAA. This coupled with the fighting in the Cabinda Province, which continued unabated throughout the year, and the uncertain mine-situation in the country, suggests that conditions in Angola are less than ideal. Nevertheless, plans are under way for the repatriation of the great numbers of refugees living in neighbouring countries like Zambia.

³⁶ Human Rights Watch, *Human Rights Developments- Angola*, 2002. Available at <http://www.hrw.org/wr2k2/africa1.html> (accessed on 6 May 2003).

³⁷ *Ibid.* p. 2.

³⁸ *Ibid.*

3 Zambia- the host state

3.1 Introduction

The Republic of Zambia [hereinafter, “Zambia”, “the country of asylum” or “the host state”], located at the heart of Africa, is a country of approximately 752,614 sq. km. of mostly rural, uncultivated land, divided into 9 Provinces.³⁹ It shares borders with a total of eight countries, including a 1,110 km long border with Angola in the West.⁴⁰ Like most African nations emanating from *the Scramble for Africa*, the borders of Zambia are artificial constructions, laid with little respect for ethnic groups and existing kingdoms. Therefore, there are Zambian people who have strong cultural affinities with the people on the other side of the Zambian border. For instance, the Luvale and Lunda people in the Western and the North-Western Province are closely related to the Lunda-Luba people of Angola and the DRC and the Nyanja speaking Chewa people in the Eastern Province are found in large numbers across the Malawian border. Other large ethnic groups in Zambia include the Bemba (20% of the population), the Tonga (15%) and the Lozi (6%). In terms of religion, similar to the Angolan population, most people of Zambia ascribe to different forms of Christianity, often in combination with traditional African beliefs.

Compared to other countries in the region, Zambia’s independence from the British in 1964 was a fairly smooth procedure, and throughout post-independence, Zambia has remained, by African standards, a relatively stable country, only occasionally affected by political turbulence. Instead, the main problems Zambia has had to face have been of an economic nature, with prices of copper, her main export commodity, slumping heavily in the 1970s and 1980s, and insufficiency in food production due to serious droughts.⁴¹ Furthermore, Zambia is one of the countries in the world most severely affected by HIV/AIDS with an estimated 1,2 million out of her 10,649 million inhabitants infected.⁴² Mainly because of HIV/AIDS, life expectancy in Zambia dropped by seven years since 1985, and today Zambia is rated as low as 143 on the HDI- scale.⁴³

³⁹ CIA, *The World Fact Book 2002- Zambia*, available at <http://www.cia.gov/cia/publications/factbook/geos/za.html>, (accessed on 5 May 2003).

⁴⁰ The other countries that border on Zambia are the DRC, Tanzania, Malawi, Mozambique, Zimbabwe, Botswana and Namibia.

⁴¹ World Bank, *World Bank Group: Zambia- Country Brief*, August 2001. Available at <http://www.worldbank.org/afr/zm2.htm>, (accessed on 6 May 2003).

⁴² UNAIDS, *Epidemiological Fact Sheet on HIV/AIDS and Sexually Transmitted Infections*, 2002 Update, United Nations Programme on HIV/AIDS (UNAIDS). Available at <http://www.unaids.org/>, (accessed on 29 April 2003), p. 2 and 3. The figures are from the end of 2001 and are presumably much higher now.

⁴³ UNDP (2001), p. 27 and 67.

With regard to human rights, Zambia like Angola has ratified the majority of the relevant instruments.⁴⁴ However, international human rights organisations report that abuses of freedom of assembly and association, freedom of expression, and torture and intimidation by the police are common-place.⁴⁵ Despite her problems, and in a spirit of African solidarity, Zambia has throughout the years committed herself fully to liberation struggles waged in neighbouring countries. As a consequence, she has experienced a continuous flow of refugees from a variety of countries, one of which is Angola.⁴⁶

3.2 The influx of refugees from Angola

Early UNHCR Statistics show that already in 1966, an estimated 3,000 refugees came to Zambia from the war-affected Angola.⁴⁷ Over the years, the numbers grew steadily, only going down when there were prospects of peace e.g. at the time of independence of Angola and following the signing of the Bicesse Accord and the Lusaka Protocol.

At the end of 2001, only 2 months before the death of Jonas Savimbi, the Angolan refugee population in Zambia was presumed to be as large as 218,154 refugees.⁴⁸ 89,950 of these refugees are living in government camps and settlements where they receive material assistance and protection from the GRZ in co-operation with the UNHCR and its implementing partners.⁴⁹ The majority live in Nangweshi camp and Mayukwayukwa settlement in the Western province, in Meheba settlement in the North-Western province and in Ukwimi camp in the East of the country.⁵⁰ Another 654 Angolan refugees live in urban areas.⁵¹

The remaining Angolan refugee population in Zambia have never registered with the local authorities nor with the UNHCR, but have instead settled spontaneously in the border areas.⁵² These refugees are by their nature very hard to distinguish from the host communities in which they have settled, and therefore any estimates of their size can hardly be any more than educated guesses. Given the fact that the numbers have been provided to the

⁴⁴ Zambia has ratified the following international and regional instruments on human rights: the ICCPR and its First Optional Protocol, the ICESCR, the CEDAW, the CRC, the CERD, the CAT and the African Charter on Human and Peoples Rights.

⁴⁵ Human Rights Watch, *World Report 2001-Zambia*. Available at <http://www.hrw.org/wr2k1/africa/zambia.html>; and, Amnesty International, *Annual Report 2002- Zambia*. Available at <http://web.amnesty.org/web/ar2002.nsf/afr/zambia!Open>, (both accessed on 6 May 2003).

⁴⁶ Zambia also hosts considerable refugee populations from the DRC, Rwanda, Burundi, Somalia and Sudan.

⁴⁷ Hansen (1981), p. 183f.

⁴⁸ Population Statistics (2001), Table 6- Indicative refugee population and major changes by major origin and country of asylum.

⁴⁹ *Ibid.*

⁵⁰ UNHCR, *Global Appeal 2002: Zambia*, p. 125.

⁵¹ *Ibid.* p. 127.

⁵² Population Statistics (2001), Table 6- Indicative refugee population and major changes by major origin and country of asylum.

UNHCR by the GRZ, who can hardly be considered an objective party as it is in the interest of the Government to uplift figures to attract more donor funding, the accuracy of these figures can be further questioned.

As a consequence of not registering with the authorities, spontaneously settled refugees from Angola do not receive any assistance or protection from the UNHCR and the GRZ. Furthermore, their legal status in Zambia is not regularised, and effectively, they fall outside the legal framework established for the protection of refugees in Zambia, which will be examined in the following Chapter.⁵³

⁵³ For more information on the spontaneously settled (or self-settled) Angolan refugee population in Zambia, please refer instead to the research conducted by anthropologist Art Hansen in the 1970s and by Oliver Bakewell- independent researcher and consultant specialising in the field of forced migration- at the end of the 90s. In addition to the above-mentioned Hansen's "Refugee Dynamics: Angolans in Zambia 1966 to 1972", see also by the same author: *Refugee self-settlement versus settlement on government schemes: the long-term consequences for security, integration and economic development of Angolan refugees (1966-1989) in Zambia*, Discussion paper / United Nations Research Institute for Social Development, 1990. Oliver Bakewell's research is published as "Repatriation and Self-Settled Refugees in Zambia: Bringing Solutions to the Wrong Problems", *JRS*, Vol. 13, No. 4, 2000 (a similar version entitled *Returning refugees or migrating villagers? Voluntary repatriation programmes in Africa reconsidered* was published as a UNHCR Working Paper already in December 1999.) Another Bakewell publication which touches on the subject is "Refugee Aid and Protection in Rural Africa: Working in Parallel or Cross-Purposes?" *RSQ*, Vol. 21, No. 1&2, 2002.

4 The Legal Status of Angolan Refugees in Zambia

4.1 International and regional refugee law in Zambia

The first thing that should be pointed out is that Zambia is a dualistic state, which means that domestic law and international law are recognised as two separate legal systems.⁵⁶ International treaties have no formal status within Zambia. In order to implement her assumed international obligations, Zambia applies *the doctrine of transformation*, whereby domestic legislation is amended for the purpose of bringing Zambian legislation into harmony with international treaty provisions.

4.1.1 The 1951 Convention and the 1967 Protocol

Zambia acceded to the 1951 Convention Relating to the Status of Refugees, [hereinafter, “the 1951 Convention”],⁵⁷ on the 24th of September 1969. This Convention contains the first universally applicable refugee definition ever adopted. Article 1(A)(2) of the 1951 Convention defines a refugee as someone who:

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

On the same date, Zambia also acceded to the 1967 Protocol Relating to the Status of Refugees [hereinafter, “the 1967 Protocol”]⁵⁸- which removes the time limitations of the 1951 Convention and extends its application. Upon accession, Zambia made full use of her right to reservation. For instance, she made reservations in relation to article 17 (wage-earning employment), article 22 (elementary education), article 26 (freedom of movement) and article 28 (travel documents), all of which are permissible under the 1951 Convention.⁵⁹

⁵⁶ Scheinin, Martin, “International Human Rights in National Law”, *An Introduction to the International Protection of Human Rights*, Hanski, Raija and Suksi, Markku (ed.) Institute for Human Rights, Åbo Akademi University, 2000, p. 418f.

⁵⁷The Convention relating to the Status of refugees, adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951, 189 U.N.T.S. 137.

⁵⁸ Protocol Relating to the Status of Refugees, adopted by the General Assembly resolution 2198 (XXI) of 16 December 1966, 606 U.N.T.S. 267.

⁵⁹ Article 42 of the 1951 Convention.

4.1.2 The UNHCR in Zambia

The UNHCR, which was established by a General Assembly Resolution from 1950 [hereinafter, “Resolution 428(V)”]⁶⁰ to be the principal UN agency concerned with refugees, maintains a strong presence in Zambia. In addition to the Branch Office in Lusaka, hosting as many as 16 international staff, three United Nations Volunteers and 33 national staff,⁶¹ another 2 Sub-Offices are located in Kawambwa and Mongu, and four field offices are located in Kaoma, Mporokoso, Nangweshi and Solwezi.⁶²

Like in the rest of the world, the Statute of the UNHCR, annexed to Resolution 428(V), governs the UNHCR’s work in Zambia. This Statute, states *inter alia*, that the agency:

“shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments”.⁶³

Furthermore, the Statute spells out that the work of the UNHCR shall be “humanitarian and social” and of an “entirely non-political nature”,⁶⁴ and that it is to follow policy directions from its parent organ, the General Assembly, from the Economic and Social Council [hereinafter, “the ECOSOC”], as well from the Executive Committee of the High Commissioner’s Programme [hereinafter, “the ExCom”]. The ExCom is a subsidiary body to the ECOSOC created in accordance with paragraph 4 of the UNHCR Statute.⁶⁵ It issues its directions to the UNHCR in the form of ‘Conclusions’, adopted within a Sub-Committee, which today goes by the name of the Standing Committee of the Whole on International Protection.⁶⁶

Governments are urged by paragraph 2 of Resolution 428(V) to co-operate with the UNHCR in the performance its functions, and in general, the GRZ has shown a strong commitment to do so.⁶⁷ With regard to whether governments are obliged to co-operate with the UNHCR and whether the Statute imposes any additional legal obligations upon them, it is common knowledge that General Assembly Resolutions are not legally binding upon

⁶⁰ United Nations General Assembly Resolution 428(V) of 14 December 1950.

⁶¹ UNHCR, *Global Appeal 2003: Zambia*, p. 164.

⁶² *Ibid.* p. 165.

⁶³ UNHCR Statute, Para. 1.

⁶⁴ UNHCR Statute, Para. 2.

⁶⁵ United Nations General Assembly Resolution 1166(XII) of 26 November 1957 and ECOSOC Resolution 672(XXV) of 30 April 1958.

⁶⁶ The Standing Committee was established in 1995 to replace the Sub-Committee of the whole on International Protection from 1975 and has general competence over protection, programme and financial issues, see *Report of the 46th Session: UN Document A/AC.96/860 of 23 October 1995*, para. 32. For more information on ExCom Conclusions, see Sztucki, Jerzy, “The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme”, pp. 285-318, *IJRL*, Vol. 1, No. 3, 1989.

⁶⁷ UNHCR BO Lusaka, *Zambia 2001 Annual Protection Report*, p. 11.

States. However, they do represent one of the principal instruments for formation of the *collective will* of the nations represented in the UN and they should therefore not be considered as completely void of legal authority.⁶⁸ As far as ExCom Conclusions are concerned, these do not have any force of law either, nor do they create legally binding obligations. Instead they can be regarded as ‘soft law’ as they represent collective international expertise in refugee matters and can contribute to the formulation of *opinio juris* in the field of refugee law.⁶⁹

4.1.3 The Regional Approach- the 1969 OAU Convention

In addition to being a State Party to the universal refugee regime under the 1951 Convention and the 1967 Protocol, Zambia ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa [hereinafter, “the 1969 OAU Convention”]⁷⁰ on the 30th of July 1973. This regional refugee instrument was adopted under the auspices of the Organisation of African Unity, which today has transformed itself into the African Union.⁷¹

Most literature related to the 1969 OAU Convention attribute the reasons for its elaboration to what was perceived as a too limited scope of application of the 1951 Convention.⁷² Indeed, one of the 1969 OAU Convention’s most celebrated features is its unique refugee definition, which both reiterates the 1951 Convention definition, and expands it by providing in Article 1(2) that:

“The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

However, more recent research places more weight in the political and security implications that refugee situations have had in Africa, and believe that the 1969 OAU Convention grew out of a need to depoliticise and cohere refugee law in Africa.⁷³ Whatever the reasons were for its creation, it is clear that the 1969 OAU Convention has had considerable effects, both of a legal

⁶⁸ For a more detailed discussion on this, see for example Brownlie, Ian, *Principles of Public International Law*, Clarendon Press, Oxford (5th edition), 1998, p. 14 and 694.

⁶⁹ Sztucki (1989), p. 303f.

⁷⁰ Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the OAU on 10 September 1969, 1001 U.N.T.S. 45.

⁷¹ The African Union was established by Article 2 of the Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the OAU on the 11th of July 2000 in Lomé, Togo.

⁷² Okoth-Obbo, George, “Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa”, pp. 79-138, *RSQ*, Vol. 20 No. 1, 2001, p. 90.

⁷³ *Ibid.*

and political nature, in Africa as well as elsewhere.⁷⁴ To date, the 1969 OAU Convention has 45 State parties.⁷⁵

With regard to the relationship between the 1969 OAU Convention and the UN refugee regime, Article VIII of the 1969 OAU Convention spells out that it is to be “the effective regional complement” of the 1951 Convention, i.e. it does not supersede the 1951 Convention but merely supplements it. The article also links the 1969 OAU Convention to the UNHCR by prescribing that Member States shall co-operate with the Agency. In practice, the UNHCR works with both Conventions in its operations in Africa.⁷⁶

4.2 Zambian refugee legislation and practice

4.2.1 Introduction to Zambian refugee legislation

Domestic legislation on refugees in Zambia, consists first and foremost of the 1970 Refugees (Control) Act [hereinafter, “the Control Act”], Chapter 112 of the Laws of Zambia, complemented by several pieces of subsidiary legislation. The Control Act was modelled closely on the 1960 Uganda Control of Alien Refugees Act.⁷⁷ Literature on the Control Act, of which there is very little, describes it both as “the least satisfactory” type of domestic refugee legislation,⁷⁸ and as “progressive”.⁷⁹ Objectively, it can be described as a very brief document, consisting only of 18 Sections, to which no legal amendments have been made during the 33 years it has been in existence.

As the name indicates, the main purpose of the Control Act is to regulate the entry, movement, settlement and activities of refugees. Unlike the universal and regional refugee instruments, the Control Act contains no provisions governing the rights of refugees, nor does it explicitly regulate the principle of *non-refoulement*.

⁷⁴ For instance, the ExCom Conclusions on Voluntary Repatriation from 1980 are closely modelled on the 1969 Convention’s provisions and its expanded refugee definition was reiterated in the Cartagena Declaration adopted by Latin American States in 1984. (Goodwin-Gill, Guy, “Voluntary Repatriation: Legal and Policy Issues”, in *Refugees and international relations*, Loescher, G & Monahan, L (ed.), Clarendon Press, Oxford, 1990, p. 262; and, Okoth-Obbo (2001), p. 114.)

⁷⁵ For the full list of States parties to the instruments, see Status of Multilateral treaties deposited with the Secretary-General.

⁷⁶ Awuku, Emmanuel Opoku, “Refugee Movements in Africa and the OAU Convention on Refugees”, pp. 79-87, *JAL*, Vol. 39 No. 1, p. 81.

⁷⁷ Holborn (1975), p. 1293.

⁷⁸ Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 Convention*, LCHR Publication, August 1995, p. 35.

⁷⁹ Aiboni, Sam Amaize, *Protection of Refugees in Africa*, Swedish Institute of International Law, 1978, p. 89.

Despite the fact that Zambia is party both to the 1951 Convention and the 1967 Protocol, as well as to the 1969 OAU Convention, the Control Act makes no direct reference to the implementation or application of these instruments, nor does it ascribe any formal role to the UNHCR in the administration of refugee matters. However, the practice in Zambia is significantly more favourable towards refugees than the written law would suggest and a wide array of practices has developed over the years in virtually all areas of refugee administration.

4.2.2 The definition of refugees in Zambia

In Zambia, the Control Act does not contain a definition of refugees, but provides instead for recognition of refugees on a class or group basis. Section 3(1) states that:

“The Minister [of Home Affairs] may declare, by statutory order, any class of persons who are, or prior to their entry into Zambia were, ordinarily resident outside Zambia to be refugees.”

Statutory Instrument No. 240 of 1971, which is known as the Refugees (Control) (Declaration of Refugees) Order, declares the following groups of persons as refugees for the purpose of the Control Act:

“persons who are, or prior to their entry into Zambia were ordinarily resident outside Zambia and who have sought asylum in Zambia owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion”

Just like the 1951 Convention definition,⁸⁰ whose wording it falls very close to, this declaration consist of both the subjective element of ‘fear’ and the objective element of ‘well-foundedness’. However, the declaration makes no allusion to the extended purely objective refugee definition of the 1969 OAU Convention.

A few things can be said about the suitability of this arrangement. Firstly, Statutory Instruments are subordinate to Acts of Parliament and do not amount to substantial legislation. To attempt to implement essential international provisions by means of subsidiary legislation, where the Act on which the Statutory Instrument is based does not embody such provisions, would be, as the Lawyers Committee for Human Rights calls it, “legally unsound”.⁸¹ Secondly, the discretionary right for the minister to make such a

⁸⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, UNHCR, Geneva, para. 37-38 [hereinafter, UNHCR Handbook (1992)]. This interpretation of the 1951 Convention definition appears to be the most generally accepted one (see for example Goodwin-Gill, Guy, *The Refugee in International Law*, Clarendon Press Oxford (2nd edition), 1996, p. 40f.), although it should be pointed out that there are scholars like James Hathaway who argue for a pure objectivistic interpretation of the definition, see Hathaway, James, *The Law of Refugee Status*, Butterworths, Toronto, 1991, p. 65-97.

⁸¹ Lawyers Committee for Human Rights (1995), p. 36.

declaration can result in it being arbitrarily applied, perhaps taking into account political considerations to the detriment of humanitarian ones.

4.2.3 Refugee status determination in Zambia

The Control Act prescribes that all refugees who enter Zambia must register with an authorised officer within seven days of arrival, in default of which their presence in the country will be considered unlawful.⁸² As indicated above, the majority of the Angolan refugees do not abide by this rule, and choose instead to settle spontaneously among native Zambians in the vast countryside. As a consequence, their status is not regularised. For those who do register with local authorities upon arrival, they will be subjected to some form of status determination procedure, either as a group or as individuals.

4.2.3.1 *Prima facie* determination of refugee status

The majority of asylum-seekers that come to Zambia from Angola and register with the authorities arrive in very large numbers. For a country such as Zambia, with her lack of funding and inadequate administrative apparatus, performing individual status determination on all new arrivals is too cumbersome a task. Instead, upon arrival, these people are as a group *prima facie* deemed as refugees under the 1969 OAU Convention on the basis of the readily apparent objective circumstances in Angola, which gave rise to the exodus.⁸³ However, the legal basis for this arrangement is somewhat unclear.

What seems to be necessary is a Statutory Instrument which includes the wider 1969 OAU Convention definition, and that declares Angolan asylum-seekers to be refugees within the meaning of that provision. No such Statutory Instrument has ever been enacted. Instead, as often happens in Zambia, the arrangement is based on custom. This may seem strange to those of us from the western world, where more often the law is based on actual written regulations. In Zambia on many occasions, the written regulations may not be as relevant as the practice that is actually adopted. Frequently the regulations are amended only after the practice has become accepted, which may take considerable time. Sometimes, the written regulations are even just ignored all together. Although it is not possible to say that this is based on culture, to people in Zambia this would not seem strange at all.

⁸² Section 6(1) and 11(1) of the Control Act. An authorized officer is defined by Section 2 as “the Commissioner and includes a refugee officer, an authorised police officer, an authorised officer of the Zambia Prison Service or of the Defence Force, and any public officer for the time being designated by the Minister as an authorised officer”.

⁸³ UNHCR BO Lusaka, *Standard Operating Procedures for Determination of Refugee Status, Eligibility for Urban Residency Status and Resettlement to a Third Country*, (draft 1st edition), May 2002, p. 7 [hereinafter, *Standard Operating Procedures* (2002)]. The other group of refugees that benefit from the *prima facie* regime in Zambia at present are asylum-seekers from the DRC.

For Angolan refugees who remain in the designated settlements or camps, the 1969 OAU Convention status granted to them on a *prima facie* basis will suffice to benefit from protection and assistance. Should any of these refugees wish to relocate to Lusaka or to other urban areas, they will retain their 1969 OAU Convention status, but can apply for 1951 Convention status through individual screening.⁸⁴

4.2.3.2 Individual status determination

The individual status determination procedure is performed by the National Eligibility Committee [hereinafter, “the NEC”] and can be cited as another example of practice in Zambia lacking legal basis.⁸⁵ The NEC, which falls directly under the Office of the Commissioner for Refugees [hereinafter, “the COR”], is a committee whose main function is to consider individual applications for refugee status on the basis of both the 1969 OAU Convention and the 1951 Convention definition. Sitting on the committee, under the chairmanship of the COR, are representatives from governmental departments whose mandate cover refugee related issues such as the Zambia Police, Immigration, the Office of the President, Foreign Affairs and the Passport and Citizenship Office as well as a Legal Advisor from the COR.

The UNHCR has observer status on the NEC and can make recommendations on rulings in individual cases, as well as on international and regional refugee law in general. The NEC performs its functions by conducting semi-judicial hearings with the applicant. In the case of a negative decision, the applicant has the right to appeal a review of the decision to the Minister of Home Affairs, and even though this normally merely results in a review of the decision by the NEC itself, the decision is sometimes reversed. In general, Angolan refugees who are denied 1951 Convention status retain their 1969 OAU Convention status,⁸⁶ unless they are considered to fall under one of the provisions relating to exclusion from refugee status under article 1 (5) of the 1969 OAU Convention, or under article 1 (F) of the 1951 Convention. There are many questions that can be asked with regard to the NEC, both as concerns the legal basis for its creation, and as concerns its suitability. Regarding its legal foundation, the Control Act does not make any reference to its creation. It can be argued, however, that the NEC was created *ex officio* by the COR for the purpose of helping him perform the duties vested in him by the Control Act, such as the issue of identity documents and permits.⁸⁷ The decisions of the NEC are

⁸⁴ Even if a refugee is not eligible for 1951 Convention status, there are other grounds on which to qualify for urban residency. These grounds include possession of a work or study permit, being a vulnerable case e.g. an unaccompanied minor, an elderly woman or a woman at risk, medical needs, security problems and being enrolled in the resettlement program. The decision is taken by the Sub-Committee for Urban Residency Status, which was established, by the GRZ and UNHCR in September 2000 (Standard Operating Procedures (2002), p. 10).

⁸⁵ *Ibid.* p. 5.

⁸⁶ *Ibid.* p. 4.

⁸⁷ Section 6(2) and 11 of the Control Act.

therefore in reality merely *recommendations* as the ultimate power to grant or withhold refugee status lies with the COR.

With regard to its suitability, it can be argued that with the uncertain legal basis of the NEC, in combination with its unclear mandate and *ad-hoc* character, the committee falls short of the recommendations of ExCom Conclusion No. 8 (XXVIII) on *Determination of Refugee Status* of being a 'clearly identified authority'.⁸⁸ Furthermore, the legal competence of the committee (with only two members serving in a legal capacity) and the lack of independence of the appeals procedure are deplorable, although not at variance with the ExCom recommendations.

4.2.4 The standard of treatment of refugees in Zambia

Although not codified in the Control Act, the right of non-discrimination on account of race, religion, country of origin, membership of a particular social group or political opinion as spelled out by article 3 of the 1951 Convention and article IV of the 1969 OAU Convention are in principle applied to refugees in Zambia.⁸⁹ In addition, in principle the GRZ makes no distinction between refugees on the basis of their status.⁹⁰

In line with Zambia's reservations to the 1951 Convention, the Zambian policy is that all refugees should reside in specifically designated refugee settlements and camps,⁹¹ where they are allocated a plot of land to cultivate and build their house on. This is done on the basis of the expectation that they are to become self-sufficient. Their freedom of movement is further restricted because the GRZ will only issue travel documents to those refugees who have a valid reason for wishing to travel.⁹² As a result of these restrictions, refugees are frequently detained if they move or reside outside the camps and settlements.

With regard to economic, social and cultural rights, refugees are free to undertake wage-earning employment provided that they have a work or a self-employment permit.⁹³ In practice, many refugees are prevented from doing so due to the tedious and highly expensive process of obtaining permits. As far as the education of refugee children is concerned, the right to attend primary school has been treated as a mandatory right.⁹⁴ Lack of

⁸⁸ ExCom Conclusion No. 8 (XXVIII)- 1977, *Determination of Refugee Status, Report of the 28th Session*: UN doc. A/AC.96/549, para. 53.6, para. e (iii).

⁸⁹ UNHCR BO Lusaka, *Zambia 2001 Annual Protection Report*, p. 10.

⁹⁰ Interview with the Commissioner for Refugees, Mr. Jacob Mphepo at his office in Lusaka on the 23rd of November 2002.

⁹¹ Section 12 of the Control Act. According to Section 4(1) of the Control Act, the Minister of Home Affairs may declare any part of Zambia to be an area for the reception or residence of refugees. So far, Statutory Instrument No. 132 of 1971, Statutory Instrument No. 133 of 1971 and Statutory Instrument No. 86 of 1987, which go by the name of the Refugees (Control) (Declaration of Reception Areas) Order, contain such declarations.

⁹² Section 12 (3)(b) and 12 (4) of the Control Act.

⁹³ UNHCR BO Lusaka, *Zambia 2001 Annual Protection Report*, p. 12.

⁹⁴ *Ibid.*

resources, however, prevents many refugee children (and Zambian children) from attending school. For example, in 2001 the primary school enrolment rate only represented between 45% and 65% of the potential age group, and secondary school enrolment was even lower.⁹⁵

While refugees are allowed to form associations, the refugees are obliged to register the association and declare its purpose to the Registrar of Societies.⁹⁶ The COR monitors the associations' activities and has the authority to dissolve the associations if their purpose is considered to be subversive or politically oriented. Generally, cultural troupes have been allowed, as the refugees are free to practice their culture in Zambia.

⁹⁵ UNHCR BO Lusaka, *Republic of Zambia: 2003 COP*, p. 21.

⁹⁶ UNHCR BO Lusaka, *Zambia 2001 Annual Protection Report*, p. 12.

5 Voluntary Repatriation in Law

5.1 The legal framework governing voluntary repatriation

The only universally applicable refugee instrument, the 1951 Convention, does not contain any provisions relating to the voluntary repatriation of refugees. Indeed, the 1951 Convention does not explicitly concern itself with durable solutions at all. The first mention of voluntary repatriation, which is promoted as a ‘permanent solution’, is instead to be found in the UNHCR Statute.⁹⁷ The facilitation of this solution (or the solution of assimilation of refugees within new communities), alongside with refugee protection, is stated to be the function of the organisation.⁹⁸

The Statute does not however, provide any description of or guidance with respect to implementation of voluntary repatriation. Rather, this has been left up to the ExCom, who in its Conclusions, most notably No. 18 (XXXI) and No. 40 (XXXVI) on *Voluntary Repatriation*,⁹⁹ have elaborated an impressive set of standards on the subject. These recognise the general preponderance of voluntary repatriation over other durable solutions and stress that the essentially voluntary character of repatriation should always be respected.¹⁰⁰ Furthermore, they urge governments of all concerned States to take necessary steps with the UNHCR to assist refugees who wish to repatriate.¹⁰¹ In addition, they emphasise that the repatriation of refugees should only take place at their freely expressed wish, under conditions of absolute safety and preferably to the place of residence of the refugee in his country of origin.¹⁰² The Conclusions also affirm that the mandate of the UNHCR is sufficiently broad to promote repatriation.¹⁰³

Despite the prominence of these Conclusions, the first legally binding instrument ever to concern itself with voluntary repatriation was the 1969 OAU Convention, which devoted an entire paragraph to the standards to be applied.

⁹⁷ UNHCR Statute, article 1.

⁹⁸ For more information on the UNHCR’s mandate in regard to repatriation operations, please refer to Zieck (1997), p. 69-100.

⁹⁹ ExCom Conclusion No. 18 (XXXI)- 1980, *Voluntary Repatriation, Report of the 31st Session*: UN document A/AC.96/588, para. 48(3); and, ExCom Conclusion No. 40(XXXVI)- 1985, *Voluntary Repatriation, Report of the 36th Session*: UN document A/AC.96/673, para. 115(5).

¹⁰⁰ ExCom Conclusion No. 18(XXXI), para. (a) and (b).

¹⁰¹ *Ibid.* para. (d).

¹⁰² ExCom Conclusion No. 40(XXXVI), para. (b).

¹⁰³ *Ibid.* para (e).

Article V- *Voluntary Repatriation* states that:

- “1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their re-settlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary- General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.”

The relatively weak and insufficient legal framework governing voluntary repatriation has forced concerned parties to make use of other means and methods to regulate the implementation of the repatriation operations. The procedure generally adopted is to conclude special agreements, normally between the UNHCR, the host country and the country of origin. This has been the approach adopted in Zambia in relation to the Angolan repatriation operation. On the 28th of November 2002, following extensive negotiations, the UNHCR, the GRZ and the GOA signed an agreement of this kind entitled ‘Agreement on the Establishment of a Tripartite Commission for the Voluntary Repatriation of Angolan Refugees’ [hereinafter, “the Tripartite Agreement”].

The Tripartite Agreement is quite short, consisting only of 18 brief articles and a Preamble. Unlike the Sample Tripartite Agreement, the Tripartite Agreement does not particularly concern itself with details, but instead leaves the details to be worked out by the Tripartite Commission established by article 1 of the Tripartite Agreement. This displays a conscious effort to

give flexibility in order to meet the practical realities when implementing the repatriation.

5.2 The relationship between voluntary repatriation and the cessation clause

Any repatriation, be it spontaneous, facilitated or promoted, will naturally require some form of improvement of conditions in the country of origin, otherwise, there would be no reason for the refugees to go back. With regard to the minimum level required, this question will be addressed under Chapter 6.4.2. In this Chapter, the focus is instead on the other end of the spectrum, namely, whether or not the improvements, which make it possible to promote voluntary repatriation, are sufficient to also warrant the application of the cessation clause relating to change of circumstances in the country of origin under article 1 C (5) of the 1951 Convention or under the almost identical article 1 (4)(e) of the 1969 OAU Convention?¹⁰⁵

Article 1 C (5) of the 1951 Convention reads:

“He can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;”

This question needs to be answered in the negative for the following reasons:

The Handbook on Voluntary Repatriation talks about promotion of repatriation “once conditions are conducive to return”.¹⁰⁶ It further states that it is a *sine qua non* for promotion of repatriation that there has been “an overall, general improvement” which makes it possible for the large majority of refugees to return home safely.¹⁰⁷ The UNHCR Handbook on

¹⁰⁴ UNHCR, *Handbook Voluntary Repatriation: International Protection*, Geneva, 1996, p. 28, [hereinafter, Handbook on Voluntary Repatriation (1996)]. The Handbook on Voluntary Repatriation is intended as a protection tool for UNHCR field staff and partners and seeks to promote consistency in international refugee protection and in the practice of agencies working in this area. (p. 5). Although not legally binding, it has been described in doctrine as “the most recent and definitive statement of the organisation [the UNHCR] regarding the theoretical framework of voluntary repatriation”, which is expected “to have a large influence internationally in the structuring of thought on voluntary repatriation.” (Takahashi, Saul, “The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection”, p. 593-612, *IJRL*, Vol. 9 No. 4, 1997, p. 600.)

¹⁰⁵ Both the 1951 Convention and the 1969 OAU Convention contain two different kinds of cessation clauses: those that relate to a change in circumstances that the refugee has brought about by himself; and those that focus on changes in the country of origin that remove the basis for the individual’s fear of persecution. This thesis will only focus on the latter i.e. the ‘ceased circumstances’ provisions relating to refugees in article 1 C (5) of the 1951 Convention and article 1 (4)(e) of the 1969 OAU Convention. Throughout this thesis, these two articles will be dealt with and referred to concurrently as “the cessation clause”.

¹⁰⁶ Handbook on Voluntary Repatriation (1996), p. 7.

¹⁰⁷ *Ibid.* p. 14.

Procedures and Criteria for Determining Refugee Status on the other hand, states that ‘circumstances’ in the meaning of article 1 C (5):

“refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere- possibly transitory- change in the facts surrounding the individual refugee’s fear, which does not entail such major changes of circumstances is not sufficient to make this clause applicable.”¹⁰⁸

ExCom Conclusion No. 69 (XXVIII) on *Cessation of Status* further stresses that the change of circumstances must be of “a profound and enduring nature” and that for States to decide to apply the cessation clause, they must first “carefully assess” in an “objective and verifiable way” that the situation, which justified the granting of refugee status, has ceased to exist.¹⁰⁹ ‘A profound and enduring nature’ has been interpreted by the UNHCR as implying a consolidation of the process of stabilization over a certain period of time. The UNHCR has emphasised that a minimum period of 12 to 18 months should normally elapse before a judgement can be considered reliable, but States have not yet accepted any particular time frame.¹¹⁰ In practice however, it usually takes considerable time after an organized voluntary repatriation operation has been concluded before the cessation clauses are invoked.¹¹¹ This is due to the fact that international protection is intended to provide security to refugees and to subject them to frequent reviews of their status would be detrimental to their sense of security.¹¹²

It appears therefore that there is a qualitative difference between the two situations, relating both to the nature of the changes as well as to their duration. The Handbook on Voluntary Repatriation acknowledges this specifically by stating that:

“the voluntary repatriation of refugees can take place at a *lower threshold* of change in the country of origin than cessation [of refugee status]”.¹¹³

This means that at the time of the promoted voluntary repatriation operation, the cessation clause is not applicable; the refugees are indeed still refugees and as such entitled to protection afforded under the regime of refugee law.

¹⁰⁸ UNHCR Handbook (1992), para. 135.

¹⁰⁹ ExCom Conclusion No. 69 (XLIII)-1992, *Cessation of Status, Report of the 43rd Session*: UN doc. A/AC.96/804, para. 22, preamble and (a).

¹¹⁰ Goodwin- Gill (1996), p. 85.

¹¹¹ For more on the timing of the application of the cessation clause, see *infra*, Chapter 7.2.

¹¹² Handbook on Voluntary Repatriation (1996), p. 9.

¹¹³ *Ibid.* p. 10.

6 Protection of the residual caseload at the time of the voluntary repatriation operation

6.1 Identifying the residual caseload

The choice of Angolan refugees not to repatriate can be attributed to a variety of factors. For some refugees, it is due to their own perception or assessment of the security situation in Angola as it directly affects them. Their decision not to repatriate will presumably change with the passage of time if there is an improvement of conditions in Angola. Their perceptions can possibly be influenced by information being presented to them, which would indicate that it would be safe for them to return. This can be described as a ‘wait and see’ attitude and it is likely to be expected from the refugees in the Nangweshi camp and the Ukwimi settlement, which are predominantly composed of former UNITA sympathisers and combatants and their relatives. For the estimated 655 refugees from the Cabinda Province,¹¹⁴ where it is in fact still not safe, their refusal to repatriate will be based on both security considerations and on the unwillingness to repatriate to another part of Angola. Furthermore, other refugees may be reluctant to repatriate due to traumatic experiences before or during flight.

For the long-term refugees, the main reasons for wanting to stay can be attributed to a high degree of integration in the area of asylum, which is something that has been particularly easy to achieve in Zambia given the ethnic, cultural and geographical similarities of the two countries, and the Zambian policy of promoting self-sufficiency. An advanced degree of integration is often coupled with a relinquishing of one’s identification with the home country.¹¹⁵ This is especially true for second-, and third-generation refugees, i.e. refugees who were born in Zambia, and who have never even been to Angola and might not even be familiar with its language and culture. It can also be expected from refugees who have lost contact with their family, (and who are unlikely to be reunited through family reunification projects), and who are unable to fend for themselves in the event of return. This group consists mainly of so called *vulnerable cases* like elderly refugees, unaccompanied minors, orphans, widows and disabled refugees.

From the above it seems safe to conclude that amongst the Angolan refugee population in Zambia, the residual caseload can be expected to be quite large. The UNHCR Handbook on Voluntary Repatriation prescribes that an

¹¹⁴ UNHCR BO Lusaka, *Registration Report by Origin and Previous Residence*, October 2002, p. 1.

¹¹⁵ Rogge (1994), p. 32.

attempt to identify the residual caseload should be undertaken early in the voluntary repatriation operation, and that ideally, provisions on how to deal with the residual caseload should be included in the Tripartite Agreements.¹¹⁶ While the authorities responsible for the present repatriation operation did make such identification attempts prior to the signing of the Tripartite Agreement on the 28th of November 2002, only one provision relating to the treatment of the residual caseload was incorporated into the agreement. This provision reads:

“the status of those refugees who do not make the decision to repatriate shall continue to be governed by the applicable national legislation in accordance with the relevant international protection principles.”¹¹⁷

The Tripartite Agreement does not make any reference to what will actually happen to the residual caseload and in fact, to date this sensitive issue has not been fully agreed on by the authorities. Therefore, in this part of the thesis the protection offered by the ‘relevant international protection principles’ will be examined.

6.2 The principle of *non-refoulement*

The UNHCR Handbook on Voluntary Repatriation states that:

“In international human rights law, the basic principle underlying voluntary repatriation is the right to return to one’s own country.”¹¹⁸

The human right to return to one’s country is undoubtedly the most cardinal right for Angolan refugees in Zambia who wish to repatriate.¹¹⁹ However this right is not very relevant for the residual caseload. For them, the most important human right will rather be the one that enables them to stay in Zambia when the voluntary repatriation operation is being implemented. The principle of *non-refoulement* provides the residual caseload with such a right. It is the first and most important legal protection that the residual caseload are entitled to.

According to the principle of *non-refoulement*, it is prohibited to forcefully return the refugees to Angola if their ‘life or freedom’, or ‘life, physical integrity or liberty’ are threatened; on account of their race, religion, nationality, membership of a particular social group, political opinion; or, owing to external aggression, occupation, foreign domination, or events

¹¹⁶ *Ibid.* p. 29.

¹¹⁷ Article 6 of the Tripartite Agreement.

¹¹⁸ Handbook on Voluntary Repatriation (1996), p. 8.

¹¹⁹ The right to return is spelled out in numerous international and regional human rights instruments including Article 13(2) of the Universal Declaration of Human Rights; Article 12(4) of the ICCPR, Article 5(d) sub (ii) of the CERD, Article 10(2) of the CRC and Article 12(2) of the African Charter on Human and People’s Rights.

seriously disturbing public order in either part or the whole of his country.¹²⁰

By virtue of this principle, refugees are what Zieck calls “unrepatriable”,¹²¹ and the protection against *refoulement* remains intact so long as the refugee definitions continue to apply. In Zambia, both refugees with status under the 1951 Convention and under the 1969 OAU Convention should be entitled to this protection as Zambia has ratified both instruments. Furthermore, there is also considerable academic support for the view that the principle of *non-refoulement* has status of customary international law, or that it is even a rule of *jus cogens*,¹²² i.e. a rule “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”.¹²³ Unfortunately, in Zambia, the status of the principle of *non-refoulement* is somewhat unclear.

6.2.1 Zambian legislation and practice

There are no explicit provisions in the Control Act upholding the refugees’ right to protection from *refoulement*. On the contrary, Section 10 of the Control Act actually empowers the Minister to order the deportation of any refugee at any time. Furthermore, it authorises courts to order the deportation of convicted refugees, regardless of the gravity of the offence for which they have been convicted:

“(1) The Minister may at any time order any refugee to return by such means or route as he shall direct to the territory from which he entered Zambia.

(2) A court convicting any refugee of an offence under the provisions of this section may order the deportation of such refugee to the territory from which he entered Zambia.”

The only exception to these rules is contained in subsection 4 and relates to cases where it is believed that a refugee may be tried, detained, restricted or punished without trial for an offence of a political character, or is likely to be subjected to physical attacks upon return.

“(4) No order shall be made under subsection (1) or (2) in respect of a refugee if the Minister or the court, as the case may be, is of the opinion that such refugee may be tried, or detained or restricted or punished without trial, for an offence of a political character after

¹²⁰ This sentence combines the necessary elements of the *non-refoulement* provisions of article 33 of the 1951 Convention and article II (3) (in combination with article I (1-2)) of the 1969 OAU Convention. It should be mentioned here that there is also a *non-refoulement* provision in article 3 of the CAT, which is not refugee-specific but relates to cases of torture.

¹²¹ Zieck (1997), p. 101f.

¹²² See for example, Goodwin-Gill (1996), p. 129f, and p. 168.

¹²³ Article 53 of the Vienna Convention on the Law of Treaties, signed at Vienna on 22 May 1969, 1155 U.N.T.S., 331.

arrival in the territory from which he came or is likely to be the subject of physical attack in such territory.”

A similarly formulated exception can be found in Section 11(2) with regard to the issue of permits to remain in Zambia.¹²⁴ Although these exceptions can be regarded as implying the principle of *non-refoulement*, the wording is too limited to provide an absolute protection for refugees against all possible evils that the principle of *non-refoulement* is intended to cover. For instance, a person who stands the risk of being subjected to ill treatment, not amounting to physical attack, or who is at risk of being detained on account of his race, religion, nationality or membership of a particular social group, falls outside the scope of the exceptions in the Control Act. Furthermore, the Control Act fails to incorporate the broader *non-refoulement* principle of the 1969 OAU Convention i.e. to not forcefully return a refugee whose life, physical integrity or liberty is threatened owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country. This failure is of crucial importance to the Angolan refugee population in Zambia, since most of these refugees possess status under that instrument.

In practice, the principle of *non-refoulement* has been further undermined by the Department of Immigration’s continuous application of the Immigration and Deportation Act [hereinafter, “the Immigration Act”], Chapter 122 of the Laws of Zambia, to refugees and asylum-seekers. The Immigration Act does not recognise the particular status of refugees or asylum-seekers and consequently treats them as ordinary aliens and subject them to immigration-related charges such as illegal entry or presence in the country. The procedure applied has been that the Minister issues a declaration under Section 22(2) of the Immigration Act,¹²⁵ declaring a refugee or an asylum-seeker a prohibited immigrant and thereby effectively circumvents the principle of *non-refoulement*.

A few observations can be made in regard to this procedure. First, the imposition of these charges appear to go against article 31(1) of the 1951 Convention, which states that:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened [...], enter or are present in their territory without authorization, provided they

¹²⁴ Section 11(2) of the Control Act reads: “An authorised officer shall not refuse a refugee a permit under this section if the officer has reasons to believe that the refusal of a permit will necessitate the return of the refugee to the territory from which he has entered Zambia and that the refugee may be tried, or detained or restricted or punished without trial, for an offence of a political character after arrival in that territory; but, save as aforesaid, such authorised officer may in his discretion and without assigning any reason refuse to issue a permit.”

¹²⁵ “Any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest shall be a prohibited immigrant in relation to Zambia.”

present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

Although it is clear from the *Travaux Préparatoires* that ‘penalties’ refers only to administrative or judicial convictions on account of illegal entry or presence and not to expulsion,¹²⁶ article 32 of the 1951 Convention prescribes that the latter can only be done on grounds of national security or public order. Unfortunately, the Immigration Act does not incorporate such standards.

In addition, such a practice seems to be at variance with the general principle of law *lex specialis legi generali derogat*. This means that, as far as refugees are concerned, the Control Act should be regarded as *lex specialis* in relation to the Immigration Act, which constitutes *lex generalis*, and the application of the former should therefore take precedence over the latter.

This principle was applied by the Court in the 1974 Zambian High Court case of *Re Chirwa (Edward Yapwantha)*.¹²⁷ In the case, which concerned a refugee from Malawi, the court held that it was *ultra vires* the powers of the Minister to invoke his powers under the Immigration Act and declare a refugee under the Control Act a prohibited immigrant.¹²⁸ However, irrespective of this judgement, the procedure continues to be applied.

To conclude, it can be said that whilst the Control Act provides limited safeguards for refugees against *refoulement*, the Immigration Act on the other hand does not appear to apply the same standard. This apparent discrepancy and lack of harmonisation of domestic legislation, coupled with the lack of collaboration between the officials tasked with asylum-seekers and refugee issues and those tasked with immigration matters, leaves asylum-seekers and refugees very much at risk of being *refouled*.

6.2.2 The Tripartite Agreement

The Tripartite Agreement makes no explicit mention of the principle of *non-refoulement* either. This is unfortunate as this would have been a good

¹²⁶ Weis, Paul, *The Refugee Convention, 1951- The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, 1995, p. 302.

¹²⁷ (1974) ZLR p. 14.

¹²⁸ The arguments presented by Judge Cullinan in favour of this judgement seems to draw on both the principle of *lex specialis*, and the need for special safeguards for refugees as well as on the intention of the legislature: “[The Control] Act, enacted some years subsequent to the Immigration and Deportation Act, seems to have been so enacted as to provide a special status and safeguards for refugees. The machinery for their deportation was provided for in detail under section 10 of the Refugees (Control) Act. That section provides certain safeguards which are not apparent in the apparently unfettered discretion conferred upon the Minister under section 22 (2) and section 24 (2) of the Immigration and Deportation Act. It seems to me that the intention of the legislature in enacting the Refugees (Control) Act would be defeated if such safeguards could be discarded by resorting to an alternative machinery under the Immigration and Deportation Act.” *Ibid.*

opportunity to bring Zambia into line with her international and regional obligations of *non-refoulement* (even though it would only have been applicable to the Angolan refugees and only at the time of their repatriation).

However, Zieck argues in relation to tripartite agreements in general that, although not explicitly stated, they appear to presuppose that the refugees whose return is thus regulated are 'unrepatriable', and that the parties are considered bound to respect the principle of *non-refoulement*.¹²⁹ If we consider this to be true, this would result in a situation in Zambia where the Angolan refugees are better protected against refoulement at the time of the present repatriation operation than at any other time throughout their period in exile in Zambia. It also means that they are better protected than refugees of other nationalities who are not in the process of repatriation. As absurd as it sounds, this appears in fact to be the case, and therefore it can be concluded that the principle of *non-refoulement* as alluded to in the Tripartite Agreement is intended to protect the residual caseload from being forcefully returned to Angola.

6.3 The principle of voluntariness

The second protection that the residual caseload benefits from lies in the voluntary nature of the repatriation operation i.e. what is cardinal here is the subjective decision of the refugee. The UNHCR Handbook on Voluntary Repatriation describes the principle of voluntariness as “the cornerstone” of international protection with respect to the return of refugees and correctly points out that it is a direct consequence of the principle of *non-refoulement*.¹³⁰ As for a definition of the meaning of ‘voluntariness’, the precursor of the Handbook on Voluntary Repatriation: the draft Protection Guidelines on Voluntary Repatriation’ from 1993, provides that it should be interpreted as:

“The ability to exercise one’s free and unconstrained will in making a meaningful choice between returning and not returning to one’s country of origin in the light of the particularity of one’s situation *vis-à-vis* existing conditions within both the countries of origin and asylum; this choice must be made without undue pressure, whether physical, psychological or material”.¹³¹

Before looking at how the principle of voluntariness is being respected in the present operation, it would be useful to consider some adversaries to the principle.

¹²⁹ Zieck (1997), p. 108.

¹³⁰ Handbook on Voluntary Repatriation (1996), p. 10.

¹³¹ UNHCR, *Protection Guidelines on Voluntary Repatriation* (draft), September 1993, UNHCR, Geneva, p. 6 [hereinafter, Guidelines on Voluntary Repatriation (1993)].

6.3.1 The existence of the principle of voluntariness

Not everyone agrees that the principle of voluntariness in repatriation operations is necessary. Apart from incidences of outright forced repatriation, like for instance that of Rwandans, Burundese and Congolese DR refugees in Tanzania between 1996 and 1997, and that of Rwandans refugees from the DRC in 1997,¹³² arguments were raised during the 1990s which suggest that the voluntary character of repatriation need not always be respected.

In doctrine, James Hathaway advocated for the abandonment of the principle of voluntariness in repatriation operations all together, by stating that once the host State deems that the conditions in the country of origin are sufficient; it is entitled to withdraw refugee status and repatriate the refugees.¹³³ Even within the UNHCR, some argued for a less strict adherence to the principle of voluntariness in certain situations. For example, where changes have occurred to create conditions under which it is safe for the refugees to return, but where it is not yet warranted to apply the cessation clause, the following question was raised:

“Should the principle of voluntariness continue to be cardinal in this type of situation, or does the existence of safe conditions diminish the need for the freely expressed wish of the individual refugee? Some of us argue that voluntary repatriation, as a corollary to *non-refoulement* remains valid as long as refugee status continues, and that there can be no modification to this position. Others among us feel that the corollary of *non-refoulement* is not voluntary repatriation but safety of return, and therefore, the issue at stake is the extent to which conditions in the country of origin are safe for return rather than the willingness of return?”¹³⁴

Replacing the requirement of voluntary return with that of *safe return* was however abandoned by the UNHCR due to practical considerations concerning the difficulty of ascertaining whether or not conditions are indeed safe for return. It was also recognised that mistakes in doing so would take a serious toll on the credibility of the agency.¹³⁵

However, the issue remained on the UNHCR agenda, and in September 1996, the then Director of UNHCR’s Division of International Protection, Mr. Dennis McNamara, introduced the *doctrine of imposed return*.¹³⁶ He

¹³² Rutinwa, Bonaventure, *The End of Asylum? - The changing nature of refugee policies in Africa*, UNHCR Working Papers No. 5, May 1999, p. 12.

¹³³ Hathaway, James, “The Meaning of Repatriation”, pp. 551-558, *IJRL*, Vol. 9 No. 4, 1997, p. 554.

¹³⁴ UNHCR, *Report of the UNHCR Working Group on International Protection*, 6 July 1992, para. 83.

¹³⁵ Zieck (1997), p. 113.

¹³⁶ Chimni, B.S., *From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems*, UNHCR Working Papers No. 2, May 1999, p. 8.

argued that today's repatriation operations take place under dramatically varying conditions and that it would be unrealistic to insist on adherence to the principle of voluntariness without taking into account the conditions and particularities of each specific situation. For example, in situations where the environment facing the refugees in the host country was particularly hostile, refugees could be sent back to "less than optimal conditions" in their home country against their will.¹³⁷ This had become necessary, according to McNamara because of increased pressure from host states coupled with a general lack of money necessary to care for refugees.¹³⁸

In line with Mr. McNamara's arguments, attempts have been made to identify in what situations the principle of voluntariness could be disregarded. The *Guidelines and Principles for Safe and Sustainable Return* from 1998 can be referred to as an example.¹³⁹ In the guideline entitled "Mandating Non-Voluntary Return", the authors suggest that the Security Council or an appropriate regional body should have the power to authorise a 'non-voluntary repatriation' in situations where it deemed conditions in the country of asylum to be not only 'more dangerous and debilitating' than in the country of origin, but also uncorrectable by the host State with international assistance. With regard to conditions in the country of origin, certain minimum requirements did have to be met, for instance there has to be at least a reasonable expectation of the provision of basic human needs, as well as non-discriminatory enjoyment of the national standard of human rights for the returnees.

Compared to Hathaway's unconditional approach to repatriation, the latter contextualised theories appear less radical. From a protection point of view however, the refugees might be worse off under the latter approach, as the doctrine of imposed return clearly is intended to take place long before conditions in the country of origin have improved to a level corresponding to a level that warrants the application of the cessation clause. Furthermore, the theories are also an outright invitation to host states to create such dangerous and debilitating conditions, and to donors and the international community to deny assistance, when they are of the opinion that the refugees should return.¹⁴⁰

Ultimately, all theories that suggest the unconditional or occasional abandonment of the principle of voluntariness are clearly more based on political considerations than on humanitarian ones, in clear derogation from Article 2 of the UNHCR Statute. Although it has increasingly been

Chimni explains the introduction of the doctrine of imposed return by the Division of International Protection as a natural consequence of its fear of being marginalized in the decision-making process of the UNHCR, since the reality is already that many refugees repatriate under some form of duress.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* p. 11.

¹³⁹ *Ibid.* p. 9f.

¹⁴⁰ *Ibid.*

recognised that there is no clear-cut line between the two,¹⁴¹ it nevertheless raises concern with regard to the protection of refugees and should rather be something to work against than to strive for.

6.3.2 Assessing voluntariness in Zambia

An African State like Zambia is undoubtedly required to respect the principle of voluntariness by virtue of article V of the 1969 OAU Convention, which clearly imposes the voluntariness requirement on its State Parties. In the repatriation operation at hand, the requirement of voluntariness has been recognised, and the Tripartite Agreement states *inter alia* that:

“The Contracting States and the High Commissioner reiterate that the voluntary character of repatriation shall be adhered to.”¹⁴²

Therefore, even though the Tripartite Agreement does not go as far as the ‘Sample Tripartite Agreement’ contained in the Handbook on Voluntary Repatriation, which explicitly states that the repatriation of the refugees “shall only take place at their freely expressed wish”,¹⁴³ it is arguable that there is still protection for the residual caseload under this instrument.

With regard to the practical implementation of the principle of voluntariness, the Tripartite Agreement proposes that the standard Voluntary Repatriation Form [hereinafter, “VRF”] be used as evidence of the voluntary decision to repatriate.¹⁴⁴ Although the use of VRFs is also the approach advanced by the UNHCR in the Handbook on Voluntary Repatriation,¹⁴⁵ the completion of a VRF may not necessarily mean that the refugees are repatriating of their own free will.

For example, in 1996, when voluntary repatriation was being planned in Zambia for Angolan refugees following the signing of the Lusaka Protocol, the Lutheran World Federation- the lead NGO operating in Meheba conducted a survey using the VRF in the settlement.¹⁴⁶ Rather than inquiring *if* the refugees wanted to repatriate or not, the refugees were asked whether they wanted to repatriate in 1996 or 1997 i.e. *when* they wanted to repatriate. The survey thus came to the astonishing result that all but 17 of the 25,330 Angolan refugees wanted to repatriate! However, the reality, which was confirmed by a researcher who visited Meheba shortly after the survey was conducted, was that many more refugees indeed wanted to stay. Since the

¹⁴¹ UNHCR, *The State of the World’s Refugees: In Search for Solutions*, Oxford University Press, 1995, p. 132f; and, UNHCR, *The State of The World’s Refugees: Fifty Years of Humanitarian Action*, Oxford University Press, 2000, p. 152f.

¹⁴² Article 6 of the Tripartite Agreement.

¹⁴³ Article 7 of the Sample Tripartite Agreement, Annex 5 of the Handbook on Voluntary Repatriation (1996).

¹⁴⁴ Article 11(c) and (d) of the Tripartite Agreement.

¹⁴⁵ Handbook on Voluntary Repatriation (1996), p. 36. (A sample VRF is attached as Annex 4.)

¹⁴⁶ Bakewell (2002), p. 62.

questions posed to the refugees were not open-ended, and since none of the alternatives included staying in Zambia, many refugees effectively registered as wanting to leave, even though they really did not want to.

What this example ultimately reflects is how crucial complete and accurate information is for ensuring the voluntary character of a repatriation operation. To the Angolan refugee population, the majority of which are illiterate or lack education and knowledge about the substance of their rights, an information campaign that fails to specifically address the issue of procedures and options for those who do not wish to repatriate, will most likely give the refugees the impression that they do not have the freedom to choose. A scenario of this kind is likely to occur also in the present repatriation operation since what will actually happen to the residual caseload has not yet been decided.

Therefore, in the following, consideration needs to be given with regard to *what is likely* to happen to the residual needs caseload. This can be done by looking at the practice adopted in previous voluntary repatriation operations. For example, in connection with the voluntary repatriation operation of Mozambican refugees from Malawi in 1993-1995,¹⁴⁷ it was noted in the Plan of Operation that:

“As regards the residual caseload, *individual and systematic determination* will be undertaken for those refugees who have genuine and demonstrable reasons for requesting continued refugee status. It is envisaged that although accepted cases will continue to enjoy international protection, not all the caseload will be in need of assistance”[emphasis added].¹⁴⁸

At this stage it would be helpful to reconsider the definition of voluntariness, which requires that the decision to repatriate should be made without pressure of any kind. This raises the question of whether the decision can be said to be truly voluntary, if the option not to return is made conditional, on loss of refugee status, of being able to demonstrate genuine protection reasons? Is it not arguable that such a condition would result in indirect pressure being applied to the refugees’ decision-making process, and in the principle of voluntariness being compromised?

This appears to have been the UNHCR’s position in 1993, as evidenced by the 1993 Protection Guidelines on Voluntary Repatriation, which state:

“Unless the situation prevailing in the refugees’ country of origin evinces a *fundamental change of circumstances* to such an extent that the refugees’ unwillingness to return to that country is no longer

¹⁴⁷A comprehensive case study of this voluntary repatriation operation is found in chapter 9 of Zieck (1997). Unfortunately, I have been unable to come across reliable information on the corresponding practice of the Zambian authorities, which is why there is no reference made to it in this part of the thesis.

¹⁴⁸ UNHCR, *Mozambique. Repatriation and Reintegration of Mozambican Refugees*, April 1993, (Rev.1), p. 29, quoted in Zieck (1997), p. 378.

justified and, as a result, the relevant cessation clause can be applied, UNHCR's general position is that the residual caseload should not be subject to individual refugee status re-determination. To do so otherwise would be tantamount to negation of the principle of voluntariness thereby putting indirect pressure on the refugees to achieve forcible return"[emphasis in original].¹⁴⁹

However, under the Mozambican approach, the fate of the residual caseload was decided immediately following the completion of the movement phase of the voluntary repatriation operation, and long before the application of the cessation clause was warranted. This clearly goes against the above-mentioned 'general position' of the UNHCR, but seems moreover to constitute the new practice in the matter.¹⁵⁰ The Handbook on Voluntary Repatriation confirms this by stating that while it is true that refugees may continue to refuse to avail themselves of the protection of their country of origin so long as the circumstances in connection with which they were recognized as refugees have not ceased to exist;

"this should be determined on a case by case basis through interviews with a view to ascertaining whether the individual not wishing to return is still in need of international protection. In particular where refugee status has been granted on the basis of prima facie (group) determination or under temporary protection arrangements, the individual determination of status following a mass voluntary repatriation should be explicitly negotiated with the government of the country of asylum."

In summary, it can be said that the current UNHCR position, which is most likely to be reflected in the present repatriation operation as well, is a clear deviation from the original meaning of the principle of voluntariness and is likely to result in the return (or the premature return) of many Angolan refugees.¹⁵¹ Effectively, this means that in practice, legal obligations and good intentions notwithstanding, the return of these refugees would be more similar to that of a 'safe return' than to a truly voluntary repatriation.

6.4 The principle of return in safety and dignity

It may be argued that a third protection for the residual caseload is the requirement in the Handbook on Voluntary Repatriation that the return takes place "in safety and with dignity".¹⁵² The precise legal status and the

¹⁴⁹ Guidelines on Voluntary Repatriation (1993), p. 64.

¹⁵⁰ Zieck (1997), p. 441.

¹⁵¹ In order not to stray too far from the issue at hand (i.e. the assessment of voluntariness in the repatriation of the Angolan refugee population from Zambia), this thesis will not look any further at what implications the current practice will have at procedural aspects such as the burden of proof in the re-determination of refugee status nor will it go any further into what appears to be a premature application of the cessation clause in individual cases, for a more detailed discussion on this, please refer to Zieck (1997), p. 438f.

¹⁵² Handbook on Voluntary Repatriation (1996), p. 11. The UNHCR sometimes uses the term '*in* dignity' but as it is done interchangeably with that of 'with dignity' there does not appear to be any significance to it.

meaning of this principle are quite unclear and will need to be examined before its possible impact on the protection of the Angolan residual caseload can be ascertained.

6.4.1 The existence of a right to return in safety and dignity

Similarly to the principle of voluntariness, the principle of return in safety and dignity is not spelled out in the 1951 Convention, but unlike the former, the latter is not even found in the UNHCR Statute. In fact, the first mention of the principle of safety and dignity in UNHCR documents is in the *Report of the Round Table on Voluntary Repatriation* that emanated from an expert meeting convened in San Remo in 1985.¹⁵³ During these deliberations, the participants affirmed the need for voluntary repatriation operations “to be carried out under conditions of absolute safety and dignity”.¹⁵⁴ However, the ExCom Conclusion No. 40 (XXXVI), which was adopted shortly afterwards, left out the dignity requirement.¹⁵⁵ A similar approach is found in article V of the 1969 OAU Convention, which talks about “safe return” and “return without risk”, but does not allude to the dignity requirement.¹⁵⁶

It is believed in this thesis that the omission of the qualifying adjective of dignity should not be construed as devoid of significance for the legal status of the principle of return in safety and dignity. It should rather be argued that out of the two components that make up the principle of return in safety and dignity, the former benefits from far better legal protection than the latter. For instance, with regard to African states like Zambia, they have a legal obligation to ensure the *safety* of the return in accordance with article V of the 1969 OAU Convention. As far as non-African States are concerned, the legal obligation of return in safety is more questionable as it arises from soft law sources only, but they nevertheless indicate *opinio juris* in the matter.

With regard to the second component, the requirement that return takes place with dignity, this appears to be mainly a creation of the Handbook of Voluntary Repatriation. Consequently, it can be regarded more as a moral and humanitarian requirement than as a legal one. Therefore, it would appear that the principle of return in safety can be distinguished from the principle of return with dignity, and only the former can be advanced as a protection tool for the Angolan refugees in Zambia.

6.4.2 The meaning of return in safety for Angolan refugees

The principle of return in safety revolves around the objective conditions in the country of origin. It can be argued that this principle too is a consequence of the principle of *non-refoulement*, as it is the objective conditions that make the forceful return of the refugees to their country of

¹⁵³ UNHCR, *Report of the Round Table on Voluntary Repatriation*- San Remo, Italy, 16-19 July 1985, EC/SCP/41, International Protection, 1 August 1985.

¹⁵⁴ *Ibid.* para. 40.

¹⁵⁵ ExCom Conclusion No. 40 (XXXVI), para. (b).

¹⁵⁶ Article V, para. (2) and (4) of the 1969 OAU Convention.

origin unlawful. According to the Handbook on Voluntary Repatriation, the principle of return in safety consists of three elements: *legal safety, physical security and material security*.¹⁵⁷

Legal safety refers mainly to the promulgation of laws or the issue of declarations of amnesties by the government of the country of origin, (and possibly also by other parties to the repatriation) for the benefit of the returning refugees, or *returnees* as they are now called. In the present operation, none of the operative articles of the Tripartite Agreement concerns itself specifically with the legal safety of the returnees. However, in the Preamble, the Tripartite Agreement makes reference to a number of amnesty laws in force in Angola, including Amnesty Law No. 24/91 of 12 July 1991, Amnesty Law No. 18/94 of 10 November 1994 and Amnesty Law No. 4/02 of 4 April 2002. Therefore, while there has been a glaring omission from the text of the Tripartite Agreement, at least there is some reference to the issue, albeit only in a cursory way.

With regard to the remaining two aspects of the principle of return in safety i.e. the physical security and the material security of the returnees, the Tripartite Agreement addresses these issues in broad terms by stating that the authorities “shall undertake all necessary initiatives to create conditions for the transportation and return of the refugees to places of final destination in conditions of safety and dignity”.¹⁵⁸ In practice, both of these aspects are likely to present major problems. For example, the most obvious and indeed very real danger to the physical security of refugees returning to Angola is undoubtedly the country’s abundance of landmines and UXOs. Although mine-clearing operations are being organized and implemented, unfortunately de-mining does not seem to be regarded as a precondition for the repatriation operation. Rather, according to a regional UNHCR spokesman,¹⁵⁹ “the key to the repatriation plan” is ongoing mine-awareness programmes.

While mine-awareness programmes of course are valuable in that they potentially reduce the number of casualties and injuries, they nevertheless do not diminish the presence of landmines in Angola. What they merely do is affect the minds of the returnees by ensuring that they all understand the realities they will be facing upon return. This practice shifts the principle of safety’s emphasis on objective conditions in the country of origin, back to that of the refugees’ subjective understanding of the same. It appears in fact to be more connected with the principle of voluntariness than with the principle of return in safety.

As for the material security of the returnees, more problems are evident. In the short term, the scarce availability of food in Angola can be resolved by

¹⁵⁷ Handbook on Voluntary Repatriation (1996), p. 12.

¹⁵⁸ Article 7 of the Tripartite Agreement.

¹⁵⁹ UNHCR World News, *Angola: UNHCR addresses returnee concerns of landmines and hunger*, Africa News Service, 15th of March 2003.

the UNHCR in co-operation with the World Food Programme and her implementing partners providing the returnees with food for the first two months.¹⁶⁰ In a longer perspective, however, it will be imperative to solve the issue of access to land, a problem to which there appears to be no quick fix solution. Despite the abundance of arable land in Angola, large portions of the territory will remain unavailable and unsuitable for such purposes for many years due to security concerns over land mines and UXOs. Furthermore, during interviews with refugees in Nangweshi many expressed fears,¹⁶¹ which have also been recognized by the UNHCR,¹⁶² that the GOA at present is more concerned with reintegrating IDPs, than with ensuring access to land for the returnees.

Unfortunately, the pace of voluntary repatriation operations are often dictated by the moving capability of the country of asylum, rather than by the capability of the country of origin to effectively cater for and absorb the returnees.¹⁶³ Quite often, repatriation operations are also unduly rushed by the desire to meet certain target dates or political deadlines, such as national elections.¹⁶⁴ Very possibly this could also be expected in the present case, as the authorities are eager to see as many refugees as possible return in time for the Angolan elections in the beginning of 2004, which, in turn, may entail compromising the certain aspects of the refugees return in safety.

This appears to leave the Angolan refugees falling between two stools in the present repatriation operation. The voluntary decision of the refugees to repatriate, which is what legitimised promoting their return to unsafe conditions in the first place, is compromised in practice, thereby turning what was supposed to be a voluntary repatriation into a safe return. However, there has been insufficient attention devoted to the actual safety of the refugees' return because the intended key to the refugees' promoted repatriation was supposed to be their voluntary decision to repatriate. Therefore, the Angolan refugees in Zambia would seem to be at risk of being repatriated involuntarily to unsafe conditions in Angola. This means that the principle of *non-refoulement* would be violated after all, and that the protection available to the residual caseload at the time of the repatriation operation would appear to be quite inadequate.

¹⁶⁰ *Ibid.*

¹⁶¹ UNHCR BO Lusaka, *Mission Report- Workshop on Voluntary Repatriation and visit to Nangweshi*, 2-5 September 2002, p. 2.

¹⁶² UNHCR, *Global Appeal 2003: Zambia*, p. 160f.

¹⁶³ UNHCR, *Evaluation of UNHCR's Repatriation Operation to Mozambique*, Evaluation Report, 1 February 1996, para. 4(c) and 16.

¹⁶⁴ *Ibid.* para. 4(j) and 253.

7 Protection of the residual caseload at the time of the application of the cessation clause

7.1 The application of the cessation clause in Zambia

The cessation clauses of the 1951 Convention, as well as those of the 1969 OAU Convention, are based on the consideration that international protection should not be granted where it is no longer necessary or justified.¹⁶⁵ In these cases, States have the exclusive authority to invoke the cessation clauses declaring that a refugee or a certain group of refugees should no longer be considered as such.¹⁶⁶ The UNHCR should be appropriately involved, and in practice, the agency has advised and responded to inquiries from States in the matter, has evaluated the significance of developments in countries of asylum, has conducted reviews of refugee caseloads potentially eligible for cessation and has issued declarations of cessation of refugee status in relation to certain refugee populations.¹⁶⁷

Declarations of cessation have been issued by the UNHCR on 21 occasions since 1973 and for three basic types of change: (i) accession to independent statehood; (ii) achievement of a successful transition to democracy; and, (iii) resolution of a civil conflict.¹⁶⁸ For Angola, a declaration relating to the first type of change was issued on the 15th of June 1979.¹⁶⁹ The declaration of cessation was limited to those refugees who had left Angola before the 11th of November 1975 i.e. to those who had been declared to be refugees *vis-à-vis* Portugal.

Notwithstanding the declaration, Zambia never applied the cessation clause to this group of refugees. Given the continuation of conflict in the newly independent state of Angola this is perhaps not so surprising, but a similar

¹⁶⁵ UNHCR Handbook (1992), p.26.

¹⁶⁶ ExCom Conclusion No. 69 (XLIII)- 1992, Preamble.

¹⁶⁷ Bonoan, Rafael, *When is International Protection No Longer Necessary? - The "Ceased Circumstances" Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973-1999*, Centre for International Studies, Massachusetts Institute of Technology. Paper prepared for the Global Consultations on International Protection in Lisbon on the 3-4 may 2001, p. 8f.

¹⁶⁸ *Ibid.*

¹⁶⁹ UNHCR, *Status of Angolans who left their country before 11 November 1975 and are still abroad*, June 15, 1979.

approach has also been adopted by the Zambian authorities in relation to other refugee populations.¹⁷⁰

Should this be taken to mean that Zambia considers the grant of refugee status as permanent, and that they will consequently never apply the cessation clause to the residual caseload? In this thesis it is believed that the answer to both questions is no. While it is true that the Control Act does not incorporate any of the cessation clauses of the 1951 Convention or of the 1969 OAU Convention, there is nothing in the Control Act that precludes the Minister of Home Affairs from ordering the deportation of these refugees under Section 10(1). Nor is there anything that precludes an authorised officer from refusing to issue these refugees with the necessary permits to remain in Zambia under Section 11 of the Control Act. Both these practices seem to result in a *de facto* cessation of refugee status. Moreover, the UNHCR Branch Office in Lusaka reports that State officials often query why refugees do not repatriate despite changes in their countries of asylum.¹⁷¹ This seems to indicate that the officials are of the opinion that there should be an end to the afforded refugee status.

Most likely, the GRZ's recent practice of not applying the cessation clause will change with the Angolan refugee population given the potential size of the residual caseload. Also, due to the fact that the overall refugee population of Zambia has more than doubled since 1996,¹⁷² a non-strict application of the cessation clause in relation to this group of refugees would be likely to set a precedent with more far-reaching political effects than previously. For instance, it could set a precedent for other large refugee nationalities in Zambia e.g. refugees from the DRC to remain in Zambia indefinitely, which is something the GRZ will probably want to avoid. In addition, there appears to be an increased international interest in the subject of cessation clauses resulting e.g. in the *Note on the Cessation Clauses* in 1997,¹⁷³ which was followed by the *Cessation Clauses: Guidelines on their Application* in 1999,¹⁷⁴ some Summary Conclusions from the Lisbon Expert Roundtable in 2001,¹⁷⁵ and most recently, a new set of Guidelines dated

¹⁷⁰ UNHCR BO Lusaka, *Zambia 1999 Annual Protection Report*, p. 4.

¹⁷¹ *Ibid.*

¹⁷² UNHCR, *Populations of Concern to the UNHCR: A Statistical Overview (1997)*, Office of the United Nations High Commissioner for Refugees, 1996, Table 2-Refugees and others of concern to UNHCR by country or territory of asylum/present residence, (131,139 thousand refugees and others of concern); and, *Population Statistics (2001)*, Table 2-Asylum-seekers, refugees and others of concern to UNHCR by country of asylum, end 2001, (284, 173 thousand refugees).

¹⁷³ UNHCR, *Note on the Cessation Clauses*, EC/47/SC/CRP.30, Executive Committee of the High Commissioner's Program, Standing Committee, 30 May 1997.

¹⁷⁴ UNHCR, *Cessation Clauses: Guidelines on their Application*, UNHCR/IOM/17/99, UNHCR/FOM/17/99, Geneva, April 1999.

¹⁷⁵ UNHCR, *Summary Conclusions- Cessation of Refugee Status*, UNHCR/IOM/08/2002, UNHCR/FOM/08/2002, Global Consultations on International Protection, Lisbon Expert Round Table, May 2001 [hereinafter, Summary Conclusions (2001)].

February 2003.¹⁷⁶ It should not be ruled out that the UNHCR's renewed interest in the matter could be mirrored by Zambia in the near future.

7.2 The timing of the application of the cessation clause

Should an application of the cessation clause be invoked in Zambia with regard to the Angolan refugee population, this is likely to take considerable time. The required changes in Angola need to be “fundamental, stable and durable”¹⁷⁷ and relevant indicators of this are:

- democratic elections
- significant reforms to the legal and social structure
- amnesties
- repeal of oppressive laws
- dismantling of repressive security forces
- general respect for human rights, with special regard to:
 - the right to life
 - the liberty of persons
 - non-discrimination
 - freedom of expression
 - non-discrimination
 - freedom of expression, assembly and association
 - fair trial, independence of the judiciary and access to courts
 - a functioning governing authority and basic administration
 - infrastructure sufficient to support basic livelihood
 - basic physical security
 - other human rights norms e.g. prohibition of torture, freedom of religion etc.¹⁷⁸

As evidenced by the latest human rights reports on Angola,¹⁷⁹ many of these relevant indicators are far from being attained, and could possibly require waiting for many more years still. Undoubtedly, one of the crucial aspects to the timing of the institution of the cessation clause will be the outcome of the upcoming Angolan elections, tentatively scheduled for the beginning of 2004.

This was an element to which the UNHCR accorded great weight when applying the cessation clause for Mozambican refugees following that

¹⁷⁶ UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)* HCR/GIP/03/03, 10 February 2003 [hereinafter, *Guidelines (2003)*].

¹⁷⁷ ExCom Conclusion No. 69 (XLIII), para. (b).

¹⁷⁸ Fitzpatrick, Joan & Brotman, Susan, *Current Issues in Cessation of Protection Under Article 1C of the 1951 Refugee Convention and Article 1.4 of the 1969 OAU Convention*, Carnegie Endowment for International Peace & UNHCR. Paper prepared for the Global Consultations on International Protection in Lisbon on the 3-4 May 2001, p. 14-15f.

¹⁷⁹ *Supra*, Chapter 2.4.

voluntary repatriation operation.¹⁸⁰ The civil war of Mozambique ended in October 1992 and the cessation clause was invoked in December 1996, approximately 26 months following the successful multiparty elections of October 1994. Initially, the UNHCR had envisaged applying the cessation clause in mid-1995, but due to among other reasons, the extensive presence of landmines and the inadequacy of food supplies, the agency was advised to reschedule.

A similar scenario can be envisaged for Angola, which would result in the general cessation of refugee status occurring around the end of 2005. However, this time estimate is subject to the availability of donor money for both the voluntary repatriation operation and the reconstruction of Angola, an aspect that might become critical due to the international community's diverted attention to the situation in the Middle East. For instance, at the end of February 2003, the UNHCR had received only \$6,5 million out of the requested \$34,5 million needed for the operation.¹⁸¹

Moreover, the implementation of the cessation clause may take longer as the UNHCR cautions that in cases, like the present, where the changes were brought about violently (by the assassination of the rebel leader Jonas Savimbi), a longer time period will need to have elapsed before the durability can be ascertained.¹⁸² This is particularly relevant in ethnically rooted civil conflicts like that in Angola since genuine reconciliation in these situations is often harder to accomplish than in predominantly political civil conflicts like that in Mozambique.¹⁸³

7.3 The conundrum of the Cabinda Province

Another question, which also merits attention, is whether or not it is possible to apply the cessation clause to the Angolan refugee population notwithstanding the continuation of fighting in the Cabinda Province? If so, should refugees from that area be expected to leave their country of asylum and seek refuge in other, so called 'safe parts' of Angola? Or, is it possible to only *partially* invoke the cessation clause; for example, to declare that all refugees from Angola cease to be refugees except those whose original place of residence is the Cabinda Province?

In principle, changes in the country of origin that affect only part of the territory should not lead to cessation of refugee status as this would seem to negate their fundamental character.¹⁸⁴ However, given the relative remoteness of the Cabinda Province in relation to the remainder of the vast Angolan territory, as well as the source of conflict, which appears unlikely to spread to the mainland, such an approach would seem rather drastic. This

¹⁸⁰ Bonoan (2001), p. 13f.

¹⁸¹ UNHCR Briefing Notes, *Angolan refugees: willing to return*, 28 February 2003, p.2.

¹⁸² Guidelines (2003), para. 14.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.* para. 17.

should however not be perceived as support of an application of the cessation clause resulting in a situation where the refugees from the Cabinda Province are compelled to relocate to unknown areas of their home country. Such a practice would seem to suggest the importation of the concept of *internal flight alternative* from refugee status determination procedures. First of all, the concept of ‘internal flight alternative’ is a far from generally accepted concept under the 1951 Convention.¹⁸⁵ Moreover, it is expressly ruled out for refugees falling under the expanded refugee definition of the 1969 OAU Convention since this provides that a person can be considered a refugee if he is compelled to leave his place of habitual residence due to events in “either part or the whole of his country of origin”.¹⁸⁶ Secondly, such a practice raises human rights concerns with regard to the freedom of movement for these individuals, and would only exacerbate Angola’s already alarming situation of internally displaced persons. Ultimately, it would solve one problem by replacing it with another.

Turning to the third question, the UNHCR has acknowledged that nothing in the 1951 Convention precludes the partial or targeted application of the cessation clause.¹⁸⁷ The Summary Conclusions from the Lisbon Expert Roundtable of 2001 refers to two possible situations where this could be considered. The first one concerns a certain sub-group of a refugee population, for instance, refugees fleeing a particular regime as opposed to refugees fleeing after that regime was deposed.¹⁸⁸ This approach was adopted by the UNHCR on one occasion: when cessation of refugee status was declared in relation to Ethiopian refugees who fled the Mengistu regime, but not for the Ethiopian refugees who fled subsequently. The second situation, on the other hand, is the one of most relevance for the Angolan refugee population, as it consists of partial cessation with respect to persons from a particular area of the country of origin, instead of a general cessation clause covering the entire territory.

7.4 Continued protection for the residual caseload- exceptions to the cessation clause

The application of the cessation clause is not always absolute in character, and the ExCom Conclusion No. 69 (XLIII) prescribes that all refugees affected by a general cessation clause must be given opportunity to have their cases reconsidered on grounds relevant to their individual case.¹⁸⁹ This is due to the recognition that although circumstances have changed to such an extent that refugee status is no longer considered necessary; there will always be individual cases that may warrant continued international protection. Therefore, exceptions to the cessation clauses have been recognized in both legislation and practice.

¹⁸⁵ Goodwin-Gill (1996), p. 74f.

¹⁸⁶ Article 1(2) of the 1969 OAU Convention.

¹⁸⁷ Guidelines (2003), para. 17.

¹⁸⁸ Summary Conclusions (2001), para. 15.

¹⁸⁹ ExCom Conclusion No. 69 (XLIII), para. (d).

7.4.1 ‘Compelling reasons’

Article 1 C of the 1951 Convention provides *in fine* an exception to the cessation clause, stating:

“this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke *compelling reasons arising out of previous persecution* for refusing to avail himself of the protection of the country of nationality;” [emphasis added].

Notwithstanding the actual wording of the article, the application of this exception is interpreted to extend to article 1 A (2) refugees as well. This is said to reflect a general humanitarian principle now well rooted in State practice.¹⁹⁰ The 1969 OAU Convention on the other hand, does not contain any similar exception to the cessation clause and consequently persons subject to article 1.4(e) cessation would unconditionally no longer qualify as refugees. Although this would be the result of a strict interpretation of the 1969 OAU Convention, its complementary status to the 1951 Convention seems to suggest that refugees with status under the regional instrument would also benefit from rights and privileges accorded under the universal instrument. Furthermore, a similar interpretation would seem to be more in line with the ‘general humanitarian principle’ referred to in the UNHCR Handbook, as well as with the principle in Zambia of not differentiating between refugees on the basis of their status.

Turning to the content of the ‘compelling reasons’ exception, this is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to their country of origin.¹⁹¹ This could include survivors and witnesses of violence and torture, including rape and sexual violence, former camp and prison detainees and traumatised refugees. However, a more generous interpretation of the term, which can be supported by the wording, should not limit its application only to the severity of past persecution.¹⁹² Rather, the refugees development of family and other ties to the country of asylum as well as his or her alienation from the country of origin, can also be taken into account as these factors have indeed also risen out of the persecution.

Such an interpretation would be more favourable to the residual caseload of Angolan refugees in Zambia. It would not only cover those refugees who were subjected to severe traumatic persecution, but also those refugees who did not experience particularly egregious persecution, or were not even persecuted at all, since these could be eligible on account of their long stay in Zambia. However, this might be a too optimistic interpretation of the

¹⁹⁰ UNHCR Handbook (1992), para. 136; and, Guidelines (2003), para. 21.

¹⁹¹ UNHCR Handbook (1992), para. 136.

¹⁹² Fitzpatrick & Brotman (2001), p. 25.

provision since after all, exceptions are to be applied restrictively. It is more likely that the GRZ, in an attempt to limit the numbers of refugees remaining, will only take into account the severity of past persecution in the application of the ‘compelling reasons’ exception. Since the majority of the Angolan refugee population did not flee on account of being subjected to atrocious persecution, but rather out of a general fear of being caught up in the liberation struggle or the civil war, it is most likely that the number of refugees allowed staying under this exception would be fairly limited.

7.4.2 Long-stayers

Another option for those refugees of the Angolan residual caseload that have been in Zambia for a long time, the so-called ‘long-stayers’ could be a second exception found in ExCom Conclusion No. 69 (XLIII) on *Cessation of Status*. According to this exception:

“appropriate arrangements, [...] be similarly considered by relevant authorities for those persons who cannot be expected to leave the country of asylum due to a long stay in that country resulting in strong family, social and economic links there;”¹⁹³

Although not required by the 1951 Convention *per se*, adopting this approach is consistent with the 1951 Convention’s broad humanitarian purpose and with the respect for general human rights standards.¹⁹⁴ It has furthermore found support in both principle and practice.¹⁹⁵ For instance, most European States make it possible for refugees to secure residence permits or even become naturalized citizens with the passage of time or due to family ties.¹⁹⁶

The aforementioned exception has great potential for and is likely to be applicable to quite a large number of Angolan refugees in Zambia. Looking simply at the length of time, it is obvious that all refugees who arrived prior to Angola’s independence in 1975 should be included. Also, refugees emanating from the subsequent civil war, at least the first decade, ought to be eligible.

With regard to the required links, it has been said before that the Angolan refugees have an ethnic and tribal composition similar to their host communities in the Western and North-Western Provinces of Zambia. From an outside perspective their lives may seem almost indistinguishable,¹⁹⁷ and over the years inter-marriages and childbearing have further induced the homogeneity of the two groups. Furthermore, scarce availability of resources in these parts of Zambia has forced the host community and the refugee

¹⁹³ ExCom Conclusion No. 69 (XLIII), para. (e) *in fine*.

¹⁹⁴ Guidelines (2003), para. 22.

¹⁹⁵ Fitzpatrick & Brotman (2001), p. 23.

¹⁹⁶ *Ibid.*

¹⁹⁷ UNHCR BO Lusaka, *Republic of Zambia: 2003 COP*, p. 14.

population to share public institutions like schools and hospitals, which has resulted in greater social interaction amongst them.¹⁹⁸ In addition, notwithstanding the GRZ policy that all refugees reside in camps and settlements, the majority of the Angolan refugees are self-sufficient and many sell and trade goods and services within and outside the refugee population.¹⁹⁹

Another thing, which deserves to be mentioned in this context, is the so-called Zambia Initiative. This programme was launched by the GRZ in co-operation with the UNHCR and other UN agencies in the beginning of 2002 as a unique integrated development and relief assistance programme in the Western Province of Zambia. It aims to address the poverty of the host population, to create an enabling environment and to provide opportunities for refugees to become fully productive members of the community rather than passive recipients of handouts.²⁰⁰ At this early stage of the Zambia Initiative it is premature to comment upon its success, but it can nevertheless be safely assumed that it will add to the integration of the Angolan refugees in Zambia and further strengthen the family, social and economic links referred to in the second exception of ExCom Conclusion No. 69 (XLIII).

7.4.3 Exceptions to the cessation clause in Zambian legislation and practice

Unfortunately, *de lege lata* there are no provisions in Zambian refugee legislation containing exceptions to the cessation clause. Therefore, an application of the cessation clause to the residual caseload would result in a situation where the entire residual caseload would be forced to return even if some of them fulfilled the criteria for any of the internationally recognized cessation clauses.

However, as seen earlier, the Control Act in Zambia is complemented by a wide array of practices, often more favourable to the refugees than the written law itself. It seems likely that the GRZ will again make use of administrative practice to make arrangements to allow Angolan refugees to remain in Zambia following cessation. This would be in the interest of the GRZ given the high level of integration of the Angolan refugees in Zambia and their economic contribution to the host country.

Furthermore, since the mid-90s, discussions have been underway in Zambia to amend the current refugee legislation in order to bring Zambia into line with her international and regional obligations. A 2002 Draft Refugee Bill,²⁰¹ which successfully incorporated all the relevant provisions, was unfortunately turned down in Parliament in December 2002. However,

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ UNHCR BO Lusaka, *Zambia Initiative Co-operating Partners' Mission Report*- 18 to 28 March 2002, p. 7.

²⁰¹ The (draft) Refugees Bill, 2002, N.A.B. 10, 30th August 2002.

lobbying is still going on and it is very probable that a new and improved refugee legislation, which includes both cessation clauses and exceptions thereto, will be a reality in Zambia at the time when it becomes relevant to apply the cessation clause to the Angolan refugee population in Zambia.

7.5 An appropriate status for the residual caseload

The starting point of this thesis was the problem of refugees and the durable solutions available to address the problem. Cessation of refugee status is not of itself considered a durable solution. Therefore, the question that ultimately remains to be answered is what will happen to those refugees of the residual caseload who may be eligible to remain in Zambia under one of the exceptions to the cessation clause? ExCom Conclusion No. 69 (XLIII) advocates that ‘an appropriate status’ and ‘appropriate arrangements’ be considered for refugees falling within the exceptions to the cessation clause.

7.5.1 Naturalization

Perhaps the most appropriate and obvious status for the residual caseload is to have a chance to become citizens of Zambia through naturalization. This solution finds support in the 1951 Convention, which states *inter alia* in article 34 that:

“The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.”

Notwithstanding that article 34 is in the form of a recommendation, and does not impose any formal obligations upon Contracting States to grant naturalization,²⁰² State practice in Europe clearly favors this solution for refugees who have been resident in the country of asylum for a longer period of time. For example, in Germany a refugee is eligible for citizenship through naturalization after seven years of residency and in the Netherlands and Sweden a mere four years is required.²⁰³ In the majority of the Western European countries, refugee status is considered as a favorable factor for naturalization, and refugees often benefit from relief from the period of required residency and from reduced fees and charges. In Africa, however, practice in this respect is rather scarce. To date, only two Sub-Saharan African States, Botswana and Tanzania have granted citizenship to large numbers of refugees through naturalization,²⁰⁴ and in both cases this was done as an exceptional measure rather than as a standard practice.²⁰⁵

²⁰² Weis (1995), p. 344 and p. 352.

²⁰³ *Ibid.* p. 350f.

²⁰⁴ Rogge (1994), p. 20.

²⁰⁵ For more on this, see for example Gasarasi, Charles P., “The Mass Naturalization and Further Integration of Rwandese Refugees in Tanzania: Process, Problems and Prospects”, *JRS*, Vol. 3 No. 2 (1990), p. 88-109.

In Zambia, the prospects for a refugee to become a naturalized citizen are limited by the legislation. The Citizenship of Zambia Act, Chapter 124 of the Laws of Zambia [hereinafter, “the Citizenship Act”] contains in Section 11-18 provisions for the acquisition of Zambian citizenship by two means: adoption and registration. However, for the latter, Section 16 (2)(b) of the Citizenship Act, as well as article 6(1)(b) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia prescribe that a person must be ordinarily resident in Zambia for a period of ten years immediately preceding the date of application for registration.

The term of being ‘ordinarily resident’ is defined by Section 18 of the Citizenship Act as “having the right to reside in Zambia by virtue of an entry permit”. The very nature of refugee hood precludes having an entry permit, and the Control Act does not require it. Consequently, Zambian law does not view refugees as being ordinarily resident in Zambia, which effectively prevents them from registering for citizenship.

Furthermore, Zambian law does not accord citizenship by virtue of the principle of *jus soli*, i.e. to children born on Zambian territory. Given the protracted nature of the Angolan refugee situation in Zambia, there are thousands of second and third generation Angolan refugees who cannot acquire Zambian citizenship but who have never even seen the country whose nationality they are expected to possess.

It is therefore clear that *de lege lata*, it is extremely difficult for Angolan refugees to become citizens of Zambia and amendments to the legislation would be necessary to facilitate naturalization. During the fall of 2002, the matter of granting citizenship through naturalization to Angolan refugees was frequently discussed in the Zambian media,²⁰⁶ and in the draft for a new Refugee Bill of 2002; article 34 of the 1951 Convention was for the first time transformed into Zambian legislation. The issue is controversial however, particularly for stakeholders in the Western and North-Western Provinces of Zambia, and their opposition has been cited by many as the main reason that the draft Refugee Bill was rejected in Parliament.²⁰⁷ Although the necessary amendments will probably be made to the legislation to allow refugees to become citizens of Zambia, it is likely that they will not be approved until the repatriation operation to Angola has begun and a substantive portion of the refugees have returned.

²⁰⁶ See for example, Times of Zambia, *Automatic Citizenship for Angolan refugees coming*, Saturday September 28, 2002, p.1; and, Times of Zambia, *Zambian citizenship for Angolan refugees- What Sakeni said*, Monday, September 30, p.2.

²⁰⁷ This opinion was expressed both by the UNHCR Representative for Zambia Mr. Ahmed Gubartalla, and by the Zambian Minister of Commerce, Trade and Industry Mr. Depak Patel in separate conversations I had with them in March and April 2003.

7.5.2 Complementary protection

Until Zambian legislation is amended to allow refugees the chance to become naturalized citizens of Zambia, an option available for the GRZ is to provide refugees of the Angolan residual caseload with ‘complementary protection’. Despite the fact that neither the Control Act, nor any other piece of legislation in Zambia provides for this, in practice, the GRZ occasionally makes use of this alternative for asylum-seekers who are unable to fulfil the criteria in refugee status determination procedures.²⁰⁸ Although it is only in this connection that the concept of complementary protection has generally developed, and it has not developed with cessation of refugee status in mind, this would seem to be precisely what the ExCom Conclusion No. 69 (XLIII) refers to as ‘an appropriate status’.²⁰⁹

The practice of regularising the stay for persons not, or no longer, qualifying as refugees, but for whom return is not possible or advisable for a number of reasons, has been adopted by a number of asylum countries, in a number of different ways.²¹⁰ Examples of these statuses are ‘B-status’, ‘subsidiary protection’, ‘de facto status’ and ‘humanitarian status’. Whereas some of these statuses are based on purely compassionate grounds or practical reasons such as age and medical conditions,²¹¹ others have an underpinning in universal human rights principles.²¹²

For instance, complementary protection could be utilised for persons with family ties in the state of refuge on the basis of the right to protection of family life from interference without proper justification, as spelled out by article 17 and 23(1) of the ICCPR, article 16 of the CRC and article 18 of the African Charter on Human and Peoples’ Rights. Furthermore, persons facing a serious risk of torture or cruel, inhuman and degrading treatment or punishment can be protected under the *non-refoulement* provision of article 3 of the CAT, or even possibly under article 7 of the ICCPR or article 5 of the African Charter of Human and Peoples’ Rights.²¹³

The UNHCR emphasises that beneficiaries of complementary forms of protection should enjoy a formal legal status with defined right and duties, and that they should be issued with documents certifying that status.²¹⁴ As a minimum, they should be entitled to the following civil and political rights: protection from *refoulement* and expulsion; protection from discrimination

²⁰⁸ UNHCR BO Lusaka, *Republic of Zambia: 2003 COP*, p. 13. The humanitarian status was granted to a group of Burundian, Rwandan, and Congolese combatants.

²⁰⁹ Fitzpatrick & Brotman (2001), p. 26.

²¹⁰ UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, EC/50/SC/CRP.18, Executive Committee of the High Commissioner’s Programme: Standing Committee 18th Meeting, 9 June 2000, para. 1-2 [hereinafter, *Complementary Forms of Protection* (2000)].

²¹¹ *Ibid.* para. 5.

²¹² *Ibid.* para. 13; and, Fitzpatrick & Brotman (2001), p. 26.

²¹³ Fitzpatrick & Brotman (2001), p. 26.

²¹⁴ *Complementary Forms of Protection* (2000), para. 14.

on account of race, religion, political opinion, nationality, country of origin, gender, physical incapacity or any other such basis; protection from torture or cruel, degrading and inhuman treatment or punishment; basic freedom of movement; and, access to courts and administrative authorities.²¹⁵ Moreover, they should be entitled to basic social and economic rights comparable to those generally available in the host country, including in particular access to adequate housing; access to assistance or employment; access to health care as needed; and, access to primary and secondary education.²¹⁶

However, at present this alternative appears to be rather problematic if applied to the residual caseload in Zambia. Firstly, it is not recognized anywhere in domestic legislation, which means that there are no established criteria for its implementation. Since complementary status is not necessarily permanent in nature,²¹⁷ it will be of utmost importance to at least codify the conditions under which the status can come to an end, as well as to make provisions for recourse to appeal. Otherwise, persons who get afforded complementary protection in connection with the cessation of their refugee status are at risk of being kept in suspense regarding their legal status.

Secondly, this status is inferior to full citizenship, since under the latter status, the former refugee would not be entitled to the same rights and benefits as ordinary Zambians. Whereas an arrangement of this kind can serve its purpose to provide temporary protection to persons not qualifying as refugees in refugee status determination procedures, it would not be suitable to adopt it in relation to persons who are likely to never be able to leave Zambia.

7.5.3 Continuation of refugee assistance

To institute procedures for reassigning the residual caseload with a new and appropriate status will undoubtedly result in a significant increase in administrative costs. For an impoverished nation like Zambia, this may prove to be quite a problem. Unfortunately, in default of availability of resources for this purpose, it is likely that the residual caseload will end up continuing to receive assistance and protection in the refugee camps and settlements of Zambia. The 44 families comprising 152 Mozambican former refugees still residing in Ukwimi following the repatriation operation of 1996 evidence this.²¹⁸ These people have not been provided with any identification papers or any other documents regarding their new status, whatever that may be, and they are still perceived by many as refugees.

²¹⁵ *Ibid.* para. 16.

²¹⁶ *Ibid.* para. 17.

²¹⁷ *Ibid.* para. 19.

²¹⁸ Lassailly-Jacob, Véronique, *Revisiting Ukwimi Resettlement Scheme, The Impact of the New Refugee Camp (Petauke District, Zambia), November-December 2001- A fieldwork report*, Centre for African Studies, French National Research Council, Paris, France, May 2002, p. 13.

In doing so, the actual legal status of the residual caseload will be far from clear and this approach should be regarded as the least appropriate one. Firstly, it will lead to a misuse of resources, which in the long run might undermine donor confidence and result in a decrease of funding. Secondly, the drafters of the refugee conventions clearly envisaged the refugee regime as a temporary status and it is precisely this temporary nature that justifies the imposition of restrictions and limitations upon generally recognized human rights. In a state like Zambia- who has made full use of her right to reservation under the 1951 Convention, and where the rights of refugees has been severely curtailed- a similar approach would in itself raise human rights concerns.

Finally, the biggest flaw in this approach is that it does not succeed with its ultimate task i.e. to provide a durable solution to the refugee problem. The residual caseload remain a problem to Angola as large numbers of Angolans in exile in neighbouring countries can prove to have serious security and political implications in the region. Furthermore, the residual caseload remains a problem to the host State Zambia and to the international community. This is because they will be responsible for providing material assistance to those who are not able to fend for themselves, which is something that will remain a problem to the residual caseload indefinitely.

8 Conclusions

This thesis proceeded from the assumption that not all Angolan refugees in Zambia have the desire to return to Angola now that the GRZ, the GOA and the UNHCR are promoting their repatriation. Later in the thesis, the assumption appeared to be correct as a number of factors were identified, which indicated that a substantial number of Angolan refugees would like to remain in Zambia. These factors, which included the ethnic, religious and cultural similarities of the two countries, the protracted nature of the Angolan refugee situation and the GRZ's policy of promoting self-sufficiency, have given rise to a situation where many Angolan refugees now feel integrated into Zambia. In fact, many Angolan refugees were even born in Zambia and no longer perceive Angola as 'home'.

The purpose of the thesis was to see what protection international and regional refugee law, Zambian legislation and practice, as well as the Tripartite Agreement stood to offer the Angolan refugees who wished to remain in Zambia, the so called 'residual caseload'. Firstly this was considered in relation to the residual caseload at the time of the voluntary repatriation i.e. at a time when refugee law was still applicable to them. Thereafter, this was examined in relation to the time following the repatriation operation, namely when the cessation clause relating to change of circumstances in the country of origin can be applied to the Angolan refugee population.

With regard to the time of the voluntary repatriation operation, it was argued that whereas for refugees who wish to return to Angola the most important human right in connection with the repatriation operation would be the right to return to one's home country; for the residual caseload, the cardinal principle will be the principle of *non-refoulement*. While the content and the legal basis of this principle in international and African regional refugee law is clear and while it is undeniable that Zambia is legally bound to observe the principle, it was concluded that the status of the principle of *non-refoulement* is not very well-anchored in Zambian legislation and practice.

The main legal instrument relating to refugees in Zambia, the 1970 Refugees (Control) Act provides only an implicit and very limited safeguard against *refoulement*. For instance, it does not offer any protection at all to refugees with status under the extended refugee definition of the 1969 OAU Convention. Even in practice, the principle of *non-refoulement* has been further undermined by the authorities' constant application of the Immigration and Deportation Act to refugees and asylum-seekers. The latter Act does not concern itself at all with the principle of *non-refoulement*. Due to this apparent discrepancy and lack of harmonisation of domestic legislation and the lack of collaboration between the officials tasked with asylum-seeker and refugee issues and those tasked with immigration

matters, the thesis came to the conclusion that in Zambia, Angolan refugees were indeed at risk of being *refouled*.

However, the thesis also came to the conclusion that at the time of the voluntary repatriation operation, the Tripartite Agreement may nevertheless protect the residual caseload from *refoulement*. It was argued that the Tripartite Agreement, without explicitly mentioning the principle of *non-refoulement*, presupposes that the Angolan refugees are unrepatriable, and that the parties consider themselves bound to respect the principle of *non-refoulement*. Therefore, it was concluded that the principle of *non-refoulement* as alluded to in the Tripartite Agreement is intended to protect the residual caseload from being forcefully returned to Angola.

The second legal protection for the residual caseload examined in the thesis, was the principle of voluntariness, which is a direct consequence of the principle of *non-refoulement*. It was argued that to return the refugees to Angola prior to the application of the cessation clause was only possible with their subjective and voluntary approval. It was further argued that despite an ongoing international debate, which suggests the abandonment of the principle of voluntariness for the benefit of 'safe return', Zambia is nevertheless bound to respect the principle by virtue of article V of the 1969 OAU Convention.

However, it was surmised that even though the Tripartite Agreement does state that the voluntary character of the repatriation shall be adhered to, it might not be able to offer very good protection to the residual caseload after all. This is because of the way in which the principle of voluntariness is at risk of being implemented in the present repatriation operation

Firstly, as the future of the residual caseload was not fully decided upon prior to the intended date of the voluntary repatriation operation, it is unlikely that the issue will be adequately addressed in the information campaigns provided to the refugees. This can lead to a situation where refugees not wanting to return to Angola actually feel compelled to do so due to the uncertainty of what would happen to them should they choose to remain in Zambia. Furthermore, if the information campaign does not address the issue at all, there is also the risk that the refugees will get the impression that they do not have any choice at all and consequently refugees irrespective of willingness will sign up for repatriation.

Secondly, it was argued that it was most likely that in the present repatriation operation, the authorities will undertake individual and systematic status determination of the residual caseload as soon as the movement phase of the voluntary repatriation operation has been completed. The view was presented that to make the option not to return conditional, on loss of refugee status, of being able to demonstrate genuine reasons for requesting continued protection, will in effect put indirect pressure on the refugees to repatriate. Although this is in line with the current UNHCR

position in the matter, it is apparent that such a practice is a clear deviation from the original meaning of voluntariness, which implied that no pressure of any kind should be imposed on the refugees' decision-making process. Consequently, the principle of voluntariness is at risk of being compromised in its implementation to such an extent that it will fail to provide protection to the residual caseload, and what was intended to be a voluntary repatriation of Angolan refugees from Zambia will be more similar to a safe return of the refugees to Angola.

The third and final protection for the residual caseload that the thesis looked at was the principle that the return of the refugees should take place in safety and in dignity. By looking at the legal basis of the principle, it was deduced that the principle actually consisted of two components, safety and dignity, and that only the first of them appeared to be properly anchored in the international and regional refugee regime. The second component appeared to be mainly a creation of the UNHCR Handbook of Voluntary Repatriation, and was consequently regarded more as a moral and humanitarian requirement than as a legal one.

It was argued that just like the principle of voluntariness, Zambia's legal obligation to observe the principle of return in safety stems from article V of the 1969 OAU Convention. However, the conclusion drawn was that the principle of return in safety as implemented in the Tripartite Agreement only provides limited protection for the residual caseload. With regard to the legal safety of the returnees, this aspect is only cursorily addressed in the Preamble of the Tripartite Agreement, which refers to Amnesty Laws in force in Angola, while none of the operative articles makes any reference to the issue. As far as the other aspects of the return in safety and dignity are concerned, the Tripartite Agreement only addresses these issues in broad terms by stating that the authorities shall undertake all necessary initiatives to create conditions for the return of the refugees in safety.

It was further concluded that in practice, the latter two aspects of the refugees' return in safety stood the risk of being compromised by the authorities' eagerness to see as many refugees as possible return in time for the Angolan elections, tentatively scheduled for the beginning of 2004. It was inferred that the eagerness to meet this target date could unduly rush the voluntary repatriation operation and that the refugees would be returned back to an unsafe Angola. The most evident risk in this respect is connected to the physical security of the refugees given Angola's abundance of landmines and UXOs, which is likely to take many years to clear. It was discovered that the authorities, rather than making the repatriation conditional upon the removal of landmines and UXOs, are instead emphasising mine-awareness programmes. Such a practice merely shifts the principle of safety's emphasis on objective conditions in the country of origin, back to that of the refugees' subjective understanding of the same, and does not improve the objective conditions in Angola.

Furthermore, it was surmised that the material safety of the returnees stood a risk of being compromised since the pace of the voluntary repatriation seems to be dictated by the moving capability of Zambia rather than by the capability of Angola to effectively cater for and absorb the returnees. This is because at present, the GOA is more concerned with reintegrating IDPs rather than with ensuring access to land for the returnees. Therefore it may prove to be a major problem for the returnees to sustain a living in Angola should they be returned too quickly.

The thesis thus came to the overall conclusion that at the time of the repatriation operation, the protection available for the residual caseload appeared to be fairly inadequate. The voluntary decision of the refugees to repatriate, which is what legitimised promoting their return to unsafe conditions in the first place, is compromised in practice, thereby turning what was supposed to be a voluntary repatriation into a safe return. However, there has been insufficient attention devoted to the actual safety of the refugees' return because the intended key to the refugees' promoted repatriation was supposed to be their voluntary decision to repatriate. Effectively, the Angolan refugees in Zambia fall between two stools and seem to be at risk of being repatriated involuntarily to unsafe conditions in Angola. Thereby the principle of *non-refoulement* ends up being violated after all.

With regard to what will happen to the residual caseload, if or when, Zambia applies the cessation clause relating to change of circumstances in the country of origin, it was firstly concluded that the Control Act does not contain any such cessation clauses. However, the Control Act does contain provisions, which if applied to the Angolan refugee population would result in a *de facto* cessation of refugee status. Secondly it was inferred that, even though the GRZ in previous years has abstained from invoking the cessation clause following repatriation operations in respect of other refugee nationalities, there is a strong possibility that this non-strict application of the cessation clause will change with the Angolan refugee population. This is supported by the fact that to abstain from applying the cessation clause to this potentially great group of refugees may set a precedent for other large refugee nationalities in Zambia e.g. refugees from the DRC to remain in Zambia indefinitely. It was also believed that there is a strong possibility that Zambia will be influenced to invoke the cessation clause by the increased interest in the subject that the UNHCR has displayed in recent years.

It was estimated in the thesis that the timing of the application of the cessation clause could occur sometime around the end of 2005, depending first and foremost on the outcome of the Angolan elections of 2004. The continuation of fighting in the Cabinda Province would probably not prevent its application, since the UNHCR has acknowledged that nothing in the 1951 Convention precludes the partial or targeted application of the cessation clause. Refugees from the Cabinda Province would not be affected

by the cessation clause under this arrangement and could consequently remain in Zambia.

The thesis then tried to ascertain if there were any exceptions to the rules of cessation of refugee status that could be invoked to protect the residual caseload from being returned. The first exception that the thesis looked at was the exception found in article 1C of the 1951 Convention relating to compelling reasons arising out of previous persecution. It was considered that in the application of this exception, the provision would probably be interpreted restrictively by the GRZ, taking into account only the severity of past persecution. Therefore it was concluded that the number of refugees of the residual caseload that would be allowed to stay under this exception would not be so great. This is because the majority of Angolan refugees never suffered atrocious forms of persecution, but left Angola out of a general fear of the conflict.

Instead it was concluded in the thesis that a second exception found in ExCom Conclusion No. 69 (XLIII) on *Cessation of Status*, could prove to be more valuable, since it is intended to cover persons who cannot be expected to leave the country of asylum due to a long stay in that country resulting in strong family, social and economic links there. Although Zambia is not legally obliged to do so, should she choose to apply this exception, quite a large proportion of the residual caseload would be eligible to stay. This is on account of the protracted nature of the refugee situation, and on account of the high level of social and economic interaction between the Angolan refugees and their host communities.

It was discovered that African regional refugee law does not contain any exceptions to the application of the cessation clause and consequently in a literal interpretation of the 1969 OAU Convention, persons subject to article 1.4(e) cessation would unconditionally no longer qualify as refugees. However, it was argued that Angolan refugees with 1969 OAU Convention status could still benefit from the exceptions afforded under the international regime due to the complementary status of this instrument to the 1951 Convention. If Zambia extended the application like this, it would seem to be more in line with the general humanitarian purpose of the instruments, as well as with the principle in Zambia of not differentiating between refugees on the basis of their status.

Unfortunately, it was appreciated that *de lege lata* there were no provisions in Zambian refugee legislation containing similar exceptions. Therefore, an application of the cessation clause to the residual caseload would result in a situation where all the refugees of the residual caseload would be forced to return to Angola even if they fulfilled the criteria for any of the internationally recognized exceptions to the cessation clauses. However, it is most likely that the GRZ will make arrangements through administrative practice to allow Angolan refugees to remain in Zambia following cessation. To do so would seem to be in the interest of the GRZ given the high level of

integration of the refugees in Zambia and their economic contribution to the host country. It was also concluded that it should not be ruled out that at the time of the application of the cessation clause, new and improved refugee legislation could be a reality in Zambia since lobbying is underway for refugee legislation, which includes both cessation clauses and exceptions thereto.

Having thus reached the positive conclusion that a substantial number of Angolan refugees of the residual caseload could be protected from being returned to Angola, it was lastly concluded that at present, Zambian domestic legislation was not very favourable to the legal integration of the residual caseload in Zambia. The most appropriate legal status, which is citizenship through naturalization, is effectively precluded for refugees. The Citizenship of Zambia Act in combination with the Constitution of Zambia requires that applicants for naturalization entered into Zambia under an entry permit, which is often an unfeasible alternative for a person in flight. Furthermore, the Citizenship Act does not accord citizenship to people just because they are born in Zambia, which prevents second and third generation refugees from obtaining citizenship.

In addition, it was concluded that even though the GRZ on occasion has granted humanitarian status to people not fulfilling refugee criteria, this alternative presents a few problems. Firstly, it is not recognized anywhere in domestic legislation, which means that there are no established criteria for its implementation nor its duration. This will leave the residual caseload living in uncertainty. Secondly, humanitarian status is inferior to full citizenship, as it does not grant the residual caseload the same rights and benefits as ordinary Zambians. Whereas an arrangement of this kind can serve its purpose to provide temporary protection to persons not qualifying as refugees in refugee status determination procedures, it does not seem as suitable to adopt in relation to persons who are likely to never be able to leave Zambia.

Therefore, the thesis ultimately concluded that there was a great risk that due to the administrative costs involved in assigning the residual caseload with a new status, they would simply end up continuing to receive refugee assistance and protection in the refugee camps and settlements of Zambia. This would not only be a blatant misuse of resources likely to undermine donor confidence in the future, and an approach which raises human right concerns by severely curtailing the former refugees rights indefinitely. Such an approach would also fail with the ultimate task i.e. to find a durable solution to the refugee problem.

Bibliography

- Aiboni, Sam Amaize *Protection of Refugees in Africa*, Swedish Institute of International Law, 1978.
- Awuku, Emmanuel O. “Refugee Movements in Africa and the OAU Convention on Refugees”, pp. 79-87, *JAL*, Vol. 39 No. 1, 1995.
- Bakewell, Oliver “Refugee Aid and Protection in Rural Africa: Working in Parallel or Cross-Purposes?” pp. 42-73, *RSQ*, Vol. 21 No. 1&2, 2002.
- Bakewell, Oliver “Repatriation and Self-Settled Refugees in Zambia: Bringing Solutions to the Wrong Problems”, pp. 356-373, *JRS*, Vol. 13 No. 4, 2000.
- Bakewell, Oliver *Returning refugees or migrating villagers? Voluntary repatriation programmes in Africa reconsidered*, UNHCR Working Paper, December 1999.
- Bonoan, Rafael *When is International Protection No Longer Necessary? - The “Ceased Circumstances” Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973-1999*, Centre for International Studies, Massachusetts Institute of Technology. Paper prepared for the Global Consultations on International Protection in Lisbon on the 3-4 may 2001.
- Brownlie, Ian *Principles of Public International Law*, Clarendon Press, Oxford (5th edition), 1998.
- Chimni, B.S. *From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems*, UNHCR Working Papers No. 2, May 1999.
- Fitzpatrick & Brotman *Current Issues in Cessation of Protection Under Article 1C of the 1951 Refugee Convention and Article 1.4 of the 1969 OAU Convention*, Carnegie Endowment for International Peace & UNHCR. Paper prepared for the Global

Consultations on International Protection in Lisbon on the 3-4 May 2001.

- Gasarasi, Charles P. "The Mass Naturalization and Further Integration of Rwandese Refugees in Tanzania: Process, Problems and Prospects", pp. 88-109, *JRS*, Vol. 3 No. 2, 1990.
- Goodwin-Gill, Guy "Voluntary Repatriation: Legal and Policy Issues", in *Refugees and international relations*, Loescher, G and Monahan, L (eds.), Clarendon Press, Oxford, 1990.
- Goodwin-Gill, Guy *The Refugee in International Law*, Clarendon Press Oxford, (2nd edition), 1996.
- Hansen, Art "Refugee Dynamics: Angolans in Zambia 1966 to 1972", pp.175-194, *IMR*, Volume 15 No. 1, 1981.
- Hansen, Art *Refugee self-settlement versus settlement on government schemes: the long-term consequences for security, integration and economic development of Angolan refugees (1966-1989) in Zambia*, Discussion paper / United Nations Research Institute for Social Development, 1990.
- Hathaway, James *The Law of Refugee Status*, Butterworths, Toronto, 1991.
- Hathaway, James "The Meaning of Repatriation", pp. 551-558, *IJRL*, Vol. 9 No. 4, 1997.
- Holborn, Louise *Refugees: A Problem of Our Time- The Work of the United Nations High Commissioner for Refugees, 1951-1972*, Radcliffe Institute, Cambridge, 1975.
- Lassailly-Jacob, V. *Revisiting Ukwimi Resettlement Scheme, The Impact of the New Refugee Camp (Petauke District, Zambia), November-December 2001- A fieldwork report*, Centre for African Studies, French National Research Council, Paris, France, May 2002.

- Lawyers Committee for Human Rights *African Exodus: Refugee Crisis, Human Rights and the 1969 Convention*, LCHR Publication, August 1995.
- Okoth-Obbo, George "Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa", pp. 79-138, *RSQ*, Vol. 20, No. 1, 2001.
- Rutinwa, Bonaventure *The End of Asylum? - The changing nature of refugee policies in Africa*, UNHCR Working Papers No. 5, May 1999.
- Scheinin, Martin "International Human Rights in National Law", *An Introduction to the International Protection of Human Rights*, Hanski, Raija and Suksi, Markku (ed.) Institute for Human Rights, Åbo Akademi University, 2000.
- Sztucki, Jerzy "The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme", p. 285-318, *IJRL*, Vol. 1 No. 3, 1989.
- Takahashi, Saul "The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection", pp. 593-612, *IJRL*, Vol. 9, No. 4, 1997.
- Weis, Paul *The Refugee Convention, 1951- The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, 1995.
- Zieck, Marjoleine *UNHCR and Voluntary Repatriation of Refugees- A Legal Analysis*, Martinus Nijhoff Publishers, The Hague, Boston and London, 1997.

UNHCR and UN documents

Background Paper on Refugees and Asylum-seekers from Angola, UNHCR Centre for Documentation and Research, Geneva, April 1999.

Cessation Clauses: Guidelines on their Application, UNHCR/IOM/17/99, UNHCR/FOM/17/99, Geneva, April 1999.

Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime, EC/50/SC/CRP.18, Executive Committee of the High Commissioner's Programme: Standing Committee 18th Meeting, 9 June 2000.

Evaluation of UNHCR's Repatriation Operation to Mozambique, Evaluation Report, 1 February 1996.

Global Appeal 2002: Zambia

Global Appeal 2003: Zambia.

Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), HCR/GIP/03/03, 10 February 2003.

Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, Geneva, 1992.

Handbook Voluntary Repatriation: International Protection, Geneva, 1996.

Mozambique. Repatriation and Reintegration of Mozambican Refugees, April 1993.

Note on the Cessation Clauses, EC/47/SC/CRP.30, Executive Committee of the High Commissioner's Program, Standing Committee, 30 May 1997.

Populations of Concern to the UNHCR: A Statistical Overview (1997), Office of the United Nations High Commissioner for Refugees, 1996.

Protection Guidelines on Voluntary Repatriation (draft), UNHCR, Geneva, September 1993.

Report of the Round Table on Voluntary Repatriation- San Remo, Italy, 16-19 July 1985, EC/SCP/41, International Protection, 1 August 1985.

Report of the UNHCR Working Group on International Protection, 6 July 1992.

Status of Angolans who left their country before 11 November 1975 and are still abroad, June 15 1979.

Summary Conclusions- Cessation of Refugee Status, UNHCR/IOM/08/2002, UNHCR/FOM/08/2002, Global Consultations on International Protection, Lisbon Expert Round Table, May 2001.

The State of the World's Refugees: In Search for Solutions, Oxford University Press, 1995.

The State of The World's Refugees: Fifty Years of Humanitarian Action, Oxford University Press, 2000.

UNHCR and internally displaced persons in Angola- a programme continuation review, UNHCR Evaluation and Policy Analysis Unit & Department of International Protection, May 2002.

2001 UNHCR Population Statistics (Provisional), UNHCR Population Data Unit, Geneva, 7 June 2002.

UNHCR Branch Office Lusaka documents

Mission Report- Workshop on Voluntary Repatriation and visit to Nangweshi, 2-5 September 2002.

Registration Report by Origin and Previous Residence, October 2002.

Republic of Zambia: 2003 Country Operations Plan.

Standard Operating Procedures for Determination of Refugee Status, Eligibility for Urban Residency Status and Resettlement to a Third Country, (draft 1st edition), May 2002.

Zambia Initiative Co-operating Partners' Mission Report- 18 to 28 March 2002.

Zambia 1999 Annual Protection Report.

Zambia 2001 Annual Protection Report.

UN Documents

United Nations General Assembly Resolution 1166(XII) of 26 November 1957.

ECOSOC Resolution 672(XXV) of 30 April 1958.

Report of the 46th Session: UN Document A/AC.96/860 of 23 October 1995.

ExCom Conclusion No. 8 (XXVIII) – 1977, *Determination of Refugee Status. Report of the 28th Session: UN doc. A/AC.96/549, para. 53.6.*

ExCom Conclusion No. 18 (XXXI)- 1980, *Voluntary Repatriation. Report of the 31st Session: UN document A/AC.96/588, para. 48(3).*

ExCom Conclusion No. 40 (XXXVI)- 1985, *Voluntary Repatriation, Report of the 36th Session: UN document A/AC.96/673, para. 115(5).*

ExCom Conclusion No. 69 (XLIII)-1992, *Cessation of Status, Report of the 43rd Session: UN doc. A/AC.96/804, para. 22.*

Legal instruments

Regional and International treaties

Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the OAU on 10 September 1969, 1001 U.N.T.S. 45.

The African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the OAU on the 11th of July 2000 in Lomé, Togo.

Convention relating to the Status of refugees, adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951, 189 U.N.T.S. 137.

Protocol Relating to the Status of Refugees, adopted by the General Assembly resolution 2198 (XXI) of 16 December 1966, 606 U.N.T.S. 267.

International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 999 U.N.T.S. 171.

First Optional Protocol to the International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 999 U.N.T.S. 302.

International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 993 U.N.T.S. 3.

Vienna Convention on the Law of Treaties, signed at Vienna on 22 May 1969, 1155 U.N.T.S, 331.

Convention on the Elimination of Discrimination Against Women, adopted by General Assembly resolution 34/180 of 18 December 1979, 1249 U.N.T.S. 13.

Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989, 1577 U.N.T.S. 3.

Zambian legislation

The Constitution of Zambia, Chapter 1 of the Laws of Zambia.

The 1970 Refugees (Control) Act, Chapter 112 of the Laws of Zambia.

The Immigration and Deportation Act, Chapter 122 of the Laws of Zambia.

The Citizenship of Zambia Act, Chapter 124 of the Laws of Zambia.

Statutory Instrument, No. 240 of 1971, the Refugees (Control) (Declaration of Refugees) Order.

Statutory Instrument No. 132 of 1971, the Refugees (Control) (Declaration of Reception Areas) Order.

Statutory Instrument No. 133 of 1971, the Refugees (Control) (Declaration of Reception Areas) Order.

Statutory Instrument No. 86 of 1987, the Refugees (Control) (Declaration of Reception Areas) Order.

The (Draft) Refugees Bill, 2002, N.A.B. 10, 30th August 2002.

Instruments related to the Peace Process in Angola

The Lusaka Protocol, signed in Lusaka, Zambia on the 15th of November 1994.

Cease Fire Agreement Between the Government of Angola and UNITA, Memorandum of Understanding signed in Luanda, Angola on the 4th of April 2002.

Agreement on the Establishment of a Tripartite Commission for the Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of Zambia and the United Nations High Commissioner for Refugees, signed on 28 November 2002 in Luanda, Angola.

Other documents

Internet documents

Amnesty International, *Annual Report 2002- Zambia*. Available at <http://web.amnesty.org/web/ar2002.nsf/afr/zambia!Open>, (accessed on 6 May 2003).

CIA, *The World Fact Book 2002- Zambia*, available at <http://www.cia.gov/cia/publications/factbook/geos/za.html>, (accessed on 5 May 2003).

Human Rights Watch, *World Report 1999: Angola*. Available at <http://www.hrw.org/worldreport99/africa/angola.html>, (accessed on 6 May 2003).

Human Rights Watch, *Report 1999: Angola Unravels: The rise and fall of the Lusaka Peace Process*. Available at <http://www.hrw.org/reports/1999/angola/>, (accessed on 6 May 2003).

Human Rights Watch, *Human Rights Developments- Angola, 2002*. Available at <http://www.hrw.org/wr2k3/africa1.html>, (accessed on 6 May 2003).

Human Rights Watch, *World Report 2001-Zambia*. Available at <http://www.hrw.org/wr2k1/africa/zambia.html>, (accessed on 6 May 2003).

Landmine Monitor, *Report 2002- Angola*. Available at <http://www.icbl.org/lm/>, (accessed on 5 May 2003).

World Bank, *Angola at a glance*, 14 September 2002. Available at http://www.worldbank.org/data/countrydata/aag/ago_aag.pdf, (accessed on 6 May 2003).

World Bank, *World Bank Group: Zambia- Country Brief*, August 2001. Available at <http://www.worldbank.org/afr/zm2.htm>, (accessed on 6 May 2003).

UNAIDS, *Epidemiological Fact Sheet on HIV/AIDS and Sexually Transmitted Infections*, 2002 Update, United Nations Programme on HIV/AIDS (UNAIDS). Available at <http://www.unaids.org/>, (accessed on 29 April 2003).

UNDP, *Human Development Report 2001*, available at <http://www.undp.org/hdr2001/>, (accessed on 6 May 2003).

Newspaper articles and press clips

Beaumont, Peter, "UNITA to die with Savimbi", *The Guardian Unlimited Observer*, Sunday, February 24, 2002.

Times of Zambia, *Automatic Citizenship for Angolan refugees coming*, Saturday September 28, 2002, p.1.

Times of Zambia, *Zambian citizenship for Angolan refugees- What Sakeni said*, Monday, September 30, p.2.

UNHCR World News, *Angola: UNHCR addresses returnee concerns of landmines and hunger*, Africa News Service, 15th of March 2003.

UNHCR Briefing Notes, *Angolan refugees: willing to return*, 28 February 2003.

Miscellaneous

Interview with the Commissioner for Refugees, Mr. Jacob Mphepo at his office in Lusaka on the 23rd of November 2002.

Interview with the UNHCR Representative for Zambia Mr. Ahmed Gubartalla, and the Zambian Minister of Commerce, Trade and Industry Mr. Deepak Patel, March and April 2003.

Table of Cases

Re Chirwa (Edward Yapwantha), 1974) ZLR p. 14