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1. INTRODUCTION

“...flight is more than ever before, the product of vicious internal conflict. Nationalistic, ethnic or communal tensions have become the predominant factors in refugee movements around the world... In a world where persecution, massive human rights violations and armed conflicts remain a daily reality, the need to protect refugees is greater than ever before. But the current scale and nature of the refugee problem and limits to absorption capacity of asylum countries means that traditional methods of protection are no longer sufficient.”¹

In recognition of the fact that assistance to refugees has social and economic implications, this should not be considered the burden of the United Nations (UN) and governments alone. Although governments should bear the main responsibility, it requires the contribution of non-governmental organisations (NGOs) and individuals as well.

¹ UNHCR Report, *The State of the World's Refugees*, Penguin Books, London 1993. P23

2. POLICY CONTEXT

The Constitution of Botswana, by entrenching a Bill of Rights, is an instrument which may be relied upon to protect refugees. The Bill states the fundamental rights and freedoms of the individual, and the right to life, liberty, security and the protection of the law, although it makes no specific reference to refugees.²

Government policy towards refugees and asylum-seekers is closely guided by the Botswana Refugee (Recognition and Control) Act CAP 25:01 of 1967. This Act, however, makes reference to Section 14(2) of the Immigration Act which states that a person may be detained in the nearest convenient prison for such a period as may be necessary 'pending removal'.³ As this part is referred to in the Refugee (Recognition and Control) Act, the Immigration Act effectively provides for the detention of asylum-seekers in prison while their applications for asylum are determined. Section 6(b) of the Refugee Act, for example, states that:

“...pending such determination he [the refugee asylum seeker] may be detained by an immigration officer for a period not exceeding twenty-eight days”⁴

The Refugee Act, however, does not make a distinction between asylum-seekers and immigrants. It defines a 'recognized refugee' as an 'immigrant whom the Minister has declared in terms of section 8(1) that he recognizes as a political refugee',⁵ while an 'immigrant' means, 'any person in Botswana other than a citizen of Botswana'.⁶ The Refugee Act limits the period of detention to twenty-eight days but the Immigration Act does not lay down an explicit time limit except that it must be for 'such period as may be necessary for the completion of arrangements therefore'.⁷

It is important to know that while the Refugee Act is inadequate it does refer to the United Nations Convention of 1951 relating to refugee status. This Convention has guided countries in formulating a definition of a refugee. According to the Convention a refugee is defined as any person who as a result of events occurring before 1st January 1951, and owing to a well-founded fear of being persecuted, is unable to get protection from his or her home country or country of habitual residence.⁸

It is apposite to observe that the UN Convention of 1951 introduces the issue of a dateline. Thus for a person to be considered a refugee, it should have been on account of events occurring before 1st January 1951. This means that

2 Constitution of Botswana, Chapter II:3.

3 Botswana Immigration Act of 1968, CAP 25:02, Section 14(2).

4 Botswana Refugee (Recognition and Control) Act of 1967, CAP 25:01, Section 6(b).

5 Ibid, Section 2 (1).

6 Ibid, Section 2 (1).

7 Botswana Immigration Act of 1968, Cap 25:02, Section 14 (1).

8 UNHCR *Collection of International Instruments Concerning refugees*. P11

people who left their countries because of events occurring after this date, and who would ordinarily be considered refugees, did not qualify for refugee status. It was in recognition of this that the UN Convention of 1951 was amended by the 1967 Protocol to remove the dateline.

The Organisation of African Unity (OAU) Convention of 1969 governing specific aspects of the refugee problems in Africa, while maintaining the UN Convention of 1951 definition, also includes those 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.”⁹

This means that for one to be considered a refugee and be accorded refugee status, within the African context, he or she may not need to prove a well-founded fear of persecution. It is sufficient if such a person can show that there are events which seriously disturb public order in his or her country of origin or habitual residence.

According to international refugee practice, persons fleeing persecution from their country of origin or habitual residence should seek asylum in the first country which they enter. This is upheld as the principle of ‘country of first asylum’ and has guided policies of the Government of Botswana towards asylum-seekers from far afield. It is against this background and the growing concern amongst non-governmental organisations in Botswana over the detention of asylum-seekers in Botswana for longer than the stipulated twenty-eight day period that this study was commissioned.

⁹ Ibid. P194.

3. AIMS AND OBJECTIVES

The aim of this study is to assess the extent to which Botswana upholds the protection of asylum-seekers and refugees within the statutes previously mentioned. To achieve this the study requires in-depth knowledge of the experiences of the above groups as well as information from relevant government officials.

The objectives of the study are to:

1. **Ascertain whether the Botswana Refugee (Recognition and Control) Act is a complete and comprehensive legal instrument to guide Government policy.**

For the purpose of this study complete means the capacity to address refugee issues without having to refer to other legislation. An example of such reference is the fact that the Refugee (Recognition and Control) Act is silent on certain aspects such as the legal status of members of a household in the event of the death of the head of the household where he/she was the only one formally recognized. Equally important is whether members of a household in similar circumstances have the option to stay where the head of that household chooses to be repatriated. The Act must be comprehensive enough to address these issues.

2. **Identify any problem** areas associated with government policy towards refugees and asylum-seekers. This entails an examination of policy implementation to evaluate the following:
 - a) Which kinds of problems arise from detaining asylum-seekers in prison and related institutions, and what are the implications of such problems?
 - b) Are asylum-seekers so detained actually kept for no more than the stipulated twenty-eight days provided for in the Refugee Act?
3. **Establish whether Botswana's Refugee Law is consistent with international refugee law**, in particular the UN Convention of 1951 relating to the Status of Refugees. In view of the comparative nature of the study, and given an established legal principle that where municipal law is at variance with international law it is a country's responsibility to ensure that the former conforms to the latter, it is important that we identify articles in the UN Convention of 1951 in respect of which Botswana has made reservations.

4. **Provide relevant government agencies with data and information** in order to assist them in developing and forming appropriate strategies and policies aimed at improving the protection of refugees and asylum-seekers. Such strategies may include the establishment of transit centres and changes in the structure and guidelines of the refugee determination procedure.
5. **Sensitise both the civil service and the general public** about the problems experienced by refugees and asylum-seekers.

4. METHODOLOGY

The study proceeded by administering formal questionnaires to refugees, asylum-seekers and officials (see appendix B). The sample of officials was drawn from relevant government departments as well as non-governmental organisations which are involved, or have been involved, in refugee matters. These Ministries and departments were The Office of the President, Immigration and Citizenship, Prisons and Rehabilitation, United Nations High Commission for Refugees (UNHCR), The Botswana Christian Council (BCC), Kagisong Centre and The Botswana Red Cross. The sample of refugees was drawn from those who came from countries in the Southern African region as well as those from further afield.

The method of administering questionnaires and a structured interview setting was used to ensure consistency in the process of collecting information. Most importantly, the study aimed for in-depth knowledge and understanding of the experiences of refugees and asylum-seekers in Botswana.

For the purpose of this study the definition *asylum-seekers* includes those who had been documented as applicants for asylum, whether they were waiting for the final results from government or waiting to appear before the Refugee Advisory Committee. Those who had been considered as falling within the UNHCR refugee mandate, as well as rejected applicants, were also classified in this category. It may be argued that mandate refugees should not be classified as asylum-seekers. However, they have very limited rights under the UN Convention of 1951, and were therefore classified as such.

The research covered seven areas in the country. Maun, Kasane, Francistown, Selebi-Phikwe, Mahalapye and Gaborone were chosen because they were either frequent points of entry or places of detention, while Dukwi was chosen because it is the only official refugee camp/settlement in Botswana.

There is no single department which has comprehensive data on the refugees and asylum-seekers in the country. A list which was made available for this study by the administration of Dukwi Refugee Camp showed that there were two hundred and five (205) residents at the end of April 1994, although this number is likely to fluctuate as the refugee population in Botswana is unstable.

It was very difficult to establish the number of asylum applicants because the police who were conducting the investigations were not willing to make this information available to the study. Those asylum-seekers who were interviewed were chosen at random but an effort was made to include all the different nationalities of asylum-seekers in the sample.

It must be noted that the expressions *camp* and *settlement* are used interchangeably. This is because of the prevailing argument about whether Dukwi is a camp or a settlement. The study assumes the position that Dukwi is a refugee camp and less of a settlement. The details of this assertion will be discussed later in the section on the research findings.

A number of methodological limitations were encountered in undertaking this study. To conduct research in Botswana, one is expected to have a research permit issued by The Office of the President in accordance with the Anthropological Research Act. This despite the fact that the research may not be anthropological in nature. The permit is not considered sufficient to authorize civil servants to be interviewed without the consent (usually in writing) of the Permanent Secretary of their Ministries. Having identified government departments representing three different Ministries, it required the consent of three Permanent Secretaries in addition to the research permit to proceed with the study.

In fact, the Permanent Secretary responsible in The Office of the President does not consider his office competent to authorize the interviewing of police officers. To achieve this, the researchers required the consent of the Commissioner of Police. The study was denied access to interview members of the Special Branch (SB) which has been the department within the police force specifically handling refugee matters. The police insisted that all their information had been passed over to The Office of the President, which is their public relations office. However, since the study was not concerned with information which may have changed hands between the two offices, this was not considered satisfactory.

The study maintained the importance of interviewing members of the police force, particularly the Special Branch. In an attempt to resolve the issue, a meeting was held at the police headquarters on the 15th June 1994 between DITSHWANELO and a senior police official, who argued that:

“...because of the security nature of our job we would not normally share or discuss the information with any person outside the police force.”¹⁰

The reluctance by some groups within the police to be interviewed meant that the initial field work conducted, did not benefit from their experience.

After further negotiations with The Office of the President and the police, clearance was granted though it did not meet the standards of scientific research because it was restricted to interview ‘administrative officers’ who

¹⁰ Interview with a senior police official in Gaborone, 15/06/94.

had been identified in advance rather than a random sample as was the case with other government departments. The study notes that the limited access renders the information given as unreliable because it fails to provide a cross-sectional view of the department.

5. BACKGROUND INFORMATION

Ninety-three point six percent (93.6%) of the asylum-seekers included in the study were from Southern Africa. The majority of both the refugees and the asylum-seekers were from Angola.¹¹ Amongst the asylum-seekers at least forty-two percent (42%) did not belong to any political movement or party in their countries of origin. While this is not a majority, it is significant to point out that victims of conflict include the civilian population which may not be involved in the conflict. Nineteen percent (19%) of the asylum-seekers were below twenty-one years, and these should be treated as unaccompanied minors. Twenty-five point five percent (25.5%) of the refugees included in the study were women. Only six percent (6%) (three in total number) of the asylum-seekers interviewed were women and two of these had been in prison. Reasons for flight included escaping the terrors of civil war, political unrest, widespread violence and armed liberation. The most frequently used points of entry by asylum-seekers are in the Kasane/Kazungula area, with sixty-five point two percent (65.2%), compared to other points of entry.¹²

The refugee population in Botswana has decreased in recent years. The total refugee population in Botswana in 1987 was five thousand five hundred and fifty nine (5559), with about eighty-two percent (82%) of these living in Dukwi.¹³ According to government figures there were about seven hundred (700) refugees by 1993.¹⁴ About two hundred (200) were resident in the Dukwi Camp while the rest were either self-sufficient refugees who were allowed to live in any part of the country, or students who were in various educational institutions in the country.

Historically, Botswana has played host to refugees from its neighbouring countries, particularly Zimbabwe and Namibia, before they gained independence in 1980 and 1990 respectively, as well as South Africa, Lesotho and Angola before general elections were held. As part of an historical overview, this section will mainly examine the case of South African and Zimbabwean refugees. The argument for focusing on these two groups is that by challenging existing practices, they compelled the government of Botswana to reconsider a new and realistic approach to administering refugee matters. However, since the study included other nationalities a brief account of refugees from Angola and Namibia will also be given.

South African Refugees

11 See Table 1 and 2 (Appendix A).

12 See Table 3.

13 Zetterqvist, J. *Refugees in Botswana in the Light of International Law*, Motala Grafiska, Motala 1990. P26.

14 Botswana Daily News No. 154, 18th August 1993.

Despite the democratic changes currently taking place in South Africa there are still South African refugees in Botswana and they will remain until they choose to repatriate. South African refugees entered Botswana as early as the institution of apartheid was conceived, Legislation such as the Native Land Act of 1913 which denied Blacks the right to acquire land, was a clear manifestation of racial discrimination. Protests and demonstrations against the system led to violence. The Sharpeville massacre of 1960 was one major incident which drew the attention of the world to the horrors of apartheid. The subsequent decision by the state not only to end demonstrations but to stifle political activity by banning liberation movements was met with strong resistance. In 1976 another disaster struck - the Soweto uprising, where over five hundred (500) school children were shot dead by security officers while protesting the use of Afrikaans as a medium of instruction in schools. The banning of liberation movements forced their members to flee South Africa. Botswana, like other countries in the region, became host to South African refugees fleeing persecution. Since there was no refugee camp until 1977, they were allowed to find their own accommodation.

Some of the political parties rented houses which they used for their members as guest houses or transit centres before they transferred to other countries. This trend was brought to an end after the political changes in South Africa, which began in 1990.

When the study asked refugees 'Where did you stay before you were recognised as refugees?', at least fifty percent (50%) indicated that they had stayed with a host family. It must be noted that what is referred to as host families in the case of South Africans were really guesthouses, which their political parties were renting. The expression 'host family' is more appropriately used in the case of Angolan refugees who appear to have stayed with local host families.

The policy to allow refugees to find their own accommodation was challenged in 1985 when South African commandos invaded Botswana and killed South African refugees whom the South African government argued were 'terrorists' responsible for the 'armed struggle' attacks in South Africa. These incursions and acts of sabotage carried out by the white minority apartheid government posed a security risk and a decision was made that the police should take over the responsibility of refugee status determination. As a result of these developments the Botswana Government decided to keep refugees in the Dukwi Refugee Camp which is approximately one hundred and thirty (130) kilometres North-west of Francistown and far from the South African border.

Even in the face of mounting foreign aggression the Botswana Government maintained its firm commitment to offer humanitarian assistance to people in need. The difficulties in addressing the South African refugee situation was

that South Africa was neither a member of the UN or the OAU. It was therefore not bound to any institutional agreement. An example of this was the agreement by OAU members that 'the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member state'.¹⁵ This was not applicable to South Africa. These incursions demonstrate the danger to which a country with an inferior military defence is exposed when being close to a belligerent power. Following the democratic changes which occurred in South Africa in the 1990's, most refugees have returned home voluntarily.

Zimbabwean Refugees

The Zimbabwean refugees fled into Botswana during the liberation war for independence in 1977 and 1978. As the struggle intensified, there was a mass influx into Botswana and according to Zetterqvist, there were approximately thirty thousand (30 000) Zimbabwean Refugees in Botswana by 1979.¹⁶ The Zimbabwean influx was important because it challenged Botswana's Refugee (Recognition and Control) Act, which used individual case-by-case refugee determination. The influx meant that the Refugee Advisory Committees, established under the aforesaid Act, could not, for practical purposes, be used because of the great numbers involved. For this reason the committees were suspended in the early 1980's. Many refugees were accepted on prima facie evidence of being part of the large group claiming asylum. The two transit centres which were established in Selebi-Phikwe and Francistown, could not support such a huge population, hence the establishment of Dukwi Refugee Camp.

Following Zimbabwean independence in 1980, many refugees repatriated and the few who remained, applied for Botswana citizenship. In 1989 the cessation clause was applied to all Zimbabwean refugees in Botswana. This was provided for in Article 1(C)(5) of the UN Convention of 1951 relating to the status of refugees. It states that it shall not be applicable to any person who:

“...can no longer because 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.”¹⁷

It is, however, necessary that the former Zimbabwean refugees, some of whom have been allowed to live in Dukwi Refugee Camp on humanitarian grounds, normalise their residence in Botswana. The official sources indicate that a

15 OAU Convention of 1969, Article II(2). UNHCR *Collection of International Instruments Concerning Refugees*, P195.

16 Zetterqvist, J. P22.

17 UN Convention of 1951, Article I (c) (5). UNHCR *Collection of International Instruments for Refugees*. P12.

Presidential Directive was issued in 1980 to grant former Zimbabwean refugees citizenship. Fourteen years later, however, Botswana citizenship has still not been offered to the applicants. Despite the fact that they are no longer recognised as refugees, their movement is nevertheless restricted. If they are to leave the camp, it is required that they, like refugees, obtain a permit which allows them to visit the designated place(s) for a given period.

The integration of refugees into the community by the host country is one of the durable solutions to refugee problems. The Presidential Directive refrained from referring to section 12(l)(c) of the Botswana Citizenship Act, which requires a minimum of ten years normal residence, thus the directive effectively allowed the Ministry of Labour and Home Affairs to process the applications. As far as the Office of the President is concerned it does not know why there has been a delay in granting citizenship. In an interview with a senior official in the Office of the President this study was informed that 'it is not clear what administrative procedures could have delayed the issuing of citizenship'¹⁸ since it was for the Ministry to implement the directive.

Some of the Zimbabwean applicants have lived under very difficult conditions. This group, government argues, had been repatriated but returned later to seek citizenship. The result of the present study does not support the view of the government. In an interview with those concerned, the study found that they had either applied for Botswana citizenship after Zimbabwe attained Independence in 1980 or after the application of the cessation clause in 1989. It is because of the timing of their applications that their applications were not submitted with the assistance of The Office of the President, according to a senior administrator of the Dukwi Refugee Camp.¹⁹ On the basis of the comparison of the two groups, this would suggest a positive policy towards those who had applied for citizenship before Zimbabwe attained independence and not after.

Angolan Refugees

Angola attained independence from Portugal in 1975 but even before then refugees from this country were already in Botswana. Their flight into Botswana was to escape oppressive Portuguese colonial rule. However, after independence, civil war began between the Patriotic Movement for the Liberation of Angola (MPLA) government, the opposition Union for the Total Independence of Angola (UNITA) and the Front for the National Liberation of Angola (FNLA). The general elections held under the supervision of the United Nations in 1992 failed to bring lasting peace to the country because UNITA rejected the results. The conflict in Angola continues and refugees are still

18 Interview with a senior Government official in The Office of the President, 05/05/1994.

19 Interview with a senior official of the Administration of the Dukwi Refugee Camp, 05/05/1994.

coming to Botswana.

Namibian Refugees

Namibia was under German occupation from 1884 until the defeat of Germany in the First World War when the colony was placed under the League of Nations at the conference which led to the Versailles Treaty in 1919. Namibia was placed under the administration of South Africa, but because of its racist policies the liberation struggle ensued, forcing many people to flee. However the democratic elections held in 1990 restored peace to the country and many refugees have since been repatriated.

6. REFUGEE DETERMINATION PROCEDURE

The definition of a *refugee* is set out in the UN Convention of 1951 relating to the Status of Refugees as well as the OAU Convention of 1969 governing the Specific Aspects of Refugee Problems in Africa. However, these texts do not state the actual determination procedure. States, however, must have an established refugee determination procedure, as this will enable them to meet their obligations of assisting refugees. It is left to the discretion of the individual state to determine this procedure. The determination of refugee status is an important and critical process in refugee protection. Its importance stems from the fact that persons in need should have access to international protection, but at the same time it should ensure that undeserving cases do not abuse the protection offered to refugees. In Botswana the procedure is contained in the Refugee (Recognition and Control) Act CAP 25:01 from 1967. The Act establishes a Refugee Advisory Committee. The Committee '...shall consist of a chairman and not less than two, nor more than four, other members'.²⁰

The function of the Committee, as the name indicates, is to assess the credibility of an asylum claim and advise the Minister responsible for the final decision. The procedure required by the Refugee (Recognition and Control) Act is that asylum-seekers should present themselves to an Immigration Officer. In practice this could be the police, the District Commissioner or a tribal chief, who, in turn, would refer the matter to the relevant authority. The authority, which carries out the preliminary investigations, has been the Special Branch, a department in the police force. On the basis of the information from the investigations, the Refugee Advisory Committee determines whether it requires the presence of the applicant when assessing a claim.²¹ It may also 'summon before it any person who may be able to give information which will assist the committee, or call upon him to submit such information in writing'.²² It is ultimately the Refugee Advisory Committee which 'will make recommendations to the Minister whether or not to recognise an asylum-seeker as a refugee'.²³ The Act does not provide for appeal in the event of an applicant for asylum being rejected. However, if the Minister is of the opinion that there is insufficient reason for rejecting an applicant, he or she may 'direct the Committee to re-open the inquiry or to make further report on the matter'.²⁴ According to the study only five out of fifty asylum-seekers claim to have been made aware of the aspects of the refugee determination procedure.

Before the official interview by the Refugee Advisory Committee the asylum-

20 Botswana Refugee (Recognition and Control) Act, Section 3(1).

21 Ibid, Section 5(1)(a).

22 Ibid, Section 5(1)(b).

23 Ibid, Section 4(3).

24 Ibid, Section 8(1)(b).

seekers are interviewed by officials of other departments and institutions, such as the Police, Immigration, Prisons, Botswana Council for Refugees (BCR) and the Dukwi Refugee Camp administration. It is difficult to know what impact these interviews may have had on the applicant's performance at the final interview. Applicants are allowed to speak in their own language and official translators are provided.

A poor translator, however, may destroy, or at least greatly hamper, an asylum-seeker's chances of being accepted. Although most, fifty-eight point eight percent (58.8%), of the non-English speaking asylum-seekers were provided with translators, two asylum-seekers from Rwanda and Zaire claimed they had not had any translators, despite the fact that they barely understood English.²⁵ A Burundian asylum-seeker claimed she had 'only used signs' during the interview.

The basis for deciding whether the asylum-seeker is to be recognized as a refugee, and whether the refugee should be granted asylum, are the findings produced after the government investigation. The outcome of these decisions depends heavily on how the country where asylum is sought defines and understands the concept *refugee*. Botswana is legally bound by both the UN Convention of 1951 and the 1967 Protocol relating to the Status of Refugees. Article 1 of the 1967 Protocol defines a refugee as any person who:

“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unwilling to return to it.”²⁶

The key phrase of the definition and the individual basis on which the asylum-seeker qualifies for refugee status is '...owing to well-founded fear of being persecuted...' *Fear* is generally considered to have a subjective character, and so refers to the feelings of the individual refugee. In this way the determination of refugee status will require consideration of the asylum-seeker's statements and personal experiences as an individual. The phrase *well-founded* is of an objective character. This means that the experiences and the state of mind of the asylum-seeker must be supported by an objective view of the situation. Due to the importance given to both the subjective and the objective element it becomes necessary to take the personal background of the asylum-seeker into consideration, and to view this, not in the abstract, but in the context of the

25 Interviews with asylum-seekers from Zaire and Rwanda.

26 UNHCR *Collection of International Instruments Concerning Refugees*, p11.

relevant background situation. The concept *persecution* was not defined in the UN Convention of 1951. It can, however, be seen in terms of the denial of basic human rights. A threat to life or freedom due to race, religion, nationality, political opinion or membership of a particular social group is always persecution. In summary, a person must show well-founded fear of persecution for one or more of the above reasons in order to be considered a refugee according to the UN Convention of 1951 and the 1967 Protocol.²⁷

It is important to understand the procedure for assessing the protection of asylum-seekers against the background of the situation of a country at a given time. Since 1982 the procedure provided for in the Refugee (Recognition and Control) Act has been temporarily suspended and replaced with a different one.²⁸ Due to the political destabilisation of not only Botswana, but also the whole of Southern Africa, by the apartheid government in South Africa in the 1980's the Refugee Advisory Committees were replaced by the Special Branch of the police. The South African government attacked certain places and individuals since they were considered centres or activists of South African liberation movements. These were clandestine acts of sabotage against a non-aggressor state. One such act, for example, was the (1986) June 14th raid on Gaborone involving ten targets which left twelve people dead, including three children. This showed a need for a careful security check on asylum-seekers. The purpose of this was to prevent anyone who was in Botswana for subversive reasons (e.g. to plant bombs or to kidnap refugees), from entering the country.²⁹

While the study does not claim that perpetrators of violence sought asylum in Botswana, the fact remains that among the victims murdered, there were people who had been granted asylum in Botswana. This placed the matter of refugees under the mandate of the Special Branch of the police. It is not so much for this study to debate the advantages and disadvantages of placing refugee matters under the police, but it is necessary and sufficient to recognise why refugee determination became a police matter. It is, however, the responsibility of the study to critically appraise the problems which were encountered as a result of that decision.

Another reason for the suspension of the Refugee Advisory Committees was that they were unable to deal effectively with the large influx of refugees from Zimbabwe from February 1977 to December 1979. This influx introduced an important conceptual framework missing in the Refugee (Recognition and Control) Act. The Act does not consider the possibility of a mass influx of asylum-seekers as envisaged by the OAU Convention of 1969.³⁰ Thus it was

27 Zetterqvist, J. P42f. UNHCR *A Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, Geneva 1988. P11f.

28 Zetterqvist, J. p50.

29 Ibid. P50.

30 UNHCR *Collection of International Instruments Concerning Refugees*.

neither practical nor feasible to follow the procedure as laid down in the Act, hence the adoption of an alternative action. This alternative procedure was used until 1992 even though there was no influx of asylum-seekers or threat posed by asylum-seekers.

The handling of asylum applications by the Special Branch made the whole question of asylum classified police information, making it difficult for civil authorities, for example NGOs, to know in detail how the procedure was conducted. In this way the police effectively negated the powers of the Refugee Advisory Committee by using procedures which were not transparent. It is also not clear which laws regulate the *modus operandi* of the Police in these matters.

This study argues that while the police force, as a professional body, is competent to establish whether or not an asylum-seeker is a security risk, it is however ill-equipped to go beyond that and make recommendations whether or not to accept his or her application for asylum. This is not only a politicisation of the police force, but it is also an area outside its competence and mandate. In an interview with a member of the Special Branch in Kasane/Kazungula, to find out the criteria they used to recommend somebody for asylum, he stated that 'some people only hear the sound of gun fire and then flee to seek asylum'.³¹ Such statements may reflect a lack of awareness of the OAU Convention of 1969, under which the applicant may be considered simply by demonstrating that such 'gun-fire', constituted '...events seriously disturbing public order...'.³²

In pursuance of its mandate under Chapter II 8 of the statutes, the UNHCR may also accept applicants whom it considers as persons falling within its competence to protect.³³ This does not mean that there are two parallel refugee determination procedures in Botswana. Those asylum-seekers who are accepted only by the UNHCR become so called *mandate* refugees, and are allowed to remain in the country only until they can be resettled. The question of resettlement is, however, not under the control of the UNHCR, but rather up to the country of possible resettlement.

P193.

31 Interview with a member of the Special Branch, Kasane-Kazungula, 29/04/1994.

32 OAU Convention 1969, Article I(2). *UNHCR Collection of International Instruments Concerning Refugees*. p194.

33 *Ibid.* p7.

7. THE DETENTION OF ASYLUM-SEEKERS

The Refugee (Recognition and Control) Act of 1967 Section 6(b) provides for the detention of asylum-seekers in prison, but makes it abundantly clear that it shall not be for a period exceeding twenty-eight (28) days.³⁴ The research shows that fifty-one point one percent (51.1%) of the officials interviewed were opposed to the use of prisons;³⁵ yet thirty-nine percent (39%) considered prison to be the most appropriate place to keep asylum-seekers.³⁶ The officials' arguments for the use of prison are mainly that there are no reception or transit centres in the country, and therefore no alternatives. A representative from The Botswana Council for Refugees (BCR) said the use of prisons was necessary, '...because there are no reception centres...Provided that they [the asylum-seekers] are not treated like prisoners'.³⁷ An official of the Special Branch stated that 'Security wise this is appropriate. Spies may otherwise accomplish their mission...'.³⁸ Consequently prisons are used for safe custody - safety for both the individual applicant for asylum as well as for the public. As mentioned earlier, the use of prisons must be understood against the concrete background of South Africa's acts of incursion and sabotage in the 1980's. Thus according to a senior government official in The Office of the President, 'the safest place for a high-profile asylum-seeker is maximum security prison'.³⁹

Conditions in prison are, however, not ideal and the general prison code of conduct and discipline as described in Part I 3(a) and Part III 3(d) of the Prison Regulations are not suited for people who need refuge. From the study it is clear that both officials and asylum-seekers regard the conditions in prison to be poor due to over-crowding. From Table 1 it is also clear that nearly all prisons in the research sample were seriously over crowded beyond official prison capacity, even without the added burden of asylum-seekers.⁴⁰

Even though asylum-seekers are only supposed to be detained for a limited period of twenty-eight (28) days, approximately seventy percent (70%) were kept for longer. Thirty-six point eight percent (36.8%) were detained for a period of between six (6) and twelve (12) months.⁴¹ One Ugandan asylum-seeker had been in prison for six months, and had not even appeared before the Refugee Advisory Committee. In another case an asylum-seeker had been

34 Botswana Refugee (Recognition and Control) Act, Section 6(b).

35 See Table 4.

36 See Table 5.

37 Interview with the Director of Administration of Botswana Council for Refugees (BCR).

38 Interview with official of Special Branch.

39 Interview with official in The Office of the President, 06/07/1994.

40 See Table 6.

41 See Table 7.

elected a "cell leader", after he had been in prison for a period of ten (10) months. While in prison the asylum-seekers were not confined in separate accommodation, but confined were with convicted prisoners. Two claimed to have been attacked by fellow inmates who attempted to abuse them sexually. The existence and practice of homosexuality between prisoners is also admitted to by many of the prison officials interviewed. Their concern about HIV/AIDS is evident, while they at the same time oppose the issuing of condoms as this would 'encourage the practice and give a sign of official acceptance'.⁴²

In one prison, an asylum-seeker swallowed pieces of broken glass in order to be transferred to Gaborone prison where UNHCR could listen to his case. The case of swallowing pieces of broken glass was confirmed by prison officers who were interviewed. In the same prison, eleven asylum-seekers had been imprisoned without warrants of detention for twelve (12) days, from 23rd May to 3rd June 1994. The longest serving detainee was a twenty-four year old male from Burundi who was in prison for twenty-five (25) days, from 10th May to 3rd June 1994, without a warrant of detention. The failure to maintain warrants of detention suggests negligence on the part of the authorities, and creates the impression that asylum-seekers are forgotten about after they are detained in prison. One Burundian asylum-seeker claimed it was like serving a life sentence since he did not know when he would be released from prison; 'I am serving a life sentence because I do not know when I will be leaving prison...it is like you are already dead.'⁴³

On a guided tour of one of the prisons, one cell was found to have its windows shattered. The explanation given by the officers was that this occurred during a quarrel between asylum-seekers and illegal immigrants all of whom were Zimbabweans. Confusion broke out when the cell-leader, himself an asylum-seeker, intervened but was challenged by the illegal-immigrants who questioned his impartiality. While prison officers were said to have acted swiftly to restore order, an undisclosed number of people were seriously injured and taken to the clinic for treatment. This incident illustrates the risk asylum-seekers may be at while in prison - something they should not have to face. During an interview with a refugee from Rwanda who recounted his experiences in prison he stated, 'The food was bad.. In prison we were not treated like Batswana were... we could not speak, they called us *makwerekwere*...' ⁴⁴ We were ordered to make two lines... Batswana had to get food first. When I was sick I was handcuffed on the way to the clinic... While we were in prison, officers wearing motorbike helmets attempted to beat us for

42 Interviews with prison officials.

43 Interview with Burundian asylum-seeker.

44 'People from the North'. This is a term used to refer to people from the north of Botswana. It is generally understood to be derogatory.

claiming our rights after staying in prison for too long...⁴⁵

The particular difficulties which women asylum-seekers are exposed to in prison should not be over-looked. Other than the risks which all asylum-seekers face, women may find the conditions unhygienic. In the absence of an adequate supply of toiletries, for example soap, sanitary pads, towels, etc., women asylum-seekers may find prison humiliating because they cannot maintain the cleanliness they would outside prison. This is not necessarily the case with other women prisoners who have relatives who may supply them with these commodities to satisfy their basic needs.

It may be argued that the detention of asylum-seekers in prison is purely administrative but nevertheless it has far reaching implications. Besides the strain which all prisoners experience from being locked up, the pressure on asylum-seekers is worse. Waiting in itself is traumatic, and with the added fear of being repatriated to where one came from, distress may be made extreme. In addition to this, asylum-seekers do not know for how long they will be in prison, and it can be psychological terror to keep someone in prison for an indefinite period of time without a date of release.⁴⁶ During an interview with an Ugandan asylum-seeker he said, 'My fear is that since we are few [three] Ugandans, it will be easy for authorities to forget about us, especially after so many months in prison. I know it is the law that we must be in prison, but it must not take this long, I fear mental disturbance...'.⁴⁷

Fifty-nine point five percent (59.5%) of the asylum-seekers described the conditions in prison as poor. A Somali asylum-seeker claimed that the conditions were very poor; '...I am deprived of my liberty for no apparent reason. I stay with criminals under the same roof, eating the same food always. If you are sick they handcuff you before taking you to the hospital.'⁴⁸ A Burundian asylum-seeker stated; 'Please don't keep refugees in prison for a long time, because when we arrive here it is not for pleasure... We have abandoned our families, relatives and friends to seek asylum- is it a crime? If yes, take the asylum-seekers to court, and if not, why do you keep them in prison for so long time...?'⁴⁹

Thirty-four percent (34%) of the asylum-seekers interviewed had university level education. A woman asylum-seeker from Burundi stated during the interview that; 'I want to know my future in Botswana and outside. Determine my status! Anywhere I go my curriculum vitae will reflect imprisonment which will discourage employers from recruiting me, especially since I am a woman.

45 Interview with Rwandan refugee.

46 Interview with Rwandan refugee.

47 Interview with Ugandan asylum-seeker.

48 Interview with Somali asylum -seeker.

49 Interview with Burundian asylum -seeker

We must get compensation for unnecessary detention'.⁵⁰ One Angolan male refugee who spent nine months in prison, claimed that his reputation and curriculum vitae had been tarnished, and that he may be less marketable to potential employers. These fears were confirmed by two Rwandese who applied for resettlement. The Embassy of a country which had been approached, stated for resettlement, in a letter to the applicant dated 14th September 1993:

“Please bring the following documents to the interview; birth certificates and passport for all family members included in your application police clearance certificates...”⁵¹

The conclusion of the letter confirms bureaucratic delays and advises that:

“...as a number of the documents for example the police clearance certificates take some time to obtain you may wish to apply for them now.”⁵²

In subsequent correspondence dated 21st December 1993, three months later, the Embassy confirmed that they were pleased to have received the Botswana Police Clearance Certificates.⁵³ The police clearance is probably required to assist in determining whether the applicant for resettlement has a criminal record. However, officials cannot deny that the detention of asylum-seekers has negative implications by claiming that police clearance certificates are issued. According to the findings, these, as the letter shows, 'take some time to obtain'. Both the fact that almost all prisons in Botswana are overcrowded and other consequences of keeping asylum-seekers in prison for long periods of time illustrate the need to find other and new solutions to the question of where asylum-seekers should be kept. A connected problem is that the training given to prison officers is not designed to enable them to handle asylum-seekers. Their duties are described in the Prison Act, and few had any training in dealing with refugees and asylum-seekers. In an interview with a wardress over the use of prison, she expressed the view that the practice "does not make our job easy. The treatment they [asylum-seekers] are given is a wrong'.⁵⁴ For example a Liberian refugee was put in leg irons when taken to hospital from Mahalapye Prison. Findings from the study show that the most used document in dealing with refugees and asylum-seekers was the Prisons Act.⁵⁵ According to an officer of Prisons and Rehabilitation, 'We use the procedure prescribed for prisoners, convicts, remands, asylum-seekers... all are treated the same..' ⁵⁶

50 Interview with Burundian aslum-seeker.

51 Letter of application for resettlement, 14/09/94.

52 Ibid.

53 Letter of application for resettlement, 21/12/1994.

54 Interview with prison wardress in Kasane, 27/04/1994.

55 See Table 8.

56 Interview with the Principal Officer at Prisons and Rehabilitation.

The problem of rejected asylum-seekers is a matter which requires attention. It is reasonable to admit that there are administrative preparations to be made to facilitate the return of rejected asylum-seekers. However, the study found that some asylum-seekers were still in prison seven months after being rejected, bearing in mind that the same people would have been in prison during the processing of their applications for asylum. Rejected applicants could not appeal as there was no provision for appeals, nor was there anyone in prison who instructed them about the refugee determination procedure.

8. DUKWI REFUGEE CAMP

Dukwi Refugee Camp was established by the Lutheran World Federation (LWF) during the influx of Zimbabwean refugees in 1978 by the Lutheran World Federation. The camp addressed the need to find reliable accommodation for refugees in the country by offering shelter. Dukwi is located about one hundred and thirty (130) kilometres north west of Francistown, and is officially classified as a restricted area. Visitors to the camp are required to obtain an entry permit from The Office of the President while foreigners should surrender their passports to authorities for the duration of their visit. It is this administrative policy which suggests that Dukwi is a camp rather than a settlement. For administrative purposes refugees are divided into self-supporting refugees and assisted refugees. The refugees who are kept in Dukwi are maintained on public funds, while self-supporting refugees have been given work permits and may live anywhere in the country. Self-supporting refugees are, however, expected to report their presence to authorities every three (3) months, although in practice this is not always done.

In the camp, refugees have access to free medical care at the local clinic. Refugee children have access to free education up to secondary school level like Botswana nationals. This opportunity is available at the Dukwi primary and secondary schools. Thus Botswana's education policy may be understood in the light of Article 22(1) of the UN Refugee Convention of 1951 which requires that 'the contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.'⁵⁷

Seventy -five percent (75%) of the refugees and asylum-seekers interviewed, described conditions in Dukwi as poor, and almost all interviewed complained that the food ration given every fortnight was very low. An Angolan asylum-seeker stated that conditions in Dukwi are '...Beyond negative. It is impossible to live off two tins of fish for two weeks.. we are not free to look for other sources [of food]'.⁵⁸ According to an official of the Botswana Council for Refugees (BCR), the food ration is more than the food ration recommended by the World Food Programme (WFP). These recommendations, however, merely set minimum standards, and governments have the prerogative to provide more. It should be noted that the final decision on the food ration is a result of a complex process which takes into consideration many factors, such as the general conditions in the country, the refugee population in the country, and the donor contribution towards the maintenance of refugees.

The Dukwi administration has to deal with problems relating to security. A

57 UN Convention of 1951, Article 22(1). *UNHCR Collection of International Instruments Concerning Refugees*. P18.

58 Interview with Angolan asylum-seeker.

section of refugees and asylum-seekers, particularly members of Union for the Total Independence of Angola (UNITA) expressed their concern about the security arrangements in the camp. These complaints appear to have followed the decision to invite the Angolan Charge d' affaires to the camp. The invitation by the Government of Botswana and UNHCR, followed the Angolan peace process which resulted in the general elections which were held in 1992. An asylum-seeker stated in an interview that, 'I am opposed to the Angolan Embassy visiting the camp since MPLA is killing the Mokongo people in Angola'.⁵⁹ Another asylum-seeker also from Angola insisted that, 'Other embassies do not visit refugees in the camp and Angola should also stay away from refugees and leave the problem to those institutions which help refugees'.⁶⁰

The presence of the Angolan Charge d' affaires must be understood within the context of finding durable solutions to refugee problems, for example, voluntary repatriation. Repatriation is however guided by a number of principles and equally important is information about the country of origin. This information would normally be obtained from a credible, neutral source and most preferably an independent source, which is not closely tied to the government of a country.

An asylum-seeker from Kenya described conditions in Dukwi in the following way, '...There is a heavy bureaucratic process taking place. To get something as basic, though important, as food is a long process...We are also confined in a very small area, which requires another bureaucratic process to obtain a permit in order to leave...'⁶¹ An Angolan asylum-seeker claimed that, 'I do not live well in the camp. The place is remote and there is no light...we sleep on the floor...'.⁶²

59 Interview with Angolan asylum-seeker.

60 Ibid.

61 Interview with Kenyan asylum-seeker.

62 Interview with Angolan asylum-seeker.

9. INTERNATIONAL REFUGEE LAW AND STATE PRACTICE

What sets refugees apart from other people in need of humanitarian aid is their need for international protection. Refugees are in a position where they can no longer rely on their own governments and state institutions to protect their rights, and fend for their physical security. There is no binding treaty or convention which obliges States to grant asylum. This means that there is a gap between the individual's right to seek asylum, according to Article 14 (1) of the Universal Declaration of Human Rights, and the State's discretion in providing it. Each State makes its own decisions as to whom it will admit and why. State practice may, however, shift according to the level of demand, pressures of the time, and the origins of the people who apply.

Generally, States which have ratified the UN Convention of 1951 and/or the 1967 Protocol to the Convention offer asylum to individuals who satisfy the definition of a refugee, as described in these two texts.⁶³ There is, however, still room for a rather liberal interpretation of the UN definition. As discussed earlier in this paper, the key phrase 'a well-founded fear of persecution' consists of a number of subjective elements. Therefore international refugee law leaves States to determine how best they should assist refugees and conduct the refugee determination procedure. Even if a country has ratified an international treaty, the treaty does not automatically become part of the State party's national legislation. However, there is, to some degree, a political and moral obligation for national laws to conform with the international standards. The refugee determination procedure in Botswana is based on the definition of the 1967 Refugee (Recognition and Control) Act. This definition complies with the modified UN Refugee Convention of 1951 in the 1967 Protocol.

The UNHCR is guided in its activities by the statute as established by the United Nation's General Assembly Resolution 428(v) of 14 December 1950. The statute projects the activities of the UNHCR towards persons who meet the criteria of the definition of a refugee as stated in Article 1 of the UN Convention of 1951 cited earlier. This criteria assumes an individual case-by-case determination, but the sometimes complex causes which have led one to seek refuge have made it difficult for every individual to prove 'a well-founded fear of persecution'. During mass influx, which would most certainly strain local resources, States with limited ability to assist may consider it unrealistic to grant asylum-seekers formal refugee status. Fear of being flooded by refugees and asylum-seekers have made States react in a number of ways - some defensive and others more constructive. One defensive method is to make it difficult for asylum-seekers to reach and cross borders. Others are to try and deter asylum-seekers by lowering the level of treatment which they get on arrival. A more constructive method is to make the refugee determination process quicker in order to "unclog" the system. States may also allow asylum-seekers to stay as a temporary measure but without the rights or privileges

63 UNHCR Report 1993. P32.

associated with formal refugee status. In such circumstances the host country may appeal to other States to admit some asylum-seekers, or alternatively make a financial or material contribution. This practice may encourage States to admit more asylum-seekers who flee persecution, while at the same time avoiding formal legal commitment by accepting them. The wisdom of avoiding formal refugee status is noticed in Goodwin-Gill's observation that '... for States at large, refugees are a class known to general international law and, as a matter of law, entitled to a somewhat better and higher standard of treatment'.⁶⁴ Avoiding granting refugee status leaves the State with a greater freedom of action. In the light of the above observation, Botswana's policy towards the Zimbabwean and South African influx was very positive. Many were accepted on prima facie evidence and granted formal refugee status.

Individual case determination is set out by the UNHCR in The Basic Requirements of 1977, which deals with the four stages of the refugee determination procedure. The first stage is when the asylum-seeker makes himself known to the authorities of the host country, The second stage is when the asylum-seeker is investigated. The third is when the decision whether or not to grant refugee status is taken, and the fourth stage is the chance of appeal.⁶⁵ According to the Basic Requirements the asylum-seeker should be informed about the refugee determination procedure, if need be, provided with an interpreter, and be given the chance to contact an UNHCR representative. If and when the asylum-seeker is recognised as a refugee he or she should be informed of this and issued with the appropriate documents. If the asylum-seeker is rejected he or she should be given reasonable time to appeal, and be permitted to stay in the host country while doing so. These Basic Requirements are, however, only recommendations and are not legally binding.

The refugee determination procedure in Botswana appears to conform very closely to the process laid down in the Basic Requirements. The asylum-seeker makes him/herself known to a state authority, usually the police,⁶⁶ who pass the matter on to the Special Branch for investigation. The Botswana Refugee (Recognition and Control) Act does not, however, provide for appeal in the event of an asylum-seeker being rejected. The Minister can re-open the case if he or she is of the opinion that there is a need to do so, but in this way the new appeal is directed to the same authority as the first request. The Basic Requirements also state that the asylum-seeker should be informed about the refugee determination procedure. According to this study only ten percent (10%) of the asylum-seekers claim to have been made aware of this procedure.

The Botswana Government has expressed reservations on six articles of the UN Convention of 1951. These are; Article 7 - Exemption from Reciprocity, Article 12 (1) - Personal Status, Article 26 - Freedom of Movement, Article 31 - Refugees Unlawfully in the Country of Refuge, Article 32 - Expulsion, and

64 Goodwin-Gill, G.S. P19

65 Zetterqvist, J. P45f.

66 According to the study 79% of the asylum-seekers had presented themselves to the police.

Article 34 - Naturalization. The reasons for reservations are not provided for the purposes of this, though attempts were made to identify them.

While the UNHCR in some instances has been asked to expand its mandate to use its 'good offices' to offer humanitarian assistance, it has not always enjoyed the support of all States. Despite protests of individual governments the majority of the international community has accepted the protection and assistance given by the UNHCR to large-scale movements of asylum-seekers.⁶⁷ The scale of the refugee crisis calls for a broad-based approach towards the problem. The UNHCR found itself having to expand its role by focusing on '... each stage of a refugee situation, from prevention of refugee outflows; to protection in the country of asylum; to the search for durable solutions',⁶⁸ In the area of prevention the cooperation of non-governmental organisations (NGOs) is absolutely crucial. Since local NGOs have the advantage of an in-depth knowledge of the country, the culture, and any problems this might cause regarding refugees there is a lot to be gained from this cooperation. The participation of NGOs is also an added advantage when monitoring human rights violations in a country, In view of the complex and far-reaching nature of the activities of UNHCR, an organisation called Partnership-in-Action (PARINAC) was formed to formalise co-operation, and harmonise the activities of the agency with NGOs working with refugees. The objectives of the NGO-UNHCR partnership is:

"to maximize the effective use of resources; avoid duplication of efforts and competition; to benefit fully from comparative advantages and expertise; to carry out concerted and coordinated advocacy activities; to improve joint efforts to implement programmes targeted at refugees in general, internally displaced persons where appropriate and at refugee women and children in particular; to undertake joint UNHCR-NGO training in all areas; and to establish improved mechanisms for dialogue."⁶⁹

In its 1993 report, the UNHCR shows that there is a corresponding relationship between human rights and refugee movements when it warned that 'by the time massive abuses of human rights occur, the chances of averting refugee flows are slim'⁷⁰. The whole thrust of prevention as emphasized at the Kathmandu PARINAC Conference, is not '...intended to obstruct escape from danger or an intolerable situation but to make flight unnecessary by removing or alleviating the conditions that force people to flee.'⁷¹

67 Goodwin-Gill, G.S. p11

68 Recommendations of PARINAC Oslo Global Conference, held 6-9/06/1994.

69 Ibid

70 UNHCR Report 1993. p23.

71 Proceedings of the Kathmandu PARINAC Conference, Background Notes on Protection, the Role of the UNHCR. Held from 1-3/11/1993.

10. CONCLUSIONS AND RECOMMENDATIONS

The study concerned itself with two main areas of refugee protection. One was an examination of Botswana's refugee policy and practice. The other aspect that was of interest to the study was the extent to which Botswana Refugee Law is consistent with International Refugee Law. The Refugee (Recognition and Control) Act was scrutinized to establish whether it is complete, adequate and comprehensive enough as a legal instrument to guide government policy. The favourable political changes in the region have contributed to the decrease of the refugee population from about thirty thousand (30 000) at the end of 1979, to seven hundred (700) in 1993. These changes included the independence of Zimbabwe in 1980, Namibia in 1990 and the non-racial elections held in South Africa in 1994. The general election held in Angola in 1992 has failed to bring about fundamental change in the country; hence the repatriation of Angolan refugees has been halted.

The Botswana refugee determination procedure, as explained in the Refugee (Recognition and Control) Act of 1967, has undergone changes. The Refugee Advisory Committees which make recommendations to the Minister responsible, were suspended in 1982, and their role was taken over by the Special Branch. The study has learnt that the reasons for the changes were due to the security measures that had to be carried out to minimise the risk of external agents, and the influx of Zimbabwean refugees. The suspension of the Refugee Advisory Committees removed civil authorities from the process of the refugee determination procedure since it became a police matter. In the absence of civil authorities and the reluctance by the Special Branch to be interviewed it is difficult to evaluate the determination procedure the period 1982 - 1994.

An important feature in the processing of applications has been the detention of asylum-seekers in prison. This policy has been administered for more than ten years. It is clear that the law allows for the detention of asylum-seekers for a limited period of twenty-eight days but only thirty-one point six percent (31.6%) of those interviewed in this study had been in prison for less than this stipulated period. This means that the majority, sixty-eight point four percent (68.4%), were in detention for longer than this period.⁷² It is wrong to detain asylum-seekers together with prisoners as '... persons awaiting trial'⁷³ because no charge has been, or is likely to be, brought against them. Consequently asylum-seekers cannot be adequately classified under the Prisons Act. The detention of asylum-seekers is contrary to article 31 (1) of the UN Convention of 1951 relating to the Status of Refugees which calls on governments not to

72 See Table 7.

73 Botswana Immigration Act of 1968, Section 14(3).

“...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 in the sense of Article 1 enter or are present in their territory without authorization provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”⁷⁴

The argument for using prisons is that there is no official transit centre in the country, and consequently this remains the only 'convenient' place. It is an established fact, however, that prison is meant to punish and rehabilitate the convicted person. Asylum-seekers, as people fleeing persecution, neither deserve punishment nor require prison rehabilitation, therefore the period of prison detention should not exceed the twenty-eight days. However to the extent that asylum-seekers are kept beyond the legally stipulated period it amounts to imposing punishment, and this constitutes a violation of their rights as protected by section 6(b) of the Refugee (Recognition and Control) Act quoted above. The problems which asylum-seekers face while in prison such as overcrowded cells, leg irons and armed escort whenever one is taken to the hospital are intimidating and humiliating enough to render prison an inappropriate place keep them.

The Refugee Advisory Committee makes recommendations to the relevant Minister concerning decisions regarding the awarding of refugee status. Unfortunately the proceedings of the committee are held in secret and the study was not able to establish how many of those, which the Committee had recommended for asylum, were rejected by the Minister. The use of Ministers as part of the process is one of the reasons why the determination process in Botswana is unnecessarily slow. If the Advisory Committees were to be given deciding powers there would be fewer stages to go through and the process would go faster.

There is no provision for appeal for a rejected applicant. There is, however, a possibility of a review, but this is not sufficient safeguard because it is based solely on the subjective opinion of the Minister.

It is necessary to discuss the Botswana government policy towards those recognized as refugees. The Dukwi Refugee Camp is deliberately situated in a remote area to ensure safety for refugees. The requirement on all those who intend to visit the camp, that they must obtain an entry permit from the Office of the President, is sufficient evidence of the above assertion. Since the favourable political changes in the Southern Africa region, the refugee population has decreased to about seven hundred (700). The reduction of the number of refugees has meant that the load is such that it no longer justifies the direct participation of an international organisation. This was demonstrated by the handing over of the camp by the founding Lutheran World Federation(LWF) to the government. This means that the Botswana Government remains the principal guardian of the welfare of refugees.

74 UN Convention of 1951, Article 31(1). UNHCR, *Collection of International Instruments Concerning Refugees.* p22.

Free medical services continue to be available for refugees. Education is free for refugees as it is for nationals. However the food ration provided every fortnight is a recurring and legitimate complaint by the refugees. The study is aware that the food ration is above the recommended ration by World Food Programme (WFP). However, Government should not conveniently maintain a low food ration on grounds that it is above the WFP recommended ration if it can afford more.

The Dukwi approach, where refugees are kept in isolated areas, their movements restricted by permits, and where the local population has limited access to the camp, is not conducive to integration. This is important because integration is recognized as one of the durable solutions to refugee problems. Consequently both refugees and the local population remain ignorant of each other, and ignorance does not promote solutions to the problem. An equally important durable solution to refugee problems is resettlement, usually to western or northern countries. This alternative should be strictly for deserving cases, for example people who require special medical care that is not available in Botswana, high profile asylum-seekers and children in vulnerable situations. Resettlement should not be abused. To illustrate this point the Refugee Advisory Committee cannot reject an applicant, while at the same time recommend him/her for resettlement by the UNHCR, because this would mean that he/she is already recognised as qualifying for refugee status. Only those who have satisfied the criteria of refugee determination may be considered for resettlement. Thus a State cannot refuse to grant an applicant asylum and instead recommend that another country should accept him/her for resettlement.

RECOMMENDATIONS

1. **The Refugee (Recognition and Control) Act of 1967 is not a complete and comprehensive legal instrument** for guiding government policy, and for this reason it should be reviewed. The Act does not provide a necessary distinction between asylum-seekers, and immigrants. In the event of death or repatriation of the head of the household, where he was the only one formally recognized, the Act must establish the legal status of other members of the household.
2. **The detention of asylum-seekers in prison even for ‘... a period not exceeding twenty-eight (28) days...’⁷⁵ must be abandoned** because of the numerous problems already cited. An asylum-seeker should also not be ‘...treated as a person awaiting trial..’⁷⁶ The sometimes long periods in prison affect the asylum-seekers in serious and far-reaching ways, and it is insufficient to defend the detention as safe custody. What is psychologically disturbing is the uncertainty of how long an asylum-seeker will be in prison, as it can range from nine days to thirteen months. The practice can be abused because there is no

⁷⁵ Botswana Refugee (Recognition and Control) Act of 1967, Section 6(b)

⁷⁶ Botswana Immigration Act of 1968, Section 14(3).

judicial review of the renewal of detention warrants by Immigration Officers. To come to terms with these problems a transit centre for asylum-seekers should be established.

3. **The Police** may be called upon to assist with the security checks that need to be done but they **should not be entrusted with the task of making recommendations as to the legitimacy of an asylum claim.** This should be left to the Refugee Advisory Committees.
4. **An asylum-seeker should not have to wait for a long time before he/she knows the results of his/her asylum claim.** A period not exceeding three (3) months is recommended as reasonable, To minimise delay, the Refugee Advisory Committee should make the selections, not the Minister. Such a committee would then be called the Refugee Selection Committee. There should be an appeals board to which rejected applicants can turn. The period of appeal should be limited to twenty-one (21) days.
5. Botswana has not ratified the United Nations Protocol of 1967 but is bound by this instrument because the Refugee (Recognition and Control) Act considers the convention to be the UN Convention of 1951 and any subsequent agreements that may amend it. **It is necessary that a country makes a formal commitment** to uphold an international instrument rather than to be bound only by way of interpretation.
6. The study is aware that Botswana has not ratified the **OAU Convention of 1969** governing the specific aspects of refugee problems in Africa, but many asylum-seekers, particularly Angolans, have been accepted according to the criteria of the Convention. It is encouraging to know that once the President has signed a convention it amounts to ratification. However, since this is not practice in international law, **Botswana should formally ratify the convention.**
7. **Government must remove restrictions on the movement of refugees** to enable them to take control of their lives and to eliminate the “dependency syndrome”. This would encourage interaction between refugees and the local population- an ingredient which is currently missing. If this recommendation is not favourable to Government, then the elimination of the “dependency syndrome” will probably be very difficult to achieve.
8. **The current food ration in Dukwi camp should be reconsidered** and within the means available, it should be increased.
9. **The Refugee Advisory Committee should not recommend an asylum-seeker for resettlement unless it has accepted his/her asylum claim.** The reasons for resettlements should be either for special medical care, which is not available locally, for high profile refugees, survivors of torture, or children in vulnerable situations.

10. **DITSHWANELO - The Botswana Centre for Human Rights, should be given observer status on the Refugee Advisory Committee.**

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Asylum-seekers from: Angola
 Burundi
 Kenya
 Rwanda
 Somalia
 Uganda
 Zaire

Director of Administration - Botswana Council For Refugees.

Lutheran World Federation

Member of the Special Branch, Kasane-Kazungula, 29th April 1994

Official in The Office of the President, Gaborone 6th July 1994.

Principal Officer at Prisons and Rehabilitation, 29th June 1994

Prison Officials

Prison wardress , Kasane, 27th April 1994.

Refugees from: Angola
 Rwanda

Senior Government Official in The Office of the President, Gaborone 5th May
1994.

Senior Police Official, Gaborone 15th June 1994

UNHCR

12. Appendix A: Tables

Table 1: NATIONALITIES OF ASYLUM-SEEKERS

NATIONALITIES	PERCENT	TOTAL NUMBER
Angola	29.8	14
Burundi	19.1	9
Zaire	14.9	7
Rwanda	10.6	5
Sudan	6.4	3
Uganda	6.4	3
Somalia	4.3	2
South Africa	4.3	2
Kenya	2.1	1
Mozambique	2.1	1
	100	47

Table 2: NATIONALITIES OF REFUGEES

NATIONALITIES	PERCENT	TOTAL NUMBER
Angola	55.4	26
Zimbabwe	23.4	11
South Africa	12.7	6
Rwanda	2.2	1
Lesotho	2.1	1
Liberia	2.1	1
Uganda	2.1	1
	100	47

Table 3: UNGAZETTED POINTS OF ENTRY USED BY ASYLUM-SEEKERS

POINTS OF ENTRY	PERCENT	TOTAL NUMBER
Kasane	47.8	22
Kazungula	17.5	8
Mamono	13	6
Ngoma	6.5	3
Shakawe	2.2	1
Other	13	6
	100	46

Table 4: OFFICIALS' REACTIONS TO THE USE OF PRISONS TO DETAIN ASYLUM-SEEKERS

OFFICIALS' REACTION	PERCENT	TOTAL NUMBER
Opposed	51.1	70
Necessary	46	63
Indifferent	2.9	4
	100	137

Table 5: OFFICIALS' VIEW ON THE MOST APPROPRIATE PLACE TO KEEP ASYLUM-SEEKERS

OFFICIALS' VIEW	PERCENT	TOTAL NUMBER
Prison	39	53
Dukwe Refugee Camp	17.6	24
Kagisong Centre	7.4	10
Other	36	49
	100	136

Table 6: PRISON POPULATIONS IN RESEARCH SAMPLES AT THE FOLLOWING DATES

DATE	PRISON	OFFICIAL CAPACITY	ACTUAL NUMBER OF PRISONERS
15/04/94	Maun	54	118
27/04/94	Kasane	116	117
17/05/94	Francistown	180	520
17/05/94	Francistown (Women's Section)	9	45
26/05/94	Selebi-Phikwe	180	232
03/06/94	Mahalapye	560	614
28/06/94	Gaborone - First Offenders	160	291
06/10/94	Gaborone (Women's Section)	30	49
06/10/94	Central	112	230
06/10/94	Gaborone - Boys	120	244

Table 7: LENGTH OF DETENTION OF ASYLUM-SEEKERS

LENGTH OF DETENTION	PERCENT	TOTAL NUMBER
Less than 28 days	31.6	11
28 days to 3 months	5.3	2
3 to 6 months	21.1	8
6 to 12 months	36.7	14
12 months to 2 years	5.3	2
	100	37

Table 8: MAIN DOCUMENTS USED BY OFFICIALS IN DEALING WITH
REFUGEES AND ASYLUM-SEEKERS

DOCUMENTS	PERCENT	TOTAL NUMBER
Prisons Act	29.2	47
Immigration Act	17.4	28
Refugees Act	16.8	27
International Conventions	12.4	20
The Constitution	2.5	4
Other	1.2	2
Nothing	20.5	33
	100	161

13. APPENDIX B : QUESTIONNAIRES

I Refugees and Asylum-Seekers

1. Sex
 - 1) M
 - 2) F
2. Age
 - 1) Less than 18
 - 2) 18 to 21
 - 3) 21 to 30
 - 4) 30 to 45
 - 5) Above 45
3. Nationality
4. Marital Status
 - 1) Single
 - 2) Married
 - 3) Divorced
 - 4) Separated
 - 5) Other (specify)

5. Do you have any children with you?
 - 1) Yes
 - 2) No
 - 3.) (specify number)
6. Where are they?
 - 1) Botswana
 - 2) Country of Origin
 - 3) Elsewhere
7. Level of formal education
 - 1) None
 - 2) Primary
 - 3) Secondary
 - 4) University or equivalence
 - 5) Other (specify)
8. Mode of transport to Botswana
 - 1) Road
 - 2) Air
 - 3) Rail
 - 4) Other (specify)
9. Port of entry
 - 1) Name of Border Post
 - 2) Sir Seretse Khama International Airport
 - 3) Ungazetted Port

10. Did you possess a valid passport or travel document when you arrived?
 - 1] Yes
 - 2] No

11. Where did you stay in Botswana before you were/are recognised as a Refugee?
 - 1] Prison
 - 2] Kagisong
 - 3] Dukwe
 - 4] Hotel
 - 5] A Host Family
 - 6] Other (specify)

12. Which Official did you present yourself to?
 - 1] Immigration
 - 2] Police
 - 3] D.C./Chief
 - 4] UNHCR
 - 5] Other (specify)

13. What happened to you immediately after you presented yourself for asylum?
 - 1] Detained in prison
 - 2] Sent to Kagisong
 - 3] Released and asked to come later
 - 4] Stayed with a host family
 - 5] Other (specify)

Refugee Section

14. How many interviews did you have?
15. Did the Officers who interviewed you inform you of the Department they represented?
- 1) Yes
 - 2) No
 - 3) Name of department represented
16. What language did you use during the interview?
17. For Non-English speakers, did you have a translator during the interview?
- 1) Yes
 - 2) No
18. In your assessment was the translator competent/fluent in your language?
- 1) Very good
 - 2) Good
 - 3) Fair
 - 4) Poor
 - 5) Very poor
19. Did you appear before the Refugee Advisory Committee?
- 1) Yes
 - 2) No

20. Were you made aware of any aspects of the procedure?
- 1] Yes
 - 2] No
21. If Yes above, who made you aware?
22. What aspects were you made aware of? That:
- 1] You are allowed access to a lawyer
 - 2] The law provides that you be detained in Prison
 - 3] Once rejected you may appeal
 - 4] Other (specify)
23. Did you contact UNHCR before you were recognised as a Refugee?
- 1] Yes
 - 2] No
24. If Yes how did you come to contact UNHCR?
- 1] I enquired
 - 2] I was advised
 - 3] By accident
25. Did you consider seeking asylum in any country other than Botswana?
- 1] Yes
 - 2] Why did you not go there?
 - 3] No
 - 4] Why did you only choose Botswana?

26. Did you belong to any political organisation in your country?
- 1] Yes
 - 2] Position held
 - 3] Responsibilities
 - 4] No
27. Did you stay in any other country after you fled before you came to Botswana?
- 1] Yes
 - 2] No
28. Did you appear before the Refugee Advisory Committee?
- 1] Yes
 - 2] No
29. Did you consider the circumstances that made you flee (danger) to have been targeted at you or the entire community?
- 1] Yes
 - 2] No
 - 3] Specify
30. How would you describe the conditions in Prison?
- 1] Very good
 - 2] Good
 - 3] Fair
 - 4] Poor
 - 5] Very poor

31. Did you feel that you were treated like the prisoners?
- 1] Yes
 - 2] No
32. How would you describe the conditions in Dukwe?
- 1] Very good
 - 2] Good
 - 3] Fair
 - 4] Poor
 - 5] Very poor
33. How would you describe the conditions in Kagisong?
- 1] Very good
 - 2] Good
 - 3] Fair
 - 4] Poor
 - 5] Very poor
34. How would you describe the attitude of the general public towards Refugees?
- 1] Very good
 - 2] Good
 - 3] Fair
 - 4] Poor
 - 5] Very poor

Explain the reasons for your choice above

35. Is there any other information you can provide that would be helpful for us in carrying out this study?

Asylum-Seekers Section

36. How did you apply for asylum? Through:
- 1] UNHCR
 - 2] UNDP or any UN Agency
 - 3] An NGO (specify)
 - 4] Directly to Government
 - 5] Other (specify)
37. Do you have any documents or relevant material that would help you prove your claim for refugee status?
- 1] Yes
 - 2] No
38. Name of Prison?
39. Length of Detention
- 1] Less than 28 days
 - 2] 28 days to 3 months
 - 3] 3 to 6 months
 - 4] 6 to 12 months
 - 5] 12 months to 2 years
 - 6] More than 2 years

40. How would you describe the conditions in Prison?
- 1] Very good
 - 2] Good
 - 3] Fair
 - 4] Poor
 - 5] Very poor
41. Have you experienced any form of discrimination?
- 1] Yes
 - 2] No
- If Yes, from whom and how?
42. Is there any information you would like to give about your experience as an Asylum-Seeker?

II Officials'

1. Department/Institution
2. Position Held
3. Length of Service with Refugees
4. Qualifications
 - 1] J.C.
 - 2] "O" Level
 - 3] Diploma
 - 4] Degree
 - 5] Other (specify)
5. How are you involved with:
 - 1] Refugee matters?
 - 2] Asylum-Seeker matters?
6. Have you had any formal or informal training on Refugee Law?
 - 1] Yes
 - 2] No
7. If Yes, where?
How long?

8. What are the primary documents that guide you in dealing with Refugees and Asylum-Seekers?

9. Do most Asylum-Seekers possess valid travel documents when they arrive?
 - 1] Yes
 - 2] No

10. Does it matter to you that Asylum-Seekers come and claim refugee status in Botswana and not elsewhere?
 - 1] Yes
 - 2] No

11. How or why does it matter?

12. What do you consider to be a reasonable time to process an application for refugee status?
 - 1] Less than 3 months
 - 2] 3 to 6 months
 - 3] 6 to 12 months
 - 4] 1 to 2 years
 - 5] More than 2 years

13. Should an unsuccessful applicant for refugee status be given reasons for rejection?
 - 1) Absolutely necessary
 - 2) Necessary
 - 3) Fair
 - 4) Opposed
 - 5) Strongly opposed
14. Do you think a lawyer should be present during the interview of an Asylum-Seeker?
 - 1) Very important
 - 2) Important
 - 3) Fair
 - 4) Opposed
 - 5) Strongly opposed
15. Should UNHCR be present during the interview of an Asylum-Seeker?
 - 1) Very important
 - 2) Important
 - 3) Fair
 - 4) Opposed
 - 5) Strongly opposed

16. Where do you consider to be an appropriate place to keep Asylum-Seekers?
 - 1] Prison
 - 2] Dukwe
 - 3] Kagisong
 - 4] Hotel
 - 5] Volunteering host families
 - 6] Other (specify)
17. What is your reaction to the use of Prisons to detain Asylum-Seekers?
 - 1] Absolutely necessary
 - 2] Necessary
 - 3] Opposed
 - 4] Strongly opposed
18. Have you visited Prison in an official capacity?
 - 1] Yes
 - 2] No
19. How often?
20. How would you describe the conditions in that Prison?
 - 1] Very good
 - 2] Good
 - 3] Fair
 - 4] Poor
 - 5] Very poor

21. Have you visited Dukwe Refugee Camp in your official capacity?
- 1] Yes
 - 2] No
22. How often?
23. Should there be a heavy police/military presence in Dukwe Refugee Camp?
- 1] Absolutely necessary
 - 2] Necessary
 - 3] Fair
 - 4] Opposed
 - 5] Strongly opposed
24. Should national security considerations greatly influence the criteria for determining refugee status in Botswana?
- 1] Absolutely necessary
 - 2] Necessary
 - 3] Fair
 - 4] Opposed
 - 5] Strongly opposed

25. To the best of your knowledge is there any form of discrimination of:

1] Asylum-Seekers by Officials?

Yes

No

2] Asylum-Seekers by General Public?

Yes

No