

UNIVERSITY OF KWAZULU NATAL

**THE UN REFUGEE CONVENTION CESSATION CLAUSE AND ITS APPLICATION TO
RWANDAN REFUGEES BASED IN KENYA**

BY

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DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

I declare that this Dissertation contains my own work except where specifically acknowledged.

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Date: 30th May 2013

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ABSTRACT

THE UN REFUGEE CONVENTION CESSATION CLAUSE AND ITS APPLICATION TO RWANDAN REFUGEES BASED IN KENYA

Kenya like many other countries offers asylum to refugees in fulfillment of the provisions of the 1951 UN Refugee Convention as well as the 1969 OAU Refugee Convention. The country, with the assistance of UNHCR, confers refugee status on refugees who meet the qualifications stated by the two treaties as well as the Refugee Act 2006. Rwandan refugees make up part of the refugee community in Kenya.

Though refugee status was created to enhance refugee protection in countries of asylum, it was never intended to last a lifetime. The United Nations envisioned an end to refugee status when the reasons for flight as well as persecution no longer continued to exist. The cessation clause marks the end of refugee status and thus facilitates re-establishment in the country of origin. This study endeavours to explore the impact that the cessation clause will have on Rwandan refugees residing in Kenya specifically based on the widespread concern about the human rights situation in Rwanda.

There is accordingly a need to explore the nature of the cessation clause, the reasons for its creation and further the qualifications entailed in its application. After understanding what the cessation clause is, there is the need to understand the genesis of Rwandan refugees. This will enhance the understanding of why Rwandan refugees continue to reside in Kenya even after the end of the Rwandan conflict. The study will then expound on the reasons for and against invocation of a cessation clause to provide an analysis of whether the country is indeed safe for return. To enhance this analysis, the study will provide a comparative study with Liberia and Angola, which recently implemented cessation clauses. Through this comparative assessment, the study will seek to ascertain the viability of the concerns raised in reference to Rwanda and further speculate on the outcome of the cessation clause pertaining to the concerns raised. This study will therefore be able to advise on whether the cessation clause applies to Rwandan refugees and thereafter offer recommendations as to whether implementation in the Rwandan context is feasible. It will also endeavor to provide an analysis of whether there is a need to amend the invocation procedure with regard to cessation clauses in general.

LIST OF CASES

1. *The Minister for immigration and Multicultural Affairs* (2006) High Court of Australia
2. *Abdullah v Bundesrepublik Deutschland* (2010) E.C.R
3. *R M v Refugee Appeal Board* (2007) Case number 16491/06 TPD, High Court of South Africa
4. *Tantoush v Refugee Appeal Board* (2007) Case number 13182/06 TPD, High Court of South Africa
5. *Consortium for Refugee and Migrants in South Africa v President of the Republic of South Africa and Faustin Kayumba Nyamwase and 10 Others* (2011) Case number 30123/11 North Gauteng High Court, Pretoria, South Africa
6. *The Rafiki Muhindo Hyacinthe Nsengiyumva case*, Paris Appeals Court, 2012

LIST OF TREATIES / STATUTES

1. The 1951 Refugee Convention on the Status of Refugees
2. The 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa
3. The Statute of the United Nations High Commissioner for Refugees
4. The Kenyan Refugee Act 2006
5. The South African Refugee Act 130 of 1998

LIST OF ABBREVIATIONS

AU	-	AFRICAN UNION
MPLA	-	POPULAR MOVEMENT FOR THE LIBERATION OF ANGOLA
OAU	-	ORGANISATION OF AFRICAN UNITY
RSD	-	REFUGEE STATUS DETERMINATION
UN	-	UNITED NATIONS
UNHCR	-	UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
UNITA	-	NATIONAL UNION FOR THE TOTAL INDEPENDENCE OF ANGOLA

TABLE OF CONTENTS

Declaration	ii
Acknowledgements	iii
Abstract	iv
List of cases	v
List of statutes	vi
List of Abbreviations	vii

CHAPTER ONE (GENERAL OVERVIEW)

1.1 INTRODUCTION	1
1.2 CONTEXT	2
1.3 PURPOSE	4
1.4 RESEARCH PLAN / CONTENT	6
1.5 METHODOLOGY	7
1.5.1 Primary Sources	7
1.5.2 Secondary Sources	8
1.5.3 Internet	8
1.6 LITERATURE REVIEW	8
1.6.1 The Cessation Clause	8
1.6.2 The Ceased Circumstances Clause	13
1.6.3 Qualifications of the Ceased Circumstances Clause	15
1.6.4 Case Law Interpretation of the Ceased Circumstances Clause	19
1.6.5 Exceptions to the Ceased Circumstances Clause	24
1.6.6 Rwanda and the Ceased Circumstances Clause	26
1.7 CONCLUSION	32

CHAPTER TWO (THE CESSATION CLAUSES: AN ANALYSIS OF THE CEASED CIRCUMSTANCES CLAUSE)

2.1 INTRODUCTION	33
2.2 THE CESSATION CLAUSES.	34
2.2.1 Treaty Provisions on the Cessation Clauses.....	34
2.2.1.1 <i>The 1951 UN Refugee Convention</i>	34
2.2.1.2 <i>The OAU Refugee Convention</i>	36
2.2.1.3 <i>The Statute of UNHCR</i>	39
2.2.2 State Domestication of the Cessation Clause.....	40
2.2.2.1 <i>Kenya Refugee Act 2006</i>	40
2.2.2.2 <i>The South African Refugee Act 1998</i>	42
2.3 CATEGORIES OF THE CESSATION CLAUSE.....	42
2.3.1 Cessation Based on Change in Personal Circumstances.....	43
2.3.2 Cessation of Group Based Refugee Status.....	45
2.4 THE CEASED CIRCUMSTANCES CLAUSE.....	45
2.4.1 Interpreting the Ceased Circumstances Clause.....	47
2.4.1.1 <i>Assessment of Fundamental Changes</i>	47
2.4.1.2 <i>Assessment of Durability of the Changes</i>	49
2.4.2 Exceptions to the Ceased Circumstances Clause.....	50
2.4.2.1 <i>Fair Process</i>	52
2.5 CASE LAW INTERPRETATIONS OF THE CEASED CIRCUMSTANCES CLAUSE.....	54
2.6 THE CEASED CIRCUMSTANCES CLAUSE AND HUMAN RIGHTS.....	60
2.7 EFFECTS OF INVOKING THE CEASED CIRCUMSTANCES CLAUSE.....	61
2.8 CONCLUSION.....	61

CHAPTER THREE (RWANDA)

3.1 INTRODUCTION.....	63
3.2 PRE-COLONIAL ERA.....	64
3.3 COLONIAL RWANDA.....	65
3.3.1 The Berlin Conference and German Colonial Rule in Rwanda	65

3.3.2 Belgian Colonial Rule in Rwanda.....	66
3.3.3 The Road to Independence.....	69
3.4 POST INDEPENDENCE RWANDA.....	70
3.4.1 The First Republic (1962-1973).....	70
3.4.2 The Second Republic (1973-1994).....	72
3.5 THE GENOCIDE.....	76
3.6 POST GENOCIDE RWANDA.....	79
3.6.1 The Executive and the Political Context since 1994.....	80
3.6.2 The Legislature.....	84
3.6.3 The Judiciary.....	85
3.6.3.1 <i>The Gacaca Courts</i>	87
3.6.3.2 <i>The International Criminal Tribunal for Rwanda (ICTR)</i>	92
3.7 CONCLUSION.....	96

CHAPTER FOUR (RWANDAN REFUGEES AND THE CEASED CIRCUMSTANCES CLAUSE)

4.1 INTRODUCTION.....	97
4.2 GROUNDS FOR INVOCATION OF THE CESSATION CLAUSE.....	98
4.2.1 Fundamental Changes.....	98
4.2.2 Durability of Changes.....	100
4.2.3 Number of Returnees already within the country of origin.....	100
4.3 OPTIONS AVAILED TO RWANDAN REFUGEES WHEN THE CESSATION CLAUSE WAS INVOKED.....	102
4.4 GROUNDS MITIGATING AGAINST THE INVOCATION OF THE CESSATION CLAUSE.....	104
4.4.1 The Political Situation in the Country.....	104
4.4.2 Human Rights Situation in the Country.....	109
4.4.3 Restriction of the Media and Freedom of Expression.....	112
4.4.4 Judicial and Penal Systems in Rwanda.....	113
4.5 CONCLUSION.....	114

CHAPTER FIVE (COMPARATIVE STUDY)

5.1 INTRODUCTION.....	115
5.2 ANGOLA'S IMPLEMENTATION OF THE CLAUSE	116
5.2.1 Overview of the Angolan Refugee Situation.....	116
5.2.2 Post Civil War Angola and the Rationale behind the Clause.....	118
5.2.3 Declaration of the Clause and its entry into force.....	120
5.2.4 Options availed to Angolan Refugees when the Clause was invoked.....	120
5.2.5 Comparison between Angola and Rwanda.....	123
5.3 LIBERIA AND THE CESSATION CLAUSE.....	125
5.2.1 Overview of the Liberian Refugee Situation.....	125
5.2.2 Post Civil War Liberia and the Rationale behind the Clause.....	126
5.2.3 Declaration of the Clause and its entry into force.....	128
5.2.4 Options availed to Liberian Refugees when the Clause was invoked.....	129
5.2.5 Comparison between Liberia and Rwanda.....	131
5.4 CONCLUSION.....	132

CHAPTER SIX (CONCLUDING REMARKS AND RECOMMENDATIONS)

6.1 GENERAL.....	134
6.2 FINDINGS.....	137
6.3 RECOMMENDATIONS.....	139

BIBLIOGRAPHY	142
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CHAPTER ONE

GENERAL OVERVIEW

1.1 INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR) estimates that ten million refugees exist worldwide.¹ Out of these ten million, it is notable that eighty percent reside in developing countries like Kenya.² Essentially, over half of all refugees who find themselves residing in countries of asylum are considered to be in a protracted refugee situation (the conflict that caused them to flee their home countries have remained unresolved for five or more years).³ Therefore, it is conceivable that some refugees would hold this status for a lifetime.

Refugee status is not necessarily intended to be permanent.⁴ Once the conflict ceases, it is understandable that the refugees would want to go back home albeit that they may harbour some concerns as to the current environment within the country of origin after the conflict. The end of refugee status and subsequent return of refugees to their country of origin is generally precipitated by the cessation clause through its ceased circumstances clause

¹ Refugee Figures, UNHCR – UN Refugee Agency, available at <http://www.unhcr.org/pages/49c3646c11.html>. Accessed on 14 November 2012.

² Press release, UN High Commissioner for Refugees (UNHCR). Annual Report, 16 June 2009. The Annual Report indicates that 42 million people are uprooted worldwide, available at <http://www.unhcr.org/4a2fd52412d.html>. Accessed on 14 November 2012.

³ James Milner. Towards solutions for protracted refugee situations, the role of resettlement, Annual Tripartite Consultations on Resettlement, Geneva, 29 June 2007, available at <http://www.unhcr.org/46934d4f2.pdf>. Accessed on 14 November 2012.

⁴ Joan Fitzpatrick and Rafael Bonoan. *Cessation of Refugee Protection*, Cambridge University Press, June 2003, available at <http://www.unhcr.org/refworld/docid/470a33bc0.html>. Accessed on 14 November 2012.

(hereafter referred to as the clause) which is contained in the 1951 United Nations Convention on the Status of Refugees.⁵

This study will focus on the analysis of the clause in order to understand when best to apply it and most importantly, ensure that refugees are not placed at risk in its application. The underlying premise is that States are bound to comply with their international obligations arising from international refugee law and this study will contribute to an understanding of whether the reality meets expectations.

1.2 CONTEXT

Since 2009, UNHCR has engaged the Rwandan Government in determination of a permanent solution regarding Rwandan refugees. On 9 December 2011, UNHCR organised a meeting with the Rwandan Government as well as Government officials from 21 African countries hosting Rwandan refugees to strategise on the way forward in the realisation of a comprehensive strategy for the Rwandan refugee situation. UNHCR used this platform to recommend the application of the clause.⁶ Subsequent to this meeting, UNHCR declared that this clause would apply to Rwandan refugees who had fled the country between the years of 1959 and 1998. The clause was to take effect on 31 December 2011 but through numerous requests by countries of asylum for flexibility, it was extended to 30 June 2013.

⁵ The 1951 Refugee Convention Relating to the Status of Refugees, available at <http://www2.ohchr.org/english/law/refugees.htm>. Accessed on 14 November 2012.

⁶ UNHCR, Implementation of the Comprehensive Strategy for the Rwandan Refugee Situation, including UNHCR's recommendations on the Applicability of the Ceased Circumstances Cessation Clauses, 31 December 2011, available at <http://www.unhcr.org/refworld/docid/4f33a1642.html> . Accessed on 14 November 2012.

The rationale behind the study is primarily that Rwanda has undergone rapid, fundamental and positive changes since the 1994 genocide thus the country is generally enjoying an essential level of peace and stability. Reflecting on these positive changes, a greater part of the Rwandan refugee population had returned home by the end of 1998.⁷ This provides a strong indicator that the country is safe for return and that Rwandan refugees ought to relinquish their refugee status. Therefore, the declaration of the invocation of the ceased circumstances clause was needed to aid the return of the remaining Rwandan refugees to their country of origin.

However, this declaration has received mixed reactions from a number of Rwandan refugees as well as human rights groups stating that it is a violation of the refugees' human rights. They claim that Rwanda is far from peaceful and raised the issue of human rights violations taking place in the country as proof that the clause need not be invoked⁸ as the environment is not conducive for return. Their greatest concern is that if the refugees were to return home they would suffer persecution most likely on ethnic grounds which formed the main reason for their flight in the first instance.

It is against this backdrop that the study endeavours to discover whether the application of the clause will result in the violation of the human rights of Rwandan refugees residing in Kenya which is host to Rwandan refugees. The study is further prompted by the need to determine the extent to which the

⁷ *Ibid.*

⁸ *Rwanda, Cessation of refugee status is unwarranted.* Memorandum of fact and law, Fahamu Network for Social Justice, Fahamu Refugee Project, available at <http://www.refugeelegalaidinformation.org/sites/srlan/files/fileuploads/Memo%20of%20Fact%20and%20Law.pdf>. Accessed on 14 November 2012.

clause provides for refugee rights protection in accordance with the principle of non-refoulement.

1.3 PURPOSE

While a number of clauses have run their course without problems and have resulted in a total reintegration of refugees in their country of origin,⁹ in other cases it has turned out to be a most difficult and problematic durable solution to implement.

The essence of this research is to determine whether the clause is applicable to Rwandan refugees residing in Kenya. Its applicability will centre on whether it will result in the violation of the refugee's rights and further explore whether the clause takes into account the human rights situation in the country of origin as a qualification for invoking the clause. To fully examine the research question, the study will endeavour to discover the rationale behind the clause and further elaborate on the qualifications/criteria a country of origin must meet in order for the clause to be applicable to refugees from that country.

The study will proceed in brief to analyse the reason for displacement and why we have Rwandan refugees residing in countries around the world. This will provide an understanding as to the source of the refugee outflow from the country and further create an appreciation of the background of the country of origin and the events leading up to displacement.

⁹ Examples of this are Angola and Liberia where 90% of all refugees were able to return home before the 30 June 2012 deadline, available at <http://www.unhcr.org/4fed82459.html>. Accessed on 14 November 2012.

Subsequently, it will endeavour to examine Rwanda today and explore the fundamental changes that have taken place in the country since the end of the conflict, thereby establishing the grounds for invocation of the clause. It will further investigate the alleged human rights abuses within the state and examine the concerns raised by human rights organisations as well as refugees on the safety of the country for return.¹⁰

Lastly there will be a comparative study to analyse Rwanda *vis-à-vis* other countries that have invoked the clause. This will be fundamental in enabling one to compare and contrast the implementation procedure against Rwanda and further establish whether the human rights issues in the particular states were ever taken into account. This will assist in predicting what may happen in the Rwandan context and other similar cases and whether Kenya is likely to implement the cessation clause.

The study will then offer a conclusion to the matter and where needs be, recommend changes to the invocation and implementation of the clause. The recommendations will endeavour to advance the protection of the human rights of all affected refugees specifically those residing in Kenya.

¹⁰ Kelly O'Connor. Contesting the Rwandan Refugees Status Cessation: The Rwandan case, available at <http://ohrh.law.ox.ac.uk/?p=1255>. Accessed on 3 May 2013.

1.4 Research Plan/Content

Chapter One: Introduction

The introductory chapter indicates the context of the study, outlining the rationale for the research question. Each subsequent chapter explores the various issues raised in this chapter.

Chapter Two: The Cessation Clauses: An Analysis of the Ceased Circumstances Clause

This chapter is an in depth analysis of the cessation clause and specifically the ceased circumstances clause, its origin and impact on refugee law.

Chapter Three: Rwanda

Chapter three considers in brief the Rwandan refugee crisis. It covers the genesis of the conflict, its completion and highlights the current status of the country after the conflict. Accordingly, it covers the historical background of Rwanda, the genocide and events after the genocide that capture the restoration and rebuilding of the country.

Chapter Four: Rwandan Refugees and the Ceased Circumstances Clause

The focus of this chapter is the concerns raised in relation to the application of the ceased circumstances clause to Rwandan refugees. It will interrogate the concerns raised by human rights groups, Rwandan refugee groups and provide an overview of the contemporary human rights situation in Rwanda.

Chapter Five: Comparative study

This chapter provides a comparative study with Angola and Liberia as these two countries have also had the ceased circumstances clauses applied to refugees from these countries of origin. It endeavours to provide an analysis of what was taken into account in determining the clause and examines the human rights situations in these countries to see whether that was taken into account in determining whether to implement the clause.

Chapter Six: Conclusion and Recommendations

The concluding chapter deals with recommendations for reform of the clause in order to enhance the protection of refugee rights in Kenya.

1.5 METHODOLOGY

To achieve relevant insight into the application of the clause to Rwandan refugees residing in Kenya, this research will utilize both primary and secondary resources.

1.5.1 Primary Sources

This study will consider the international and regional treaties that are relevant to refugees. It will further explore national legislation based on the cessation of refugee status and use this analysis to determine whether countries of asylum such as Kenya have domesticated the provisions of the treaty pertaining to cessation of refugee status. It will also analyse case law on the cessation of refugee status to provide the

most appropriate interpretation of the treaties and domestic statutes as they pertain to the clause.

1.5.2 Secondary Sources

This will include literature on refugee law as well as books, journal articles and other relevant material dealing with the plight of Rwandan refugees and the operation of the cessation clause, in particular the ceased circumstance clause.

1.5.3 Internet

The internet is a reservoir of information on the Rwandan genocide as well as information pertaining to Rwandan refugees. The comparative nature of the research study, as well as the rather dynamic nature of the change in socio-political landscape in Rwanda demands that such an avenue for resource material cannot be ignored.

1.6 LITERATURE REVIEW

1.6.1 The cessation clauses

The cessation clause of the 1951 Refugee Convention Relating to the Status of Refugees and parallel provisions in other international refugee instruments were long neglected as a subject of refugee law.¹¹ While it is understood that the purpose of the clauses was to stipulate provisions for the end of refugee status, it is important to understand the provisions

¹¹ *Supra*, note 4.

of the clauses in their exact context to enable us identify whether they are truly practical in their application.

The cessation clauses are provided for in various treaties. To start with, the 1951 Refugee Convention Relating to the Status of Refugees provides a comprehensive definition of the cessation clauses applicable to refugees in Article 1C.¹² This article states that the convention will cease to apply to persons protected under the convention when certain events either undertaken by the person or regarding his country of origin infer that there is no longer any need to obtain protection as a refugee.

The clauses set out in Article 1C can be divided broadly into two categories: those relating to a change in the personal situation of the refugee brought about by his/her own acts (contained in sub paragraphs 1 to 4) and those relating to the change in objective circumstances which

¹² This Convention shall cease to apply to any person falling under the terms of Section A if:

- 1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- 2) Having lost his nationality, he has voluntarily re-acquired it; or
- 3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- 4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;
- 5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not be applicable 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;
- 6) Being a person who has no nationality, he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;
Provided that 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 return to the country of his former habitual residence.

formed the basis of the recognition of refugee status (contained in subparagraphs 5 and 6).

The OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa¹³ also provides for a cessation clause in Article 1(4)e.¹⁴ From this article it is clear that the OAU Convention and the 1951 Convention both have similar provisions regarding the cessation clause. However, the two can be contrasted by virtue of the fact that the OAU Convention does not recognise exceptions to the cessation clause. Furthermore, the cessation clause of the 1951 Convention applies only to those with 'a well founded fear of being persecuted for reasons of race, religion, nationality, and membership of a particular social group or political opinion'. Article 8(2) of the OAU Convention encompasses two definitions of a refugee, being the traditional definition contained in Article 1(1) (as outlined above) and a broader definition that includes:

.....every person who owing to external aggression, occupation, foreign domination or events seriously disturbing the 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 citizenship or nationality.¹⁵

¹³ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The convention was adopted on 10 September 1969 and entered into force on 20 June 1974, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf. Accessed on 1 October 2012.

¹⁴ He (a refugee) can no longer, because the circumstances in connection with which he was recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of his country of nationality

¹⁵ OAU Refugee Convention, Article 1(2).

According to the Refugee Studies Centre, this extended definition generally characterises mass outflows in Africa.¹⁶ This is because the OAU Convention provides a much wider qualification of refugee status, thus increasing the number of applicants seeking status and protection under the Convention.

To further enhance the definition and understanding of the cessation clause, UNHCR has drafted Guidelines¹⁷ to assist in the implementation of the cessation clause. These Guidelines specify the qualifications of the cessation clauses and further provide guidance on how these qualifications are to be understood and applied. However, the Guidelines do not go into detail regarding certain specifics as to the application of the clause and only suggest ways in which interpretation can be inferred through analysis of the specific sub articles referring to cessation. Hathaway¹⁸ furthermore notes that the UNHCR's interpretation of the 1951 Convention's obligations regarding cessation, though authoritative, are not binding on states therefore giving states the leeway to use them or create their own interpretation of the clause, which may be detrimental to refugees.

¹⁶ Refugee Studies Centre, Working Paper series No.76, Oxford Department of International Development, University of Oxford, August 2011, available at http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents. Accessed on 1 October 2012.

¹⁷ UN High Commissioner for Refugees. The Cessation Clauses: Guidelines on Their Application, 26 April 1999, available at <http://www.unhcr.org/refworld/docid/3c06138c4.html>. Accessed 14 November 2012.

¹⁸ James Hathaway. The right of states to repatriate former refugees, 2005, *OHIO ST. J. DISP.RE*, P.204-206.

The Statute of the UNHCR also provides for the cessation clauses that allow the High Commissioner to cease recognising refugee status in circumstances similar to those of the convention, including a 'ceased circumstance' clause.¹⁹ The clause states:

He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, claim grounds other than personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked.²⁰

The Statute of the UNHCR guides and complements the 1951 Refugee Convention in reiterating the need to have refugee status end once the reason that compelled flight has ceased to exist.

A number of states have also domesticated the cessation of refugee status in their national laws. The South African Refugee Act²¹ provides for the cessation of refugee status in section 5(1) a-e, which is virtually verbatim, the provisions of the 1951 Refugee Convention and the OAU Refugee Convention. Kenya also provides for cessation in section 5(a-g) in its Refugee Act 2006.²² Through its 2010 Constitution²³ it is

¹⁹ *Ibid.*

²⁰ Article 6A(e), United Nations General Assembly (1950), available at <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>. Accessed on 1 October 2012.

²¹ South African Refugee Act 130 of 1998, available at <http://www.home-affairs.gov.za/PDF/Acts/Refugees%20Act130.pdf>. Accessed on 14 November 2012.

²² The Refugee Act 2006, available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/RefugeesAct_13of2006_01.pdf. Accessed on 14 November 2012.

²³ The Constitution of Kenya 2010, available at http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.parliament.go.ke%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D460%26Itemid&ei=q7WjUOaJLMGYhQebxYGYBQ&usq=AFQjCNF95LT6uUoMtD2aghW0IW6WGK6PPg. Accessed on 14 November 2012.

recognised through Article 2(6) that all treaties ratified by the country are applicable in Kenya hence the provisions of the 1951 Refugee Convention and the OAU Refugee Convention are part of Kenyan law.

1.6.2 The ceased circumstances clause

The cessation clauses are divided into two main categories as specified above. One that applies to an individual and one that applies to specific groups of refugees who hold the same nationality. Restricting ourselves to the Rwandan context, it would be prudent to concentrate on the clauses that apply to the group refugees. These clauses are known as the ceased circumstances clauses.

The ceased circumstances clauses are contained in the 1951 Convention but are limited to subparagraphs 5 and 6.²⁴ They make reference to a change in the objective circumstances which formed the basis for the recognition of refugee status.²⁵ According to Fitzpatrick and Bonoan,²⁶ substantial similarity exists among the ceased circumstances clauses of the UNHCR Statute, the 1951 Refugee Convention and the OAU Refugee Convention. They further reiterate the Guidelines²⁷ by stating that State parties to the 1951 Refugee Convention possess the authority to invoke Article 1C(5) and (6), while the UNHCR can declare that its competence ceases to apply with regard to persons falling within situations spelled out in the statute. This interpretation essentially dictates out the extent of the cooperation between UNHCR and State

²⁴ *Supra*, note 12.

²⁵ *Supra*, note 18.

²⁶ *Supra*, note 4

²⁷ *Supra*, note 18.

parties in the interpretation and implementation of the ceased circumstances provisions. The ceased circumstance clause in reference to the UNHCR comprehensive strategy on Rwanda²⁸ states that the ceased circumstances clause is not invoked in an open-ended manner. This ultimately means that the determination of cessation restricts itself to specific events, against which fundamental changes can be measured as the sole basis of cessation. Furthermore, the restriction is based on changes with specific reference to what caused the refugees to flee, ensuring that the country has taken steps to alleviate all basis of fear of persecution with reference to the conflict making the country suitable for return. Cwik²⁹ submits that the ceased circumstances clause implies state cessation of refugee status which is termed 'mandated repatriation'. Cwik further states that mandated repatriation through the ceased circumstances clause is not well developed in international practice. This supports the notion by Hathaway of the lack of strength which the Guidelines have in ensuring that State parties restrict themselves to the procedure prescribed in the cessation Guidelines. One may however state that because the majority of these countries enlist the services of the UNHCR in refugee status determination they shall have no option but to follow the Guidelines as they do not have the resources or data to ensure implementation of the clause. For the ceased circumstances clause to come into force, there are certain qualifications that asylum

²⁸ *Supra*, note 5.

²⁹ Marissa Elizabeth Cwik. Forced to flee and forced to repatriate? How the cessation clause of Article 1C (5) and (6) of the 1951 Refugee Convention operates in international law and practice; *Vanderbilt Journal of Transnational Law*; Vol 44.711; p. 715, 2011, available at <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Cwik-CR.pdf>. Accessed on 14 November 2012.

states as well as UNHCR ought to examine to determine whether a country is safe for return.

1.6.3. Qualifications of the ceased circumstances clause

According to the Guidelines,³⁰ the phrase ‘circumstances in connection with which he has been recognised as a refugee’ refers to the objective situation in the refugee’s country of origin that caused him or her to flee. It is therefore paramount that the current situation be extensively examined to determine whether return is the best option for the refugees. Therefore, through the aforementioned Guidelines, UNHCR has identified certain qualifications that the country of origin must fulfil in order for cessation to apply.

To start with, there must be fundamental changes in the country of origin which can be assumed to remove the basis of the fear of persecution. These changes ought to be profound or substantial, that could convince a refugee to return home and reintegrate into society. According to Cwik,³¹ the changes that qualify as fundamental most often involve an end to hostilities and a political change resulting in a return to peace and stability. In order for this particular change to influence the need to invoke the clause, it ought to be supported by significant reforms that alter the basic legal or social structure of the state, including democratic elections, declarations of amnesties, repeal of oppressive law and dismantling of former security services. Cwik however argues that if the society undergoes a change that eliminates the original cause of fear of

³⁰ *Supra*, note 18.

³¹ *Supra*, note 29.

persecution but the change creates a new fear of persecution that could potentially give rise to refugee status; the ceased circumstance clause cannot be invoked. The main area of deliberation would then be whether current human rights violations in the country of origin would create a new fear of persecution thereby creating the need to re-avail refugee status. The study will attempt to provide an answer to this question.

According to Harrell-Bond,³² there are many areas of debate regarding the descriptions of what truly amounts to fundamental changes in the country of origin. She adds that Hathaway described the change needed to justify a declaration of cessation as 'change [that] must be of substantial political significance in the sense that the power structure under which persecution was deemed a real possibility no longer exists'. Fitzpatrick on the other hand states that such developments must be comprehensive in nature and scope. Harrell-Bond further notes that the Executive Committee stated that the changes in the country must be profound and enduring. This places tremendous emphasis on the political situation in the country of origin as a strong determinant of cessation.

Additionally, the UNHCR maintains that the change must also be durable and stable.³³ Durable change can be made within a relatively short period of time depending on the process of change. The Guidelines illustrate durability through peaceful change in the country of origin that takes

³² Barbara E. Harrell-Bond. 'Cessation clause Uganda style'. Keynote speech delivered at the Northwestern University Conference on Human Rights, 23 January 2011, available at http://www.cics.northwestern.edu/documents/workingpapers/CFMS_11-001_Harrell-Bond.pdf.

Accessed on 15 November 2012.

³³ *Supra*, note 29.

place under a constitutional process, where there are free and fair elections with a real change in the regime which respects fundamental human rights and where there is relative political and economic stability in the country. On the other hand, a longer period of time will be required to test durability of change where the changes are violent in nature involving the overthrow of a regime. The Guidelines state that under the latter, the human rights situation in the country needs to be carefully assessed. They however make no mention of whether the assessment of the human rights situation is an overall factor in the analysis of fundamental change and durability.

Not much has been stated with regard to the assessment of durability of the changes in the country of origin. Asylum States like Kenya in partnership with UNHCR have to determine which timeframe would be appropriate in determining the durability of the change. This can be reflected through the invocation of the cessation clause to Angolan and Liberian refugees whose conflicts ended much later than Rwanda and yet the cessation clause was applied to both countries earlier than the date upon which it is proposed to be invoked in Rwanda. Therefore durability of change – though a standard in determining change – cannot form a concrete qualification in relation to countries that have experienced severe conflict. It implies that asylum states like Kenya which have not conducted any form of assessment regarding change in Rwanda will most likely invoke the cessation clause.

Another qualification that asylum States like Kenya as well as the UNHCR examine is the record of return by refugees to the country. The

UNHCR keeps track of the number of refugees who choose to go back home. Thus, when they begin to realise that a majority of the refugees are actually returning home and are being reintegrated into the community, this serves as a silent qualification to the need to invoke the cessation clause so as to encourage other refugees to return home. The question would then be whether the substantial voluntary repatriation by some refugees would justify application of cessation to others who continue to remain in exile? In response to this, UNHCR states that,

The existence of conditions conducive to voluntary repatriation does not *ipso facto* warrant the application of the ceased circumstance clause. Although the situation in the country of origin may have improved sufficiently to provoke a refugee's personal decision to return voluntarily, the scope of these changes may fall short of the fundamental and durable character of changes required for the application of that particular clause.³⁴

UNHCR in its comprehensive strategy on the ceased circumstances clause in relation to countries of origin, always make reference to the number of refugees who have returned home. This is deemed to be justification for the cessation clause especially in the clause on intensifying efforts to promote voluntary repatriation.³⁵ Thus, it cannot be suggested that the number of refugees who return does not provide tremendous bearing on the invocation of the ceased circumstances clause.

It would also be important to understand fully whether the general human rights situation in the country of origin forms part of the qualifications on the assessment of whether to invoke the ceased circumstance clause.

³⁴ *Supra*, note 29.

³⁵ *Supra*, note 6.

Fitzpatrick and Bonoan state that UNHCR has cited adherence to international human rights instruments in law and practice and the ability of national and international organisations to verify and supervise respect for human rights as important factors to consider in the determination of the ceased circumstances clause.³⁶ They further state that although the observance of these rights need not be exemplary, significant improvements in these areas and progress towards the development of national institutions to protect human rights are necessary to provide a basis for concluding that a fundamental change has indeed taken place. The Guidelines as well as the treaties fail to lay much importance on the analysis of the human rights situation in the country, and this can be inferred from the statement declaring that the rights situation need not be exemplary.

1.6.4 Case law interpretation of the ceased circumstance clause

Hathaway states that it is evident that the practice and procedures in the invocation of the cessation clause are not well developed.³⁷ This fact is supported by Cwik³⁸ who speculates that this gap in international law places refugees at a high risk of prematurely losing protection and increases the burden on asylum countries to try and implement the clause the best way they know how. Cwik further notes that state jurisprudence on Article 1C(5) to (6) is limited and inconsistent.

Case law on the ceased circumstance clause has been relatively obscure with few cases centred on it. This is because case law on refugee law primarily concerns refugee status and hardly ever on the cessation clause.

³⁶ *Supra*, note 4.

³⁷ *Supra*, note 29, p 182-83.

³⁸ *Ibid.*

However there have been a number of cases that have attempted to analyse the ceased circumstance clause.

The High Court of Australia, in *The Minister for Immigration and Multicultural Affairs v QAAH*, found that when determining whether a fear of persecution exists, the refugee has the burden of proving that there is a continued fear of persecution.³⁹ According to the Court, the 1951 Refugee Convention as well as domestic law requires that Australia ought to extend protection only to persons who continue to meet the definition set in Article 1A (2) which governs the initial determination of refugee status. This implies that determination of refugee status and cessation is done in the same way. However, this cannot be sustainable, as it would mean that each refugee be interviewed to determine whether the ceased circumstance clause ought to apply to him or her. The court determined that the ceased circumstance clause ought to operate automatically in direct contradiction to the stipulations in the UNHCR Guidelines. The court went a step further and rejected the affirmative burden UNHCR placed on asylum states to investigate the fundamental changes in the country of origin. This created immense confusion, leaving open the question of whether removing the burden to investigate from asylum states would result in more harm than good for refugees.

Germany, like Australia, has a similar interpretation of the burden of protection. In 2008, the German Federal Council withdrew refugee status from an individual because the court determined that the fear of persecution

³⁹ *Ibid*; Kneebone & O'Sullivan, *supra* note 11, at 514 (citing *Minister of Immigration & Multicultural & Indigenous Affairs v QAAH* (2006) 231 CLR 1 (Austl.)).

had ceased.⁴⁰ Similar to Australia, the German court highlighted the linkage between the refugee status determination and the ceased circumstance clause. The court rejected the broad articulation of protection advanced by UNHCR that includes an investigation into fundamental, durable changes in the country of origin. Cwik further adds that in an advisory opinion on the German cessation cases, the European Court of Justice (ECJ) set forth a more inclusive understanding of protection than that outlined by the German court in deciding whether the country of origin has a functioning legal system and whether the individual in question will have access to that system.⁴¹ The ECJ also recommended the need to take into account the human rights situation in the country of origin. The ECJ is far clearer in its suggestion as compared to the previous judgments.

In response to the ECJ ruling, UNHCR adopted an interpretation of the ceased circumstance clause as follows:

Application of the 'ceased circumstances' clause should be informed by the overall objective of refugee protection, which aims at finding durable solutions for refugees. Durable solutions are integration in the host state, resettlement to a third state and voluntary return to the home state if this is possible in safety and dignity.⁴²

UNHCR, through the statement above, fails to mention mandatory repatriation as a result of asylum states declaring the ceased circumstances clause. The discretion to determine whether a ceased circumstance clause applies to a refugee community is conferred on the asylum state and this prerogative, especially where the asylum state plays host to numerous

⁴⁰ *Supra*, note 29(citing Joined Cases 175–179/08, *Abdullah et al. v Bundesrepublik Deutschland*, 2010 ECR 113/4).

⁴¹ *Ibid.*

⁴² *Supra*, note 29.

refugee communities, will most likely overlook the concerns that refugees have in returning home and invoke the ceased circumstance clause merely to reduce the refugee populations in the country.

The ceased circumstances clause results in mandated repatriation which in essence goes against the principle of non-refoulement especially where refugees have expressed concern about their return home. In the South African case of *RM v Refugee Appeals Board & 2 Others*,⁴³ Patel J ruled in favour of the applicant who was denied refugee status based on the fact that Angola was now safe for return and thus he could not be accorded refugee status. The applicant argued that he had faced a significant amount of trauma and thus returning him to Angola would further worsen his mental and physical health, as he had not yet fully recovered from the ordeal he went through when the country was at war. The court stated that returning him to Angola would go against the principle of non-refoulement enshrined in the South African Refugee Act that protected refugees from return to the country of origin when they continued to suffer from a well-founded fear of persecution. The applicant's fear was genuine and thus the court ordered the Ministry of Home Affairs to avail him refugee status.

Furthermore in the case of *Tantoush v The Refugee Appeals Board and 5 Others*⁴⁴ Murphy J ruled against the Refugee Appeals Board granting the applicant refugee status based on the fact that returning him to Libya would violate the principle of non-refoulement. He took judicial notice of the human

⁴³ Unreported case, Case number 16491/06 TPD (2007) High Court of South Africa, available at <http://www.refugeecaselaw.org/CaseAdditionalInfo.aspx?caseid=1159>. Accessed on 17 November 2012.

⁴⁴ Unreported case No. 13182/06 TPD (2007) High Court of South Africa, available at <http://www.saflii.org/za/cases/ZAGPHC/2007/191.html> . Accessed on 4 May 2013.

rights situation in Libya stating that the likelihood of the applicant being persecuted on return was quite high and thus he had satisfied the qualifications of refugee status.

Cases such as General Faustin Nyamwase⁴⁵ and Rafiki Nsengiyumva⁴⁶ illustrate the concern of repatriating refugees to Rwanda based on the political situation in the country. This necessitates availment of refugee status to the applicants based on the likelihood that they would suffer persecution upon return as they were considered enemies of the state. In the Faustin Nyamwase case, he had survived an assassination attempt perceived to have been orchestrated by the Rwandan Government thus returning him to Rwanda would be sure death or persecution. The cases shall be discussed in detail in the chapter on the cessation clause.

It is important to understand what UNHCR has done to uphold the principle of non-refoulement in order to protect those refugees who still express concern about the fear of persecution they may face in their country of origin. Consequently, UNHCR has formulated a number of legitimate exceptions to the ceased circumstances clause.

⁴⁵ In the Matter of General Faustin Nyamwase, South African Refugee Case, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Briefing-Paper.pdf> . Accessed on 4 May 2013.

⁴⁶ Rwandan Government Loses case Against Rafiki Muhindo Hyacinth Nsengiyumua. Afro American Network Reported on 19 December 2012, available at <http://www.afroamerica.net/AfricaGL/2012/12/19/rwandan-government-loses-case-against-rafiki-muhindo-hyacinthe-nsengiyumva/>. Accessed on 4 May 2013.

1.6.5 Exceptions to the Ceased Circumstances Clause

According to Harrell-Bond⁴⁷ an individual's right to be exempted from the cessation clause is equally difficult to define. She highlights a quote from Siddique where he stated that,

It was only in 1992 that a second possible exception arose under the rubric of acquired rights. It was recommended that those 'with strong economic ties and/or family and social links in the country of asylum, particularly when all or most ties in the country of origin have been lost' be [exempted]...[this] acknowledges the significant difficulties inherent in having to break once again the social, cultural and professional ties, that by force of circumstances the person has had to develop abroad ... the Executive Committee made a similar recommendation, so as to avoid hardship cases ... states should seriously consider an appropriate status, preserving previously acquired rights ... for those who cannot be expected to leave the country of asylum due to long stay.

Cwik⁴⁸ states that when an asylum state applies the ceased circumstance clause then it mandates repatriation. However, UNHCR recommends that the state provide a method for reviewing the individual circumstances of a refugee in order to determine if the individual ought to be exempted from application of the clause. At this stage, the focus is on the specific causes of the individual's flight. The inquiry then becomes two-fold: first, whether the documented change eliminates the risk of persecution and second, whether national protection can replace international protection.⁴⁹ This is done under UNHCR's strong recommendation of allowing refugees the opportunity to apply for continuation of status; hence the 'humanitarian principle' comes in

⁴⁷ *Supra*, note 32.

⁴⁸ *Supra*, note 29.

⁴⁹ *Ibid.*

to force. This essentially means that a refugee may maintain his status, despite the invocation of the ceased circumstance clause by the asylum state. To do so he must, beyond the above inquiry, establish 'compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country of nationality.'⁵⁰

According to Fitzpatrick and Bonoan, Articles 1C(5) and (6) of the UN Refugee Convention refer to compelling reasons arising out of previous persecution for refusing to return to the country of origin. They note that Article 4(e) of the OAU Refugee Convention includes no such exemption clause, noting that this creates disharmony in the application of such a clause especially in African states. In Goodwin-Gill's⁵¹ description on the textual inadequacies of Articles 1C(5) and (6) concerning residual cases, he simply states that they are perverse.

The Guidelines⁵² state that the provisions on exemptions apply to a very small group of refugees. However the overriding consideration is that it ought to be invoked on humanitarian grounds. The Executive Committee of UNHCR recommended in Conclusion No. 69 (XLIII)⁵³ of 1992, that in order to avoid hardship, states must seriously consider an appropriate status, preserving previously acquired rights, for persons who have compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country.

⁵⁰ *Ibid.*

⁵¹ GS Goodwin-Gill. *The Refugee in International Law*, 2nd ed, Clarendon, Oxford, 1996, p. 87.

⁵² *Supra*, note 17.

⁵³ Excom Conclusions; No. 69 (XLIII), 9 October 1990, available at <http://www.unhcr.org/3ae68c431c.html>. Accessed on 16 November 2012.

Illustrations of what would be termed compelling reasons might include severe forms of persecution that result in continuing trauma. Another one would be the likely persecution upon return.⁵⁴

In summary, as much as the exemption clauses provide relief to those who can prove that they have compelling reasons for refusing to return and further those who state that they continue to have a well-founded fear of persecution, it is questionable whether the human rights situation in the country would qualify as a ground for exception.

1.6.6 Rwanda and the ceased circumstance clause

As of September 2011, there were approximately 100,000 Rwandan refugees and others in refugee-like situations in some forty countries of asylum, mainly in Africa.⁵⁵ The majority of Rwandan refugees fled the country of origin as a result of the 1994 Genocide and its aftermath which involved armed clashes in north-western Rwanda that occurred in 1997 and 1998. There were also a large number who had fled inter-ethnic violence that occurred following the death of the Rwandan monarch in 1959 and that continued until the 1994 Genocide. The country's conflicts were generally as a result of inter-ethnic violence between the warring Hutu and Tutsi tribes.

⁵⁴ Immigration and Refugee Board of Canada. Chapter 7 – Change of circumstances and compelling reasons, available at <http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/Pages/Def2010Chap07.aspx#n72>. Accessed on 16 November 2012.

⁵⁵ *Supra*, note 6.

In October 2009, UNHCR announced at the 60th Executive Committee of the High Commissioner's Programme (EXCOM) a comprehensive strategy to bring a proper closure to the Rwandan refugee situation.⁵⁶The recommendations made by UNHCR to states regarding the application of the ceased circumstances clause in Rwanda is the commencement of all the aspects of cessation of refugee status (including exemption procedures) for Rwandan refugees who had fled Rwanda from 1959 to 1998 so as to enable their status to definitively cease by 30 June 2013. The basis of the invocation of the clause was merely based on the fundamental changes in the country setting far-reaching grounds for invocation of the clause. These grounds were essentially centred on political stability through a stable government and free and fair elections. They also examined the infrastructure, reconciliation and the economy, among others.

As stated earlier, the invocation of the clause was not received with enthusiasm from Rwandan refugees across the world. They stated that the country was far from safe and that requiring them to return to Rwanda would be a violation of their rights. Understanding the context under which these concerns have been raised with regard to Rwanda will need the examination of the issues of concern raised by various groups which include the state of the country and the reasons why the ceased circumstance clause ought not to be invoked.

⁵⁶ *Ibid.*

Cooke, on behalf of the Centre for Strategic and International Studies⁵⁷ in its June 2011 report listed the Government of Rwanda's inability to manage political competition within a democratic framework as one of its key concerns. It stated that there was evidence of mutual fear and suspicion along ethnic lines within the Government which was a subsequent product of state manipulation that had been experienced for more than a century. Cooke then added that the country's stability masks deep-rooted tensions, unresolved resentments, and an authoritarian Government that is unwilling to countenance criticism or open political debate. Their analysis was that given the country's past, instability could escalate very quickly and could become potentially violent. This in relation to the clause puts in doubt the political stability of the country questioning reasons for the invocation of the clause.

Cooke reports further on the ruling Rwandan Patriotic Front stating that although domestic opposition parties can criticise certain policies and programs, there is no possibility of more fundamental debate on how the Government deals with issues of accountability, ethnic equity, or state legitimacy. It states that domestic critics of the Government are effectively silenced through exile, intimidation, imprisonment or assassination. Timothy Longman, the Director of the Boston University's African Studies Centre, states that Rwanda has made a transition from one type of regime to the other with the current regime in Rwanda tolerating very little public criticism and strictly limiting freedoms of speech, press and association. He further

⁵⁷ Jennifer G. Cooke, Centre for Strategic and International Studies, *Rwanda: Assessing Risks to Security*, June 2011, available at http://csis.org/files/publication/110623_Cooke_Rwanda_Web.pdf. Accessed on 16 November 2012.

added that political parties are restricted and intimidated, while constraints and manipulation of the electoral process have prevented elections from being truly free and fair. He then states that Rwanda's persistent authoritarian rule may ultimately prove disastrous for the country's long-term stability.⁵⁸

Through analysis of fundamental changes in the country of origin, the clause lays emphasis on democracy. However, it is silent in analysing authoritarian rule through democracy. Does it suggest that democracy through elections is the only ground for determining the political stability of a country of origin? Even if so, isn't there a need to examine in detail the analysis of how the elections are conducted and determine whether they have been deemed free and fair before using it as a justification for invoking the clause?

Straus and Waldorf⁵⁹ also state their support for classifying Rwanda as an authoritarian state. This adds emphasis to authoritarian rule and impacts tremendously on the lack of transparency that rights group have in monitoring the Government.

The Fund for Peace's Failed States Index 2011,⁶⁰ ranked Rwanda 34th out of 177 with a score of 90.1, a 2.3 point decline from the previous year, placing the country in their danger category. The report noted the increasing

⁵⁸ *Ibid.*

⁵⁹ Scott Straus and Lars Waldorf. *Remaking Rwanda: State Building and Human Rights after Mass Violence*, University of Wisconsin Press, 2011, p 12-13.

⁶⁰ Fund for Peace. Failed States Index 2011, June 20, 2011, available at www.fundforpeace.org/global/library/cr-11-14-fs-failedstatesindex2011-1106q.pdf. Accessed on 16 November 2012.

authoritarian rule of President Paul Kagame including further restrictions on the media and opposition groups. It listed areas of concern in the Rwandan state as the rise of factionalised elites, vengeance-seeking groups and violation of human rights and the rule of law.

It is notable that states have also expressed their concern regarding the fact that Tutsi (though the minority tribe) maintain majority leadership positions disregarding the Hutu tribe. According to a confidential United States Embassy cable released by Wikileaks,⁶¹ despite the Tutsi representing only about 15 per cent of the population, an analysis of the ethnic breakdown of the current Rwandan Government shows Tutsis hold a preponderant percentage of senior positions. Hutus in very senior positions often hold relatively little real authority while senior Tutsi exercise real power. The cable notes that the military and security agencies are controlled by Tutsis. It further noted that if the Rwandan Government were ever to surmount the challenges and divides of Rwandan society, it must begin to share real authority with Hutus to a much greater degree than it does now. An allegation like this would certainly raise eyebrows as this goes back to the causes of the 1959 massacres in the country. Were these allegations ever examined and investigated before declaration of the clause? These are some of the questions that we ought to look into to clarify the extent to which

⁶¹ US Embassy – Kigali; “Ethnicity in Rwanda – Who Governs the Country?”, 5 August 2008 (Reference ID Created Released Classification Origin 08KIGALI525 2008-08-05 16:34 2011-08-30 01:44 SECRET//NOFORN Embassy KigaliVZCZCXYZ0000 PP RUEHWEB DE RUEHLGB #0525/01 2181634 ZNY SSSSS ZZH P 051634Z AUG 08FM AMEMBASSY KIGALI TO SECSTATE WASHDC PRIORITY 5505); available at: www.rwandainfo.com/eng/ethnicity-in-rwanda-who-governs-the-country/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Rwandainfo_EN+%28Articles+on+Rwandainfo+English%29. Accessed on 16 November 2012.

UNHCR examined the circumstances in Rwanda before declaring the invocation of the clause.

Human rights groups have been at the forefront of raising awareness about the human rights situation in Rwanda. Groups such as Amnesty International and Human Rights Watch have documented concerns about the human rights violations taking place in the country. According to Carina Tertsakian, a senior researcher in the Africa Division of Human Rights Watch she states that despite an outward appearance of calm, Rwanda is a fragile country ruled by fear. The deep mistrust resulting from the genocide has been exacerbated by a Government which does not tolerate criticism and keeps a close watch on all its citizens – Tutsi as well as Hutu – to ensure that no one is stepping out of line.⁶² Amnesty International⁶³ raised several concerns about the state of Rwanda. The report highlighted the concerns pertaining to the political situation of the country, the trials in the *Gacaca* courts and human rights violations taking place in the country. The report raised further concerns of the readiness of the country to receive returnees especially those of Hutu ethnicity.

There is a need to undertake a detailed objective analysis of the Rwandan situation through the qualifications suggested in invoking the clause. This will

⁶² Carina Tertsakian. Human Rights Watch (HRW), *Time for a review of UK policy on Rwanda, African Arguments*, 29 July 2011, available at www.hrw.org/news/2011/07/29/time-review-uk-policy-rwanda. Accessed on 16 November 2012.

⁶³ The Memorandum to the Government of Uganda about the cessation of refugee protection for Rwanda. Amnesty International, December 2011, available at <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/AFR5902111?CMD=VEROBJ&MLKOB=30224985959>. Accessed on 16 November 2012.

enable us to understand fully why the clause was invoked and whether the grounds for invocation are justifiable by humanitarian standards.

1.7 CONCLUSION

This study therefore re-emphasises that the interpretation and application of the ceased circumstances cessation clause is replete with difficulties. It is for this reason, that the study is intended to cast light on the invocation of the clause in the practical setting of Rwanda. This analysis will illustrate the shortfalls in the blind application of the clause without proper regard for all the pertinent facts and circumstances and the danger this poses to refugees who are, by their very nature, vulnerable. It will also expose the dangers of invoking a cessation clause based on certain qualifications that may not particularly be in the refugees' best interests. This study explores the current refugee law in relation to cessation in an effort to question whether as it is, it enhances refugee protection and further ensures that refugee rights are promoted even upon their return to their country of origin. It examines this mainly from a human rights perspective. By understanding this countries of asylum like Kenya can be able to take pertinent steps in enhancing refugee protection through the invocation of cessation clauses.

CHAPTER TWO

The Cessation Clauses: An analysis of the ceased circumstances clause

2.1 INTRODUCTION

Cessation of refugee protection is a subject of confusion and contestation drawing keen interest among states, refugees and the United Nations High Commissioner for Refugees (UNHCR).⁶⁴ Though refugee treaties such as the 1951 UN Refugee Convention and the OAU Refugee Convention provide for cessation of refugee status, they do not address many of the salient contemporary issues concerning termination of international protection.

Evidence indicates that the cessation clauses and in particular the ceased circumstances clause have been the subject of examination by academics and the office of the United Nations High Commissioner for Refugees (UNHCR) since the mid-1980's.⁶⁵ Though the cessation provisions in the treaties appear theoretically coherent, the cessation clause has proven to be troublesome in its application. This has been largely on account of premature declarations of cessation that return refugees to situations that are still uncertain.⁶⁶

This chapter seeks to analyse the cessation clause and in particular the ceased circumstances clause in order to understand its relevance and application to

⁶⁴ Joan Fitzpatrick, Jeffrey and Susan Brotman. Current Issues in Cessation of protection under Article 1C of the 1951 UN Refugee Convention and Article 1.4 of the 1969 OAU Convention, available at <http://www.unhcr.org/refworld/pdfid/3bf925ef4.pdf>. Accessed on 20 November 2012.

⁶⁵ *Ibid*; the mid-1980's and early 1990's saw mass influxes of refugees particularly Bosnian and Kosovo, into Europe prompting an academic interest in the cessation clause.

⁶⁶ Yasmin Siddiqui. Refugee Studies Centre, Working Paper series No.76, Oxford Department of International Development, University of Oxford, August 2011, available at http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents. Accessed on 1 October 2012.

Rwandan refugees residing in Kenya. Throughout this chapter, the study shall analyse the meaning of the cessation clauses, its categories, application and implementation.

2.2 THE CESSATION CLAUSES

Refugee status, as contained in international law, is in principle, a transitory phenomenon which lasts as long as the reasons for fearing persecution in the country of origin persist.⁶⁷ The cessation clauses set out the only situations in which refugee status properly and legitimately come to an end. Cessation clauses therefore are simply the provisions in international and domestic law on what would constitute an end to refugee status.

2.2.1 Treaty provisions on the Cessation Clauses

There are three main treaties that govern refugee protection and are applicable to refugee affairs in Africa and more specifically Kenya. These treaties are the 1951 UN Refugee Convention,⁶⁸ the 1969 OAU Refugee Convention and the Statute of the UNHCR. A brief analysis of the three treaties is necessary to establish the parameters of the provisions within them as they relate to cessation clauses.

2.2.1.1 The 1951 UN Refugee Convention

The 1951 United Nations Convention Relating to the Status of Refugees (hereafter known as the 1951 UN Refugee Convention) recognises the

⁶⁷ UN High Commissioner for Refugees. The Cessation Clauses, Guidelines on Their Application, 26 April 1999, available at <http://www.unhcr.org/refworld/docid/3c06138c4.html>. Accessed on 14 November 2012.

⁶⁸ The 1951 Refugee Convention Relating to the Status of Refugees, available at <http://www2.ohchr.org/english/law/pdf/refugees.pdf>. Accessed on 9 September 2012.

need for international cooperation and responsibility sharing among states in an effort to promote refugee protection around the world. Furthermore, it sets out the definition of a refugee; the rights of individuals who are granted asylum and the responsibilities of nations who grant asylum. Countries that ratify this treaty are obliged to protect refugees in their territory. Kenya ratified the treaty on 16 May 1966.

Article 1C of the 1951 UN Refugee Convention governs cessation of refugee status and provides as follows:

This Convention shall cease to apply to any person falling under the terms of Section A if:

- 1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- 2) Having lost his nationality, he has voluntarily re-acquired it; or
- 3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- 4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;
- 5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not be applicable 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;

6) Being a person who has no nationality, he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that 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 return to the country of his former habitual residence.

As much as the 1951 UN Refugee Convention was created to enhance refugee protection, it was not designed to tackle the root causes of people's flight; specifically human rights violations, political and armed conflict in the country of origin among others.⁶⁹ Its core mandate was to alleviate the consequences of these problems by offering victims a degree of international legal protection among other assistance and eventually helping them begin a new life.⁷⁰

2.2.1.2 The OAU Refugee Convention

Cognisance was taken of the particular need to protect refugees in the African context and accordingly, in 1969, the OAU (as it then was) adopted a treaty that replicated the 1951 UN Refugee Convention and expanded upon it to cater for the circumstances giving rise to refugee movements in Africa. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter the OAU Refugee Convention) entered into force in 1974 and set down a foundation for refugee jurisprudence and practice to develop in a predictable and asylum- friendly

⁶⁹ UNHCR. The Refugee Convention, the Landmark document that underpins our work, available at www.unhcr-centraleurope.org/en/resources/conventions/refugee-convention.html. Accessed on 27 November 2012.

⁷⁰ *Ibid.*

manner in Africa. This Convention set out the principles which were specific to Africa, including additional exclusion and inclusion clauses and the prohibition of so called 'subversive activities'⁷¹ within the refugee and asylum context. Kenya ratified the treaty on 23 June 1992.

The 1951 UN Refugee Convention applies only to those with a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion'.⁷² By contrast, the OAU Refugee Convention encompasses two definitions of a refugee in Article 1(1):⁷³ the traditional definition similar to the 1951 UN Refugee Convention and a broader one that includes

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 citizenship or nationality.

This contrast creates tremendous challenges in the implementation of the cessation clause. This is because the OAU Refugee Convention is much broader in its description of who qualifies as a refugee. Academics suggest that the cessation under the OAU Refugee Convention may be conducted within the framework of the 1951 UN Refugee Convention.⁷⁴

However, one can argue that if an African state has ratified the OAU

⁷¹ UNHCR. Q&A, OAU Convention remains a key plank of refugee protection in Africa after 40 Years, available at www.unhcr.org/4aa7b80c6.html. Accessed on 27 November 2012.

⁷² The 1951 UN Convention Article 8(2).

⁷³ *Ibid.*

⁷⁴ *Supra*, note 66.

Refugee Convention, then it is the treaty that should be relied on since it is directly applicable to Africa. It cannot be disregarded in favour of one that is seemingly less onerous.

The Convention provides for cessation of refugee status under Article 1(4)⁷⁵ where it states that:

This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or, (b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the circumstances in connection with which he was recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purpose and objectives of this Convention.

From the above Article it is evident that the OAU Refugee Convention tracks the 1951 UN Refugee Convention text, adding two further criteria for cessation; this being the commission of a serious non-political crime outside the country of refuge (Article 1.4(f)) and serious infringement of the purposes and objectives of the Convention (Article 1.4(g)). The OAU Refugee Convention, unlike the 1951 UN Refugee Convention, does not

⁷⁵ The OAU Convention Governing Specific Aspects of Refugee Problems in Africa. Article 1(4), available at www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf. Accessed on 21 November 2012.

provide for an exception to the cessation clause. This essentially means that African refugees (who have sought refuge in another African country) cannot be exempted from application of the cessation clause unless the country has ratified the 1951 UN Refugee Convention, which provides for the exemption clauses.

2.2.1.3 The Statute of UNHCR

The 1951 UN Refugee Convention in its preamble granted UNHCR the statutory authority to declare refugee status and facilitate asylum.⁷⁶ Once refugee status is granted, UNHCR has certain responsibilities towards the refugee: first, to allocate resources to alleviate the immediate crisis, and second, to seek a permanent solution for refugees.⁷⁷ Article 35 provides that the UNHCR is tasked with the role of supervising the process with cooperation from all ratifying states. Furthermore, it oversees the application of international treaties, and coordinates the admission of refugees to host countries.

The Statute of UNHCR, apart from providing for Refugee Status Determination (RSD) and protection of refugees, provides for cessation of refugee status in circumstances similar to those in the 1951 UN Refugee Convention in Article 6A(e) where it states:

He can no longer because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, claim grounds other than personal

⁷⁶ *Supra*, note 68, preamble, paras 5-6.

⁷⁷ UN General Assembly. Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html>. Accessed 21 November 2012.

convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked.

The 1951 UN Refugee Convention and the 1969 OAU Refugee Convention can be distinguished with respect to this Article as it is broader in its provisions on the exemptions from the cessation clause through its provision for grounds other than personal convenience. There is need for harmony with the 1951 UN Refugee Convention considering that the Statute instructs the implementing partner of the 1951 UN Refugee Convention.⁷⁸

2.2.2 State Domestication of the Cessation Clause

Kenyan law also provides for the cessation of refugee status. This is mainly because it offers asylum to large numbers of refugees thereby creating a need to domesticate the treaties in order to adequately manage refugees. To highlight what asylum states like Kenya have been doing in the area of refugee protection and cessation this study shall examine two countries namely Kenya and South Africa in relation to their Refugee Acts.

2.2.2.1 Kenya Refugee Act 2006

The Refugee Act 13 of 2006⁷⁹ was adopted in pursuit of domesticating the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention in Kenya. The treaties were domesticated under section 16 of the Refugees Act, which states that every refugee and every member of his family living

⁷⁸ *Supra*, note 64.

⁷⁹ The Kenya Refugee Act 2006, available at, http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/RefugeesAct_13of2006_01.pdf. Accessed on 21 November 2012.

in Kenya shall be entitled to rights and be subject to conventions to which Kenya is a party. The Constitution of Kenya in Article 2(6)⁸⁰ states that all treaties ratified by Kenya are applicable in Kenya and therefore serve as laws of Kenya. This has further strengthened the weight of refugee protection pursuant to Kenya's international obligations.

The Refugee Act 2006 provides for cessation of refugee status in section 5(a-g) which reflects the exact wording of the OAU Refugee Convention. It also adds an exemption clause to cessation on grounds of compelling reasons for non-return. This shows the lengths to which the country has gone to harmonise the treaties and incorporate them into Kenyan Law making all their provisions applicable in the country.

Though the Act states that RSD is handled by the Department of Refugee Affairs, in reality the process is being carried out by the UNHCR.⁸¹ This implies that the cessation process will also be carried out by UNHCR as the country does not have the resources to undertake the process. The likelihood that cessation will be implemented in accordance with the 1951 UN Refugee Convention is also quite high. It is also important to note that currently Kenya does not have a refugee policy particularly with respect to local integration therefore the durable solutions applicable to refugees are voluntary repatriation and resettlement to a third country.

⁸⁰ The Constitution of Kenya 2010, available at http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=OCB4QFjAA&url=http%3A%2F%2Fwww.parliament.go.ke%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D460%26Itemid&ei=q7WjUOaJLMGYhQebxYGYBQ&usg=AFQjCNF95LT6uUoMtD2a ghW0IW6WgK6PPg. Accessed on 14 November 2012.

⁸¹ Department of Refugee Affairs. Refugee Status Determination, available at http://www.refugees.go.ke/index.php?option=com_content&view=article&id=83&Itemid=115. Accessed on 21 November 2012.

2.2.2.2 The South African Refugee Act

South Africa, like Kenya, has also domesticated the treaties into the Refugee Act 130 of 1998.⁸² The Act became operative in 2000. This Act also provides for the cessation clause as per the 1951 UN Refugee Convention. This is unlike the Kenyan Refugee Act 2006 that harmonises the provisions in relation to cessation of the two treaties in its Act.

Furthermore, in contrast to Kenya, South Africa's RSD is conducted by the Government of South Africa through its Department of Home Affairs.⁸³ This Department determines the eligibility of an asylum seeker through provisions contained in the aforementioned treaties. This implies that in matters of cessation of refugee status it will also fall on the same department to determine and implement cessation. This may ensure compliance with all the relevant treaties instead of restricting it to one. The department has the leeway to undertake cessation using any and all of the treaty provisions on application of cessation, which may ensure that the best interests of the refugees are taken into account. This is especially true in exception clauses, which are vital in the effective implementation of cessation clauses (which the South African Refugees Act contains).

2.3 CATEGORIES OF THE CESSATION CLAUSE

The Cessation clause as described in the treaties and statutes captures two broad categories in its definition. The categories are as follows:

⁸² South African Refugee Act 1998, available at <http://www.home-affairs.gov.za/PDF/Acts/Refugees%20Act130.pdf>. Accessed on 14 November 2012.

⁸³ Department of Home Affairs. General information on refugees and asylum seekers, available at <http://www.home-affairs.gov.za/Refugee%20status%20&%20asylum.html>. Accessed on 21 November 2012.

2.3.1 Cessation based on change in personal circumstances

These clauses are provided under Article 1C (1-4) of the 1951 UN Refugee Convention and Article 1.4 (a-d) of the OAU Refugee Convention. According to these clauses, it is the conduct of the refugees that suggests cessation. To prove cessation under this category it is important that the elements of voluntariness, intent and effective protection of the refugee be carefully examined. There is a need to examine these elements critically in order to protect against unfounded termination of refugee status as a result of a mistake in a presumption of cessation of status through the individual's conduct.

This category has four main types of clauses that indicate cessation from the individual's conduct and actions. As the essence of this study is not centred on this clause, we shall briefly list and explain each clause.

The first clause under this heading is the clause relating to re-availment of national protection. According to the UNHCR Guidelines⁸⁴ on the cessation clause, this clause focuses on diplomatic protection by the country of nationality of the refugee. This relates to actions that a state is entitled to take *vis-à-vis* another state in order to obtain redress, in the event that the rights of one of its nationals has been violated or threatened by the latter state. Furthermore, if a refugee re-avails him or herself of such form of protection, then refugee status should come to an end. Illustrations of such kind of re-

⁸⁴ Para 6.

availment are the renewal of passports in the consular office among others. The re-availment must be voluntary for it to meet the criteria of cessation.

Second is the re-acquisition of the nationality of the refugee's country of origin. This clause⁸⁵ is applicable to a refugee who at some point lost the nationality of the country of origin in respect of which he or she had a well-founded fear of persecution. In the process of re-acquiring their nationality, the refugee must have acted out of his/her own free will.

Third is the acquisition of a new nationality. This clause⁸⁶ relates not to the normalisation of relations between the refugee and his country of origin but to the establishment of relations between the refugee and a new country. This could also be the country of asylum. For this clause to lead to cessation of refugee status a new nationality must have been acquired; this must be supported by evidence that the refugee has acquired the nationality of this new country.

Lastly, is the clause on voluntary re-establishment by the refugee of protection of his country of origin. This clause⁸⁷ entails that the refugee must have returned to his or her country of origin. Furthermore, re-establishment denotes not only return to the country of origin but also resettlement there. This means that the refugee must have returned to his country of origin voluntarily, settled down and resumed a normal life for a prolonged period of time, while at all material times considering that country as his country of permanent domicile.

⁸⁵ Para 12-13.

⁸⁶ Para 15.

⁸⁷ Paras 19-20.

2.3.2 Cessation of group-based refugee status

The last two clauses on cessation of refugee status contained in the 1951 UN Refugee Convention and the OAU Refugee Convention are similar. Sub-paragraph 5 of Article 1C of the 1951 UN Refugee Convention refers to refugees who have a nationality and sub-paragraph 6 refers to stateless refugees,⁸⁸ while the OAU Refugee Convention provides for group-based refugee status in Article 1.4(e). These clauses are further echoed in the Kenyan Refugee Act under section 5(e). In what follows, group-based refugee status, as it pertains to Rwandans residing in Kenya, shall be explored.

2.4 THE CEASED CIRCUMSTANCES CLAUSE

Notwithstanding the above discussion, this study shall restrict itself to Article 1C (5) of the 1951 UN Refugee Convention and Article 1.4(e) of the OAU Refugee Convention (the ceased circumstance clause) as well as the Kenya Refugee Act Section 5(e). The study is centred on Rwandan refugees who are not stateless but possess Rwandan nationality. These refugees are those who find themselves in the precarious situation that their refugee status is in the process of being revoked in light of a change in circumstances in Rwanda that has ostensibly removed the basis of the fear of persecution; that caused the refugees to flee from the country of origin in the early to mid-1990s.

According to the 1951 UN Refugee Convention, State parties to the 1951 UN Refugee Convention have the authority to invoke Article 1C (5), while UNHCR can declare that its competence ceases to apply with regard to persons falling

⁸⁸ Para 23.

within situations spelled out in the Statute.⁸⁹ According to Fitzpatrick and Bonoan, this legal distinction, however belies the extent of cooperation between the UNHCR and State parties in the interpretation and implementation of the ceased circumstances provisions. Some states like Kenya are assisted by UNHCR in the supervision of refugee-related matters, such as RSD, while others have their own governmental departments handling refugee issues. UNHCR has recommended that it be appropriately involved in the process pursuant to its supervisory role in the implementation of the Convention provided in Article 35 of the 1951 UN Refugee Convention. In states such as South Africa that handle refugee related issues on their own, UNHCR can assist by evaluating the impact of changes in the country of origin or in advising on the implications of cessation of refugee status in relation to large groups of refugees in their territory.

For the successful implementation of the ceased circumstances clause, it is essential that state parties work together with UNHCR so as to fully understand how to go about implementation of the clause.

There is a need to discover the qualifications governing the invocation of the ceased circumstances clause in order to understand how it is implemented by State parties and UNHCR.

⁸⁹ Joan Fitzpatrick and Rafael Bonoan. *Cessation of Refugee Protection*, Cambridge University Press, June 2003, available at <http://www.unhcr.org/refworld/docid/470a33bc0.html>. Accessed on 14 November 2012.

2.4.1 Interpreting the Ceased Circumstances Clause

UNHCR and State parties work together in the application and implementation of the cessation clause as discussed above. They have subsequently elaborated on the concepts of implementation and declaration of the cessation clause through a comprehensive set of Guidelines. Through this elaboration they have developed a set of standards for ascertaining whether events in a country of origin may be sufficient to warrant the application of Article 1C(5) and 1.4 (e) of the 1951 UN Refugee Convention and OAU Refugee Convention, respectively.

These Guidelines lay emphasis on the extent and durability of developments in the country of origin as key components of evaluating fundamental change. The standards informing the change in circumstances will be discussed below.

2.4.1.1 Assessment of fundamental change

For the ceased circumstance clause to be applied there must be a fundamental change in the country of origin. The description of what determines a fundamental change has not been well elaborated in the Guidelines and specifically the treaties. It is thus notable that the process of assessing changed circumstances remains underdeveloped. The quantum and relevance of evidence of changed conditions are not specified with precision.⁹⁰ In an effort to clarify the changed

⁹⁰ Para 46.

circumstances aspect, the Executive Committee Conclusion No. 69 (XLIII)⁹¹ states that:

States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.

The 1997 Note on the Cessation clauses⁹² confirms the comments made by the Executive Committee, adding that certain changes reflect fundamental changes that may alleviate the fear of persecution causing the refugees to flee from their country of origin. These changes are democratic elections, significant reforms to the legal and social structure, amnesties, repeal of oppressive laws, basic physical security, dismantling of repressive security forces, general respect for human rights, with special regard for the right to life, freedom of expression, assembly and association, a functioning governing authority and sufficient infrastructure to support basic livelihood. In essence, a fundamental change involves developments on governance and human rights that result in a complete political transformation of a country of origin.⁹³

⁹¹ The Executive Committee Conclusions No. 69 (XLIII), available at <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf>. Accessed on 22 November 2012.

⁹² UN High Commissioner for Refugees. Note on Cessation Clauses, 30 May 1997, EC/47/SC/CRP.30, available at <http://www.unhcr.org/refworld/docid/47dfaf1d.html>. Accessed on 22 November 2012.

⁹³ Executive Committee of the High Commissioner's Programme. Sub-Committee of the Whole on International Protection, 'Discussion Note on the Application of the "Ceased Circumstances" Cessation Clause in the 1951 Convention'; UN doc. EC/SCP/1992/CRP.1, para 11; 20 December 1991.

The Executive Conclusion No. 69 and the Guidelines allude to the UNHCR's supervisory role under Article 35 of the 1951 UN Refugee Convention in discussion of the evaluation of changed conditions; but they do not clearly state what is to happen when the asylum states assessment diverges from UNHCR's.⁹⁴ The treaties fail to describe how state parties like Kenya are to conduct assessments of the changed circumstances in the country of origin. As they are the implementing parties, they should be the ones to carry out the assessments as UNHCR's role is envisaged to be only supervisory. However, practice proves otherwise, as UNHCR in more cases than one, plays both the implementing and supervisory role which goes against the set standards of the treaties. An illustration of the above is Kenya which still relies heavily on UNHCR in the coordination and supervision of refugee issues.

It is thus necessary to examine the change over a period of time to ensure that the change is permanent and thus the safety of the returnees will not be compromised. This then brings forth durability in the assessment of the fundamental changes.

2.4.1.2 Assessment of durability of the change

The changes must be durable and a strict approach ought to be applied and maintained in deciding whether or not the changes qualify as being durable. A country that was once in turmoil may have moments of peace and stability but this is not enough ground to justify the application of the

⁹⁴ Para 45.

cessation clause as the peace and stability must be consistent and monitored over a substantial period of time.

The durability of the change will be reflected in the way in which the changes occurred, the nature of the changes, the overall political climate of the country, the effects of the change on the present and previous government (if there was a change of government), the ability of the regime in governance, in fortifying the changes and in restoration of stability in the country.⁹⁵ UNHCR in their supervisory role has suggested a period in which these fundamental changes ought to be examined. It has advocated a minimum waiting period of twelve to eighteen months before assessing developments in a country of origin.⁹⁶ The practice of some State parties is consistent with this recommendation, an example of which would be the Swiss Government, which observes a minimum of a two-year waiting period⁹⁷ before assessment of changes in the country of origin. However, while this reflects the position in a developed state, the practice in developing states like Kenya is still not clear.

In conclusion, duration involves the period; type of conflict; and the subsequent rebuilding period within the country of origin. Durability obviously varies from country to country.

2.4.2 Exceptions to the Ceased Circumstances Clause

When countries of origin experience fundamental changes, refugees may themselves eagerly embrace an opportunity to return home. However, not all

⁹⁵ *Supra*, note 92.

⁹⁶ *Ibid.*

⁹⁷ *Ibid*, note 88.

refugees will share in this excitement. Refugees who feel that their safety will be compromised on their return home have a right to retain their status in the country of asylum. These are termed as exceptions to the cessation clauses.

These exceptions are captured in two categories. To start with are the refugees whose personal risk of persecution has not yet ceased, despite the general changes in the country of origin.⁹⁸ Secondly, there are refugees who have 'compelling reasons' arising out of previous persecution that make it impossible for the refugees to return home.⁹⁹ The term compelling reasons describes the justifiable reasons provided by the refugee as to why they should not be subject to the ceased circumstances clause.

Refugees subject to cessation may be eligible for protection against involuntary repatriation under human rights treaties, and states must provide them leave to remain, preferably with their refugee status.¹⁰⁰ Certain humanitarian claims may be accommodated by states of refuge, including especially vulnerable persons, persons who have developed close family ties in the state of refuge¹⁰¹ and persons who would suffer serious economic harm

⁹⁸ UNHCR.Note on the Principle of Non-Refoulement, November 1997, available at <http://www.unhcr.org/refworld/docid/438c6d972.html>. Accessed 19 November 2012.

⁹⁹ *Ibid.*

¹⁰⁰ Prominent among the human rights bars to *refoulement* or provisions that may prevent deportation are Art. 3 of the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UN doc.A/RES/39/46; Arts.3 and 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5; Arts.7 and 17 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171; and Arts.5 and 11 of the 1969 American Convention on Human Rights, OAS Treaty Series No. 35.

¹⁰¹ In some cases, deportation of persons with close family ties in the state of refuge may violate human rights treaties, such as Art.8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such persons fall within the third category, and states have a legal obligation to permit them to remain. Their cases are not 'humanitarian' in the sense that states have discretion to accommodate them, or not. The European Commission's 'Draft Directive on Minimum Standards for Qualification and Status as Refugees' (above n. 36), has proposed to extend to persons eligible for 'subsidiary protection' under human rights treaties minimum standards of treatment that are similar to the treatment of recognized refugees, although with shorter residence permits and

if repatriated.¹⁰² Accordingly, Executive Committee Conclusion No. 69 provides for exceptions for two groups: (i) 'persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country'; and (ii) 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'.¹⁰³ The UNHCR Statute refers to persons who present grounds other than 'personal convenience' for continuing to refuse repatriation.

It is paramount that all refugees to whom the ceased circumstance clause applies ought to be informed of the existence of exemptions and how they can apply for it. In analysis of the reasons given by the refugees on why they need to be exempted, fair process ought to be undertaken in the application process.

2.4.2.1 Fair Process

To ensure that all refugees who claim exemption are adequately considered, the implementing state or authority ought to conduct the exemption process fairly. To ensure this, the refugee is allowed to produce any evidence that he or she may feel sufficient to support his case. He will also be required to give testimony as to why the clause ought not to be applied to him. This testimony can be supported by the testimony of friends and family in assisting the refugee to build a strong case for

delayed access to employment, employment related training, and integration measures (Arts. 21, 24, and 31 of the Draft Directive).

¹⁰² *Ibid*, note 93.

¹⁰³ *Ibid*.

exemption. The minimum requirements of fair process in cessation cases are:

notice to appear, provided in a language understandable by the refugee; a neutral decision maker; a hearing or interview at which the refugee may present evidence of continued eligibility for refugee status and rebut or explain evidence that one of the cessation grounds applies; interpretation during the interview, if necessary; an opportunity to seek either a continuation of refugee status or alternative relief where compelling reasons exist to avoid repatriation or where the refugee qualifies for another lawful status; and the possibility of appeal'.¹⁰⁴

The burden of proof must rest with the asylum state authorities (in Kenya it would be the Department of Refugee Affairs) where the cessation clauses are applied to an individually recognized refugee.¹⁰⁵ It is stated that the allocation of this burden is justified because of the refugee's settled expectations of protection, and because the authorities may have greater access to relevant information, especially in the ceased circumstances cases.¹⁰⁶ The notice of intent by the asylum states should be communicated to the refugees individually to enable them to become aware of the intention of the state to invoke the cessation clause. In Kenya, this would most likely be done by UNHCR on behalf of the state which negates the principle of having the asylum states decide on their own whether the refugee reasons suffice.

The Draft Council Directive on Minimum Standards for Asylum Procedures, presented in September 2000 by the European Commission,

¹⁰⁴ *Supra*, note 98.

¹⁰⁵ GS Goodwin-Gill. *The Refugee in International Law*, 2nd ed, Clarendon, Oxford, 1996; p 87.

¹⁰⁶ *Supra*, note 64.

suggests that procedural minima may be derogated from in cases (among others of withdrawal (cessation) of refugee status) where it is impossible for the determining authority to comply.¹⁰⁷ The exercise of exemption clauses through fair process guarantee that all refugees benefit from the protection of the right to non-refoulement.

2.5 CASE LAW INTERPRETATIONS OF THE CEASED CIRCUMSTANCES

CLAUSE

Few courts have dealt with issues in relation to the ceased circumstances clause and the interpretation advanced by UNHCR on the same. Those who have dealt with issues on cessation have mainly encountered issues in relation to exemptions from the clause.

The High Court of Australia¹⁰⁸ in *The Minister for Immigration and Multicultural Affairs v QAAH*¹⁰⁹ found that when determining whether a fear of persecution still persists, the refugee has the burden of proving a continued fear of persecution. This reaffirmed the UNHCR position that the refugee has the burden of proof in showing that they still continued to have a well-founded fear of persecution. The court in its interpretation examined the 1951 UN Refugee Convention as well as domestic law to require Australia to extend protection only to persons who

¹⁰⁷ Commission of the European Communities, 'Draft Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', COM(2000) 578 final, 20 Sept. 2000, Art. 26(3).

¹⁰⁸ Marissa Elizabeth Cwik. Forced to flee and forced to repatriate? How the cessation clause of Article 1C(5) and (6) of the 1951 UN Refugee Convention operates in international law and practice, *Vanderbilt Journal of Transnational Law*; Vol 44.71,p 715, 2011, available at <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Cwik-CR.pdf>. Accessed on 14 November 2012.

¹⁰⁹ *Supra*, note 28. Kneebone and O'Sullivan, *supra* note 11, at 514 (citing *Minister of Immigration & Multicultural & Indigenous Affairs v QAAH* (2006) 231 CLR 1 (Austl)).

continued to meet the definition set forth in Article 1(A)(2) governing the initial determination of refugee status. This implies that refugee status evaluation and cessation determination would involve the same evidentiary burden placed on the refugee to prove his case. The court further rejected the affirmative burden that UNHCR places on states to investigate a change in circumstances in the country of origin.

Another country that shares a similar interpretation on the exceptions of the clause is Germany. In 2008, the German Federal Administrative Court¹¹⁰ withdrew refugee status from an individual because the court determined that the fear of persecution had ceased. The court further rejected the broad definition of protection that was advanced by UNHCR stating that countries ought to investigate the fundamental and durable changes in the country of origin. The European Court of Justice¹¹¹ in an advisory opinion on this case among others set a more inclusive understanding of protection. It stated that when deciding whether a refugee should continue to receive protection, the host country must determine whether the country of origin has a functioning legal system and whether the refugee shall have access to that system and the basic human rights of the country of origin. These impose a burden on the host country in determination of these facts before ascertaining whether a cessation clause is applicable to the particular individual. These decisions are contradictory in the sense that the courts in both states felt that the burden of examination of fundamental changes need not be placed upon the country of asylum. However, the European Court of Justice felt that the country of asylum ought to undertake

¹¹⁰ *Supra*, note 105.

¹¹¹ *Ibid.*

examination of these changes in the country of origin. This suggests that asylum states do not want the responsibility of examination of fundamental changes, thereby leaving the responsibility on UNHCR to advise on whether to invoke the clause or not. Whether this proves detrimental to the refugee is to be determined by further research.

The South African High Court has also attempted to invoke exception to the cessation clause in the case of *RM v The Refugee Appeals Board & 2 others*.¹¹² In this case, the applicant had sought refugee status and had made his application of the same. The applicant was Angolan. His application was rejected on the fact that Angola was now safe for return and the majority of Angolan refugees had already voluntarily repatriated to Angola as the war had ended. It was deemed that he had no premise to base his application for refugee status. He appealed the decision to the Refugee Appeals Board and the same decision was upheld denying him refugee status. He made a final appeal to the High Court of South Africa because his application for refugee status was not founded on the change in the circumstances of Angola but on the fact that he had compelling reasons that prevented him from returning home. The applicant stated that the reason for his flight from Angola was based on the ordeal he went through where he and his uncle were made to consume the body parts of his father after he was killed by UNITA for joining the rebel faction MPLA. He reported the matter to the police who refused to believe him and as a result he soon became a target of the rebels who began tracking him for the sins committed by his father during the war. He thus fled to South Africa seeking

¹¹² Unreported case, Case number 16491/06 TPD (2007) High Court of South Africa, available at <http://www.refugeecaselaw.org/CaseAdditionalInfo.aspx?caseid=1159>. Accessed on 17 November 2012.

asylum. He was denied refugee status on the basis that the war in Angola had ceased. On appeal to the High Court, Patel J, ruled in favour of the applicant stating that the applicant had faced a significant amount of trauma while in Angola, resulting in post-traumatic stress disorder and thus returning him to Angola would further worsen his mental and physical health, compounded by the fact that he had not yet recovered from the ordeal he went through when the country was at war. This was evidenced by the amount of psychiatric help he had been receiving upon his entry to South Africa (which treatment he was not likely to receive in Angola). The court further added that the South African Refugee Act upheld the principle of non-refoulement and thus protected refugees from return to the country of origin where they would continue to suffer from a well-founded fear of persecution. The applicant's fear in this case was genuine and thus the need to accord him refugee status was evident.

The human rights situation in the country of origin pertaining to an application for refugee status was examined in the case of *Tantoush v The Refugee Appeals Board and 5 Others*.¹¹³ In this case the applicant was of Libyan nationality but had gained entry to South Africa while on route to Australia, but was holding a fake South African passport. On arrival in South Africa, he was arrested for possessing a fraudulent passport and it was then that he expressed his desire to seek asylum. He underwent RSD and was found ineligible for refugee status. He appealed the decision to the Refugee Appeals Board where his application was unsuccessful. The Refugee Appeals Board noted the dishonest history of the applicant due to lies he had told and the acquisition and possession of a

¹¹³ Unreported case No. 13182/06 TPD (2007) High Court of South Africa, available at <http://www.saflii.org/za/cases/ZAGPHC/2007/191.html>. Accessed on 4 May 2013.

forged passport and stated that after leaving Libya the applicant had resided in Saudi Arabia and Pakistan where he would have made his application for asylum if what he truly sought was asylum. However, on appeal to the High Court, Murphy J, ruled in favour of the applicant. He stated that while the applicant was in Libya he had participated in a number of activities that was opposed to the government of Libya and as a result, his colleague was arrested and killed in prison because of the activities they participated in against the government. Significantly, the court took judicial notice of the human rights situation in Libya and held that returning him to Libya would be tantamount to returning the applicant to face inevitable persecution as the Libyan government had requested that he be extradited to Libya on fabricated robbery charges. Thus, in light of this factor, he had fulfilled the qualifications necessary for conferment of refugee status.

The political situation in Rwanda has also been a base upon which courts have chosen to confer refugee status on individuals who the government of Rwanda sought to have repatriated to the country to face criminal charges. A unique illustration of this is the case of General Faustin Nyamwasa¹¹⁴(a former RPF general and former Minister of the Rwandan Government)who was living in South Africa when the Government of Rwanda sought his extradition to Rwanda to face charges of corruption, embezzlement and terrorism. The applicant sought asylum in South Africa after an attempted assassination believed to be by the Rwandan Government. His application for refugee status was granted.

¹¹⁴ *Consortium for Refugee and Migrants in South Africa v President of the Republic of South Africa and Faustin Kayumba Nyamwase and 10 Others*, South African Refugee Case, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Briefing-Paper.pdf> . Accessed on 4 May 2013.

However, the case against his conferment of refugee status is mainly grounded on the fact that he cannot be accorded refugee status because he is accused of war crimes. The Consortium for Refugees and Migrants in South Africa made an application to the High Court of South Africa under judicial review to have the refugee status conferred on Nyamwasa revoked. This was mainly on the grounds that the applicant is wanted for crimes against humanity and therefore cannot be accorded refugee status as people who have committed crimes against humanity are barred from conferment of refugee status by both the 1951 UN Refugee Convention and the OAU Conventions in Articles 1(F) and 1(5) respectively. The High Court must decide whether to revoke refugee status in fulfilment of the aforementioned articles as well as South African refugee law or whether there is an exception to these provisions, such as the competing principle of non refoulement which is in question in this case.

In addition to the aforementioned case, is the case of Rafiki Nsengiyumva,¹¹⁵ where on 16 December 2012 the Paris Appeals Court issued a ruling against the Rwandan government in its case against the former Public Works Minister. Rafiki was detained in France following an INTERPOL notice initiated by the Rwandan government. French Courts had cleared him on 28 September 2011 of the accusations levelled against him by the Government of Rwanda for participating and leading the 1994 Rwandan massacres. The court was of the view that the Rwandan Government was not genuine in its application to have the accused

¹¹⁵ Rwandan Government Loses case Against Rafiki Muhindo Hyacinth Nsengiyumva. Afro American Network Reported on 19 December 2012, available at <http://www.afroamerica.net/AfricaGL/2012/12/19/rwanda-government-loses-case-against-rafiki-muhindo-hyacinthe-nsengiyumva/>. Accessed on 4 May 2013.

returned to face the aforementioned charges, as he was likely to suffer persecution upon return.

Case law has not expounded much on the burden of states to examine the changes in the country of origin. Furthermore, its focus seems to be limited to examining the clause from an individual point of view, neglecting the group based approach. The cases examined above are from developed countries. Efforts to find cases from developing states like Kenya have proven futile as much of the case law is restricted to RSD and not cessation of refugee status.

2.6 THE CEASED CIRCUMSTANCES CLAUSE AND HUMAN RIGHTS

The Executive Committee Conclusion No. 69 states that the general human rights situation ought to be assessed prior to invoking the clause. The treaties as well as the Guidelines fail to determine how this assessment is to be conducted. It fails to state whether the assessment will be conducted by local or international human rights groups. It also fails to elaborate on what is meant by “the general human rights situation in the country of origin”. The lack of emphasis and elaboration on human rights is prejudicial to refugees as returning refugees to a country of origin that suffers from human rights violations opens them up to further persecution upon return.

Ignoring the human rights situation in the country of origin negates the refugees’ right to non-refoulement. There is a need for guidance on the analysis of the human rights situation in the country of origin. This enables us to understand who is tasked with the examination of the rights situation and further the extent to

which human rights violations can affect the declaration of a ceased circumstance clause. The lack of elaboration on this is potentially fatal to refugees who are forced to return home.

2.7 EFFECTS OF INVOKING THE CEASED CIRCUMSTANCE CLAUSE

Once the ceased circumstances clause is applied, refugee status ceases. This means that refugees residing in asylum states like Kenya have no status and thus must return home. Should they choose to remain in the country of asylum, they would be deemed illegal immigrants. To prevent this from happening they have no choice but to return home, or be locally integrated in the country of asylum. Could this then imply that forced repatriation takes effect? Forced repatriation offers a refugee no choice but to return home. Some countries of asylum choose to close refugee camps and/or offer no food rations, among other services to the refugees in a bid to force their return home. This has been evidenced in Tanzania in relation to Burundian refugees.¹¹⁶ The ceased circumstances clause chooses to term the return home as voluntary repatriation, however whether the return is voluntary is debatable, especially in the manner in which it is applied.

2.8 CONCLUSION

The cessation clause through the ceased circumstances clause serves to assist repatriation of refugees to their country of origin. From the above analysis it is clear that the clause is theoretical in nature, rendering its practical implementation and application highly problematic as it fails to detail how asylum

¹¹⁶ IRIN Africa. Burundi, Refugee Camps in Tanzania to close, available at <http://www.irinnews.org/Report/84290/BURUNDI-Refugee-camps-in-Tanzania-to-close>. Accessed on 14 November 2012.

states like Kenya can investigate the fundamental changes in the country of origin. It speculates as to what factors the countries may look into but lays great emphasis on political stability without going into detail as to what actually indicates political stability. Applicability of the clause fails to elaborate sufficiently on the link between the cessation clause and protection of human rights. There is thus a need for further guidance on how the clause ought to be analysed and implemented, allocating roles to each party.

CHAPTER THREE

Rwanda

3.1 INTRODUCTION

Rwanda is most commonly remembered for the genocide that resulted in the massacre of thousands of Rwandans in the early nineties. This massacre not only led to the deaths of many Rwandans but further led to Rwandan refugees fleeing to neighbouring states seeking sanctuary from persecution and death. Though many believe that the genocide was the first massacre of Rwandans, few are aware that the killings had been taking place since the country struggled for independence in the late 1950's.¹¹⁷

This study seeks to explore Rwanda's history in an effort to understand the Rwandan refugee crisis. Furthermore, it hopes to provide an account of what has taken place in the country since the end of the genocide in 1994. The chapter concludes with an analysis of Rwanda's past and present, thereby providing an opportunity for discussion on whether changes made after the genocide qualify for invocation of the ceased circumstances clause in relation to Rwandan refugees residing in Kenya.

¹¹⁷ Idi T. Gaparayi. Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the *Gacaca* Tribunals, 2001, *African Human Rights Law Journal*, Volume 1. Pg 132-143; available on: http://www.chr.up.ac.za/images/files/publications/ahrlj/ahrlj_vol01_no01_2001.pdf. Accessed on 11 June 2012.

3.2 PRE-COLONIAL RWANDA

During the pre-colonial era, Rwanda was mainly inhabited by three tribes.¹¹⁸ These tribes comprised of the Twa, Hutu and Tutsi. According to statistics, the Twa make up almost 1% of the population. They are hunter-gatherers and are believed to be the first occupants of the country. The Hutu then occupied the land and pushed the Twa deeper into the forests. Their arrival is estimated at around the 5th to the 11th century¹¹⁹ as the exact timeline of their arrival has not been fully established. They were mainly agriculturalists whose social structure was based on the clan system. Each clan was headed by the *Bahinza* (King) who ruled over the clan.¹²⁰

It is speculated that the Tutsi migrated to Rwanda in the 14th century¹²¹ and were mainly cattle owners. They took control over the land and were led by a king known as *Mwami*. The Tutsi and Hutu interacted in the beginning using a form of barter trade known as *Ubahake*¹²² which entailed the use of cattle by the Hutu in exchange for personal and military service. The apex of the class system soon changed with the Tutsi taking leadership control over the Hutu. In the middle of the 16th century, the Tutsi king was able to centralize the leadership and had

¹¹⁸ The University of Pennsylvania. History of the Rwandan Genocide, *East Africa Learning Encyclopaedia*, available at www.africa.upenn.edu/NEH/rwhistory.htm. Accessed on 11 June, 2012.

¹¹⁹ Pre-colonial Rwanda, Encyclopaedia Britannica, available at <http://www.britannica.com/EBchecked/topic/514402/Rwanda/274457/Pre-colonial-Rwanda>. Accessed on 11 June 2012.

¹²⁰ The Ministry of Education, Science, Technology and Scientific Research. The teaching of the History of Rwanda, A Participatory Approach, available at <http://www.law.berkeley.edu/HRCweb/pdfs/Rwanda-Curriculum-English1.pdf>. Accessed on 11 June 2012.

¹²¹ *Supra*, note 119.

¹²² *Supra*, note 118.

overall power over all the chiefs. In the early 19th century, *MwamiKigenIV* established the borders that were in place when the Germans arrived in 1894.¹²³

3.3 COLONIAL RWANDA

In the mid 1800's,¹²⁴ the western powers established colonies in Africa for the sole purpose of retrieving raw materials, providing cheap labour and new markets for the countries that were undergoing the infamous industrial revolution. The competition for control over the colonies was immense and thus a conference was held to set the rules of colonization of African states. Rwanda was one of the countries that were colonised in the scramble for Africa.

3.3.1 The Berlin Conference and German Colonial Rule in Rwanda

In 1884, leaders from 14 colonial powers¹²⁵ including the United States, Belgium, Portugal, Germany and Spain held the Berlin Conference, where they divided the continent of Africa into 50 states which they claimed for themselves. This division eventually led to the creation of the map of Africa¹²⁶ and the region demarcated as Rwanda was occupied by Germany. Upon arrival in 1890, the Germans found in place a centralized system of Government and thus ruled indirectly.¹²⁷ They conducted military operations against the Hutu chiefs that were not under the Tutsi *Mwami's* control to ensure that they were all under the control of the Tutsi. It was around this time

¹²³ *Ibid.*

¹²⁴ The American University, Washington College of Law, Centre for Human Rights and Humanitarian Law. The Rwandan Commemoration Project, Genocide in our Time, available at www.wacl.american.edu/humright/center/rwanda/jigsaw1.pdf. Accessed on 11 June 2012.

¹²⁵ Berlin Conference 1884-85. World Model UN Conference 2012, Background, available at www.worldmun.org/upload/BC.pdf. Accessed on 11 June 2012.

¹²⁶ Maps, American Radio Works, available at <http://www.americanradioworks.org>. Accessed on 11 June, 2012.

¹²⁷ *Ibid.*

that the first missionaries arrived in Rwanda. The White Fathers established missions and schools as early as 1903 and this led to the growth of the Catholic Church and the spread of Christianity throughout the country.¹²⁸

3.3.2 The Belgian Colonial Rule in Rwanda

During the First World War, the Belgians gained control of Rwanda and thereafter the League of Nations mandated that Rwanda be placed under Belgian supervision on 23 August 1923. The Belgians curtailed the power of the *Mwami* and integrated Rwandans into the political process. This essentially meant that they would have political representation in Government. Sources indicate that the Belgians like the Germans had created a strict system of racial discrimination.¹²⁹ They stated that the Tutsi were superior as they were more “white” looking and thus placed them in positions of power over the other tribes.¹³⁰ The Hutu, who made up approximately 85% of the total population of the indigenous tribes, were denied higher education, land ownership and positions in Government.¹³¹

The Catholic Church also played a key role in advancing ethnicity in the country during the Belgian rule.¹³² The Catholic Church during this period

¹²⁸ Silvia Cristofori. The Gift and the Theft: An Economic-Political Interpretation of Rwandan Missionary Diaries of White Father, Dossier, 1990-1910, available at http://www.storicamente.org/07_dossier/religion_capitalism_africa/cristofori.htm. Accessed on 11 June 2012.

¹²⁹ Rwanda. Belgian Colonization, available at <http://emileelime.tripod.com/id4.html>. Accessed on 10 June 2012.

¹³⁰ Frank Rusagara. Rwanda, The Epicenter of the Great Lakes Conflict System, available at <http://www.nai.uu.se/ecas-4/panels/41-60/panel-48/Frank-Rusagara-Full-paper.pdf>. Assessed on 10 June 2012.

¹³¹ *Ibid.*

¹³² Rwanda: Genocide Report on Rwanda; African Union; available at http://www.africa-union.org/official_documents/reports/report_rowanda_genocide.pdf. Accessed on 10 June 2012. During the Seventh ordinary session of the central organ of the OAU mechanism for conflict prevention, management and resolution at ministerial level held on 20-21 November 1997, in the secretary general's report (the Secretary General at the time was MelesZenawi) he stated the need for the establishment of an international panel of eminent personalities to investigate the genocide in Rwanda and the surrounding events that led to it. This request was accepted by the union and a

functioned as predominantly the country's state Church, evidenced in the following remarks by Omaar and de Waal:

Much of the elaborate Hamitic ideology was simply invented by the Catholic White Fathers; missionaries who wrote what later became the established version of Rwanda's history to conform to their essentially racist views.¹³³

The White Fathers were in charge of education and thus with the full backing of the Belgian Government were able to establish doctrines pertaining to their racist ideologies about Africans (particularly Bantus).¹³⁴ They established the differences between the Hutus and Tutsis and thus were able to teach the children these differences, which instilled the feelings of animosity between the two ethnic groups and established the notion of superiority of the Tutsi over the Hutu. The Belgians and the Catholic priests used the ethnic card to gain political mileage over the indigenous tribes and thus were able to polarize the society for many years to come.¹³⁵

Towards the end of the colonial period, the Rwandan Society was hierarchical, with the whites known as the *Bazungu* on top – a tiny cluster of Belgian Administrators; and Catholic missionaries whose power and control were undisputed. Below them were intermediaries, a very small group of

panel was established under the chairmanship of H.E Sir Quett Ketumile Joni Masire who was the former president of Botswana. He was assisted by General Ahmadou Toumani Touré (former president of Mali), Lisbet Palme, Ellen Johnson Sirleaf, Justice PN Bhagwati, Senator Hocine Djoundi and Ambassador Stephen Lewis. The report was published in July 2000 with recommendations on how to prevent a future genocide, among others regarding response to ethnic tensions.

¹³³ Rakiya Omaar and Alex de Waal. "Genocide in Rwanda: US Complicity by Silence," *Covert Action Quarterly*, 52 (Spring 1995), p 6.

¹³⁴ Jay James Carney. From Democratization to Ethnic Revolution, Catholic Politics in Rwanda, 1950-1962; 2011; available at http://aladinrc.wrlc.org/bitstream/handle/1961/9713/Carney_cua_0043A_10206...?sequence=1. Accessed on 10 June 2012.

¹³⁵ *Ibid.*

Tutsi drawn from two clans who monopolized most of the opportunities provided by indirect rule.¹³⁶The Tutsi therefore had control over the other tribes. The Tutsi tribe was favoured by the Belgian colonial Government but reports indicate that only two Tutsi clans were privileged by colonial rule.¹³⁷Below the indigenous Tutsi were virtually all the Hutus and even some Tutsi who were relegated to the role of slaves or serfs.¹³⁸

In 1952 economic changes were implemented which led to Hutus expressing dissatisfaction over the discrimination resulting in various forms of civil unrest.¹³⁹The colonial Government, in a bid to curtail the unrest, tried to transfer the power to the Hutu, however this was unsuccessful. Subsequently, the Hutu in an effort to speak with one voice against their dissatisfaction with colonial rule drafted the *Bahutu* Manifesto of 1957.¹⁴⁰The manifesto was against the dual colonialism of the Belgians and the Tutsi. The central passages of the manifesto highlighted that:

the problem is basically that of the monopoly of one race, the Tutsi... which condemns the desperate Hutu to be forever subaltern workers.¹⁴¹

¹³⁶ *Supra*, note 132.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Supra*, note 124. The Belgians implemented the Ten-Year Development Plan, a series of broad socio-economic reforms in order to promote political progress and social stability. However this programme eventually granted the Tutsi minority political, economic and social domination over the Hutu majority.

¹⁴⁰ *Ibid.*

¹⁴¹ *Supra*, note 132.

The manifesto displayed a lot of bitterness on the part of the Hutu against the Tutsi as well as the Belgians, indicating that no deal could be brokered between the colonialists and the Hutu.

3.3.3 The road to independence

The road to independence in Rwanda can essentially be summarised in the following quote:

In 1959, after seven years of escalating civil unrest between the Hutu and the Tutsi, the Belgian Administrators declared a State of Emergency and called in ground forces and paratroopers from Congo to restore order. In the same year, Administrators called for new election of communal councils in hopes of diffusing the imbalance of the Tutsi power. With the support of the UN General Assembly, the Trusteeship Council recommended that the future success of the region depended on the formation of a single united Rwanda-Burundi State.¹⁴²

On 17 June 1962 the General Assembly voted to terminate the Belgian Trusteeship Agreement, and subsequently on 1 July 1962 Rwanda separated from Burundi and attained full independence. Grégoire Kayibanda leader of the PARMEHUTU (*Parti du Mouvement de l'Emancipation Hutu* (Hutu Emancipation Movement Party)), became President. The President's ethnic background was Hutu, symbolising an end to Tutsi domination in government.¹⁴³

¹⁴² *Ibid.*

¹⁴³ Gerard Prunier. *The Rwanda Crisis, History of Genocide*, New York: Columbia Press; p 65.

3.4 POST INDEPENDENCE RWANDA

3.4.1 The first Republic (1962-1973)

In 1962 a new era reigned over the country. The Hutu believed that Kayibanda's rise to power would ensure that the injustices against their people would be addressed.¹⁴⁴ Accordingly, the president excluded the Tutsi from all positions of leadership and limited their access to education.¹⁴⁵ He concentrated all political and economic power in the hands of a few Hutu as elites from the central region of the country.

In 1963, the Tutsi invaded Rwanda from Burundi but they were unsuccessful. This angered the Hutu and thus in retaliation, they massacred over 12 000 Tutsi while countless others fled from the country.¹⁴⁶ They then began to constantly refer to the Tutsi as *Inyenzi* (cockroaches) meaning that they had to be exterminated as they were after the downfall of the Hutu.¹⁴⁷

Before the incursions ceased, 20 000 Tutsi had been killed, and another 300 000 had fled to the Congo, Burundi, Uganda and to what was then called Tanganyika (present-day Tanzania).¹⁴⁸ Hutu Government officials (senior officials were all Hutu) began accusing all Tutsi of being accomplices of the raiders. All Tutsi, in any event, were considered foreign invaders and, accordingly, all became fair game for the slaughters of those years. This

¹⁴⁴ Rwanda, Tragic Land of Dual Nationalism, available at <http://www.press.umich.edu/pdf/0472098985-ch4.pdf>. Accessed on 21 June 2012.

¹⁴⁵ John F. Clark. The Rwandan Genocide, The Rwanda Gateway, available at <http://www.rwandagateway.org/spip.php?article197>. Accessed on 21 June 2012.

¹⁴⁶ *Supra*, note 132.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

included women and children.¹⁴⁹ This captured in essence the defining anger that would lead to the genocide many years later. These massacres captured the attention of the world and were condemned as genocide by such prominent western dissidents as philosophers Bertrand Russell in England and Jean-Paul Sartre in France.¹⁵⁰

The PARMEHUTU claimed that they were a ruling party that embraced democracy on a notion of ‘*rubandanyamwinshi*’, meaning majority people.¹⁵¹ In this Government, the Tutsi were banned from the upper reaches of the Government and the military. The ethnicity cards that had been introduced earlier by the Belgians were maintained to the advantage of the Hutu who could now identify the Tutsi.¹⁵² Rwanda subsequently became a one-party state in 1965.¹⁵³ In 1969, Kayibanda was re-elected to a second four year term.

The identification system formed the basis of the strict quota system, which, in turn, determined such key matters as school enrolments and civic service hiring.¹⁵⁴ The Hutu themselves were divided,

the Hutu of the north and the north west always saw themselves, above all as different from and better than the rest of their kin, they developed a mythology of separateness based on their incorporation into the Rwandan state system.¹⁵⁵

¹⁴⁹ *Ibid.*

¹⁵⁰ *Supra*; note 143.

¹⁵¹ Mahmood Mamdani. *When Victims Became Killers; Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press, Princeton and Oxford, 2001, p 102.

¹⁵² *Ibid.*

¹⁵³ *Supra*, note 132.

¹⁵⁴ *Supra*, note 132.

By 1972, years after the formal declaration of independence, northern Hutu leaders had grown frustrated by the monopoly of power and Government exercised by Kayibanda and his party.¹⁵⁶ The President wanted to continue his stronghold on power in order to divert the frustration of the people from his Government therefore he began to emphasize ethnic division once more and called for Hutu solidarity at the expense of the Tutsi.

Kayibanda's presidency ended in 1973, when he was overthrown in a bloodless *coup d'état* led by Major General Juvénal Habyarimana.¹⁵⁷ Habyarimana was a serious military officer who seized power with a promise to restore order and national unity.

3.4.2 The Second Republic (1973-1994)

When Habyarimana seized power, he suspended all political activities and proclaimed a military regime referred to as the second Republic.¹⁵⁸ When the *coup* took place, the Constitution of 1962 was partially suspended, and the National Assembly dissolved.¹⁵⁹ The Tutsi welcomed this rule as there was a level of understanding that if the Tutsi stayed away from any levels of power, politics, Government, and the military they would live a normal life.

¹⁵⁵ Joan Kakwenzire. 'The Development and Consolidation of Extremist Forces in Rwanda 1990-1994', in Howard Adelman and Astri Suhrke, *The Path of Genocide: The Rwanda Crisis from Uganda to Zaire*. New Brunswick, USA: Transaction Publishers, 1999, p 19.

¹⁵⁶ *Supra*; note 132.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

In 1975, Habyarimana launched *le Mouvement Révolutionnaire National pour le Développement (MRND)* that served as the country's single ruling party that eventually re-elected the President in 1983 and 1988. In 1978 they promulgated a new constitution that repeatedly returned him to office by organizing elections in which he was the sole candidate.¹⁶⁰

The first positive consequence of the implicit deal between Habyarimana and the Tutsi was an end to the violence. The massacres stopped. However, certain things remained the same, such as identification cards, ethnic quotas, and spheres of exclusive ethnic concentration remained part and parcel of the society.¹⁶¹ The Hutu controlled all power, to the exclusion of the Tutsi. There were only a handful of Tutsi officers in the entire army. Hutu officers were also discouraged from marrying Tutsi women.¹⁶² To illustrate the extent of the segregation in the Government, one Tutsi held a seat in a cabinet of 25 to 30 ministers¹⁶³ and two Tutsi sat in a Parliament of 70 members. In the private sector however many Tutsi flourished as businessmen and they thrived in international trade.¹⁶⁴ For the Tutsi, this was an improvement in their way of life, especially from the previous Government.

Rwanda was relatively peaceful at this time. As one German missionary later recalled,

¹⁶⁰ *Ibid.*

¹⁶¹ *Supra*, note 142.

¹⁶² *Supra*, note 132.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

[In the early 1980s] we used to compare the nearly idyllic situation in Rwanda with the post-Idi Amin chaos in Uganda, the Tutsi apartheid in Burundi, the 'real African Socialism' of Tanzania, and Mobutu's kleptocracy in Zaire, and we felt the regime had many positive points.¹⁶⁵

During this period, all officials in Government were chosen from party cadres and the party was everywhere from the very top of the Government hierarchy to its very base.¹⁶⁶ Habyarimana subjected himself to elections twice throughout this period and was triumphantly re-elected with 99.98% of the vote.¹⁶⁷ The country also flourished economically and like other African states at the time enjoyed income from the export of cash crops. It had also developed infrastructure and further received a large amount of foreign aid from developed states.¹⁶⁸ A German missionary once said that the president of Rwanda ran a 'development dictatorship'¹⁶⁹ which implied that his Government was development conscious; unlike the previous regime, which focused on building the economy of the state and was among one of the fastest developing countries within the eastern and southern region of Africa.

In 1988, the economy of Rwanda began to crumble. The country began to suffer from the policies set up by the colonial Government and the previous Government.¹⁷⁰ Like most African states there was increasing dependence on growth of cash crops and because of the drought in 1989, many of the people in Rwanda faced famine and this affected the economy. The foreign

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Supra*, note 151.

¹⁶⁹ *Supra*, note 143.

¹⁷⁰ *Supra*, note 151.

aid increased during this period, but like many other states most people never felt the effect of this aid as it was misused by Government officials.¹⁷¹

As the years went by, there was a lot of dissatisfaction by the Tutsi and a group of Hutu who felt that the only beneficiaries of the President's Government were the Hutu who hailed from the north. Corruption continued to thrive at the hands of the top Government officials. André Sibomana, a Catholic priest stated that,

we have evidence that he or his wife were diverting funds allocated to buying food for the population to import luxury items instead, for example, televisions, which are sold at vastly inflated prices.¹⁷²

This mainly evidenced the extent to which the Rwandan coffers had been plundered by the President and his family as well as close allies. They affected the economy and many people were immensely dissatisfied. This led to an increase in the pressure for power sharing in the Government and subsequently became a call that the president found quite hard to avoid. In August 1993, the Rwandan Patriotic Front (RPF) and the Rwandan Government signed the Arusha Peace Accord.¹⁷³ This agreement embodied a transitional government leading to a democratically elected government. This power sharing did not just include the sharing of power with the Hutu but

¹⁷¹ *Ibid.*

¹⁷² André Sibomana. *Hope for Rwanda*, London: Pluto Press, 1999, p 25.

¹⁷³ Lindsay Scorgie. Rwanda's Arusha Accords: A Missed opportunity; 2004, available at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/23742/1/Rwandas%20Arusha%20Accords%20A%20Missed%20Opportunity.pdf?1>. Accessed on 23 June 2012.

with the Tutsi from the RPF.¹⁷⁴ This created a lot of dissatisfaction among the various groups in the country, especially the non-northerners who wanted a greater share of the Government and were strongly opposed to the sharing of power with the Tutsi. The Government then began to use violence and incitement as a means to avoid the pressure of power sharing; they began blaming the current situation in the country on the Tutsi.¹⁷⁵ At this point many Tutsi began fleeing the country. There were rumours of a militia known as the *Interahamwe* being trained to rid the country of the Tutsi as the Government used media to spread hate messages against the Tutsi in efforts to ensure that there would be no power sharing.¹⁷⁶ This pressure could eventually not be contained, leading to the 1994 genocide.

3.5 THE GENOCIDE

Many scholars have written articles as well as books on the events leading up to the genocide, the genocide itself and its aftermath. There are authorities that state that the genocide was a plot hatched after the invasion by the RPF;¹⁷⁷ others say that 'dress rehearsals' for genocide began with the 'formation of death squads' in 1991¹⁷⁸ while another states that the plan was drawn up in January 1994.¹⁷⁹

From the chronology of events, Rwanda underwent three years since October 1990 of anti-Tutsi incidents that eventually led to the death of the President on 6

¹⁷⁴ *Ibid.*

¹⁷⁵ The Rwanda Genocide, Ethnic Tensions in Rwanda, available at <http://www.history.com/topics/rwandan-genocide>. Accessed on 23 June 2012.

¹⁷⁶ *Ibid.*

¹⁷⁷ Howard Adelman. The Arusha Peace Process and the Rwanda Genocide, IPEP-commissioned paper, 1999, p 8.

¹⁷⁸ *Supra*, note 132.

¹⁷⁹ *Ibid.*

April 1994 – an event that marked the beginning of the genocide in Rwanda. It is still unknown who shot down the President's plane and there are many speculations as to what really happened that day. According to Keane,

On the evening of 6 April 1994 as Habyarimana was returning from a session of negotiations at Arusha, two missiles were fired at his jet as it landed at Kigali International Airport. The most likely explanation – one disputed by Hutu extremists and their French supporters – was that soldiers of the Presidential guard based next to the airport fired the missiles. There is another theory that members of the French military or security services, or mercenaries in the pay of France, shot down the aircraft.¹⁸⁰

The plane crashed onto the Presidential palace grounds and as a result the President was killed along with Cyprien Ntaryamira, the President of Burundi as well as the chief of staff of the Rwandan army Déogratias Nsabimana. The Hutu immediately blamed the Tutsi for this and this triggered the mass murder of many Tutsi. The Hutu, immediately angered by the death of their President and further by the thought that the Tutsi were behind the killing, staged mass murders across the country.¹⁸¹ Almost immediately roadblocks were set up in Kigali as well as other towns. They butchered many Tutsi with machetes and knives and whatever weapons they could get their hands on. The Hutu clubbed their Tutsi neighbours, raped and murdered their women and children.¹⁸² They went from house to house searching for the Tutsi, believing that an end to the Tutsi race would mean nationwide satisfaction for the majority of the nation, which was the Hutu.

Once Hutu power had been established everywhere, the killings continued on a larger scale. Jean Kambanda, the Prime Minister during these months,

¹⁸⁰ Fergal Keane. *Season of Blood: A Rwandan Journey*, Viking, 1995, p 27.

¹⁸¹ *Ibid.*

¹⁸² Genocide in Rwanda, United Human Rights Council, available at http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.html. Accessed on 25 June 2012.

confessed at his trial four years later, when he pleaded guilty to acts of genocide, that the attacks had been planned in advance and that:

There was in 1994 a widespread and systematic attack against the civilian population of the Tutsi, the purpose of which was to exterminate them. Mass killings of hundreds of thousands occurred in Rwanda, including women and children, old and young, who were pursued and killed at places where they sought refuge: prefectures, commune offices, schools, churches, and stadiums.¹⁸³

Many Tutsi were killed. Thousands had sought sanctuary in churches, schools, hospitals or offices where they were found and murdered. Others were ordered to assemble in large areas where the *Interahamwe*, the Presidential guard and other Hutu militia descended on the Tutsi with clubs and machetes as well as guns and grenades.¹⁸⁴

According to the African Union Report,

A pattern of slaughter emerged. First, the *Interahamwe* surrounded the buildings to ensure that no one escaped. Then, the military fired tear gas or fragmentation grenades to kill and disorient intended victims. Those who fled the building were immediately killed. Soldiers, police, militias, and civil self-defence forces then entered the building and killed all the remaining occupants. To ensure that no one escaped, search parties would inspect the rooms and all surrounding areas outside. The following day the *Interahamwe* returned to kill any who would be found alive.¹⁸⁵

Many victims were murdered through being buried alive after digging their own graves, pregnant women having their wombs slashed open and the foetuses

¹⁸³ International Criminal Tribunal for Rwanda: Judgement read out to Jean Kambanda, ICTR Judgement 97-23-S.

¹⁸⁴ United States Bureau of Citizenship and Immigration Services. Rwanda: Information on the role of the Interhamwe (also Interahamwe) militia and the use of roadblocks during the 1994 Rwandan genocide, 14 August 2001, RWA01001.OGC, available at <http://www.unhcr.org/refworld/docid/3decf4b24.html>. Accessed on 25 June 2012.

¹⁸⁵ *Supra*, note 132.

killed, internal organs removed and being burnt alive.¹⁸⁶ There was rampant lawlessness, looting and chaos. The infrastructure had been destroyed, the ability to govern dismantled. Homes had been demolished, belongings stolen. The UN, recognizing that genocide had in fact taken place, increased the number of troops present in the country to prevent further killing. The French Government in mid-June announced that 2 500 French troops would be sent to Rwanda. On 4 July 1994, RPF completed the capture of Kigali and also took Butare, Ruhengeri and Gisenyi.¹⁸⁷ The RPF (except for the zones controlled by the French) now controlled the whole country.¹⁸⁸ On 17 July, the RPF announced that one of its leaders, Pasteur Bizimungu (a Hutu) had been chosen as President of Rwanda. The next day the RPF announced that the war was over. It is estimated that around 800 000 people were killed during the 1994 genocide.¹⁸⁹

3.6 POST GENOCIDE RWANDA

After 18 July 1994, Rwanda was a waste land. The RPF had managed to gain control of the country putting an end to the genocide and there after launched their Government of National Unity¹⁹⁰ in an effort to restore order and peace in the State. The new Government faced what appeared to be insurmountable challenges which included a tattered social fabric, lack of funds for rebuilding and restoring of infrastructure, reconstruction of the economy and creation of a justice system, among others. However, the Government embarked on rebuilding the

¹⁸⁶ *Supra*, note 151.

¹⁸⁷ The Rwandan Patriotic Front. The Struggle, available at <http://rpfinkotanyi.org/en/?the-struggle>. Accessed on 5 August 2012.

¹⁸⁸ Linda Melvern. *A Country Ransacked, Rwandan Stories*, available at http://www.rwandanstories.org/aftermath/a_wasteland.html. Accessed on 5 August 2012.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Supra*, note 187.

nation to ensure the return of its people who were seeking refuge in neighbouring states.

3.6.1 The Executive and the Political context since 1994

After the genocide a new Government was established mainly comprising of the RPF. The Government was headed by President Pasteur Bizimungu, who had joined the RPF in August 1990 just before the 1990 invasion and worked with the then rebel RPF in invading Rwanda.¹⁹¹ The vice president was General Paul Kagame who had masterminded the RPF invasion during the civil war that occurred from 1990 to 1994.¹⁹² A cabinet was established comprising of 22 ministers that were to assist the two in rebuilding the nation and restoring order in an otherwise lawless state after the genocide.¹⁹³

The new Government stated that it would be following the precepts set down in the 1991 constitution by establishing a multi-party political structure and promoting the Arusha Accord that advocated for power sharing.¹⁹⁴ As much of the Arusha accord was taken into consideration in establishing the new Government, certain new aspects of the accord were introduced, such as the position of Vice President that was introduced to ensure that power was shared equally as the President was Hutu and the Vice President Tutsi.

Of the 22 ministers, 16 were Hutu and only five were Tutsi. Though this cabinet represented Hutu dominance in the Government this was far from the case as the RPF ensured that the most prominent Government offices were held by Tutsis.

¹⁹¹ *Supra*, note 188.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Supra*; note 132.

Eleven months after the new Government was sworn in, J.D Ntakirutimana, the Hutu chief of staff to Faustin Twagiramungu, the Hutu Prime Minister, defected from the Government stating that 'for thirty years, the Hutu had power and today it belongs to the Tutsi assisted by a few token Hutu among whom I figured ... some of us believed the RPF victory would enable us to achieve a real change. But the RPF has simply installed a new form of Tutsi power ... the radicals from the two sides reinforce each other and what the RPF is doing today boosts up the position of the Hutu extremists in the refugee camps'.¹⁹⁵

By August 1995, the Prime Minister himself resigned and the next day four others followed suit, including another of the leading RPF Hutu in the cabinet, Interior Minister Seth Sendashonga. This enhanced the belief that the presence of the Hutu in the Government was only for show and thus they had no say in the way the country was being run.¹⁹⁶

Those who have studied governance in Rwanda since the end of the genocide tell of an unofficial Government running parallel to the cabinet that controls the decision making process and makes all important decisions concerning the country.¹⁹⁷ This unofficial Government was mainly Tutsi and all observers at the time agree that the most powerful man in the country since the end of the genocide was the Vice President, Paul Kagame who also served as the minister of defence and commanded the RPF forces.¹⁹⁸

The composition of Government within the next two years was 15 Tutsi of 22 chiefs or ministerial staff, 16 of 19 permanent secretaries, and 80 per cent of the country's

¹⁹⁵ *Ibid.*

¹⁹⁶ *Supra*, note143, p 300.

¹⁹⁷ *Supra*, note132.

¹⁹⁸ *Ibid.*

burgomasters were RPF Tutsi. Even when there were a majority of Hutu cabinet ministers, they were closely monitored by Tutsi aides. In the same period, 95 per cent of the lecturers at the national University at Butare were Tutsi as were 80 per cent of the students. Six of the 11 prefects and 90 per cent of the judges then being trained for the Justice Department were Tutsi. The Government structure remained the same as before the genocide; the only difference was that it was now Tutsi dominance, not Hutu.¹⁹⁹

The relationship between Bizimungu and Kagame which had symbolized post-genocide reconciliation soured and in March 2000, Bizimungu resigned after falling out with top RPF members over the makeup of a new cabinet.²⁰⁰ After his resignation, Paul Kagame became the President of Rwanda. This was the first non-violent presidential change in the country's history.²⁰¹

At the end of 2001, former president, Bizimungu came back to Rwanda and launched a new political party called *Parti Démocratique pour le Renouveau-Ubuyanja* (PDR).²⁰² All these parties were opposed to the RPF led Government and thus many of them were banned in Rwanda. PDR was banned by the Government in June 2000 stating that it was a radical Hutu party. Throughout the remainder of 2000 to 2001 there were repeated incidents of harassment of PDR founders, including Bizimungu. An incident capturing the extent of harassment that was taking place in Rwanda concerning political parties was exhibited in December 2001 when Gratien

¹⁹⁹ *Ibid.*

²⁰⁰ Rwandan President Bizimungu Resigns. Reuters 2000, available at <http://www.hurriyetaidailynews.com/default.aspx?pageid=438&n=rwandan-president-bizimungu-resigns-2000-03-24>. Accessed on 5 August 2012.

²⁰¹ Rwanda, Country Assessment, October 2002. Country Information & Policy Unit; Immigration and Nationality Directorate; Home Office, United Kingdom, available at <http://www.unhcr.org/refworld/pdfid/3df4aaec0.pdf>. Accessed on 6 August 2012.

²⁰² *Supra*, note 132.

Munyarubunga, a taxi driver and member of the opposition PDR, was killed by two of his passengers²⁰³ leading to allegations that the Government was taking part in activities that would ensure that political parties formed by the Hutu would not be allowed to operate in the country.

Subsequently, Bizimungu was later arrested in 2002 for embezzlement of state funds, inciting violence and criminal association which was mainly seen as a way in which the Government wanted to silence the opposition. He was jailed for sixteen years.²⁰⁴

In 2003, Paul Kagame was re-elected and on 26 May 2003 the country adopted a new Constitution by referendum.²⁰⁵ The Constitution provided for the executive, judicial and legislative arms of Government. The 2003 elections were the first multi-party presidential and parliamentary elections in decades.²⁰⁶ President Kagame won the elections, receiving 95% of the votes cast, while his nearest rival Faustin Twagiramungu received 3.6% of the votes. Twagiramungu claimed that the elections were flawed and that his supporters were intimidated by Government officials.²⁰⁷ This would be an allegation that would resurface again in the next elections. In August 2010, Rwanda held its Presidential elections where Kagame emerged the winner again with 93% of the vote and his closest rival Jean Damascene Ntawukuriryayo of the Social Democratic Party achieved only 5.1% according

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Republic of Rwanda; Public Administration. Country Profile, May 2004, available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023283.pdf>. Accessed on 8 August 2012.

²⁰⁶ Ted Dagne. Congressional Research Service, Rwanda; Background and Current Developments, 1 June 2011, available at <http://www.fas.org/sgp/crs/row/R40115.pdf>. Accessed on 8 August 2012.

²⁰⁷ *Ibid.*

to the National Electoral Commission of Rwanda.²⁰⁸ This shows the commitment the country has to democracy though much of the elections have always been disputed on grounds of rigging.

3.6.2 The Legislature

The legislature is provided for by the Rwandan Constitution and is bicameral. The two chambers are the Chamber of Deputies and the Senate.²⁰⁹ The Chamber of Deputies is composed of 80 members. These members are elected through a secret ballot. The Chamber of Deputies has three missions: Legislation, Government oversight and representation of the people. It is notable that the Rwandan parliament has the highest majority of female parliamentarian representatives and has received a lot of positive recognition from this.²¹⁰ In September 2008, Rwanda held elections for the national assembly where Rwandan women took 56.2% of the seats in parliament and elected the first female speaker of parliament in October 2008.²¹¹

Members of the upper house, the senate, are not directly elected by the citizens. From the Constitution, it is established that 12 are elected by provincial and sector councils, eight are directly appointed by the President (officially to ensure representation for marginalized communities), four are appointed by the Forum of Political Formations and two are elected by the staff of the Rwandan universities. These members are mainly RPF members hence most legislation that is government driven often passes as a result of

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Stephanie McCrummen. A woman's world, Women run the show in a recovering Rwanda, *Washington Post*, 27 October 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/26/AR2008102602197.html>. Accessed on 8 August 2012.

²¹¹ *Ibid.*

this. Parliamentary members are deterred from debating bills and developing their own independent legislation, resulting in a lack of representation for the needs of all the Rwandan people, especially the primarily agriculturalist rural population, which is predominantly Hutu.²¹²

In the 2008 parliamentary election, RPF retained a majority of the seats in parliament. The other parties that have seats in the parliament are the Social Democratic Party (PSD) and the Liberal Party (PL). When examined through the voting record, in matters of presidential policy, these parties show consistent voting in line with the RPF. There is an assumption that there is no opposition to any legislation that is designated as important to the president.²¹³ All of this implies a somewhat dictatorial system of government.

3.6.3 The Judiciary

The judiciary of Rwanda also derives its powers from the Constitution like the other arms of Government. Judicial power is exercised by the Supreme Court and other courts established by the Constitution and other laws. This is provided for by Article 140 of the Constitution.²¹⁴ The Judicial court structure essentially consists of the Supreme Court at the apex of the judiciary. The other courts are subsequently the High Court of Rwanda, the Provincial Courts, the Court of the City of Kigali, the District Courts, Municipality and Town Courts. There are also specialized courts such as the *Gacaca* courts

²¹² *Supra*, note 132.

²¹³ Rwandan Constitutional Law and the oppression of political opposition and dissidents, available at <http://rwandinfo.com/eng/rwandan-constitutional-law-and-the-oppression-of-political-opposition-and-dissidents/>. Accessed on 8 August 2012.

²¹⁴ Sam Rugege. A paper on Judicial Independence in Rwanda, 2007, available at http://www.mcgeorge.edu/Documents/Conferences/JUDIND_RUGEGE_MASTER.pdf. Accessed on 8 August 2012.

and the Military courts.²¹⁵ Tribunals are also provided for in the judicial system.

The Constitution provides for the appointment of judges. This is specifically the appointment of the Chief Justice, Deputy Chief Justice, and the judges of the Supreme Court. The judges are appointed for life, subject to the retirement age. The Chief Justice and Deputy Chief Justice are appointed for a non-renewable term of eight years. These two judges are appointed by the President after consultation with the cabinet, the superior council of the judiciary, and an election by the senate. The other judges are appointed by the Superior Council of the Judiciary after competition through tests and interviews organized by the council.²¹⁶

The Superior Council, apart from being responsible for the appointment of judges, also oversees the promotion and discipline of judicial personnel. It is important to note that the Council is chaired by the Chief Justice and is dominated by judges representing the different courts. The presence of the Chief Justice and Deputy Chief Justice in the Council, the two being appointees of the President may lead one to believe that the President can exert influence over which judges are to be hired and therefore maintain some form of indirect control over the judiciary. This has a tremendous impact on the independence of the judiciary, or the perception associated therewith, at least. When examining the judiciary in Rwanda, special interest is taken of

²¹⁵ *Ibid.*

²¹⁶ *Supra*, note 214.

two judicial bodies in the country, being the *Gacaca* courts and the International Criminal Tribunal for Rwanda.

3.6.3.1 The *Gacaca* courts

The *Gacaca* courts are adapted traditional courts involving the local communities that hear and decide genocide cases in Rwanda.²¹⁷ These courts were specifically introduced to handle genocide cases because there were so many genocide suspects that the regular courts could not handle all of them. The creation of the *Gacaca* courts has been lauded by many who believe that they are the fastest way to access justice.²¹⁸ They have cited the following as examples of why the *Gacaca* courts are more advantageous than regular courts:

- they are speedy because of the simplified court procedure;
- they are less formal and therefore not intimidating to witnesses;
- they are inexpensive for the State, victims and witnesses as they take place within the local area.²¹⁹

Gacaca in Rwandan terms means 'lawn' and was traditionally used to denominate a dispute settlement mechanism concerned primarily with land disputes, succession matters, small theft and other relatively small cases.²²⁰ The Rwandan Government, faced with an enormous backlog of genocide cases, with over 110000 accused still in prison four years after

²¹⁷ *Ibid.*

²¹⁸ *Supra*, note 214.

²¹⁹ Dadimos Haile. Rwanda's experiment in people courts (Gacaca) and the tragedy of unexplained humanitarianism; a normative/ethical perspective; University of Antwerp, January 2008, available at <http://www.ua.ac.be/objs/00167439.pdf>. Accessed on 8 August 2012.

²²⁰ Barbara Oomen. Rwanda's Gacaca: Objectives, Merits and their relation to *supranational* criminal law, available at <http://www.roac.nl/roac/files/Teacher%20Publications/oomen/Oomen%20Rwanda.pdf>. Accessed on 9 August 2012.

the genocide, began to entertain the idea of involving the wider community in their trial in around 1998.²²¹ There was therefore a need to ensure adequate implementation of the courts throughout Rwanda. The first legislation was passed in 2001, and pilot courts were set in motion in 2002.²²² It took up to 2005 before the *Gacaca* courts were set up throughout Rwanda and implemented.²²³

These courts would consist of general assemblies, presided over by lay judges in each of Rwanda's 11000 cells, and would record all of the events in the cells, categorize them and pass judgment in the least severe cases while referring others to higher-level *Gacaca* domestic courts. The 11 000 cells consist of three main organs, namely the general assembly which is constituted by all the adults of a given cell, which can only meet legitimately if at least 100 of its members are present.²²⁴ Secondly there is the bench which consists of 9 lay judges, and 5 deputies. These judges must have met the criteria set out, first being that they should not have participated in the genocide and are free of sectarianism. If it is found that the judges have not met the criteria then they can be replaced. Finally there is the public prosecution.

²²¹ *Ibid.*

²²² Organic law No 40/2000 of 26/01/2001 setting up "Gacaca jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994 and Organic law No 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994.

²²³ *Supra*, note 220.

²²⁴ *Ibid.*

The general assembly compiles a record of events that occurred in the cell during the genocide. Subsequently, the judges categorize the crimes committed in the cell. The first category offences include planning, organizing and supervising the genocide or crimes against humanity, acting as an accomplice in these matters, committing them from a position of authority, killing with exceptional zeal and committing acts of torture and rape. The second category offences generally entail killing and assault while the third category entails offences against property.²²⁵

After categorization of the crimes, first category crimes are forwarded to the Public Prosecution to be tried in domestic courts and the second category crimes are tried in the *Gacaca* courts. Offences against property are determined in the cell level.

The courts are formal and follow strict rules of procedure. They meet once a week and every Rwandan has a duty to participate. Refusing to do so is a criminal offence.²²⁶ The hearings have specific meetings to determine who lived in the cell at the time of the crimes, the witnesses and the reading out of the charges made against the accused.²²⁷ They then proceed to hearing and judgments are delivered.

The sanctions passed by the *Gacaca* courts vary in relation to the category of the crime. They can vary from the death penalty in the matter of first category crimes, to civil reparation in relation to property offences

²²⁵ Sec 51 of Organic Law no 16/2004.

²²⁶ Sec 17 of Organic Law no.16/2004.

²²⁷ Sec 34 of Organic Law no.16/2004.

with a number of mitigating and aggravating circumstances.²²⁸ Persons with authority are liable for the most severe penalty handed out in a given category. The combination of a confession, guilty plea, repentance and apology also serve as mitigating factors. It is important to note that those who commit the crimes in the first and second category can lose their civil rights, including the right to vote and to participate in services such as teaching and medicine.

It is important to note that as soon as the draft *Gacaca* legislation was presented to the local and international community it encountered a number of serious objections.²²⁹ Essentially, the concerns were mainly whether the local courts would be able to meet the minimum fair trial standards agreed to internationally specifically in reference to the right of suspects to be tried by an impartial, competent and independent tribunal. The observers wondered whether the notion of neighbours trying neighbours would not compromise the impartiality of the procedures and lead to false accusations or reticence to speak up in court.²³⁰ Furthermore, the competence of the 11 000 *Gacaca* benches elicited serious reservations as most people wondered whether 260 000 unpaid, often illiterate lay judges, with hardly any training would be able to handle complicated cases under review.²³¹ It was noted that even if the community selected judges, the Government could replace them relatively

²²⁸ *Supra*, note 220.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

easily.²³² The replacement of 1 200 judges on accusations of genocide in the pilot phase only demonstrated that concerns about impartiality, uttered by suspects and victims alike, were far from unfounded.²³³

There is no right to legal assistance during the *Gacaca* proceedings, to avoid making the proceedings judicial.²³⁴ In addition, while suspects feared inadequate protection when testifying, victims feared inadequate protection when testifying and in 2004 the murder of a number of genocide witnesses and the threatening of many others, caused widespread fear among victims and criticism of the *Gacaca* by victim's organizations like Ibuka.²³⁵

Another area of concern is in relation to confessions. The way the confessions are received compromises the presumption of innocence. The prison environment exerts a great deal of pressure on the prisoners to confess to acts of genocide, and many of these confessions were obtained under duress.²³⁶ Consequently, these confessions have led to the release of nearly 60 000 persons,²³⁷ who are perceived to be threats to many victims of their crimes. It is also a concern that crimes in the third category, concerning property have no possibility of appeal as the *Gacaca* court is the only appellate court in those matters.

²³² Instructions no 06/2005 of 20/7/2005 of the Executive Secretary of the national service of *Gacaca* Courts on dismissal of the judge (*Inyangamugayo*) from the *Gacaca* court bench, dissolution of a *Gacaca* Court bench and replacement of the *Inyangamugayo*.

²³³ The Department of the *Gacaca* Jurisdictions; *Gacaca* Courts in the Experimental Phase, 2005, available at <http://www.inkiko-gacaca.gov.rw/pdf/Achievements.pdf>. Accessed on 10 August 2012.

²³⁴ *Supra*, note 220.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

The influence that the RPF-dominated Government has had on the *Gacaca* design means that the courts can only deal with the genocide that took place in April-June 1994, and not with the war crimes committed by the Rwandan Patriotic Army, which also resulted in tens of thousands of casualties. In addition, the Government emphasis on a historical narrative of Hutu extremism and group culpability causes many Rwandan Hutus to feel targeted and guilty before they have even been tried.²³⁸ This was visible in 2005 when the pilot *Gacaca* courts resulted in thousands of Hutu fleeing the country. This departure was fuelled by rumours of a giant Hutu killing machine put in place by the Government.²³⁹

3.6.3.2 The International Criminal Tribunal for Rwanda [ICTR]

This tribunal was formed on 8 November 1994 by resolution 955²⁴⁰ of the United Nations Security Council recognizing the serious violations of humanitarian law (including genocide) that were committed in the territory of Rwanda between 1 January 1994 and 31 December 1994.²⁴¹ The tribunal was primarily established to contribute to the process of national reconciliation in Rwanda and to enhance peace in the region. Furthermore, Resolution 977²⁴² was created on 22 February 1995 by the Security Council deciding the seat of the tribunal will be located in Arusha, United Republic of Tanzania.

²³⁸ *Ibid.*

²³⁹ *Supra*, note 220.

²⁴⁰ Resolution 955, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>. Accessed on 13 August 2012.

²⁴¹ International Criminal Tribunal for Rwanda, General Information, available at <http://www.unict.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>. Accessed on 13 August 2012.

²⁴² Resolution 977, available at <http://www.unict.org/Portals/0/English%5CLegal%5CResolutions%5CEnglish%5Cscr977e.pdf>. Accessed on 13 August 2012.

This tribunal is governed by its own statute, which is annexed to Security Council Resolution 955. The Rules of Procedure and Evidence which the judges adopted in accordance with Article 14 of the Statute, establish the framework for the functioning of the Tribunal. This tribunal consists of three organs: the Chambers, Appeals Chamber and the Office of the Prosecutor in charge of investigations and prosecutions. There is also the registry which is tasked with providing the overall judicial and administrative support to the Chambers and the Prosecutor.²⁴³

The tribunal consists of sixteen permanent judges, noting that no two judges may be nationals of the same state. The judges are divided as follows: three judges in each of the three Trial Chambers and seven judges in the Appeals Chamber. Five judges of the Appeals Chamber are tasked with hearing appeals of the Trial Chambers. There is the option of adding a number of *ad litem* (temporary) judges when the workload of the tribunal becomes too much.

The Office of the Prosecutor acts independently to investigate crimes, prepare charges and prosecute accused persons. It is significant to note that the prosecutor does not receive instructions from any Government; however the prosecutor may begin investigations based on information obtained from Governments, non-governmental organisations, the United Nations among others. The prosecutor investigates allegations against an

²⁴³ *Supra*, note 240.

individual suspected of committing a crime within the scope of crimes tried by the tribunal.

The accused are entitled to procedural rights which include the presumption of innocence, protection from self-incrimination, trial without undue delay, to be informed of the charges, to examine witness and to an interpreter.²⁴⁴ If an accused person cannot afford legal representation the tribunal will assign same to him. After the trial ends, the trial chamber pronounces judgment. The judges will then impose penalties and sentences. Judgment is by a majority of judges and delivered in public. The majority judges provide a reasoned opinion as to why they ruled that way and the dissenting judges may also provide their own opinion. The accused is informed of his right to appeal the decision of the trial chamber. The prosecutor also has the right to appeal. The appeals chamber is empowered to hear appeals that only stem from an error on a question of law that invalidates the decision, or an error of fact that has occasioned a miscarriage of justice.²⁴⁵

After they have heard the appeal and examined all relevant documents in relation to the appeal, the appeal judges may affirm, reverse, or revise the trial chamber's decision. Article 25 of the Statute provides, however, for a review measure known as a review proceeding. This is permitted when new facts have been discovered which were unknown at the time of the

²⁴⁴ *Ibid*, Article 20(4).

²⁴⁵ International Criminal Tribunal for Rwanda. Facts about the ICTR, available at <http://www.unictt.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>. Accessed on 13 August 2012.

proceedings before the Trial Chambers or the Appeals Chamber and which would have been a decisive factor in reaching the decision. Therefore the prosecutor or the accused may submit an application for the judgment to be reviewed. If the decision of the trial court is still upheld then the accused will continue to serve the sentence prescribed.

The tribunal had completed a total of 72 cases by 2012. Of the 72, 45 of the accused were convicted, 17 have appealed their conviction and 10 were acquitted.²⁴⁶ In relation to completion of the ICTR'S work, the deadline was pushed back to the first half of 2013 mainly because of the difficulties encountered in referring the low ranking accused to the national courts.²⁴⁷

Human Rights organizations and international non-governmental organisations, such as Human Rights Watch and Amnesty International, have expressed criticism and concern about the weaknesses and shortcomings of the tribunal.²⁴⁸ According to these organizations, the tribunal receives very little cooperation from a few key UN member states, and it lacks funds to operate with full effectiveness because member states have not paid their assessed contributions. Some states have failed to arrest indicted people known to be on their territory. For example, Charles Munyaneza and Celestine Ugirashebuja who were local mayors

²⁴⁶ International Criminal Tribunal for Rwanda. Status of cases, available at <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx>. Accessed on 14 August 2012.

²⁴⁷ France at the United Nations. International criminal jurisdiction, available at <http://www.franceonu.org/france-at-the-united-nations/thematic-files/rule-of-law/international-criminal/article/international-criminal>. Accessed 14 August 2012.

²⁴⁸ IRIN. Humanitarian news and analysis, International Criminal Tribunal for Rwanda, available at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59475>. Accessed on 14 August 2012.

accused of organizing the genocide in their provinces of Southern Rwanda, and who are now leading ordinary lives with their families in the UK.²⁴⁹ Other issues raised by the organizations are that Rwanda took months before approving the transfer of detainees in Government custody to testify in Arusha, and have not yet complied with the tribunal's requests for such transfers. Further criticisms have been that the Arusha process should include complaints concerning those responsible for alleged massacres of Hutu communities as the RPF swept through the country ending the genocide as none of them have been investigated or indicted. As such, some cite the tribunal as being biased, focusing only on one ethnic group.²⁵⁰

3.7 CONCLUSION

Rwanda has experienced years of turmoil originating from ethnicity. This was the main cause of the genocide that led to many refugees fleeing from Rwanda to neighbouring states such as Kenya. Through briefly exploring the past and present one is able to capture the changes that have taken place in the country. The main question is whether the changes are profound and fundamental enough to warrant the return of Rwandan refugees from Kenya to their country of origin.

²⁴⁹ *Ibid.*

²⁵⁰ *Supra*, note 248.

CHAPTER FOUR

Rwandan refugees and the Ceased Circumstances Clause

4.1 INTRODUCTION

In October 2009, at the 60th Executive Committee of the High Commissioner's Programme (EXCOM), UNHCR announced a comprehensive strategy to bring closure to the Rwandan refugee situation.²⁵¹ The strategy was composed of four components that included:

1. Enhancing the promotion of voluntary repatriation;
2. Reintegration of Rwandan refugees in Rwanda;
3. Pursuing opportunities for local integration or alternative legal status in the countries of asylum; and
4. Exemption clauses for those unable to return and elaborating a common schedule leading to the cessation of refugee status.

UNHCR has stated that the ceased circumstance clause applies to Rwandan refugees who fled the country from 1959 to 31 December 1998.²⁵² Furthermore, the process envisaged implementation throughout 2012 so as to enable the refugee status of Rwandans to have definitively ceased by 30 June 2013.²⁵³

This announcement has been met with mixed reaction. Some feel that the announcement is premature while others – especially the Rwandan Government

²⁵¹ UNHCR. Implementation of the Comprehensive Strategy for the Rwandan Refugee Situation, including UNHCR's recommendations on the Applicability of the Ceased Circumstances' Cessation Clauses, 31 December 2011, available at <http://www.unhcr.org/refworld/docid/4f33a1642.html>. Accessed on 14 November 2012.

²⁵² UNHCR denies forcing refugees to return home, available at <http://www.newtimes.co.rw/news/index.php?i=14891&a=49719>. Accessed on 14 November 2012.

²⁵³ *Supra*, note 251.

– feel that it's time for Rwandan refugees to return home. This chapter will critically explore these mixed reactions to the ceased circumstance clause (herein after referred to as the cessation clause). This study further hopes to provide in detail the concerns raised thereby putting to test the laid down principles and guidelines *vis-à-vis* promotion of refugee rights in relation to the cessation clause.

4.2 GROUNDS FOR INVOCATION OF THE CESSATION CLAUSE

The Rwandan Government and UNHCR rely on a number of distinct grounds as justification for the invocation of the cessation clause to Rwandan refugees. Each of these will be dealt with in turn below.

4.2.1 Fundamental changes

According to UNHCR,²⁵⁴ the country has undergone fundamental changes since the 1994 genocide that have enhanced peace and stability in the country. UNHCR and the Rwandan Government acknowledge that significant efforts have been undertaken by the Government to promote reconciliation noting that the cause of the conflict was based on ethnicity. It is therefore important to note that the country has been able to demonstrate efforts towards reconciliation by forming the National Unity and Reconciliation Commission.²⁵⁵ This Commission's main purpose is to enhance the coming

²⁵⁴ *Ibid.*

²⁵⁵ National Unity and Reconciliation Commission of Rwanda, available at http://www.uri.org/cooperation_circles/detail/nurrwanda. Accessed on 26 December 2012.

together of all ethnic groups in an effort to strengthen unity within the country.²⁵⁶

Promotion of democracy has been achieved through the adoption of a new Constitution and the holding of parliamentary and presidential elections not once, but twice.²⁵⁷ According to the Government of Rwanda all elections since 1994 have been conducted peacefully. Rwanda has further committed itself to strengthening the protection of human rights by signing many international and regional treaties in relation to human rights.²⁵⁸ It has also established a National Human Rights Commission for the promotion and protection of human rights.²⁵⁹ The death penalty within the country has been abolished, thus strengthening the protection of the right to life.²⁶⁰

It was announced in June 2012 that the proceedings of the traditional *Gacaca* courts have been concluded, thereby enhancing access to justice for the many genocide victims.²⁶¹ The country is also growing economically and a lot of emphasis has been placed on the rate at which the country has been able

²⁵⁶ Unity and Reconciliation in Rwanda. Background information on the justice and reconciliation process in Rwanda, available at <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>. Accessed on 26 December 2012.

²⁵⁷ Marina Rafti. A Perilous Path to Democracy, Political Transition and Authoritarian Consolidation in Rwanda, Discussion paper, 2008.03, November 2007, available at <http://ideas.repec.org/p/iob/dpaper/2008003.html>. Accessed on 26 December 2012.

²⁵⁸ Rwanda – Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/en/countries/africaregion/pages/rwindex.aspx>. Accessed on 26 December 2012.

²⁵⁹ Rwanda. National Human Rights Commission, available at <http://www.cndp.org.rw/spip.php?rubrique11>. Accessed on 26 December 2012.

²⁶⁰ Death Penalty Focus. Working for Alternatives to the Death Penalty, Abolitionist for all crimes; available at <http://www.deathpenalty.org/article.php?id=81>. Accessed on 26 December 2012.

²⁶¹ Rwanda, *Gacaca* Genocide Courts finish their work, BBC News Africa, 18 June 2012, available at <http://www.bbc.co.uk/news/world-africa-18490348>. Accessed on 26 December 2012.

to rebuild and develop. A more detailed examination of the extent and gravity of the changes have been dealt with in the previous chapter.²⁶²

4.2.2 Durability of the Changes

UNHCR has been able to monitor the country since 1994 and has paid the country numerous visits to establish the authenticity and extent of the changes. The United Nations High Commissioner for Refugees, Antonio Guterres, visited the country in 2009. He lauded the number of returnees to Rwanda and emphasised the need to encourage repatriations through the cessation clause to encourage more to return home.²⁶³

UNHCR recommends a waiting period of 12 to 18 months before examining the fundamental changes and the durability of the changes. In Rwanda's case they have examined the country for over a period of 10 years before declaring the cessation clause. Accordingly, this presents a strong case for cessation based on the extent of monitoring and evaluation done by the organisation, in determining the extent of the durability of the particular changes.

4.2.3 Number of returnees already within the country of origin

UNHCR notes that the greatest part of the Rwandan refugee population had returned home as at the end of 1998. From August 1994 to October 2002, some 3.1 million Rwandan refugees returned to their country of origin.²⁶⁴

Between October 2002, when UNHCR started advocating for returns, and at

²⁶² Chapter Three; p 11-21.

²⁶³ UN Refugee Chief begins two day visit to Rwanda; BBC Monitoring International reports; 19 October 2009; Access my library; available at: <http://www.accessmylibrary.com/article-1G1-210087584/un-refugee-chief-begins.html>. Accessed on 26 December 2012.

²⁶⁴ *Supra*, note 251.

the end of November 2011, 150519 refugees had been repatriated with the assistance of UNHCR.²⁶⁵

According to UNHCR only 106833 Rwandan refugees remain in asylum states.²⁶⁶ Out of this number, some of the refugees may have fled after 1998 meaning that the cessation clause does not apply to them.²⁶⁷ This demonstrates clearly that only a small fraction of the greater refugee population is still residing outside of Rwanda. It is important to note that after the genocide, the refugee population originating from Rwanda was around two million. Thus the cessation clause may be able to urge the remaining refugees to return home or further provide alternative status to them.²⁶⁸

Based on the fundamental developments and the durability of the changes in Rwanda, UNHCR in consultation with the principal countries of asylum and the country of origin, decided to declare the cessation clause. The consequence of this is that the refugee status of Rwandan refugees who fled the country between 1959 and 31 December 1998 as a result of the different episodes of inter-ethnic violence between 1959 and 1998 would cease.²⁶⁹

²⁶⁵ *Ibid.*

²⁶⁶ 2012 UNHCR Country operations profile, Rwanda, Statistical snapshot, available at <http://www.unhcr.org/pages/49e45c576.html>. Accessed on 26 December 2012.

²⁶⁷ *Ibid.*

²⁶⁸ Rwandans in exile oppose UN move to force them back home. The East African, available at <http://www.theeastafrican.co.ke/Rwanda/News/Rwandans-in-exile-oppose-UN-move-to-force-them-back-home/-/1433218/1653034/-/view/printVersion/-/3spdkg/-/index.html>. Accessed on 26 December 2012.

²⁶⁹ *Supra*; note 251.

4.3 OPTIONS AVAILED TO RWANDAN REFUGEES WHEN THE CESSATION CLAUSE WAS INVOKED

The options that have been availed to the refugees comprise of voluntary repatriation, local integration and exemption procedures. With reference to voluntary repatriation, UNHCR has been actively promoting voluntary repatriation²⁷⁰ for Rwandan refugees since October 2002.²⁷¹ Ten tripartite agreements have been signed by countries of asylum housing Rwandan refugees over the past nine years.²⁷² Together with the Government of Rwanda they have produced information leaflets.²⁷³ The information contained in these leaflets informs prospective returnees on how they can go about preparing to return home. They have also held information meetings with refugee communities where they clarify questions in relation to the cessation clause. As a result of this, many refugees have returned home. UNHCR has been keeping track of some returnees who have reintegrated reasonably well into their home communities. However, some are faced with socio-economic problems which impede meaningful access to basic services such as health and education.²⁷⁴ However, this is a problem experienced in most developing states thus it is in no way an impediment to the implementation of the cessation clause.

Rwandan refugees have been long-term residents in their countries of asylum since the ethnic conflicts began. According to UNHCR one-third of them have

²⁷⁰ UNHCR. Voluntary Repatriation to Rwanda, available at http://www.urpn.org/uploads/1/3/1/5/13155817/microsoft_powerpoint_-_voluntary_repatriation.pdf. Accessed on 27 December 2012.

²⁷¹ *Supra*, note 251.

²⁷² *Ibid.*

²⁷³ Rwanda; Ministry of Disaster Management and Refugee Affairs, available at http://www.midimar.gov.rw/index.php/cessationclausecentre/cat_view/40-cessation-clause. Accessed on 27 December 2012.

²⁷⁴ *Supra*, note 251.

been born in exile.²⁷⁵ They have, as a result, established strong links within these countries making local integration a probable durable solution. However, UNHCR notes that governments in countries of asylum have yet to offer this durable solution to Rwandan refugees or further define categories of refugees who may be eligible for this solution.²⁷⁶ This makes voluntary repatriation the sole option unless the refugees can prove that the exemption clauses apply to them.

The last option is the application for exemption from the cessation clause. There are two categories in which the cessation clause will not apply:

- (i) refugees who continue to have a well-founded fear of persecution; and
- (ii) persons who have compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of the country of origin.

Those who have applied for exemptions under either of the two categories must provide proof or any supporting evidence including testimonies of their need to be exempted from application of the cessation clause. They cannot apply as a group for exemption, each application must be individual.

²⁷⁵ *Ibid.*

²⁷⁶ Susan Meyer. Clarifying Local Integration, available at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR26/FMR2629.pdf>. Accessed on 27 December 2012.

4.4 GROUNDS MITIGATING AGAINST THE INVOCATION OF THE CLAUSE

Though UNHCR and the State of Rwanda present a strong case for cessation of refugee status there are others (including refugees) who feel otherwise. They base their concerns on the following grounds.

4.4.1 The political situation in the country

The Centre for Strategic and International Studies listed the Government of Rwanda's 'inability to manage political competition within a democratic framework' as a key stress point in the context of mutual suspicion and fear along ethnic lines – the product of more than a century of state manipulation. Furthermore, the country's apparent stability masks deep-rooted tensions, unresolved resentments, and an authoritarian Government that is unwilling to countenance criticism or open political debate.²⁷⁷ Given the country's past, instability could escalate very quickly and could potentially be very violent.²⁷⁸

After the end of the genocide, RPF took over as governing party of the Rwandan. There have been concerns that this Government has engineered projects aimed at hunting down and eliminating the Hutu community as a means of ensuring that they can never again have power and control of the country. An illustration of this is when President Kagame stated that, 'he will use a coffee spoon to empty a barrel filled with water'. Many believe that he was referring to reducing the Hutu population until it becomes a minority in

²⁷⁷ Jennifer Cooke. Centre for Strategic and International Studies, Rwanda: Assessing Risks to Security, June 2011(CSIS 2011) p1, available at http://csis.org/files/publication/110623_Cooke_Rwanda_Web.pdf. Accessed on 25 September 2012.

²⁷⁸ *Ibid.*

Rwanda.²⁷⁹ He further made a similar statement in 2004, at Woodrow Wilson International Centre where he stated that, 'unless there is a concerted effort by the international community to deal with these *génocidaires*, they will remain a potential threat to peace and stability in Rwanda and in the whole region of the great lakes'.²⁸⁰ This illustrates the level of discontent that the president has towards refugees residing outside Rwanda and in particular the Hutu refugees. Hence, the reference made to '*génocidaires*'. The highlight of this discontent however was in May 2011, when President Obama officially declared the death of Osama bin Laden. President Kagame reminded the refugees and asylum seekers in the strongest terms when he stated:

In Rwanda we have our own criminals and terrorists sheltering in foreign countries. What has happened to Osama bin Laden should serve as notice to them that they cannot hide forever. Justice, in whatever form, will catch up with them.²⁸¹

These statements give the impression that refugees returning to the country will be returning to a country waiting to persecute them and hold them accountable for crimes that they may not have committed during the genocide based on their ethnicity. This is mainly because the majority of the refugees residing outside the country are Hutu's; some of which committed crimes during the genocide. Furthermore, the use of crimes such as genocide ideology by RPF allows its secret services to continue to eliminate domestic

²⁷⁹ Filip Reyntjens. Constructing the truth, dealing with dissent, domesticating the world: Governance in post-genocide" African Affairs (2011), 110/438, available at <http://www.kictanet.or.ke/wp-content/uploads/2012/04/Rwanda-is-a-country-full-of-paradoxes.pdf>. Accessed on 26 December 2012.

²⁸⁰ Rwandan platform for dialogue, truth and justice. Open letter to the UNHCR on the reasons why they are against invocation of the cessation clause on Rwandan refugees; 24 October 2011.

²⁸¹ Salem-News.Com. "Stop Killing Rwandans or Resign: RNC Tells President Kagame" available at <http://neworleans.afrobeatradio.net/2011/05/20/stop-killing-rwandans-or-resign-rnc-tells-president-kagame/>. Accessed on 30 September 2012.

individuals and external politicians one at a time.²⁸² The fact that the President can utter such comments speaks volumes about the sentiments shared by his government on the same.

The RPF as a political party is revered not so much for restoring the country's stability, but for establishing some form of *de facto* rule in Rwanda. In the chapter titled *The Brittle Nature of the Rwandan Patriotic Front (RPF)*, Cooke reports,

Among the greatest vulnerabilities that Rwanda will confront in the coming decade is the underlying nature and occasionally brutal tactics of the RPF. Without exception, prominent critics of the RPF are now dead, in prison, or living in exile. Although domestic "opposition" can critique certain policies and programs, there is no possibility of more fundamental debate on how the Government deals with issues of accountability, ethnic equity, or state legitimacy. The Government's absolute suppression of dissent ultimately adds to its own fragility ... Domestic critics are effectively silenced through exile, intimidation, imprisonment, or assassination.²⁸³

The RPF has not been brought to book over the human rights violations it perpetrated during the genocide in the fight to gain control over the country.²⁸⁴ It continues to perpetrate crimes against the Hutu in the name of ensuring the suppression of a second genocide by maintaining a dictatorial Government still founded on ethnicity. This is illustrated by (i) *Gacaca* courts which have tried mainly the Hutu community, ignoring Tutsis who also massacred Hutus, (ii) by the International Criminal Tribunal for Rwanda (ICTR) which prosecuted the vanquished (Hutu) only and did not do the same to Tutsi perpetrators of

²⁸² *Supra*, note 277.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

abominable crimes; (iii) there is also the reluctance of the international community to take measures against the regime for the ongoing cycle of rights abuse, crimes against humanity, and lack of political participation in the country.²⁸⁵

In 2002, the government implemented a new law (No 47/2001) that contained two new offences that punished any speech, written statement or action inciting *irondamoko* (ethnicism or discrimination) or divisionism with heavy penalties and fines.²⁸⁶ In 2009, it further banned references to ethnic distinction with the offence of expression or promotion of 'genocide ideology'. This has hastened a number of arrests on not only journalists but regular citizens believed to be speaking against the Government or inciting the people.²⁸⁷

Political repression continues to persist in Rwanda as demonstrated in the case of Victoire Ingabire who returned to Rwanda in January 2010. Upon her return she visited the Gisozi Genocide Memorial. Before she left the memorial she publicly called for the prosecution of war crimes and crimes against humanity committed against the Hutu in 1994, which is [was] part of the International Criminal Tribunal for Rwanda's (ICTR) mandate.²⁸⁸ She also said there should be a commemoration of Hutu victims killed during the

²⁸⁵ *Ibid.*

²⁸⁶ Rwanda: Cessation of Refugees Status is unwarranted, The Fahamu Refugee Programme, available at <http://www.refugeelegalaidinformation.org/sites/srlan/files/fileuploads/Memo%20of%20Fact%20and%20Law.pdf>. Accessed on 30 September 2012.

²⁸⁷ *Ibid.*

²⁸⁸ United Nations Security Council. Resolution 955 (1994); S/RES/955, 8 November 1994, available at <http://www1.umn.edu/humanrts/peace/docs/scres955.html>. Accessed on 26 December 2012.

genocide.²⁸⁹ As a result of her comments she was arrested and accused of genocide ideology, divisionism and genocide denial; all separate crimes concerning people who perpetrated genocide. She was later granted bail on these charges but placed under strict house arrest and constant surveillance. The judge ordered that she could not leave Kigali and she had to report to the local police headquarters regularly for interrogation. She has since been arrested again on further charges which include participating in the formation of a new armed group to oppose the Rwandan Government.

According to Amnesty International's Annual Report 2011 on Rwanda,²⁹⁰ there had been a clampdown on freedom of expression and association before the August presidential elections in 2010. This prevented new opposition parties from fielding new candidates. A report by Human Rights Watch in 2011²⁹¹ that was submitted to the UK's International Development Committee stated that the human rights situation in Rwanda had deteriorated in 2010 in the run up to the presidential elections with a crackdown on opposition parties,²⁹² journalists and other critics. None of the three new opposition parties were allowed to contest the 2012 elections as two of them were prevented from registering as political parties. Two opposition leaders were charged with criminal offences and were sentenced to four years

²⁸⁹ Rwanda Urged to Ensure Opposition Leader Receives Fair Trial, Amnesty International, 28 April 2010, available at <http://www.amnesty.org/en/news-and-updates/rwanda-urged-ensure-opposition-leader-receives-fair-trial-2010-04-288>. Accessed on 1 October 2012.

²⁹⁰ Amnesty International, *Annual Report 2011*, "Rwanda," 17 May 2011, available at www.amnesty.org/en/region/rwanda/report-2011. Accessed on 1 October 2012.

²⁹¹ Human Rights Watch submission to the International Development Committee (IDC), "Working effectively in fragile and conflict-affected states: DRC, Rwanda and Burundi," May 2011 available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmintdev/writev/conflict/co16.htm>. Accessed on 1 October 2012.

²⁹² Human Rights Watch, "Rwanda: Stop Attacks on Journalists, Opponents Government Actions Undermine Democracy as Presidential Election Draws Near," June 26, 2010, available at www.hrw.org/news/2010/06/26/rwanda-stop-attacks-journalists-opponents. Accessed on 1 October 2012.

imprisonment. There had been a severe emergence of splits within the ruling party that led to the former head of the army, Faustin Kayumba Nyamwasa, fleeing to South Africa (and suffering an attempted assassination while in South Africa, allegedly at the hands of the Rwandan government). Some senior military officials were arrested while others fled to neighbouring states. It was against the backdrop of all these activities that the incumbent President was elected with 93% of the majority vote.

This captures the extent of political suppression in the country and gives an account of the breach of fundamental civil and political rights under the pretext of preserving peace and order used by many dictatorial states.

4.4.2 Human rights situation in the country

According to the Amnesty International Human Rights report 2012,²⁹³ security concerns intensified in the country in 2011 after the 2010 grenade attacks which exacerbated divisions in the ruling party that resulted in a number of defections. The report highlighted that freedom of expression remained severely restricted as a growing number of people were convicted for perceived threats to national security, such as criticizing Government policies.

Human rights defenders continued to be intimidated and harassed by officials, through detention, threats, administrative obstacles and allegations of financial misconduct. An illustration of this is the case of Joseph Sanane and Epimack Kwokwo, President and Acting Executive Secretary of the

²⁹³ Amnesty International Human Rights Report.Rwanda 2012, available at <http://www.amnesty.org/en/region/rwanda/report-2012>. Accessed on 1 October 2012.

Human Rights League in the Great Lakes Region (LDGL), who were detained and accused of having helped LDGL's Executive Secretary, Pascal Nyilibakwe to leave Rwanda in 2010 after repeated death threats. They were detained and released after several hours. This shows the extent to which unlawful detention is prevalent in the country.

The Amnesty report further reflects that scores of young men arrested in 2010 and 2011 were unlawfully held in military detention facilities and in illegal detention facilities for several months. They were denied access to lawyers, medical care and the opportunity to challenge their cases before a court. The police were evasive in their disclosure of information to the families of the accused. Most of the people arrested were charged with threatening national security. The authorities failed to shed light on the enforced disappearance of one Robert Ndengeye Urayenzeza, who was last seen in March 2010 and was believed to be in police custody.

Human Rights Watch has also documented a long-standing pattern of intimidation and harassment of human rights defenders by Rwandan officials, including threats to their security, administrative obstacles, public and personalized attacks, and allegations that they are complicit with political opponents. The report also details that several human rights organizations, once active in Rwanda, have also been silenced through infiltration by people close to the Government who have taken over these groups' leadership.²⁹⁴

An example of the level of intimidation and harassment can be illustrated in

²⁹⁴ Human Rights Watch, "Rwanda: Stop Intimidating Regional Human Rights Group," August 23, 2011, available at www.hrw.org/news/2011/08/23/rwanda-stop-intimidating-regional-human-rights-group. Accessed on 1 October 2012.

the case of an American Lawyer, Peter Erlinder, who was arrested on charges of genocidal denial, genocide ideology, and threatening national security. He had come to defend Victoire Ingabire. He was later released on medical bail as the case against him proceeds.²⁹⁵

Amnesty International²⁹⁶ and Human Rights Watch have been outspoken in their criticism of the cessation clause that is to be applied to Rwandan refugees. They have repeatedly stated that the country is not safe for return as persecution still persists and the environment in the country is far from friendly as many human rights violations continue to be perpetrated by the state. They strongly condemn the cessation clause and have been imploring UNHCR and host countries to rethink invoking the cessation clause.²⁹⁷

Rwandan refugees have themselves condemned the cessation clause, stating that going back to Rwanda would be a death sentence. They highlight their concerns on the cessation clause through memorandums and press releases, some of which have been sent to UNHCR stating reasons why they should not be forced to return to Rwanda.²⁹⁸

The reports by different organisations are similar when it comes to the area of rights abuse: they generally centre on disappearance of suspects, unlawful arrest, denial of civil and political rights and intimidation. These abuses have

²⁹⁵ *Supra*, note 293.

²⁹⁶ Memorandum to the Government of Uganda on the invocation of the cessation clause to Rwandan refugees, December 2011, available at <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/AFR5902111?CMD=VEROBJ&MLKOB=30224985959>. Accessed on 1 October 2012.

²⁹⁷ *Ibid.*

²⁹⁸ The cessation clause, a failure to protect Rwandan refugees; Kakuma news reflector – a refugee free press, available at <http://kanere.org/2012/04/16/the-rwandan-refugee-cessation-clause/>. Accessed on 1 October 2012.

been made known to the Government of Rwanda that generally denies their existence only admitting in certain occasions that the restriction of certain rights is necessary to preserve peace and maintain stability.²⁹⁹

4.4.3 Restriction of the media and freedom of expression

Reporters without Borders ranked Rwanda 156th out of 179 countries in press freedom for the period 2011-2012, showing the extent to which freedom of the press is interfered with by the state.³⁰⁰

Amnesty International in their Annual Report in 2011³⁰¹ stated that the Government used regulatory sanctions, restrictive laws and criminal defamation cases to close down media outlets critical of the Government. In July, the Government began to enforce aspects of a 2009 media law which maintains defamation as a criminal offence. All these led to editors and journalists fleeing the country after facing threats and harassment as well as intimidation with respect to arrest.

Jeffrey Gettleman reported in the New York Times that in the past three years, being 2007-2010, Rwandan officials have prosecuted more than 2 000 people, including political rivals, teachers and students, for espousing 'genocidal ideology' or 'divisionism'.³⁰² This can be illustrated in the case of

²⁹⁹ Rwanda – Human Rights: Government denies Amnesty report; Inter-press Service News Agency; available at <http://ipsnews2.wpengine.com/1997/02/rwanda-human-rights-government-denies-amnesty-report/>. Accessed on 1 October 2012.

³⁰⁰ Reporters Without Borders. Press Freedom Index 2011-2012, available at http://en.rsf.org/spip.php?page=classement&id_rubrique=1043. Accessed on 1 October 2012.

³⁰¹ *Supra*, note 280.

³⁰² Jeffrey Gettleman. "Rwanda Pursues Dissenters and the Homeless", New York Times, 30, April 2010, available at www.nytimes.com/2010/05/01/world/africa/01rwanda.html. Accessed on 1 October 2012.

Rwanda Journalist Association president, DeoMushayidi, in connection with the 2010 grenade attacks. There were claims that he was part of a network threatening national security and that he conspired with a military officer to launch a wave of bombings in Kigali, a charge which Reporters Without Borders investigated and found baseless.³⁰³

4.4.4 Judicial and Penal systems in Rwanda

The law on genocide ideology sets in motion many cases of rights abuse and further provides the Government with an avenue to harass anyone suspected of it. This specific law enhances human rights abuse and the enforcement of this law by the Rwandan Government has resulted in numerous arrests and sentences for outspokenness in relation to Government policies and actions.

In relation to the extradition of suspects to stand trial in the country for genocide crimes, Amnesty International reported that judicial proceedings against suspects took place in Belgium, Finland, Netherlands, Spain, Switzerland, and the USA. No country extradited genocide suspects to Rwanda due to fair trial concerns.³⁰⁴ They stated that the country had not demonstrated adequate provision for fair trial of genocide suspects and thus extradition would in some way result in human rights abuses for the suspects. The same has been reflected by the ICTR, through denial of case transfers to

³⁰³ Tom Rhodes. "Rwanda's Kagame tries to link bombs to critical press", March 10, 2010; available at <http://cpj.org/blog/2010/03/in-rwanda-kagame-tries-to-link-bombs-to-critical-p.php>. Accessed on 1 October 2012.

³⁰⁴ *Supra*, note 293.

Rwanda citing fair trial concerns, including inadequate witness protection and improper sentencing guidelines.³⁰⁵

The *Gacaca* courts have also raised a lot of concern in matters related to fair trial. The concern has been that the suspects were not given adequate protection; untrained judges were the ones overseeing the trials and this brought into question aspects such as impartiality and undue influence, lack of evidence and reliance on word of mouth which could result in unfair convictions.³⁰⁶ This casts a lot of doubt on the quality of justice dispensed by these institutions.

4.5 CONCLUSION

The opportunity to return home for a refugee is an option many would love to be given. However, if the situation at home is unsafe then it is better to remain in the country of asylum than return home where they may suffer further persecution. There is a need to determine to what extent political instability and human rights abuse can influence declaration of the cessation clause. This is a delicate situation. If declared prematurely without fully considering all aspects of the cessation clause then it could result in further violation of refugee rights especially centring on the principle of non-refoulement. The likelihood of this happening in developing states like Kenya is quite high.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

CHAPTER FIVE

Comparative study

5.1 INTRODUCTION

In 2009, UNHCR's governing body, the Executive Committee, announced the implementation of comprehensive strategies aimed at finding solutions for Angolan, Liberian and Rwandan refugees thereby bringing an end to three of Africa's longstanding refugee situations.³⁰⁷ These solutions involve voluntary repatriation together with assistance packages to help refugees reintegrate, or secure an alternative legal status that would allow them to continue residing in the country of asylum.

Cessation clauses provided by the 1951 UN Refugee Convention as well as the OAU Refugee Convention state that refugee status must come to an end once fundamental and durable changes have taken place in the country of origin. This has been reaffirmed in Kenyan Refugee Act 2006. In the case of Angola, UNHCR recommended that the cessation clause apply to refugees who fled the country as a result of conflict between 1961 and 2002. With regard to Liberian refugees, the cessation clause applied to those who fled the civil wars from 1989

³⁰⁷ UNHCR working to help conclude three African refugee situations; Summary of UNHCR spokesperson Adrian Edwards, 7 February 2012, available at, <http://www.unhcr.org/4f3125cc9.html> ; accessed on 24 October 2012.

and 2003; and for Rwandan refugees, the clause applied to those who fled between 1959 and 1998.³⁰⁸

These countries have been working closely with UNHCR and asylum states like Kenya to ensure the return of their citizens. The three countries are similar in many respects and therefore a comparative study is necessary and justified as it compares the circumstances in which the cessation clauses have been implemented in Liberia and Angola in order to transfer those lessons learnt to the Rwandan context. The two countries have already passed the cessation deadline that was scheduled for 30 June 2012 and thus one is able to appreciate the challenges faced in implementing the clause as well as see the role played by UNHCR in assisting repatriation. Case studies of Angola and Liberia will be undertaken in conjunction with the process of cross-referencing their situation with the Rwandan context.

5.2 ANGOLA'S IMPLEMENTATION OF THE CLAUSE

5.2.1 Overview of the Angolan Refugee Situation

Angola has emerged from decades of armed conflict that began in 1961 and ended in 2002.³⁰⁹ The war of independence in Angola lasted from 1961 to 1975 and was subsequently followed by a civil war between the Government of Angola and rebel forces within the country. This unrest spanning over 40

³⁰⁸ *Ibid.*

³⁰⁹ Sean Cleary. Angola – A case study of private military involvement, available at <http://www.iss.org.za/Pubs/Books/PeaceProfitPlunder/Chap8.pdf>. Accessed on 24 October 2012.

years resulted in millions of Angolans fleeing the country to seek refuge in neighbouring states.³¹⁰

During the civil war, many Angolans faced human rights violations and displacement as they were uprooted from their homes. The refugee population ranged from over four million people displaced internally with another 600 000 seeking refuge abroad.³¹¹ As a result of this conflict, Angolan refugees were granted refugee status on a *prima facie* basis and accorded asylum.

The Angolan civil war ended with the signing of the Luena Memorandum of Understanding on 4 April 2002 between the Government of the Republic of Angola and the National Union for the Total Independence of Angola (UNITA).³¹² After the signing of the memorandum, the country embarked on a period of restoration and subsequently refugees began returning home.

It is estimated by UNHCR, that as at the end of 2011, there were around 131 300 Angolan refugees and 730 asylum seekers still in exile.³¹³ Since mid May 2012, UNHCR doubled the size of repatriation convoys from the Democratic Republic of the Congo for refugees returning to northern Angola. It was

³¹⁰ Implementation of the Comprehensive Strategy for the Angolan Refugee Situation including UNHCR's recommendations on the applicability of the "ceased circumstances" cessation clauses, available at <http://www.unhcr.org/refworld/pdfid/4f3395972.pdf>. Accessed on 24 October 2012.

³¹¹ *Ibid.*

³¹² Peace Accords, Angola. Luena Memorandum of Understanding, available at <https://peaceaccords.nd.edu/matrix/accord/12>. Accessed on 24 October 2012.

³¹³ *Supra*, note 310.

estimated that 1 200 people were returning weekly.³¹⁴ This illustrates that out of the estimated 600 000 refugees that sought asylum, the majority of them had already returned home by 2012. Most of the refugees who still remain in exile are from the Cabinda province; which is the province which continues to witness conflict as a result of the secessionist struggles by rebels.³¹⁵

5.2.2 Post Civil War Angola and the Rationale Behind the Clause

Since the Luena Memorandum of Understanding, Angola began the path to reconstruction and stability. The first post-war legislative elections in Angola were held in 2008 and resulted in a victory for the ruling party, the Movement for the Liberation of Angola (MPLA).³¹⁶ The results were undisputed and accepted by UNITA which became the main opposition party. This stability eventually led to the promulgation of a new Constitution in early 2010³¹⁷ which centred on the rule of law and introduced a Bill of Rights. There was reconstruction in the area of infrastructure and services which had become virtually nonexistent as a result of the civil wars. These developments in the subsequent years after the signing of the Luena Agreement set in motion a mass influx of returnees demonstrating the extent of fundamental and durable changes in the state.

³¹⁴ Angola, UNHCR increases returns for Angolan refugees ahead of end June deadline, reported on 8 June 2012, available at <http://allafrica.com/stories/201206081027.html>. Accessed on 24 October 2012.

³¹⁵ Angola, the forgotten people; displaced persons in Cabinda province; Refugees international; available at <http://reliefweb.int/report/angola/angola-forgotten-people-displaced-persons-cabinda-province>. Accessed on 24 October 2012.

³¹⁶ US Department of State. Diplomacy in action, Angola, available at <http://www.state.gov/r/pa/ei/bgn/6619.htm>. Accessed on 24 October 2012.

³¹⁷ Angola's 2010 Constitution, Electoral Institute for the sustainability of democracy in Africa, available at <http://www.eisa.org.za/WEP/ang5.htm>. Accessed on 24 October 2012.

However, the country has since 2002 received its fair share of criticism pertaining to human rights violations and thereby putting into question whether the country was indeed safe for return. According to Human Rights Watch, analysis of the human rights situation remained restricted specifically in Cabinda province where the Government failed to respond to calls for an independent investigation into allegations of torture and other serious human rights violations committed by the Angolan Armed Forces.³¹⁸ This province was plagued by allegations of arbitrary arrests, torture, forced confessions by the police and a complete denial of the right to fair trial to those arrested.

Since 2002, the media environment has been severely restricted. Defamation has been criminalised under the press law, thus hampering the right to freedom of expression and limiting reporting of certain violations in the country because of fear.³¹⁹ Furthermore, the refusal by Government to allow any opportunity for public protests has hampered the right to peaceful assembly. Human rights defenders were targeted and subjected to unnecessary law suits in an effort to intimidate them and influence their reporting.³²⁰

Amnesty International in its 2012 report of Angola³²¹ highlighted similar issues, whereby it stated that the Government had curtailed freedom of assembly through excessive use of force, arbitrary arrests and detentions as well as unnecessary criminal charges. The report also noted that two

³¹⁸ Human Rights Watch. Angola Annual Report; 2009, available at <http://www.hrw.org/world-report-2009/angola-0>. Accessed on 24 October 2012.

³¹⁹ *Ibid.*

³²⁰ Human Rights Watch. Angola Annual Report 2012, available at <http://www.hrw.org/world-report-2012/world-report-2012-angola-0>. Accessed on 24 October 2012.

³²¹ Amnesty International. Angola Annual Report 2012, available at <http://www.amnesty.org/en/region/angola/report-2012>. Accessed on 24 October 2012.

journalists were tried and convicted of defamation for writing critical articles against the State.

Briefly examining the above concerns, the question is whether these allegations are enough to halt the application of the ceased circumstances clause. In Angola's case the fact that human rights violations continue to be perpetrated in the country has done little to halt the application of the clause to Angolan refugees.

5.2.3 Declaration of the clause and its entry into force

UNHCR recommended that all aspects of the cessation of refugee status for Angolan refugees be implemented during the first half of 2012. This clause was restricted to those who fled Angola as a result of conflicts between 1961 and 2002 with refugee status formally ceasing on 30 June 2012.³²²

5.2.4 Options availed to the Angolan refugees when the clause was invoked

The UNHCR and the Angolan Government initiated a series of campaigns that informed the refugees of the options available in relation to the cessation clause. It was important that this information be effectively disseminated to the community to enable them to take necessary steps to return and adhere to the cessation clause.

The first option availed to the refugees was voluntary repatriation. Though a great majority of the refugees returned home after the end of the conflict in 2002, it is recorded by UNHCR that between 2002 and 2007, an estimated

³²² *Supra*, note 310.

450 000 Angolans voluntarily returned to Angola.³²³ UNHCR was instrumental in encouraging the remaining refugees to return and this resulted in 12 770 Angolan refugees returning in 2008; 2 334 in 2009 and 273 in 2010.³²⁴ Once the refugees began returning, UNHCR monitored a few to establish whether they had reintegrated reasonably well into their homes. The report was positive as the Government of Angola intensified steps to create the reception and reintegration capacity in the country amid a number of challenges such as access to basic services such as healthcare and education, among others. These challenges did not, however, negate the fact that the refugees were now home and could begin working towards a better future for the country.

The second option considered in the Angolan refugee situation was the choice between local integration and alternative legal status in the host countries where the refugees were residing. As a result of the decades of armed conflict in Angola, many families that fled the violence had established family ties through marriage to nationals of the countries of asylum or third-country nationals residing there.³²⁵ In such cases, UNHCR considered local integration as an appropriate durable solution.³²⁶ Therefore, UNHCR proceeded to explore ways in which this could be made possible in the case of Angolan refugees. Most significantly, the Government of Zambia committed to locally integrating some 10 000 long-staying Angolan refugees

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ Local integration as a durable solution, UNHCR, available at <http://www.unhcr.org/3f8189ec4.html>. Accessed on 25 October 2012.

within its territory.³²⁷ However, Angolan law does not permit dual citizenship and thus if the refugees were locally integrated they would lose their Angolan citizenship permanently. This to some extent was a stumbling block to this durable solution. Furthermore, host countries have been reluctant to provide for local integration citing reasons such as scarcity of land and lack of resources to ensure adequate integration. There has also been hostility by many host countries within the African continent to encourage local integration as its citizens would not want to compete with refugees for jobs as well as other resources. This has made it difficult for Angolan refugees to obtain work permits, among other tools, that would enable them to effectively settle within the country.³²⁸

Lastly, for the cessation to be effective it was paramount that exemption procedures³²⁹ be made available to refugees who continue to have a well founded fear of persecution and those who have compelling reasons arising out of previous persecution. This was mainly done in relation to refugees from the Cabinda province that continued to suffer from civil unrest. UNHCR states that it is paramount that refugees be provided with the application process for exemption so that those who cannot return may legally maintain their status as refugees. The reasons for exemption must be legitimate and form the basis of a well founded fear that continues to persist and exist in the country of origin. This was upheld in the South African case of *RM v Refugee*

³²⁷ Zambian refugee policy. Repatriation and local integration, available at http://www.pcr.uu.se/digitalAssets/18/18633_mfs24_broche.pdf. Accessed on 25 October 2012.

³²⁸ Sarah Meyer. Forced Migration Organization: Research on local integration, p 18, available at <http://www.forcedmigration.org/research-resources/expert-guides/local-integration/fmo045.pdf>. Accessed on 24 October 2012.

³²⁹ UNHCR. Guidelines on Exemption Procedures in respect of Cessation Declarations, December 2011, available at <http://www.unhcr.org/refworld/pdfid/4eef5c3a2.pdf>. Accessed on 25 October 2012.

Appeal Board,³³⁰ where Patel J set aside the decision of the Refugee Appeal Board as well as the Minister for Home Affairs indicating that even though the applicant had been denied refugee status, his application fell under the provisions of section 5(1)(e) and 5(2) of the Refugee Act. He ordered the Ministry of Home Affairs as well as the Immigration department to issue the applicant with the necessary refugee papers as compelling reasons continued to exist that prevented the refugee from returning to Angola even after a cessation clause had been declared.

5.2.5 Comparison between Angola and Rwanda

The similarities between Angola and Rwanda are particularly pronounced. Both these countries have suffered from civil unrest resulting in an outpouring of refugees into neighbouring states. In relation to Angola, 40 years of conflict has resulted in a peace agreement in 2002 whereby the majority of Angolan refugees have since returned to their country of origin. However, it was estimated that more than 131 000 remain in exile,³³¹ mainly in the Democratic Republic of Congo and Zambia but after the notification of the invocation of the cessation clause almost half of them had indicated their wish to return home. Similarly, Rwanda had a vast number of refugees fleeing as a result of the 1994 genocide and its aftermath, including armed clashes in north-western Rwanda in 1997 and 1998. Over the years however, a vast number of refugees have returned to Rwanda but around 100,000³³² still remain in

³³⁰ *RM v Refugee Appeal Board* (2007), Refugee Case Law Site, available at, <http://www.refugeecaselaw.org/CaseAdditionalInfo.aspx?caseid=1159>. Accessed on 25 October 2012.

³³¹ Angola, UNHCR, available at <http://www.unhcr.org/pages/4a03e30d6.html>. Accessed on 25 October 2012.

³³² Rwanda, UNHCR, available at <http://www.unhcr.org/pages/49e45c576.html>. Accessed on 25 October 2012.

exile even after the declaration of the cessation clause. A good number still resides in Kenya.

These two countries share the unenviable position of being accused of perpetrating human rights abuses. This has been a common concern expressed in relation to the prospect of return by some of the refugees from the two states. Both Governments refuse to comment on the allegations and continue to stifle freedom of speech and expression. The extent of the rights abuse has however not been enough to counter the impression made that fundamental and durable changes have taken place in the respective countries and thus the countries are presumed safe for return. The cessation clause overlooks these aspects. The fact that UNHCR did not take into account the concerns of human rights abuse raised in Angola makes it more likely that the concerns raised in relation to Rwanda will also be ignored.

In relation to Angola, most refugees have had no option but to return home as they cannot be locally integrated in the country of asylum, with the exception of Zambia. When you look at Rwanda, most states that house Rwandan refugees do not provide for local integration, except for Kenya and South Africa and therefore the refugees will have to be repatriated if they cannot convince the respective parties that they still have a continued well-founded fear.

The deadline for cessation has already elapsed in the case of Angola and thus many Angolans have since returned home having no option but to do so.

UNHCR and host countries have worked tirelessly to ensure the success of the cessation clause and when we examine the Angolan context one wonders whether the issue of human rights abuse in countries of origin have any influence on invoking a cessation clause. Fortunately, in any event, there have been no reports of returnees suffering persecution or human rights upon their return to Angola.

5.3 LIBERIA AND THE CESSATION CLAUSE

5.3.1 Overview of the Liberian Refugee Situation

From 1989 to 2003, Liberia went through two civil conflicts, the first from 1989 to 1996 and the second from 1999-2003, which resulted in a mass exodus of refugees from the state.³³³ The 1989-1996 Liberian ‘first’ civil war, claimed the lives of more than 200 000 Liberians and further displaced at least half a million to neighbouring states. Peace negotiations led to a ceasefire in 1995, only to be broken the following year. A final peace agreement was signed and elections were held in 1997 whereupon Charles Taylor became President. Notwithstanding this, war broke out in 1999 when Liberian dissidents attacked north western Liberia. The situation worsened with various rebel groups joining in the fight which caused further displacement as well as created a major humanitarian and human rights crisis through the widespread use of child soldiers, extensive ethnic violence and massive human rights violations.³³⁴

³³³ UNHCR, Implementation of the Comprehensive Strategy for the Liberian Refugee Situation, including UNHCR’s recommendations on the Applicability of the “Ceased Circumstances” Cessation Clauses, 13 January 2012, available at <http://www.unhcr.org/refworld/docid/4f339902.html>. Accessed on 25 October 2012.

³³⁴ Child Soldiers in Liberia, History, Horror and Hope, available at www.stanford.edu/class/.../Child%20Soldiers%20in%20Liberia.doc. Accessed on 25 October 2012.

Fourteen years of war eventually led to the departure of Charles Taylor, the creation of a transitional Government and the signing of the Comprehensive Peace Agreement (CPA) in 2003.³³⁵ This agreement was signed to create and develop sustainable and lasting peace through the deployment of a United Nations peacekeeping force, the conduction of free and fair elections, the restructuring of the Liberian Army and National Police and the establishment of commissions relating to justice such as the Truth and Reconciliation Commission and the Liberian Lands Commission.³³⁶ After the elections that saw the inauguration of Ellen Johnson Sirleaf as President, the Truth and Reconciliation Commission (TRC)³³⁷ and the Liberian Lands Commission (LLC)³³⁸ were established in a bid to work towards reconciliation. The TRC was mandated to investigate gross human rights violations and war crimes, including massacres, sexual violations and murder.³³⁹

5.3.2 Post Civil War Liberia and the Rationale Behind the Invocation of the Cessation Clause

The years after the signing of the Peace Agreement have seen significant efforts in enhancing rights protection and furthering the rule of law in Liberia, as well as the steady expansion of the economy and a progressive reduction

³³⁵ Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and political parties, Accra, August 18, 2003, available at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_08182003.pdf. Accessed on 25 October 2012.

³³⁶ *Supra*, note 333.

³³⁷ Truth and Reconciliation Commission Liberia, Final Report 2009, available at <http://trcofliberia.org/reports/final-report>. Accessed on 25 October 2012.

³³⁸ Liberian Land Commission, available at: <http://www.lc.gov.lr/>. Accessed on 25 October 2012.

³³⁹ *Ibid.*

in the number of United Nations Mission in Liberia (UNMIL) peace keeping soldiers needed to ensure general security.³⁴⁰ The changes in the country being positive within this subsequent year led to the mass return of Liberian refugees to the country. Between October 2004 and December 2011, 169 630 Liberian refugees repatriated; the majority of whom (126 180) were assisted by the UNHCR.³⁴¹

Amnesty International's Annual Report on Liberia³⁴² demonstrated long delays in the judicial system that led to appalling overcrowding in prisons, as most detainees who were awaiting trial were incarcerated in inhumane conditions. Many perpetrators of the war crimes were still yet to be prosecuted leading to increased allegations of impunity. Human rights abuses against women and girls, including rape and other forms of sexual violence were prevalent in the country. The report also highlighted the use of excessive force by the police during demonstrations and the Government was non-responsive to this. The sentiments reported by Amnesty International were further strengthened by the Human Rights Watch report³⁴³ which stressed the allegations of impunity due to the lack of prosecution of certain perpetrators of war crimes and further harassment by the police in relation to demonstrations.

³⁴⁰ UN Security Council Resolution 1885 (2009) Adopted by the Security Council at its 6188th meeting, on 15 September 2009; available at <http://www.un.org/en/peacekeeping/missions/unmil/resolutions.shtml>. Accessed on 25 October 2012.

³⁴¹ *Supra*, note 333.

³⁴² Amnesty International. Annual Report 2012, Liberia, Available at <http://www.amnesty.org/en/region/liberia/report-2012>. Accessed on 25 October 2012.

³⁴³ Human Rights Watch. Liberia Annual Report 2011, available at <http://www.hrw.org/world-report-2011/liberia>. Accessed on 25 October 2012.

There have been concerns among certain Liberian refugees that the conditions are not safe for return.³⁴⁴ Many expressed fear that the security situation was quite fragile as the country had ruined schools and health centres and hostile strangers had moved into their houses and occupied their land. They also felt that many of the perpetrators who had committed acts of violence against them remained free and thus would be able to attack them. There was accordingly a general fear that the situation in the country was unsafe.

Despite these concerns, the country of origin as well as UNHCR felt that the cessation clause was applicable to Liberian refugees. They therefore went ahead and declared the cessation clause as well as stated a timeline for its application.

5.3.3 Declaration of the cessation clause and its entry into force

UNHCR on examining the fundamental changes in the country since the civil war considered that the refugee status of Liberian refugees who fled the country between 1989 to 2003 could now be brought to an end under the 1951 UN Refugee Convention and the OAU Refugee Convention. The cessation clause was effected on 30 June 2012 in relation to Liberian refugees.

³⁴⁴ IRIN. Humanitarian news and analysis, Many Liberian refugees are still afraid to return home, available at <http://www.irinnews.org/printreport.aspx?reportid=52897>. Accessed on 25 October 2012.

5.3.4 Options availed to Liberian refugees when the cessation clause was invoked

For the cessation clause to apply there are various options that are available for refugees. The first option that was availed to Liberians was voluntary repatriation. The refugees were informed by UNHCR as well as their country of origin that they could now return home and that they would be assisted to re-establish themselves in their country as the reasons for their flight no longer existed. This declaration led to an influx of refugees back to the country and the number continued to increase as the years went by. This durable solution has been well embraced by Liberian refugees as once the deadline of the cessation clause drew nearer it was reported that around 1 600 refugees returned home to beat the deadline.³⁴⁵ The host countries as well as the country of origin used information campaigns and outreach sessions to furnish refugees with the options available to them so that they could make informed decisions.³⁴⁶

The second option was that of local integration. This was a possible durable solution as some Liberian refugees had become long term residents in their country of asylum considering the length of the civil war in the country that caused them to flee. They have established family ties and married nationals of the country of asylum. Many of these refugees further work in the specific countries and thus contribute to the economy of those countries. This therefore becomes an alternative to repatriation if the country of asylum

³⁴⁵ More than 1600 Liberian refugees return home a day after refugee status ends. UNHCR, available at <http://www.unhcr.org/5017c9949.html>. Accessed on 25 October 2012.

³⁴⁶ *Ibid.*

provides for it. Within the legal framework of the Economic Community of West African States (ECOWAS),³⁴⁷ Liberian nationals are entitled to reside and establish themselves as ECOWAS citizens in their countries of asylum provided they satisfy the set requirements, which are primarily either long-term residency, possessing work permits or through naturalisation. In relation to Liberian refugees, during a consultative meeting of 26-27 September 2011 in Abidjan, Côte d'Ivoire, refugee-hosting states affirmed their preparedness to offer alternative legal status to long-staying Liberian refugees wishing to remain in their countries, but with a request made to the international community in meeting the administrative costs.³⁴⁸ It is important to note that the Liberian Constitution does not provide for dual citizenship. Some Governments have been resistant to local integration and state that they would rather have the refugees return home. Some argue that this constitutes forced repatriation.³⁴⁹

The third option that has been availed to the Liberian refugees falls under the category of exemption procedures.³⁵⁰ The host countries and UNHCR work together to ensure that the necessary procedures are in place to receive applications for exemption as well as how they will be decided. They thus decide upon each individual application whether the application provides a strong case for exemption and if so, the refugee continues to maintain refugee status.

³⁴⁷ The 1979 ECOWAS Protocol Relating to the Free Movement of Persons, Residence and Establishment (AIP//5179), available at <http://www.sec.ecowas.int/sitecedeo/english/protocoles.htm>. Accessed on 25 October 2012.

³⁴⁸ *Supra*, note 333.

³⁴⁹ *Supra*, note 328.

³⁵⁰ *Supra*, note 333.

5.3.5 Comparison between Liberia and Rwanda

Both these countries experienced conflict that resulted in a mass outflow of refugees into neighbouring states and further affected the infrastructure of the states. In both states the greater part of the refugee population have returned home and the number of returns in the subsequent years has been encouraging. The return of refugees in both states encourages the invocation of the cessation clause as the record of return shows that the country of origin is relatively safe for return. In both states there have been important steps towards democracy and reconciliation as there have been elections held and further constitutional changes have been instituted in a bid to enhance rights protection and encourage the reconstruction of strong government offices to serve the people.

Though these positive developments are noteworthy, in both countries there have been strong allegations of human rights abuse. In Rwanda, the main area of concern has been on the restricted space for political opposition in the country; judicial concerns focussing particularly on the *Gacaca* courts which have been a source of apprehension for many refugees though they have since been concluded. In Liberia, the concerns mainly centre on increased insecurity in the country especially for women and children and further harassment by the police. There have also been allegations of impunity as people who committed crimes during the civil war continue to walk free. This has essentially been a concern to the refugees as some of these refugees were victims of those same perpetrators.

Though the deadline for the return of Liberian refugees has since elapsed, it is noteworthy that many refugees have returned home and are still struggling to settle. Liberia is a member of ECOWAS and therefore has the benefit of the set conditions for ECOWAS members such as work permits in the regional block as well as free movement and residence. Rwanda however, is a member of the East African Community (EAC) which does not provide for regional work permits and residency, thus local integration becomes a problem as many countries within the region do not provide for local integration as per their statutes and policies. Kenya is also part of the EAC and thus the likelihood of it supporting the return of refugees to Rwanda is quite high because they are partners under the same regional framework.

Liberia is the last of the two countries to begin the road to recovery. It has further implemented the cessation clause despite allegations of human rights violations. The question is therefore whether the same should apply to Rwanda?

5.4 CONCLUSION

Through the above comparative study, an analysis of the similarities and differences between the three countries has been conducted. The most notable similarity that has been revealed is the degree of human rights violations and the concerns raised by international rights organisations on the same. Despite these concerns, Angola and Liberia have implemented the cessation clause. This implies that the human rights situation in the country of origin is not that significant when implementing the cessation clause. The study further suggests

that the implementation of the cessation clause to Rwandan refugees is inevitable based on this comparative study as the other two countries have implemented the same despite the concerns about human rights violations. The various case studies however do not make any mention of any human rights assessments conducted by the countries of asylum accommodating Liberian and Angolan refugees. It infers the likelihood that Kenya would also not conduct any assessment. This would prove detrimental to the Rwandan refugees residing in Kenya.

CHAPTER SIX

Concluding remarks and recommendations

6.1 GENERAL

My children will always be in danger. Hutus hate them because they have a Tutsi mother.

Tutsis hate them because they have a Hutu father. The son of a snake is a snake.³⁵¹

This quote epitomises the aftermath of the Rwandan genocide: refugees may wish to go home, but there is a very real perception that they will always be in danger. That danger may come from the Rwandans themselves who continue to adhere to defined tribal categorisation; or it may come from the Government itself, which is seen to be more and more oppressive. Nevertheless, a ceased circumstances clause has been invoked in respect of Rwandan refugees and this study has sought to determine the viability of the application of the clause.

The ceased circumstances clause was created to recognise an end to refugee status. Its provisions in treaties and statutes serve to aid the repatriation of refugees to their country of origin so that they can re-establish themselves and further be able to regain the protection of their country of nationality.

In order to explore the application of the cessation clause to Rwandan refugees, chapter two of the study has analysed the theoretical context in which the cessation clause was created and thus we have been able to understand the need for a cessation clause. It has further exposed the qualifications involved in invoking a cessation clause as well as the implementation procedures. Through examination of these qualifications the study has been able to depict the

³⁵¹ The words of Nestor Negibira, a Hutu who married a Tutsi, as quoted in Robert Guest. *The Shackled Continent: Africa's Past, Present and Future*. (2005) p 109.

shortcomings sighted in the creation and application of the cessation clause from a country of asylum's perspective specifically looking at Kenya. These shortcomings raise questions as to the viability of invoking a cessation clause especially in situations where the country of origin continues to violate the human rights of its citizens.

In the Rwandan context, the study, through chapter three, has explored the Rwandan history in an effort to understand why Rwandan refugees exist to date. Furthermore, the study has exposed the reasons why the cessation clause is applicable to Rwandan refugees for the period ranging from 1959 to 1998. At this point the study provided a brief overview of the fundamental changes that the country has experienced since the end of the genocide and further, its current status in the political, social and economic setting. This provided an appreciation of the transition that the country had undergone through pre-colonial, colonial, post-colonial, genocide and post-genocide settings.

The study in chapter four exposed the grounds of opposition in reference to the cessation clause. It provided two points of view where it undertook to briefly discuss the reasons for and against invocation of the cessation clause. In examining the reasons against the invocation of the clause, the study has been able to expose the extent of the human rights violations in Rwanda. It has further highlighted the apprehensions of various human rights organisations on the invocation of the cessation clause. The study has accordingly presented the likelihood of persecution upon return, based on the human rights situation in Rwanda. It poses the question of whether human rights violations within the

country of origin are enough to deter or suspend the invocation of a cessation clause.

The study has also provided a comparative study with two countries similar to Rwanda. These countries are Liberia and Angola. The two countries have already implemented the cessation clause and thus a lot can be deduced from the implementation procedure and more specifically the concerns raised during implementation in those countries and how they were addressed. One common factor that arose during the comparative study is that both countries similar to Rwanda suffered from human rights violations. Many international organisations such as Amnesty International and Human Rights Watch had expressed concern as to whether the countries of origin were truly safe for return. Their concerns however fell on deaf ears; the cessation clause was implemented in both countries amid all the concerns raised. It thus suggests that though human rights violations were a factor of concern in the invocation of a cessation clause, the concerns raised were not enough to suspend implementation of the clause. These two countries were able to provide a case study on what would inevitably be the fate of Rwanda based significantly on the fact that implementation of their cessation clauses did not take into account the human rights factor but further based the reasons for invocation on perceived political stability. This extensively exposed the lack of adherence to other factors in determining invocation of cessation clauses. It brings out the issue of assessment of changed circumstances in the country of origin by countries of asylum like Kenya. It illustrates that it is highly unlikely that developing states conduct investigations

pertaining to the extent of fundamental changes vis a vie the human rights situations in the country of origin before invoking the cessation clause.

This study has consequently resulted in the formulation of specific findings and recommendations with regard to the application of the cessation clause to Rwandan refugees residing in Kenya.

6.2 FINDINGS

The findings of this study are as follows:

1. The human rights situation in Rwanda holds credible ground for suspension of the cessation clause in Kenya

According to the UNHCR Guidelines, the human rights situation in the country of origin is part of the fundamental changes that ought to be examined before a cessation clause is declared. This study has explored the human rights situation in Rwanda, exposing grave concerns of violations of civil, political and social rights. These issues have been raised by credible and reputable non-governmental organisations seeking suspension of the cessation clause until the human rights situation in the country can be fully investigated and a conclusive decision made. The grounds raised for suspension are credible under humanitarian grounds as many of the refugees are likely to suffer when the cessation clause is implemented if a proper decision that is mindful of the principle of non-refoulement is not made.

2. Political stability of the country of origin forms the overall qualification of whether a cessation clause ought to be invoked

The study reveals that political stability in the country of origin according to the UNHCR Guidelines forms the basis of whether a cessation clause ought to be declared. As long as a country appears politically stable in the sense that elections have been carried out, there is a stable government in place, it means that the country is *prima facie* safe for return. It does not speculate in detail on what actually informs stability of the government. One would question whether authoritarian rule or dictatorship forms a stable government as political stability is relative. It may not necessarily infer that the country is safe for return; other factors such as the human rights situation may cast doubts as to the extent of political stability in the country of origin. In Rwanda's case claims of authoritarian rule resulting in human rights violations casts doubt on the political stability of the country making one wonder whether the country is truly safe for return.

3. There is no set criteria or timeline for the investigative procedure before invoking a cessation clause

The study reveals that there is no adequate guide in place that narrates or allocates the roles and duties of UNHCR and the asylum states like Kenya regarding the procedure of implementing a cessation clause. The lack of elaboration on the above will often lead to premature declarations for cessation as asylum states like Kenya may interpret fundamental changes in their own way and different states have their own time limit in elaborating the durability of these changes. This makes the decision on declaration of a

cessation clause somewhat arbitrary. It also brings out Kenya's dependence on the assistance of UNHCR making the chances of declaring a decision contrary to what has been suggested by UNHCR highly unlikely.

4. Implementation of the cessation clause in Kenya will result in the violation of Rwandan refugees' human rights

The study reveals that sending the Rwandan refugees home will result in a violation of their human rights. This is fundamentally based on the current human rights situation in Rwanda. Their right to non-refoulement will be violated by making them return to a country where they could suffer further persecution because of the current human rights situation in the country. This violates the entire essence of refugee protection. It further brings out the likelihood that Kenya will invoke the cessation clause in comparison to other African asylum states that have hosted Liberian and Angolan refugees.

6.3 RECOMMENDATIONS

i. There is need for harmony in the two treaties dealing with refugees in Africa

The two refugee treaties i.e. the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention provide, *inter alia*, for cessation of refugee status. However, the OAU Refugee Convention is more elaborate on its definition of who qualifies as a refugee and further what 'expanded' situations can result in the cessation of refugee status when compared to the 1951 UN Refugee Convention. The 1951 UN Refugee Convention provides for exemption clauses while the 1969 OAU Refugee Convention does not. The 1951 UN

Refugee Convention has guidelines to assist in the interpretation of the clause while the 1969 OAU Refugee Convention does not. The need to harmonise these two and further create comprehensive guidelines for the two, specifying the roles of the country of origin, the UNHCR and countries of asylum will go a long way in alleviating the confusion in interpretation and implementation of the clause. The Kenyan Refugee Act may also be amended to reflect this harmonisation.

ii. There is a need to revise the 1999 UNHCR Guidelines on the cessation clause

There is an urgent need to amend the guidelines so that they are clear on all factors that need to be taken into account in relation to invoking the ceased circumstances clause. The guidelines should further specify the roles of all parties in relation to implementation of the clause. This will facilitate a clear understanding of who does what and how countries of asylum like Kenya can be guided in investigating fundamental changes in the country of origin. Amendments to the guidelines are due as they were drafted in 1999 and thus there is need to constantly review them so that they are in line with the current position regarding refugee law. Lastly the amended guidelines ought to make it compulsory that cognisance is taken of the human rights situation in the country of origin and provide sufficient instruction on the way in which human rights can be analysed in an effort to enhance refugee protection when deliberating on cessation.

iii. There is a need for mandatory investigations by countries of asylum before signing any tripartite agreement in relation to the cessation clause

Countries of asylum like Kenya ought to be forced, through ratification of the refugee treaties, to conduct investigations as to the stability of a refugee-producing country before invoking the clause. The investigation procedures and criteria ought to be outlined in the guidelines to help the relevant government agencies in this respect the Department of Refugee Affairs within Kenya to enable them better conduct appropriate investigations before signing tripartite agreements. This responsibility placed on states will go a long way in preventing premature declarations of cessation.

iv. The Cessation clause pertaining to Rwandan refugees as well as refugees originating from countries suffering from human rights violations ought to be suspended

This study indicates that invoking the cessation clause pertaining to Rwandan refugees in Kenya at the present time will result in more harm than good. Though the majority of the refugee population has returned home, this should never be used as an indicator to force the others to return. In cases where human rights violations are prevalent, that alone should suspend all talks on cessation in efforts to enhance refugee protection. The desire to have refugees return home should never surpass the desire to enhance refugee protection.

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