

**INTERNATIONAL REFUGEE LAW AND THE RIGHT TO
NATIONALITY: LEGAL RESPONSES TO THE RWANDAN
REFUGEE CRISIS IN UGANDA**

Marshall Godfrey ALENYO (113222182)

Masters of Law (LLM)
International Human Rights and Public Policy
Law Department, University College Cork

Supervisor: Professor Siobhán Mullally

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This is to confirm that this thesis is my own work. I have not knowingly plagiarised any part of this work, neither have I colluded with any individual living or dead in the writing of this dissertation

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1948 Universal Declaration of Human Rights

1949 The Geneva Convention on the Stateless Women

1949 Refugees and Stateless Persons Convention

1950 Statute of the office of the United Nations High Commissioner for Refugees

1951 Convention Relating to the Status of Refugees

1951 Convention Relating to the Status of Stateless Persons

1957 Convention on the Nationality of Married Women

1961 Convention on the Reduction of Statelessness

1966 International Covenant on Civil and Political Rights

1966 International Covenant on Economic, Social, and Cultural Rights

1967 Protocol Relating to the Status of Refugees

1969 The Vienna Convention on the Law of Treaties
1975 Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment
1979 Convention on the Elimination of all forms of Discrimination against Woman
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COMM.79/93.

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ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and welfare of Child
ACHPR	African charter on Human and Peoples Rights
AJIL	American Journal of International law
AU	African Union
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CJRS	Canadian Journal on Refugees
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
Geo, Imm.l.j.	Georgetown Immigration Law Journal
Harv.int'l.l.j	Harvard International Law Journal
HRC	Human Rights Committee
ICJ	International Court of Justice
IJRL	International Journal of Refugee Law
ILC	International Law Commission
IRO	International Refugee Organisation
OAU	Organisation of Africa Unity
UCIC	Uganda Citizenship and Immigration control Act.
UKTS	United Kingdom Treaty series
UNTS	United Nations Treaty Series
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commission for Refugees
Vard.jtl.	Vanderbilt Journal of Transitional Law

INTRODUCTION

'During the twentieth century a more multi faceted and cosmopolitan view of legal relations in international law emerged. It is widely thought that individuals now have a certain status in international law as beneficiaries of rights and the bearers of obligations.' Kate Parrett¹

The objective of this thesis is to highlight the interaction between international refugee law and the right to a nationality with particular focus on the access to citizenship by Rwandan refugees and their descendants in Uganda.² Most of these refugees have, after years of sojourn, developed social and economic ties to Uganda, which renders it impossible to leave the country of asylum. It also creates a need to find a solution for their continued stay beyond refugee status. Under International refugee law, local integration into the community is a durable solution. Among others, it provides for assimilation and naturalisation as an end to refugee status and beginning of a new chapter of citizenship in the host country.

In this thesis I will contend that substantive legal crisis pertains, particularly if we consider the challenges that face the Rwandan refugees who have lived in Uganda for over fifty years.³ Most having been born in Uganda but cannot access to Ugandan citizenship.⁴

The government of Uganda is to invoke the "ceased circumstances" clause to the 1959-1998 refugees following a declaration by the UNHCR in 2009. This would entitle refugee who cannot repatriate

¹ Parrett Kate, *The Individual in the International Legal System: Continuity and Change in International Law*. (Cambridge, UK: Cambridge University Press, 2011) 3

² Jason Clay, 'The Eviction of Banyarwanda: The Story Behind the Refugee Crisis in Southwest Uganda' (Cambridge, MA: Cultural Survival Inc. 1984).

³ Charles Mwalimu, 'The Legal Framework on Admissions and Resettlement of African Refugees with an Emphasis on Kenya, Tanzania, and Uganda' (2004) 18 *The 'Emory Int'l L. Rev.* 455.

⁴ Deborah Mulumba, and Mlahagwa Olema-Wendo, 'Policy analysis report: Mapping migration in Uganda' (Department of Development Studies: Mbarara University of Science and Technology 2009) 15.

to access alternative immigration status like citizenship, naturalisation and permanent residence.⁵ This thesis ultimately intends to interrogate the nationality laws, in Uganda to expose of at all its impediments on the enjoyment of the right to nationality by Rwandan refugees as provided by Article 15 of the UDHR.

Chapter one will trace the development of international refugee law and elucidate the scope of Article 1(c) and Article 34 of the 1951 Convention Relating to the Status of Refugees⁶. It will introduce the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,⁷ defining the scope of the “ceased circumstances” cessation clauses (herein after referred to as the cessation clause) and contextualise the right of a refugee to assimilation and naturalisation in Africa. Chapter two will consider the evolution and recognition of the right to nationality as a human right. I will discuss its nexus with other human rights norms. The International Court of Justice (ICJ) decisions in the *Nottebohm*⁸ and the *Diallo*⁹ cases will be discussed in detail in order to underscore the principle of effective nationality and social ties. Finally this chapter will survey the position of the African Union on the right to nationality.

⁵ 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) (hereinafter referred to as the comprehensive strategy) www.refworld.org/docid/4f33a1642.html accessed 3 September 2014.

⁶ The 1951 UN Convention relating to the status of refugees, UNTS 177. Here in after referred to as the 1951 Refugee Convention.

⁷ UNHCR, *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969, entered into force 20 June 1974) www.unhcr.org/45dc1a682.html accessed 20 August 2014. This was adopted by the Assembly of Heads of States and Government at its sixth session (hereinafter referred to as the OAU Convention).

⁸ *Liechtenstein v Guatemala (Second Phase)* (1955) International Court of Justice (ICJ), 6 April 1955, www.icj-cij.org/docket/files/18/2676.pdf accessed 15 August 2014 (herein after referred to as the *Nottebohm* case).

⁹ *Republic of Guinea v The Democratic Republic Congo* (2010) ICJ, Separate Opinion of Judge Cançado Trindade 729 (Herein after referred to as the *Diallo* case).

Chapter three traces the history of nationality law in Uganda. It briefly introduces the refugee policy and its implementation, and reveals the Rwandan refugee crisis in the country.¹⁰ I will also probe the requirements for citizenship in Uganda, and show that invocation of the proposed cessation clause will expose the refugees to an unresolved immigration situation. In chapter four, I will make a legal response to this citizenship crisis highlighting the constitutional petition no.34 of 2010 before the Constitutional Court of Uganda.¹¹ I will also critique the invocation of the cessation clause and the danger of creating a class of stateless persons.¹² Chapter five will conclude the discussion in this thesis and make recommendations that need to be considered by various institutions before invocation of the cessation clause on Rwandan refugees, in order to protect their right a nationality.

¹⁰ Zachary Lomo, Angela Naggaga, and Lucy Hovil, 'The Phenomenon of Forced Migration in Uganda: An Overview of Policy and Practice in an Historical Context' (2006) Refugee Law Project Working Paper 1 refugeelawproject.org/files/working_papers/RLP.WP01.pdf accessed 13 August 2014.

¹¹ This is a public interest litigation brought before the Court of Appeal of Uganda that sits as the Constitutional Court under Article 137 (1) of the 1995 Constitution of Uganda for the purpose of purpose of interpretation of the Constitution.

¹² UNHCR, *Comprehensive and Regional Approaches within a Protection Framework* (EXCOM Conclusions 80 [XLVII] 1996) www.unhcr.org/3ae68c6e24.html accessed 15 August 2014.

CHAPTER ONE: REFUGEES IN INTERNATIONAL LAW

International Refugee Law: A Historical Overview

The underlying development of International refugee law was the protection of displaced persons who found themselves outside their countries of origin and without the protection of their home government.¹³ The refugee is a person faced with persecution and 'lack of protection in one's own country or habitual residence'.¹⁴ This, according to Goodwill-Gill and McAdam is what distinguishes refugees in International refugee law from ordinary aliens.¹⁵

Continental Europe, grappling with the effects of the World War II made the first real attempt at an international level to give protection to refugees under the auspices of the League of Nations.¹⁶ The League however handled the refugees not as an international category of persons but as persons oscillating between states and hence subjects of their state of origin.¹⁷ In order to give the refugees international protection and consolidate them as subjects of international refugee law, the Convention Relating to the International Status of Refugees was adopted and entered into force in 1935.¹⁸ After the Second World War the world faced new threats which in turn required a fresh approach to the management of international affairs.¹⁹ It became necessary that a more compatible and sustainable approach to managing refugee affairs

¹³ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, New York: Oxford University Press, 2011) 16.

¹⁴ *R v Secretary of State for the Home Department Ex parte Adan* (1998) UKHL 15 (1998) 2 WLR 702.

¹⁵ Goodwill-Gill and McAdam (n 13) 9.

¹⁶ *ibid* 16-20.

¹⁷ Rehman Javaid, *International Human Rights Law* (2nd edn, Harlow, England: Longman/Pearson Education 2010) 643.

¹⁸ League of Nations, *Convention Relating to the International Status of Refugees* (League of Nations, Treaty Series Vol. CLIX No. 3663 28 October 1933) www.refworld.org/docid/3dd8cf374.html accessed 22 19 August 2014.

¹⁹ Rehman Javaid (n 17) 3.

be established. Consequently, the International Refugee Organisation (IRO) was formed.²⁰ It was a non permanent body aiding large scale resettlement of specified categories of refugees.²¹ The European states that constituted the majority within the UN realised that there was urgent need for a fresh mandate to coordinate action to protect refugees and resolve their problems at a global scale, and provide for the right to seek and enjoy asylum.²² This led United Nations state parties to replace the IRO with the Office of the United Nations High Commissioner for Refugees with a three-year mandate which has since then been always extended.²³ The UNHCR legal and operational competence extends to refugees who were covered by various treaties, and included refugees resulting from events occurring before 1 January 1951.²⁴

International refugee law therefore developed a set of rules and procedural safeguards to protect the persons seeking asylum and then to give the recognised refugee specific rights and responsibilities. The main source of these rights has been the 1951 Refugee Convention and its 1967 protocol.²⁵ It is therefore important to look at this convention in detail together with complementary conventions such as the OAU Convention.²⁶ This will enable us to source the cessation clause, and the

²⁰ United Nations, *Constitution of the International Refugee Organisation*, (UNTS 18, 15 December 1946) 3 www.refworld.org/docid/3ae6b37810.html accessed 22 September 2014.

²¹ United Nations Relief and Rehabilitation Administration (UNRRA) www.libllo.org/pha/policy/1943/431109a.html accessed 20 August 2014.

²² UN General Assembly, *Universal Declaration of Human Rights (UDHR 1948)* Article 14 www.un.org/en/documents/udhr/index.shtml#a accessed 12 August 2014.

²³ UN General Assembly, *Refugees and Stateless Persons (A/RES/319(IV)A*, 3 December 1949) www.un.org/documents/ga/res/4/ares4.htm accessed 20 August 2014; *Statute of the Office of the United Nations High Commissioner for Refugees (A/RES/428(V)*, 14 December 1950) www.unhcr.org/4d944e589.pdf accessed 20 August 2014; Rehman Javaid (n 17) 643-645.

²⁴ UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees (GA Res. 428(v)* 14 December 1950) www.unhcr.org/3b66c39e1.html accessed 14 September 2014.

²⁵ UNHCR, *The 1951 Convention Relating to the Status of Refugees* (herein after referred to as the 1951 Convention) www.unhcr.org/3b66c2aa10.html accessed 20 August 2014

²⁶ The OAU Convention (n 7).

refugees' right to assimilation and naturalisation, a right to which I argue in chapter 4, that the Rwandan refugee in Uganda is entitled.

The 1951 Convention and the 1967 Protocol on Refugee Status

A refugee under Article 1 of the 1951 Convention is defined as:

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

The 1951 Convention initially limited itself to rectifying the European refugee situation and premised its interventions of achieving this protection through state responsibility.²⁷ However, the 1967 Protocol removed the temporal and geographical limits of the Convention and extended its scope beyond the frontiers of Europe.²⁸ It also captured the insight of the new refugee situations that had arisen since the adoption of the Convention.²⁹

²⁷ Javaid Rehman (n 17) 644.

²⁸ UN General Assembly, *Protocol Relating to the Status of Refugees*, (Preamble UNTS 606, 31 January 1967) 267 articles 1(2) and 11 www.refworld.org/docid/3ae6b3ae4.html accessed 22 August 2014.

²⁹ UNGA, *Protocol Relating to the Status of Refugees* (Resolution 2198 [XXI] 16 December 1966) [www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2198\(XXI\)&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2198(XXI)&Lang=E&Area=RESOLUTION) accessed 22 August 2014; UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (HCR/1P/4/ENG/REV.3 December 2011) www.refworld.org/docid/4f33c8d92.html accessed 22 August 2014.

The 1951 Convention structurally contained three elements: first, the definition of the refugee³⁰ which addressed the refugee as a legal person with rights and obligations; second, the principle of non-refoulement which has found itself at the heart of refugee protection.³¹ It provided that

‘No contracting state party shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political group’.³²

The third element was the rights and obligations of Refugees and the responsibilities placed upon states. It became evident that different refugee situations had to be managed by adopting regional strategies. One of such situations was in Africa to which I now turn.³³

The African Approach to International Refugee Law

The OAU Convention was principally intended to manage the unique problem of the nature of African refugee situations and as much as possible to contextualise the international standards and obligations.³⁴ Africa was going through a period of conflicts and OAU heads of state were urgently noted that ‘all those member states which have not acceded to it to do so without further delay and re-dedicate ourselves to a most effective implementation of the Convention.’³⁵

³⁰ UNHCR (n 25) Article 1 of the 1951 Convention.

³¹ *R v. Immigration officer at Prague airport Ex parte European Roma Rights Centre* (2004) UKHL 55 (2005) (UNHCR intervening) 2 AC 1 para 26.

³² UNHCR (n 25) Article 33(1) of the 1951 Convention.

³³ The OAU Convention (n 7). It was adopted following the conviction that the problems of Africa must be solved in the spirit of the Charter of the OAU and in the African context.

³⁴ *ibid.*

³⁵ The Tunis Declaration on the 1969 Convention Governing the Specific Aspects of Refugee Problems (1994) 13 (2-3) *Refugee Survey Quarterly* 168 rsq.oxfordjournals.org/content/13/2-3/167.full.pdf accessed 22 August 2014.

The OAU Convention extended the scope of the 1951 Convention to Africa. In addition to adopting its definition of a refugee, Article 1(2) of the OAU Convention also expanded the term refugee to;

'[A]lso apply to every person who owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

The concept of granting refugee status to massive influxes was to become a hall mark in the management of refugee situations in Africa. The OAU Convention in principle categorised refugees as temporary residents, leading to good reception for refugee arrivals as brothers, sisters or neighbours.³⁶ This attitude was reflected in the OAU Convention policy of promoting voluntary repatriation as the most viable and durable solution to the African refugee situation.³⁷

As the continent of Africa grappled with the refugee question characterised by mass influxes, most countries adopted a policy of 'once a refugee always a refugee' and some scholars contend that asylum had been 'established as a right in Africa.'³⁸ Indeed, Okoth-Obbo writing on 'thirty years of the OAU Convention' quotes the lamentation of the then Secretary General of the OAU that

³⁶ George Okoth-Obbo, 'Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) *Refugee Survey Quarterly* 79.

³⁷ Jennifer L Turner, 'Liberian Refugees: A Test of the OAU Convention Governing the Specific Aspect of the Refugee Problem in Africa' (1994) 8 *Geo Imm LJ* 281.

³⁸ Zachary A Lomo, 'The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work' (2000) 18(2) *Berkeley J Int'l L* 268; Joe Oloka-Onyango, 'Plugging the Holes: Refugees, OAU Policy and the Practices of Member States' (1986) *USC Issues Brief*, Washington D.C.

'... [y]ears after the adoption of the OAU Convention, the continent is still afflicted by the plight of over 4 million refugees on the continent, and several times that number of displaced persons inside their countries ... (this situation) undermines the very principles that guided the founding fathers in framing the OAU Refugee Convention ...'³⁹

The OAU Convention was adopted with the assumption that the aggression and conflicts would soon end, peace would return, and refugees would then go back home in dignity.⁴⁰ This expectation led the framers of the OAU Convention to adopt the policy of voluntary repatriation providing that 'The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against their will.'⁴¹

Repatriation has institutional and human rights dimensions;⁴² its facilitation and promotion fall within the competence and mandate of the UNHCR.⁴³ Strategically because of the difficulties which may result from this policy, the UN General Assembly authorised UNHCR involvement in rehabilitation and reintegration programs⁴⁴ and Goodwill-Gill and McAdam reveal that a 'fund for durable solutions was at one time proposed to assist developing countries to meet some of the costs of this solution'⁴⁵.

³⁹ Okoth-Obbo George (n 36).

⁴⁰ Elizabeth Marissa 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' (2011) 44 *Vand J Transnat'l L* 711.

⁴¹ OAU Convention (n 7) Article 5 (1).

⁴² Guy S Goodwin-Gill and Jane McAdam (n 13) 492.

⁴³ Executive Committee conclusions <http://www.unhcr.org/41b4607c4.pdf> accessed 20 September 2014 Conclusion No. 18 (xxxi).

⁴⁴ There are several resolutions like UNGA res. 2956 (xxvii), 12 Dec 1972; 3143 (xxviii), 14 Dec 1973; 3271 (xxix), 10 Dec 1974; 3454 (xxx), 9 Dec 1975; 31/35, 30 Nov 1978, 29 Nov 1978; 34/60, 29 Nov 1979; and 35/41, 25 Nov 1980.

⁴⁵ Guy S Goodwin-Gill and Jane McAdam (n 13) 493 para 2.

Was Voluntary Repatriation Successful in Africa?

The scope of my thesis is not to evaluate the success of this policy in Africa but to briefly highlight its contribution to the accumulation of refugee populations in countries of asylum like Uganda. The policy makers in Africa had not anticipated a situation of prolonged conflicts leading to long residence of refugees, and other acquired social and economic ties which would make it difficult if not impossible for refugee to leave countries of asylum. The hope that African refugees would only 'stay' for a short period started dissipating with new arrivals while at the same time the 'old' arrivals were getting more connected to the community.⁴⁶

The OAU Commission on Refugees was established to devise ways and means for the return of refugees to the country of origin in line with the policy of repatriation.⁴⁷ Voluntary repatriation was also enhanced by the executive committee of UNHCR which recommended this policy.⁴⁸ It was also used as a panacea to solve political conflicts in Africa, for example in Mozambique, Liberia, and Rwanda. Voluntary repatriation was one of the policies that were included in the peace terms between the government of Rwanda and the Rwanda Patriotic Front (RPF) during peace talks in Arusha, Tanzania.⁴⁹

⁴⁶ Said Adejumobi, 'Citizenship, Rights and the Problem of Internal Conflicts and Civil Wars in Africa' (2001) 6(2) African Journal of Political Science 77 archive.lib.msu.edu/DMC/African%20Journals/pdfs/political%20science/volume6n2/ajps006002006.pdf

⁴⁷ Organisation of African Unity (Council of Ministers), 'Resolution on the Problem of Refugees in Africa' (OAU Kinshasa 4-10 September 1967) CM/Res 104 (IX).

⁴⁸ Executive Committee conclusions (n 43) <http://www.unhcr.org/41b4607c4.pdf> most notably conclusion No. 18(xxxi) on voluntary repatriation (31st session 1980) and conclusion No. 40 (xxxvi) voluntary repatriation (36th session 1985).

⁴⁹ Government of Rwanda, *Peace Agreement between the Government of Rwanda and The Rwandese Patriotic Front* (1993) repositories.lib.utexas.edu/handle/2152/5089 accessed 22 August 2014. These were peace talks between the RPF of President Paul Kagame and the then government of Juvenile Habyarimana. The peace talks were however overtaken by the 1994 genocide.

Most African countries started getting desperate with the 'visitors' who were not leaving. Indeed, the political rhetoric with which the Convention was signed was not the stamina with which it was implemented, leading to criticism. Joe Oloka-Onyango commented about the lack of a monitoring mechanism by the OAU to effectively pursue the matter of adherence to the principles of the Convention or monitor the respective laws and practices of member states.⁵⁰ Uganda for example expelled the Rwandese in 1982,⁵¹ the Kenyan government has been returning Somali asylum seekers,⁵² and in Tanzania the government closed borders to the Burundian refugees who were fleeing from their country.⁵³ The policy of repatriation across Africa was not yielding much success. Many refugees sojourned in the countries of asylum endlessly. How would these refugees end their seemingly indefinite sojourn in countries of asylum? I will now turn to the application of the cessation clause in Africa which is seen as a solution to ending indefinite refugee status.

The "Ceased Circumstances" Cessation Clause

The first United Nations Commissioner for Refugees, Van Heuven Goedhart once stated than 'refugee status should not be granted for a day longer than absolutely necessary ...'⁵⁴ The UNHCR has the authority

⁵⁰ Joe Oloka-Onyango, 'Human Rights, the OAU Convention, and the Refugee Crisis in Africa: Forty Years after Geneva' (1991) 3(3) IJRL. 453.

⁵¹ Jason Clay (n 2); Charles Westin, 'Regional Analysis of Refugee Movements: Origins and Response' (2002) Centre for Research in International Migration and Ethnic Relations Stockholm University Occasional Paper 4 www.diva-portal.org/smash/get/diva2:462577/FULLTEXT01.pdf accessed 22 August 2014; Gingyera-Pinyowa, *Uganda and the Problem of Refugees* (Makerere University Press 1998).

⁵² Human Rights Watch, *From Horror to Helplessness: Kenya's Forgotten Somali Refugee Crisis* (HRW March 2009) 6. www.hrw.org/sites/default/files/reports/kenya0309webwcover_1.pdf accessed 22 September 2014.

⁵³ Bonaventure Rutinwa, 'The Tanzanian Government's Response to the Refugee Emergency' (1996) 9 (3) Journal of Refugee Studies 291-302 doi:10.1093/jrs/9.3.

⁵⁴ Yasmeen Siddiqui, 'Reviewing the Application of the Cessation Clause of the 1951 Convention Relating to the Status of Refugees in Africa' (2011) Oxford Refugee Studies Centre Paper 76

to invoke the cessation clause.⁵⁵ Article 1c(1) to 1c(6) of the 1951 Convention provides for terms under which refugee status can cease. It relates to situations where Convention protection is no longer justified or necessary because of changes in the individual's circumstances (clauses 1-4) or conditions in their country of nationality or former habitual residence (clauses 5-6); and is commonly referred to as the ceased circumstances clause or the 'cessation clause'.⁵⁶ The invocation of clause 1c (5) has been defined as a 'negotiation between legal principles that underpin the international refugee protection regime and practical constraints of international politics'.⁵⁷

Hathaway and Castillo assert that Article 1(c) reflects a concern that states should be able to divest themselves of their protection 'burden' once national protection is available once more.⁵⁸ As Kelly McMillan avers, underlying Article 1(c) therefore is the principle that international protection is a form of 'surrogate protection', which should continue only so long as it is justified and necessary.⁵⁹ It is perceived that the circumstances that warranted refugee status and therefore the need for international protection have ceased to exist when the refugee resumes the protection of their country of origin (COR). This can be through, among others, re-establishment of their connection or

www.rsc.ox.ac.uk/files/publications/working-paper-series/wp76-reviewing-application-cessation-clause-1951-convention-2011.pdf accessed 1 September 2014.

⁵⁵ UNGA (n 24) paras 6(A)(ii)(e) & (f) www.unhcr.org/3b66c39e1.pdf accessed 20 August 2014.

⁵⁶ Organisation of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)*, (1001 UNTS 45, 10 September 1969) www.refworld.org/docid/3ae6b36018.html accessed 9 September 2014. Article 4(e) provides that 'this Convention shall cease to apply to any refugee if he can no longer, because the circumstances in connection with which he was recognised as refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality'.

⁵⁷ Kelly E McMillan, 'Uganda's Invocation of Cessation Regarding its Rwandan Refugee Caseload: Lessons for International Protection' (2012) 24(2) *International Journal of Refugee Law* 231.

⁵⁸ Manuel A Castillo and James C Hathaway, 'Temporary Protection' (Hathaway, *JC Reconceiving International refugee law* The Hague: M. Nijhoff Publishers 1997) 22.

⁵⁹ Kelly E McMillan (n 57).

resumption of citizenship rights.⁶⁰ At this point the UNHCR or the country of asylum may apply Article 1(c)(5) through a formal declaration of cessation of refugee status, either on an individual or a group basis. The declaration does not however require the consent of the refugees. McMillan summated that this ‘... will invariably culminate into the return of the former refugee to her COR or such former refugees are thereupon subject to the rules of immigration control’.⁶¹ This would be the fate of the Rwandan refugees in Uganda, as we shall see in chapter 3.

Yasmeen Siddiqui reveals the policy contradiction between Article 1c(5), articles 12-30, and Article 34 of the 1951 Convention. While the former allows states to end protection when it is deemed no longer necessary, the latter provisions favour economic and social assimilation and naturalisation. Goodwill-Gill and McAdam state that ‘it is difficult to reconcile the absoluteness of this statement with the obligations with which states have expressly accepted articles 2-34 of the 1951 Convention’.⁶²

The OAU Convention compliments the 1951 Convention. However, there has been dissonance as regards the application of some of the concepts which both conventions provide for the cessation of refugee status. The 1951 Convention provides exemptions to the cessation clause noting 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 avail himself of the protection of the country of nationality’. On the contrary, the OAU Convention does not provide for such exemptions.

⁶⁰ *ibid* 234.

⁶¹ *ibid*; James C Hathaway, ‘The Meaning of Repatriation’ (1997) *IJRL* 551.

⁶² Yasmeen Siddiqui (n 54) p 9.

The statute of the UNHCR provides for cessation of refugee status.⁶³ The principle behind the cessation clause under the UNHCR statute is the

'Circumstances in connection with which he has been recognised as a refugee have ceased to exist can be exempted from cessation of refugee status on grounds other than personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality.'⁶⁴

This provision creates a class of refugees who cannot have their status ceased and this provision applies to refugees under the general definition.⁶⁵ How would the refugee exempted from the cessation of status then live permanently in the country of asylum? They would need to be assimilated and naturalised. This is what I discuss in the subsequent sections.

Article 34 of the 1951 Convention.

This Article provides for assimilation and naturalisation as a possibility of putting an end to persistence of refugee character. This would give a refugee permanent local integration into the community.⁶⁶ Hathaway explains that local integration '... [I]n essence means a refugee is granted some form of durable legal status that allows him or her to remain in the country of first asylum on an indefinite basis and to fully

⁶³ UNGA (n 24) Article 6A(e).

⁶⁴ Yasmeen Siddiqui (n 54) 11; Joan Fitzpatrick and Rafael Bonoan 'Cessation of Refugee Protection' (n.d.) 512 www.refworld.org/pdfid/470a33bc0.pdf accessed 22 August 2014.

⁶⁵ UNHCR, *General Conclusion on International Protection* (No. 65 (XLII) – 1991 EXCOM Conclusions, 11 October 1991) www.unhcr.org/3ae68c404.html accessed 22 August 2014; UNHCR, *Cessation of Status* (No. 69 (XLIII) – 1992 EXCOM Conclusions, 9 October 1992) www.unhcr.org/3ae68c431c.html accessed 22 August 2014.

⁶⁶ UNHCR (n 25) The 1951 Convention Article 34.

participate in the social, economic, and cultural life of the host country.⁶⁷

Article 34 has two parts, first; 'The contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees.'⁶⁸ The use of word "shall" makes it 'clear that Article 34 imposes not only a recommendation but a qualified duty'.⁶⁹ This provision is '... [a] means of giving refugees a fair chance to persuade states of their suitability for citizenship.'⁷⁰ One of the core mandates of the Office of the UN High Commissioner for Refugees is 'assisting governments and private organisations to facilitate assimilation and naturalisation of refugees'.⁷¹ This is intended to put an end to a person's refugee character⁷².

Paul Weis opined that the 1951 Convention contains an 'obligation to facilitate the naturalisation of refugees as far as possible',⁷³ and Hathaway contends that the spirit was to 'promote rather than compel access to naturalisation'. It requires governments to use whatever opportunities for naturalisation may exist under domestic law of the state of sojourn.⁷⁴ Indeed, states tend to apply better or favourable conditions for granting naturalisation to refugees as compared to other aliens generally.⁷⁵ However, the contracting states cannot be compelled to grant individuals its nationality.⁷⁶

⁶⁷ James C Hathaway, *Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2005) 977-978.

⁶⁸ Paul Weis, 'The Refugee Convention 1951: The Travaux Préparatoires Analysed' (1995) Vol.7 Cambridge International Document Series 344.

⁶⁹ *ibid*, commentary, para 2. y on the Refugee Convention 1951 no.80 Para (2).

⁷⁰ Hathaway (n 67) 984.

⁷¹ UNGA (n 24); UNHCR, *Commentary of the Refugee Convention 1951 Articles 2-11, 13-37* (Commentary by Professor Atle Grahl-Madsen in 1963; re-published October 1997) www.refworld.org/docid/4785ee9d2.html accessed 20 September 2014.

⁷² Paul Weis (n 68).

⁷³ *ibid*, giving his opinion in the commentary.

⁷⁴ Hathaway (n 67) 990.

⁷⁵ Civil Code of France updated 4 May 2006 Article 21-17 provides that 'naturalisation may be granted only to an alien who proves an usual residence in France for five years before the submission of the request' but a refugee is not required to have that as per Article 21-19(7)

The second part of Article 34 requires state parties to facilitate the naturalisation⁷⁷ this provision 'did not apply to the duration of the period of residence (*required for naturalisation*), but solely to the administrative formalities taking place between submission of the application and the decision'.⁷⁸ The requirement to reduce naturalisation fees was in line with the economic conditions of most refugees⁷⁹ therefore revealing that Article 34 of the 1951 Convention intended to create the most flexible regime to naturalise refugees.

Conclusion

In this chapter, I have made an overview of the international refugee law and one consistent theme has been the protection and dignity of refugees. I have explored the development of the OAU Convention, looking at its emphasis on voluntary repatriation and noting that some refugees did not return to their countries of origin for

file:///C:/Users/pcworld/Downloads/Code_22.pdf accessed 9 October 2014; Dilek Çinar, *Eudo Citizenship Observatory: Country Report Austria* (European University Institute 2011) 5 <http://eudo-citizenship.eu/docs/CountryReports/Austria.pdf> accessed 9 October 2014. Dilek notes that recognised refugees were explicitly exempt from the requirement to renounce their previous citizenship in order to be granted Austrian citizenship. Also, requirements for naturalisation were reduced to 3 years generally, but 2 years for recognised refugees or stateless persons.

⁷⁶ UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Statelessness and Related Persons* (E/1618; E/AC.35/5, 17 February 1950) 4 www.refworld.org/docid/40aa15374.html accessed 9 October 2014.

⁷⁷ It is to the effect that it addresses state parties and provides that; "they shall in particular make every effort to expedite naturalization proceedings and reduce as far as possible the charges and costs of such proceedings."

⁷⁸ UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twenty-Second Meeting Held at Lake Success, New York, on Thursday, 2 February 1950, at 2.30 p.m.*, 14 February 1950, E/AC.32/SR.22 www.refworld.org/docid/3ae68c1c10.html accessed 9 October 2014 words by the French Delegate Mr. Ordonneau in para 10.

⁷⁹ Hathaway (n 67) 987 discusses in footnote 87 that countries like Sweden under their Aliens Act and the laws do not charge former refugees for naturalisation. See Swedish Migration Board. See also Swedish Aliens Act, 2005.

various reasons. I also discussed the applicability of the cessation clause arguing that ultimately there is need for exemption of the some of the refugees leading to the need for local integration. Wherefore, I looked at the access of naturalisation under Article 34 of the 1951 Convention as intended to achieve de jure integration. It is important in the next chapter to look at the evolution of the right to nationality as a human right and understand its nexus with international refugee law.

CHAPTER TWO: THE RIGHT TO NATIONALITY IN AFRICA: EVOLUTION AND APPLICATION

'International law constructs the spaces of the world as states and emplaces individuals within them through the legal bond of nationality and exceptionally through rights ...' Alison Kesby⁸⁰

Introduction

In the previous chapter we saw that the international refugee law consistently promoted the protection of rights of refugees, giving them for example, the right to naturalisation. I also touched on the scope and access to naturalisation under Article 34 of the 1951 Convention. This chapter focuses on the evolvement of the right to nationality in international law. It surveys some of the recent developments in the interpretation, application, and enhancement of nationality as a concept of human rights. The chapter will discuss the principles of effective nationality by looking at the decisions of the international judicial institutions and highlight the doctrine of state sovereignty regarding nationality law.⁸¹ Finally, the chapter will suggest a convergence between the rights to nationality and other norms of international law and argue that the right to nationality is a human right which imposes positive duties on states to respect and grant to an individual including a refugee.

The Origin and Concept of the Right to Nationality

General principles of international law use the terms citizenship and nationality synonymously. However, in international human rights law, 'citizenship is to be distinguished from mere nationality':

⁸⁰Alison, Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 31.

⁸¹ I will specifically look at the *Nottebohm* case and the *Diallo* case in which the International Court of Justice admitted itself to the concept of effective nationality and the social ties concept respectively.

conceptually, the terms 'nationality' and 'citizenship' emphasise two different aspects of the same notion: nationality stresses the international where as citizenship the national municipal aspect.⁸²

International law looked at the individual as its subject but at the same time as a responsibility of the state; each individual came to the jurisdiction of international law as a national of a specific state. Questions of nationality only arose in inter-state disputes.⁸³ Peter Spiro asserts that 'nationality may only be handled as a problem of the choice of law when a tribunal has to decide what nationality to apply'.⁸⁴ Nationality was within the sovereign domain of states and 'reinforced by a national law superstructure that tied individuals to perpetual allegiance to the sovereigns in whose protection they were born.'⁸⁵ Spiro argues that nationality was not an issue until it became a subject of international discourse resultant from interstate interaction.⁸⁶ The debates in international law perceived nationality in a context of state practice; but was nationality a matter preserved for states to decide without external influence? Eminent international law authorities seem to agree that states have the prerogative of nationality. Spiro further contends that state was the source of the bestowment and cancellation of nationality. He quotes Ruadestein's 1926 observation that, 'it is indeed the sphere in which the principles of sovereignty find their most definite application'.⁸⁷ This thrived in an era where international law

⁸² Paul Weis, *Nationality and Statelessness in International Law* (2nd edn Alphen aan den Rijn [The Netherlands]: Sijthoff & Noordhoff, 1979).

⁸³ Jeffrey L. Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 194 *Michigan Journal of International Law* 1141.

⁸⁴ Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 (4) *American Journal of International Law* 105.

⁸⁵ Polly J Price, 'Natural Law and Birthright Citizenship in Calvin's Case (1608)' (1997) 9 *Yale JL & Human* 73.

⁸⁶ Peter J. Spiro (n 84) 39 referring to the Harvard Research (n 90).

⁸⁷ *ibid* 35.

held an objective view that it should not inquire into the quality of membership between individuals and states.

The modern state finds the formal concept of nationality as primarily a public order tool of governance. Because of this, 'nationality becomes the status by which individuals ascribe to states and are distinguished from aliens'.⁸⁸ The nationality question was beginning to get attention in international public order which led to the need to reconceptualise its scope. Inevitably, any resistance to expanding the debate on nationality was likely to fail. There was need to adopt an international instrument to harmonise this discourse.⁸⁹ States construed nationality as an attribute of territorial supremacy, which could be codified.⁹⁰

Was a Right to Nationality Codified?

Nationality was not treated with urgency in the development of international law. It was applied selectively in territorial or trade disputes, and purely for resolving conflicts among states, which led to the League of Nations' codification conference.⁹¹ This conference reaffirmed that, 'It is for each state to determine under its own law who are its nationals. Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that state'.⁹² Importantly, it introduced the first limitations

⁸⁸ Alison Kesby (n 82) 42; Alison Brysk and Gershon Shafir, *People Out of Place: Globalization, Human Rights, and the Citizenship Gap* (New York: Routledge 2004) 87; Peter J Spiro, 'Mandated Membership, Diluted Identity: Citizenship, Globalization, and International Law' (Diluted Identity: Citizenship, Globalization, and International Law, August 5, 2002).

⁸⁹ Manley O Hudson, *Research in International Law, Harvard Law School* (Cambridge: Harvard Law School, 1929) 7 [hereinafter referred to as the Harvard Research].

⁹⁰ Peter J Spiro (n 84) 10; Paul Weis, *Nationality and Statelessness in International Law* (London: Stevens 1956) 102.

⁹¹ League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law* (LNTS vol. 179 No. 4137, 13 April 1930) 89 www.refworld.org/docid/3ae6b3b00.html (herein after referred to as the Hague Convention on Nationality) accessed August 27, 2014.

⁹² *ibid* articles 1 & 2.

against absolute state sovereignty regarding nationality. Article 1 (2) provided that,

‘This law shall be recognised by other states in so far as it is consistent with international conventions, international customs, and the principles of law generally recognised with regard to nationality.’

Imperatively, no nationality laws should be repugnant to a state’s international obligations. The Hague Convention on Nationality resulted into three important catalysts that guided the evolution and scope of a right to nationality. First, that nationality is a legal term describing membership of a state and not nationality as an ethnological term connoting a historical relationship to a specific ethnic, linguistic, or racial group.⁹³ Secondly, the grant of nationality was a confirmation that an individual was a member of a specific state. Thirdly, that nationality was the prerequisite for enjoyment of rights and protections available under international law. Indeed, Professor O’Connell asserts that,

‘[T]he expression ‘nationality’ in international law is only short hand for the ascription of individuals to specific states for the purpose either of jurisdiction or diplomatic protection. In the sense that a person falls within the plenary jurisdiction of a state, and may be represented by it, such a person is said to be a national of that state.’⁹⁴

It can therefore be concluded that there was no codification of the right to nationality. However, this conference harmonised the approach to nationality in as far as resolving certain conflicts resultant from nationality laws were concerned. The first interpretation of nationality before an international judicial institution, the ICJ was a legal dispute

⁹³ Jeffery L Blackman (n 83) referring to Paul Weis (n 82) *“Nationality and Statelessness in International Law”* (2nd Ed 1979) 146 discussing nationality and giving the example of the Irish in Northern Ireland who have never been nationals of the Republic of Ireland.

⁹⁴ Daniel P O’Connell, *State Succession in Municipal Law and International Law* (Cambridge: University Press 1967) 498.

between states. In looking at the grant of nationality for purposes of interstate relationship, the ICJ set the legal parameters for what would constitute effective nationality; a discussion I now turn to.

The Principle of Effective Nationality: The Nottebohm Case

States determine their own nationality laws but in consistence with international conventions, customs, and the principles of law.⁹⁵ In 1923, the Permanent International Court of Justice stated that 'in the present state of international law, questions of nationality are in the opinion of the court in principle within the reserved domain of state jurisdiction'.⁹⁶ This decision was before the World War II, after which Europe and the United Nations grappled with the issue of the Jews as 'stateless' people. Scholars like Spiro have argued that the inclusion of the right to nationality in the UDHR was specifically a measure taken in order to address the mass denationalisation of the sort undertaken by the Nazi regime against German Jews⁹⁷.

The first authoritative decision on the principle of effective nationality was the Nottebohm case before the ICJ.⁹⁸ This case considered whether a state's determination of nationality was definite for purposes of exercising diplomatic protection; and whether the formal tie of nationality needed to be supported by indication of actual membership in the national community.⁹⁹ The case involved a claim by

⁹⁵ League of Nations (n 91) Article 1.

⁹⁶ *Nationality Decrees Issued in Tunis and Morocco* (1921) PCIJ (ser. B) No. 4 (1923) Advisory Opinion www.worldcourts.com/pcij/eng/decisions/1923.02.07_morocco.htm; *Acquisition of Polish Nationality* (1923) PCIJ (ser. B) No. 7 Advisory Opinion www.worldcourts.com/pcij/eng/decisions/1923.09.15_polish_nationality.htm These two cases bring out the fact that states ultimately have the sovereign right to grant nationality using their domestic laws.

⁹⁷ Peter J. Spiro (n 84) 34 referring to Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 80-83.

⁹⁸ *Liechtenstein v Guatemala (Second Phase)* (1955) International Court of Justice (ICJ), 6 April 1955, (Nottebohm case) www.icj-cij.org/docket/files/18/2676.pdf accessed 15 Aug 2014).

⁹⁹ *ibid* para 4.

Liechtenstein against Guatemala for wrongful seizure of property of a Liechtenstein national, Friedrich Nottebohm who had been a German national from his birth in 1881 until his naturalisation as a Liechtensteiner in 1939. A long-time resident of Guatemala, Nottebohm had few ties to Liechtenstein before acquiring its nationality. His qualification for naturalisation appeared to have consisted of payment of a substantial sum to a sub national division of the municipality¹⁰⁰ and a visit of less than two weeks to undertake the naturalisation formalities.¹⁰¹ Guatemala challenged Liechtenstein's nationality on grounds that it was defective and invited court to examine whether Liechtenstein's citizenship had been properly acquired and whether it could be effectively used against another state.

The ICJ held that Nottebohm's Liechtenstein naturalisation had no effect against another state, at least not for purposes of exercising protection against Guatemala. The Court further stated that,

'[A]ccording to the practice of states to arbitral and judicial decision and to the opinion of writers, nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.¹⁰²

The Court introduced an organic test premised on social attachments: Spiro notes that the ICJ in the Nottebohm's case 'evinced an identity-based conception of nationality connecting with some fact of organic community'¹⁰³ and Blackman avers that by following this organic approach the ICJ offered perhaps the most satisfying definition

¹⁰⁰ *ibid* para 44 – 45.

¹⁰¹ *ibid* para 15 – 16.

¹⁰² *ibid* para 23-24.

¹⁰³ Peter J Spiro (n 84) 21.

of nationality by acknowledging both its legal and political aspects, as well as its social and cultural dimensions.¹⁰⁴

The ICJ also reaffirmed the principle of state sovereignty over nationality when it held that

‘It is for Liechtenstein as it is for every sovereign state to settle by its own legislation the rules relating to the acquisition of its nationality; hence the wider concept of that nationality is within the domestic jurisdiction of the state’.

The nationality being non-factual could not be effective against another state.¹⁰⁵ The following principles on nationality emerged from this landmark decision. First, it provided an extension of the accepted rule that states could not reach out to claim those to whom they had no real connection.¹⁰⁶ Secondly, while a state would do what it pleased with its own nationals, the doctrine of diplomatic protection constrained what they could do to nationals of other states. Spiro observes that for purposes of diplomatic protection even where a person had dual nationality, ‘the most dominated effective nationality alone counted – noting that in dual nationals prominence should be given to real and effective nationality’.¹⁰⁷ Thirdly is the principle of ‘close relationship’ between an individual’s social ties and the state. This concept of close relationship is however not limited to nationals but also extends to non nationals who are habitually resident in a state as was decided by the ICJ in the Diallo case.¹⁰⁸

¹⁰⁴ Jeffery Blackman (n 83) 1147.

¹⁰⁵ Nottebohm case (n 98) 22.

¹⁰⁶ *ibid* 17-20.

¹⁰⁷ *ibid* 22; Peter J Spiro (n 84) 23.

¹⁰⁸ *Republic of Guinea v The Democratic Republic Congo* (2010) ICJ, Separate Opinion of Judge Cançado Trindade (Diallo Case) www.worldcourts.com/icj/eng/decisions/2010.11.30_ahmadou_Cancado_Trindade.pdf accessed 15 August 2014.

In this case, the Republic of Guinea brought a petition in relation to violation of international law regarding diplomatic protection and the treatment of non nationals in states of their habitual residence. Ahmadou Diallo, a national of Guinea was demanding payment from oil companies linked to the government of Zaire (now known as the Democratic Republic of Congo [DRC] since 1997). He was not paid, arrested, tortured, and deported from the DRC. The Republic of Guinea alleged that the DRC committed serious violations of international law following the above acts against its citizen.¹⁰⁹ Further that in not informing Mr. Diallo of his rights upon detention the DRC had violated its obligation under Article 36 (1)(b) of the 1963 Vienna Convention on Consular Relations.

The ICJ relied on Article 12 (4) of the ICCPR¹¹⁰ and the principle of relationship created between an individual and the state of habitual residence. Judge Cancado Trindade asserted that 'Article 12(4) in principle "extends an unrestricted protection against expulsion to aliens who ... have developed such close relationship with the state of residence that [it] has practically become his "home country"'.¹¹¹ A resident non national who develops a web of relationship to the country of his habitual residence is entitled to call this his own country. This principle was also expounded by the HRC when it noted that it 'embraces at the very least an individual who because of his or her

¹⁰⁹ Gentian Zyberi, 'The ICJ Issues the Diallo Compensation Judgment' (*International Law Observer*, 20 June 2012) www.internationallawobserver.eu/2012/06/20/the-icj-issues-the-diallo-compensation-judgment/ accessed 16 September 2014. Gentian reports that in respect of the circumstances in which Mr. Diallo was expelled, the DRC violated Article 13 of the ICCPR, and Article 12 para 4 of the ACHPR. In respect of the circumstances in which he was arrested and detained with view to his expulsion, the DRC violated Article 9 paras 1 and 2 of the ICCPR and Article 6 of the ACHPR.

¹¹⁰ UNOHCHR, *International Covenant on Civil and Political Rights (ICCPR)* www.ohchr.org/en/professionalinterest/pages/ccpr.aspx Article 12(4) provides that 'everyone lawfully present within the territory of a state shall within that territory have the right to liberty of movement and freedom to choose his residence

¹¹¹ The Diallo case (n 108) 40 para 156.

special ties to or claims in relation to a given country cannot be considered to be merely alien'.¹¹²

The decisions of the ICJ outlined effective nationality and construed an obligation arising between the state and individuals who have social attachment to it. But does this connote nationality as a human right? This is the question that I address in the next section. I will also draw the nexus of the right to nationality with other human rights norms.

Is the Right to a Nationality a Human Right?

The adoption of the UDHR ushered a new era in international human rights law. Spiro captures the effect of this new regime noting that '... only in the dawn of the human rights revolution in the mid 19th century did international law come tentatively to pose an alternative conception of nationality.'¹¹³ Nationality was still necessary to enable the individual to have a place in the international system. Hannah Arendt avers that indeed the right to belonging and protection at national and international level are connected.¹¹⁴

The inclusion of the right to nationality in the UDHR was premised on the belief that to lack nationality was to fall through the cracks of international law and human rights. Article 15 of the UDHR set out for the first time in international law the individual's right to nationality. It provides that everyone has a right to a nationality, and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. This Article however does not carry an obligation on states to confer nationality.

¹¹² Human Rights Committee, 'General Comment 27, Freedom of movement Art 12' (UN Doc CCPR/C/21/Rev.1/Add.9 1999) www1.umn.edu/humanrts/gencomm/hrcom27.htm accessed 17 August 2014.

¹¹³ Peter J. Spiro (n 84) 8 para 1.

¹¹⁴ Hannah Arendt, 'The Rights of Man: What Are They?' (1949) 3(1) *Modern Review* 24, in Alison Kesby (n 80) 45.

The right to nationality was further expounded by two Conventions: Article 24 of the ICCPR provides that every child has a right to nationality; and Article 1 the 1961 Convention on Reduction of Statelessness provides that contracting states shall grant nationality to a person born in its territory who would otherwise be stateless. These two covenants contained the only substantive provisions in international law which directly addressed the right to nationality, yet they also do not bestow an obligation to states to grant nationality. They are limited to children and reduction of statelessness. Jeffery Blackman proposes that other 'provisions related to conferral of nationality are most possibly in the realm of *lex ferenda*, whereas the duty to prevent statelessness is a principle obligation with a stronger pedigree under international law ...'¹¹⁵ meaning therefore that the principle against statelessness manacled states to grant nationality if the denial would lead to statelessness and vulnerability. Alison Kesby reveals that during the holocaust '... the Jews had to lose their nationality before they could be exterminated'.¹¹⁶

The principle of non discrimination also has a bearing on the right to nationality. Article 2 of the UDHR provides that 'everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind. Indeed the Committee on the Elimination of Racial Discrimination (CERD) recognised that 'deprivation of citizenship on the basis of race, colour, descent or national or ethnic origin is a breach of state parties' obligation to ensure non discriminatory enjoyment of the right to nationality'.¹¹⁷ Article 26 of the ICCPR not only

¹¹⁵ Jeffery Blackman (n 83) 1182 para 1.

¹¹⁶ Alison Kesby (n 80) 39 referring to Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press 1963) and Adler Hans Günther, *Der verwaltete Mensch: Studien zur Deportation der Juden aus Deutschland* (Mohr Siebeck GmbH & Company K, 1974).

¹¹⁷ UN Committee on the Elimination of Racial Discrimination, '*CERD General Recommendation XXX on Discrimination against Non Citizens*' (1 October 2002) www.refworld.org/docid/45139e084.html accessed 26 September 2014.

reaffirms the 'non-discrimination doctrine', but also superimposes this principle on states whenever they exercise their legislative authority. The ICCPR human rights committee also adopted this position when it noted that:

'[A]rticle 26 does not ... duplicate the guarantee already provided in Article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.'¹¹⁸

We have seen that states have discretion over the conferral of nationality. However, as discussed above this is subject to the limitations placed by other tenets of international human rights. Most prominently, a state should avoid creating statelessness as a result of implementation of its nationality laws. Having elucidated that nationality is a fundamental human right, it is important to now look at how this right is being applied in Africa, in order to lay the foundation for the discussion in chapter 3 on access to nationality in Uganda by the Rwandan refugees.

Application of the Right to Nationality in Africa

After decades of conflict, the states in Africa started addressing the issue of Nationality and its parasite phenomenon of statelessness. As states found need to protect their citizens and give them duties, most started denying non citizens some category of rights. This situation led to discussions at continental level and attempts at making policies. The African Commission on Human and People's Rights (ACHPR) was established to 'formulate ... principles and rules aimed at solving legal problems relating to human and people's rights ... upon which African

¹¹⁸ UNCERD (n 117) General Recommendation No.18. on non discrimination; Jeffery Blackman (n 83) 1184 para 4 discussing the application of Article 26 by the Committee including the *Broeks v Netherlands*, Communication No. 172/1984 (footnote 154).

countries may base their legislation'.¹¹⁹ The African states discovered that they had an increasing number of persons in their jurisdictions that were not their nationals. They attempted to address this quagmire through the ACHPR.

The Commission passed a resolution 234 on the right to nationality,¹²⁰ which was made mindful of Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC) providing for the right to a name and a nationality and compelled state parties to ensure that the constitutional legislation recognises the principles to which a child shall acquire the nationality of the state in the territory of which he has been born, if at the time of the child's birth he is not granted nationality by any other state in accordance with the laws.¹²¹ Resolution 234 also promoted the principle of equality of men and women to acquire their partner's nationality as envisaged by Article 2 of the Africa Charter and Article 6 of the Protocol to the African Charter on Human Rights on the Rights of Women in Africa¹²².

The commission also reasserted the obligation to promote and enhance the right to nationality as provided by various international instruments¹²³ and expressed deep concerns at the arbitrary denial or

¹¹⁹ African Union, *African Charter on Human and People's Rights* (OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 [1982] entered into force 21 October 1986) Article 45 (1)(b) www.achpr.org/files/instruments/achpr/banjul_charter.pdf accessed 22 August 2014.

¹²⁰ African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality* (53rd Ordinary Session 9-23 April 2013 Banjul, The Gambia, 23 April 2013) www.refworld.org/docid/51adbcd24.html accessed 26 August 2014.

¹²¹ African Union, *African Charter on the Rights and Welfare of the Child* (OAU Doc. CAB/LEG/24.9/49 [1990] entered into force 29 November 1999) Article 6 www1.umn.edu/humanrts/africa/afchild.htm accessed 26 August 2014.

¹²² African Union (n 119) Article 2; *Protocol to the ACHPR on the Rights of Women in Africa* Article 6(g) www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf accessed 22 August 2014.

¹²³ It particularly recalled the following international instruments: Article 5d(iii) of the ICERD; Article 24(3) of the ICCPR; Articles 7 & 8 of the UNCRC; Articles 1-3 of the UN Convention on the Nationality of Men and Women; Article 9 of the UNCEDAW; and the UN Convention on the Reduction of Statelessness.

deprivation of nationality to persons or groups of persons by African states.¹²⁴ The Commission required all African states to include information on the recognition and implementation of the right to nationality in their periodic reports.¹²⁵ It also committed itself to assign a Special Rapporteur on refugees, asylum seekers, the displaced and migrants to carry out an in-depth research on issues relating to the right to nationality'.¹²⁶ In effect the Commission recognised the importance of the right to nationality as an axis on which individuals in Africa would turn to enjoy other human rights.

Conclusion

In this chapter, we have seen that nationality relates to membership of a state as a component of the international system but not the rights of nationals within their state. I traced the evolution of the nationality is a human right, and I revealed that states must exercise nationality laws mindful of the right of the individual are provided as a subject of international law, and I have argued that much as it is within the sovereignty of a state to decide its nationals, this obligation has been changing with the advancement of international human rights and states are now obliged to enact nationality legislation which reflects and conforms to their international commitments. As Blackman posits, '[a]s regards the right to a nationality, the duty to avoid statelessness and the norm of non-discrimination have emerged to present affirmative obligations upon states.' I have also explored the African position on the right to nationality, discussing the Africa Commission adoption of resolution 234 on the right to nationality which further entrenched the importance of nationality in the enjoyment of the human and people's rights in Africa. In the next chapter, I will introduce the history of the nationality law in Uganda. I will also introduce the

¹²⁴ ACHPR (n 120) Resolution 234 para 7.

¹²⁵ African Union (n 119) Article 62.

¹²⁶ ACHPR (n 120) last paragraph.

presence of Rwandan refugees in the country and discuss the application of the strategies to resolve their refugee situation, highlighting the citizenship question.

CHAPTER THREE: NATIONALITY LAW IN UGANDA: IMPLICATIONS FOR RWANDAN REFUGEES AFTER INVOCATION OF THE CESSATION CLAUSE

Introduction

Alison Kesby articulated the right to nationality as a right to have rights. This is actualised by the national citizenship which attaches one to the socio-political community. This chapter briefly looks at the historical path of the nationality law in Uganda and the current scope of its applicability. It will also attempt to expose the 'dangerous impasse'¹²⁷ of the Rwandan refugee crisis in Uganda as regards the question of access to alternative immigration status in the event of the invocation of the cessation clause.¹²⁸

The History of Nationality Laws in Uganda

Attempts to define the nationality of Ugandans can be attached to its colonial legacy which began in 1893 when the Imperial British East African Company transferred its administrative rights of territory consisting of Buganda kingdom to the British government; by 1894, the British protectorate of Uganda had been established. The composition of colonial Uganda was an agglomeration of migrant groups who subscribed to various chieftains and kingdoms. Since then, migration has been an integral part of Uganda's history.¹²⁹ Under the British protectorate, a Ugandan was seen as a native of the protectorate.

¹²⁷ Lucy Hovil, 'A Dangerous Impasse: Rwandan Refugees in Uganda' (2010) Citizenship and Displacement in the Great Lakes Region Working Paper 4 www.refugee-rights.org/Publications/Papers/2010/10_08_30_Dangerous_Impasse.pdf accessed 29 August 2014.

¹²⁸ UN General Assembly, *Convention Relating to the Status of Refugees* (UNTS vol. 189 p. 137, 28 July 1951) www.refworld.org/docid/3be01b964.html accessed 22 September 2014 Article 1(C).

¹²⁹ Deborah Mulumba and Wendo Mlahagwa Olema, 'Policy Analysis Report: Mapping Migration in Uganda' (2009) www.immis.org/wp-content/uploads/2010/05/Policy-Analysis-Report-Uganda.pdf accessed 20 August 2014.

Protectorate states were considered foreign and birth in such places did not confer upon one the British nationality.¹³⁰ There was no status of nationality due to a lack of a formal procedure for determining who was or was not a subject of the protectorate.¹³¹

The 1948 British Nationality Act established for the first time a statutory basis for determining a British Protected Person. With this Act, the native in Uganda now became a British protected person by virtue of their connection with the protected state. However, there was no provision that a British protected person of this type made one a citizen of the Commonwealth meaning therefore that the nationality status of the native Ugandan remained undefined.¹³² In 1962, towards Uganda's independence the House of Lords enacted the Independence Act to provide for a Ugandan nationality and how a citizen of Uganda would be defined. Section 2(2) of this Act provided that

'any person who immediately before the appointed day is a citizen of the UK and colonies shall on that day cease to be such a citizen if (a) under the law of Uganda he becomes on that day a citizen of Uganda; and (b) he, his father or his father's father was born in Uganda.'¹³³

The nationality law that the above Act referred to was the 1962 Constitution of Uganda which provided for Ugandan citizenship defining a Ugandan as

'a person born in Uganda; and such a person was by 8th October 1962 a citizen of UK and colonies or British

¹³⁰ The British Protected Persons Order 1934 later repealed by the British Nationality Act 1948.

¹³¹ Bronwen Manby, *Right to a Nationality and the Secession of South Sudan: A Commentary on the Impact of the New Laws*. (London, Africa Governance Monitoring and Advocacy Project [Afrimap] 2012) www.afrimap.org/english/images/report/OSIEA-AfriMAP-Nationality-Sudans-full-EN.pdf accessed 20 August 2014 referring to Laurie Fransman, *British nationality law* (3rd edn, Butterworths 2005) 128.

¹³² The 1948 British Nationality Act.

¹³³ The Uganda Independence Act 1962 s 2(2).

protected person; and one of the parents of that person should have been born in Uganda'.¹³⁴

In 1966 Uganda got a new government that replaced the Independence Constitution with the 1967 Republican Constitution, which maintained the citizenship categories created by the Independence Constitution.¹³⁵ Between 1967 and 1985, Uganda had several governments that maintained the citizenship provisions of the 1967 Constitution. In 1986 the government of president Yoweri Museveni introduced a new legal regime and issued a Legal Notice No. 1 of 1986 which suspended (many parts) of the 1967 Constitution. In 1994 a new Constitution was promulgated and took effect in 1995, effectively replacing the 1967 Constitution.¹³⁶ The 1995 Constitution provided for five categories of citizens. It sustained those who had acquired citizenship under the previous constitutions¹³⁷ and created citizenship categories that now prevail as follows:

- Persons born in or outside Uganda one of whose parents or grandparents was a citizen of Uganda by birth and one of whose parents or grandparent is or was a member of one of the indigenous communities of Uganda as of 1 February 1926.¹³⁸
- A child of not more than five years of age found in Uganda none of the parents being known is a citizen by foundling or assumption.¹³⁹
- A child adopted by a citizen of Uganda shall be registered as a citizen of Uganda.¹⁴⁰

¹³⁴ The 1962 Independence Constitution of Uganda s 7(1) here in after referred to as the Independence Constitution.

¹³⁵ The 1967 Republican Constitution s 9 herein after referred to as the 1967 Constitution.

¹³⁶ The 1995 Constitution of the Republic of Uganda here in after referred to as the 1995 Constitution.

¹³⁷ *ibid* Article 9.

¹³⁸ *ibid* Article 10 (a) and (b). These were the indigenous communities as of 1 February 1926 the date when the demarcation and confirmation of the boundaries of Uganda were gazette.

¹³⁹ *ibid* Article 11(1).

- Citizenship by registration covers the following sub categories
 - Every person born in Uganda and
 - (a) at the time of whose birth neither of whose parents and none of his or her grandparents had diplomatic status in Uganda; and, neither of whose parents and none of his or her grandparents was a refugee in Uganda;¹⁴¹ or
 - (b) Who has lived continuously in Uganda since the ninth day of October 1962.¹⁴²
- Every person married to a Ugandan citizen, upon proof of a legal and subsisting marriage of three years or more; every person who has legally and voluntarily migrated and has been living in Uganda for at least ten years; and, every person who in the commencement of the constitution had lived in Uganda for at least twenty years.¹⁴³
- Citizenship by naturalisation, which was left to parliament to determine under Article 13.¹⁴⁴ Parliament passed the enabling law¹⁴⁵ prescribing that to be naturalised a person should have been resident for an aggregate period of 20 years; should have resided in Uganda throughout the period of 24 months immediately preceding the date of application; must have knowledge of a prescribed vernacular language; be of good character; and if naturalised to continue residing permanently in Uganda.¹⁴⁶ This provision will come to our discussion in

¹⁴⁰ *ibid* Article 11(2).

¹⁴¹ *ibid* Article 12(1) (a).

¹⁴² *ibid* Article 12(1) (b).

¹⁴³ *ibid* Article 12(2).

¹⁴⁴ *ibid* Article 13. Unlike the provisions of Article 12 which clearly lay down the definition and qualifications for registration as a citizen, Article 13 left that role to Parliament.

¹⁴⁵ Uganda Citizenship and Immigration Control Act 1999 herein after referred to as the UCIC Act 1999.

¹⁴⁶ *ibid* s 16(5). However, the Minister responsible has not issued a statutory instrument to activate this section meaning that this provision of the law is in abeyance.

chapter 4 when looking at its application in Rwandan refugees who have lived in Uganda for over twenty years.

- Dual citizenship was permitted for a citizen of 18 years and above who if they acquire another citizenship can retain their Uganda citizenship; and a non citizen who acquires Ugandan citizenship can retain their other citizenship.¹⁴⁷

The application of the above nationality laws created much debate among the communities that had been present in Uganda long before 1900 and had not been included in the list of indigenous people as of 1926.¹⁴⁸ There was also the issue of the Banyarwanda migrant community who had not become citizens under the 1962 Constitution because Rwanda was not a member of the British Empire.¹⁴⁹ However, the 1995 Constitution included Banyarwanda as an indigenous community of Uganda, which has generated much controversy and political and academic debate.¹⁵⁰ The Rwandan refugees who are subjects of my thesis found themselves entangled in this citizenship debacle. In 1994 during the exact period the 1995 Constitution was being debated in Uganda, the RPF took over power in Rwanda and this influenced the exclusion of refugees as a category to be registered for Ugandan citizenship.¹⁵¹

¹⁴⁷ The Constitution (Amendment) Act 2005 which among others repealed Article 14(a) of the 1995 Constitution that prohibited dual citizenship. This requires a non citizen to first qualify to be registered or naturalised as a citizen before they can be entitled to benefit from the operation of dual citizenship.

¹⁴⁸ Mahmood Mamdani, *'From citizen to refugee: Uganda Asians come to Britain'* (Oxford, Pambazuka 2011).

¹⁴⁹ Rwanda was a French Colony but became part of the Commonwealth in 2010 when it changed its official language from French to English.

¹⁵⁰ E R Kamuhangire, 'No "Banyarwanda of Rwandese Origin"' *The Observer* (Kampala, 17 December 2008).

¹⁵¹ Committee on Legal Affairs, *'Hansard Records: Constituent Assembly Debates Committee on Legal Affairs Debating Draft Chapter Three on Citizenship'* (Chaired by Prof. George-William Kanyeihamba, 1994) Unpublished but can be obtained from the registry of the Uganda Electoral Commission.

The Presence of Rwandan Refugees in Uganda

Uganda has been a host to Rwandan refugees since the colonial era. In Rwanda, the period between 1959 and 1990 was marked by violence and revolution. Rwanda was a Belgian colony from 1914 to 1962. It gained independence on 1 July 1962. The years between 1961 and 1973 were marked by attacks and murders of Tutsi and around 300,000 Tutsi fled mostly to Burundi and Uganda.¹⁵² Juvenile Habyarimana, a Hutu mounted a coup d'état against the government in 1973, which led to an avalanche of Rwandan refugee arrivals into Uganda. In 1990, the Tutsi refugees in Uganda formed a 4000 man Rwandese Patriotic Front (RPF) that waged a war the government of Rwanda, culminating into the assassination of Habyarimana in 1994, and triggering the 1994 Genocide. At least 500,000 people were killed, and close to 1.75 million fled to exile.¹⁵³ Following the genocide, as most Tutsi refugees repatriated back to Rwanda, many remained for social, political and economic reasons.¹⁵⁴

The government of Uganda practice kept refugees apart from the society as a distinct group soon to leave and 'so Ugandans have always viewed Banyarwanda genetically as foreigners'.¹⁵⁵ Catherine Watson estimated that by 1991, the number of Rwandans in Uganda was about 1.3 million, identified in three groups as 450,000 Ugandan Banyarwanda, ie indigenous Ugandans who are descendants of Rwandan families who found themselves in Uganda as a result of the colonial partition of 1918; 650 000 economic migrants who came to find

¹⁵² UNHCR, '*UNHCR CDR Background Paper on Refugees and Asylum Seekers from Rwanda*' (1 December 1998) www.refworld.org/docid/3ae6a63f8.html accessed 6 September 2014.

¹⁵³ *ibid* 2.4.

¹⁵⁴ Mulumba and Olema (n 129).

¹⁵⁵ Folajinmi Olabode Adisa, '*The comfort of strangers: the impact of Rwandan refugees on neighbouring countries*' (Nairobi, UNCHS 1996) 34 para 5 www.books.openedition.org/ifra/568?lang=en#ftn2 accessed 2 September 2014.

work in Uganda; and 84 000 refugees (UNHCR registered figures for 1992).¹⁵⁶

At the same time however, there was a government policy for practical local integration through which the government of Uganda has since the 1960s set aside land to construct settlements for all refugees, where they are placed as self-supporting communities.¹⁵⁷ Thus they acquired social ties and quasi permanent status that contribute to some of their resistance to returning to Rwanda. Most of the Rwandan refugees in settlements have one thing in common, which Cleophas Koroma also notes: 'they are unwilling and reluctant to return to Rwanda despite campaigns to encourage their repatriation'.¹⁵⁸

Since 2002, the government of Rwanda requested the UNHCR to revoke refugee status for Rwandan refugees who fled the country between 1959 and 1998, and in 2009 the UNHCR declared that it had agreed to this request, reasoning that Rwanda had achieved fundamental change;¹⁵⁹ which position has been disputed by various organisations and academics.¹⁶⁰

¹⁵⁶ *ibid* para 2.

¹⁵⁷ Mulumba and Olema (n 129).

¹⁵⁸ Cleophas Koroma, 'Reluctant to return? The primacy of social networks in the repatriation of Rwandan refugees in Uganda' (2014) Refugee Studies Centre Working Paper 103; E R Kamuhangire (n 153) 'No "Banyarwanda of Rwandese Origin"' *The Observer* (Kampala, 17 December 2008).

¹⁵⁹ FAHAMU, 'Statement of the Joint Committee of the 8th Tripartite Commission Meeting, 13 May 2010' *FAHAMU Refugee Legal Aid Newsletter* (June 2010) www.refugeelegalaidinformation.org/sites/srlan/files/fileuploads/FRLANJune2010.pdf accessed 1 September 2014;

¹⁶⁰ For example, Barbara Harrell-Bond, 'Cessation Clause Uganda Style: Keynote Speech Delivered at the North western University Conference on Human Rights' 23 January 2011 Centre for Forced Migration Studies Working Paper11-001 accessed www.cics.northwestern.edu/documents/workingpapers/CFMS_11-001_Harrell-Bond.pdf

The UNHCR held a series of meetings with the governments of Uganda and Rwanda between 2009 and 2012¹⁶¹ and in 2013 with all the countries hosting Rwandan refugees in Africa.¹⁶² The objective was to agree on a timeline for implementation of the 'Comprehensive Strategy for Rwandan Refugee Situation'.¹⁶³ The parties agreed that each country would work out its modality for the rollout of the comprehensive strategy, which would culminate into cessation of refugee status. If Uganda implemented this strategy, it would lead to approximately 11,700 Rwandan refugees in Uganda losing their status.¹⁶⁴ The comprehensive solution has four components:¹⁶⁵

1. Enhancing voluntary repatriation and reintegration of Rwandan refugees to Rwanda and the end of November 2011 150,519 refugees had been repatriated;
2. Meet the needs of those individuals unable to return to their countries of origin for protection related reasons;
3. Pursuing opportunities for local integration or alternative legal immigration status in the countries of asylum;
4. Design a common schedule leading to the cessation of the refugee status by June 2013.

¹⁶¹ UNHCR Rwanda, 'Tripartite meeting: Parties agree to reinforce voluntary repatriation of Rwandan refugees' *Refugee Bulletin Issue number II* (September-October 2011) www.unhcr.org/4ec3d2b19.pdf

¹⁶² www.irinnews.org/fr/report/98409/_no_consensus_on_implementation_of_cessation_clause_for_Rwanda_refugees accessed 2 September 2014.

¹⁶³ 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) (hereinafter referred to as the comprehensive strategy) www.refworld.org/docid/4f33a1642.html accessed 3 September 2014.

¹⁶⁴ Kelly E McMillan, 'Uganda's Invocation of Cessation Regarding its Rwandan Refugee Caseload: Lessons for International Protection' (2012) 24(2) *International Journal of Refugee Law* 233; see also UNHCR Rwanda (n 161).

¹⁶⁵ Chris Dolan, 'Is Rwanda Safe for Refugee Return?' *The African Executive* (9 August 2014) www.africanexecutive.com/modules/magazine/article_print.php?article=5276 accessed 15 August 2014.

All these would have to be in line with the executive committee guidelines on the cessation of refugee status which stressed the need for detailed consideration on 'fundamentality of change' in the country of origin.¹⁶⁶ However, most of the refugees that came as early as the 1950s fall into the category of long-status refugees who are unable or unwilling to return to their country of origin. But would their stay pass the test of 'personal convenience'?¹⁶⁷ Gahl-Madsen observes that the scope of 'personal convenience' should not include the following grounds:

'[n]ew family ties in the country of origin as a result of persecution, war, or simply lapse in time. Also one is not motivated merely by personal convenience if one hesitates to return to a country where there is no abode, no vocation and nothing else which bond oneself to that country.'¹⁶⁸

The long-status Rwandan refugees therefore are categorised as persons who for lapse of time could not return to Rwanda. The UNHCR recognised the existence of refugees that have been 'in the country for over 20 years'.¹⁶⁹ It is these long-status refugees who must find facilities, after the cessation of their refugee status that will entitle them to lawfully live in Uganda. These facilities would include local integration via acquisition of permanent residence or citizenship through registration or naturalisation. This is the discussion to which I now

¹⁶⁶ UNHCR, 'Cessation of Status No. 69 (XLIII) – 1992 EXCOM Conclusions' (9 October 1992).

¹⁶⁷ Yasmeen Siddiqui, 'Reviewing the Application of the Cessation Clause of the 1951 Convention Relating to the Status of Refugees in Africa' (2011) Oxford Refugee Studies Centre Paper 76 p 11. www.rsc.ox.ac.uk/files/publications/working-paper-series/wp76-reviewing-application-cessation-clause-1951-convention-2011.pdf accessed 1 September 2014. Yasmeen discusses the concept of exemption from cessation of refugee status if one is staying for reasons other than personal convenience.

¹⁶⁸ UNHCR, 'Commentary of the Refugee Convention 1951 Articles 2-11, 13-37' (October 1997) www.refworld.org/docid/4785ee9d2.html accessed 8 September 2014

¹⁶⁹ UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: UGANDA (March 2011) www.refworld.org/pdfid/4d806bc112f.pdf accessed 25 August 2014.

turn, and argue that the immigration laws of Uganda expressly deny refugees and their decedents such facilities.

The UNHCR Comprehensive Strategy to the Rwanda Refugee Crisis

The strategy as expounded earlier requires that refugees who do not qualify for further international protection but elect to stay because of their long-status and attachment to the country of asylum acquire alternative immigration status.¹⁷⁰ The application of the comprehensive strategy was aimed at achieving a durable solution which would necessitate remaining refugees to become either permanent residents or be naturalised as citizens of Uganda.¹⁷¹ The country of origin and the country of asylum had specific roles for this strategy to succeed. In Rwanda (the country of origin) there were three developments that took place that have a bearing the effectiveness of the durable solution.

First, the government of Rwanda passed a new Constitution in 2003 in which Article 7 provided that every person has a right to nationality, but also enshrined that 'Rwandans or their descendants who were deprived of their nationality between 1 November 1959 and 31 December 1994 by reason of acquisition of foreign nationalities automatically reacquire Rwandan nationality if they return to settle in Rwanda.'¹⁷² In other words, those people who lost their nationality in the above-mentioned period would only regain their Rwandan nationality if they indeed returned and settled in Rwanda. The provision is silent on refugees, meaning that in theory the long-status refugees still had Rwandan Nationality. But in practice they were now domiciled in Uganda, and therefore could not benefit from this provision.

¹⁷⁰ Chris Dolan (n 165).

¹⁷¹ UNHCR (n 163) *Comprehensive Strategy*.

¹⁷² The Constitution of the Republic of Rwanda 2003 adopted 26 May 2003 after a referendum and confirmation by the Supreme Court.

Secondly, under the comprehensive strategy the government of Rwanda allowed to give national passports to all Rwandan refugees who wished to continue living in Uganda after the cessation of their refugee status but did not undertake to support them acquire the necessary immigration facilities to legalise their stay in Uganda. Without the necessary immigration facilities these people would become illegal immigrants, and therefore subjects of deportation from Uganda under section 53 of the Uganda Citizenship and Immigration Control (UCIC) Act which provides that 'subject to this Act, no person *who is not a citizen of Uganda* shall enter or remain in Uganda unless that person is in possession of a valid entry permit, certificate of permanent residence or pass issued under this Act.¹⁷³

Thirdly, on 1 July 2007, Rwanda became a member of the East African Community (EAC)¹⁷⁴ which has a protocol on free movement of persons and goods in the East Africa.¹⁷⁵ However citizens of member states do not have rights to reside in other states without residence permits. Moreover, long-status refugees would require permanent residence not mere work permits which have specific short duration. But would these refugees qualify to obtain the available immigration facilities to enable them reside legally in Uganda after the invocation of cessation clause?

Permanent Residence?

The National Citizenship and Immigration Board¹⁷⁶ may grant a person permanent residence if, first, they prove that 'the person has contributed to the socioeconomic or intellectual development of

¹⁷³ Uganda Citizenship and Immigration Control (UCIC) Act s 53(1) (emphasis added).

¹⁷⁴ The East African Community, 'Key dates in the EAC's history' www.eac.int/news/index.php?option=com_content&view accessed 2 September 2014.

¹⁷⁵ The East African Community Protocol on the Establishment of the East African Common Market Article 7.

¹⁷⁶ The 1995 Uganda Constitution Article 16 and the UCIC Act s 56(1) define the powers of the National Citizenship and Immigration Board (hereinafter referred to as the board).

Uganda'.¹⁷⁷ This is a tall order for the mostly poor and illiterate Rwandan refugee populations who could not have made this kind of contribution; this clause is therefore very prohibitive.

Secondly, they should have continuously lived in Uganda legally for ten or more years.¹⁷⁸ This sounds possible because a person who is granted refugee status under section 4 of the Refugee Act 2006 of Uganda is entitled to residence.¹⁷⁹ However, in applying for permanent residence, a former refugee will not be allowed to benefit from the years of sojourn in Uganda even if he has stayed since 1959.¹⁸⁰

Lastly, the fees requirements for a certificate of residence are US\$ 1,000 each for five, ten, fifteen or life residence, and US\$ 250 for residence due to marriage.¹⁸¹ This amount is too high and therefore restrictive given the socioeconomic status of majority of refugees. The cheapest option would be to apply through marriage, but the danger is in s 55(5) of the UCIC Act which provides that 'where a person has been granted permanent residence under sub section 3(g) and the marriage by virtue of which the person was granted a certificate of residence is (a) invalid or otherwise declared void by court or tribunal of competent jurisdiction; or (b) dissolved, that person shall cease to hold a certificate of permanent residence.'

Basing on the foregoing, I aver that permanent residence in Uganda as an option for Rwandan refugees post cessation of their refugee status is not viable under currently laws, as the conditions and status of majority of the refugee caseload cannot meet the requirements for issuance of this facility. The other option for them under the comprehensive strategy would be to acquire Ugandan nationality or citizenship. But would they qualify?

¹⁷⁷ UCIC Act s 55(3)(a)(i).

¹⁷⁸ *ibid* s 55(3)(a)(ii).

¹⁷⁹ The Refugee Act 2006 s 35.

¹⁸⁰ UCIC Act s 25.

¹⁸¹ The Uganda Citizenship and Immigration Control (Fees) Regulations 2009.

Citizenship by Registration

Article 12 of the 1995 Constitution provides for citizenship by registration, but disqualifies refugees and their descendants from being registered as Ugandans. Specifically, Article 12(1) provides that 'every person born in Uganda at the time of whose birth *neither* of his or her parents and *none* of his or her grandparents *was a refugee* in Uganda, who has lived continuously in Uganda since the 9 October 1962 shall on application be entitled to be registered as a citizen of Uganda.'¹⁸²

Secondly, the procedure which requires a successful applicant for registration to renounce to their former citizenship before their home authority does not favour a refugee even if they were to be registered. A refugee, after the invocation of the cessation clause, will therefore not be able register as a citizen because the law disentitles them and their descendants in the first place.¹⁸³ In the second place, they would have to go to their country of origin high commission for citizenship renunciation certificates, which would present another challenge under international refugee law.

Citizenship by Naturalisation?

Article 13 of the 1995 Uganda Constitution is to the effect that 'parliament shall by law provide for acquisition and loss of citizenship by naturalisation'. The UCIC Act was enacted to fulfil these requirements and in section 16 provides for citizenship by naturalisation. Subsection 5(a-e) enlists the qualifications for naturalisation: a person must have 'resided in Uganda for an aggregate period of twenty years; resided in Uganda throughout the period of 24 months immediately preceding the date of application; adequate knowledge of a prescribed vernacular language; good character; and intentions if naturalised to continue to reside permanently in Uganda.'¹⁸⁴

¹⁸² The 1995 Uganda Constitution Article 12(1)(a)(ii) (emphasis added).

¹⁸³ *ibid.*

¹⁸⁴ UCIC Act 1999 s 16 (5) (a-e).

The spirit of Article 34 of the 1951 Convention mandates states as far as possible to naturalise and make the process fast and cheap. However, Ugandan laws prohibit refugees from calculating the duration of their stay in Uganda basing on their sojourn in asylum for purposes of citizenship application.¹⁸⁵ There has been debate as to the interpretation of Convention Travel Document.¹⁸⁶ But I refer to one held by a refugee in Uganda and argue that this provision was clearly also intended to prohibit refugees from acquiring Uganda citizenship by naturalisation. Therefore the refugees clearly do not qualify for citizenship of Uganda under the country's nationality laws.

This chapter traced the development of the nationality laws in Uganda, and looked at the presence and situation of the Rwandan refugees in light of the UNHCR comprehensive strategy to solve their refugee situation. I evaluated refugees' access to alternative immigration status and concluded that the laws of Uganda do not provide alternative immigration facilities for refugees and their descendants. In the next chapter, I will make a legal response to this impasse premised on international refugee law and the obligations to promote the right to nationality of refugees.

¹⁸⁵ *ibid* s 25.

¹⁸⁶ *ibid* s 2(g) defines a convention travel document as a travel document issued to a refugee under the relevant refugee instruments and the control of alien refugees act (repealed by the Refugees Act 2006). It also in s 2(t) defines relevant refugee instruments to mean the 1951 United Nations Convention relating to the status of refugees as amended by the 1967 protocol relating to the status of refugees and the 1969 Organisation of African Unity convention governing specific aspects of refugee problems in Africa and any other international convention or other instrument prescribed by the minister by statutory instrument.

CHAPTER 4: LEGAL RESPONSES TO THE RWANDAN REFUGEE NATIONALITY CRISIS IN UGANDA

In this chapter, I will give a legal overview of the Constitutional petition no.34/2010 before the Constitutional Court of Uganda, which seeks an interpretation of Article 12 and 13 of the Constitution of Uganda. The petitioners brought this petition on behalf of refugees who desire to acquire citizenship but are denied by the nationality laws. I will argue that Uganda is in breach of article 34 of the 1951 Refugee Convention. I will also expose the uncertainty which will unfold if the cessation clause is applied to the Rwandan refugee caseload before addressing the citizenship impasse that I have exposed in chapter 3, and argue that this will ultimately lead the Rwandan refugees and their descendants into a situation of statelessness.

A Brief Note on the Refugee Policy in Uganda

Uganda's refugee policy since the 1960s was in line with the OAU policy of treating refugees as temporarily resident in the country of asylum.¹⁸⁷ There was an unofficial but active policy that 'once a refugee always a refugee' and the Ugandan refugee law then referred to refugees as aliens.¹⁸⁸ It reflected a policy of no citizenship to 'refugee aliens'. The Control of Alien refugees Act provided that for the purposes of immigration and citizenship, no period spent in Uganda as a refugee would be deemed to be residence in Uganda for purposes of citizenship application.¹⁸⁹ The refugees were not seen as part of the community of

¹⁸⁷ George Okoth-Obbo, 'Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) Refugee Survey Quarterly 79.

¹⁸⁸ Control of Alien Refugees Act Cap 64 of 1960 www.refworld.org/docid/3ae6b4d2c.html accessed 17 September 2014.

¹⁸⁹ *ibid* s18.

Uganda, leading for example to the mass expulsion of the Banyarwanda refugees from south western Uganda in 1980s.¹⁹⁰

However, the government of Yoweri Museveni, after the 1981-1985 guerrilla warfare that ushered him into power and most of the new leadership having been refugees themselves, changed the approach to the refugee policy in Uganda. In 2006 Uganda adopted a more progressive refugee law - the Refugee Act 2006 - that, in the words of the then UNHCR representative in Uganda Stefano Severe, 'embodies some of the best regional tenets on refugee law.'¹⁹¹ The Refugee Act 2006 repealed the draconian "aliens control" and "the exemption from citizenship" clauses replacing them with section 45 which provides that, 'the Constitution and any other law in force in Uganda regulating citizenship shall apply to the naturalisation of a recognised refugee.'¹⁹²

The UCIC Act 1999, which is the principle nationality legislation, however excluded refugees. Section 25 prohibits holders of Convention Travel Documents (CTDs) from using the duration of their stay in Uganda for purposes of calculating years for citizenship qualification.¹⁹³ Ironically, the parliamentary debate on the Refugee Act 2006 does not reveal opposition to naturalisation of refugees. Col. Tom Butime, standing in for the Minister for Internal Affairs¹⁹⁴ in a policy response said,

"[Y]ou cannot be an automatic citizen because you are born here. At the age of 18 you can decide which nationality you would like to belong, either your fathers or mothers. They also know that if you enter this country

¹⁹⁰ Jason Clay, 'The Eviction of Banyarwanda: The Story Behind the Refugee Crisis in Southwest Uganda' 1984 (Cambridge, MA: Cultural Survival Inc. 1987).

¹⁹¹ Vanessa Akello, 'Uganda's Progressive Refugee Act Becomes Operational' *UNHCR News Series* (Kampala, 22 June 2009) www.unhcr.org/4a3f9e076.html accessed 5 September 2014.

¹⁹² Emphasis added.

¹⁹³ Refugees are holders of Conventional Travel Documents (CTDs) issued to them under the 1951 Convention

¹⁹⁴ Ministry of Internal Affairs is the line ministry for immigration in Uganda.

and follow the regulations and laws of Uganda, the citizens Act and others you can become a citizen by naturalisation, which is provided in the Constitution of Uganda.”¹⁹⁵

Paradoxically, what the minister was referring to is Article 13 of the Constitution whose implementation reveals a dissonance between the written law and the practice as regards access to citizenship by refugees in Uganda.

The Constitutional Petition for Access to Nationality of Uganda

The preceding chapters have exposed the lack of access to Uganda citizenship for refugees created by a lacuna in law and practice. They have also alluded to inability of particularly long status refugees to return home. In the brief note on the refugee policy in Uganda, I have shown that there was no explicit intention to deny refugees citizenship.¹⁹⁶ In recognition of this unresolved state of affairs, the desire for naturalisation among the refugee population,¹⁹⁷ and the anxiety of the impending invocation of the cessation clause, the Refugee Law Project in Uganda and the Makerere University Centre Public Interest Litigation petitioned the Constitutional Court of Uganda for the interpretation of the constitutional provisions on citizenship by registration and naturalisation.

¹⁹⁵ Parliament House Kampala 22 March 2006, para 3.50 14
www.parliament.go.ug/hansard/hans_view_date.jsp?dateYYYY=2006&dateMM=03&dateDD=22

¹⁹⁶ *ibid.*

¹⁹⁷ Joe Oloka-Onyango, ‘Some Categories of Refugees Eligible for Citizenship in Uganda’ *The Monitor* (Kampala, 20 November 2007); Refugee Law Project, ‘A Dangerous Impasse: Rwandan Refugees in Uganda’ (2010) *Citizenship and Displacement in the Great Lakes Region Working Paper No.4* www.refugee-rights.org/Publications/Papers/2010/10_08_30_Dangerous_Impasse.pdf accessed 5 September 2014.

The petitioners argued that a refugee is conferred naturalisation rights under section 6(1) d, of the Refugee Act 2006, which provides that "A person shall cease to be a refugee if he becomes a citizen of Uganda."¹⁹⁸ This section, they aver, proves that a refugee shall become a citizen at one point. They also contend that this section should be read with section 15 of the Uganda Citizenship and Immigration Control (UCIC) Act 1999, which provides for the requirements and procedure for registration as a citizen.

Secondly, the petitioners argue that the Article 12(a)(ii) of the Constitution which provides that persons born in Uganda whose parents and grandparents were refugees at the time of their birth are ineligible for citizenship by registration has no legal effect on the eligibility of refugees to register as citizens under Article 12(2)(c) of the Constitution. They argue that Article 12(a)(ii) is limited to persons born in Uganda before 9 October 1962 and is not expressly provided to be applied to other provisions.

Thirdly, they aver that the consequence of Article 12(2), which provides for other grounds to qualify for citizenship, is exclusive and should be construed and applied in separation from Article 12(1), which prohibits refugees from citizenship. Further, that Article 13, which provides for citizenship by naturalisation, should be interpreted to include refugees and duration of residence as a refugee should be used to calculate duration for period required for naturalisation. They pray for declarations that a resident refugee who satisfies the requirements under the law be eligible to apply for and acquire citizenship by naturalisation or registration as provided by the Constitution. Wherefore, the petitioners being refugee law practitioners seek to achieve a shift in government policy to grant refugees citizenship of Uganda.

¹⁹⁸ The refugee Act 2006 (Uganda) www.refworld.org/docid/4b7baba52.html accessed 17 September 2014.

The Government of Uganda's Response

The response of the Attorney General of Uganda addressed two issues of law.¹⁹⁹ First, whether a refugee is qualified to be registered as a citizen of Uganda, to which he responded in the negative. The government stated that Article 12(1) of the 1995 Constitution clearly does not make provisions for the refugees acquiring citizenship of Uganda by registration. It has an element of voluntary migration and therefore a refugee cannot become a citizen by registration. The second issue was whether a refugee can be naturalised as a citizen of Uganda. The government responded also in the negative, and argued that:

‘The framers of the Constitution cannot have legislated against obtaining or being granted citizenship under Article 12 and section 14 and could not later in another provision, ie Article 13 of the Constitution and section 18 of the UCIC Act 1999 legislate and intend for them to be granted citizenship by naturalisation. The spirit and tone of Article 12 of the 1995 Constitution and section 14 of the UCIC Act 1999 is very clear, unwavering, and unambiguous.’²⁰⁰

This response shows clearly that the government of Uganda has a policy not to register or naturalise refugees as citizens of Uganda; and as I discussed in chapter 3, Article 13, which provides for naturalisation has not been made available to refugee applicants for citizenship.

The conflict and the undecided situation regarding access to citizenship by refugees have created an impasse which resulted into the pending Constitutional Court petition. It is imperative to examine whether Uganda is in compliance with the obligations in Article 34 of the 1951 Convention, and observance of refugees' right to nationality.

¹⁹⁹ *Centre for Public Interest Law Ltd v Attorney General* (2011) Constitutional Court of Uganda Constitutional Petition 34/2010 (Unreported).

²⁰⁰ *ibid* paras 3 and 4.

Is there an Obligation for Uganda to Naturalise Refugees?

International refugee law provides for naturalisation of refugees.²⁰¹ The conclusion I made in chapter 2, were also emphatically reflected in the nationality decree in the case of *Tunis and Morocco* when the PCIJ observed that 'questions of nationality are in principle within the reserved domain of states jurisdiction.'²⁰² However, the era of human rights reconfigured this position, as was well articulated by Weis that practically,

'... [I]n the domain of international human rights law of a state to determine nationality must be exercised within the confines of that state's international obligation, but most notably its treaty obligations, but most possibly various obligations derived from other sources of public international law such as customs'.²⁰³

The ICJ has also interpreted the provisions of international human rights treaties as carrying positive obligations on states. In Diallo's case, the ICJ opined that Diallo used his nationality status to vindicate his rights.²⁰⁴ The ICJ also emphasised that 'international instruments and treaties of international law of human rights may be cited as the only protection afforded to the "the wretched of the Earth."' ²⁰⁵ Noteworthy, as I argue in chapter 2, Kesby contends that 'when posited as an inherent human right, nationality is no longer with

²⁰¹ UNGA, *Convention Relating to the Status of Refugees*, (UNTS vol. 189 p. 137, 28 July 1951) www.refworld.org/docid/3be01b964.html accessed 2 September 2014 Article 34.

²⁰² *Nationality Decrees Issued in Tunis and Morocco* (1921) PCIJ ser. B No. 4 (1923) Advisory Opinion www.worldcourts.com/pcij/eng/decisions/1923.02.07_morocco.htm accessed 3 September 2014

²⁰³ Paul Weis, *Nationality and Statelessness in International Law* (London: Stevens, 1956).

²⁰⁴ *Republic of Guinea V. The Democratic Republic Congo* (2010) ICJ, Separate Opinion of Judge Cançado Trindade 729 (the Diallo case).

²⁰⁵ *ibid.*

the exclusive jurisdiction of states²⁰⁶ and states must harmonise their nationality laws with their human rights obligations.²⁰⁷

Uganda has obligations under international human rights and humanitarian treaties²⁰⁸ and did not make reservations to the naturalisation of refugees under the 1951 Convention²⁰⁹. Article 13 of the Constitution of Uganda domesticates the principle in Article 34 of the 1951 Convention, and provides for parliament to pass a law, which would provide for acquisition and loss of citizenship by naturalisation. The Rwandan refugees however failed to access naturalisation under this provision as we saw in chapter 3.²¹⁰ The UNHCR is mandated to seek permanent solutions to refugee problems;²¹¹ and if refugees in Uganda are to achieve naturalisation, the UNHCR is obliged to employ 'an interactive process involving both refugees and nationals of the host state as well as its institutions.'²¹²

Concerning the long status Rwandan refugees who have been present in Uganda for over 50 years, Abraham Kiapi asserts that they are '... in practice integrated into the Ugandan society, and have been offered employment including joining the police forces and even the army.²¹³ These privileges they mostly fraudulently acquired through impersonation of Ugandan citizenship.'

²⁰⁶ Alison, Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 40.

²⁰⁷ Inter-American Court of Human Rights (IACrHR) 'Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica' OC-4/84 www.refworld.org/docid/44e492b74.html accessed 5 September 2014.

²⁰⁸ UN High Commission for Refugees (UNHCR), Treaties to which Uganda is Party <https://treaties.un.org/pages/Result.aspx?searchText=Uganda&dir=&file=&query=All&tab>

²⁰⁹ UN High Commissioner for Refugees, 'Reservations and Declarations' www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=4dac387c6&cid=49aea9390&keywords=reservations

²¹⁰ Uganda Citizenship and Immigration Control (UCIC) Act 1999 s 16(5) (a-e).

²¹¹ *Saadi v United Kingdom* (2008) ECtHR 13229/03, www.refworld.org/docid/47a074302.html accessed 18 September 2014.

²¹² UNHCR, 'Local Integration' (UN Doc.EC/GC/0216, 25 April 2002) paras 7-8.

²¹³ Abraham Kiapi, *The Legal Status of Refugees in Uganda: A Critical Study of Legislative Instruments* (S.I: s.n, 1993).

This implies that they are therefore still refugees and descendants of refugees. Hathaway propounds that 'in contrast to simple local integration, enfranchisement through citizenship is legally sufficient to bring refugee status to an end.'²¹⁴ In effect, naturalisation is the principle de jure integration that is parcelled in legal, economic, and socio-cultural dimensions, and is the highest state of integration which is protected by the provisions of article 34 that state parties should not breach by failing to assimilate and naturalise refugees.

Is Uganda in Breach of Article 34?

The UNHCR has previously pushed for naturalisation as a solution before evoking the cessation clause as they did in Malawi and Mozambique.²¹⁵ It also helped to resolve citizenship and nationality crises in other member states like Bosnia and Herzegovina, interventions that elucidated the applicability and the concept of facilitation under Article 34 of the 1951 Convention. Sam Walker recorded the UNHCR's explanation of the applicable meaning of facilitate as follows:

'... [T]o "facilitate" naturalisation means that refugees and stateless persons should be given appropriate facilities for the acquisition of nationality of the country of asylum and should be provided with the necessary information on the regulations and procedures in place.'²¹⁶

The current legal limbo in Uganda's nationality law results into grave consequences both to the refugees and those who would advise them about the nationality procedure. For example, Sam Walker in

²¹⁴ James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge [England]: Cambridge University Press, 2005) 980.

²¹⁵ UNHCR, 'Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique' (1996) www.refworld.org/docid/4165775d4.html accessed 17 September 2014.

²¹⁶ Sam Walker, 'Can Refugees Become Citizens of Uganda?' (2008) Refugee Law Project Briefing Paper, 5 www.refugeelawproject.org/files/briefing_papers/RLP.BP0803.pdf accessed 5 September 2014.

opining that refugees can actually be naturalised in Uganda, argued that the CTDs which the UCIC Act does not consider in granting citizenship refer to those not held by refugees resident in Uganda, but those held by the refugees from abroad.²¹⁷ His interpretation is very limited because all refugees, including those in Uganda, hold CTDs.²¹⁸ Moreover, such distinction is not premised anywhere in the law.

Contracting states are required to give an explanation for their actions which deny refugees access to naturalisation. Hathaway quantified this by asserting that 'Article 34 is breached where a state party simply does not allow refugees to secure its citizenship and refuses to provide a cogent explanation for that inaccessibility'.²¹⁹ The Government of Uganda does not give an explanation for failure to naturalise refugees. International refugee law experts have pointed correctly to the obligation that is invited by the use of phrase, 'shall facilitate as far as possible' which makes it incumbent upon state parties (like Uganda) to provide a good faith justification for the formal or de facto exclusion of refugees from naturalisation.²²⁰

The UN human rights committee opined that states may be duty bound to enable persons lawfully resident ultimately to become citizens. In the case of *Stewart v Canada*, the committee observed that

'though we are limiting our decision on whether a person who enters a given state under the states' immigration laws can regard it as his own country when he has not acquired its nationality, ... the answer could possibly be positive, were the country immigration law to place

²¹⁷ *ibid.* See also UCIC Act 1999 (n 210) s 2(g) and s 25(e).

²¹⁸ The Refugee Act 2006 (n 198) s 31(5) provides that a refugee resident in Uganda shall hold a travel document issued under or in accordance with Article 28 of the Geneva Convention (the 1951 Refugee Convention).

²¹⁹ Hathaway (n 214) 989.

²²⁰ *ibid.*

unseasonable impediments on acquiring nationality by new immigrants.²²¹

While Uganda's nationality laws are infested with obstacles to naturalisation of refugees, the decision in the foregoing case suggests that, the refugees would be entitled to call Uganda their own country without acquiring its nationality. Be that as it may, the current practice places refugees in a risky situation and is indeed in breach of the desires of Article 34 which did not limit itself to directing contracting states to avoid doing bad, but as Hathaway cautioned, 'positively directs them to do good'.²²² Having breached the provisions of Article 34 and failed to naturalise refugees, what then is the fate of the Rwandan refugees in light of Uganda's immigration laws, and the impending cessation of their status? This is the subject of my next discussion.

The Impending Fate of Rwandan Refugees in Uganda Expulsion?

Rwandan refugees in Uganda experienced mass expulsion in 1980s, when the Banyarwanda in the southwest Uganda were expelled as non-citizens and their property confiscated.²²³ Uganda expelled its residents before in 1972²²⁴ and a state has a right pursue its legitimate aims at immigration control.²²⁵

The Rwandan refugees have developed the close relationship discussed in the Diallo case, when the ICJ noted that a person even

²²¹ *Stewart v Canada* (1996) 4 IHRR 418 (Unite Nations Human Rights Committee [UNHRC]) opil.ouplaw.com/view/10.1093/law:ihrl/1745unhrc96.case.1/law-ihrl-1745unhrc96 accessed 5 September 2014.

²²² Hathaway (n 214) 990.

²²³ Jason Clay (n 190) 8.

²²⁴ Mohamed Mamdani, *From Citizen to Refugee: Uganda Asians Come to Britain* 2nd edn, Oxford: Pambazuka 2011) 18.

²²⁵ *Gül v. Switzerland* (1996) European Court of Human Rights (ECtHR) 23218/94 www.refworld.org/docid/3ae6b6b20.html accessed 18 September 2014; *Sen v Netherlands* (2003) ECtHR 31465/96 www.justcite.com/Document/b2mto5utnSaaa accessed 18 September 2014.

being a non-national could develop 'a close relationship with the state of residence that has 'practically become his home'.²²⁶ The European Court of Human Rights (ECtHR) in the case of *Maslov v Austria* noted that 'the totality of social ties between settled migrants and the community in which they are living constitutes part of the concepts of private life which states should not interfere with.'²²⁷

The state of course has to balance their immigration control and the applicants' rights mostly of persons who have created private networks to which their livelihood is attached.²²⁸ The expulsion of the long status refugees would fault Uganda the same way as the Republic of Latvia was faulted by the European Court of Human Rights. In 2004, the ECtHR in the case of *Slivenko v Latvia* decided that Latvia violated the rights of the petitioners when 'it removed them from the country where they had developed uninterruptedly since birth the networks that make the private life of every human being.'²²⁹

This case introduces the concept of quasi nationality, which Joe Oloka-Onyango used to describe the long stay Rwandan refugees. He noted that some of the Rwandan refugees were born in Uganda; many are now in the age of majority and seek facilities as quasi nationals.²³⁰ Quasi-nationality was also elucidated when the ECtHR faulted France on the deportation of Mohand Beldjoudi an Algerian national who was born and spent all his life in France. Court held that

'Having resided in France for several decades, he has spent his whole life - over forty years - in France, was

²²⁶ The Diallo case (n 204).

²²⁷ *Maslov v. Austria* (2007) ECtHR 1638/2003, www.refworld.org/docid/464423e22.html accessed 18 September 2014.

²²⁸ *Rodrigues Da Silva and Hoogkamer V. The Netherlands* (2006) ECHR 50435/99 (2007) 44 EHRR 34, www.bailii.org/eu/cases/ECHR/2006/86.html accessed 3 September 2014

²²⁹ *Slivenko v Latvia* (2003) ECtHR 48321/99 www.refworld.org/docid/402b5b034.html accessed 5 September 2014

²³⁰ Joe Oloka-Onyango, 'Ugandan Officials Wrong on Rwandans' *The Monitor* (Kampala, 17 November 2007).

educated in French and appears not to know Arabic. He does not seem to have any links with Algeria apart from that of nationality ... therefore for all intent and purposes he was a quasi national.'²³¹

It is an established dogma of international public law that states like Uganda would argue a right to immigration control and public order. This notwithstanding, Uganda has an obligation to respect the acquired rights of its refugees in relation to the social ties they have created within the state.²³² And indeed, as Kesby postulates, 'well established family and social ties might mitigate the effects of a person's status as a non national, and give rise to an intermediate category in which admission and the right to remain may be secured'.²³³ This, I argue, is the category of persons under which the long status Rwandan refugees in Uganda fall; thus it would be wrong if the country expelled them. But, having been denied alternative immigration status, for how long would they stay in Uganda? And, what effect would this have on their right to nationality particularly if the UNHCR proceeded to evoke the cessation clause within Uganda's prevailing nationality framework?

Statelessness?

Catherine Dauvergne asserts that '...the geography of the world is nationalised. There is no empty, non-national space where people can live beyond the reach of a nation.'²³⁴ The allocation of individuals as nationals of states is the domain of international human rights law. At the same time, national law decides the terms of this membership within states. However, individuals like refugees find themselves

²³¹ *Beldjoudi V. France* (1992) ECtHR 12083/86 14 EHRR 801 www.bailii.org/eu/cases/ECHR/1992/42.html accessed 7 September 2014.

²³² Hathaway (n 214) 222.

²³³ Alison Kesby (n 206).

²³⁴ Catherine Dauvergne, *Making People Illegal What Globalization Means for Migration and Law*. (Cambridge: Cambridge University Press, 2008) 44 www.search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=259183>

resident in these states without legal belonging and therefore become subjects of international protection. Those without this protection become anonymous beings that are, as Kesby asserts, 'exposed to arbitrary power and mercy of the police and illegal acts'.²³⁵ This description fits the persons alluded to by the UN ad hoc committee, who 'leads an illegal existence, avoiding all contact with the authorities and living under threat of discovery and expulsion.'²³⁶

In Uganda, the invocation of the cessation clause to those Rwandan refugees who cannot by reason of their attachments leave and yet lack of access to citizenship, would make them a category of such persons. The lack of citizenship would mute their access to other rights as was exposed in the case of *Trop v Dulles* in which lack of citizenship was said to 'constitute the total destruction of the individual's status in organised society ... (because) it strips the individual of his status in the national and international political community.'²³⁷ They will live under a regime of de facto statelessness.²³⁸

The UNHCR experts meeting on the concept of stateless persons under international law opined that persons who are unable to avail themselves to their country of nationality should include 'persons who are unable to return to the country of their nationality.'²³⁹ They noted also that where there is a non-automatic model of acquisition a person should not be treated as a national where the mechanism of acquisition

²³⁵ Kesby (n 206) 3.

²³⁶ See UN Ad Hoc committee on Refugee and stateless persons, E/112/Add 1(august 199) 14, available at www.refworld.org/docid/3aef8c002.html accessed 28 August 2014.

²³⁷ *Trop V. Dulles* (1958) US Supreme Court 356 U.S. 86 laws.findlaw.com/us/356/86.html accessed 12 September 2014.

²³⁸ UN General Assembly, *Convention Relating to the Status of Stateless Persons* (UNTS vol 36028 September 1954) 117 www.refworld.org/docid/3ae6b3840.html [accessed 8 October 2014. Article 1(2)(ii) defines a stateless person not to include 'a persons who is recognised by the component authorities of the country in which they have taken residence as having rights and obligations which are attached to possession of the nationality of that country.'

²³⁹ UNHCR, 'Expert Meeting: The Concept of Stateless Persons under International Law ("Prato Conclusions")' www.refworld.org/docid/4ca1ae002.html accessed 18 September 2014.

has not been completed".²⁴⁰ The provision in the Uganda Constitution of the naturalisation laws falls within this thinking, as it is effectively inaccessible. The UNCHR experts alluded to such a stalemate and noted that;

'There are procedures in which the administration exercises discretion with regard to acquisition of nationality or where documentation and other requirements cannot reasonably be satisfied by the persons concerned.'²⁴¹

Indeed, because the refugees cannot satisfy some requirements in the Ugandan nationality laws, a petition has been filed on their behalf in an effort to exhaust domestic remedies in relation to grant of nationality, as was expounded earlier in this chapter. The UNCHR experts also opined that persons don't have to exhaust domestic remedies before they are brought under the definition of statelessness and caution that a de facto stateless person should not prove that they cannot get nationality to all countries in the world, rather the test is premised on an effective link.²⁴² They noted that 'the adoption of an appropriate standard of proof would limit the states that need to be considered to those to which the person enjoys relevant link,'²⁴³ the link which the ICJ found lacking in the *Nottebohm* case. Blackman writing in the context of state succession proffers that

'a vast majority of people on this planet have effective links with only one state and the individual right to nationality for such people can only give rise to corresponding of but one state to confer nationality.'²⁴⁴

²⁴⁰ *ibid* para 17.

²⁴¹ *ibid* para 21.

²⁴² *ibid* para 19.

²⁴³ *ibid* para 22.

²⁴⁴ Jeffery Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19(4) *Michigan Journal of International Law* 1141.

It can be argued that, for majority of long status Rwandan refugees, that state that Blackman refers to would be Uganda. Thus it would create a corresponding duty for Uganda to naturalise these refugees. Regrettably, through prohibitive nationality laws and citizenship practice, the Rwandan refugees and their descendants are denied the right to nationality as provided by Article 15 of the UDHR discussed in chapter 2.

Conclusion

The citizenship limbo and procedural lacuna in which the refugees would find themselves if the cessation clause is evoked without putting in place the necessary access to permanent residence or citizenship will force these refugees to become de facto stateless persons. As the UNHCR experts on statelessness warned, eventually ‘...unresolved situations of de facto statelessness in particular over two or more generations, may lead to de jure statelessness.’²⁴⁵

²⁴⁵ UNHCR (n 239) para 12.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

Introduction

The main objective of my thesis was to highlight and respond to the impediments faced by the Rwandan refugees and their descendents in accessing citizenship in Uganda, and how this affects their right to nationality. I have discussed the scope of international refugee law, the 1951 Convention on the Status of Refugees and particularly Article 34, which provides for naturalisation of refugees. I have expounded that international law recognises that state parties have a sovereign duty to decide who their nationals are, but also revealed that states are required to apply the test of effective links to the individual as decided by the ICJ in the *Nottebohm* case. However, when regarded as a human right, nationality is to be granted by states in line with their international treaty obligations and customs. I also concluded that the right to nationality is a fundamental human right and discussed its consolidation and practice in Africa.

I averred that application for citizenship by the Rwandan refugees aims at making them part of the community of Uganda with civil and political rights so that they achieve *de jure* integration. This thesis then exposed the impediments to acquisition of citizenship by refugees under the nationality law in Uganda showing specifically that it does not provide for citizenship by registration for refugees and their descendents. I noted that while the 1995 Uganda Constitution provides for naturalisation, refugees are denied access to this right by other limiting legislation under the country's immigration laws. To heighten this citizenship stalemate, I proffered, is the looming controversial application of the UNHCR Comprehensive Strategy for the Rwandan Refugee Situation towards refugees who have lived in Uganda between 1950 and 1998. The invocation of this ceased circumstances clause was announced in 2009 by the tripartite agreement between the Governments of Rwanda and Uganda.

I argued that cessation of refugee status would particularly affect long status refugees who have effective links and social ties to Uganda. Majority of such refugees have lost attachment or have in fact never been to Rwanda, having been born and lived in, and call Uganda home. The current immigration laws in Uganda do not enable them to get citizenship or permanent residence. The lack of international protection after the cessation of refugee status will throw them into a human rights limbo in which they will then live as outlaws or illegal immigrants, without any socio-political rights. They will thus become de facto stateless persons. This unsolved situation of de facto statelessness will ultimately become de jure statelessness²⁴⁶ and as Hannah Arendt strongly stated,

'...[w]ithout a political status and legal personality the stateless are expelled from the public sphere of equality and left with only those characteristics which can be expressed in the private sphere.'²⁴⁷

The refugees being subjects of international refugee law cannot be left in a human rights black hole where they have no more protection. In the case of Rwandan (and indeed all other) refugees in Uganda, cessation of their status in the absence of access to alternative immigration status would render them 'without a place' in the international system and 'out of place' in Uganda.

Recommendations

Under international refugee law, protection of refugees is a mandate of the UNHCR,²⁴⁸ in consultation with the state parties and other implementing partners. The recommendations I make point

²⁴⁶ UNHCR, *Expert Meeting - The Concept of Stateless Persons under International Law ("Prato Conclusions")* May 2010, para 22 www.refworld.org/docid/4ca1ae002.html accessed 18 September 2014.

²⁴⁷ Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 2013) 301.

²⁴⁸ UNHCR, 'Note on the mandate of the High Commissioner for Refugees and his Office' www.refworld.org/pdfid/5268c9474.pdf

towards an amicable approach to the naturalisation of refugees and a more acceptable timing of the implementation of the comprehensive strategy. This would take into account the social ties and legal needs of the refugees, create alternative immigration status for them, and be mindful of the operational challenges involved in this under taking.

Recommendations for the Government of Uganda

Currently, the Government of Uganda has suspended the invocation of cessation of Rwandan refugee status pending harmonisation of its immigration laws.²⁴⁹ It is important to maintain this suspension until a coherent solution to the citizenship impasse is achieved. Part of the solution would be to review and consider amending the Ugandan laws affecting refugee status and citizenship to take care of the following suggestions:

The 1995 Constitution of Uganda needs to be amended. Article 11(1) should entitle refugees' children born in Uganda whose parents have no effective other nationality to become citizens. This would be in line with the African Commission resolution 234 on the right to nationality which provides that state parties should as much as possible give children the nationality of the country where they are born if they would otherwise risk becoming stateless.²⁵⁰

Article 12(1)(i) of the Constitution should also be repealed because it prohibits persons who are refugees, or whose parents and grandparents were refugees from registering as citizens of Uganda. This would recognise their right to nationality as provided by Article 15 of the UDHR.

Article 13 of the Constitution provides for naturalisation but does not clearly state that refugee are to be naturalised. This needs to be

²⁴⁹ IRIN, 'No Consensus on Implementation of Cessation Clause for Rwandan Refugees', 14 July 2013. www.irinnews.org/report/98409/no-consensus-on-implementation-of-cessation-clause-for-rwandan-refugees accessed 25 August 2014.

²⁵⁰ African Human Rights Commission, 'Resolution 234 on the Right to Nationality', 23 April 2013 www.achpr.org/sessions/53rd/resolutions/234/ accessed 25 August 2014.

clarified and brought in line with Article 34 of the 1951 Convention in order to liberate it from further ambiguity.

The Uganda Citizenship and Immigration Control (UCIC) Act 1999 should also be amended to reflect the principles of the right to nationality in the UDHR and the spirit of the ACHPR resolution 234. There is urgent need to repeal section 25(e) of the UCIC Act, because it prohibits the use of the duration spent as a refugee in Uganda from being used for purposes of calculating the number of years required to qualify for citizenship. In the same vein, the provisions of section 55 (3)(a) also be amended to provide for refugees' duration of stay as ground for grant of permanent residence. These two provisions deny refugees the right to apply for citizenship or even permanent residence in Uganda contrary to, among others, the core solution proffered in the UNHCR comprehensive strategy for solving the Rwandan refugee situation.

Section 16 of the UCIC Act should be amended to reduce the duration for naturalisation from 20 years. This compared to countries like South Africa²⁵¹, Rwanda²⁵², and Kenya²⁵³, Tanzania²⁵⁴ is very high and prohibitive. I propose it should be reduced to 10 years.

There is also need, after solving the 'qualification prohibitions' to amend The UCIC (Fees) Regulations 2009 to reduce or waive citizenship fees for refugees in line with Article 34 of the 1951 Refugee Convention.

The government should redraft section 45 the Refugee Act 2006 to clearly provide for the right to naturalisation for refugees and delete the part which merely alludes to 'application of naturalisation laws to refugees'. In addition, section 45 should include the use of calculation of refugee residence for application of citizenship. The Government

²⁵¹ South African Citizenship Act (of which year)

²⁵² Organic Law no.29/2004 of 03/12/2004 on the Rwandan Nationality Code Article 14.

²⁵³ Article 93(c) of the Constitution of the Republic of Kenya.

²⁵⁴ S 9(1) of the Tanzania Citizenship Act, 1995.

should also design a naturalisation residency calculator policy which also provides for the refugee applicants.

There is also need to remove the requirement that for refugees who acquire citizenship they must first renounce their former citizenship to their home government. The best practice of Austria should be adopted where a refugee is not required to denounce their former citizenship in order to obtain Austrian nationality.²⁵⁵

Recommendations to the UNHCR

The UNHCR has a mandate to assist states by advising on the implications of the cassation of refugee status in relation to large groups of refugees in their territory. Any involvement in the citizenship stalemate in Uganda involving refugees would be in line with the UNHCR supervising role under Article 35 of the 1951 convention.²⁵⁶ The UNHCR should consider long stay and the resultant social ties to the country of asylum as grounds for exemptions to cessation of refugee status, and in the particular case of Rwanda refugees in Uganda, to amend the terms of the comprehensive strategy to provide for such exemption. The state parties to the 1951 Convention possess the authority to invoke articles on the ceased circumstances. However, the UNHCR can 'declare that its competence ceases to apply in regard to persons falling within situations spelled out in the statute.'²⁵⁷

The UNHCR issues declarations of cessation mainly to 'provide a legal frame work for the discontinuation of UNHCR protection and material assistance to refugees and to promote, with states of asylum concerned, the provision of an alternative residence status to the former

²⁵⁵ Dilek Çınar, *Eudo Citizenship Observatory: Country Report Austria* (European University Institute 2011) 5 <http://eudo-citizenship.eu/docs/CountryReports/Austria.pdf> accessed 9 October 2014. Dilek notes that recognised refugees were explicitly exempt from the requirement to renounce their previous citizenship in order to be granted Austrian citizenship

²⁵⁶ UNHCR, 'Note on the Cessation Clause' 30 May 1997, UN Doc.EC/47/SC/CRP.30 Para. 34 www.refworld.org/docid/47fdfaf1d.html accessed 24 September 2014.

²⁵⁷ *ibid* para 31.

refugee'.²⁵⁸ It is of paramount importance and urgency that UNHCR suspends the invocation of the current cessation clause to the Rwandan refugees until there is available alternative immigration status. Otherwise it will be seen that the cessation clause is being used as a shortcut to overcome an intractable refugee problem as the UNHCR itself warned.²⁵⁹

The UNHCR should also consider making an Amicus Brief in the Constitutional Petition no 34 of 2010, which is before the Constitutional Court and support the view that the nationality law in Uganda violates international legal obligations enshrined in the principle of naturalisation. It has an expanded supervisory role²⁶⁰ and should use this, in consultation with the government of Uganda, to create a naturalisation policy for refugees as part of a durable solution to the Rwandan (and even other) refugees in Uganda. It should engage in high-level negotiations for amending of the Uganda nationality laws particularly highlighting those provisions that limit Naturalisation of refugees and their enjoyment of a right to nationality.

There is urgent need for the UNHCR to carry out a comparative study on permanent residence and citizenship in other countries which have implemented the ceased circumstances clause and understand how the naturalisation question was approached and If possible to have a field consultancy to evaluate the status of each of the effected refugees to prepare a case-by-case strategy. The UNHCR should to carry out a baseline survey on the attitudes of refugees towards naturalisation in order to help establish parameters for planning.

It would finally be interesting for the UNHCR to precede the invocation of the ceased circumstances clause to Rwandan refugees in

²⁵⁸ *ibid* para 31.

²⁵⁹ *ibid* para 40.

²⁶⁰ SsVolker Türk, 'UNHCR's Supervisory Responsibility', *Revue Québécoise de Droit International* vol. 14.1 (2001)143-145, www.sqdi.org/volumes/pdf/14.1_-_turk.pdf as regards the scope of application of UNHCR's supervisory responsibility *ratione materiae*.

Uganda with a study on the impact of such an intervention in other countries in Africa, particularly its contribution to statelessness.

Recommendations to other Stakeholders

There is an urgent need to lobby the UNHCR to suspend the cessation of Rwandan refugee status before well established formalities for a clear road map to alternative immigration status for refugees (particularly citizenship) is put in place.

There is urgent need for a study on the implication of applying the cessation clause on the rights of refugees generally, but particularly rights to nationality, health, education, family life, and property among others. Organisations advocating for refugee rights in Uganda, like the Refugee Law Project, International Refugee Rights Initiative, FAHAMU legal aid Programme and others, collaborating with the UNHCR and government are particularly urged to consider this recommendation.

There is need for a consortium of legal academics, refugee rights advocates, and international human rights experts, for example from the Centre for Criminal Justice and Human Rights, to study the risk of statelessness resulting from the interface of Nationality laws and international refugee policies like "the ceased circumstances clause". Looking specifically at the effect of Article 1 c(5) and (6) on the right to nationality at a wider level where ever it has been applied.

Summary

I have made an exploration of the delicate topic of naturalisation of refugees in the country of asylum, in this case Uganda, and concluded that nationality is a fundamental human right. If refugees develop social and economic ties and cannot leave the asylum country, acquiring citizenship would enable them permanently integrate. The application of the ceased circumstances "cessation clauses" without providing refugees with access to citizenship or permanent residence will overtime render them stateless. If this thesis has any future use, it will

be a modest contribution to caution against implementation of international refugee policies like cessation clauses without due regard to fundamental human rights. It is my contention that if caution is not taken, the Rwandan refugees (and others) in Uganda will keep oscillating back and forth "from convention to convention" ie from the Refugee Convention to the Convention on Stateless Persons and back again without a right to nationality.

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