

# No Return to Persecution or Danger: Judicial Application of the Principle of *Non-Refoulement* in Refugee Law in South Africa and Malawi

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**ABSTRACT:** Refugeehood is premised on the ethical principle of surrogate protection. Where there is failure by a state to ensure the minimal levels of human rights protection for its citizens, either through inability or unwillingness, the social compact between the state and its citizen gets ruptured. Such rupture triggers the international duty of surrogate protection. The principle of *non-refoulement* is a core principle of international law that is premised on the principle of surrogate protection. An exploration of South African refugee law jurisprudence, exemplified most recently by the decisions in *Ruta* and *Saidi*, shows that the courts, including the Constitutional Court, are giving the principle of *non-refoulement* due recognition. Significant challenges, however, remain in practice. There has been some executive resistance against progressive rights-based refugee law jurisprudence. Corrupt practices also create an impediment to the realisation of refugee rights. In Malawi, by comparison, refugee law jurisprudence is sparse, and whilst there has been evidence of judicial progressiveness, such as in the *Abdihaji* case, there have also been other decisions, such as *Kambiningi*, where courts have shown lack of familiarity with or appreciation of the principle of *non-refoulement*. The legislative framework in Malawi also fails to sufficiently guarantee *non-refoulement*. The position in Malawi is mirrored in most Southern African states. The article critically examines the decisions in *Ruta*, *Saidi* and *Abdihaji*. Importantly, it makes recommendations for reform in the refugee law regimes in Malawi and other Southern African states drawing on the experiences from *Ruta* and *Saidi*.

**KEYWORDS:** asylum, minimal legitimacy, refugee status determination, return, surrogate protection

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## I INTRODUCTION

Refugees face four major challenges once they have successfully left their country of origin or habitual residence (the source country). The first major challenge is access to entry into a state (the host state) where they may have refuge from serious harm or the threat of harm. Once granted access into the host state, the second challenge is how to safeguard their right not to be returned, expelled or otherwise sent to a jurisdiction where they are likely to suffer persecution or other forms of serious harm. The safeguard against such return, expulsion or sending is referred to as *non-refoulement* under international law.<sup>1</sup> The third challenge is to convince authorities of the host state that they are, in fact, entitled to recognition of their refugee status and to be granted official refugee status.<sup>2</sup> The fourth challenge is to access a comprehensive spectrum of rights necessary to ensure a life of dignity in the host state.

Under the 1951 International Convention Relating to the Status of Refugees (the 1951 Convention), a refugee is defined as any person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>3</sup> The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention) adopted the refugee definition under the 1951 Convention. However, the 1969 OAU Convention extends the definition of a refugee to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in his or her country of origin or nationality, is compelled to seek refuge in another country.<sup>4</sup> These definitions have been adopted in many African countries including South Africa<sup>5</sup> and Malawi.<sup>6</sup>

The essence of refugee protection lies in authorities in host states ensuring state protection for all persons who are refugees by definition.<sup>7</sup> The granting of refugee status entails the formal recognition of an asylum seeker as a person deserving of and entitled to surrogate state protection by the host state. An asylum seeker is essentially a person who is seeking to be recognised as a refugee in the host state.<sup>8</sup> The process through which an asylum seeker's claims are assessed in order to establish whether or not he or she should be formally recognised as a refugee is called refugee status determination (RSD). RSD is merely declaratory and the fact that a refugee has not been declared as such through the RSD process does not take away the right of *non-refoulement*. However, the RSD process remains crucial because a positive RSD outcome, in practice, provides greater assurance and guarantee that he or she will not be sent back to a state where he or she has a well-founded fear of persecution or serious harm. As Mireku has observed, 'refusal of a refugee status may result in the expulsion of the refugee to a

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<sup>1</sup> E Larking *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (2014) 19.

<sup>2</sup> J Hathaway *The Rights of Refugees Under International Law* (2005) 1.

<sup>3</sup> Article 1(A)(2).

<sup>4</sup> 1969 Organisation of African Union (OAU) Convention art I(2).

<sup>5</sup> South African Refugees Act 130 of 1998 s 3.

<sup>6</sup> Malawian Refugees Act of 1989 s 2.

<sup>7</sup> States are called upon to adopt more liberal and expansive interpretations of the term 'refugee'. Andrew Shacknove for instance has stated that '[a]n overly narrow conception of "refugee" will contribute to the denial of international protection to countless people in dire circumstances whose claim to assistance is impeccable.' A Shacknove "Who Is a Refugee?" (1985) 95(2) *Ethics* 274, 276.

<sup>8</sup> C d'Orsi *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven* (2016) 5.

jurisdiction where he or she is likely to face [the] death penalty...or to be subjected to torture or any other cruel, degrading, or inhuman punishment.<sup>9</sup>

The significance of RSD has been emphasised by the UNHCR which has stated that, although the principle of *non-refoulement* is universally recognised, the risk of *non-refoulement* could only be avoided in earnest if the state concerned has accepted a formal legal obligation to protect the refugee.<sup>10</sup> Indeed, the UNHCR has stated that the most essential component of refugee status determination is the protection against return to a country where a person has reason to fear persecution.<sup>11</sup> Albie Sachs argues that when one considers the various obligations that the 1951 Convention imposes on state parties in respect of refugees, the principle of *non-refoulement*, when taken together with the other obligations, presents a coherent and enforceable legal regime for refugees that is markedly more favourable than the discretionary regime generally applicable to immigrants.<sup>12</sup> Kneebone is therefore right in asserting that the right to seek asylum and the right against *refoulement* are the twin key precepts of refugee protection.<sup>13</sup>

This paper examines two decisions of the Constitutional Court of South Africa: *Ruta v Minister of Home Affairs*<sup>14</sup> and *Saidi and Others v Minister of Home Affairs and Others*.<sup>15</sup> In *Ruta*, the Court determined that prospective asylum seekers in South Africa are entitled to apply for asylum at any time that they might wish, even if they may delay in making such an application. In *Saidi*, the Court held that a Refugee Reception Officer (RRO) has the power to extend the permit issued under s 22(1) of the Refugees Act 130 of 1998 (South African Refugees Act) pending finalisation of judicial review proceedings under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in respect of a decision made in terms of the South African Refugees Act refusing an application for asylum made under s 21(1) of the South African Refugees Act. The Court further held that, pending finalisation of the review proceedings, an RRO is obliged to extend the permit of the asylum seeker concerned. This paper interrogates the correctness of these decisions and, in particular, explores their application and exposition of the principle of *non-refoulement*.

The paper explores the core principle of *non-refoulement* in international refugee law, locating the place that this principle has occupied under South African and Malawian domestic law; and draws some parallels between the two jurisdictions in this regard. The paper proceeds to discuss the relationship between the RSD process and the principle of *non-refoulement*. It explores how such a relationship has been reflected in South African jurisprudence, with reference to the decisions in *Ruta* and *Saidi*. The paper concludes by making appropriate

<sup>9</sup> O Mireku 'South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties' (2002) 35(3) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 399.

<sup>10</sup> United Nations High Commissioner for Refugees (UNHCR) *Note on Non-Refoulement (Submitted by the High Commissioner) Note on Non-Refoulement (Submitted by the High Commissioner)* EC/SCP/2, 1977 para 18.

<sup>11</sup> *Ibid* at para. 1. This view is shared by various scholars. Matthew Lister, for instance, has stated that the host state's duty of *non-refoulement* 'provides an important core of what states owe to refugees.' M Lister, 'Who are Refugees?' (2013) 32(5) *Law and Philosophy* 645, 648.

<sup>12</sup> A Sachs 'From Refugee to Judge of Refugee Law: a Tentative Introduction to Some Off-The-Cuff Remarks' in J Simeon (ed) *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* (2010) 51.

<sup>13</sup> S Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (2009) 8.

<sup>14</sup> [2018] ZACC 52; 2019 (2) SA 329 (CC).

<sup>15</sup> [2018] ZACC 9; 2018 (4) SA 333 (CC).

recommendations for better refugee protection by strengthening measures to ensure greater adherence to the principle of *non-refoulement* in South Africa and Malawi.

## II THE JUSTIFICATION FOR INTERNATIONAL REFUGEE PROTECTION

Refugeehood is said to result from the negation of the principles and ideals which define the relationship of rights and obligations between the subject and the state. Nathwani argues that refugee law is dependent on a theory of what he describes as a minimally legitimate state.<sup>16</sup> He describes the minimally legitimate state as one that falls short of ensuring the minimal threshold beneath which the compact between the state and the citizen, for reciprocal rights and obligations, becomes effectively repudiated. In such a situation, Nathwani argues that the state loses its legitimacy as a protector of the citizen.<sup>17</sup> He further states that international human rights norms provide the standard of the minimally legitimate state. Shacknove's analysis brings better clarity to what a minimally legitimate state entails. He states that citizens are entitled to expect that their government will, at a minimum, guarantee physical security, vital subsistence, and liberty of political participation and physical movement and, in exchange, the citizens pledge their allegiance to the state.<sup>18</sup> Shacknove argues that:

No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning. Thus, refugees must be persons whose home state has failed to secure their basic needs. There is no justification for granting refugee status to individuals who do not suffer from the absence of one or more of these needs. Nor is there reason for denying refugee status to those who do. Moreover, because all of these needs are equally essential for survival, the violation of each constitutes an equally valid claim to refugeehood.<sup>19</sup>

Where such a social compact is broken, Rawls provides us with a morally and politically defensible set of principles of justice that trigger an international obligation to provide surrogate state protection for refugees. Rawls, in his work *The Law of Peoples*,<sup>20</sup> draws upon Brierly<sup>21</sup> and outlines a non-exhaustive list of familiar and traditional principles of justice among free and democratic peoples,<sup>22</sup> which include that peoples are to 'honour human rights', and that 'peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.'<sup>23</sup> These two postulations by Rawls in

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<sup>16</sup> N Nathwani *Rethinking Refugee Law* (2003) 17.

<sup>17</sup> *Ibid.*

<sup>18</sup> A Shacknove 'Who is a Refugee?' (1985) 95(2) *Ethics* 274.

<sup>19</sup> *Ibid* at 281.

<sup>20</sup> J Rawls *The Law of Peoples: with 'The Idea of Public Reason Revisited'* (1999) 37.

<sup>21</sup> J Brierly *The Law of Nations: An Introduction to the Law of Peace* (1963) and T Nardin *Law, Morality, and the Relations of States* (1983).

<sup>22</sup> This non-exhaustive list of principles of justice, according to Rawls (note 20 above) at 37, is as follows:

- (a) Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
- (b) Peoples are to observe treaties and undertakings.
- (c) Peoples are equal and are parties to the agreements that bind them.
- (d) Peoples are to observe a duty of non-intervention.
- (e) Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
- (f) Peoples are to honor human rights.
- (g) Peoples are to observe certain specified restrictions in the conduct of war. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.

<sup>23</sup> Rawls (note 20 above).

the *Law of Peoples* provide a sound moral and political grounding for international surrogate protection to persons fleeing from countries that fail the minimal legitimacy test.

Sarker critiques Rawls' thesis, arguing that 'Matters of global justice require an inclusive approach, which is probably lacking in Rawls' *Law of Peoples*' and that 'refugees and stateless persons have little to gain from the formulated principles.'<sup>24</sup> However, the critique seems to miss the point. As pointed out above, the Rawlsian typology of principles of global justice outlined in the *Law of Peoples* is useful in understanding the international basis and justification for refugee protection. This is an understanding that such protection is premised on the principle of surrogacy. Democratic and well-ordered societies (peoples) are under a duty to honour human rights and to help other peoples living under harsh and unfavourable conditions so that such peoples may flourish and live a dignified life in society. It is this duty that provides moral and political justification for the principle of *non-refoulement*. In order for the obligation of international surrogate protection to be triggered, the harsh and unfavourable conditions should be heightened to such a degree of hostility, denial, deprivation, or failure that the minimal legitimacy of the state concerned is lost and the social compact for reciprocal rights and duties between state and citizen is broken.

Carens takes a broad communitarian approach (communitarianism on the global plane) as a strand of justification for the international community's duty to provide surrogate state protection to refugees. Carens argues that even if being assigned to a particular sovereign state works well for most people, it does not work as well for refugees. He states that refugees are in a situation where their state has failed them, either deliberately or through its incapacity. He then argues that '[b]ecause the state system assigns people to states, states have a collective responsibility to help those for whom this assignment is disastrous.'<sup>25</sup> Carens' thesis mirrors the theory of the minimally legitimate state. He argues that:

If people flee from the state of their birth (or citizenship) because it fails to provide them with a place where they can live safely, then other states have a duty to provide a safe haven. Thus, we can see that states have a duty to admit refugees that derives from their own claim to exercise power legitimately in a world divided into states.<sup>26</sup>

Hathaway aptly captures the *raison d'être* of international refugee law in a manner that seems to effectively summarise the moral, ethical and political grounding of refugeehood. He states that 'In pith and substance, refugee law is not immigration law at all, but rather a system for the surrogate or substitute protection of human rights',<sup>27</sup> and that 'Refugee status is a categorical designation that reflects a unique ethical and consequential legal entitlement to make claims on the international community.'<sup>28</sup>

It can therefore be seen that there is an international moral, ethical and political human rights-based imperative for states to provide surrogate international protection to those persons whose states of nationality have either become persecutory or hugely burdened to a degree

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<sup>24</sup> SP Sarker *Refugee Law in India: The Road from Ambiguity to Protection* (2017).

<sup>25</sup> J Carens *The Ethics of Immigration* (2013) 196.

<sup>26</sup> *Ibid.*

<sup>27</sup> Hathaway (note 2 above) at 5.

<sup>28</sup> J Hathaway 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20(3) *Journal of Refugee Studies* 349, 352.

that they cannot ensure minimal level human rights guarantees for their citizens.<sup>29</sup> It is the state's willingness and ability to ensure minimal threshold guarantees of human rights that foregrounds its legitimacy both as an international actor and as a domestic (and therefore primary) protector of citizens' rights. Failure to meet the minimal level threshold either repudiates (in the case of outlaw — persecutory states) or otherwise ruptures (in the case of non-persecutory but severely burdened states) the social compact between the state and the citizen, and this triggers the international duty of surrogate protection.

### III THE PRINCIPLE OF *NON-REFOULEMENT* IN INTERNATIONAL LAW

Refugees are very vulnerable people.<sup>30</sup> As earlier stated, refugeehood results from persecutory conduct or other push factors that pose, or are likely to pose, a threat of serious harm to citizens. This situation creates an imperative for other states to provide surrogate protection. It must therefore necessarily follow that it would be ethically wrong and would constitute a serious denial of human rights for the receiving state to either turn asylum seekers back at the point of entry or send them back to the country where they are fleeing from. The principle of *non-refoulement* binds states to avoid this form of conduct. The principle is well expressed under art 33(1) of the 1951 Convention<sup>31</sup> and art 2(3) of the 1969 OAU Convention.<sup>32</sup> Jean Allain states that the principle forms the cornerstone of refugee law and that it is the 'final bulwark of international protection.'<sup>33</sup>

Sarker states that this principle is so fundamental to the concept of protection underlying the Refugee Convention that no reservation from this provision is permissible under international law.<sup>34</sup> He observes that the principle of *non-refoulement* covers admission and non-rejection at the border of a state and that it is, therefore, the corollary of the right to seek asylum. He argues that in theory, the principle applies to all persons regardless of whether they meet the strict definition of refugee within the meaning of art 1A(2) of the 1951 Convention, and that

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<sup>29</sup> Rawls describes two types of non-ideal theory of states. He describes what he calls the 'outlaw State' and the 'burdened society [State].' He states that the 'outlaw State' 'deals with conditions of noncompliance, that is, with conditions in which certain regimes refuse to comply with a reasonable Law of Peoples' where they think that this 'advances, or might advance, the regime's rational (not reasonable) interests.' On the other hand, he describes the burdened society as the kind of non-ideal theory which 'deals with unfavorable conditions, that is, with the conditions of societies whose historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult if not impossible. These societies I call burdened societies.' Rawls (note 20 above) 90.

<sup>30</sup> EQ Blavo *The Problems of Refugees in Africa* (1968) 20; P Weis 'The International Protection of Refugees' (1954) 48(2) *American Journal of International Law* 193–194; T Kupe, S Hassim & T Worby (eds) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa* (2009).

<sup>31</sup> Article 33(1) of the 1951 Convention provides that 'No Contracting State 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 group or political opinion.'

<sup>32</sup> Article 2(3) of the 1969 OAU Convention states that 'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Art I, paragraphs 1 and 2.'

<sup>33</sup> J Allain 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 *International Journal of Refugee Law* 533, 546.

<sup>34</sup> Sarker (note 24 above) at 11.

‘good faith’ implementation of the principle requires states to consider whether a person is entitled to protection before returning them.<sup>35</sup>

The principle of *non-refoulement* is a cardinal principle of international refugee law and it is a rule of customary international law, enforceable against all states, *erga omnes*.<sup>36</sup> Lauterpacht & Bethlehem have argued that within the scheme of the 1951 Convention, the prohibition on *refoulement* in art 33 is paramount, and that this is exemplified by the fact that it permits of no reservations.<sup>37</sup> They therefore argue that the principle of *non-refoulement* in fact imposes a non-derogable obligation and that it embodies the humanitarian essence of the Convention.<sup>38</sup> Lauterpacht & Bethlehem point out that this non-derogable character of the principle has been affirmed by both the United Nations General Assembly (UNGA) and the Executive Committee of the UNHCR (the Executive Committee).<sup>39</sup> Lauterpacht & Bethlehem conclude by positing that in fact, the principle of *non-refoulement* should be considered as a peremptory norm of international law, i.e., a rule of *jus cogens* which permits of no derogations, limitations or restrictions. The Executive Committee of the UNHCR has observed that ‘the principle of *non-refoulement* has progressively acquired the character of a peremptory rule of international law.’<sup>40</sup>

*Non-refoulement* is not restricted to refugee law. International law generally proscribes conduct by host states that would expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition or expulsion to countries where there is a real risk of such danger.<sup>41</sup>

The Committee Against Torture (CAT Committee)<sup>42</sup> has stated that,<sup>43</sup> apart from the Convention Against Torture<sup>44</sup> and the 1951 Convention itself,<sup>45</sup> examples of other international provisions which are directly relevant to the application of the principle of ‘*non-refoulement*’ in cases of risk of torture and other ill-treatment for a person in the country to which the person is being deported may also be found in other relevant treaties. These include the International

<sup>35</sup> Also see E Lauterpacht & D Bethlehem ‘The Scope and the Content of the Principle of Non-Refoulement’ in E Feller, V Türk & F Nicholson (eds) (2003) *UNHCR’s Global Consultations on International Protection* ch 2.1, 116.

<sup>36</sup> G Goodwin-Gill & J McAdam *The Refugee in International Law* (1998) 248.

<sup>37</sup> Article 42(1) of the 1951 Convention.

<sup>38</sup> Lauterpacht & Bethlehem (note 35 above) at 107, para. 51.

<sup>39</sup> Conclusion No. 79 (XLVII) 1996, at para. (i); A/RES/51/75, 12 Feb. 1997 at para. 3.

<sup>40</sup> Conclusion No. 25 (XXXIII) 1982 at para. (b).

<sup>41</sup> Human Rights Committee, General Comment No. 20 of 3 April 1992, *Prohibition of Torture*, para 9. The Committee states that the prohibition of torture under art 7 of the International Covenant on Civil and Political Rights, 1966 impliedly engenders the principle of *non-refoulement*; and that this principle is a norm of customary international law. Similarly, the Committee Against Torture, under General Comment No. 4 (2017) on the implementation of art 3 of the Convention in the context of art 22, CAT/C/GC/4, has stated that the principle of ‘*non-refoulement*’ of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is absolute. Para. 9. See also *Gorki Ernesto Tapia Páez v Sweden* (CAT/C/18/D/39/1996) para. 14.5; *Núñez Chipana v Venezuela* (CAT/C/21/D/110/1998), para. 5.6; *Agiza v Sweden* (CAT/C/34/D/233/2003) para. 13.8; *Singh Sogi v Canada* (CAT/C/39/D/297/2006), para. 10.2; *Abdussamatov & Others v Kazakhstan* (CAT/C/48/D/444/2010) para. 13.7; and *Nasirov v Kazakhstan* (CAT/C/52/D/475/2011) para. 11.6.

<sup>42</sup> Established under art 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

<sup>43</sup> See CAT/C/GC/4, Para. 26.

<sup>44</sup> Article 3(1).

<sup>45</sup> Article 33(1).

Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;<sup>46</sup> the International Convention for the Protection of All Persons from Enforced Disappearance;<sup>47</sup> the African Charter on Human and Peoples' Rights;<sup>48</sup> and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>49</sup>

All these provisions demonstrate the central importance that international human rights law places on the principle of *non-refoulement* as a rule of both treaty law as well as customary international law.

## IV THE PRINCIPLE OF *NON-REFOULEMENT* UNDER DOMESTIC LAW: SOUTH AFRICA AND MALAWI

### A *Non-refoulement* in South Africa

The principle of *non-refoulement* has been domesticated under South African law. Section 2 of the South African Refugees Act provides that notwithstanding any provision of the Act or any other law, no person may be refused entry into the Republic of South Africa, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such measure, such person would be compelled to return to or remain in a country where he or she may face any of the risks or dangers envisaged by the refugee definitions under the 1951 and 1969 OAU conventions. In *Minister of Home Affairs and Others v Watchenuka and Another (Watchenuka)*,<sup>50</sup> the South African Supreme Court of Appeal stated that the South African Refugees Act 'was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles established in international law', and that s 2 of the Act, that sets out the principle of *non-refoulement*, exemplifies how the Act gives effect to such international obligations.

It is noteworthy, however, that even prior to the passage of the South African Refugees Act in 1998, the principle of *non-refoulement* was, in the light of the Constitution of the Republic of South Africa, 1996<sup>51</sup> (the Constitution), acknowledged and applied by South African courts. In *Watchenuka*, the Court solemnly stated that:

Human dignity has no nationality. It is inherent in all people — citizens and non-citizens alike — simply because they are human. And while that person happens to be in this country — for whatever reason — it must be respected, and is protected, by s 10 of the Bill of Rights.<sup>52</sup>

In *Kabuika and Another v Minister of Home Affairs and Others*,<sup>53</sup> the High Court acknowledged the principle of *non-refoulement* as lying at the foundation of refugee protection in the country.<sup>54</sup> Although South Africa was at the time yet to ratify the 1951 Convention, the Court acknowledged *non-refoulement* as a customary international law principle that was

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<sup>46</sup> Article 56 (3).

<sup>47</sup> Article 16 (1).

<sup>48</sup> Article 12 (3).

<sup>49</sup> Articles II (3) and V (1).

<sup>50</sup> [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) para. 2.

<sup>51</sup> The South African Constitution is based on, among others, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Courts have interpreted refugee rights as guaranteed under international law, and in the context of the South African Constitutional, these values including s 232 of the Constitution.

<sup>52</sup> *Watchenuka* (note 50 above) at para 25.

<sup>53</sup> 1997 (4) SA 341 (C).

<sup>54</sup> Cape Provincial Division.

to be applied in making decisions concerning refugee status in South Africa. The decision was an early exemplification of the liberal stance that had been adopted by South African post-apartheid courts under a new Constitution. The High Court was eager to adopt a human rights-friendly approach to refugee protection by invoking international refugee law norms in the absence, at that stage, of a codified domestic refugee law regime.

Another significant decision on the principle of *non-refoulement*, albeit not made in the context of refugee law but significant to it, was *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening)*.<sup>55</sup> The question that arose in that case was whether it was constitutional for South Africa, a country that had abolished the death penalty, to deport persons to another country where they would face the risk of the death penalty. In argument, the government argued that the prohibition would not apply as South Africa had simply deported and not extradited Mr. Mohamed to the United States of America. The Constitutional Court disagreed. The Court held that although the government claimed to have deported and not to have extradited Mr. Mohamed, this was of no relevance. The Court referred to art 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on *non-refoulement* and stated that the principle:

makes no distinction between expulsion, return or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case.

*Mohamed* establishes the point that the principle of *non-refoulement* is of universal application. It applies in all cases where there is a threat that a person would be subjected to torture, cruel, inhuman or other forms of ill-treatment in the country to which such person is sent. It also emphasises that the prohibition of acts amounting to *refouler*<sup>56</sup> applies with equal force irrespective of whether one calls them deportations, expulsions, return or extradition. As long as they amount to sending the person to another country under circumstances where such person would be subjected to various forms of serious harm, the principle applies.

In *Union of Refugee Women and Others v The Director: Private Security Industry Regulatory Authority and Others*,<sup>57</sup> Sachs J, after enumerating a wide array of rights that the 1951 Convention guarantees, stated that ‘in devising these ... yardsticks, those who drafted the Convention clearly sought to ensure that refugees would not end up as pariahs at the margins of host societies.’<sup>58</sup> He then pointed out that it is particularly important that the Convention ‘protects refugees from being returned to the place where their lives and freedoms would be at risk (the principle of *non-refoulement*)’,<sup>59</sup> and that collectively, ‘these obligations constitute a coherent and enforceable legal regime for refugees that are markedly more favourable than the discretionary regime generally applicable to immigrants.’<sup>60</sup>

The principle was also highlighted in *Abdi and Another v Minister of Home Affairs and Others*,<sup>61</sup> where the Supreme Court of Appeal held that the appellants would face a real risk of

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<sup>55</sup> [2001] ZACC 18, 2001 (3) SA 893 (CC).

<sup>56</sup> Sending back.

<sup>57</sup> [2006] ZACC 23, 2007 (4) BCLR 339 (CC).

<sup>58</sup> *Ibid* at para 134.

<sup>59</sup> *Ibid* at para 135.

<sup>60</sup> *Ibid*.

<sup>61</sup> [2011] ZASCA 2, 2011 (3) SA 37 (SCA).

suffering physical harm if they were forced to return to Somalia. The Court observed that it was obvious that no effective guarantee could be given to them against persecution or subjection to some form of torture, or cruel, inhuman and degrading treatment if they were to be compelled to re-enter Somalia. The Court emphasized that it was the prevention of this type of harm that the South African Refugees Act sought to address by prohibiting a refugee's deportation under such circumstances. The Court pointed out that deportation to another country that would result in the imposition of a cruel, unusual or degrading punishment was in conflict with the fundamental values of the Constitution. Thus, the Court in *Abdi* pointed out, again, that *non-refoulement* lay at the core of refugee protection.

Whilst the principle of *non-refoulement* was dealt with, to significant degrees, in the foregoing decisions of courts in South Africa, it was not until 2018 that the centrality of the principle was most forcefully discussed and applied by the Constitutional Court in two important decisions. The first decision was *Ruta*.<sup>62</sup> In *Ruta*, the Court set out to determine three important issues. First, the Court was called upon to determine, as a matter of principle, whether an 'illegal foreigner' who claims to be a refugee and expresses intention to apply for asylum should be permitted to apply in accordance with the South African Refugees Act instead of being dealt with under the Immigration Act. The second issue was whether the 15-months' delay between Mr Ruta's arrival in South Africa in December 2014 and his arrest in March 2016 barred him from applying for refugee status. Thirdly, the Court was invited to decide, more generally, whether a foreigner may arrive in South Africa and tarry illegally for months without applying for refugee status, and then, when the law catches up with him, insist on exercising the right to apply for asylum.

The Court in *Ruta* answered all these questions in Mr. Ruta's favour. The Court held that failure to apply for asylum at 'the first available opportunity' was not a ground for disqualifying the applicant. Cameron J referred to s 2 of the South African Refugees Act which provides for the principle of *non-refoulement*. He expressed some powerful words in affirmation of the principle. He stated that s 2 was a remarkable provision and unprecedented in the history of South Africa's enactments. According to him, this was because s 2 places the prohibition it enacts above any contrary provision of the South African Refugees Act itself and 'above anything in any other statute or legal provision.' He explained that s 2 expresses the principle of *nonrefoulement*, i.e., the concept that one fleeing persecution or threats to 'his or her life, physical safety or freedom' should not be made to return to the country inflicting it.<sup>63</sup> Cameron J stated that the principle has become a deeply-lodged part of customary international

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<sup>62</sup> [2018] ZACC 52, 2019 (2) SA 329 (CC).

<sup>63</sup> Article 33 of the United Nations Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol 189 at 137.

law.<sup>64</sup> He cautioned that in view of rather unfavourable approaches towards refugeehood being developed on other continents, ‘the response to these principles of African countries, including our own, is of profound importance.’<sup>65</sup>

The decision in *Ruta* is one that arguably runs against the currency of popular public opinion. The idea that a person can enter the country without due legal process and then only claim that they seek asylum two years later upon being arrested might strike many as condonation of unacceptable and dishonest conduct. Yet, the decision was correct for at least two reasons. The first ground is to consider that a refugee is a vulnerable person whose main pre-occupation is to run away from serious harm or a threat thereof and find a place in another country in which he or she finds safety and protection. Once in a safe place, the refugee is pre-occupied with survival rather than fulfilment of formal state processes. In other words, there is a real possibility that the asylum seeker’s failure to formally apply for asylum may not be an indication that he or she is not a real refugee. Secondly, the decision in *Ruta* is correct considering the non-derogability of the principle of *non-refoulement*. Thus, once a person claims that he or she seeks to apply for asylum, it is important that the state must accept and scrupulously investigate the claim first before taking any further action that might result in deportation or expulsion, so that the risk of deporting and expelling the person under circumstances that would violate *non-refoulement* is eliminated.

The decision in *Ruta* is also significant in that it indicts many countries on other continents for their increasingly restrictive approaches towards admission to refugeehood of people who are in real need of surrogate state protection. The Court in *Ruta* then exhorts African countries, such as South Africa, to come up with their own principled responses to refugee and asylum seeker challenges. These principled responses should ensure that the application of the principle of *non-refoulement* under domestic law is safeguarded.

The second important case on the principle of *non-refoulement* which the Court dealt with in 2018 was *Saidi*. *Saidi* presents an interesting scenario. The applicants were asylum seekers in the Republic of South Africa. During the entire period for which their applications for asylum were being processed internally (i.e., within the DHA), the Refugee Reception Officer (RRO) readily granted extension of their asylum seeker permits. The asylum applications were however

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<sup>64</sup> See UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 United Nations Treaty Series, 85, 10 December 1984. Article 3 of the Convention Against Torture (CAT) provides: ‘1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’ South Africa became a State Party to the CAT on 10 December 1998, see UN Treaty Series Depository Records with respect to the Convention Against Torture, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en). See also UN General Assembly, International Covenant on Civil and Political Rights, 999 UNTS, 171, 16 December 1966. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides: ‘No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.’ This art has been interpreted implicitly to include prohibition of refoulement. Read together with art 2(1) of the ICCPR, it is considered to provide broader scope than CAT. (UN Human Rights Committee, General Comment No. 31 (2004), UN Doc. HRI/GEN/Rev.8 at para 12.) South Africa became a State Party to the ICCPR on 10 December 1998, see UN Treaty Series Depository Records, available at [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND).’

<sup>65</sup> 2019 (2) SA 329 (CC) at paras 24–26.

subsequently rejected by the Refugee Status Determination Officer (RSDO) in terms of s 24(3) of the South African Refugees Act. The applicants unsuccessfully appealed and exhausted all the internal processes of appeal, and then brought an application to the High Court for review in terms of PAJA. Meanwhile, the RRO refused to extend the permits, arguing that under these circumstances, only the courts could grant the extensions sought. The dispute hinged on the interpretation ascribed by the RRO to s 22(1) as read with s 22(3).

22. (1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

(3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.

Both the High Court and the Supreme Court of Appeal agreed that according to s 22(3), the RRO still had a discretion whether or not to grant an extension of the permit so long as the application for asylum was still pending for court determination under PAJA review. However, they concluded that such extension could not be automatic, giving the RRO no room for discretion, as argued by the applicants.

At the Constitutional Court, in an illuminating majority decision, Madlanga J determined not only that the RRO had power to grant extensions of the temporary asylum seeker permits under s 22(3), but that notwithstanding the use of the word ‘may’ in that provision, when it was read in the context of the duty of *non-refoulement* under s 2(1) of the South African Refugees Act and under international law, the provision imposes a peremptory duty to automatically extend the temporary permit pending outcome on the PAJA review of the internal rejection of the applicants’ asylum applications. The Court reasoned that without the requirement for the RRO to issue the extensions automatically, the provision could create room for the state to deport the applicants in the interim as they could have lost their right to remain and sojourn in South Africa. The Court held that this would potentially breach the important principle of *non-refoulement*.

The majority in the *Saidi* Court took the view that interpreting the provision to impose a duty to grant extensions comported with s 39(2) of the Constitution, which requires that courts must interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. In this regard, the Court rejected the argument advanced by the Department of Home Affairs (DHA) that the word ‘outcome’ had to be interpreted to mean that the exhaustion of internal remedies and the exclusion of external judicial processes. The Court held that, consistent with s 39(2), the word ‘outcome’ had to be interpreted in a manner that best protects the fundamental rights of asylum seekers. It was the Court’s view that such an approach entailed that ‘outcome’ had to be understood to include the judicial review process under PAJA. This approach, according to the majority, would ensure protection of an asylum seeker’s right to just administrative action without the risk of deportation, right to freedom and security of the person, and right to life.

Again it is evident that at the centre of the Court’s decision to tie the hands of the RRO, taking away her discretion on whether or not to extend a temporary asylum seeker’s permit pending conclusion of a PAJA review, was the Court’s unflinching desire to uphold the

important international law principle of *non-refoulement*. *Saidi* shows how the constitutional value and right of human dignity can be used to inform a just and fair interpretation and application of PAJA in a manner that gives firm recognition to the principle of *non-refoulement*; and thus ensures heightened protection of refugee rights in South Africa.

Whilst this is so, it has also been observed that notwithstanding progressive refugee law jurisprudence in South Africa in relation to the principle of *non-refoulement*, the policy preferences of the executive have been at odds with such jurisprudence. Amit, for instance, notes that South African government officials have tended to question the country's international obligations with respect to refugees.<sup>66</sup> Amit quotes the Minister of Home Affairs criticising the fact that 'law is written in such a progressive manner that you essentially cannot deny anyone the claim and temporary status of asylum-seeker, due to a number of precedent-setting rulings of our courts, as well as various clauses of the Refugee[s] Act.'<sup>67</sup>

Amit's research demonstrates that these centralised preferences of the government's political leadership enable and reinforce the legal misunderstandings of street level actors 'who directly control and deny asylum seekers access to the legal protections and procedures found in both the Refugees and Immigration Acts.' Amit argues that:

street level actors exercise great discretion over who gets access to asylum at multiple stages of the process, effectively negating legally mandated rights. Individual offices have created their own discretionary procedures requiring that asylum seekers make frequent visits to these offices to maintain their legal status, placing them in a constant state of legal precarity while creating even more opportunities for street level actors to exercise their autonomy over the asylum process and thwart the realization of legal guarantees. The policy-generating practices of these actors, more than the legal framework, determine entitlements to asylum protection, often in ways that depart from the law.

Amit therefore bemoans the excessive power wielded by street level bureaucrats due to the discretion that they have which frequently results in a negation of refugee rights. What the Court has done in *Saidi* is to take away the exercise of discretion by an RRO regarding the most crucial aspect of refugee protection, namely the guarantee of the principle of *non-refoulement*. If the Court were to hold that the RRO should retain discretion and decide whether or not to extend temporary asylum permits pending the conclusion of the PAJA review process, as urged by DHA and supported by the minority in *Saidi*, there would be no guarantee that these misunderstandings and misapplications of the law could not persist.

Amit further describes the problems that asylum seekers face at RROs when they make applications for extension of their temporary asylum seeker permits:<sup>68</sup>

Encounters described by asylum seekers reveal the attitudes driving these practices. Refugee reception office staff question both asylum seeker motives for leaving their countries of origin and their decision to come to South Africa 'when we do not have enough resources for them.' Often, the only way to overcome these attitudes and access services is by paying for protection...Asylum seekers have described the inner workings of this alternative process: 'They ask for money outside and they share with the security guard. Inside we are called to a room. They call one of us who

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<sup>66</sup> R Amit '(Dis)Placing the Law: Lessons from South Africa on Advancing U.S. Asylum Rights' (2019) 20(2) *Loyola Journal of Public Interest Law* 35, 150.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at 153.

must ask for R200 from the others and then when you collect the permit the official has already got the money.<sup>69</sup>

This corruption dimension relates to the exercise of discretion by RROs which the Court in *Saidi* either did not contemplate or articulate in further support of the correct and principled approach that it took. Not only does removing the discretion on the part of the RRO remove the possibility of *refoulement* as a result of misunderstanding or misapplying the law; it would also help to minimise the prospect of corruption which increases when officials are granted wide discretion to make decisions concerning the fate of vulnerable people.

It needs to be pointed out that at the end of 2019, the South African Government promulgated Regulations under the South African Refugees Act that, in some respects, have a chilling effect on the enjoyment of political rights by refugees and raise the prospect of violation of the principle of *non-refoulement* by the South African state.<sup>70</sup> Regulation 4(2), (3) & (4) states that:

- (2) No refugee or asylum seeker may participate in any political activity or campaign in furtherance of any political party or political interests in the Republic.
- (3) The Standing Committee may withdraw the refugee status of any person who participated in any political activity or campaign in furtherance of any political party or political interests in the Republic, or who has been found to have acted as contemplated in subregulation (1).
- (4) Any person whose refugee status has been withdrawn shall be dealt with as an illegal foreigner in terms of the provisions of the Immigration Act.

One of the effects of this regulation, therefore, is that a refugee who is found to have taken part in any political activity or campaign deemed to offend the regulation is liable to deportation under the Immigration Act. Under art 33(2) of the 1951 Convention, the only instance in which a refugee might be treated in a manner otherwise inconsistent with the state's obligation of *non-refoulement* is where there are reasonable grounds for regarding the refugee as a danger to the security of the country, or where the refugee has been convicted by a final judgment of a particularly serious crime, and that he or she constitutes a danger to the community of that country. It is clear that the proposed refugee regulations are inconsistent with international refugee law, in particular the principle of *non-refoulement*.

## **B *Non-refoulement* in Malawi**

The framework legislation governing refugee rights and affairs in Malawi is the Refugees Act 3 of 1989 (Malawian Refugees Act). Just like its South African counterpart, the Malawian Refugees Act was passed in order to give effect to refugee conventions applicable to Malawi and generally to make provision relating to refugees in the country.<sup>71</sup> The principle of *non-refoulement* is expressly provided for under s 10(1) of the Malawian Refugees Act, which provides that a refugee in Malawi shall not be expelled or returned to the borders of a country where his or her life or freedom will be threatened on account of any of the factors that define refugeehood under the 1951 and 1969 Conventions.

In Malawi, unlike in South Africa, there is a dearth of refugee law jurisprudence. There is a lone decision of the High Court, *Aden Abdihaji and 67 Others v Republic*,<sup>72</sup> which dealt

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<sup>69</sup> R Amit *Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System* (2015) 41.

<sup>70</sup> Government Notice No. R. 1707 of 27 December 2019, made in terms of s 38 of the South African Refugees Act.

<sup>71</sup> Long title to the Act.

<sup>72</sup> Criminal Appeal No. 74 of 2005 (HC, LL).

with issues similar to the decisions the South African Constitutional Court grappled with in *Ruta*. In *Aden Abdihaji*, the appellants appealed against a decision of a Magistrate's Court where they were all convicted of the offence of illegal entry into Malawi. They had arrived in Malawi without travel documents having fled from a war situation in Somalia. The conviction was entered after the appellants' plea of guilty. In mitigation of sentence, they informed the Magistrate that they were in Malawi seeking asylum from Somalia where there was war. The state was opposed to giving the appellants an opportunity to apply for asylum, arguing that as at the time of their arrest the appellants had not yet submitted themselves to government officials to be registered as asylum seekers as required by law. The Magistrate's Court proceeded to sentence each appellant to pay a fine of MK500 (about U\$5 at the time) and recommended their deportation to Somalia. The Court further ordered that they be detained in custody pending such deportation. The appellants were therefore sent to prison.

On appeal to the High Court, the appellants argued, firstly, that they had been wrongly convicted because illegal entry under s 5(a) as read with s 39(2) of the Immigration Act was not an offence. The prosecution conceded this position but, rather bizarrely, still argued that the conviction be sustained because there had been a guilty plea. Effectively, the prosecution was arguing that the convictions be sustained although they were wrong in law. Secondly, the appellants argued that the Magistrate erred in failing to take the plea that they were in Malawi to seek asylum into account. They therefore argued that the Court was wrong to convict them. Thirdly, the appellants contended that the Magistrate misdirected himself by declaring them illegal immigrants before the Refugee Committee had considered their applications for asylum. Finally, the appellants argued that in view of their claim for asylum, the Magistrate erred in law in ordering that they be deported before their application had been determined. They contended that this was contrary to the customary international law principle of *non-refoulement*.

In its decision, the Court first observed that under s 10(4) of the Malawian Refugees Act, any person claiming to be a refugee (or indeed an asylum seeker) is permitted to enter and remain in Malawi for such period as the Refugee Committee may require to process his application for refugee status. The section provides that:

A person who has illegally entered Malawi for the purpose of seeking asylum as a refugee shall present himself to a competent officer within twenty hours of his entry or within such longer period as the competent officer may consider acceptable in the circumstances and such person shall not be detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.

In view of the scope of this provision, the Court held that even where an asylum seeker had entered Malawi without appropriate documentation as was the case in this matter, the law still prohibited the detention, imprisonment or any other form of penalisation on account of illegal entry. The law places paramountcy on the process of RSD, and the overall aim is to prevent *non-refoulement* and uphold the dignity of asylum seekers.

The principle of *non-refoulement* in Malawi is premised upon both international law tenets as described earlier, and statute. Section 10(1) of the Malawian Refugees Act provides that a refugee should not be expelled or returned to the borders of a country where his life or freedom would be threatened on account of various grounds premised on the refugee definitions under

both the 1951 Convention and the 1969 Convention.<sup>73</sup> The Court noted the argument of the state that the appellants had to be sent back, on the basis of *refoulement*, to Somalia and found the argument untenable. Chombo J stated that the situation that the appellants were running away from was one of war. As such, she held that it would be overtaxing on any person coming from such a situation to expect them to have or to carry proper travel documents. The judge observed that at the point of departure for any such person, the main preoccupation is to escape to safety and not to make for proper transiting arrangements. She held that it would be against human rights principles to return the appellants to Somalia, and that this would be as good as sentencing them to death. She firmly grounded her decision in art 33 of the 1951 Convention which, according to the court, forbids any state party, under the principle of *non-refoulement*, from returning refugees to their countries of origin or any country at all that is at war.

The *Abdihaji* decision is of particular importance as it expressed, through judicial fiat, the concerns that the UNHCR had already previously expressed in respect of the policy of demanding travel documents from asylum seekers at points of entry. SAPA-SFP of April 17, 2001 (Blantyre) reported that '[T]he UNHCR chief in Malawi, Michael Owor, accused the government of flouting international conventions on refugees', who emphasised, 'Refugees don't need papers. What sort of papers do they want?'<sup>74</sup> The Court, in *Abdihaji*, further held that the prohibition of *non-refoulement* was in tandem with the right of human dignity as provided for, among others, under s 12(v) of the Constitution.

Another interesting decision of the High Court that had a significant bearing on the principle of *non-refoulement* is *Kambiningi Jones and Others v Refugee Committee*.<sup>75</sup> The applicants had all previously been granted refugee status in Malawi. However, during their stay, they allegedly caused so much trouble for the authorities in circumstances that the state concluded amounted to a threat to public order and national security. In the result, after according them a hearing, the Refugee Committee revoked their refugee status and deported them to Mozambique where they had expressed preference to be deported. Upon being deported, they later came back to Malawi and commenced judicial review proceedings against the decision to deport them. The court dismissed their application. The court, first, concluded that looking at the facts, it shared the view that the applicants posed a security threat to the Republic of Malawi. However, the basis of the High Court's decision was that the applicants had no *locus standi* because they were no longer refugees but illegal immigrants in Malawi having been deported before and returned to Malawi illegally.

The central premise of the court's decision in *Kambiningi Jones* was that the applicants did not have the right of access to justice in Malawi because they had been deported and returned to Malawi illegally. However, the court's approach was erroneous. Firstly, the right of access to justice before the courts is not restricted to those who are legally in the country. Even persons illegally in Malawi are entitled to the human rights protections accorded by the Constitution, except those that are stated to only apply to citizens. For instance, if a person who is illegally present in Malawi is tortured, it would not lie in the mouth of the torturer to argue that the victim has no *locus standi* before Malawian courts on account of their immigration

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<sup>73</sup> The grounds are (a) race, religion, nationality or membership of a particular social group or political opinion; or (b) external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of that country.

<sup>74</sup> Cited in Hathaway (note 2 above) 371.

<sup>75</sup> [2005] MWHC 24.

status. Secondly, it is evident that the court did not explore the issue of *non-refoulement* in earnest. There was no interrogation of whether the applicants might be subjected to various forms of ill-treatment in Mozambique. If, upon their illegal return to Malawi, the applicants alleged that they had been subjected to torture in Mozambique, the effect of the Malawian decision in denying them legal standing would be to violate the principle of *non-refoulement*. In my view, the principle of *non-refoulement* is non-derogable and it is now a norm of *jus cogens* (a peremptory norm of international law). In that regard, even where issues of national security arise, the State remains under an obligation to ensure that the country to which the refugees are deported is a safe country. I do not take a view on whether Mozambique was an unsafe country broadly speaking, but the authorities ought to have considered whether the applicants return from Mozambique was based on harm factors that would engage the principle of *non-refoulement*.

Another decision is that of a lower (Magistrate) Court, *Republic v Abdul Rahman and Others*,<sup>76</sup> where the Magistrate arrived at effectively the same outcome as in *Aden Abdihaji*, albeit with much less comprehensive reasoning. Just like in *Aden Abdihaji*, notwithstanding a charge of illegal entry, the Magistrate ordered that the asylum seekers should be allowed to apply for asylum and taken to a designated refugee camp where they were to be kept under conditions that would guarantee their basic rights. The major difference between the two decisions was that in *Abdul Rahman*, the Magistrate Court sustained the convictions but suspended the sentences, whereas in *Aden Abdihaji*, the court quashed the convictions altogether.

### C *Non-refoulement*: a comparative analysis of Malawi and South Africa

An exploration of jurisprudence in Malawi and other African States reveals that the approach taken in South Africa has not been mirrored in Malawi. In Malawi, there is no provision that expressly stipulates what a competent officer should do once asylum seekers present themselves to an officer seeking asylum. It should be noted here that although s 13(1)(b)(i) of the Malawian Refugees Act provides that the Minister may make regulations for carrying out or giving effect to the provisions of this Act, including making provision for the procedure to be followed by competent officers for the purpose of facilitating the entry of refugees and their family members, regrettably, the only regulations that have been made by the Minister under s 13 are regulations prescribing the ‘Procedure on application for refugee status in Malawi.’ No regulations have been prescribed to deal with the entry of refugees and their family members into Malawian territory. What emerges therefore is that much discretion is left to the immigration, police or security officer, who is the competent officer envisaged under the Malawian Refugees Act<sup>77</sup> to determine what happens to a person seeking asylum who presents himself or herself at a port of entry for purposes of seeking asylum in Malawi.

An informed reading of the *Abdihaji* decision shows that Malawian authorities, unlike those in South Africa, do not issue a temporary asylum permit pending RSD. It seems that what the authorities demand is proof that the asylum seeker has applied for asylum. Such proof is supposed to guarantee *non-refoulement*. Unfortunately, that approach has proved problematic on the ground as authorities have, in various cases, rounded up asylum seekers for having no refugee status certificates notwithstanding that their applications for asylum are still pending.<sup>78</sup>

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<sup>76</sup> Criminal Cause No. 26 of 2005, Senior Resident Magistrate Court, LL.

<sup>77</sup> See s 2 of the Act.

<sup>78</sup> See Hathaway (note 2 above) at 371.

Secondly, in both *Ruta* in South Africa and *Abdihaji* in Malawi, courts have strongly emphasised the centrality of the principle of *non-refoulement* in refugee protection. They have made it clear that delay in applying for asylum is no ground for denying an asylum seeker the opportunity to present their application even in instances, as in *Ruta*, where the applicant's illegal entry is only discovered due to the commission of an offence. Both courts premise their reasoning on the pre-eminent character of the principle of *non-refoulement*. This principle forms the central edifice upon which the entire refugee protection framework is premised and without its effective guarantee the whole global scheme of refugee protection would utterly collapse. However, the approach of the court in the Malawian *Kambiningi Jones* case shows no appreciation or engagement by the court with the principle of *non-refoulement* in an instance where issues of revocation of refugee status, illegal return to Malawi and a quest to seek justice through the courts were implicated. The court ought to have provided a platform for the refugees to express themselves in order to ensure that the decision of the government did not expose the applicants to a risk of *refoulement*. Terminating the proceeding on technical grounds of *locus standi* posed a risk of the possibility of a proscribed form of *refoulement*.

Thirdly, under the South African framework, as observed by Cameron J in *Ruta*, the South African Refugees Act has a primacy clause which trumps all other provisions in the Act and under other laws which may otherwise have the effect of negating the principle of *non-refoulement*.<sup>79</sup> By contrast, s 10(1) of the Malawian Refugees Act is not couched as a primacy clause.

Fourthly, under the South African regime, the scope of the principle of *non-refoulement* under s 2 of the South African Refugees Act extends to the obligation of relevant South African authorities not to refuse an asylum seeker entry into the Republic. Again, in comparison, s 10(1) of the Malawian Refugees Act simply states that 'A refugee shall not be expelled or returned to the borders of a country where his life or freedom will be threatened'. The Malawian provision therefore expresses the obligation not to expel or 'return to the borders.' This envisages a scenario in which the asylum seeker is already within the jurisdiction of Malawi. There is, however, no express statutory obligation not to refuse an asylum seeker entry. At best, it could be implied in the duty not to return such a person. An express provision would be ideal. The duty not to refuse an asylum seeker entry into the territory of the prospective host State (non-rejection at the frontier) is a core aspect of the principle of *non-refoulement*.<sup>80</sup>

Whilst there is no record of Malawian authorities refusing asylum seekers entry into the Republic, the gap in the law creates a loophole for some street level authorities (immigration authorities in the field) to seek to exercise discretion and refuse an asylum seeker access to entry into Malawi. In fact, it would not be too speculative to suggest that there have been unreported cases of refusal of entry at point of entry, given the well-evidenced propensity of Malawian immigration authorities to depart from the demands of the principle of *non-refoulement*. As some of the decisions that I discuss in this paper show, immigration authorities have been too quick to proceed with the deportation of asylum seekers back to conflict zones at the mere suggestion of some non-compliance with ordinary rules of immigration.

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<sup>79</sup> South African Refugees Act, s 2.

<sup>80</sup> Art 2(3) of the 1969 OAU Convention for instance provides that 'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Art I, paragraphs 1 and 2.'

## V RECOMMENDATIONS

From the present study's analysis, it is evident that the principle of *non-refoulement* is more strongly guaranteed under the South African refugee protection framework than it is under the Malawian framework. It is therefore strongly recommended, in view of the centrality and high status of the principle of *non-refoulement* under international law, that legislative reform on refugee law in Malawi should follow upon that of South Africa so as to ensure legislative primacy for the principle of *non-refoulement* in the Malawian Refugees Act.<sup>81</sup>

Further, the law in Malawi should also expressly impose the obligation not to refuse an asylum seeker entry into the jurisdiction until their application for refugee status has been finally determined. The need for such legislative reform cannot be overemphasised considering that *non-refoulement* is not only as a rule of customary international law; but also, as Lauterpacht, the UNHCR and others state, that it has now matured into a peremptory norm of international law (*jus cogens*).

In *Ruta*, Cameron J made a crucial observation that on other continents, we are witnessing the rise of inhospitable approaches to refugeehood, and that in that context, it is of profound importance that African states should ensure that their responses to principles such as *non-refoulement* continue to reflect a unique African spirit.<sup>82</sup> D'Orsi provides, as an example of this African spirit, the case of Malawi where, against all the odds, with pervasive poverty, a dense population and a poor human rights record at the time, over a million Mozambican refugees were shown hospitality in the 1980s without the threat of being sent back to Mozambique against their will.<sup>83</sup> It is therefore recommended that much research effort and innovation be invested towards coming up with a uniquely African regime of *non-refoulement* as a progressive torchbearer in the protection of refugees. Research centres such as the Council for the Development of Social Science Research in Africa (CODESRIA) could play a leading role in such an effort.

The South African Refugees Regulations of 27 December 2019, in some respects, constrict the enjoyment of some fundamental refugee rights such as freedom of expression, and they introduce measures which would render refugees who are legitimately exercising their political expression rights liable to deportation and thus being vulnerable to *refoulement* measures by the South African state. It is recommended that these regulations be urgently reviewed and that such unduly restrictive measures on the enjoyment of rights, and particularly in so far as they may enable the state to deport such refugees, be repealed.

Finally, in a 2013 work,<sup>84</sup> I proposed the adoption of a Charter on the Movement and Treatment of Refugees in the SADC Region to ensure a harmonised protection system, and also for SADC to adopt Model Legislation on Refugees in order to provide a standard legal framework to be used as a benchmark for the review and reform of national legislation relating

<sup>81</sup> Malawian Refugees Act s 10(1).

<sup>82</sup> *Ruta* (note 62 above) at paras 24–26.

<sup>83</sup> D'Orsi (note 8 above) at 55.

<sup>84</sup> R Kapindu, *Towards a More Effective Guarantee of Socioeconomic Rights for Refugees in Southern Africa*, PhD Thesis, University of the Witwatersrand, Johannesburg, (2014), available at [http://wiredspace.wits.ac.za/bitstream/handle/10539/15799/Redson%20Kapindu%20-%20PhD%20Thesis%20-%20Final%20submission%20-%20Wits%20\(2\).pdf?sequence=1](http://wiredspace.wits.ac.za/bitstream/handle/10539/15799/Redson%20Kapindu%20-%20PhD%20Thesis%20-%20Final%20submission%20-%20Wits%20(2).pdf?sequence=1)

to refugees in the region, in conformity with international human rights standards.<sup>85</sup> I persist with that proposal, which comports with strong emerging jurisprudence on refugee law such as that in *Ruta* and *Saidi* in South Africa, and *Aden Abdihaji* in Malawi.

## VI CONCLUSION

The principle of *non-refoulement* is a core principle of international law. It is not only a principle of customary international law, but it has arguably crystallised into a peremptory norm of international law (*jus cogens*). Both the South African and Malawian constitutions enjoin courts, when interpreting the Bill of Rights, to consider international law.<sup>86</sup> Further, both states are bound by international law obligations whether arising out of treaty law, customary international law, *jus cogens* norms or otherwise. What the consistent jurisprudence of the Constitutional Court over the past two decades shows, exemplified most recently by the decisions in *Ruta* and *Saidi*, is that the Court is giving the principle of *non-refoulement* full recognition and upholding it in its pronouncements. Fortunately for South Africa, the jurisprudence is supported by a legislative framework for refugee protection that is already significantly protective of refugee rights. This has enabled the development of a body of jurisprudence that is generally consistent with international refugee law norms. Again, in South Africa, there is a body of more active human rights defenders with a keen interest in refugee rights unlike in many other African countries, including Malawi. That is why, outside of South Africa, there is a paucity of refugee law jurisprudence by higher courts of record.

The story, however, is not all rosy for South Africa. As I have described above, there is an enduring problem of bad practices that violate human rights. Progressive judicial pronouncements, and a progressive refugee law legislative framework, frequently mean less in terms of the actual experiences of refugees, especially those of asylum seekers whose status is yet to be decided by the authorities. There is evidence of entrenched institutional fatigue within the DHA to handle significant volumes of asylum seekers and authorities at high levels have openly expressed their frustration at the progressive nature of the refugee protection framework. They have stated that the progressive nature of the law comes in the way of their desire to return or send back asylum seekers. The result of this approach, it seems, is that it has also created fertile ground for corrupt practices by some officers. These are worrisome developments. However, what is important is that the courts should remain vigilant and steadfast in presenting the last bastion of protection for the asylum seekers and refugees from practices that amount to or pose a threat of *refoulement*. Courts need to remain resolute in affirming the principle of *non-refoulement*.

In Malawi, the approach adopted in the lone decision of the High Court, the *Abdihaji* case, decided in 2005, was quite progressive. The Court affirmed the principle of *non-refoulement*, articulating the issues that would later also be raised by the South African Constitutional Court in *Ruta* in 2018. The problem with the Malawian position is that there are too many legislative gaps. The legislative refugee protection framework is weak. It does not even guarantee the right of the asylum seeker to enter at the point of entry. The Malawian refugee framework does not make provision for the issuance of temporary asylum seeker permits as authority for legal

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<sup>85</sup> This Model legislation would follow the 'Model Law on HIV in Southern Africa' that was adopted by the SADC Parliamentary Forum in November 2008. See S Eboerah & A Tanoh (eds) *Compendium of African Sub-regional Human Rights Documents* (2010) 465.

<sup>86</sup> Constitution of South Africa s 39; Constitution of Malawi s 11(2)(c).

residence within the jurisdiction. The result is that asylum seekers are frequently subjected to arbitrary arrests and threats of deportation that amount to *refoulement* or threats of it which are prohibited under international law.

The position obtaining in Malawi seems to be reflected in various other southern African jurisdictions including Botswana — Refugees (Recognition and Control) Act, 1968; Lesotho — Refugee Act 18 of 1983; Tanzania — Refugees Act 9 of 1998; and Zimbabwe — Refugees Act, 1983. Zambia is the only jurisdiction outside South Africa that has passed legislation that comprehensively guarantees the principle of *non-refoulement* in a comparable manner to the South African regime.<sup>87</sup> This is particularly evident in s 23(1) of the *Zambian Refugees Act*.<sup>88</sup> Perhaps this development is unsurprising considering that this is a very recent piece of legislation and it demonstrates that the framers of the *Zambian Act* took into account recent developments in international refugee law.

All in all, the decisions of the Constitutional Court in *Ruta* and *Saidi* provide an important clarion call for other jurisdictions in the region to review their refugee legislative frameworks and modernise them in tandem with current norms of international refugee law.

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<sup>87</sup> Refugees Act 1 of 2017 of Zambia.

<sup>88</sup> *Ibid.* Section 23(1) provides that ‘Despite the provisions of any other law, a person shall not be refused entry into Zambia or be expelled, extradited or returned from Zambia to another country if that refusal, expulsion or return would compel that person to return to or remain in a country where — (a) that person may be subjected to persecution on account of that person’s race, religion, nationality, membership of a particular social group or political opinion; or (b) that person’s life, physical well-being or liberty is threatened by external aggression, occupation, foreign domination or event seriously disrupting public order in part or the whole of that country.’

