

**Legality Of Malawi's Reservation To Article 26 Of CSR 51 And
Measures Restricting Freedom Of Movement And Choice Of
Residence Of Refugees**

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I take full responsibility for all errors in this essay. It is my hope that through this work, I have made a contribution to existing knowledge on legal protection of refugees in Malawi.

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Dedication

To my parents Hon. Justice and Mrs. Chinangwa, thank you for everything.

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Acronyms

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
AU	African Union
CSR51	United Nations Convention Relating to the Status of Refugees
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILC Drafts	International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts
ILM	International Legal Materials
ILR	International Law Reports
OAUR69	Organization of African Unity Convention Governing the Specific Aspect of Refugee Problems in Africa
OAU	Organization of African Unity
PCJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nation High Commissioner For Refugees
US	United States of America

1. Introduction

1

1.1 Origin of Thesis

In 1994 the Government of Malawi established a single refugee center and required all refugees to live at the designated refugee center.¹To the present day the Government of Malawi adopts an encampment policy for all refugees and asylum seekers.² The Policy follows from the reservations to article 26, which Malawi made when acceding to the 1951 United Nations Convention Relating to the Status of Refugees (hereinafter CSR 51).³

In early 2006, I was requested to be part of a Task Force, which was to prepare a cabinet paper for the Minister of Home Affairs and Internal Security, concerning the decision to return all refugees in urban areas to the designated areas.

The core issue emerged of the legal basis for restricting the movement, choice of residence of refugee within Malawi and for ordering their return to the designated areas. The Refugee Act⁴ did not provide guidance. The CSR 51, in light of the reservation to article 26 raised other issues on the interpretation, scope, effect, legality of the reservation and the encampment policy.

Unfortunately before the paper was completed, the Government commenced the forced return of all refugees to the designated areas. The development rendered the preparation of the paper of no significance, hence it was never completed.

This motivated me to undertake an independent, holistic legal analysis of the legality of the reservation and the measures in international law. The aim is to use the results of the

¹ U.S. Department of State Country Report on Human Rights Practices 1995 - Malawi- January 1996

² <http://www.malawi.gov.mw/Povelty/Home%20Povelty.htm>

³ This has been the view of the Government , and even accepted by UNHCR Malawi field office, see Kelvin s. Sentala , Refugee law as provided for in national laws in Malawi and Reservations made by Malawi to the 1951 convention, a paper presented at Malawi Law Society Workshop on International Refugee Law, 6th -7th November 2006,

⁴ Chapter 15:04 of the Laws of Malawi

analysis to clarify the uncertainty and provide a grounded understanding of the effect of the reservation on the enjoyment of refugees of the rights in article 26 of CSR51.

1.2 Background Overview

Malawi faced the challenge of protecting large numbers of refugees, e.g. in the 1980- 90 it hosted over a 1 million Mozambican refugees⁵. To date the challenge remains of affording effective enjoyment of rights by refugees while accommodating the national interests, i.e. security, public order, job security etc. Competing priorities with existing domestic social problems (unemployment, lack of business opportunities) resulting in restrictions on refugees rights to wage earning employment, or business this forces them to be dependent on UNHRC handouts for survival.

The decision to establish refugee camps for the residence of refugees further compounded the problem. To the present day the Government of Malawi has designated two refugee camps for the residence of refugee and asylum seekers. This policy does not apply to other migrants.

The negative effect of the policy on the livelihood and enjoyment of the other rights by refugees can not be underestimated, as the free exercise of the freedom of movement and choice of residence is a prerequisite to the effective enjoyment of the other rights.

1.3 Objective of the Thesis

The purpose of the thesis is to discuss the legality in international law of the reservation made by Malawi to article 26 of CSR51 and the measures employed restricting the freedom of movement and choice of residence of refugees in Malawi.

⁵ Khalid Koser , “ *Information and Repatriation: The Case of Mozambican Refugees in Malawi*” .Journal of Refugee Studies Vol. 10. No. 1(1997),p4

First the discussion will analyze whether the formulation of the reservation complies with the general international rules and the provisions in CSR51 regulating legality of reservations. Secondly the thesis will discuss the effect of the reservation on the enjoyment by refugees of the rights to freedom of movement and choice of residence provided in art.26 of CSR51. To this end the discussion will analyze whether the application of the reservation through the measures restricting freedom of movement and choice of residence of refugees is lawful and compatible with Malawi's obligations as a party to the Convention. The thesis will also discuss the possible legal consequences of the reservation and measures.

1.4 Theories and Methodology

1.4.1 Theories

Grotius theorized international law as a system of regulating the affairs and warfare of its rising nation states⁶. There are a number of theories of the juridical basis of international law⁷. For this analysis the consensual theory has been preferred.

1.4.1.1 Consensual theory

The theory postulates international law as a positivistic system of law based on the actual practice of states. Its binding quality flows from the consent of states.⁸ International law can not be created without the consent of the states. The consent may be given in a variety of ways, express in treatise or implied in custom. Therefore a treaty would only be binding on a state only if it deliberately and positively accepts the terms.⁹

Following on this theory, the thesis argues that once Malawi expressed its consent to be bound by the provisions of CSR 51, the legality of its actions are determined by the convention and not domestic legislation.

⁶P.101, Freeman, *Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell Ltd, 1994

⁷J. Austin's command theory, Natural law theory and *Ubi societas, ubi jus*.

⁸P.15, M. Dixon, *Textbook on International Law*, Oxford University Press, 2005

⁹Dixon, p.16

It is within the context of this conceptual framework that the thesis discusses the legality in international law of the reservation to article 26 of CSR51, the measures restricting freedom of movement and choice of residence within Malawi.

1.4.2 Methodology

In accordance with the objectives, the study utilizes the traditional legal review and interpretation of law on the international, regional and national levels based on materials and literature (books and law review articles) collected from the library, as well as electronic databases (UNHCR publications).

The method was also preferred to the other methods because the issues raised are primarily legal issues requiring a review and interpretation of existing legal instruments. Therefore not necessary to collect and analyze qualitative or quantitative data.

1.5 Legal Sources

The thesis utilizes the following legal sources.

1.5.1 International Instruments

The thesis reviewed, interprets and applies international instruments to which Malawi is a party, and also other instrument for comparisons. Principally among these being the United Nations Convention Relating to the Status of Refugees of 28th July, 1951 and the Protocol Relating to the Status of Refugees of 31st, January, 1967. The other instruments were the United Nations Charter of 26th June, 1945, Universal Declaration of Human Rights of 10th December, 1948 and the International Covenant on Civil and Political Rights of 16th December, 1966.

1.5.2 Regional Instruments

Regional instruments were also consulted, principally Organization of African Unity Convention Governing the Specific Aspect of Refugee Problems in Africa of 10th September, 1969 and the African Charter on Human and Peoples Rights of 27th June, 1981.

1.5.3 National Legislation

The thesis also analyzes national legislation from Malawi. The Constitution, Refuge Act¹⁰, Penal Code¹¹ and Immigration Act¹² were the primary sources.

1.5.4 Cases

Court decisions from International Tribunal, Regional tribunal and the national courts in Malawi were used in the analysis of the issues.

1.6 Demarcation and Structure

The thesis is divided into six chapters. Chapter four, five and six are the principle chapters as they contain my discussion of the issues underling the thesis.

Chapter 1 contains the introductory part of the thesis. Chapter 2, discusses the general rules regulating the implementation of international law into domestic legal system, the principle of good faith and the implementation of CSR 51 in Malawi.

Chapter 3 discusses the scope of the freedom of movement and choice of residence in art.26 CSR51 from a general human rights law perspective, the international refugee law context and Malawi refugee law.

¹⁰ Chapter 15:04 of the Laws of Malawi

¹¹ Chapter 7:01 of the Laws of Malawi

¹² Chapter 15:03 of the Laws of Malawi

Chapter 4 analyses the legality in international law of Malawi's reservation to art.26 of CSR51 in the context of the theory, practice of reservations and relevant provisions of the CSR51. Chapter 5 considers the legality of the measures restricting the freedom of movement and choice of residence of refugees.

Chapter 6 contains the discussion of the legal consequences for Malawi of its reservation and restrictions in light of their legality in international law. Chapter 7 is the conclusion.

2 Implementation And Observance Of CSR51 In Malawi

2.1 The Implementation of Treaties

For the provisions of CSR51 to be applicable within Malawi it will depend on whether it forms part of the domestic law. This will depend on the theory and means of implementation of international law followed in Malawi.

2.1.1 Theories of Implementation

There are three theories¹³ that explain the relationship between international and national law, namely monism¹⁴, dualism¹⁵ and monistic conception.¹⁶

Malawi appears to adhere to the dualist theory¹⁷. The first Constitution¹⁸ did not explicitly make provisions for the implementation of international law. The Supreme Court in *Chakufwa Tom Chihana V Republic*¹⁹, pointed out the requirement of an Act of Parliament to incorporate the provisions of the international treaty into Malawi law for it to be applicable. This meant that international law was not part of the law of Malawi unless specifically implemented by an Act of Parliament.

¹³ Cassese, Antonio, *International Law*, Oxford University Press, 2005, p213

¹⁴ Monism supposes that international law and national law are part of one coherent legal system, operating in the same arena and concerned with the same subject matter, with international law attaining superiority over national law in cases of conflict between the two. See M. Dixon p 83, Cf Cassese p214 who suggest the superiority of national over international law

¹⁵ Dualism perceives national law and international law as separate systems of law, differing as to their subjects, sources and content. See, Cassese p214

¹⁶ Presupposes the existence of a single legal system with the various legal orders operating at different levels but with same subjects. International law supreme over national law. Cassese calls it monistic conception.

¹⁷ Hansen, Thomas Trier, *Implementation of International Human Rights standards Through The Courts in Malawi*, Journal of African Law, 46,1(200), p.31

¹⁸ Came into force on independence from Britain on 6th July 1966.

¹⁹ MSCA Criminal Appeal no. 9 of 1993, www.saflii.org/mw/cases/MWSC/1993/1.html

In 1994 a new Constitution came into force which ushered in a Democratic State from a one party state. The Constitution in s.211²⁰(1) provided that international agreements entered into need to be ratified by an Act of Parliament and the Act should also provide that the agreement forms part of the law of Malawi. In respect of agreements entered into before the entry into force of the 1994 Constitution S. 211(2) and binding on the Republic they form part of the law, unless Parliament subsequently provides otherwise or the agreement otherwise lapses. Under s.211(3), Customary international law forms part of the law of Malawi unless inconsistent with the constitution or an Act of Parliament.

These provision means that international law and national law belong to different legal systems, hence a dualist approach obtains in Malawi. This implies that for the CSR 51 to be applicable, had to be implemented into the domestic law by an Act of Parliament.

2.2 Implementation of CSR 51 in Malawi

Depending on which theory forms the basis of the constitutional rules regulating the relationship of national law and international law there will still be the need to translate international legal obligations into national legal system.

In most states have own choice of procedures for giving effect to international obligations within national legal systems.²¹ There two modes (doctrines) for the implementation of international law in the domestic systems, namely transformation²² and incorporation.

The doctrine of incorporation means that international rules become part of the national law without the requirement of their being formally adopted by legislative Act or judicial

²⁰S.211 (1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement,(2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses,(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.

²¹ Quoted by A.P. Fachi, *The local remedies in the light of Finnish Ships Arbitration*, 17 BYIL(1936)p 23-4

²² Martin Dixon, Malcolm Shaw, and Ian Brownlie call it transformation while Cassese calls it legislative *ad hoc* or automatic *ad hoc* incorporation. For the purposes of this discussion transformation is preferred.

decision. In some states this may only apply to customary international law and not to treaties,²³ as long as not inconsistent with Acts of Parliament or prior Judicial decisions.²⁴

Under the transformation doctrine international rules become applicable in the domestic legal system through specific domestic legislation. This may be through a domestic statute referring to the Treaty as part of the law of the state without reformulating its provisions, with the treaty itself annexed. Alternatively the legislative Act may translate the specific provisions of the treaty into a domestic Act without annexing the treaty.

Malawi is a party to CSR 51, 1967 Protocol Relating to the Status of Refugees and the Organization of African Union²⁵ Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969(hereinafter referred to as the OAU 69)²⁶. Malawi acceded to the 1951 Convention and the Protocol on 10th December, 1987. It acceded to the OAU 69 on 4th November, 1987.

On 26th April, 1989 Malawi enacted the Refugee Act.²⁷ The Act in s.2 on interpretations defines the word "refugee conventions" to mean the CSR51, 1967 Protocol and the OAU 69. The same section defines a refugee in (a) using the same wording of the CSR51 as amended by the 1967 Protocol and in (b) incorporates art. 2 of OAU69.²⁸

S.8 on grounds for exclusion from refugee status, combines the provisions of art.1 (F) of CSR51 Convention and art.5 of OAU69.S.10 (1) (a), (b) (C) and (6) reformulates the

²³ In *McLain Watson v Department of Trade and Industry*, Lord Oliver noted, "Quite simply, a treaty is no part of English law unless and until it has been incorporated into the law by legislation." 1989] AllER 523,531

²⁴ In Britain, see Brownlie, p 41. In *Trendtex Trading Corporation v Central Bank of Nigeria*, Shaw LJ noted that, "the English Courts must at any given time discover what the prevailing international rule is and apply that rule"

²⁵ Now African Union

²⁶ CSR51 entered into force on 22nd April, 1954, the Protocol on 4th October, 1967. OAU69 on 20th June, 1974.

²⁷ Chapter 15:04 of the Laws of Malawi

²⁸ Maluwa, Tiyanjana, *The Domestic Implementation of International Refugee Law: a Brief Note on Malawi's Refugee Act*, IJRL Vol.3 No.3 (1991), p503

provisions of articles 32, 33 of CSR51 and art.2(3) of the OAUR69. S.10 (4) on treatment of refugees illegally within Malawi transforms art.31 of the CSR51.

Cessation of refugee status is considered in s. 12 which outlines similar as art.1 (C) of the CSR51 and art.1 (a) (b), (c), (d) and (e) of the OAUR69. The proviso to s.10 cover those refugee who are able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country of nationality or return to the country of former habitual residence, provide in the proviso to art. 1 (c)(5) of the CSR5.

It can be concluded that Malawi implemented the Refugee Convention by transformation of the Conventions through a legislative Act, translating the provisions of the treaties by setting out in detail the various obligations and rights into a domestic Act. Therefore the Convention rules have a status of an Act of Parliament subordinate only to the Constitution.

2.3 *Pacta Sunt Servanda*

The implementation of CSR 51 into the national law is one part in Malawi's duty to comply with its international obligations under the convention. The other part comprises the obligation to perform the convention in good faith, *pacta sunt servanda*.

The principle places an obligation on state parties to treatise whether bilateral or multilateral to perform or carry out the obligations under them in good faith. This principle is the basis of law of treaties since the whole concept of binding international agreements is founded on the presupposition that such instruments are commonly accepted as possessing that quality²⁹. The ICJ stated in *Nuclear Tests Case (Australia v France)*,³⁰

²⁹ Shaw, p 81

³⁰ ICJ Reports, 1974, pp.253, 268

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith... Just as very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of international obligations assumed by unilateral obligation.”

The United Nations Charter enshrines this principle in art.2 (2),³¹ supplemented by the General Assembly Resolution 2625(XXV)³², which elaborates the principle³³ and extends the duty to obligations under generally recognized principles of international law. This would include the obligations under the CSR51. The principle exists at custom and as well as part of treaty law in art 26 of Vienna Convention on the Law of Treaties of 1969.³⁴The principle does not create new obligations but shapes the observance of existing rules of international law and constrains the manner in which those rules may legitimately be exercised.³⁵

Therefore Malawi as a state party has an obligation to implement and perform the obligations under the CSR 51 in good faith.

³¹ “ All members , in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”

³² 1970 Declaration on Principles Concerning Friendly Relations and Co-operation among States

³³ ” Every state has a duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law. Every state has a duty to fulfill in good faith its obligations under international agreements valid under the general recognized principles and rules of international law...”

³⁴ “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

³⁵ Shaw, p82

3 Scope Of Freedom Of Movement And Choice Of Residence In Art 26

3.1 Introduction

Article 26 of CSR 51 (the subject of Malawi reservation) guarantees freedom of movement and choice of residence for refugees. In order to fully analyze the legality of the reservation and the measures it is imperative to understand the scope of freedom of movement and choice of residence guaranteed. This being a general human right will consider freedom of movement and choice of residence from a general human rights perspective, refugee law and finally in the context of Malawi.

3.2 Under Human Rights Law

The discussion will start with the Universal Declaration of Human Rights of 1949(hereinafter UDHR), the International Convent on Civil and Political Rights (hereinafter ICCPR).On a Regional level will only focus on the African Charter of Human and Peoples Rights since Malawi is an African country and a party to it.

3.2.1.1.1 Universal Declaration of Human Rights

The UDHR art. 13(1) guarantees everyone the freedom of movement and residence within the borders of each state. The provision outlines two rights,³⁶ the right to freedom of movement (freedom of internal movement) and the freedom of residence (freedom of residence).

³⁶ Commentary by Grahl-Madsen, Melander and Ring, in Alfredsson, G and Eide, A (eds), *The Universal Declaration of Human Rights*, Kluwer International, 1999, pp.265

Freedom of internal movement means everyone within the state may move freely within that state, without let, hindrance and without having to ask the permission of the authorities or to justify his/her presence in any particular place.³⁷

In terms of freedom of residence art. 13(1) means that everyone, within the territory of the state may choose where to live whether in a city or village or country side. May also choose which place, town, village or country side he/she will make the center of their life. This can be decided without asking for special permit from the authorities³⁸.

The use of the word “everyone” signifies the availability of the right to citizens and aliens. Art. 26 read in the context of art.14 (1)³⁹ extends the freedoms also to refugees. Art.13 (1) does not restrict the freedom to only those lawfully within the territory, but guarantees to everyone within the state territory. This means that every person within the territory of the state whether lawfully or unlawfully present enjoys the right. Though in practice state decides only guarantee this right to those lawfully present.

The enjoyment of the rights in art.13 (1) is subject to the limitations placed by art.29.⁴⁰ The limitations should be determined by law for securing recognition, respect for the rights and freedoms of others, meeting the just requirements of morality, public order and general welfare in a democratic society. The article prohibits the exercise of the rights contrary to the purposes and principles of the United Nations.

Following the UDHR a number of international and regional Human Rights Instruments⁴¹ have also made provision for the rights.

³⁷ See note 37 above

³⁸ Commentary by Grahl-Madsen, Melander and Ring, in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights*, pp.272

³⁹ on the right to seek and enjoy asylum

⁴⁰ Provides for duties to one community. Also limit's the rights to due to securing due recognition and respect for the rights and freedoms of others, requirements of morality, public order and the general welfare in a democratic society and to act contrary to the purposes and principles of the United nations

⁴¹ European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 art.2 (1) of the 4th Protocol and the American Convention on Human Rights in art.22 (1)

3.2.2 International Covenant on Civil and Political Rights

The ICCPR⁴², in art.12 (1) makes provisions for right to liberty of internal movement and freedom of choice of residence.

In terms of liberty of movement the provision means a person lawfully within the territory of the state has the liberty to move unhindered throughout the territory of the state without depending on any particular purpose or reason for the person wanting to move⁴³.For choice of residence the provision means that everyone lawfully within the territory of the state has the freedom to set up permanently or temporarily residence at any location within the states party's territory.⁴⁴

The enjoyment of the rights in this art is restricted to persons lawfully within the territory of a state as opposed to art.13 (1) of the UDHR. The lawfulness will be determined by each national legal system⁴⁵.The article does not create a right of entry for aliens as their entry is also subject to the law of each state.⁴⁶

The covenant does not make provide for the right to seek and enjoy asylum. It is submitted the use of the words “everyone” means the rights are guaranteed to citizens, aliens and including refugees as long as lawfully within the territory.

Art. 12(3) limits the enjoyment of the right by allowing restrictions that are, provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and consistent with the other rights recognized in the covenant. In *Ackla v Togo*⁴⁷ the Human Rights Committee stated that failure by the state to

⁴² Entered into force on 23rd March 1976

⁴³ General Comment 15/27

⁴⁴ General Comment 15/27

⁴⁵ Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCPR Commentary*, N.P.Engel, Publishers, 2005 p.262

⁴⁶ Nowak,p.263

⁴⁷ Human Rights Committee,(505/92)

give any explanation justify its restrictions on an individual to enter his home district and village, pursuant to art.12 (3) will result in a violation of art.12 (1).In *Karker v France*⁴⁸ The Committee held measures restricting the choice of residence of a refugee to be necessary in the interest of national security, where he was a member of a group which supported violent action. In *Mpandanjila v Zaire*⁴⁹The Committee held administrative measures banning ex-parliamentarian (who were critical to the government) and their families to forced relocated regions of the country a violation of art.12. In *Mpaka-Nsusu v Zaire*⁵⁰ The Committee found the banishment of a presidential candidate to his village of origin to be a violation of art.12.⁵¹

Theses cases show that the enjoyment of rights can only be limited on grounds specified in art.12(3). Whether a states limitation is justified will depend on the reasons and manner of implementing the restrictions. Where no reasons are provide or where the reasons provided are not among the permissible ones the state will be in violation of art.12. The cases also show that the burden rests with the state to show that the limitations are compatible with the provision. In *Ackla v Togo*, *Mpandanjila v Zaire* and *Mpaka-Nsusu v Zaire* the state failed to give reasons justifying the restriction in line with the convention and the measures were held to have violated art.12. While the Committee found the measures in *Karker v France* as justified limitations of the basis of national security.

Under the ICCPR the fact that internal law legalizes the limitation appears does to be relevant, but rather consistency of the limitation with art.12.

⁴⁸ Human Rights Committee,(833/98)

⁴⁹ 183/1983

⁵⁰ 157/1983

⁵¹ See also, Bailliet, Cecelia, *Between Conflict & Consensus: Conciliating Land Disputes in Guatemala*, Institute of Public & International Law, University of Oslo,2002, p.159

3.2.3 African Charter of Human and Peoples Rights (ACHPR)⁵²

The African Charter of Human and Peoples Rights in article 12. Art. 12(1) guarantees every individual the right to freedom of movement and residence within the borders of a State party provided they abide by the law. The requirement for the individual to abide by implies that the entry and presence of the individual into that territory should be in accordance with the domestic law⁵³.

Art 12 (3) provides every individual the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. Article 2 guarantees every individual the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, national and social origin, fortune, birth or other status among others. Refugee being a status would be within article 2, therefore a refugee within the territory of a member state would also enjoy the freedom of movement and choice of residence.

The exercise of the rights appears to be limited by the requirement that the person abides by the law. This broad limitation may open the door to unwarranted limitation and restrictions.⁵⁴

3.3 Under Refugee Law

General international human rights law establishes the minimum core content of human rights applicable to every one regardless of their status or any other pre-requisite. Refugee

⁵² Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986:

⁵³ Ouguergouz, Fatsah, *The African Charter on Human and Peoples' Rights, A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff Publishers, 2003, p 122

⁵⁴ F. Ouguergouz, p.123

law is a specialized branch of human rights law that seeks to protect the rights of persons that are outside their country of origin due to a well founded fear of persecution⁵⁵.

3.3.1 Under CSR 51

The CSR 51 is the specific international instrument regarding the rights of refugees (also called an extraordinary Bill of Rights of refugees⁵⁶), though international human rights law still offers an increasingly important complement to the Convention⁵⁷.

The CSR 51 in art. 26 provides⁵⁸,

“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”

The words “shall accord” imply that art. 26 impose a mandatory obligation, not a mere recommendation.⁵⁹The obligation is subject “to any regulations applicable to aliens generally in the same circumstances”, this prohibits a state from passing special regulations restricting these freedoms for refugees which does not apply also to aliens.

Article 26 applies only to “refugees lawfully in (the) territory”. There appears to be no single precise meaning of “lawfully in the territory”. The Court of Appeal in England in *Kaya v Haringey London Borough Council* said;

“There is no settled international meaning of the term” lawfully” not merely in international but national law. The word ...can mean a wide range of things in different contexts...the most obvious

⁵⁵ McAdam, Jane (2006) *The Refugee Convention as a rights blueprint for persons in need of international protection*, (online) New Issues In Refugee Research, Research Paper No. 125, UNHCR, www.unhcr.org

⁵⁶ Gorlick, Brian, *Human Rights and Refugees: Enhancing Protection Through International Human Rights Law*, 2000, Nordic Journal Of International Law 69: p117, p122

⁵⁷ Edwards, Alice, *Human Rights, Refugees, and The Right ‘To Enjoy’ Asylum*, IJRL 2005, vol 17, no.2 p.293, p296. see Da Costa, Rosa (2006) , *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, (online) Legal And Protection Policy Research Series , UNHCR, www.unhcr.org

⁵⁸ Art.2 of the 1938 Convention on the Status of Refugees Coming From Germany, is similar to this provision

⁵⁹ Commentary On The Refugee Convention, 1951, Articles 2-11, 13-37, Grahl-Madsen, p.63

explanation...is that the contracting parties to the Convention wished to reserve to themselves the right to determine conditions of entry, at least in cases not covered by the Refugee Convention.”⁶⁰

The explanation proffered appears sound and in conformity with similar provisions in the international human rights instruments. From the wording of the article the determination of lawful presence within a state territory was to be determined by its national law, only constrained by the impermissibility of deeming presence to be unlawful in circumstances where the convention deems it lawful.⁶¹ Reading it with art. 31(2) the rights apply after regularization of status to an asylum seeker who entered or was present without authorization⁶².

In terms of freedom of movement the article means that a refugee is free within the territory of the state, to move for whatever reasons without seeking permission from the authorities of the state. This may only be restricted by those regulations that apply to aliens generally. The right is applicable only within the territory of the State concerned and does not include the right to enter, leave or re-enter the national territory.

For choice of residence it implies the right of a refugee to decide where to establish his/her residence freely without being confined to specific regions or designated areas within the state. It should be noted that art. 21 CSR 51 provides where housing is regulated by laws or regulations or subject to the control of public authorities, refugees lawfully in the territory are to be granted treatment as favourable as possible, and at least as favourable as granted to aliens generally in the same circumstances. The right to elect one's place of residence also implies the right to continue living in that place⁶³.

⁶⁰ [2001]EWCA Civ 677,para.31

⁶¹ Hathaway, James *The Rights of Refugees Under International Law*, Cambridge University Press,2005

⁶² Field, Ophelia and Edwards, Alice, (2006) *Alternatives To Detention Of Asylum Seekers And Refugees* (online) Legal And Protection Policy Research Series, UNHCR, www.unhcr.org

⁶³ Rosa da Costa, p.157

Article 9 of the CSR51 Convention allows States to derogate from their obligations in article 26 in certain situations, such as in time of war or other grave exceptional circumstances. However, such derogations are subject to certain conditions, i.e. they must be against a particular person (rather than a group or category of persons), of a provisional nature, and in the case of an already recognized refugee, the State must show that the continuation of these provisional measures in that particular instance is necessary in the interests of national security.

The use of the phrase “in the case of a particular person”, shows that the meaning of this provision is to restrict the applicability of provisional measures to individual persons, and not groups of refugees.

Article 8 of the CSR51 aims at exempting refugees who formally possess the nationality of the country which they have fled from being subjected to exceptional measures which are otherwise imposed on nationals of that country during times of war or international tension e.g. restrictions on freedom of movement, prohibition of entry and rejection at border. This provision guarantees the continued enjoyment of the freedom by refugees even if the same has been curtailed for other foreigners.

The following African countries⁶⁴ have made reservations to this provision, Angola, Botswana, Burundi, Mozambique, Rwanda including Malawi. Thought it should be pointed out that countries from other continents have also maintained reservation to it.

3.3.2 Under OAU 69

At the African regional level the OAU69, regulates all matters relating to refugees. Surprisingly no provision specifically provides for the freedom of movement and choice of residence, even though this is one of the most important rights to a refugee.

⁶⁴ Declarations and Reservations to the 1951 Convention relating to the Status of Refugees *As of 1 March 2006*

The provisions in art.12 (1) and (3) the African Charter of Human and Peoples Rights (ACHPR)⁶⁵ remain the only relevant ones.

In terms of limitations on the freedom, art.6 of the OAU⁶⁹ obliges states for reasons of security to as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin⁶⁶. This places a justifiable restriction on the choice of residence of refugees for reasons of security.

3.4 Freedom of Movement and Choice of Residence in Malawi.

The overall law governing residence of persons in Malawi is the Constitution⁶⁷, which in s. 39 guarantees that everyone shall have the right of freedom of movement and residence within the borders of Malawi. S. 20 prohibits discrimination on the basis among other of “other status.” It is submitted this include refugees in the enjoyment of the right. S.44(2) permits the restrictions or limitation on the freedom in s.39 provided they are prescribed by law, are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

For matters specifically concerning refugees are regulated by the Refugee Act⁶⁸, which incorporates the CSR51, 1967 Protocol and OAU⁶⁹. The Act does not specifically have a specific provision regulating movement and residence of refugees.S.13 (b) (VI) empowers the minister to make regulations for the carrying out of or giving effect to the provisions of the Act which may make provision for the traveling or movement of refugees within and outside Malawi. The Subsidiary Legislation (Refugee Regulations)⁶⁹ made pursuant to s.13 do not contain any provision restricting or limiting the movement or residence of refugees.

⁶⁵ See p.29 above

⁶⁶ Similar provisions are found in Latin America asylum conventions: Havana convention, art.2(4); Caracas convention on Territorial asylum, art.9

⁶⁷ Chapter 1:01 of the Laws of Malawi

⁶⁸ Cap 15:04 of the Laws of Malawi.

⁶⁹ General Notice.51/1991

Malawi made a reservation to art.26 of CSR51 on the freedom of movement and choice of residence, pursuant to which the internal movement and choice of residence of refugees has been curtailed through the encampment policy.⁷⁰ This has led to the restriction of the choice of residence of refugee to refugee camps and movement of is subject to prior permission.

⁷⁰ <http://www.malawi.gov.mw/Povelty/Home%20Povelty.htm>

4 Whether The Reservations Is Lawful ?

4.1 Theory and Practice of Reservations⁷¹

Prior to the League of Nations the established customary international rule required a reservation to a multilateral convention to be accepted by all the signatory states.⁷² The ICJ advisory opinion in the *Reservations to the Convention on the Punishment of Genocide*⁷³ modified the rule so that a state party which had made and maintained a reservation which was objected to by one or more of the parties to the convention but not by others, to be regarded as being a party to the convention if the reservation was compatible with the object and purpose of the convention otherwise, that state could not be regarded as being a party.

The Vienna Convention on the Law of Treaties⁷⁴ codified existing customary rules as well as formulated new rules regulating the admissibility and effect of reservations. Article 19 makes the admissibility of a reservation based on whether it's prohibited by the treaty or not. For treaties without provisions prohibiting reservations or only allowing reservations to specified provisions, it depends on the compatibility with the object and purpose of the treaty.⁷⁵

In art. 21 the effect of objecting or accepting a reservation in practical terms still modifies the application of the treaty to the extent of the reservation, unless the objecting state

⁷¹ A reservation has been defined in Vienna Convention on the Law of Treaties, art.2, as "...a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state

⁷² Ruda, *Reservations to Treaties*, 146 RECUEL Des COURS 95,112 (1975)

⁷³ ICJ Reports, 1951,pp15

⁷⁴ Of 22nd May, 1969, entered in force on 27th January, 1980

⁷⁵ The legal effect of reservations is regulated by art.20-21. The Unanimity rule has been retained in art. 20 (2) .

opposes the entry into force.⁷⁶ Each state party has the discretion to determine whether a reservation fulfils the criteria and whether to object or not. Under most treaties no independent or objective treaty body has the mandate to determine the admissibility of reservations.

This may have adverse implications in the implementation of treaties that aim at protecting individual rights like the ICCPR and CSR 51, since the decision of a state to object or not may not necessary be because the reservation is incompatible with the object and purpose of the treaty but rather on other self interest considerations or political reasons. Partly due to this fear the European Court of Human Rights⁷⁷ and the UN Human Rights Committee⁷⁸ consider that if a state enters a reservation to a human rights treaty that is inadmissible because it is not allowed by the treaty or because it is contrary to the object and purpose of the treaty, that reservation must be regarded as null and void. This practice also considers invalid reservations as being severable with the effect that the treaty would apply in full between the reserving state and the other state⁷⁹.

In contrast the CSR51 does not provide for refugees the procedural right to petition International Tribunals to enforce their rights. This would not preclude refugee petitions to

⁷⁶In the *Anglo-French Continental Shelf case*⁷⁶ arbitral tribunal noted that the combined effect of the French reservations and their rejection by the United Kingdom did not render art. 6[Geneva Convention on the Continental Shelf, 1958] inapplicable, only inapplicable to the extent of the reservations.” Cmnd.7438(1979),p. 45; 54 ILR, p.52

⁷⁷ The European Court of Human Rights, in the *Belilos case*(Series A,No132)considered an interpretative declaration of Switzerland to art.6 of the European Convention on Human Rights, which had the effect of a reservation. It held it invalid with the effect that Switzerland was bound by art.6 in full. In *Loizidou (preliminary objections) case*(Series A,No.310)the Court held reservations made by Turkey as being impermissible under the European Convention on Human Rights. The effect was that Turkey’s acceptance of the jurisdiction of the Commission and the Court remained unrestricted by the terms of the limitations.

⁷⁸ 24/52 of 2 November 1994, CCPR/C/21/Rev.1/Add.6 The Committee reasoned that the special nature of human rights treaties which are not just a web of interstate exchange of mutual obligations but concern the endowment of individual rights. That states have not often seen the need to object, hence the absence of objections does not imply that the reservation is compatible or not with the object and purpose of the convention.

⁷⁹ Goodman,Ryan, *Human Rights Treatise, Invalid Reservations and State Consent*, 96 AJIL 531(2002), Baratta, Robert, *Should Invalid Reservations to Human Rights Treatise be Disregarded?* 11 EUR.INT.L 413 (2000)

International Human rights tribunals under the human rights instruments⁸⁰. It remains to be seen whether the tribunals would make similar pronouncements on the severability of reservations to CSR51.

4.2 Reservations under CSR 51

The CSR 51 regulates the formulation of reservations through article 42;

- “1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1),33, 36-46 inclusive.
2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.”

The Convention prohibits reservations to articles specified in art.42 (1) and permits to all the others. Any reservations to the prohibited articles would be inadmissible under the Convention. States may make reservations to the other articles do not require acceptance by other state for them to take effect. Additionally even where a treaty expressly permits reservations, any such reservation must be compatible with the object and purpose of the treaty.⁸¹.This prohibits a state making a reservation to a permissible provision, but whose effect may be incompatible with its object and purpose.

⁸⁰ Persuad, Santhash (2006) *Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights* (online) New Issues in Refugee Research, UNHCR, www.unhcr.org

⁸¹ Blay, Samuel K.N. and Tsamenyi, B.Martin, *Reservations and Declarations Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugee*. International Journal of Refugee Law Vol.2 No.2 (1990), 531

4.3 Malawi's Reservations to CSR51

Malawi made reservations to articles 7, 13, 15, 17, 19, 22, 24, 26 and 34 of CSR 51⁸². For this discussion, the focus will be on the legality of reservation to art 26;

“ In respect of article 26

The Government of the Republic of Malawi reserves its right to designate the place or places of residence of the refugees and to restrict their movements whenever considerations of national security or public order so require⁸³.”

It did not make any reservations to the 1967 Protocol only made a declaration⁸⁴.

4.4 Legality of Reservation to Article 26

The legality of a reservation by a state party to CSR51 depends on whether it satisfies the requirements of art.42, and consistent with the object and purpose of the convention. Under this provision the reservation should ;

- (i) be made at signature, ratification or accession,
- (ii) not be to the provisions specified in art. 42(1),
- (iii) consistent with object and purpose of CSR51

It should be noted that the provision of the Vienna Convention on the Law of Treaties may not apply to the CSR51 by operation of art. 4 since it was concluded before the entry into force of the Vienna Convention. The rules contained in the Vienna Convention to the extent that they reflect customary international law, may still be applicable to the CSR 51 independent of the Vienna Convention. It is noted that the rules in art.19 as shown in chapter two above are a reflection of existing customary law.

⁸² Declarations and Reservations to the 1951 Convention relating to the Status of Refugees *As of 1 March 2006*

⁸³ Note 82,

⁸⁴ Note 82,

4.4.1 At signature, ratification or accession,

Malawi made acceded to the CSR 51 and the 1967 Protocol on 10th December 1987⁸⁵. In its accession instrument it appended reservation to mentioned articles including article 26 of CSR51. Since the reservations were made at accession it meets the requirement of (i).

4.4.2 Not prohibited by art.42 (1)

Article 26 is not among the articles to which reservations are expressly prohibited under art. 42. The reservation therefore satisfies the second requirement of not being made to an article which is among those to which reservations are expressly prohibited by art.42 of the Convention.

4.3.3 Consistency with object and purpose

In discussing the consistency of the reservation, will first outline the object and purpose of CSR 51. Then will discuss the scope and effect of the reservation in light of the object and purpose of CSR51.

4.3.3.1 object and purpose

The object and purposes of CSR 51 are outline in the preamble. These include to safeguard and assure refugees the widest possible exercise of the fundamental human rights. To revise and consolidate earlier international agreements and extend the scope and protection accorded by them.⁸⁶ The fundamental rights and freedoms include those in the field of non-refoulment, residence and freedom of movement⁸⁷.

⁸⁵ <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>

⁸⁶ See also, Blay and Tsamenyi, p.532

⁸⁷ Blay and Tsamenyi, p.532

4.3.3.2 Scope and Effect

A reservation can have the legal effect of excluding, modifying or even extending the obligation of a state party to a treaty provision⁸⁸.

A reservation has excluding effect where it denies the active duty (an obligation to do something) created or imposed by a treaty-based norm⁸⁹. The reserving state party will be free from perform the duty.

A reservation has modifying effect where it does not deny or dissolve the obligation expressed in the treaty provision, but permits it to prevail under a modified form. This may be through altering the content by limiting the scope of obligations, to cover only part of the original state of affairs (quantitative modifying reservation) or altering the contents of the norm by replacing the original state of affairs with a completely distinct state of affairs (qualitative modifying reservation)⁹⁰.

A reserving state may also commit itself to obligations not required by the treaty or to obligations that go beyond those which the treaty stipulates (extensive or commissive reservations).⁹¹

The reservations made by Malawi can be classified into excluding and modifying reservations. Excluding reservations would include those made to articles 7, 13, 15, 19, 22 and 24 which the Government considered as recommendations and not legally binding obligations. The list would also include reservations to articles 17 and 34 which it considered itself not bound by.

⁸⁸ Frank Horn, *Reservations and Interpretive Declarations to Multilateral Treaties*, Swedish Institute of International Law, 1988 p80

⁸⁹ Horn, p.83

⁹⁰ Horn, p.81

⁹¹ Horn, p89-90

For reservation to art.26 on the face of it appears to support the view obtaining prevailing legal view in Malawi that it excludes the duty of the Government to perform the obligation stipulated⁹². Interpreting the provision in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose⁹³ may provide a different meaning.

The ordinary meaning of to “reserve the right to do something” is to formally keep until later (or until when necessary) the right to do something⁹⁴. The word right appears to have been used in the ordinary meaning of having a legal or moral authority to do something⁹⁵ than in the sense of entitlements in Human Rights law sense.

The word “whenever” means at any time or in any situation when something may be wanted, needed, possible or necessary⁹⁶. The word “consideration” appear to have been used in the ordinary meaning of careful thought before making a decision or judgment about something⁹⁷ or to think about a particular fact or detail and allow it to have some influence when making a decision. The word "require" ordinarily mean need, or necessitate.

Apply in good faith the ordinary meaning of the terms used in their context and in the light of the object and purpose of the provision the reservation to art. 26 means; the Government of Malawi formally kept till later or until when it thinks necessary, its legal authority to designate place or places of residence of refugees and restrict their movement at any time or in any situation when careful thought or decision or judgment of national security or public order need or necessitate.

This means that the reservation only modified and did not exclude the application of the provision. It did not deny or dissolve the obligation expressed in art.26, but permitted it to

⁹² K. Sentala , See note 3 above

⁹³ Art.31 Vienna Convention on the Law of Treaties. This is also a customary principle of interpretation.

⁹⁴ Macmillan English Dictionary For Advanced Learners,2006 Edition,p.1204

⁹⁵ Macmillan English Dictionary,p.1222

⁹⁶ Macmillan English Dictionary, p.1632

⁹⁷ Macmillan English Dictionary,p.295

prevail in a modified form. Therefore Malawi has a duty to fulfill the obligation but in the form modified by its reservation. This implies that refugees lawfully within Malawi have the freedom of internal movement and choice of residence subject to the modifications made by the reservation.

Therefore the enjoyment of the right to freedom of internal movement and choice of residence of refugees lawfully within Malawi can only be limited the consideration of national security and public order. Therefore where national security or public order does not require, then the Government can not validly restrict the choice of residence and movement of refugees lawfully within Malawi.

The meaning of “lawfully within” is subject to the national legislation regulating the entry and exit of persons.⁹⁸In Malawi the Immigration Act⁹⁹ regulates the entry, residence and exit of person. In s.13 places an obligation on persons entering to immediately present themselves to the nearest immigration officer or if impracticable to do so within 24 hours. Failure to do so may lender the person illegal within Malawi. Under s.21 a person cannot be lawfully within Malawi unless in possession of visitors or any residence permit.

For refugees and asylum seeker the application of the provision is modified by the provision of the Refugee Act.¹⁰⁰Under s.10(4) any person who illegally enters Malawi as an asylum seeker should present himself within 20 hours of his entry before a competent officer but should not be detained, imprisoned, declared a prohibited immigrant or otherwise penalized. For asylum seekers that have complied with s.10(4) would be lawfully within Malawi, for those that have not would be illegally within Malawi though this itself may not prevent the determination of their application nor lender then subject to persecution¹⁰¹ or refoulment¹⁰². For those whose status has been recognized by the

⁹⁸ See chapter three above

⁹⁹ Chapter 15:01 of the Laws of Malawi

¹⁰⁰ Chapter 15:04 of the Laws of Malawi

¹⁰¹ S.10(4) of Refugee Act

¹⁰² Article 33 CSR51 Convention

Refugee Committee under s.6 of the Act they are lawful within Malawi. Hence these qualify to enjoy the rights in art.26 of CSR51.

Therefore the reservation is consistent with the object and purpose of the convention since it does not exclude the exercise of the rights, only limits the exercise to situations where the considerations of national security or public order.

4.4 Conclusion

Therefore the reservation complies with the rules regulating the formulation of reservations and consistent with the object and purpose of under CSR51. The other state parties did not object to the reservation¹⁰³. Therefore it is submitted that the reservation made by Malawi to art. 26 of CSR 51 is lawful in international law

¹⁰³ Declarations and Reservations to the 1951 Convention relating to the Status of Refugees *As of 1 March 2006*

5 Whether The Measures Are Lawful?

5.1 Legality of the Measures

The legality of the measures restricting freedom of movement and choice of residence of refugee in Malawi will depend on whether the measures comply with the provisions of article 26 CSR51 as modified by the reservation.

In order to comply with article 26 as modified by the reservation the measures have to meet the following conditions¹⁰⁴;

- (i) should be required
- (ii) by national security or,
- (iii) public order.

5.1.1 Should be required

The reservations to article 26 preconditions the designation of places of residence and restriction on movement on whenever the consideration of national security and public order so require. This implies that the measures and restrictions would only be implemented when required. In each situation the government will make a decision having considered the situation and the requirement of national security. This may result in imposition of only restrictions on freedom of movement of all or only a select number of refugee depending on what would be considered the requirement of national security or public order.

The duration of the restrictions would also then depend on a requirement of national security or public order. When the purpose has been achieved the measures would have to

¹⁰⁴ Refer to discussion on the scope of the reservation and art.26, 5.1 above

cease unless still required. It is argued that this means that the measures or restrictions would have to relate or be proportional to the requirement.

Whether the restrictions and designation of residence is lawful will depend on the perceived requirement of the consideration of national security and public order.

5.1.2 National Security

The CSR51 and the 1967 Protocol have not defined national security. In order to establish a general understanding of the term in the context of refugee law we will discuss cases and literature interpreting discussing the concept and will apply that to the present case.

Grahl-Madsen considered the term threat to national security to include,

“If a refugee is spying against his country of residence, he is threatening the national security of that country...The same applies if he is engaged in activities directed at the overthrow by force or other illegal means of the government of his country of residence, or in activities which are directed against a foreign government, which as a result threatens the government of the country of residence with intervention of a serious nature”¹⁰⁵

Grahl-Madsen formulation focuses on the subversive activities of the refugee which have a direct impact on the host country. Accordingly activities which do not have the same impact would not amount to a threat to national security.

In the United Kingdom the House of Lords in *Secretary of State for Home Department v Rehman*¹⁰⁶ was of the opinion that requirement to show direct impact on host state limits the discretion of the executive in deciding how the interest of the state need to be protected. It was of the view that what is required is a real possibility of an adverse effect on the host state by the activities of the refugee. The UK is therefore not obliged to harbor a person

¹⁰⁵A. Grahl-Madsen, “*Expulsion of Refugees*,” in P. Macalister-smith and G. Alfredsson eds, p8

¹⁰⁶ [2001] UKHL 47

who is taking actions against another state, if that other state could realistically be seen by the executive as likely to take action against the UK.

In Canada the Supreme Court in *Suresh v Canada*¹⁰⁷ stated;

“A person constitutes a “danger to the security of Canada” if he or she poses a serious threat to the security of Canada, whether direct or indirect and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be serious in the sense that it must be grounded on the objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible”.

The courts reasoning suggest that not every threat would be regarded as a threat to national security. The threat needs to be serious, the suspicion objectively reasonable, based on evidence and the harm or risk substantial. The activities of the refugee and their likely impact on the host state or its citizens would be the determinant of whether the refugee poses a threat to national security or not. Hathaway¹⁰⁸ has proposed the following test;

“...a refugee poses a risk to the host state’s national security if his or her presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state’s most basic interests, including the risk of an armed attack on its territory or its citizens, or destruction of its democratic institutions.”

From this formulation the following are the key requirements;

- (a) refugees subversive activities or
- (b) presence,
- (c) objectively reasonable or possibility of direct or indirect inflicted substantial harm,
- (d) host states most basic interests.

¹⁰⁷ [2002] 1SCR 3(Can. SC, Jan.11,2002)

¹⁰⁸Hathaway, *The Rights of Refugees under International Law*, p.266

If these are met a state may be justified to determine a refugee as a threat to national security. Though the formulation was derived from discussion of threats to national security posed by a particular refugee provided for in art.9 of CSR 51, the same me equally apply to a determination of threats posed by a group of refugees. The phrase ‘consideration of national security’ covers the same concerns as threat to “national security”.¹⁰⁹ Therefore the general formulation will be applied in the discussion of the legality of the restrictions implemented by Malawi.

Though the determination of whether a particular situation threatens national security or not is in the discretion of the state, the discussion aims at undertaking an objective assessment of whether the measures undertaken pursuant to the reservation to art.26 can/could reasonably and objectively be justified on the requirement of national security.

The discussion will undertake the objective assessment based on available country reports from United Nations High Commissioner for Refugees, U.S Department of State Country Reports on Human Rights, Amnesty International Reports and those from other reputable institutions from 1993 to 2007.¹¹⁰

¹⁰⁹ The justification for closing Luwani Refugee camp was the threat to national security by refugee and not consideration of national security. See note 8 above.

¹¹⁰ The following country reports have been used for establishing country situation within Malawi from 1993 to 2006, Amnesty International Report -Malawi (From 1994-2006) (online)Amnesty Internationaleport,web.amnesty.org/web/ar1994.nsf/webafrcountries/MALAWI? , Country Report on Human Rights Practices Malawi- (from 1994 to 2006) (online) U.S. Department of State Human Rights Reports,www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm,World Refugee Survey 2001-Malawi (March 2001) (online) U.S Committee for Refugees , www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm

World Refugee Survey 2003-Malawi (June 2003) (online) U.S Committee for Refugees, www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm, World Refugee Survey 2004-Malawi (May 2004) (online) U.S Committee for Refugees, www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm, www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm, UNHCR Country Operations Plan 2002 - Malawi (July 2001) (online) UNHCR, www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm ,[The State of The World's Refugees 2000 - Mozambican refugees in Malawi](http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm) (November 2000) UNHCR State of the World's Refugees Country Chapters, (online) www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm ,[UK Home Office Immigration and Nationality Directorate Country Report - Malawi](http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm) (March 2006) UK Home Office, Immigration and Nationality Directorate Reports, (online) www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm , see Refernces for full list of reports considered.

5.1.2.1 Subversive Activities

Subversive activities include activities like, spying against country of residence, directed to wards overthrowing by force or other illegal means the host country government, or any activities directed against a foreign government, which as a result threatens the government of the country of residence with intervention¹¹¹. It is submitted that the threat posed by the activities in order to justify the measures imposed on all refugees should not be only those of individuals but rather of a representative number.

According to the U.S Department of State Country report of 1994, at the beginning of 1994, 700,000 Mozambicans remained in Malawi, down from a peak in excess of 1 million. The Government initially hesitated to take on the responsibility of a new refugee population, in part due to popular resentment that UNHCR support allowed refugees a lifestyle unattainable to many Malawians. Subsequently, the Government initiated plans to relocate the new refugees to a camp, converting a former prison for this purpose.¹¹²

The 1995 report records the remaining refugee population consists of approximately 900 "urban refugees" from Somalia, Zaire, Rwanda, and Burundi. Responding to local resentment over the presence of these refugees, the Government decided to establish a single refugee center with the support of UNHCR funding. In February these urban refugees rioted when the Government phased out cash payments and required refugees to live at its designated refugee center.¹¹³

The Malawi Government Official website only reports that the Government of Malawi adopts an encampment policy for all refugees and asylum seekers. There are two camps namely; [Dzaleka](#) and [Luwani](#) in Dowa and Neno Districts respectively¹¹⁴. The justifications or legal basis of the policy is not mentioned.

¹¹¹ See note 108 above

¹¹² <http://www.unhcr.org/cgi-bin/tehis/vtx/rsd/rsddocview.htm>

¹¹³ <http://www.unhcr.org>

¹¹⁴ <http://www.malawi.gov.mw/Povelty/Home%20Povelty.htm><http://www.malawi.gov.mw/Povelty/Home%20Povelty.htm>

Based on the reports the initial decision to designate the places of residence of refugees was not premised on the requirement of considerations of national security due to subversive activities perpetrated by refugees. The remaining issue is whether the continued enforcement of the measures can be justified in national security based on subversive refugee activities.

The reports from 1994 to 2006 disclose few incidents of alleged subversive activities of refugees. UNHCR News ¹¹⁵ reports of Eritrean asylum seekers who arrived in Malawi from Ethiopia on 14 August, 1999, were detained on allegations that they entered illegally using fake visas. They were detained at a detention center. Alerted to their imminent deportation they staged a protest on August 20 during which one of them was killed and several others reportedly wounded, were subsequently deported.¹¹⁶ In this case the asylum seekers were detained on allegations of using fake visas and not on the basis of their subversive activities posing a threat to national security.

In November 2005 the government revoked the refugee status of 15 refugees, claiming they had written a letter threatening the lives of the president and the refugee commissioner, a claim that police investigators had determined to be unfounded in 2003. They were detained and deported them to the Mozambican border. They returned, obtained a High Court order restraining the government from deporting them and granting them the right to apply for judicial review of the refugee committee's decision to revoke their refugee status. Fearing for their safety, the group went into hiding and later stayed in a UNHCR safe house in Mangochi.¹¹⁷

On April 22, 2006 security forces raided the UNHCR safe house in Mangochi, and forcibly deported them for a second time to the Mozambican border. Mozambican authorities denied the refugees entry and returned them to the Mangochi police station, where police rearrested and held them at Maula Prison. The government denied a UNHCR request to

¹¹⁵ ¹¹⁵ <http://www.unhcr.org/news/NEWS/3ae6b8211c.html>

¹¹⁶ <http://www.unhcr.org/news/NEWS/3ae6b8211c.html>

¹¹⁷ Country Report on Human Rights Practices 2006 - Malawi (2007) U.S. Department of State

transfer the group to a safe house, claiming they posed a threat to national security. The men remained in prison until resettlement to Sweden.¹¹⁸

The report does not indicate that the 15 refugee intended to overthrow the government or were engaged in spying against Malawi or were engaged in activities against foreign governments or how they were a threat to its citizens.

On 11 May 2007¹¹⁹ Government decided to close one of the refugee camps (Luwani Refugee Camp) and relocate the refugees to Dzaleka. The responsible Minister at a press briefing said the decision was because some refugees were a security threat to the Country. Example were cited of 46 Ethiopian who were intercepted at Mwanza border as they tried to cross into Mozambique and 64 other Ethiopians that were intercepted in May at Zobue border post hidden inside a fuel tanker destined for South Africa.

The cited examples show incidents of trafficking or smuggling of asylum seekers. The persons seem to use Malawi as a transit country. It was not clear from the reports how they posed the threat a threat to Malawi's security. The decision does not appear to have been based on the fear that the asylum seekers intended to overthrow the government or spying against Malawi or were engaged in activities against foreign governments or were a threat to citizens.

It may not be necessary for the refugees to actually engage in the activities, it would suffice that the activities raise an objectively reasonable or real possibility of directly or indirectly inflicted substantial harm which is based on objective evidence. A part from these instances the reports do not report of refugee activities that were regarded as subversive in the sense of activities directed at the overthrow by force or other illegal means of the government or in activities which are directed against a foreign government including the countries of origin, which as a result threatened the government of Malawi with intervention of a serious nature.

¹¹⁸ Country Report on Human Rights Practices 2006 - Malawi (2007) U.S. Department of State

¹¹⁹ <http://www.unhcr.org/news/NEWS/4656be2511.html> , also reported in the Malawi Daily times Newspaper

Therefore from the available reports there was no objective verifiable evidence of subversive activities of refugees that amounted to a threat to national security.

5.1.2.2 Presence

Threats to national security are not confined to refugee subversive activities, the settlement or residence of refugee in any place within the state may also in other cases pose a threat to national security. Art. 2 (6) of the OAU 69 requires that refugees be settled at a reasonable distance from their frontier of the country of origin. This may be understandable to avoid the settlement from being used for launching subversive activities against the country of origin and to avoid the possibility of the conflict in the country of origin spiraling into the host country through incursions into the refugee settlements by one of the parties to the conflict.

In Malawi the majority of refugees resided at the Dzaleka camp in Mwanza, and a second camp in Luwani in Mwanza that opened in October 2003.¹²⁰

The refugees hosted in Malawi come from Democratic Republic of Congo, Somalia, Rwanda and Burundi. These countries do not share a common border with Malawi. All the refugee countries of origin are in the Northern part of Africa further away from the camps. This may indicate a less likelihood of their using the camps as a base for launching attacks against their country of origin.

When the Government decided to close Luwani Refugee Camp which was closer to the border with Mozambique, it was not based on threats refugees posed to the security of that country as the reports do not disclose of any subversive activities launched by refugees against that country.¹²¹ It was reported in UNHCR World Country Survey of 2004, that Local authorities and press accused refugees from Dzaleka camp of illicit business deals,

¹²⁰ Country Report on Human Rights Practices 2004 - Malawi (2005) U.S. Department of State

¹²¹ <http://www.unhcr.org/news/NEWS/4656be2511.html>

taking over Malawian markets, and threatening national security¹²². The claims have not been corroborated or substantiated by other objectively assessable evidence.

The other reports¹²³ do not record of instances where refugees have used the camps for launching attacks against their countries of origin or neighboring countries. There was also no indication of whether the presence of refugees has threatened the security of the citizens.

Therefore from the available reports there was no objective verifiable evidence that the presence of refugee in any place within Malawi apart from the designated areas, threatened the national security or Malawi or neighboring countries.

5.1.2.3 Risk of substantial harm

The activities or presence of refugees should raise an objectively reasonable or possibility or suspicion of direct or indirect inflicted substantial harm. This would depend on the activities or presence of the refugees within a country. The suspicion needs to be objectively reasonable and based on evidence. For instance it was reported that Local authorities and press accused refugees from Dzaleka camp of illicit business deals, taking over Malawian markets, and threatening national security¹²⁴. This may indicate presence of suspicion of the refugees as posing a threat to national security. If this would be based on evidence it would create an objectively reasonable suspicion. In *Karker v France*¹²⁵ the refugee was considered a threat to national security on suspicion based objectively available evidence that was even presented to the court, that showed him to be an active supported of a movement that advocated violent action. The case exemplifies how reasonable suspicion should be grounded in objectively assessable evidence.

¹²² World Refugee Survey 2004 Country Report, <http://www.refugees.org/countryreports.aspx?id=135>

¹²³ See list in note 113

¹²⁴ World Refugee Survey 2004 Country Report, <http://www.refugees.org/countryreports.aspx?id=135>

¹²⁵ HUMAN RIGHTS COMMITTEE,(833/98)

Another instance would be that of refugees who were suspected of writing a letter threatening the life of the president.¹²⁶ If this was established, then it may have been used as a basis for the restriction of the movement of the concerned refugees but not all the refugees.

The threatened harm should also be an objectively reasonable or possibility of direct or indirect inflicted substantial harm. The suspicion alone is not enough but should be coupled with possibility of direct or indirect substantial harm. There should be a possibility that harm will occur. Where no such possibility exists the requirement would not be fulfilled. In the case of the written letter threatening the life of the president and without any possibility of the threat being carried, it may not meet the possibility requirement.

The possibility must be of direct or indirect harm substantial harm and not negligible harm. What would amount to substantial harm may vary according to the circumstances of the particular case. In the case of the written letter threatening the life of the president plus the possibility of it's being attempted, may be considered a substantial harm as it concerns the head of state that is the symbol of the nation.

Therefore from the available reports though some instances of suspicion of refugees were reported it is submitted they did not raise an objectively reasonable possibility of direct or indirect inflicted substantial harm.

5.1.2.4 Host States most basic interests.

The threat of substantial harm may not enough it should be directed against a basic interest of the state. The basic interest include the survival of the state, safety or security of citizens, military defenses, maintenance of domestic peace, and maintenance of peaceful relations with other states, prevention of destruction of democratic institutions, prevention

¹²⁶ See note 120 above

of armed attack, among others¹²⁷. The list though not exhaustive may illustrate the class of interests that may amount to most basic interest. For this purpose an objectively reasonable or real possibility of substantial harm to one or more of the above may qualify as a threat to national security.

From the preceding discussion and the available reports it can be observed that there has not been a threat of substantial harm directed against the survival of the state of Malawi. Refugees have not threatened the military defenses or maintenance of domestic peace. The safety or security of Malawi citizens has not been threatened by the movement or free choice of residence of refugees. Peaceful relations still subsist with its neighbors and other states. Democratic institutions and other constitutional institutions still thrive without any threat from the refugees. This although not being an exhaustive consideration of all Malawi's basic interest but still is indicative of the conclusion that presence or activities of refugees may not be a threat.

The above discussion generally indicates that the requirements of national security may not have justified the imposition or continued maintenance of restrictions on the movement and choice of residence of refugees lawfully within Malawi.

5.1.3 Public order

The consideration of public order can justify the designation of places of residence and restrictions on freedom of movement of refugees in Malawi under the reservation to art.26. The concept of public order recurs in several treaties¹²⁸ and may have different meanings. For the purpose of this discussion will consider the meaning in the context of Refugee law. Public order appears in art.2 and 32 of the CSR51 and art.1 (2) of the OAU Refugee Convention. Art. 32 concerns the expulsion of a refugee lawfully in the territory on the ground of national security and public order.

¹²⁷ *The Rights of Refugees under International Law*, p.266

¹²⁸ See art.12(3) ICCPR, art.9(2) ECHR of the 4th APS

While national security addresses threats emanating from outside the host country borders, public order addresses a general category of concerns focusing on the importance of maintaining basic internal security.¹²⁹ From the CSR51's *travaux préparatoires*, public order was intended to be a reference to acts prejudicial to the "peace and tranquility of society at large" and threats to state authority.¹³⁰ Refugees who commit serious crimes or obstinately refuse to abide by the laws and who refuse to conform their conduct to the basic manners and customs of the host state could be considered to disturb public order¹³¹.

In the case of expulsion of a refugee the "common criteria seems to be that public order is at stake only in cases where a refugee constitutes a threat to an uncertain number of persons carrying out their lawful occupations (habitual criminals, wanton killers), or to society at large, as in the case of riots and unrests, or traffic of drugs.¹³² Public order consideration extends beyond criminal activities. This concept clearly excludes poverty, ill health, economic and social considerations.

Situations concerning the violations or non respect of fundamental human rights may also be a threat to Public order. Rankin¹³³ in analyzing the meaning of public order in art.1 (2) of the OAU69 considers it as a concept that looks to the basic standards governing the state in its relation to the community and its individual members. The minimum standard of the concept may be characterized by three thresholds namely, non-international armed conflict, internal disturbances and tensions and widespread violations of human rights.¹³⁴

From the foregoing discussion three criteria may be used in determining activities or situation that disturb public order, namely;

¹²⁹ Hathaway, *The rights of Refugees under International Law*, p680

¹³⁰ Micah Bond Rankin, [Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on](http://www.unhcr.org/research/OAU_refugee_definition_thirty_years_on_2005), 2005, www.unhcr.org/research/

¹³¹ Hathaway, p683

¹³² Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, at art. 2, 32. at art. 32, p 130, para. 6.

¹³³ See note 133

¹³⁴ See note 133

- (a) activities that threaten a number of persons,
- (b) threats to society at large,
- (c) situations of non respect for human rights,

Criteria (a) and (b) apply in situations of expulsion of individual refugee for disturbing public order. The expulsion situations may require a higher threshold of disturbance than situations requiring the restrictions of movement and designation of places of residence. Though this being the case the two criteria still may be applicable in determining whether conduct of a refugee or refugee amounts to disturbance of public order necessitating the operation of the reservation to art.26

The three criteria will be used in discussing whether the conduct of refugees in Malawi has disturbed public order to justify the designation of places of residence and restrictions on freedom of internal movement.

5.1.3.1 Threats to Persons

Public order may be disturbed where refugees criminal activities (habitual criminals, wanton killers) constitute a threat to an uncertain number of persons carrying out their lawful occupations.¹³⁵ Refugees who commit serious crimes may be considered to disturb public order¹³⁶.

In Malawi the Penal Code¹³⁷ in Division 1 on Offences Against Public Order, outlines the serious and minor offences whose commission disturbs public order. The provision includes, s.38 Treason, s.39 concealment of treason, s.40 promoting war among Africans, s.41 Inciting to mutiny, s.42, Aiding soldiers or policemen in acts of mutiny among the

¹³⁵ Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951, Articles 2 – 11, 13-37* at art. 2, 32. art. 32, p 130, para. 6.

¹³⁶ Hathaway, p683

¹³⁷ Chapter 7:01 of the Laws of Malawi

serious crimes. The Code in sections 61 to 62 prescribes for minor offences, those affecting relations with foreign states and external tranquility.

A review of the available reports shows one reported instances of allegations of offences committed by refugees.

One of the reports¹³⁸ recorded that Local authorities and press accused refugees from Dzaleka camp of illicit business deals, taking over Malawian markets, and threatening national security. Taking over of Malawian markets is not a crime under the penal code not to be a crime in Malawi Penal code therefore may not be considered a threat to public order. The illicit business deals if of a very serious criminal nature would amount to a serious crime and a disturbance of public order. From the reports this was only an allegation and not substantiated.

Apart from this instance the reports do not report of other instances of refugees committing serious crimes which threatened an uncertain number of persons within Malawi carrying out their lawful occupations and resulted in disturbing public order.

5.1.3.2 Threats to the society at large

Threats to society at large, as in the case of riots and unrests, or traffic of drugs¹³⁹ can also amount to disturbances of public order. Therefore if refugees staged riots or other unrest while within Malawi which constituted a threat to the society at large, the government would be justified in exercising its right to designate places of residence of refugee and restrict their freedom of internal movement.

The duration of the measures would have to be proportional with the public order requirement, when the necessity ends the measures would also have to cease. The measures

¹³⁸ World Refugee Survey 2004 Country Report, <http://www.refugees.org/countryreports.aspx?id=135>

¹³⁹ Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951, Articles 2 – 11, 13-37* at art. 32, 130, para. 6.

would have to only apply to the participating refugees and not to the whole refugee population, unless it proved impossible to determine those not involved.

In the case of the Eritrean asylum seekers¹⁴⁰ who were detained for entering using fake visas. They staged a protest at the detention center after being alerted of their imminent deportation, resulting in the death of one of them and several others reportedly wounded. If these were not already detained, restrictions on their movement and choice of residence would have been justified if the staged protest constituted a threat to society at large. The measures would have been in force for as long as they were required. These would have only applied to the protesting refugees and not to all.

The reports do not record of other instances of riots or unrest involving refugees that threatened society at large and disturbed public order.

5.1.3.3 Non respect for human rights

The concept of public order has also been used to characterize the basic standards governing the state in its relation to the community and its individual members. This may be characterized by non-international armed conflict, internal disturbances and tensions and widespread violations of human rights.¹⁴¹ This characterization stems from a consideration of situations seriously disturbing public order which may compel a person to leave his place of habitual residence and seek refuge outside his country as provided for in art.1(2) of the OAU69.

This context concerns situations of the break down of the public order of the state generally. The existence of such a situation may be sufficient to compel person to leave and seek asylum or even compel a state to take extraordinary emergency measures to restore or maintain public order. It is submitted that the existence of such a situation may justify the

¹⁴⁰ See note 119 above

¹⁴¹ Micah Bond Rankin, *Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on*, 2005, www.unhcr.org/research/

imposition of proportional restrictive measures on freedom of movement and choice of residence of refugee in Malawi on the considerations of public order under the reservation to art.26.

5.1.3.3.1 Non-international armed conflict

Non-international armed conflict is a situation where peace and tranquility no longer exists, exclusive control of territory is lost, and society at large is threatened.¹⁴² The reports show that since the time of the introduction of the encampment policy, even before then, Malawi has not experienced non-international armed conflict where peace and tranquility no longer existed, exclusive control of territory was lost, and society at large was threatened.

5.1.3.3.2 Internal disturbances and tensions

Internal disturbances and tensions are situations of some seriousness and duration which are a threat to the state authority or to indeterminate numbers of people. Disturbances are said to occur when “the state uses armed force to maintain order” whereas internal tensions occur when “force is used as a preventive measure to maintain respect for law.”¹⁴³ These may include riots, isolated and sporadic acts of violence and other acts of a similar nature¹⁴⁴.

These situations have happened in Malawi during the transition period from a one party state to a multiparty state.¹⁴⁵ The report Malawi: Between the Referendum and the Elections reports of the situation when mid-ranking and junior army offices mutinied and attacked bases of the Malawi Young Pioneers (MYP) after the government failed to honor the undertaking to disarm them. The army intervened and forcibly disarmed the MYP. The

¹⁴² Rankin, based the interpretation on Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II.

¹⁴³ Rankin, *ibid* 142

¹⁴⁴ Article I(2) of Protocol II to the Geneva Conventions

¹⁴⁵ Malawi: Between the Referendum and the Elections May 1994 by WRITENET. <http://www.unhcr.org/>

army attacked the Ministry of Youth and other MYP installations in Lilongwe. The army then moved into MYP bases throughout the country. At least 30 people appear to have died in the operation.

Riots, isolated and sporadic acts of violence and other acts of a similar nature appear to have happened during this period. These situations though seem not to have recurred with the same severity since then. If the situation had been protracted the Government would have been acted within its rights under the reservation to art.26, if it had taken measures to restrict refugee residence and movement in consideration of public order. The report shows that this was the period of the repatriation of Mozambican refugees before the imposition of the encampment measures.

The reports do not record of other such instances involving the internal disturbances and tensions.

5.1.3.3 Widespread violation of the human rights

The third threshold of is the widespread violation of the human rights. Not each and every violation of human rights that would amount to disturbing public order but only serious violations to fundamental human rights that cause a substantial disruption to the community as a whole and to the basic principles that ought to govern relationships within a given community. To seriously disturb public order should be seen as event-type involving violence or threats against an indeterminate number of people or to society at large.¹⁴⁶ Fundamental human rights concerns those core set of human rights from which no derogation is permitted,¹⁴⁷ a violation of these on a sufficiently broad scale may be an indication that public order has been disturbed.

¹⁴⁶ Rankin, *ibid*

¹⁴⁷ Report of the Secretary-General submitted pursuant to Commission on Human Rights decision 2001/112. E/CN. 4/2002/103, 20 December 2001, para.2. [Secretary-General Report]. See specifically UN Human Rights Committee, General Comment No. 24, CCP/X/21/Rev.1 [CHR Emergency Comment]. The rights include; the right to life ,the prohibition of torture or cruel, inhuman or degrading punishment, the prohibition of slavery, slave-trade and servitude, etal.

It would be difficult to imagine a situation perpetrated by refugees in a host country that would fit or attain this standard. From available country reports Malawi does not seem to have experienced events perpetrated by refugees involving violence or threats against fundamental human rights of an indeterminate number of people or to society at large on a sufficiently broad scale to be an indication that public order had been disturbed to justify restrictions on movement and choice of residence of refugees.

Other concerns such as basic affronts to public morality or social norms of the asylum country could be deemed grounds for public order restrictions only in truly grave cases¹⁴⁸. In Malawi only in very grave cases would public order restrictions on the movement and choice of residence of refugees be justified on the basis of their being an affront to public morality or social norms. These may not be borne out by any objectively verifiable evidence in the available reports.

5.2 Conclusion

The discussion has shown that the restrictive measures on freedom of internal movement and choice of residence of refugees in Malawi can not be supported on the consideration or requirements of national security or public order. Therefore the measures do not fulfill the condition precedent for their imposition in accordance with the reservation to article 26 of CSR51. Therefore the measures are inconsistent with art. 26 as modified by the reservation. The inconsistency renders the measures unlawful in international law.

¹⁴⁸ Hathaway, p 686

6 Legal Consequences Of The Measures

The discussion will focus on legal consequences for Malawi resulting from the unlawful measures restricting freedom of internal movement and choice of residence of refugees in relation to other state parties and the refugees. The discussion will also focus on the enforcement measures available to the state parties and refugees.

6.1 Between Malawi and other state parties

Malawi as a state party to CSR51 has entered into legal relationship with the other state parties involving rights and obligations. It is bound¹⁴⁹ by the provisions of the convention from the date of its accession and has a good faith obligation¹⁵⁰ to implement and comply with the provisions.

Failure to fulfill the obligation may result in the responsibility of the state being engaged, from which a number of legal consequences will flow¹⁵¹. In this context state responsibility designates the legal consequences of an international wrongful act of a state, namely the obligations of the wrongdoer, on one hand and the rights and powers of any state affected by the wrong on the other hand.¹⁵² For a wrongful act to occur it is necessary for conduct consisting of an action or omission attributable to the state under international law and which constitutes a breach of an international obligation (or international law¹⁵³) of the state¹⁵⁴. There should also not exist circumstances precluding wrongfulness¹⁵⁵.

¹⁴⁹ See Cassese, *International Law*, p170

¹⁵⁰ Art.26 Vienna Convention on the Law of Treaties,

¹⁵¹ Aust, *Modern Treaty Law and Practice*, pp. 300

¹⁵² Cassese, pp.241

¹⁵³ The Decision of the France-Mexico Claims Commission in *Caire (The Estate of Jean –Baptiste Caire)* pp.530

¹⁵⁴ Art.2 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, August 10, 2001

¹⁵⁵ Cassese, *International Law*, pp.245-6, See also ILC Draft articles.

In this discussion the focus will be on the consequences of the measures restricting freedom of movement and choice of residence in the light of their unlawfulness. The reservation being lawful would not amount to an international wrongful act hence no consequences would flow from it.

6.1.1 Consequences of the measures

Under the provision of art.26 as modified by the reservation Malawi has an obligation to accord refugees lawfully within its territory the right to choose their place of residence and to move freely within its territory subject to regulations applicable to aliens generally, except where considerations of national security and public order so require.

The discussion in chapter 5 has shown that the restrictive measures on freedom of internal movement and choice of residence of refugees in Malawi are unlawful¹⁵⁶. As a consequence of the imposition and continued maintenance of the measures Malawi is in violation of the under art.26.

The violation of the international obligation amounts into a breach of international law which constitutes an international wrongful act.¹⁵⁷The ICJ in *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* stated;

“when a state has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect.”¹⁵⁸

From discussion in chapter 5 there exist no circumstances precluding wrongfulness.¹⁵⁹ Therefore Malawi’s responsibility will be engaged as a consequence of the breach.

¹⁵⁶ See Conclusion to chapter 5

¹⁵⁷ Evans, M, *International Law*, Oxford University Press, 2006, p.454

¹⁵⁸ ICJ Reports 1997, p7, (1998)37MLS

¹⁵⁹ No existence of consent of the other states, self defence, countermeasures in respect of an international wrong, force majeure, distress or necessity, See also Arts.20-24 of ILC Drafts

Following this the other state parties can invoke the responsibility of Malawi for the wrongful act. Treaty obligations are owed to all the other States parties. Under art. 48 (1) of the ILC Draft Articles any state other than an injured state is entitled to invoke the responsibility of another if the obligation is owed to a group of states including that state, and is established for the protection of a collective interest of the group.

The example of such group interest could be the obligations to protect human rights norms¹⁶⁰, which refugee rights are part of. Therefore any state party can intervene (without the necessity of showing that it has been injured) and request cessation of the restrictive measures, assurances and guarantees of non repetition under art.48 (2). The other states can the means provided in art.33 (1) of the UN Charter namely negotiation, enquiry, mediation, conciliation, arbitration, resort to regional agencies or arrangements or peaceful means to achieve cessation of the breach.

Failure to settle the matter by other means it can be referred to the ICJ under art.38.of the Convention. Under art.38 any disputes between states parties relating to the interpretation or application which can not be settled by other means shall be referred top the ICJ. In the present discussion the matter appear to relate to the application of the convention and not to its interpretation therefore within the mandate of the court.

6.2 Malawi and Refugees

The discussion will consider the consequences in international law of the measures under the CSR51 first then under general Human Rights law.

¹⁶⁰ Evans, see note 165, p.474

6.2.1 Under the CSR51

For implications to flow there should be first an obligation that Malawi owes to refugees in international law under the convention, that obligation should have been breached by Malawi and no circumstances precluding wrongfulness should exist.

6.2.1.1 Existence Obligation

The CSR51 remains a treaty between States, as such, treaty obligations are primarily owed to the parties and not the individual beneficiaries. This stems from the fact that traditionally individuals were not considered subjects of international law¹⁶¹. This was pointed out by the PCJ in *Danzing Railway Officials*¹⁶² case;

“According to a well-established principle of international law, [a treaty between Poland and Germany] being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations enforceable by the national courts.”

Modern practice indicates that individuals have become increasingly recognized as subjects (not as mere beneficiaries) of international law,¹⁶³ with obligations and corresponding rights. The extent of the rights and obligations still depend on the intention of the Parties¹⁶⁴.

From the preamble, the specific rights¹⁶⁵ and duties¹⁶⁶ in CSR51 it cannot be disputed that the very object of the Convention, according to the intention of the contracting parties, was the adoption of some definite rules creating individual refugees rights and obligations. A

¹⁶¹ Shaw, *International Law*, pp.182, O’Connell, *International Law*, pp.106-7

¹⁶² PCJ, Series B, No.15 (1928); 4ILR, pp.287

¹⁶³ Shaw, pp.183, Cassese, pp. 144-50

¹⁶⁴ Shaw, pp.184

¹⁶⁵ Art.12,13,14,15,16,26

¹⁶⁶ Art.2

reading of the Convention shows that apart from the obligations owed to other parties a state also owes obligations directly to individual refugees who are the beneficiaries¹⁶⁷. Walter Kälin,¹⁶⁸ observed that;

“It should be noted that the Refugee Convention remains a treaty between States. As such, treaty obligations are *not only owed to those individuals entitled by its guarantees*, but at the same time to the other States parties.”

It is submitted that the CSR51 also creates some binding obligations owed to refugees. Malawi therefore owes some obligation in international law to the refugees. The obligation extends not to all rights provided for under the convention, but those which are guaranteed by provisions that Malawi consented to be bound by.

In terms of art.26 Malawi has an obligation to accord refugees lawfully within its territory the right to choose their place of residence and to move freely within its territory subject to regulations applicable to aliens generally. This obligation is owed only to refugees lawfully within Malawi and may be limited whenever considerations of national security and public order require.

6.2.1.2 Breach and Consequences

The unlawfulness of the measures restricting choice of residence and freedom of movement of refugees in Malawi necessarily also implies a violation of the obligations owed to refugees. The violation implies a breach by Malawi of the international obligations under art.26 of CSR51.

The breach of international law has attendant consequences that flow from it¹⁶⁹. Whether refugees as holders of rights provided by art.26, can under the Convention invoke the

¹⁶⁷ Art.14,29,32,33,

¹⁶⁸ (2001)*Supervising the 1951 Convention on the Status of Refugees: article 35 and beyond*, (online) UNHCR , www.unhcr.org

responsibility of Malawi, seek cessation of the wrongful policy and redress for the breach will depend on whether the convention also endows them with procedural rights.

Under the CSR 51 states appear to have only granted refugees substantive rights and not procedural rights¹⁷⁰. Therefore refugees do not possess procedural rights to petition international bodies to enforce compliance with the treaty obligations¹⁷¹. This may be contrasted with states parties that have procedural rights under art.38.

The absence in CSR51 of procedural rights for petition international bodies to enforce compliance with the treaty obligations at international level is a serious blow to the protection of refugee rights guaranteed under the convention.

6.3 Human Rights Consequences

Refugee rights are fundamentally human rights.¹⁷² The rights in the Human Rights treaties are complimentary¹⁷³ to those in the Refugee Convention, therefore readily applicable and relevant to the protection of rights of refugees. From the discussion in chapter three it was observed that the rights in art.26 of the Convention are also guaranteed for every person in other human rights conventions.

These rights are available to every person within the territory of a state party¹⁷⁴ and extend to refugees within a territory of a state party independent of the CSR5. Malawi being a party to these conventions without reservations to the articles providing the freedom of movement and residence has a binding legal obligation to guarantee the rights to refugees

¹⁶⁹ See note 156

¹⁷⁰ See Cassese, pp.146-50 for discussion of individual substantive and procedural rights

¹⁷¹ Refugees have procedural rights at national level under ss.41 (1) on the right to access to any court, tribunal with jurisdiction for final settlement of legal issues, s.41 (2) right to an effective remedy by a court of law for acts violating the rights and freedoms granted by the Constitution.

¹⁷² Gorlick, Brian, *Human Rights and Refugees: Enhancing Protection through International Human Rights Law*, Nordic Journal Of International Law 69:117-177,2000

¹⁷³ Gorlick, pp171

¹⁷⁴ Malawi is a party to both conventions

in its territory without discrimination¹⁷⁵. Failure to fully perform the obligation may lead to consequences.

The measures and encampment policy form the discussion above may also violate the rights under these conventions¹⁷⁶ the refugees may after exhausting local remedies have an avenue to lodge a complaint in international law.

6.3.1 Under The ICCPR Mechanism

Under the ICCPR regime, states have an obligation to respect and ensure that all individuals within their territory and subject to their jurisdiction enjoy the rights provided by the Covenant¹⁷⁷. Malawi as a state party has an obligation under art.12(1) to ensure that all person, including refugees lawfully within its territory have the liberty of movement and freedom to choose residence. For those that are also parties (Malawi is one of them) to the Optional Protocol to the International Covenant on Civil and Political Rights, individuals within their territory can lodge complaints to the Human Rights Committee.¹⁷⁸ Under art.2 an individual who claim a violation of rights under the ICCPR after exhausting local remedies¹⁷⁹ can submit a written communication for consideration¹⁸⁰. The Committee, will then examine if a state party has violated this individual's human rights, as laid down in the ICCPR. The procedure, although written and confidential, can be compared to court proceedings. The Committee's decision, which is called a 'View', is not 'directly' legally binding. States have, however, accepted the Committee's competence to interpret the ICCPR¹⁸¹. If the Committee finds a human rights violation, states parties have an

¹⁷⁵ Gorlick, pp171

¹⁷⁶ The measures appear not to fulfill the limitation in ICCPR Art.12(3) and ACHPR at.12 (2)

¹⁷⁷ Art.2

¹⁷⁸ Art.1 of the Protocol,

¹⁷⁹ Art.5 (2) (b)

¹⁸⁰ Brian Gorlick, *Human Rights and Refugees: Enhancing Protection through International Human Rights Law*, Nordic Journal Of International Law 69: pp174-175

¹⁸¹ Persuad, Santhash, p3

obligation to repair this violation, under the provisions of the ICCPR, which are in turn legally binding.¹⁸²

Therefore a refugee can after exhausting the local remedies¹⁸³, use this mechanism by submitting a written communication alleging a violation of the rights in art.12 (1) of the ICCPR by Malawi through the restrictions on the movement and residence. The Human Rights Committee would have to notify Malawi¹⁸⁴. It will after examining the communication notify its views to Malawi and the refugees. If the Committee finds a human rights violation, Malawi would have an obligation to repair the violation.

Though this procedure is available it should be noted that very few communications have been submitted by asylum-seekers or refugees, and even fewer have been found admissible by the Committee.¹⁸⁵ A significant number of states unfortunately refuse to comply with the Committee's Views despite the fact that Views are made public and thus create a certain pressure. They either do not respond to the Committee's request for information on the implementation of the View, reiterate that the Committee made a wrong decision or simply refuse to take appropriate measures.¹⁸⁶

Irrespective of the shortfalls the mechanism can be utilized to enforce the compliance by Malawi of its obligation to refugees.

6.3.2 ACHPR Mechanism

The African Charter of Human and Peoples Rights in art.12 (1) guarantee's the freedom of movement and residence. The Charter in art.1 places an obligation on state parties to adopt

¹⁸² McGoldrick, Dominic, *The Human Rights Committee: its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford University Press, 1999; 151

¹⁸³ Through Judicial Review in the High Court in Malawi. For discussion of the procedures see Bradley and King, *Constitutional and Administrative Law*, Pearson, Longman, 2003

¹⁸⁴ Art.4

¹⁸⁵ Persuad, Santhash, p3

¹⁸⁶ Persuad, Santhash, p3

legislative and other means to give effect to rights, duties and freedoms enshrined in it. This is an obligation to ensure effective enjoyment of the rights by the individuals without distinction.

The charter provides mechanisms for the enforcement of the rights or ensuring compliance with Charter obligations by states through the African Commission on Human and Peoples Rights established in art.30. The Commission can consider state party¹⁸⁷ and individual complaints¹⁸⁸ concerning violations of the provisions of the Charter. The objective of the individual complaints mechanism is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of.¹⁸⁹

The refugees having fulfilled the requirements in art.56 can submit a communication to the Commission alleging violation of the rights in art.12 (1) by Malawi through its restrictive measures on movement and the encampment policy. The Commission would notify Malawi and if the measures continue it will in accordance with its procedures issue a decision. The only draw back is that the decision is not binding and its enforcement depends on the good will of the concerned state party, in this case Malawi.

The above are some of the legal consequences that may flow from the unlawful policy by Malawi restricting the movement and choice of residence of refugees.

¹⁸⁷ Art.43

¹⁸⁸ Art. 55, Though it's disputed whether this provision is the legal basis for individual complaints. See Steiner and Alston, *International Human Rights in Context*, (Oxford University Press,2000),pp.920-24

¹⁸⁹ *In the Free Legal Assistance Group Case, 1996*

7 Conclusion

“Exile is strangely compelling to think about but terrible to experience”

Edward, W .

“Refugees are for the most part victims of human rights abuses. And more often than not, the great majority of today’s refugees are likely to suffer double violation: the violation in their own country of origin which will usually underlie the flight to another country; and the denial of a full guarantee of their fundamental rights and freedoms in the receiving state.”¹⁹⁰

The above quotation rightly puts in perspective the observation and conclusion of the thesis. The thesis set out to discuss the legality in international law of the reservations made by Malawi to CSR51 and the measures restricting the movement and choice of residence of refugees. Freedom of movement and choice of residence is one of the key rights for refugees without which the enjoyment of the other rights will be greatly constrained.

The consequences of the breach under the CSR51 for Malawi in relation to the other state parties differ from those of refugees. While the other state parties have an avenue for seeking cessation of the wrongful act and ensuring compliance the refugees do not have such procedural rights. This difference though justified by the fact that only states are parties to the convention and only they can decide what rights refugees can benefit from the convention, leaves the beneficiary of the rights and the individual the protection of whose rights the convention seeks to protect without an effective mechanism of enforcing compliance in cases of violations. This may further be compounded by the fact that states

¹⁹⁰ Maluwa, Tiyanjana,

are general unlikely for political considerations to condemn other states for failure to fulfill the treaty obligations unless their interests or that of their nationals are affected.

Refugees are only left with a complimentary enforcement mechanism through the Human rights treaty bodies whose decisions as shown in the preceding chapter lack effectiveness as they rely on the goodwill of the concerned states for their implementation. The lack of an effective enforcement mechanism for the rights of refugees was a great omission and a flaw of the international refugee law.

It should be concede that a full assessment of the legality of the measures and effect on the enjoyment of rights by refugees was impeded by absence of a written Refugee Policy in Malawi and the absence of official documentation explaining the reasons or justifications for the encampment policy. In the absence, the thesis only based its discussion and conclusions secondary sources, through country reports. Despite this limitation the conclusion drawn are still valid.

It should be pointed out that the conclusion of the thesis does not imply that Malawi does not have a right to restrict the movement and choice of residence of refugees. The thesis only demonstrates that according to the wording of the reservation to art.26 such restriction can only be made in if the specified preconditions exist. Failure to meet the requirements would lender any restrictions unlawful. It is from this premise that the thesis concludes that after an objective analysis the measures restricting the movement of refugees and choice of residence of refugees in Malawi do not meet the specified requirements hence unlawful under international law.

“The Lord also will be a refuge for the oppressed, a refugee in times of trouble.”

Psalms 10:9

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