



Fahamu Refugee Programme Project on Domestic Refugee Law Terms of Reference for Contributors

Introduction

Under Fahamu's Refugee Programme is a project to produce rigorous critical legal reviews (the Reviews) of domestic refugee legislation or the legal framework for refugee protection in all states of the global south with such legislation or legal framework¹ (the Project). In its first phase, the Project will focus on East Africa, countries of the Southern African Development Community (SADC) and Southeast Asia. The Project coordinators are Marina Sharpe (East Africa), Fatima Khan (SADC countries) and Martin Jones (Southeast Asian countries) (the Project Coordinators).

The Reviews will be drafted by volunteer contributors (the Contributors), edited and reviewed by one or more of the Project Coordinators and peer reviewed by outside specialists. Each Review will be published for comment on the Southern Refugee Legal Aid Network (SRLAN) website and, subject to receipt of a publishing contract, again in regionally themed monographs that will collate all Reviews at the conclusion of phase one of the Project (the Project Monographs). Contributors may wish to publish reviews in a peer reviewed academic journal, and should discuss this with the Project Coordinators.

These terms of reference set out and elaborate (i) the Project context; (ii) the Project objectives; (iii) the proper scope and structure of Reviews of domestic legislation; (iv) the process by which Reviews will be peer reviewed; (v) the method of publication for each Review; and (vi) the Project timeline. These terms of reference should inform Contributors regarding what is expected of them and ensure consistency in scope and structure across all Reviews.

Context and Objectives

Less than 1% of refugees will be 'resettled' to countries where their rights are respected; most will remain in countries of asylum in the global south where the observance of rights for everyone, but especially refugees, is generally deteriorating. The basic infrastructure for enforcing refugee rights is missing in most countries. Forty-five states have not ratified the *1951 Convention relating to the Status of Refugees* (the '51 Convention) or its 1967 Protocol, some of them hosts to major refugee populations. Furthermore, few states in the global south have domestic legalisation to regulate refugee matters. Where domestic legislation does exist, it is often not in conformity with the standards

¹ A draft list of such states is attached hereto as Annex A.

of the '51 Convention, regional refugee law instruments² or international and regional human rights law,³ and in some cases domestic refugee law conflicts with domestic standards such as those set forth in national constitutions. Most southern states are thus in urgent need of law reform to bring their domestic refugee law into conformity with international standards. The Project's objective, therefore, is to produce Reviews that will highlight the gaps in and shortcomings of domestic refugee laws, in order to promote law reform and to provide the basis for domestic advocacy and strategic litigation.

Scope and Structure

Each Review should provide rigorous critical analysis of domestic refugee legislation or the domestic legal framework for refugee protection, using international refugee law, regional refugee law, international human rights law, regional human rights law and/or, if appropriate, domestic human rights standards contained in instruments such as the national constitution as benchmarks (see footnotes 2 and 3 and Annexes B-D below for a non-exhaustive list of suggested benchmark instruments).

The outline below suggests a structure for Reviews.

1. Introduction⁴

- 1.1. Overview of state X, including government attitudes towards human and refugee rights and policies towards refugees and other migrants.
- 1.2. Overview of the refugee situation in state X, including numbers, locations and history of refugee populations and movements.
- 1.3. Overview of legal profession, presence or absence of the rule of law in state X, and the applicability of international law in domestic proceedings (i.e. how are international obligations received into the domestic law of the state – is the jurisdiction monist or dualist?).

2. Overview of availability of data concerning state X and its laws and practice, noting main sources and limitations of sources

3. Overview of refugee rights framework applicable in state X⁵

- 3.1. Overview of international and regional refugee instruments that state X has ratified, noting any reservations and declarations (see Annex B).
- 3.2. Overview of international and regional customary norms relevant to refugees, noting any formal statements of state X concerning these norms (see Annex C).
- 3.3. Overview of international and regional human rights instruments that state X has ratified, noting any reservations and declarations (see footnote 3 and Annex D).
- 3.4. Overview of domestic human rights standards applicable by virtue of state X's constitution or other relevant legal instruments.⁶

² Such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees.

³ Such as the 1948 Universal Declaration of Human Rights, 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1969 American Convention on Human Rights, the 1981 African Charter on Human and Peoples' Rights and the 1989 UN Convention on the Rights of the Child.

⁴ The introduction should provide an outline (or road-map) to the paper as a whole, identifying the structure of the paper and key findings in advance.

⁵ While this section should focus on treaties ratified by the state, treaties which the state has signed but not ratified should also be identified (along with any known plans to ratify the treaty).

⁶ Relevant provisions may include human rights legislation prohibiting discrimination and administrative tribunal legislation prescribing minimum procedural standards.

4. Overview of state X's refugee legislation and any regulations promulgated thereunder
 - 4.1. Current refugee legislation and any regulations, including any legislation that applies to refugees by virtue of them being non-citizens of state X (e.g. immigration legislation).
 - 4.2. Legislative history if current refugee law in state X repeals state X's prior law.
 - 4.3. Future legislative developments if a new law is anticipated or under discussion.

5. Critical legal analysis of the rights of refugees, using rights framework outlined at 3 and any relevant issues relating to practice outlined at 2 above as the benchmarks (see also Annex E)
 - 5.1. Acceptance of the category of refugee
 - 5.1.1. Process by which refugee status is recognized
 - 5.2. Civil rights
 - 5.2.1. Non-discrimination
 - 5.2.2. Equal access to and protection of the law
 - 5.2.3. Freedom of conscience and religious practices
 - 5.2.4. Free movement
 - 5.2.4.1. Choice of residence
 - 5.2.4.2. Freedom from detention
 - 5.2.5. Documentation
 - 5.2.5.1. Right to administrative assistance
 - 5.2.5.2. Right to identity document
 - 5.2.5.3. Right to travel document
 - 5.3. Economic rights
 - 5.3.1. Right to property
 - 5.3.1.1. Moveable and immovable property
 - 5.3.1.2. Artistic rights and industrial property
 - 5.3.1.3. Transfer of assets
 - 5.3.2. Employment rights
 - 5.3.2.1. Wage-earning employment
 - 5.3.2.2. Self-employment
 - 5.3.2.3. Practice of a liberal profession
 - 5.3.2.4. Social security
 - 5.3.2.5. Freedom of association
 - 5.3.3. Public relief
 - 5.3.3.1. Rationing
 - 5.3.3.2. Housing
 - 5.4. Right to Education
 - 5.5. Prohibition on expulsion and refoulement
 - 5.6. Prohibition on prosecution for illegal entry
 - 5.7. Other refugee rights

6. Conclusion, including law reform recommendations

To avoid Reviews reading as a 'laundry-list' style catalogue of rights violations, appropriate and relevant additional information should be provided. For example, the Contributor may want to consider how the treatment of refugees compares to that received by comparator groups such as immigrants. The Contributor may also want to outline the practical effects of rights violations, for example by detailing how refugees cope with restrictions on, for example, the right to work in state X or violations of freedom of movement in state X.

Peer Review

Each Review will be edited and reviewed by one or more of the Project Coordinators for style and substance to ensure consistency of presentation across Reviews and correct legal analysis. The Project Coordinator(s) will provide comments as necessary, pursuant to which the Contributor will revise his or her Review. The Project Coordinator(s) will continue to provide comments and the Contributor will continue to revise his or her Review until a final draft is agreed between the Contributor and the Project Coordinator(s). If a final draft cannot be agreed, the Project Coordinators may choose not to include the Contributor's Review in the Project. In such cases, the Contributor retains full rights to his or her Review.

The interim draft will be posted on the SRLAN website for comment and may be submitted to conferences for comments. The Contributor will revise the Review pursuant to comments received via the website and at any conferences.

Agreed final drafts will be peer reviewed by outside specialists. In some cases, such as where the Review is submitted for publication in a peer reviewed academic journal, the Project peer review process will be substituted by that of the journal.

Publication

Each Review will be published for comment as a working paper on the SRLAN website and, subject to receipt of a publishing contract, once it is finalised in the relevant Project Monograph. Contributors may wish to publish reviews in a peer reviewed academic journal, and should discuss this with the Project Coordinators.

Timeline

Reviews should be finalised (including the process of peer review) within 8 months of the Contributor's agreement to participate in the Project and published within a further three months. It is hoped that the Project will be concluded and the Project Monographs published within three years of 1 November 2008.

Further Information

If you have any questions or concerns, please contact Marina Sharpe at marina@fahamu.org, Fatima Khan at fatima.khan@uct.ac.za or Martin Jones at martindavidjones@gmail.com.

Annex A
Draft List of States With Domestic Refugee Law

CENTRAL ASIA

Kazakhstan
Kyrgyz Republic
Russian Federation
Turkmenistan

CENTRAL AND SOUTH AMERICA

Argentina
Belize
Bolivia
Brazil
Chile
Colombia
Costa Rica
Ecuador
Mexico
Nicaragua
Panama
Paraguay
Uruguay
Venezuela

EUROPE

Albania
Armenia
Azerbaijan
Belarus
Bosnia and Herzegovina
Croatia
Georgia
Macedonia
Montenegro
Turkey
Ukraine

MIDDLE EAST AND NORTH AFRICA

Algeria
Iran
Mauritania

SUB-SAHARAN AFRICA

Angola
Benin
Burundi
Cameroon
Congo-Brazzaville
DRC
Ethiopia
Ghana

Guinea
Lesotho
Liberia
Malawi
Mozambique
Namibia
Niger
Kenya
Rwanda
Senegal
Somalia
South Africa
Sudan
Tanzania
Uganda
Zambia
Zimbabwe

EAST, SOUTH AND SOUTH EAST ASIA

Bangladesh
Cambodia
China
East Timor
Hong Kong
Indonesia
India
Japan
Malaysia
Nepal
Pakistan
Philippines
Sri Lanka
South Korea
Thailand

Annex B
Refugee Law Instruments

International and regional refugee instruments to be considered include but are not limited to the following:

- International refugee instruments, including:
 - Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.
 - Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.
- Regional refugee instruments, including:
 - Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85), 17 April 1998.
 - Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entered into force June 20, 1974
 - Organization of American States Convention on Territorial Asylum, Mar. 28, 1954, 1438 U.N. 129, OAS Treaty Series, No. 19.
 - Organization of American States Convention on Diplomatic Asylum, Mar. 28, 1954, 1438 U.N. 104, OAS Treaty Series, No. 18.
- Other international instruments, including:
 - Local, regional or international peace agreements or comprehensive plans of action to resolve armed conflicts or protracted refugee situations
 - Memoranda, agreements, aide memories, note verbales, cooperation agreements and other instruments entered into or exchanged with UNHCR

Annex C Customary Law

The issue of customary international law is one that is fraught with much debate. Without attempting to resolve the debate, we wish that all reviews at least turn their attention to international and regional customary norms that may provide rights to refugees (or limit state actions towards refugees). Specifically, consideration of such norms should include but are not limited to the following:

- A customary norm against *refoulement*
 - Of refugees
 - Of individuals at risk of torture
 - Of individuals at risk of life, including due to the imposition of capital punishment
- A customary norm granting the right to seek asylum
 - Of refugees generally
 - At particular locations, for example at diplomatic and consular posts

The analysis need not be exhaustive with respect to the existence of customary norms.

Annex D
International Human Rights Instruments

International human rights instruments, including but not limited to the following:

- International human rights instruments, including:
 - International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.
 - International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (including the Optional Protocol and the Second Optional Protocol).
 - International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969.
 - Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.
 - Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.
 - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003.
 - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.
 - Universal Declaration of Human Rights (1948), G.A. res. 217A(III).
- Relevant regional instruments should also be considered.

Annex E Rights of Refugees

The following is not intended as an exhaustive list of articulations of the relevant list of rights of a refugee. It is based largely upon the rights contained in the *Convention Relating to the Status of Refugees*. Unless stated otherwise, the rights reference the *Convention*.

- Acceptance of the category of refugee: Article 1(A)(2)
 - Process by which refugee status is recognized
 - Opportunities to appeal or otherwise challenge refugee status decisions
- Civil rights
 - Non-discrimination
 - Equal access to and protection of the law
 - Freedom of conscience and religious practices
 - Free movement
 - Choice of residence
 - Freedom from detention
 - Documentation
 - Right to administrative assistance
 - Right to identity document
 - Right to travel document
- Economic rights
 - Right to property
 - Moveable and immovable property
 - Artistic rights and industrial property
 - Transfer of assets
 - Employment rights
 - Wage-earning employment
 - Self-employment
 - Practice of a liberal profession
 - Social security
 - Freedom of association
 - Public relief
 - Rationing
 - Housing
- Right to Education
- Prohibition on expulsion and *refoulement*
- Prohibition on prosecution for illegal entry
- Other refugee rights