PROMISES TO KEEP:
INDIVIDUAL RIGHTS OF
REFUGEES AND OTHERS UNDER
INTERNATIONAL HUMAN
RIGHTS CONVENTIONS AND
THE ZAMBIAN CONSTITUTION

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ABSTRACT
This article compares the status of five human rights accorded to refugees and others
under the various international and regional human rights instruments to which
Zambia is a party with municipal constitutional provisions and laws. The rights in
question are the right to seek asylum, right to freedom from discrimination, right to
freedom of movement, right to association, right to information. The article argues
that an extension of the equitable doctrine of estoppel prevents Zambia from
enforcing constitutional and statutory provisions that are in contravention of its
international obligations.

I INTRODUCTION

The woods are lovely, dark and deep
But I have promises to keep
And miles to go before I sleep
And miles to go before I sleep.
– R Frost Stopping by Woods on a Snowy Evening

Robert Frost’s poetic soliloquy speaks of the affairs and commitments of
life which curtail more aesthetic passtimes. One such commitment of life
in Zambia is constitutional revision. For a number of years groups both
inside and outside of the Zambian government have called for revision of
the Constitution of Zambia Act, 1991 (‘the Constitution’). A focal point
of this proposed process of revision has been Part III of the Constitution
which announces the ‘fundamental rights and freedoms of the
individual’. This process of revision is of no small importance to the
nearly 300 000 refugees who by April of 2002 resided in Zambia either in
refugee camps and settlements or as spontaneously settled persons close

* Country Director, Jesuit Refugee Service Zambia. The author wishes to thank the anonymous
reviewers of this article for their helpful comments and suggestions for improvement.
1 Articles 11–32 of the Constitution.
2 Article 11 of the Constitution.

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to the borders of Angola and the Democratic Republic of Congo (‘DRC’).

I will compare and contrast Part III with the commitments to which Zambia has subscribed pursuant to its accession or ratification of various international human rights covenants and conventions. The Human Rights Committee of the United Nations Social and Economic Council noted in its 1996 report on Zambia that it took ‘note of the establishment of a Commission to review the Constitution and of the adoption of measures designed to strengthen the rule of law’. 3 The Committee’s more or less optimistic view was based upon statements made to it by Zambian representatives that the ‘national debate on the provisions of the new constitution was already far advanced’ and that ‘[c]are would be taken during the technical drafting stage to ensure compatibility with international human rights instruments’. 4

More than six years have elapsed since those views were expressed in New York. If the discussion for constitutional revision was ‘far advanced’ at that time and yet no revisions have been forthcoming, one wonders how government officials would characterise current reflections on the Constitution in the light of international human rights instruments. Regardless of what terms are used to describe this state of affairs, the fact remains that since 1991 there have been no amendments to Part III of the Constitution. 5

I argue that while Zambia’s reservations filed along with its accession to the Convention Relating to the Status of Refugees (CSR) and other restrictions upon the human rights of refugees find support in provisions of the Constitution, Zambia’s subsequent accession to other international human rights covenants, particularly the International Covenant on Civil and Political Rights (ICCPR) and the first Optional Protocol accompanying it, have rendered those reservations and the concomitant constitutional provisions nullities as a matter of international law.

I will not consider all human rights, 6 but will focus on the right to seek asylum, the right to freedom from discrimination, the rights to freedom of movement and association and the right to information. For the sake of convenience I will refer to these rights as the ‘five rights’. This article is divided into five sections including this introduction. The second section identifies and explains constitutional provisions relevant to the rights of refugees. The third section looks at corresponding provisions in

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5 While Act 18 of 1996 amended several provisions of the Constitution, Part III pertaining to individual rights was not touched. An explanation for this may be that the National Assembly can only amend Part III after a national referendum as set out in art 79(3).
6 The rights to a nationality and to employment, while crucial for refugees in Zambia, will not be considered in this article.
international human rights treaties to which Zambia is a party. The fourth section presents a legal analysis of the results of the conflicts between constitutional and treaty provisions. The final section sets out the conclusions of the study.

II THE CONSTITUTION OF ZAMBA AND THE FIVE RIGHTS

The Constitution of Zambia was not written with refugees in mind. Nonetheless, the rights accorded persons under the Constitution and the manner in which those rights are restricted affect refugees in Zambia. Article 11 of the Constitution extends to ‘every person in Zambia’ the rights to life, liberty, security, protection of law, freedom of conscience, expression, assembly, movement and association as well as other rights and goes on to recite that the rights announced are irrespective of ‘race, place of origin, political opinions, colour, creed, sex or marital status’ but are subject to enunciated limitations. 7 Thus it is clear that refugees in Zambia, are rights holders under the Constitution. It is also clear that restrictions on the constitutionally guaranteed rights of refugees would also constitute restrictions on the rights of Zambian citizens.

As those who have studied the provisions of Part III are well aware, it is often the case that rights are first announced and then the limitations of the rights are specified. For example, art 12(1) guarantees the right not to be deprived of life while art 12(3) sets out constitutional exceptions for the use of deadly force including, surprisingly, defence of property. 8 As this example illustrates, constitutional limitations of the fundamental rights can significantly narrow the scope of the right itself.

The right to seek asylum is not explicitly mentioned in the Constitution. Again, this is unsurprising. Apart from art 16 of the German Constitution, 9 the right is not mentioned in most constitutions of the world’s nations. Asylum is a status accorded to non-inhabitants, those who are ‘outside the country’ of nationality 10 and therefore rather by way of exceptional circumstance than everyday occurrence in the life of a nation. Nonetheless other provisions of Part III of Zambia’s

7 Article 11 recognises and declares that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely: (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, expression, assembly, movement and association; (c) protection of young persons from exploitation; (d) protection for the privacy of his home and other property and from deprivation of property without compensation; and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

8 Article 12(3)(a) of the Constitution.

9 Article 16(a)(1) of the German Basic Law provides that anybody persecuted on political grounds has the right of asylum.

10 Article 1(A)(2) of the CSR.
Constitution do have a bearing on this right. Article 13 provides for protection of the right of personal liberty but among the ten listed exceptions to this right is one that permits arrest ‘for the purpose of preventing the unlawful entry of that person into Zambia’.\(^{11}\) Moreover, art 13 rights are among those to which derogation is permitted during states of emergency\(^{12}\) as provided in art 25.\(^{13}\) The power to take ‘measures for the purpose of dealing with any situation existing or arising during that period’ would seem to include sealing a border and prohibiting entry.

A second problem with the right to asylum is found in Zambian legislation. The Refugee Control Act of 1970 contains a provision concerning non refoulement which is clearly at odds with the provisions of art 33 of the CSR. Under this Act non refoulement is granted only if there is a threat of persecution based on political opinion or threat of bodily harm.\(^{14}\) The CSR standard for non refoulement is a threat to life or liberty based on any of the five grounds for asylum.\(^{15}\)

Freedom from discrimination is accorded to any person in Zambia. As noted earlier, art 11 makes non-discriminatory treatment a hallmark of all fundamental rights. Nonetheless, when the Constitution addresses the right to freedom from discrimination in art 23, the effort expended is to list circumstances and situations in which discriminatory treatment is permissible. The first words of the first clause of the article set the tone. They are words of exception: ‘subject to clauses (4), (5) and (7)’. The article then announces the right: ‘no law shall make any provision that is discriminatory either of itself or in its effect’.\(^{16}\) The term ‘discrimination’ is defined as different treatment based on, among other grounds, place of origin so arguably refugees, who, by definition have non-Zambian origins are protected. However, art 23(4) exempts the application of art 23(1) ‘with respect to person who are not citizens of Zambia’. Also exempted from the protection against discriminatory treatment are laws relating to

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11 Article 13(1)(j) of the Constitution.
13 Article 25 of the Constitution states ‘[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 13, 16, 17, 19, 20, 21, 22, 23, or 24 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force, or measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question’.
15 Article 33(1) of the CSR.
16 Article 23(1) of the Constitution.
marriage, adoption, divorce, burial, devolution of property, and matters covered in customary law.\textsuperscript{17} Any vestige of protection for refugees against discriminatory treatment is completely eradicated in art 23(7) which permits laws which restrict the right to privacy of home and other property (art 17), freedom of conscience (art 19), freedom of expression (art 20), freedom of assembly and association (art 21), and freedom of movement (art 22), based on grounds, among others of alienage. In theory, not only could refugees be denied the right to practice their religion, but according to this provision in art 23, so could women. This is, to say the least, a disturbing claim, so I include the language of art 23(7) in full at this point:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by Articles 17, 19, 20, 21 and 22, being such a restriction as is authorised by clause (2) of Article 17, clause (5) of Article 19, clause (2) of Article 20, clause (2) of Article 21 or clause (3) of Article 22, as the case may be.

The clauses referred to in the articles in question, with the exception of art 20(2) – which is an error and should refer to clause (3), each permit derogation on grounds of defence, public safety, public order, public morality, or public health. It should be noted that none of these terms are defined within the Constitution\textsuperscript{18} and to survive constitutional challenge a discriminatory law need only to be shown to ‘reasonably required’.\textsuperscript{19} Moreover, the burden of proof is clearly placed on the person complaining of the government action to show that it was not ‘reasonably justified in a democratic society’. Thus the presumption of law is clearly that any law is reasonably so justified until it is shown not to be.

Two hypothetical examples might clarify the extent of these exceptions. One could imagine that the National Assembly would hold the opinion that refugees are untruthful by nature and their utterances lead to widespread confusion in Zambia. Legislating under the public morality or public order provision, the legislature could prohibit refugees from speaking publicly. In the second hypothetical one could assume that in order to protect public health the National Assembly forbids all women, being, in its judgment, too prone to emotional outbursts, from going to churches. Arguably each of these pieces of legislation would survive challenge because each could be shown to be legislatively reasonable. Other constitutional systems would require the legislature to show compelling government interests, linked to a means of obtaining that

\textsuperscript{17} Ibid art 23(4).

\textsuperscript{18} Ibid art 139.

\textsuperscript{19} See for example art 19(5) of the Constitution.
interest which was the least restrictive of the fundamental right involved.  

As the discussion of art 23 noted, art 22 of the Constitution guarantees freedom of movement. As in the case of the non-discrimination guarantee, art 22 begins by drawing attention to the fact that it is a right expressly limited by the Constitution (‘subject to the other provisions of this Article’) and can be limited on grounds not laid down in the Constitution, ‘except in accordance with any other written law’. With those exceptions in mind, the Constitution guarantees freedom of movement only to citizens of Zambia and notes that freedom of movement allows freedom to move throughout Zambia, to reside in any part, and to leave and return to Zambia. Article 22 underlines the fact that freedom of movement is restricted to citizens by stating that it is permissible for laws to impose ‘restrictions upon the freedom of movement of any person who is not a citizen of Zambia’. The Refugee Control Act of 1970 provides an example of such a restriction on freedom of movement. Refugees are required to reside in areas designated by the Commissioner for Refugees and may not leave those areas without written permission from the Commissioner or his delegate.

Freedom of association is promised to all persons in Zambia. The right is defined as including the ability to assemble freely and to associate with other persons as well as to form groups of various types. As is the case for the right to freedom from discrimination, the right to freedom of association is subject to derogation during periods of emergency and may be limited by legislation which is ‘reasonably required in the interests of defense, public safety, public order, public morality or public health’. It is presumably pursuant to its powers to legislate over matters of defense or public safety that the Refugee Control Act of 1970 contains the following provision:

No person other than the Commissioner or a refugee officer may in a refugee settlement address an assembly or meeting of more than ten refugees whether or not such meeting is held in a public place.

20 See the discussion of protection of fundamental rights in Bowers v Hardwick 478 US 186 (1986).
21 Article 22(1) of the Constitution.
22 Ibid.
23 Ibid art 22(3)(b).
24 As noted earlier, the broad emergency powers found in arts 25 and 30 of the Constitution would permit further restrictions on freedom of movement.
26 Article 21(1) provides that ‘except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests’.
27 Ibid.
28 Ibid art 21(2)(a).
29 Laws of Zambia, Chap 120, s 14(2).
Refugees may associate in Zambia, provided that no more than ten of them do so at one time.

Finally, under the constitutional provision which guarantees freedom of expression, all persons in Zambia are guaranteed the right to 'receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons'. For refugees, however, this right is again restricted. The provision of the Refugee Control Act concerning the size of gatherings in refugee camps or settlements also serves to restrict the right to impart or receive information. As was the case in the restrictions of other fundamental rights, the burden to prove that the restriction is not reasonable lies with the one whose right is restricted. Of course, even these narrowed rights may be further restricted during periods of public emergency.

III HUMAN RIGHTS INSTRUMENTS AND THE FIVE RIGHTS

As was noted earlier, Zambia is party to all major human rights instruments. It acceded to the CSR and the accompanying 1967 Protocol on 24 September, 1969. The other six documents are the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention for the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), and the Convention on the Rights of the Child (CRC). Zambia filed reservations to the CSR when it acceded to the treaty in 1969. The reservations concerned the right of employment, right to education, freedom of movement, and right to a return travel document. Zambia has no reservations on

30 Article 20(1) of the Constitution.
31 Laws of Zambia, Chap 120 s 14(2).
32 Article 20(3) of the Constitution.
33 Ibid arts 23(7), 25 and 30.
34 The text of the Zambian reservations reads: 'Zambia Subject to the following reservations made pursuant to article 42(1) of the Convention:

The Government of the Republic of Zambia wishes to state with regard to article 17, paragraph 2, that Zambia does not consider itself bound to grant to a refugee who fulfils any one of the conditions set out in sub-paragraphs (a) to (c) automatic exemption from the obligation to obtain a work permit. Further, with regard to article 17 as a whole, Zambia does not wish to undertake to grant to refugees rights of wage-earning employment more favourable than those granted to aliens generally.

The Government of the Republic of Zambia wishes to state that it considers article 22 (1) to be a recommendation only and not a binding obligation to accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

The Government of the Republic of Zambia wishes to state with regard to article 26 that it
file to any of the other human rights instruments to which it is a party.\textsuperscript{35}

While present in the Universal Declaration of Human Rights, the right to seek asylum is not explicitly set forth in any of the documents considered in this article. One distinguished commentator puts the matter bluntly: 'the individual still has no right to be granted asylum. The right appertains to States and the correlative duty, if any, is that which obliges other States to respect the grant of asylum'.\textsuperscript{36} Within the CSR itself, the 'right' would be intimated by the duty of States not to impose penalties on asylum seekers for illegal entry (art 31) and the obligation of non refoulement (art 33). Apart from the CSR, the only other international human rights document\textsuperscript{37} in which the word refugee appears is the CRC which requires States to provide protection and assistance in obtaining the rights mentioned in the Convention to children who are asylum seekers.\textsuperscript{38}

In contrast to the right to seek asylum, the right to freedom from discrimination is a guiding principle in all human rights instruments. Under art 3 of the CSR, States Parties agree to apply the Convention without discrimination based on 'race, religion, or country of origin'.\textsuperscript{39} Article 26 of the ICCPR provides protection against discrimination as it announces:

[all] persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{40}

The Covenant further guarantees that any person whose rights or freedoms are abridged shall be accorded remedies by the States party.\textsuperscript{41} Moreover, the ICCPR and the ICESCR contain identical language stating that all rights recognized in the covenant will be extended to all persons without discrimination on grounds of alienage among others.\textsuperscript{42}

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reserves the right to designate a place or places of residence for refugees.
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The Government of the Republic of Zambia wishes to state with regard to article 28 that Zambia considers itself not bound to issue a travel document with a return clause in cases where a country of second asylum has accepted or indicated its willingness to accept a refugee from Zambia'.\textsuperscript{35}

Zambia initially filed a reservation to CAT art 19 but withdrew it in February 1999.


The right to seek and obtain asylum is provided for in several regional human rights instruments such as the Bangui Charter to which Zambia is a signatory.

\textsuperscript{38} Article 22(1) of the CRC.

\textsuperscript{39} Article 3 of the CSR.

\textsuperscript{40} Article 26 of the ICCPR.

\textsuperscript{41} Ibid art 2(3).

\textsuperscript{42} Ibid art 2(1); also art 2(2) of the ICESCR.
One would think that the CERD prohibits discrimination against refugees on the basis of race but the document is more complex. In the first place ‘racial discrimination’ is defined as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.43

The CERD does permit distinctions to be made between citizens and non-citizens44 so long as they are not based solely upon race.45 The CAT provides protection against refoulement to any person who fears torture.47 Finally, the CRC, like the ICCPR and ICESCR provides that all other rights mentioned shall be granted to children without discrimination based on any status.48

The right to freedom of movement is one of those explicitly accorded any person within a State by the ICCPR. Article 12 of the Covenant states that persons legally within a State should be allowed to move throughout the State, to come and go, and to reside wherever he or she chooses.49 The only condition placed on this right in the covenant is that a person be ‘lawfully’ within the territory of the State.50 According to the provisions of art 2(1) this right cannot be restricted based on status. While States may derogate from this right during times of emergency, this derogation must be made in accord with the provision of the covenant.51

Refugees are explicitly granted freedom of movement and residence within the country of refugee in art 26 of CSR. Again, the ‘right’ is expressed in terms of an obligation assumed by the signatory State and is not enforceable by the refugee under the terms of the Convention. In contrast, both the CERD52 and the CEDAW53 require States Parties to accord the rights of movement and residence equally. In the case of CERD the State is required to ‘guarantee’ the right.54 The CEDAW provision notes that States ‘shall accord to men and women the same right’.55 Freedom of movement is not mentioned in the remaining three human rights instruments.

43 Article 1(1) of the CERD.
44 Ibid art 1(2).
46 Article 2 of the CEDAW.
47 Article 3(1) of the CAT.
48 Article 2(1) of the CRC.
49 Article 12(1) of the ICCPR.
50 Ibid.
51 Article 4 of the CPPR.
52 Article 5(3)(c) of the CERD.
53 Article 15(4) of the CEDAW.
54 Article 5 of the CERD.
55 Article 15(4) of the CEDAW.
Under the CSR, States undertake to allow refugees the same rights to form ‘non-political and non-profit’ associations as are accorded other foreign nationals in their jurisdictions.\(^\text{56}\) Under the ICCPR, however, the right is accorded to everyone within the State on an equal basis subject only to legal limits that are ‘necessary’ for public order.\(^\text{57}\) The ICESCR recognises the right of everyone to join or form trade unions and for these unions to join international unions.\(^\text{58}\) CERD requires States to guarantee the ‘right to freedom of peaceful assembly and association’ to all regardless of race.\(^\text{59}\) CEDAW requires that States ‘ensure’ to women on an equal basis with men the right to freedom of association.\(^\text{60}\) Finally, CRC declares that State parties recognise the right of children to association.\(^\text{61}\) Both CCPR and CRC allow for restrictions upon the right to freedom of association. However, such restrictions must be justified as being ‘necessary’ to the interests of security, safety, and so forth.\(^\text{62}\) The CAT contains no provisions relating to freedom of association.

The right to information is not explicitly touched upon in the CSR. Contracting States do undertake to provide elementary education to refugees on a par with their own citizens and to allow the same opportunities for further education to refugees as are accorded other foreign nationals.\(^\text{63}\) It is reasonable to suggest that these provisions for education encompass some of the benefits protected in a right to information.

Following the same analogy between education and information, one can see that the provisions found in ICESCR are also germane. In art 13 of that convention, States recognise the right of everyone to education as a means of building up respect for human rights and fundamental freedoms.\(^\text{64}\) The right encompasses not only formal education aimed at children and youth, but also adult education and literacy programmes.\(^\text{65}\) ICESCR also calls for recognition of the right of everyone to participate in the cultural life of the nation\(^\text{66}\) which would seem to constitute another form of access to information. In a similar fashion, CERD requires States to guarantee the right to education to all without regard to race.\(^\text{67}\) Likewise, CEDAW requires States to ensure access to education for women equal to that for men.\(^\text{68}\)

\(^{56}\) Article 15 of the CSR
\(^{57}\) Articles 22(1)-(2) of the ICCPR.
\(^{58}\) Articles 8(a)-(b) of the ICESCR.
\(^{59}\) Article 5(d)(ix) of the CERD.
\(^{60}\) Article 7(c) of the CEDAW.
\(^{61}\) Article 15(1) of the CRC.
\(^{62}\) Article 22(2) of the ICCPR and art 15(2) of the CRC.
\(^{63}\) Article 22(1)-(2) of the CSR.
\(^{64}\) Article 13(1) of the ICESCR.
\(^{65}\) Ibid art 13(2)(d).
\(^{66}\) Ibid art 15(1)(a).
\(^{67}\) Article 5(c)(v) of the CERD.
\(^{68}\) Article 10 of the CEDAW.
States Parties to the ICCPR recognise the rights of everyone to freedom of expression which it defines as including 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. Limitation of this right is permitted only where it is shown that the limitation is necessary to protect other vital State interests.

The CRC contains language identical to that of the ICCPR concerning the right to education. The right to information or to education is not mentioned in the CAT.

While there are no mechanisms to assure State accountability found in the CSR, the other human rights instruments do so provide. In the case of ICESCR this mechanism consists of reports to be filed periodically with the Economic and Social Council of the UN. In the case of CEDAW there is a special committee set up to receive reports from States Party and to make general recommendations to the General Assembly. The CRC contains slightly more powerful language. While establishing a committee to receive reports on compliance from States Party and make general recommendations as required by CEDAW, it also permits the committee to make 'suggestions and general recommendations' to any State Party.

More robust accountability provisions are found in the CERD and the CAT. In the case of the CERD complaints may be brought by a State Party against another State for non-compliance with treaty provisions. The Committee established under this treaty has the power to make findings of fact with respect to alleged non-compliance and to communicate these findings to the parties together with suggestions for amicable solutions to the problem. In addition, CERD contains a provision under which a State may declare that individuals within its jurisdiction may bring complaints to the Committee. The Committee is ultimately empowered to make 'suggestions and recommendations' to the State and the petitioner.

The Committee formed pursuant to the CAT is granted the power to initiate inquiries into treaty non-compliance upon the receipt of 'reliable information'. The Committee is also given the power to communicate

69 Article 19(2) of the ICCPR.
70 Ibid art 19(3).
71 Article 13 of the CRC. The only difference is the use of the words 'the child' instead of 'everyone'.
72 See arts 16–25 of the ICESCR.
73 See arts 17–22 of the CEDAW.
74 See arts 42–46 of the CRC.
75 Article 11 of the CERD.
76 Ibid art 13(1).
77 Ibid art 14(1).
78 Ibid art 14(7)(b).
79 Article 20(1) of the CAT.
its findings, suggestions, and recommendations to the State Party. Unlike the CERD, where the power to receive complaints among States Party is a term of the convention, this power is given to the Committee under the CAT only if the State makes a declaration so stating. A similar declaration by the State is necessary for the Committee to receive complaints from individuals. In each case the power of the Committee is limited to ‘forwarding its views’ to the State and the complainant.

The ICCPR also contains provision for the formation of the Human Rights Committee. The Committee may receive complaints of non-compliance against a State Party from another State Party if the former State Party has made a declaration allowing this procedure. Finally, pursuant to the procedure contained in the (First) Optional Protocol, complaints about non-compliance may be received by the Human Rights Committee from individuals in States, such as Zambia which have acceded to this Protocol. The Committee is empowered to ‘forward its views’ to the State Party and the complainant.

A brief summary of the status of the five rights is in order at this point. The right to asylum exists as an obligation assumed by a State not to refoule refugees and to permit or, at least not penalise illegal entry into its territory for the purpose of finding protection. This ‘right’ is set out in the CSR. The remaining four rights are all explicitly recognised as belonging to individuals in the ICCPR and are elaborated upon or given special focus in the other five human rights instruments.

IV LEGAL ANALYSIS OF THE CONFLICT OF CONSTITUTION AND TREATY OBLIGATION

The survey of the five rights has shown that there are instances of conflict between the rights recognised in international human rights instruments and their expression in the Zambian Constitution and legislation. One clear example of such conflict is the variance of standard for permitting derogation from the rights in the interest of public safety. The Constitution of Zambia places the burden of proving that the derogation of the right was not reasonable to achieve a state interest upon the one adversely affected by the derogation. The human rights treaties require the State to show that the derogation is necessary to achieve the interest. A second conflict is that between the provisions concerning the expulsion of refugees in the Refugee Control Act and the guarantee of non-refoulement in CSR. A final conflict is the derogation of the right to non-discriminatory legal protection found in the Constitution which, in turn,

80 Ibid art 20(4).
81 Ibid art 21.
82 Ibid art 22.
83 Ibid arts 21(1); 22(7).
84 Article 41 of the ICCPR.
85 Article 6 of the Protocol.
allows the Zambian government to deny to refugees the rights to movement, information, and association. These conflicts raise the question as to which rights should prevail in Zambia?

The position of the Zambian government is clear, if disingenuous. It can be set out as follows:

Zambia has a dualistic legal regime implying that international instruments ratified or acceded to are not self-executing at domestic level and require enabling legislation to be enforceable. Incorporation of international instruments to which Zambia is party is done by either passing regulations under already existing legislation or passing a whole new piece of legislation. According to this view if the right is not enshrined in domestic legislation it is not enforceable in Zambia. The corollary to this position is that if a fundamental right is recognised in Zambia in a manner less complete than its recognition in an international human rights instrument, the domestic law prevails.

Two situations must be distinguished at this point. The first is the effect of the non-compliance in the Constitution with treaty obligations as they pertain to other States party to the treaty. The second is the effect of the non-compliance with respect to individuals within Zambia who are adversely affected by the constitutional provisions or laws embodying them.

With respect to the first situation international law is clear. 'A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law'. As indicated earlier in this article, many of the human rights instruments have provisions for claims to be brought by other States party to the treaty. In such instances non-conformity in the Zambian Constitution would not excuse non-compliance.

Moreover, in the case of the ICCPR, Zambia has undertaken an affirmative duty to make its laws conform to the provisions of the covenant. Article 2(2) of the Covenant states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Goodwin-Gill has noted the effect of this language.

Words such as 'necessary' and 'appropriate' indicate that the State enjoys discretion in

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86 See Second Periodic Reports of States Parties due in 1990: Zambia, UN Doc. CCPR/C/63/Add.3 (10 March 1995) para 45: 'Zambia does not have any laws that limit the movements of citizens or non-citizens within its territory'.
88 1 Brownlie Principles of Public International Law 5 ed (1998) 34.
89 Article 2(2) of the ICCPR.
its choice of implementing measures, but the standard of compliance remains an international one. The question is that of effective or efficient implementation of the treaty provisions, in fact, and in the light of the principles of effectiveness of obligations.  

Thus if the practice of Zambia does not comply with the provision of a human right recognised in a covenant, the terms of the covenant prevail over the Zambian law which permits the offending practice.  

Two further situations need to be distinguished with respect to claims brought by refugees or others within Zambia for violations of the four rights protected in the ICCPR. Since Zambia has acceded to the Optional Protocol individuals may present such claims to the Human Rights Committee. Constitutional or legislative provisions that violate rights guaranteed by the ICCPR would be of no effect before the Committee. A more complex situation arises when a Zambian court has to consider a situation in which these internationally recognised rights conflict with the rights set out in the Constitution.  

One might suppose that a Zambian court would recite the language about the necessity of domestication of treaty materials in municipal law for them to be given effect. However, there is an argument to be advanced that when there is a violation of a right found in the ICCPR, (even a violation sanctioned by the Constitution of Zambia) the government should be estopped from relying on the Constitution because of its accession to the ICCPR and its obligation toward every person in Zambia to guarantee the rights contained in the Covenant. If this principle was adopted by a Zambian court, then the provisions of the Covenant would prevail over conflicting constitutional provisions.  

The case of the right to asylum presents a different set of considerations than those of the other four rights. To begin with, this right is not included among the rights declared by the ICCPR or any other international human rights treaty. Secondly, in terms of the CSR the 'right' exists as an obligation assumed by a State Party to the Convention which is owed to other States Party and not to individuals. These facts would seem to argue that a claim against a potential abridgment of this right by a refugee would receive short shrift.  

90 Goodwin-Gill (note 36 above) 237.  
91 It must be admitted that normally estoppel requires adverse reliance by a party on another party's words or conduct, in this case reliance by one asserting the right on Zambia's accession to the pertinent human rights instrument. The position espoused here would require an extension of the current doctrine of estoppel and the force of the argument would be in large part a moral one.  
92 Current Zambian case law provides some support for this position. Justice Musumali writing in Longwe v Intercontinental Hotel[1993] 4 LRC 221 (HC Zambia) stated: 'Ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by that State to be bound by the provision of such [an instrument]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty or Convention in my resolution of the dispute.'
As was noted earlier, the right to asylum seems to consist of two aspects: a right to enter a state to seek protection without penalty and a right not to be returned to the home state where persecution is feared. With respect to the rights of entry, the first aspect of the right to asylum, the common law doctrine of necessity would seem applicable. At common law the necessity to save one’s life would serve as a defense to a charge of criminal trespass, or to a suit brought in delict. The Zambian legal tradition, being rooted in English common law, should recognise this defense and apply it in cases of entry of refugees.

The right of non refoulement should also be recognised by Zambian courts. There is in international law the category of rules referred to as jus cogens. ‘They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect’. 93 These are obligations ‘owed to the international community as a whole’. 94 The principle of non refoulement is one such rule. It certainly has the status of customary international law. For example, it was recognized as a principle of international law by the United States Supreme Court in the case Sale v Haitian Centers Council 95 even though the Court found, erroneously, that refoulement was not taking place. It has been enshrined as the key provision in the CAT, a treaty ratified by the vast majority of the nations of the world including Zambia. Thus it could be argued here that as in the case of the provisions of the ICCPR, Zambia is estopped 96 from implementing provisions of its law which amount to refoulement of refugees.

The analysis of the conflicts between certain provisions of the Constitution of Zambia and the ‘five rights’ results in a conclusion that there is a legal basis for holding that the exercise of the rights should be allowed to prevail over the Constitution even were the case to be brought in a Zambian court by an affected individual.

V Conclusions

Zambia, like the narrator in the Frost poem, has promises to keep. The beneficiaries of these promises are all persons residing within Zambia, including the 300 000 refugees. This article has shown that there is a tension between the commitments made through international human rights instruments and the domestic embodiment of these rights in the Constitution and legislation of Zambia. Specifically this tension manifests itself in the case of the right to asylum in art 13 of the Constitution which inhibits the entry of potential asylum seekers and a

93 Brownlie (note 88 above) 515.
94 Barcelona Traction Case ICI Reports (1970) 3, 32.
95 113 SCt. 2549 (1993).
96 See note 91 above.
statutory provision in the Refugee Control Act of 1970 which is more limited than the corresponding treaty provision.

In the case of the right to be free from discrimination, the Constitution embodies several discriminatory principles and provides insufficient protection of this right to refugees among others. These constitutional provisions conflict with the non-discrimination provisions of the ICCPR and fail to comply with Zambia’s duty under art 2 of the ICCPR to make its laws reflect the rights enshrined in that Covenant. Zambia has yet to keep its art 2 promise.

A further conflict arises between the Zambian Constitution and the ICCPR in that in order to limit any of the other four rights by legislation only some reasonable basis must exist. Moreover, the burden is on those whose rights are adversely affected by such provisions to show that they are not reasonable. These provisions are in contrast to the ICCPR guarantees which require the State to show that the limitations of rights were necessary.

The right to freedom of movement is to be accorded to every person in a State by the terms of the ICCPR. Under the Zambian Constitution only citizens have this right. The provisions of the Refugee Control Act of 1970 specifically deny refugees the exercise of this right.

The right to freedom of association is likewise enshrined in many of the human rights instruments including the CCPR. Through the Refugee Control Act, groups of refugees are limited to no more than ten without the express approval of the Commissioner for Refugees.

Finally the right to information, guaranteed in the ICCPR and other instruments is also severely limited through the provisions of the Refugee Control Act. Apparently the provisions in this act are deemed to be reasonable limitations of the guarantees of free access to information contained in art 20 of the Constitution of Zambia.

In Zambia there is talk these days of a new deal. The government once again claims that protection of rights will be a task of priority. The issue of readdressing the provisions on fundamental rights is still (again?) on the table. In the course of this revision of the Constitution the commitments entailed in Zambia’s accession to the human rights instruments must take the forefront. Zambia, after all, has promises to keep.