

Submission by the United Nations High Commissioner for Refugees
For the Office of the High Commissioner for Human Rights' Compilation Report
Universal Periodic Review: 3rd Cycle, 29th Session

BOTSWANA

I. BACKGROUND INFORMATION

Botswana acceded to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (hereinafter jointly referred to as the *1951 Convention*) in 1969.¹ Botswana ratified the *1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (the *1969 OAU Convention*) in 1995. Botswana succeeded to the *1954 Convention relating to the Status of Stateless Persons* (the *1954 Convention*) in 1969 subject to certain reservations.² However, Botswana is not party to the *1961 Convention on the Reduction of Statelessness* (the *1961 Convention*).

The *Refugee (Recognition and Control) Act of 1968* (the *Refugee Act*) is the main domestic legislation regulating asylum in Botswana. In mid-2015, the Government announced its intention to revise the *Refugee Act*. The first draft of the amended *Refugee Act* is expected to be finalised by the Government by mid-2017. All refugee and asylum matters are managed by the Ministry of Defence, Justice and Security.

As of 30 November 2016, Botswana hosted 2,114 refugees and 731 asylum-seekers and most of them reside in Dukwi refugee camp. The main countries of origin for refugees in Botswana are Namibia (938) and Zimbabwe (736). The remaining refugees and asylum-seekers originate from the Democratic Republic of the Congo (the DRC), Somalia and other countries in Africa. There are also over 500 rejected asylum-seekers in detention in the Centre for Illegal Immigration (CII) out of which 271 as of January 2017 are children.

II. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS

Challenges linked to outstanding 2nd cycle UPR recommendations

Issue 1: Fair and efficient asylum procedures

Linked to 2nd cycle UPR recommendation no. 116.41: “Continue its engagement with improving the rights of refugees (Uganda)”, and no. 116.42: “Improve the reception conditions, health care, access to water and sanitation, adequate housing and food, for refugees; Make sure that refugees are not repatriated in case that their lives are in danger in their country of origin, and promote, through public policies, their total integration into the society out of the refugees camps (Ecuador)”.³

Refugee status determination (RSD) is conducted by the Refugee Advisory Committee (RAC) which prepares a recommendation to be approved by the Minister of Justice, Defence and

¹ Botswana has reservations to the following *1951 Convention* Articles: 7, 17, 26, 31, 32 and 34 and paragraph 1 of Article 12. Botswana also has a reservation to Article IV of the *1967 Protocol*.

² The text of Botswana’s reservation reads: “(a) Article 31 of the said Convention shall not oblige Botswana to grant to a stateless person a status more favourable than that accorded to aliens in general; (b) Articles 12, paragraph 1, and 7, paragraph 2 of the Convention shall be recognized as recommendations only”.

³ All recommendations made to Botswana during its 2nd cycle UPR can be found in: “Report of the Working Group on the Universal Periodic Review of Botswana” (22 March 2013), A/HRC/23/7, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BWSession15.aspx>.

Security. RAC is mainly composed of officials from the Ministry of Defence and Security, which means that RAC members often do not have any expertise regarding refugee law.

In addition, there is no provision in the *Refugee Act* that establishes an RSD appeal mechanism by an authority, court or tribunal, separate from and independent of the authority, which made the initial decision.⁴ Although a discretionary review of first instance decisions is available by the Minister⁵ neither are there procedural rules or timeframes regarding this review process. There are also no provisions in the *Refugee Act* ensuring gender and child sensitive procedures or access to professional interpreters. The *Refugee Act* does also not provide for access to legal representation during the asylum procedures including for unaccompanied and separated children (UASC).

The Government of Botswana also applies a stringent policy on the concept of “first country of asylum” and “safe third country” that affects all asylum-seekers having transited through another country. Dismissing claims as inadmissible on the basis of these concepts before looking at the merits of the claim results in a rejecting rate of at least 92 per cent. Transfer to the “first country of asylum” or “third safe country” require application of safeguards, and would not be appropriate where they represent an attempt, in whole or part, by a *1951 Convention* State party to divest itself of responsibility. Nonetheless, they are used as an excuse to deny or limit jurisdiction and responsibility under international refugee and human rights law.⁶

Recommendations:

UNHCR recommends that the Government of Botswana:

- a) Provide legal and procedural safeguards for asylum-seekers during RSD procedures, including access to legal representation in particular for unaccompanied and separated children and access to professional interpreters, and introduce child and gender sensitive procedures;
- b) Amend the *Refugee Act* to ensure a right to appeal, to shift the responsibility for examining appeals concerning asylum cases to a judicial body which is fully independent and impartial, and to provide for oral hearings at the appeals level; and
- c) Refrain from declaring asylum applications inadmissible on the sole basis of “first country of asylum” or “safe third country”, ensuring that asylum-seekers effectively benefit from international protection and that Botswana retain responsibility for obligations arising under the *1951 Convention*.

Issue 2: Detention of rejected asylum-seekers and protection against refoulement

Linked to 2nd cycle UPR recommendation no. 116.42 (above-mentioned)

In July 2015, 511 asylum-seekers, mainly from DRC, arrived in Botswana and all of them, including women and children, were detained and denied asylum at CII. Their asylum claims were rejected on the basis of “first country of asylum” or “third safe country” concepts without an individual assessment of each claim, and without assessing whether the concerned individuals could be readmitted in, and effectively receive protection from, another country. As of April 2017, all 511 persons remain detained at CII.

According to data available in June 2016, at least 404 of the rejected DRC asylum-seekers, including their dependents in CII, had fled conflict and violence from eastern DRC. UNHCR is

⁴ UN High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 192 (vi), January 1992, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁵ Section 8 of the *Refugees Act* provides that the Minister may direct RAC to “reopen the inquiry or to make further report in the matter”.

⁶ UN High Commissioner for Refugees (UNHCR), Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 6, available at: <http://www.refworld.org/docid/51af82794.html>.

concerned about the potential return of persons to eastern DRC in light of the *UNHCR position on returns to North Kivu, South Kivu and adjacent areas in the Democratic Republic of Congo affected by on-going conflict and violence in the region*, which was published in September 2014 and remains valid.⁷ In its position paper, UNHCR considers that it is likely that Congolese who have fled the conflict in eastern DRC are in need of international protection in accordance with the broader refugee definition contained in the *OAU Convention*. In addition, many persons fleeing the DRC are likely to meet the *1951 Convention* criteria for refugee status.⁸ Under the present circumstances, “UNHCR urges States not to forcibly return to DRC persons originating from these areas until the security and human rights situation has improved considerably”.⁹ This standard is applicable to rejected asylum-seekers as well, since “[t]he bar on forcible return serves as a minimum standard and needs to remain in place until such time as the security and human rights situation in the affected areas has improved sufficiently to permit a safe and dignified return of those determined not to be in need of international protection”.¹⁰ If rejected asylum-seekers are returned to eastern DRC, their return would most likely constitute *refoulement*, which would be in breach of Article 33 of the *1951 Convention*.

Furthermore, a significant number of the rejected asylum-seekers detained at CII are children. In January 2017, UNHCR recorded that at least 271 rejected asylum-seeking children, including UASC, were living in CII. While the *Botswana Children’s Act (2009)* stipulates the consideration of the best interests of the child and children’s right to education, these children have been in detention for over one and a half year and have not attended school during this time. Also, in January 2017, UNHCR was informed about a boy being sexually assaulted by an older inmate in CII. UNHCR notes that children should never be detained under any circumstances as detention is never in the child’s best interest.

Recommendations:

UNHCR recommends that the Government of Botswana:

- a) Release all rejected asylum-seeking children from CII and ensure durable solutions in the best interests of the child.
- a) Provide all rejected asylum-seeking children with access to primary and secondary education while they reside in Botswana irrespectively of their status; and
- b) Release all rejected eastern DRC asylum-seekers from CII and allow them to stay in Dukwi refugee camp until the situation in DRC is conducive for return.

Issue 3: Freedom of movement and the right to work

Linked to 2nd cycle UPR recommendation no. 116.41 and no. 116.42 (above-mentioned)

Botswana’s reservation to Article 26 of the *1951 Convention* concerning freedom of movement remains a significant gap in the legal framework of the country. In practice, this reservation is enforced through government policy and is not legislated. The policy entails that all asylum-seekers and refugees are required to reside in Dukwi refugee camp. To leave the camp, asylum-seekers and refugees must obtain exit permits (or work or residence permits), but only a few exit permits are granted by the Government. The Government has also recently installed a high fence around the camp and a gate at its entrance. The gate is yet to be locked, however the small foot gate is usually locked over the weekends. Due to the increased physical barriers around the camp, school children are experiencing practical difficulties with leaving and entering the camp to attend school.

⁷ UNHCR, *UNHCR position on returns to North Kivu, South Kivu and adjacent areas in the Democratic Republic of Congo affected by on-going conflict and violence in the region - Update I*, September 2014, available at: <http://www.refworld.org/docid/5400755a4.html>.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

While asylum-seekers and refugees are officially required to reside in Dukwi refugee camp, some of them live in urban areas without the required permits. One of the reasons behind this is the high rejection rate for obtaining exit permits. Without official permission to reside in urban areas, refugees and asylum-seekers are at risk of arrest and detention in prisons or CII, despite there being no lawful provision for such detention and no lawful sanction for breaching the unwritten encampment policy. Additional refugees living or visiting urban areas without permission, including those visiting or living with a spouse who is a national, risk withdrawal of their refugee status for violating the encampment policy. This policy has also resulted in a lack of livelihood opportunities for refugees and led to the prevalence of negative coping mechanisms, such as sex work, alcoholism, sexual exploitation and abuse, particularly for women and children who are at a heightened risk due to lack of adequate protection.

Botswana has also made a reservation to Article 17 of the *1951 Convention* and does not provide asylum-seekers and refugees with the right to work. As refugees do not have access to work permits, they are unable to be self-sufficient. This means that refugees may resort to working in hazardous jobs in the informal labour market to provide for themselves and their families, and are also likely to be subject to exploitation as they may not be protected by relevant national labour laws.

Access to employment is in the interest of both the host country and the beneficiaries of international protection. It removes the incentive of unofficial employment; contributes to self-reliance; promotes integration in the host community; and provides people with an opportunity to develop their skills and experience. Employment provides the individual not only with an income, but also with independence, social status and recognition. In addition, providing access to the labour market can discourage informal employment and can facilitate reintegration into the country of origin, if voluntary repatriation becomes feasible, by allowing refugees who return home to do so with a degree of financial independence or acquired work skills.¹¹

Due to limitations on employment and freedom of movement, asylum-seekers and refugees in Botswana depend entirely on UNHCR and the Government for food aid and other necessities. As UNHCR intends to close its national office in Botswana, it would be beneficial if asylum-seekers and refugees could engage in livelihoods activities to sustain themselves and their families rather than relying on the Government.

Recommendation:

UNHCR recommends that the Government of Botswana:

- a) Withdraw its reservation to Articles 17 and 26 of the *1951 Convention*;
- b) Amend its encampment policy to ensure freedom of movement for refugees and asylum-seekers; and
- c) Provide work permits and decent work opportunities to asylum-seekers and refugees.

Additional protection challenges

Issue 5: Naturalisation

Despite the Government's reservation to Article 34 of the *1951 Convention* regarding naturalisation of refugees, Botswana has had significant success in the past with the naturalisation of Angolan refugees. However, recently, refugees have faced difficulties in applying for naturalisation. In the past years only one waiver was granted to a Rwandese national to apply for citizenship. There are also several refugees who are married to citizens

¹¹ UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, para. 13, <http://www.refworld.org/docid/3bfa81864.html>

of Botswana and submitted applications to be naturalised; some of these applications have been pending with Botswana authorities for ten years. Although these applicants have not received written decisions regarding their naturalisation applications, they have been told by Botswana authorities that their applications are not likely to be approved.

UNHCR considers integration, not only as a legal and socio-economic process, but also a social and cultural process of acclimatisation by refugees to local communities. It should enable refugees to live with the host population without discrimination or exploitation, and contribute actively to the social life of their country of asylum. The timely grant of secure legal status and residency rights are essential factors in the integration process. UNHCR strongly believes that refugees should receive long-term residence rights at an early stage, as shorter term residency has been proven to have a negative impact on a person's sense of belonging and motivation to integrate.

Recommendation:

UNHCR recommends that the Government of Botswana:

- a) Withdraw its reservation to Article 34 of the *1951 Convention*; and
- b) Allow refugees, particularly those with ties to Botswana, to be naturalised.

Issue 6: Prevention of statelessness and protection of stateless persons

Botswana has no specific provisions to reduce and prevent statelessness and to grant protection to stateless persons. The country has not yet fully implemented the *1954 Convention*. While it is commendable that Botswana is a State Party to many universal and regional conventions that recognize the individual human right to a nationality,¹² the resulting commitments are not yet fully reflected in Botswana's domestic law.¹³ There is no legal guarantee for children born in the country who would otherwise be stateless to acquire Botswana nationality. Furthermore, no provision in the domestic nationality law protects foundlings.

Recommendations:

UNHCR recommends that the Government of Botswana:

- a) Accede to the *1961 Convention on the Reduction of Statelessness*; and
- b) Amend section 4 of the *Citizenship Act 1998 and Citizenship Regulations 2004* to grant nationality, at birth and by operation of the law, to any child born in Botswana who would otherwise be stateless and to foundlings.

**UNHCR
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¹² Botswana is a State Party to, for example, the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights* and the *African Charter on the Rights and Welfare of the Child*.

¹³ *Citizenship Act 1998 and Citizenship Regulations 2004* [Botswana], 24 April 1998, available at: <http://www.refworld.org/docid/4c5818202.html>.

ANNEX

Excerpts of relevant Recommendations from the 2nd cycle Universal Periodic Review, Concluding Observations from UN Treaty Bodies and Recommendations of Special Procedures mandate holders

BOTSWANA

We would like to bring your attention to the following excerpts from the 2nd cycle UPR recommendations, UN Treaty Monitoring Bodies' Concluding Observations, and recommendations from UN Special Procedures mandate holders' reports relating to issues of interest and persons of concern to UNHCR with regards to Botswana.

I. Universal Periodic Review (Second Cycle – 2012)

Recommendation ¹⁴	Recommending State/s	Position ¹⁵
Refugees and asylum-seekers		
115.38. Seek support and assistance from international institutions in dealing with the challenges that constrain the effective realization of certain rights, particularly the right to education and the protection of refugees.	Burkina Faso	Supported
115.91. Consider the possibility to seek further international cooperation in order to find sustainable solutions in the area of refugees law.	Paraguay	Supported
116.41. Continue its engagement with improving the rights of refugees.	Uganda	Supported ¹⁶
116.42. Improve the reception conditions, health care, access to water and sanitation, adequate housing and food, for refugees; Make sure that refugees are not repatriated in case that their lives are in danger in their country of origin, and promote, through public policies, their total integration into the society out of the refugees camps.	Ecuador	Supported ¹⁷

¹⁴ All recommendations made to Botswana during its 2nd cycle UPR can be found in: "Report of the Working Group on the Universal Periodic Review of Botswana" (22 March 2013), A/HRC/23/7, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BWSession15.aspx>.

¹⁵ Botswana views and replies can be found in: *Addendum* (23 May 2013), A/HRC/23/7/Add.1, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BWSession15.aspx>.

¹⁶ **Addendum:** "The Government considers it appropriate to continue engagement to improve the rights of refugees."

¹⁷ **Addendum:** "The Government considers it in line with its commitments. The Government is committed to providing access to water and sanitation, adequate housing and food, for refugees within her limited resources. Botswana adheres fully to the principle of non-refoulement and has not sent any refugee to countries of origin against their will. Botswana is committed to the implementation of the key durable solutions (Repatriation, Reintegration and Resettlement) to refugee problems."

116.43. Maintain the positive efforts aiming to find durable solutions by way of repatriation, reintegration and resettlement of refugees.	Egypt	Supported ¹⁸
Groups with specific needs		
115.39. Accelerate the implementation of the Action Plan to enable targeted programming and interventions for the welfare and protection of the most vulnerable children in Botswana.	Indonesia	Supported
115.52. Further consolidate on important fields of rules of law, gender equality, and social welfare to better overall conditions for vulnerable groups such as women, children and youth.	Viet Nam	Supported
115.90. Take appropriate measures to protect and promote the rights of disadvantaged groups.	Congo	Supported
Sexual and gender-based violence		
115.47. Continue strengthening the necessary policies to promote gender equality, with a focus on education, on adopting awareness campaigns for the population against gender violence, and on putting in place specific legislation that criminalizes violence against women.	Spain	Supported
115.61. Intensify efforts to combat violence against women.	Congo	Supported
115.62. Fight efficiently against rape and domestic violence.	Togo	Supported
115.63. Continue to fight against sexual violence.	Djibouti	Supported
115.64. Urgent implementation of measures to improve the reporting rate of gender based violence, where the NGO Genderlinks estimates only 1 in 24 incidents were currently reported; and to increase the prosecution of perpetrators.	United Kingdom of Great Britain and Northern Ireland	Supported
115.65. Actively combat all forms of gender-based discrimination and violence, in particular domestic and sexual violence.	France	Supported
115.66. Draft implementation instructions and provide police and the public training on the Domestic Violence Act.	United States of America	Supported
115.67. Continue to take steps towards eliminating gender-based violence, including through strengthening domestic laws and policies to protect women.	Australia	Supported
115.68. Consider enacting specific legislation on domestic violence to hold perpetrators accountable for their behaviour.	Brazil	Supported

¹⁸ **Addendum:** “Botswana is committed to the implementation of the key durable solutions (Repatriation, Reintegration and Resettlement) to refugee problems.”

115.69. Take the necessary measures to ensure sexual assault perpetrated by a spouse is explicitly covered by the criminal code and educate chiefs and other customary law practitioners so that their decisions are in line with constitutional law, particularly with respect to marriage and property rights.	Canada	Supported
115.70. Enact specific legislation on marital rape	Ireland	Supported
115.71. Take concrete measures to ensure a safer environment for both women and girls.	Netherlands	Supported
115.72. Take efficient steps to secure the protection of women, also when abuse happens within the family.	Norway	Supported
115.73. Strengthen national frameworks and mechanisms to effectively address and combat violence against women and girls.	Sri Lanka	Supported
117.26. Ensure that all violence against women and girls constitutes a criminal offence, that victims have access to immediate means of redress and protection; and that all perpetrators are prosecuted.	Ireland	Not Supported
SOGI		
115.35. Include a gender perspective into its policies and programmes to combat HIV/AIDS, taking into account what has been pointed out by CEDAW.	Chile	Supported
115.47. Continue strengthening the necessary policies to promote gender equality, with a focus on education, on adopting awareness campaigns for the population against gender violence, and on putting in place specific legislation that criminalizes violence against women.	Spain	Supported
115.50. Continue repealing discriminatory laws and to allocate adequate budget for the implementation of its National Gender Programme to ensure non-discrimination against women.	Thailand	Supported
115.51. Intensify its efforts aimed at modifying or eliminating the negative cultural practices and stereotypes which are the source of certain forms of discrimination against women.	Tunisia	Supported
115.52. Further consolidate on important fields of rules of law, gender equality, and social welfare to better overall conditions for vulnerable groups such as women, children and youth.	Viet Nam	Supported

116.35. Take steps to implement comprehensive anti-discrimination laws, particularly to eliminate discrimination on the basis of sexual orientation.	Australia	Not supported ¹⁹
117.27. Decriminalize consensual same-sex activities between adults and promote tolerance in this regard.	Czech Republic	Not supported
117.28. Evaluate to repeal the criminalization of same-sex relations.	Argentina	Not supported
117.29. De-criminalize same sex activities and adopt policies to counter discrimination against LGBT.	Netherlands	Not supported
117.30. Decriminalize consensual sexual relations between same-sex adults and strength efforts to combat discrimination against those persons, while respecting their rights to association and representation in civil society.	Spain	Not supported
117.31. Remove relevant articles of the Penal Code criminalising same sex sexual activities.	Slovakia	Not supported
117.32. Guarantee the fundamental rights of all persons living in Botswana and thereby decriminalize sexual relations of consenting adults of the same sex.	France	Not supported
Birth registration		
115.77. Continue to take the necessary measures to make sure that all the population has easy access to free birth registration for newborns.	Mexico	Supported
Migrants		
116.10. Sign and ratify the International Covenant on Economic, Social and Cultural Rights as well as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.	Turkey	Not supported ²⁰
116.16. Consider the possibility of ratifying the International Covenant on Economic, Social and Cultural Rights, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and Convention on the Rights of Persons with Disabilities.	Ecuador	Partially supported ²¹

¹⁹ **Addendum:** “Botswana, as a predominantly Christian nation, has not reached a stage in which she can accept same sex activities. It will be necessary to conduct educational campaigns on this issue so that when the laws are changed people will be carried along.”

²⁰ **Addendum:** “The Government will consider accession when it is in a position to effectively implement the treaty provisions and having completed thorough consultations with all stakeholders such as workers, employers and trade unions.”

²¹ **Addendum:** “With respect to the ECSOC and the Convention on the Rights of Persons with Disabilities and the Government will consider accession when it is in a position to effectively implement these Conventions. Regarding the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Government does not consider its ratification an immediate priority, and will consider accession after it has completed thorough consultations with other stakeholders such as workers, employers and trade unions.”

116.20. Consider ratifying the International Convention on the Protection of the Rights of Migrant Workers and Their Families and the ILO Convention 189.	Philippines	Partially supported ²²
116.21. Ratify the International Convention on the Protection of the Rights of all Migrant Workers and members of their families.	Rwanda	Not supported ²³

²² **Addendum:** “Botswana supports the spirit and intent of the International Convention on the Protection of the Rights of Migrant Workers and Their Families, but does not consider ratification to this convention an immediate priority. Regarding the ILO Convention 169 and 189 the Government will consider accession after it has completed thorough consultations with other stakeholders such as workers, employers and trade unions.”

²³ **Addendum:** Botswana supports the spirit and intent of the convention, but does not consider ratification to this convention an immediate priority. The Government will consider ratification after it has completed thorough consultations with other stakeholders such as workers, employers and trade unions.”