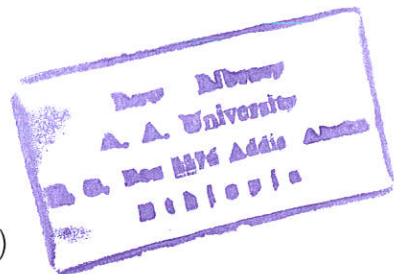


The Right to Asylum: A Case Study with Particular Reference to Somali and Eritrean Asylum-seekers and Refugees in Ethiopia

Thesis prepared in partial fulfilment of LL.M programme in Human Rights Law, Addis Ababa University, School of Graduate Studies, Law Faculty

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Addis Ababa University
School of Graduate Studies
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January, 2011

Addis Ababa, Ethiopia

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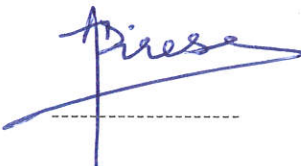
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Signature

DECLARATION

I, Awoke Diress, hereby declare that this thesis is my original work, it has not been presented for a degree in any other University, and all sources of material used for the thesis have been duly acknowledge.

Awoke Diress



Signature

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ACRONYMS

ACHPR	- African Charter on Human and Peoples Right
ARRA	- Administration for Refugee and Returnee Affairs
AU	- African Union
CAT	- Convention against Torture
EXCOM	- Executive Committee of the United Nation High Commissioner for Refugees
EU	- European Union
ICCPR	-International Conventional on Civil and political Rights
IHL	-International Human Rights Law
IRL	- International Refugee Law
OAU	- Organization of African Unity
OSA	- Organization of South America
RSD	- Refugee Status Determination
SIRAA	- Security, Intelligence and Refugees Affairs Authority
UNHCR	- United Nations High Commissioner for Refugees
UDHR	- Universal Declaration of Human Rights
UN	- United Nations
WFP	- World Food Program

ABSTRACT

A number of factors led to the gestation of this research into a relatively less developed jurisprudential area of human rights law: The right to asylum fortified by the right of non-refoulement.

The first factor is the survival instinct which is shared by all humanity including myself and which is gradually gaining importance and stipulated in to jurisprudence. It is this factor to a varied degree that continuously derives people. This natural tendency of ensuring survival and perpetuation by avoiding pain and seeking pleasure leads people to move across the globe. This is typically manifested in forced displacement. Within that still broad category one finds refugees who are in need of international protection because of plight caused by serious threat to their life, liberty or security of person and violation of other fundamental human rights in their country of origin.

The second motivating factor is the objective current Political dynamism in the Horn of Africa .The recent escalation of the crisis in Somalia and the human rights situation in Eritrea has driven a significant number of refugees into Ethiopia. Due to its location, Ethiopia cannot escape the reverberations from the contemporary political uncertainty in the region that calls for this timely work.

This case study is a key to a true appreciation and understanding of the plight of these protection seekers, the situation of their rights in practice in light of the legal and procedural standards required for the treatment of persons seeking asylum in Ethiopia derive from fundamental respect for the dignity of the individual and from the legal obligations undertaken by governments by virtue of accession to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, the 1969 OAU Convention, other relevant international human rights instruments and the national law on asylum- a reflection on Ethiopia's heritage of providing sanctuary- unfortunately very little known to Ethiopians.

INTRODUCTION

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”
(Universal Declaration of Human Rights Article 14)

I. Back ground of the Study

Throughout recorded history, oppression, disaster and persecution have caused people to flee their homelands. Evidently, in biblical times, the enslaved Israelites fled Egypt. After World War I, people were displaced in masse from Asia Minor, the Russian Empire, and the Balkans. During World War II, an estimated 7 million Jews and others threatened by the Nazis fled their homelands.¹

At the end of the 20th century (1993), there were some 18.2 million refugees in the world, the greatest number being located in Africa, Asia, the Middle East, South America and Eastern Europe. However, the majority of them remained in their own region, finding refuge in neighboring countries. Rarely were these recognized as refugees and granted political asylum (territorial asylum) in Western Europe.²

Particularly, there were 6.7 million refugees in Africa, of which Somali refugees constitute around half a millions hosted in neighboring Countries. In Ethiopia alone, there were 285, 000 Somali Refugees accommodated in Eight Refugee Camps.³ These numbers decreased very significantly when most of the Somali refugees repatriated between 1997 and 2005.⁴

¹ Microsoft ® Encarta ® 2007, © 1993-2006 Microsoft Corporation

² Helen Lambert: Seeking Asylum- Comparative Law and Practices in Selected European Countries, Nartinus Nijhoff Publishers, Dordrecht/ Boston/ London, 1995

³ Africa Fact sheet, UNHCR_RLO, Information section (May 1993)

⁴ UNHCR Ethiopia - Regional Liaison Office for Africa Country Operations Plan Ethiopia 2008-2009

At the start of the year 2010 there were 12 million refugees, 0.9 million asylum seekers and 0.8 million returned refugees globally. Even today, Millions are on the move today fleeing from violence, war and persecution, in search of protection of their most fundamental human rights, refugees have been the continuous feature of international life in the present century.⁵

Only in Ethiopia, as of 30 May, 2010, there are 133, 714 refugees and asylum seekers hosted in thirteen camps throughout the country and in Addis Ababa; 72,054 of them are from Somalia , 33,725 are from Eritrea, 24,481 are from Sudan, 2,731 are from Kenya, 477 are from Democratic Republic of Congo, 93 from Burundi, 71 from Djibouti, 13 from Rwanda, 35 from Uganda and 13,078 were Eritrean, 5,763 were Afar, and the remaining 34 are from Yemen, Zimbabwe, Togo, Burundi, DRG; and other 13 nationalities located mostly in urban areas.⁶

Asylum for refugee

At the base of asylum and refugee protection regime a simple, but very powerful idea: the right to seek asylum from persecution proclaimed in the 1948 Universal Declaration of Human rights and human beings should not be returned to conditions which seriously and unjustly threaten their lives or freedoms contained in the accompanying legal definition of a refugee in the 1951 Geneva Convention Relating to the Status of Refugees were both given a central place in the human rights framework that evolved after the horrors of the Second World War. These legal instruments that codified the evolving humanitarian principle of asylum sixty years ago –continue- to inspire asylum and refugee law today.

⁵ Ms. Kate Jastram and Ms. Marilyn Achiron, UNHCR (writer) REFUGEE PROTECTION-A Guide to International Refugee Law Published by the Inter-Parliamentary Union with UNHCR,2001

⁶ The numbers of refugee population continue to increase due to the arrival of asylum seekers from Somalia and Eritrea in to Ethiopia in each day.

Thus, this study looks at asylum in the essential characteristics of modern refugee law in the human rights paradigm. Political asylum should not be mistaken with modern refugee law, which rather deals with massive influx of population, while the right to asylum concerns individuals and is usually delivered in a case-to-case basis. However, the two may somehow overlap, since each refugee may demand to be accorded on an individual basis political asylum. Persons in the position of refugees are not just criminals who have escaped from justice, but large numbers of people who have been forced to leave their country of origin due to persecution, gross human rights violation, war ...etc.

II. Statement of the Problem

Now it has been seven years since Proclamation no.409/2004 regulating refugee status and the right to asylum in force. This law which was meant to implement the international obligations has facilitated for the easy asylum application processing and granting to refugees.

Ethiopia has acceded to the 1951 Convention, the 1969 OAU Convention, and the 1984 CAT Convention and a number of international human rights conventions that should nearly imply the right to enter, the right to seek asylum, the right to non-refoulement and the right live until durable solution is found.

Whilst the principles of asylum may be firmly established in normative, legal and institutional terms, their practical application remains imperfect across the globe. This is not an exception in Ethiopia.

2.1. Problem of Identification challenging the integrity of the asylum system

The right to seek asylum is threatened where asylum-seekers were part of mixed population movements. In an effort to implement international refugee

instruments and ensure protection of refugees in Ethiopia, the first step, of course is to identify the refugees. This is very important, as any confusion in this process could well result in the impairment of the whole purpose of international protection. In the case of Somali and Eritrean, their identification from local inhabitants is far from easy that threaten the right to seek asylum.

2.2. Denial of access to formal recognition of refugee Status

Access to the recognition of refugee status is not always available specially for the case of Somali and Eritrean asylum seekers residing in the eastern camps that put them to wait for months with no legal status and with out access to basic subsistence.

2.3. Lack of fair and efficient national asylum/ RSD procedure

The right to seek asylum was also jeopardized where access to fair and effective asylum procedures was lacking. Although the government of Ethiopia has acknowledged the paramount importance enacting national implementing legislation by enacting Refugee proclamation No.409/ 2004, at present Legal and practical problems remain in the quality and capacity of national asylum systems that eventually affect protection of asylum seekers and refugees. Practical problems include: absence of well developed procedural standards for refugee Status determination procedures, and the non- availability of expert assistance for asylum-seekers and refugees, de facto absence of the right of appeal on negative refugee status decision and lack of uniform asylum procedure.

To substantiate the practical problem, UNHCR, has been working with the government of Ethiopia for a long period of time to help improving the quality of national asylum system by sharing expertise, information and best practice.

2.4. Restriction of Basic Rights

While no serious violations of basic human rights of asylum-seekers and refugees were recorded under the existing provisions; the freedom of movement of refugees is limited and encampment is the preferred option. Despite a refugee lawfully staying their territory has the right to choose their place of residence and to move freely within its territory, until very recently, Ethiopia practices as strict *de facto* policy of encampment for Somali and Eritrean refugees, which obliges the majority of refugees to remain within the confines refugee camps. The encampment policy limits the extent to which certain standards of treatment can be fully enjoyed by refugees.

2.5. Problem of Durable asylum (Lack of Local Integration and naturalization Prospects)

Ethiopia maintains two reservations to the 1951 Convention, notably Right to wage-earning and self-employment as well as liberal professions and Right to public education with respect to education other than elementary education. These reservations make self-sufficiency almost impossible for refugees and seriously impact on their feeling of self-dignity as they become dependant on assistance from UNHCR and other agencies. It also impacts on their ability to integrate locally, not only as they are not allowed to access Government public schools, but also as one of the conditions to be granted Ethiopian citizenship is a legal source of income.

III. Objective of the Study

The human and political problems presented by refugees and asylum seekers are chronic and not improving. This is reflected in international concern and the existence of a treaty frame work. The emergent body of refugee law is an amalgam of international, regional and national rules and procedures-that-includes complementary forms of protection is a dynamic body of law, informed

by the broad object and purpose of the refugee law, as well as by developments in related areas of human rights law.

But, it is national law and practice, particularly with regard to immigration and access to fair and efficient asylum procedure which in reality determines refugee right to asylum. The primary aim of this academic research is to contribute to the existing body of knowledge in areas of refugee law there by envisaging the scope and content of the right to asylum with respect to refugee law and its place in Ethiopia. Thus, the practice of Ethiopia will be thoroughly discussed.

3.1. Over all objectives

The cardinal objective of the research is to identify key legal, policy and practical gaps that have paramount impact on refugee protection regime in Ethiopia and to come up with possible recommendations for improvement from the perspective of asylum-seekers, refugees, the hosting State and the UNHCR.

3.2. Specific Objectives

- To assess the scope and content of the right to asylum to expanded the humanitarian nature of protection for this right.

- To explore the extent to which the special protection needs of refugees and asylum-seekers are safeguarded in the context of asylum. It examines how the non-refoulement and asylum procedures interrelate, and what consequences this may have for the protection of refugees and asylum-seekers.

- To identify the core procedural rights and general principles which are necessary safeguard the right to seek asylum and the principle of non-refoulement.

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- To identify the core procedural rights and general principles which are necessary safeguard the right to seek asylum and the principle of non-refoulement.

-To assess Federal substantive and procedural laws and polices quite relevant to the protection of asylum-seekers and refugees in light of International Standards.

- To examine UNHCR's role in the Ethiopian asylum system and to shed light the possible major avenues through which it could be able to play its maximum role safeguarding refugee right to seek and enjoy asylum.

- To critically look in to Ethiopia commitment in discharging its international duty of refugee protection through the case study assessment on the protection provided in practice to refugees and asylum seekers according to established International Standards.

III. Significance of the Study

The theme of this study gains importance in light of the increase, in recent years, in the numbers of refugees in Ethiopia as a result of regional events taking place in East Africa. This requires the activation of legal provisions related to the right to asylum.

-This research is hoped to serve Ethiopia to provide effective protection for asylum seekers and refugees in keeping with the old tradition of granting asylum and discharge its international obligation.

- The study may also serve a valuable resource for judges, adjudicators, legal practitioners, government officers, UNHCR staffs, humanitarian workers, non-governmental refugee advocates, and academics alike in their various efforts towards the common goal of strengthening refugee protection in Ethiopia.

Notably,

The analysis, conclusions and recommendations of this research will be shared with the UNHCR Representation in Ethiopia and ARRA. This will shed light on the law and practice and may help these key actors in the Ethiopian asylum and refugee protection regime in order to gain a better understanding of issues related to the implementation of refugee law in Ethiopia. This may assist not only in meeting changing realities in the field, but also in setting the bases of future refugee law.

V. Methodology

A number of research methods were employed:

5.1. Desk research: In researching this paper, to review background information, a wide range of publicly-available material has been scrutinized, including academic literature as well as reports by UNHCR, governments, NGOs and international organizations. Relevant legal instruments, as well as jurisprudence on international, regional and national levels, have been examined. The study also contains the findings of a survey of regional refugee protection mechanisms.

5.2. Legal analyses of Domestic laws: Most importantly, critical analysis of the national Refugee legislation and other subordinate legislations related with asylum issues that are relevant to protection of asylum seekers and refugees is conducted.

The researcher also employed non doctrinal legal research method through conducted continuous personal observation, interviews with key actors involved in the Ethiopian asylum system to explore my provisional findings of current practice.

5.3. Document Analysis: official publications by ARRA and UNHCR country operation plan on the in Ethiopia made by UNHCR, Official statistics pertaining to

asylum-seekers and refugees; relevant secondary documentary resources, such as reports, and country of origin information from reliable sources are consulted and analyzed.

5.4. Personal Observation: The researcher has been working with Somali asylum-seekers and refugees since the inception of the research as a registration, Refugee Status Determination and Protection staff. The researcher ample professional experience in a diverse range of protection settings, hence, will be reflected in the research. In compiling its observations, the study has also benefited from access to internal UNHCR documents as well as the input of staff with professional experience in a diverse range of protection settings.

5.5. Interviews and discussions with key actors: In the course of this research, Interview and discussion with 8 personnel of key actors in the Ethiopian asylum and refugee protection system, i.e., SIRRA, ARRA and UNHCR are made using flexible unstructured questionnaires, which were adapted to each context and each interviewee. The aim was to achieve good insight into the current practice (rather than only the legal provisions) of asylum-seekers access to territory, reception conditions, access to asylum procedures from first instance up to the appeal stage, Standard of treatment as well as the state's overall attitude towards Somali and Eritrean asylum seekers and refugees.

VI. Scope of the study

Lack of a Definition of the term "Asylum"

As the phrase 'asylum' is not a term of art defined in any international instrument, it seems prudent at the outset to understand the nature of the protection regimes that this study aims to examine. Asylum is commonly expressed as the granting of protection, by a State, to persons fleeing persecution or serious danger. A

person who is granted asylum is known as a refugee. An asylum seeker is a person who has not yet received a decision on his/her claim for refugee status. It could refer to someone who has not yet submitted an application or someone who is waiting for an answer. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is an asylum seeker at the beginning.

The concepts of asylum and refugee status/ complementary protection status/ temporary protection status or Mandate refugee Status are sometimes used interchangeably but it should be stressed that territorial asylum can only be provided by States. UNHCR may grant refugee status, but it cannot provide asylum.

The lack of a universally-accepted definition of 'asylum' can lead to its confusion with the concept of "the right to asylum". The latter concept is generally used to describe a short-term the right to grant asylum from state perspective and the right to seek and enjoy asylum or the right to be granted asylum from the individual point of view.

The issue asylum and refugee protection from the international law perspective is very complex that can't be sufficiently addressed in this very small thesis. There are, then, three caveats to be made:

Firstly, this is a study made not purely from an international law stand point of view as should be clear from the title. A political view of all the materials used is adopted, even if those materials include legal texts.

As a result, this paper is limited on issue which the writer believes as indispensable for the subject at bar. Hence, the two most recurring themes throughout this paper are the establishment of the beneficiaries of who should receive protection and a conceptualization of such protection from the growing

need for the international protection of human rights brings the advantage of ensuring admission, non-refoulement and saving lives.

VII. Limitation of the Study

The writer admits from the out set that the research is by no means exhaustive due to two main limitations:

- Though the views of asylum-seekers and refugees are very important for the comprehensiveness of the issue this research strives to reveal, budget and time constraints had been an important impediment. In addition, the fact that the researcher works in the Protection unit in the office of UNHCR may raise expectation among asylum seekers and refugees who desperately want to be resettled and they may provide biased response to the questions asked. So, the writer deliberately avoids conducting interview.
- More than one hundred thousands of Somali and Eritrean asylum seekers and refugees are hosted in 10 different remote refugee camps at the northern, eastern and southern tips of Ethiopia. Few are officially allowed to reside in Addis Ababa. This scenario made difficult for the researcher to conduct field visit mainly in the case of Eritrean refugees instead forced to focus on qualitative data.

However, adopting this highly qualitative research methodology enables the researcher to provide an interpretative measurement based on the collected data, interviewees with key actors working in the area and continuous personal observation.

Taking into account all these circumstances, the study highlights contemporary situation of Somali and Eritrean asylum-seekers and refugee in Ethiopia

surveying eastern, northern and Southern camps but care has been taken not to over-interpret the results of the research and to stick to my finding.

VIII. Structure of the Study

The paper encompasses three chapters. The Introduction part supplies the necessary background information.

Chapter one will briefly recount the development of asylum in modern refugee law and outline the existing international and regional standards that imply the right to asylum. It concludes by noting the major actors involved in refugee international protection regime.

Chapter two will attempt to explore some of the most important international and regional legal instruments that safeguard and give effect the right to asylum substantively and procedurally through analyzing international legal principles and soft laws to clarify applicable law and legal standards relating to specific thematic issues with the aim of providing guidance in the particular area concerned. The ultimate purpose is to enhance the delivery of protection to refugees and asylum-seekers through proper understanding of the relevant international standards for effective refugee protection in Ethiopia.

Chapter Three endeavors to survey the national legal frameworks that are directly imperative sources of refugee protection. The normative framework will be followed by the analysis of the practical implementation through the case study on Somalia and Eritrean Asylum-seekers and Refugees in Ethiopia.

Finally, conclusions and recommendations are supplemented.

Chapter One

1. The Development of Modern international Refugee Law

1.1. General Overview

Every year, tens of thousands of people leave their homes and often their countries because of persecution or war. These people become refugees. They nearly always have to move suddenly, leaving their possessions behind, tearing families apart. Many are never able to return to their homes. There was close to 1 million individuals worldwide whose asylum application had not yet been adjudicated by the end of 2009.

Most refugees seek safety in a neighboring country. Others have to travel great distances to find safety. Refugees often arrive at airports and sea ports far from their native land, asking for entry. In 1951, the United Nations adopted the Convention Relating to the Status of Refugees. More than half of the countries in the world have agreed with the Convention. They give protection to refugees and agree not to force them to return to their country to risk persecution or death. Article 33 of the Convention says: "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

This also applies if a government wants to send a refugee to another country from which the refugee might be sent home. Also, governments must hear the claim of a refugee who wants to find safety (seek asylum) in their country. This principle applies to all states, whether or not they are party to the 1951 Convention.

According to the Convention, a refugee is someone who has left their country and is unable to return because of a real fear of being persecuted because of

their race, religion, nationality, membership of a particular social group, or political opinion.

The 1951 Convention also says that refugees should be free from discrimination and should receive their full rights in the country where they go to be safe. Many articles of the Universal Declaration of Human Rights also protect refugees. However, countries disagree about who is a "genuine" refugee. The media and politicians often demand limits on the number of refugees, saying that they cause racial tension, and shortages of housing and jobs.

In recent years the governments of many of the world's richest countries have reduced the number of refugees they allow in, for two reasons. First, air travel has become cheaper, meaning that more refugees from developing countries want to enter developed countries. Second, the world economic downturn has reduced the need for large workforces. This means that individuals who used to come as migrant workers now have to apply for refugee status which pose significant challenge in refugee protection.

In response to increasing mixed migration, developed countries have started to adopt strict restrictive measures on access to asylum. They justify restrictions on refugees, often say that refugees are not victims of oppression, but just want a better standard of living. They call them "economic migrants". Governments often argue that refugee's fears are exaggerated or untrue.

A competing interest at stake with the right to asylum is the right of States to admit or exclude aliens from their territory which is a key attribute of national sovereignty. However, many of those who arrive on their territory or at their borders without visas or without a right to enter or remain cannot be returned if claim international protection or Asylum or refugee status.

When referring to international norms, the asylum literature cites numerous explicit international and regional agreements that prescribe the establishment of

an asylum process, the definition of a refugee, the principle of non-refoulement, and the link between asylum and human rights. The most important international refugee norms are the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol, the 1948 Universal Declaration of Human Rights. 128 states were party to the 1951 Convention and/or 1967 Protocol.¹³

However, contemporary international refugee law can't be understood without embarking on the discussion of its origin, nature and evolving legal and institutional framework for the protection of refugees. The outline provided hereunder would clear up the back ground .and help to get the general concept of the development of international refugee law.

1.2. Pre-1951

People have fled persecution from the earliest moment in history when they began forming communities. A tradition of offering asylum began at almost the same time; and when nations began to develop an international conscience in the early 20th century, efforts to help refugees also went global.

The modern legal concept of a refugee may be most specifically traced back to 1921, after the First World War, when the League of Nations created a high commissioner for Russian refugees, which led to the development of a specific travel document.⁷ Faced with a wave of Russian refugees, certain European countries found it necessary to introduce special legislation to overcome the problem created by the lack of identity papers, which made it impossible for many of these refugees to perform the most elementary acts of civil life (marriage, contracts etc.).⁸

⁷ Refugee: West's Encyclopedia of American Law (Full Article) from Answers.com (Accessed on 10 May 2009)

⁸ Prince Sadruddin Aga Khan, Former United Nations High Commissioner for Refugees, Lectures on legal problems relating to refugees and displaced persons, given at the Hague

In 1921, Fridtjof Nansen, the first High Commissioner for Refugees, acting within the framework of the newly established League of Nations, undertook a real crusade which resulted eventually in a number of international agreements benefiting the various groups needing assistance at that time: Russian, Armenian, Assyro-Chaldean and Turkish refugees, and subsequently refugees from Germany and Austria.

A body of refugee law thus began to take root. The 1933 League of Nations' Convention relating to the International Status of Refugees and the 1938 Convention concerning the Status of Refugees coming from Germany provided limited protection for uprooted peoples. The 1933 instrument, for instance, had introduced the notion that signatory states were obligated not to expel authorized refugees from their territories and to avoid "non-admittance [of refugees] at the frontier." But that Convention lacked teeth: only eight countries ratified it, several of them after imposing substantial limitations on their obligations. None of these early refugee organizations were totally successful and legal protection remained rudimentary.⁹

International Refugee institutions created at different times, assumed the task of coordinating and providing international assistance. The United Nations Relief and Rehabilitation Agency (UNRRA) assisted seven million people during and after the Second World War. Likewise, the International Refugee Organization (IRO), created in 1946, resettled more than one million displaced Europeans around the world and helped 73,000 civilians to return to their former homes.

As can be inferred from the foregoing notes, agreements were made in response to unrest in Europe in early 20th century and there was no clear definition of the

Academy of International Law, 4-6 August 1976 (<http://www.unhcr.org> (Accessed on 10 May 2010))

⁹ Ibid

term refugee. Refugees are categorized by countries they came from. For the first time, in 1938, the mandate given to the Inter-Governmental Committee on Refugees, set up to deal with refugees from Germany mentions the causes of the flight of those persons, who "*must emigrate on account of their political opinions, religious beliefs or racial origin*".¹⁰

As prince Sadruddin Aga remarked, these agreements, which dealt with specific groups of refugees, never attempted to give a general definition of the term "refugee", which in the circumstance, appeared unnecessary.¹¹

In 1946, in the Constitution of the International Refugee Organization (IRO) drawn up by the Economic and Social Council, the notion of persecution, or well-founded fear of it, was first spelt out in full. This represented a twofold innovation: the fact, not only of describing the reasons which make a person a refugee, but also, of associating those reasons with a partly subjective element, namely fear, based on well-founded grounds of persecution. Consequently, from then on, every refugee would have to substantiate the fear he invokes by providing some proof based both on objective data and on the personal factors which make him fear persecution in the future, even if he has not been persecuted in the past. The collective aspect of the "refugee" phenomenon thus ceased to be decisive in granting refugee status, the emphasis being placed henceforth on the situation of the individual.¹²

I.2.The 1951 Geneva Refugee Convention and the Statute of the UNHCR

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments

¹⁰ Ibid

¹¹ Ibid

¹² Prince Sadruddin Aga Khan, *supra* cited at note 8, page 21

reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin.¹³

The Convention definition of a 'refugee', which forms the basis on which states formulate their domestic definitions and decisions concerning the nature of the characteristics which need to be identified if the protection offered by asylum is to be granted. However, as Joanne Van Selm-Thorurn noted, in comprehending current refugee definitions and Conventions, it is important to take into account the origins of notions of defining the characteristics of refugees. The historical context also helps to explain both the nature of the 1951 Convention and some of its apparent limitations.¹⁴

In the aftermath of World War II, the United Nations General Assembly created the Office of the United Nations High Commissioner for Refugees (UNHCR). The Statute of UNHCR adopted by the UN General Assembly in December 1950,¹⁵ has been given a mandate to provide international protection to refugees and seek permanent solutions to their problems.

The Statute established UNHCR's mandate, functions and structure and provides the criteria by which persons may come within the competence of UNHCR. As stated under Article 6 (A) its Statute, the competence of UNHCR shall extend to:

(I) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933

¹³ volker turk and frances nichol son , Refugee protection in international law: an overall perspective volker turk and frances nichol son , available at [http:// www.unhcr.org](http://www.unhcr.org), page , 1

¹⁴ Ibid,

¹⁵ Statute Of The Office Of The United Nations High Commissioner For Refugees United Nations General Assembly Resolution 428 (V) Of 14 December 1950 Text: UN Document A/1775 (1950)

and 10 February 1938, the Protocol of 14 September 1939 or the constitution of the International Refugee Organization.

(II) Any person who, as a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.

The 1951 Convention Relating to the Status of Refugees defines the 'term 'refugee' nearly similar to the definition of the Statute of UNHCR.¹⁶ Article 1 A (2) provides that for the purposes of the present Convention, the term "refugee" shall apply to any person who as a result of events occurring before 1 January 1951 and:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country...."

Though essentially the same with the definition provided in the Statute of UNHCR¹⁷, the definition of the term "refugee" given by the 1951 Convention was subject to two limitations: apart from refugees who were already considered and regarded as such under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol

¹⁶ Convention Relating To The Status Of Refugees Adopted On 28 July 1951 Entry Into Force: 22 April 1954

¹⁷ However, the definition of the term "refugee" in the 1950 UNHCR Statute doesn't make inclusive "membership of a particular social group" as a ground of persecution.

of 14 September 1939 or the Constitution of the International Refugee Organization; the 1951 Convention related only to these persons who had become refugees as a result of "events occurring before 1 January 1951 in Europe". However, States were also given the option of restricting the Convention's application to European refugees.¹⁸

The 1950 statute of UNHCR and 1951 Refugee Convention, were negotiated in the aftermath of World War II, were intended to deal with the European problem of 1.25 million refugees arising out of the post-war chaos. In particular it was directed at the victims of Nazi and other fascist regimes. This is recognized by the definition which describes a refugee as a person with an individual 'well-founded fear of being persecuted' for reasons of race, religion, nationality, membership of a particular social group or political opinion, as a result of 'events occurring before 1 Jan. 1951' (Art. 1 A(2)).¹⁹

Persecution and the Reasons for Persecution

In the absence of any accepted legal definition of the concept of persecution, there continue of course to be varying interpretations in different jurisdictions as to whom international protection should be extended and as to what constitutes persecution under the 1951 Convention. With regard to the term 'persecution', a legal definition of persecution for the purposes of refugee status determination exists neither in the 1951 Convention nor elsewhere in international law.²⁰

While there is no exhaustive definition of persecution in international refugee law, the refugee definition requires a connection between the human rights violation

¹⁸ See article 1 A (2) and B of the 1951 Convention on the Status of refugees

¹⁹ Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives Edited by Susan Kneebone Excerpt Monash University, Victoria Cambridge University Press, 2010 (also available at [http:// www.cambrdg.org/us/catalogue](http://www.cambrdg.org/us/catalogue)) (accessed on 9 Feb., 2010)

²⁰ Volker Turk and Frances Nicholson supra cited at note 13, p. 66.

or other serious harm and one of the grounds mentioned in the Geneva Convention. The abusive behavior or the lack of protection against human rights violations must be motivated at least partly by one or several Convention grounds. Articles 31 and 33 refer to those whose life or freedom “was” or “would be” threatened, so clearly it includes the threat of death, or the threat of torture, or cruel, inhuman or degrading treatment or punishment. A comprehensive analysis today will require the general notion to be related to developments within the broad field of human rights.²¹

Volker Turk and Frances Nichol noted that the lack of a legal definition of persecution is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term²².

As UNHCR’s paper on interpreting Article 1 notes:

“The on-going development of international human rights law subsequent to the adoption of the 1951 Convention has helped to advance the understanding, expressed in the UNHCR Handbook, that persecution comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element. While it is generally agreed that ‘mere’ discrimination may not, in the normal course, amount to persecution in and of itself (though particularly egregious forms undoubtedly will be so considered), a persistent pattern of consistent discrimination will usually, on cumulative grounds, amount to persecution and warrant international protection.”

²¹ For example the 1984 Convention against Torture, article 7; 1966 International Covenant on Civil and Political Rights, article 3; 1950 European Convention on Human Rights, article 6; 1969 American Convention on Human Rights, article 5; 1981 African Charter of Human and Peoples’ Rights).

²² Volker Turk and Frances Nichol Son, supra cited at note 13

Guy S. Goodwin-Gil,²³ concur this argument and said that the persecution feared be for reasons of “race, religion, nationality, membership of a particular social group (added at the 1951 Conference), or political opinion”. This language, which recalls the language of non-discrimination in the Universal Declaration of Human Rights and subsequent human rights instruments, gives an insight into the characteristics of individuals and groups which are considered relevant to refugee protection. Persecution for the stated reasons implies a violation of human rights of particular gravity; it may be the result of cumulative events or systemic mistreatment, but equally it could comprise a single act of torture.²⁴

At the same time, fear of persecution and lack of protection are themselves interrelated elements. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear. However, there is no necessary linkage between persecution and Government authority. A Convention refugee, by definition, must be *unable* or *unwilling* to avail him- or herself of the protection of the State or Government, and the notion of inability to secure the protection of the State is broad enough to include a situation where the authorities cannot or will not provide protection, for example, against the persecution of non-State actors.²⁵

Thus, Persecution under the 1951 Convention is a complex of reasons, interests, and measures. The measures affect or are directed against groups or individuals for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These reasons in turn show that the groups or individuals are identified by reference to a classification which ought to be irrelevant to the enjoyment of fundamental human rights.

²³ Guy-Goodwin-Gill, The 1951 Protocol relating to the Status of Refugees, [Http://untreaty.un.org/cod/avl/faculty/Goodwin-Gil.html](http://untreaty.un.org/cod/avl/faculty/Goodwin-Gil.html) (accessed on 30 April 2010)

²⁴ Ibid

²⁵ Ibid

Secondly, the writer prefer not to specifically address the meaning to be given to the terms 'race', 'religion', 'nationality', 'membership of a particular social group', and 'political opinion' in Article 33(1) of the 1951 Convention. For the reasons just stated, it seems not consider them to be of controlling importance. Also, the meaning of these terms in Article 33(1) will be identical to their meaning in Article 1A (2). An examination of the meaning of Article 1A (2) goes beyond the scope of this Opinion. For completeness, the writer note simply that the meaning of these terms for the purposes of Article 1A (2) is addressed in the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*.²⁶

Thus, this definition depends entirely on whether the asylum seeker is successful or not in showing well-founded individual fear of persecution either of the five grounds, the emphasis being on political persecution. The general sprit of the 1951 Convention is that every person is entitled freedom from persecution and that s/he will receive recognition and assistance from the international community in order to safeguard that freedom.²⁷

Cessation Clause: When is a refugee not a refugee?

A person can cease to be a refugee for a number of reasons: if he/she voluntarily avails him/herself of the protection of his/her country of origin, has reacquired his/her or acquired a new nationality, or has voluntarily re-established residence in the country of origin (or habitual residence). Most important in the context of country of origin information research is the reference to "ceased circumstances": "Art 1.C (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; [...]"

²⁶ EXCOM Conclusion No. 15 (XXX) 1979, paras. 66–86

²⁷ Helen Lambert Supra cited at note 2, page 2

Exclusion and Asylum: Persons undeserving of international protection

Finally, the 1951 Convention definition categorically excludes from the benefits of refugee status anyone whom there are serious reasons to believe has committed a war crime, a serious non-political offence prior to admission, or acts contrary to the purposes and principles of the United Nations (article 1F). From the very beginning, therefore, the 1951 Convention has contained clauses sufficient to ensure that the serious criminal and the terrorist do not benefit from international protection.²⁸

This definition is cited as one of the most widely accepted international norms²⁹. As of October 1, 2008, no fewer than 147 of the 191 member states of the United Nations had acceded to these international instruments, which, under the terms of its mandate, are promoted and supervised by UNHCR.³⁰ As indicated in the next discussion, regional instruments notably the binding 1969 Convention of the organization of African Unity (OAU) and the 2004 EU Qualification Directive and various non binding Declarations such as the 1984 Cartagena Declaration on Refugees (OAS) and the 1966 Asian-African Legal Consultative Organization (Bangkok principle), make a direct reference to the definition of the term refugee in the 1951 Convention definition.

Apart from providing the basic refugee definition, the 1951 Convention sets out the legal status of refugees in their country of asylum and prescribes the rights which flow from that status, and describes the obligations of State Parties to the Convention. Considerably, the most important right detailed in the 1951

²⁸ Guy-Goodwin-Gill, *Supra* at note 23

²⁹ UNHCR, United Nations High Commissioner for Refugees States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, 2008, available at <http://www.unhcr.org> (Accessed on 1 April, 2010)

³⁰ *Ibid*

Convention is the right to be protected against forcible return, or refoulement, to the territory from which the refugee had fled. Article 33 (2) provides.³¹

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"

Albeit its time limits and scope, the 1951 Convention is remarked as the foundation of international refugee law and represents a milestone in the emergence of a global will to address problems of forced displacement. As indicated in the proceeding section, it not only defines the term "refugee" but also clearly sets minimum standards for the treatment of persons who are found to qualify for refugee status.³²

1.3. The 1967 Protocol

Let it be clear, refugees existed outside of Europe in 1951 but the records show that their plight and the burden on their hosts was not recognized as being of immediate concern to the Convention.³³ Refugee crises were emerged during the late 1950s and early 1960s beyond the continent of Europe, particularly in Asia and Africa.³⁴ It became necessary for the international community to widen both the temporal and geographical scope of the 1951 Convention.

³¹ The principle of *non-refoulement* is also incorporated in a number of regional instruments on refugees. In addition, the *refoulement* prohibitions under international human rights law which prohibit the returning of a person to a territory where there is a real risk that s/he may face torture, cruel, inhuman or degrading treatment or punishment or other irreparable harm (article 3 of the Convention against Torture (CAT) and articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR)).

³² UNHCR: An Introduction to International Protection, Protecting persons of concern to UNHCR (Self-study module), 1 August 2005, page 10

³³ Lucy Mayblin: Historically European, Morally Universal? The 1951 Geneva Convention on the Status of Refugees, <http://www.e-ir.info/?author=784> (Accessed on 28 December, 2009

³⁴ Supra cited at note 32

In the light of on-going concern over the situation of refugees and the limitation on the personal scope of the 1951 Convention, a Colloquium on the Legal Aspects of Refugee Problems was organized in Bellagio, Italy, in April 1965. The outcome of this meeting was agreement amongst the participants that the 1951 Convention ought to be adapted 'to meet new refugee situations which have arisen, and thereby to overcome the increasing discrepancy between the Convention and the Statute of the Office of the High Commissioner for Refugees'. The Colloquium further agreed that the most appropriate way of adapting the 1951 Convention would be through the adoption of a Protocol to 'remove the existing dateline (1 January 1951) in Article 1A(2) of the Convention'.³⁵

Thus, Protocol relating the Status of refugees to the 1951 Convention was adopted in 1967 and lifts the time and geographic limits found in the 1951 Convention's refugee definition (for those States that had applied it).³⁶ As stated in its preambular paragraphs, the objective of the 1967 Protocol was to ensure 'that equal status should be enjoyed by all refugees covered by the definition in the [1951] Convention irrespective of the dateline 1 January 1951'.

Article II (1) of the 1967 Protocol provides that the States Parties to the Protocol undertake to cooperate with the UNHCR in the exercise of its functions. Article VII reiterates the preclusion on reservations indicated in Article 42(1) of the 1951 Convention. The Protocol entered into force on 4 October 1967.³⁷

States parties to the Protocol agreed to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's

³⁵ Cf: Sir Elihu Lauterpacht and Daniel Bethlehem The scope and content of the principle of *non-refoulement*: Opinion, p.102

³⁶ Article I (2) of the 1967 Protocol reads as follows: "for the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this Article, mean any person within the definition of Article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and ..." and the words "... a result of such events", in Article 1 A (2) were omitted."

³⁷ Ms. Kate Jastram and Ms. Marilyn Achiron, *Supra* note 5, page 8

refugee definition. So far, as UNHCR witnessed, the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that *both* treaties are central to the international refugee protection system.³⁸

1.5. Widespread of Refugee Crisis and the Adoption of Regional Asylum Mechanism

Some commentators argue that the drafter of the 1967 protocol missed the chance they had to widen the terms of this world wide accepted definition although the timelessness was unique. It was already evident that Third World Refugees, mostly displaced by war of independence, generalized violence etc..., but not refugees in the sense of the 1951 Convention, would become a problem.³⁹

Consequently, the substantive content of the 1951 convention definition remained unchanged but legal discussions emphasized the appearance of two trends of thinking: on one hand, a doctrine in favor of legal change in the existing definition, which dominated in Africa and Latin America. On the other hand, a doctrine in favor of a widening of the interpretation of the 1951 Convention, in particular its definition, which clearly prevailed in Western Europe. Asylum policies in Europe were elaborated in the early 1950's until 1970s. They are largely based on the individual approach of persecution adopted in the 1951 Convention. This basic principle has remained in place and, therefore, each asylum application is considered on a case-by-case and is decided on its own merits with reference to the reasons or grounds put forward by the applicant.⁴⁰

³⁸ Ibid

³⁹ Supera note at 42

⁴⁰ Supera note at 42

1.5.1. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

Since the late 1950s, UNHCR has been increasingly involved in Africa and Asia in a scale problem of refugees and displaced persons called for a new approach in the field both of assistance and international protection. The first of these problems concerned some 180,000 Algerian refugees in Morocco and Tunisia, including a large number of women and children.⁴¹ In 1958, Under the terms of its Resolution 1672 (XVI), the United Nations General Assembly requested the High Commissioner to envisage the possibility assisting these refugees thereby expanding for the first time the UNHCR Mandate.⁴²

Africa's first modern refugee crisis arose in the 1960s when wars of national liberation displaced tens of thousands of people; the result was a strengthening of the formal support system for refugees.⁴³

The OAU Convention, to date, the only *legally binding* regional refugee treaty unequivocally *asserted* the 1951 Refugee Convention as "*the basic* and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment," adopts a two-part of definition of refugee including the 1951 convention/UNHCR Statutes the first part⁴⁴, but includes a more objectively based consideration.

⁴¹ Astri Suhrke: Safeguarding the Right to Asylum, Working Paper Program of Human Rights Studies CHR. Michelson Institute Department of Social Science and Development Bergen, December 1992, page 7

⁴² Prince Sadruddin Aga Khan, *Supra* at note 8, Page 28

⁴³ Astri Suhrke, *Supra* note at note 41

⁴⁴The OAU refugee Convention retained the individual definition for determining refugee status and incorporates the refugee definition provided in the 1951 Convention and its 1967 Protocol under its' Article I.A (1) provides: "*For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,.... t*"

The Legal Definition: Extended Grounds of Persecution: 'External Aggression, Occupation, Foreign Domination or Events Seriously Disturbing Public Order'

Article 1(2) of the Convention provides that:

"The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

Article I (5) sets out exclusion criteria similar to those found in Article 1F of the 1951 Convention. *Put simply*, unlike the 1951 Convention, persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in States that are parties to this Convention, regardless of whether they have a well-founded fear of persecution or not, which is based on an objective assessment of the situation of the country of origin.

The United Nation General Assembly has endorsed the OAU definitions as the basis of for determining refugee Status in Africa and recommended that "... The OAU Refugee Convention , the regional Complement in Africa of the 1951 Convention..., be applied by the United Nations and all its organs as well as non-governmental organizations dealing with refugee problems in Africa. ⁴⁵ The OAU convention marked an important step to ward in strengthening the protection for those forcibly displaced on the continent. As one writer remarked that:

"The OAU Refugee Convention is most recognized for having extended the conventional concept of a refugee beyond the narrower scope of the 1951 Refugee

⁴⁵ GA Resolution 34/61 On The Situation Of Refugees In Africa (29 November 1979, Para. 1. Recommendation From The Pan African Conference On The Situation Of Refugees In Africa, Arusha, Tanzania,, 7-17 May 1979, Recommendation 2 (1) And 7 (5)

*Convention. [T]he result is an "interpretive consensus" that suggests that three fundamental characteristics differentiate it from the definition found in the 1951 Convention: first, the OAU definition is objective rather than subjective; second, it does not require a specific type of harm or cause of flight; and third, it was primarily designed and intended to be applied to the context of group displacements.*⁴⁶

With respect to eligibility criteria, the OAU Convention should be seen as complementary to and applied in conjunction with the 1951 UN refugee Convention. Undeniably, no question that the broader refugee concept can have important technical advantages in large-scale influx situations. It represents an important extension of the refugee concept as it means people fleeing the indiscriminate effects of a civil war, for example, qualify as refugees under the OAU Refugee Convention even though the element of persecution on one of the 1951 Convention grounds might be missing.⁴⁷

But this has brought a strong implication on the fate of million of refugees: The very existence of the OAU Convention has been used by some to justify a conservative reading of the 1951 Convention. For example, in certain states, notably European Countries, the 1951 Convention has often been construed as inapplicable to victims of civil war even though such persons comprise a significant proportion of displaced persons around the world. This narrow approach is based on a number of misconceptions:⁴⁸

- Civilians in internal armed conflicts are by nature only victims of indiscriminate violence rather than targets of persecution based on Convention grounds;
- Persecution requires an individual to be at greater risk of ill-treatment than any other member of his ethnic, religious or political community;

⁴⁶ George Okoth-Obbo, Thirty Years On: A Legal Review Of The 1969 OAU Refugee Convention Governing The Specific Aspects Of Refugee Problems In Africa, *Refugee Survey Quarterly*, Vol. 20, No. 1, 2001 @ UNHCR 2001 Available At www.unhcr.org

⁴⁷ UNHCR, Introduction to International Protection, *Supra* at note 32, page 61

⁴⁸ Ruma Mandal: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection"), United Nations High Commissioner For Refugees, June 2005, 20 available at <http://www.unhcr.org><http://www.unhcr.org> (accessed on 30 June, 2009) , page 12

- Acts of anti-government forces, i.e. non-state agents, cannot amount to persecution for the purposes of the Convention;
- Persecution cannot take place where (as a result of conflict) there is no longer any governmental authority exercising control over the country;
- An internal flight alternative is available in the particular conflict situation;
- As many victims of civil wars tend to receive temporary protection rather than refugee status in countries of asylum they cannot be eligible for recognition as refugees under the Convention.

Others strongly disagree, including UNHCR. These commentators defend their position that there is no persuasive evidence that the drafters of the OAU Convention thought the 1951 Convention refugee definition inadequate to deal with issues such as mass displacement or flight from civil war situations. Rather, a dearth of primary materials documenting the OAU Convention's drafting history has allowed misunderstandings about the scope of its refugee definition to flourish. Resort to the broader concept should not be taken to imply that persons who flee their countries because of foreign aggression, civil war, international strife or general disregard for human rights are not a priori covered by the 1951 Convention, traditional refugee concept such an assertion would be both factually and legally wrong.⁴⁹

The OAU Convention is very progressive in many ways in strengthening the protection of refugees and the institution of asylum- ahead of the 1951 Convention. The principle of non-refoulement including prohibition on rejection at the frontier is protected (Article 2 (3) and prohibits repatriation of any refugee against his will (Article 5(1)).⁵⁰

⁴⁹ Printed in George Okoth-Obbo, Thirty Years On: A Legal Review Of The 1969 OAU Refugee Convention Governing The Specific Aspects Of Refugee Problems In Africa, *Refugee Survey Quarterly*, Vol. 20, No. 1, 2001 © UNHCR 2001 available at www.UNHCR.org

⁵⁰ See the full provision of Article 2 and 5 of the 1969 OAU Convention

The only specific provision in the OAU Convention which deals with the rights of refugees falling within its scope is concerned with travel documents. Article 6 (1) requires the issue of 1951 Convention Travel Documents to refugees, as defined by the OAU Convention, who are lawfully in the territory of member states and gives discretion for member states to issue such a travel document of any other refugee in their territory. The term “any other refugee” implies any other person recognized as a refugee by the member state but fall out of the definition of the 1951 Convention and the OAU Convention.

With respect to other Substantive rights, given that the OAU Convention explicitly recognizes the primacy of the 1951 Convention regime and the desirability of common global standards, the entitlements set out in the 1951 Convention are equally applicable to refugees falling within the extended definition of the OAU Convention, tacitly recognizing that the source of the harm causing flight is irrelevant for the purpose of the Status.⁵¹

As it will be noted in the next discussion, this is very significant in light of the EU Qualification Directive adopted in 2004 that creates separate but subsidiary refugee protection regime for persons nearly falling with in the extended definition of the OAU Convention, where a Status results in a lower form of rights than the 1951 Convention Status. The OAU Convention has been also provided positive inspiration for legal developments elsewhere, mainly the Cartagena Declaration on Refugees in Latin America

1.5.2. The OAS Cartagena Declaration on Refugees

In Latin America, when refugee crisis emerged in the 1980s, regional mechanism combined with innovative UNHCR practice to meet the refugees challenge was brought in to picture. In 1984, a group of government representatives, academics

⁵¹ Jan Mac Adam, *Complementary protection in International Refugee Law*, Oxford University Press, INC. New York, 2007 , also available at <http://www.unhcr.org> , page 38

and distinguished lawyers from Latin America adopted what became known as the Cartagena Declaration on Refugees.⁵²

The Declaration recommends that the definition or concept of a refugee to be used throughout the Latin American region is one which, in addition to containing the elements of the 1951 Convention, includes among refugees persons who have fled their country: Article III (3) of the Declaration reads as follows:

- "To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention and the doctrine employed in the reports of the Inter-American Commission on Human Rights."

- "Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

The definition is similar to that found in the OAU Convention but expressly widened the definition of the term refugee to ensure that all victims of generalized violence including massive violations of human rights could claim protection, thus going beyond the comparable OAU Convention.

⁵² Cartagena Declaración on Refulges Adopted at a colloquium entitled "Coloquio Sobre la Protección Internacional de los Refugiados en Américan Central, México y Panamá: Problemas Jurídicos y Humanitarios" The internacional protection of refugees in the region held at Cartagena, Colombia from 19 - 22 November 1984

There are no recommendations on grounds for exclusion or cessation in the Cartagena Declaration. Nevertheless the relevant criteria in the 1951 Convention are generally considered to apply given the clear description of the Cartagena elements as 'in addition' to the 1951 Convention definition.⁵³

The Declaration goes on to affirm in Conclusion 5 the customary nature of the principle of *non-refoulement* in relation to refugees, expressly mentioning the prohibition on rejection at the border. No reference is made to any exceptions to the principle of *non-refoulement*.

Conclusion 10 of the Declaration urges non-governmental, international and national organizations to continue their worthy task, co-coordinating their activities with UNHCR and the national authorities of the country of asylum, in accordance with the guidelines lay down by the authorities in question.

Apparently the Declaration lacked the status of a treaty and is not legally binding on States. However, most Latin American States apply the definition as a matter of practice; some have incorporated the definition into their own national legislation. The Declaration has been endorsed by the Organization of American States (OAS), the UN General Assembly, and UNHCR's advisory Executive Committee.⁵⁴

1.5.3. The European Approach: Temporary, Complementary and Subsidiary protection regime

While Africa and Latin America countries preferred to adopt an expanded definition of the concept of refugee, in Europe, a different approach has been taken in widening the definition of the term refugee as witnessed in practice through widening the interpretation of the 1951 Convention, creating a range of

⁵³ Ruma Mandal, *supra* cited at note 48, page 47

⁵⁴ Ms. Kate Jastram and Ms. Marilyn Achiron, *Supra* cited at note 5, page 15

alternative status under domestic law in light of various Recommendations: Complementary protection through International Human rights instruments and recently the creation of subsidiary protection regime since the adoption of EU Qualification Directive in 2004.

1.5.3.1. Liberal Interpretation: The era of open door asylum policy

Practically, at least until the 1980s, a doctrine in favor of a widening of the interpretation of the 1951 Convention, in particular its definition, were prevailed in Western Europe. Substantially, the 1956 Hungarian refugee Crisis forced States to provide hundreds of these asylum seekers either temporary protection or permanent residence through individual status determination or *a prima facie* bases though strictly not fall with in the temporal requirements of the 1951 Convention definition due to time limitation.⁵⁵

Asylum policies in Europe were elaborated in the early 1950's, Some states also grant refugee status to people seeking protection from gender discrimination; for example, women in nations with Sharia law may seek asylum to avoid severe punishments for adultery⁵⁶.

This asylum policy was articulated by the rapid economic reconstruction of countries in Western Europe where the great majority of refugees were located. With the ebbing of political tensions, the majority of refugees were able to become integrated, at least from an economic and social point of view during the period 1955-1970.⁵⁷

⁵⁵ Jan MacAdam, *supra* cited at note 51

⁵⁶ S.E. Smith, What is political asylum, <http://www.conjuncture.com> accessed on 9 Oct, 2009

⁵⁷ Prince Sadruddin Aga Khan, *supra* cited at note 8

1.5.3.2. Restrictive Interpretation: The era of restrictive asylum policy after the end of cold war

Though most European Countries are parties to the 1951 Convention, faced by increasing numbers of asylum seekers in the 1980s⁵⁸, certain European States have chosen to interpret Article 1(A) 2 of the 1951 Convention restrictively so as not to include asylum seekers who fled due to war and conflict as defined by the OAU Convention and the Cartagena Declaration, yet, this group of refugees may be granted a residence permit (permanent or temporary) on humanitarian grounds.⁵⁹

Under extreme pressure not to send them home to danger, governments have been increasingly resorted to creating special form of protection exceptions to the 1951 Convention. These are known variously as B or C status, 'Duldung,' (tolerance), 'exceptional leave to remain,' or "humanitarian status" in Europe. Similarly, the US has been adopted '*temporary protected statuses*' under the 1991 US Immigration Act. Falling short of full refugee status, these allow asylum-seekers who might not qualify for refugee status to remain at the discretion of the authorities until it is deemed safe for them to return.⁶⁰

1.5.3.4. Temporary Protection: Lesson from 1990s Yugoslavia Crisis

Temporary protection is an immediate, short-term response when large numbers of people arrive after fleeing armed conflict, massive violations of human rights or other forms of persecution. European States had chosen create a range of

⁵⁸ These groups of refugees are coming from countries of origin where events of generalized violence, gross human rights violation or events that seriously disturb public order as defined by the OAU Convention and the Cartagena Declaration

⁵⁹ Supera note at 48

⁶⁰ The United Nations, the UNHCR and Refugee protection: a non-specialist analysis (Ian Guest), International Journal of refugee law, Volume 3 Number 3. 1991, Oxford University press, page 587

alternative statuses or devices under domestic law to provide for prolonged stay. Notably, many European States offered 'temporary protection' when they experience a sudden mass influx of people, and their regular asylum systems face being overwhelmed (as happened during the conflict in the former Yugoslavia in the early 1990s).

In such circumstances people can be speedily admitted to safe countries, but without any guarantee of long-term asylum. Thus 'temporary protection' can work to the advantage of both governments and asylum seekers in specific circumstances. But it only complements and does not substitute for the wider protection measures, including full refugee status, offered by the 1951 Convention.⁶¹

1.5.3.5. Council of Europe Recommendations

At the Continent level, the Council of Europe has long called for a common approach to be taken in relation to persons falling outside the scope of the 1951 Convention who nevertheless need protection from return to their country of origin.⁶² Among the various recommendations made by the Parliamentary Assembly and the Committee of Ministers,⁶³ Recommendation (2001)18 of the Committee of Ministers suggests the following criteria for the granting of such protection in the case of persons ineligible for recognition under the 1951 Convention including:

“Risk of torture or inhuman or degrading treatment or punishment; forced to flee or remain outside country of origin as a result of a threat to life, security or liberty

⁶¹ Ms. Kate Jastram and Ms. Marilyn Achiron, supra cited at note 5, page 54

⁶² Ruma Mandal: supra cited at note 48, page 23

⁶³ See for example, Parliamentary Assembly Recommendations 773 (1976) on the Situation of De Facto Refugees, 817 (1977) on Certain Aspects of the Right to Asylum, 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe and 1525 (2001) on the United Nations High Commissioner for Refugees and the Fiftieth Anniversary of the Geneva Convention.

because of indiscriminate violence arising out of situations such as armed conflict; or other reasons recognized by legislation or practice in a member state”.

Ruma Mandal on his extensive research on the Protection Mechanisms Outside of the 1951 Convention remarked that although not legally-binding, these recommendations are significant in that they reflect the views of member state governments on the concept of refugee.⁶⁴ Since 2004, in the case of European Union states, the impact of the recommendation has been superseded by the EU Qualification Directive⁶⁵.

1.5.3.6. The 2004 European Union Qualification Directive: The Creation of a Subsidiary protection regime

On 29 April 2004, the Council of the European Union adopted the Directive 2004/83, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, (Hereinafter referred as the EU Directive).

The EU Directive, in its preamble explicitly recognizes that the 1951 Convention is the cornerstone of the international legal regime for the protection of refugees and broadly reflects the terms in Article 1A of the 1951 Convention but limited to third-country nationals and stateless persons, thereby excluding EU nationals from the protective scope of this instrument.⁶⁶

⁶⁴ Ruma Mandal: supra cited at note 48, page 17

⁶⁵ *Article 38 of the EU Directive provides that member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive.*

⁶⁶ See also Art. 2(c) of the Directive that defines ‘refugee’ as: “refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality.....”

Apart from this, the EU Directive further sets out a system of 'subsidiary protection' for certain individuals who do not satisfy the 1951 Convention refugee definition, rather than bringing such persons into an expanded refugee definition. Article 2 (e) of the EU directive states that:

"...a person eligible for subsidiary protection means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15"

Article 15 of the EU Directive describes 'serious harm' as: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Article 15(c) of the EU Directive has more of a link to the concepts found in the OAU Convention and the Cartagena Declaration in so far as these relate to situations of armed conflict. In fact, Article 15(c) reflects the practice in European states of providing protection from return to individuals fleeing conflict, for example in relation to the break-up of the former Yugoslavia.⁶⁷

The EU Directive expressly recognize the need to provide protection for persons who are at risk of death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person due to war.⁶⁸ Undeniably, it

⁶⁷ Ruma Mandal: supra cited at note 48, page 23

⁶⁸ The *refoulement* prohibitions under international human rights law which prohibit the returning of a person to a territory where there is a real risk that s/he may face torture, cruel, inhuman or degrading treatment or punishment or other irreparable harm (article 3 of the Convention against

broadened the concept of refugee though employing a different terminology as 'persons otherwise in need of international protection' and admirably set up a foundation for member States to create a subsidiary protection regime as a complementary and additional to the refugee protection enshrined in the 1951 Convention.

María-Teresa Gil-Bazo argued elsewhere that international human rights law has evolved in a manner that has conferred individuals falling within its protection scope protection claims vis-à-vis the State where they find themselves. Therefore, in addition to refugees within the meaning of the 1951 Convention, there are other categories of individuals that have a right to protection under international law and accordingly, they are 'refugees' in a broader sense.⁶⁹

Goodwin-Gill accords this view and argued that the refugee in this broader sense includes not only those who have a well founded fear of persecution, but also those who have a substantial risk to be subjected to torture or to a serious harm if they are returned to their country of origin, for reasons that include war, violence, conflict and massive violations of human rights.⁷⁰

As indicated in its preamble no. 24 and 25, the adoption of the EU Directive, was found necessary to introduce criteria on the basis of which applicants for international protection are to be recognized as eligible for subsidiary protection that should be drawn from international obligations under human rights instruments and practices existing in Member States.⁷¹

Article 21 provide Protection from refoulement, Article 17 speaks about exclusion, the principle of family unity in the context of the right to asylum is

Torture (CAT) and articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR)).

⁶⁹ María-Teresa Gil-Bazo: Refugee Status, Subsidiary Protection, and the Right to be granted Asylum under EC Law, page 47

⁷⁰ Goodwin-Gill, 'Asylum: The Law and Politics of Change', *IJRL* 7 (1995, page 7)

⁷¹ See the preamble of the 2004 EU Qualification Directive No. 24 and 25

maintained under *Article 23* and finally *Article 24 expressly obliged State parties to issue Residence permits* as follows:

*“As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status and Subsidiary status residence permit but restrict the residence permit to be issued to the family members of the beneficiaries of refugee status only....”*⁷²

The EU Directive under its preamble (15) retreat Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention and under paragraph no 19 stated that Protection can be provided to persons with refugee Status and Subsidiary protection not only by the State but also by parties or organizations, including international organizations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State.

Finally, note should be taken concerning the binding nature of the EU Directive: Article 38 of the EU Directive unequivocally obliges member States of the EU to bring into force their laws, regulations and administrative provisions necessary to comply with this Directive.

1.5.4. The 1966 Asian African legal Consultative Organization

The legal concept of refugee in the Asia Countries context appears difficult to draw. Very few states are actually party to the 1951 Convention/1967 Protocol and there is no regional legal instrument adopted to govern the situation of refugees in Asia. However, many of them have generously responded to the protection needs of asylum seekers arriving in their territory.⁷³

⁷² See Article 24 Sub Article 1 and 2 of the 2004 EU Directive

⁷³ Ruma Mandal: Supra cited at note 48, page 27

Beyond this, the revised Bangkok Principles⁷⁴, adopted on the Status and treatment of refugees was adopted by the Asian-African Legal Consultative Organization (formerly Committee) at its 40th Session in New Delhi on 24 June 2001 incorporates not only the definition provided in the 1951 Convention but also that of the broader definition provided by the OAU Convention.⁷⁵

As UNHCR strongly commented, while the Bangkok Principles are declaratory in nature, their provisions represent the result of serious and lengthy negotiations by member States of the Asian-African Legal Consultative Organization. They reflect an important understanding of who is a refugee in the contemporary context in parts of the world with significant experience in receiving and hosting refugees.⁷⁶

The Bangkok Principles incorporates the principle of non-refoulement including rejection at the frontier and minimum standard for the treatment of refugees.⁷⁷ Though not legally binding and are yet; it would seem, to be formally applied by any Asian country. Nevertheless, it is interesting that Asian Countries has chosen to follow the strategy of an elaborated regional refugee definition in meeting the needs of all refugees under UNHCR's competence.⁷⁸

1.6. The Protection Gap and the UNHCR Broader Mandate

The 1951 Convention provides States Parties with a legal foundation for refugee protection. For its part, UNHCR has been given a mandate to provide international protection to refugees and seek permanent solutions to their

⁷⁴ Originally Adopted At The Eighth Session Of The Asian-African Legal Consultative Committee In Bangkok, August, 1966

⁷⁵ See Article I Of The Asian-African Legal Consultative Organization

⁷⁶ Global Consultations On International Protection: Complementary Forms Of Protection Ec/Gc/01/18 4 September 2001, Accessed On 3 Sep. 2009, Available At [Http://Www.Unhcr.Org](http://www.unhcr.org)

⁷⁷ See Article III and IV of the Asian-African Legal Consultative Organization

⁷⁸ Supra cited at note 78, Page Xi

problems through its Statute, adopted by the UN General Assembly in December 1950.

Since the 1960s, UNHCR's mandate for refugees has been developed through successive United Nations General Assembly Resolutions which have elaborated on the criteria set out in its founding Statute. Although the language of these resolutions has not been very consistent, helpful guidance can be found in UNHCR's use of the term:

*"refugee" in the broader sense, to denote persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or security of person in their country of origin as a result of persecution or armed conflict, or serious public disorder*⁷⁹

They include: refugees defined under the 1951 Convention, Persons fleeing conflict or serious disturbances of the public order (i.e., refugees under the OAU Convention, Cartagena Declaration and EU Qualification Directive definitions). UNHCR's authority to act on their behalf is either based on the 1951 Convention and the OAU Convention, the Cartagena Declaration, or on UN General Assembly resolutions.

At times when the refugees defined in the broader mandate are not recognized as refugees by the country of asylum, they are referred as "Mandate refugees" as persons considered by UNHCR to be refugees according to its Statute or under the broader mandate given by the General Assembly. UNHCR determination of their refugee status is not dependent upon the country of asylum being party to the 1951 Convention or other regional instruments. Mandate status is especially significant in Countries that are not parties to the 1951 Convention or its 1967 protocol and/or other regional instruments.⁸⁰

⁷⁹ Ms. Kate Jastram and Ms. Marilyn Achiron, Supra cited at note 5, Page 53

⁸⁰ Ibid

However, States are not always willing to provide territorial asylum for Mandate refugees especially in the absence of any legal obligation of the refugee or human right instruments. UNHCR doesn't have territory. This is apparently one of the challenges facing refugees and international community today consists of bridging the "protection gap" which exists in situations where UNHCR seeks to provide international protection as per its broader Mandate but host countries refuse⁸¹.

As we have seen above, the refugee concept as defined in the 1951 Convention, the 1967 Protocol and the UNHCR Statute has been broadened through the adoption of more far-reaching refugee definitions in instruments adopted at the regional level. Broader concepts of this kind have also been included in the legislation of various countries in different forms, e.g. B status, or humanitarian asylum. This legislation accords certain rights with regard to entry and stay for persons who have valid reasons for leaving their country of origin due to the political or security situation prevailing there, but who cannot establish a "well-founded fear of persecution" under the Convention definition. The legal status enjoyed by such persons is generally less favorable than that provided for refugees by the 1951 Convention and the 1967 Protocol.

To summarize the above discourse, important institutional and legal developments and considerable extra-legal mechanisms in respect for the protection of refugees, both at the international, regional and national level, have taken place since 1920s.

- The 1951 Convention and the 1967 protocol offer a continuing solid basis for refugee protection. However, just as the mandate of the UNHCR has evolved to accommodate changing political realities, a similar evolution of State practices, symbolized and controlled by international legal instruments, may be necessary, desirable and possible. This evolution would need to take in to

⁸¹ Ms. Kate Jastram and Ms. Marilyn Achiron , supra cited at note 5, page 22

account the ideological framework of the international system influencing forced migration; the nature of push factors; and the context within which migration takes place. Some evolution would appear necessary if those fleeing conflict en masse are to be protected by the international community in a humanitarian spirit. The concern is to establish where international instruments can develop in order to maintain for those in flight from the post-cold war malaise of civil conflict.⁸²

- The 1951 Convention legal definitions allows for the classification of two out of three categories of refugees. Those who actively oppose the governing party or system of their country of origin, and are, as a result, persecuted (or likely to be persecuted) by that State and choose to escape are one category. Those who, because of their ethnic, racial or religious origins are targeted for persecution by the state are also included. However, the category of innocent victims is excluded, as is the category may squeeze into the second interpretation of the legal definition, or politically defined as de facto refugees under some circumstances in some states. However, the victim groups, don't fit the legal definition, and are often lucky to be categorized in the scope of the potential notion of refugee is.⁸³ The former group of refugees, who are, frequently referred to as "Convention Refugee" or 'Political refugee' are entitled to claim protection for fear of persecution from any of these conventional grounds in more than 147 state parties to the accords and may invoke the full rights set out in the convention and call up on the institutional support of UNHCR.
- Secondly, an expanded conceptual advance on the term "refugee" has been witnessed on contemporary international law (at least of regional scope) that goes beyond the narrower concept of refugee defined in the 1951 Convention.

⁸² Joanne Van Selm-Thorburn, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis*, page 36

⁸³ Ibid

These categories are refugees who flee their country of origin due to serious disturbance of public order that includes war, violence, conflict and massive violations of human rights rather than individual fear of individual persecution. They are commonly referred to as 'refugees' as "Displaced Persons", "De facto Refugees" or 'non-Convention refugee' or "Other person in need of international protection".

- Thirdly though International human rights instruments don't define the term 'refugee', they provide protection against refoulement can be a basis for complementary protection. This is evident in the EU Qualification Directive that encompasses all persons protected from refoulement under its provisions, which in turn are based on international human rights instruments, notably the 1984 Convention against torture and the 1966 international convention on civil and political rights as well as national practices.
- The second and third group of refugees are protected by regional agreements at least with in Africa, Latin America and European Union, they are least protected against return, and may be entitled to other preferential rights akin to those afforded convention refugees. However, if they are not able to invoke the protection of special regional arrangement, they may not claim protection as a right except as stipulated in the national legislation of the asylum state.
- Finally a definition of refugee status (or of analogous legal status, such as that of "asylee") is contained in the Constitution or in the ordinary legislation of a number of countries. Whereas a welcome trend has developed in recent years to include in such national legislation a definition close to the definition of the 1951 Convention or the 1967 Protocol, the national definitions of refugees are generally at variance, particularly if they were drafted in earlier periods, with those contained in international instruments adopted by the United Nations, or concluded under its auspices.⁸⁴

⁸⁴ UN High Commissioner for Refugees, Note on Determination of Refugee Status under

1.7. The Right to asylum

There is difference among scholars on the question whether asylum is a right of a right or note. In other words, does an individual have the right versus a state to enjoy asylum even for a short time; thus precluding the possibility of refoulement at the border, expulsion or of a refugee to his state of origin? It can be said that, in UDHR, asylum is an inalienable right for individuals in terms of seeking and enjoyment if granted.

1.7.1. The right to seek asylum

Article 14 of the Universal Declaration of Human Rights, (1948) stipulates that "Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in certain cases." It is clear from this text that the Declaration makes no mention of an asylum-seeker's right to have it. Moreover, the 1951 Convention does not grant automatic or permanent protection to whoever seeks it. Article 1-2 of the 1969 Organization of African Unity Convention Governing Specific Aspect of Refugee Problems in Africa only calls upon Member States of the OAU to "use their best endeavors to receive refugees and to secure the settlement of those refugees..."

The legal concept of a refugee ought not to be conflated with that of an asylum-seeker. Traditionally, asylum meant a right to refuge and an asylum-seeker was one who sought out such refuge in a state other than one of his origin or habitual residency. With time, however, the term has undergone a shift and is now increasingly interpreted as the right of the state to give protection to exiles and

International Instruments, 24 August 1977, EC/SCP/5, available at:
<http://www.unhcr.org/refworld/docid/3ae68cc04.html> [accessed 27 June 2010]

refugees. This was clearly emphasized in the *Asylum case* before the International Court of Justice (ICJ).⁸⁵

It is unclear in international law the extent to which individuals has the right to enter and *reside in* other countries. While the Universal Declaration of Human Rights, Article 14 speaks of the right to seek and to enjoy in other countries asylum from persecution, there is no explicit mention of a right *to be granted* asylum. The 1951 Convention does not even address asylum or admission, but rather considers it to be a matter best left to state discretion. This gap within the 1951 convention is a result of the common assumption within international relations, that states are the only subjects of international law and that individuals and more specifically, refugees and asylum-seekers, have no standing in international law. The right to receive or be granted asylum, which establishes a positive obligation upon states can only be found in various regional arrangements, such as: Article 22(7) of the American Convention on Human Rights, Article 27 of the American Declaration on the Rights and Duties of Man, and Article 12(3) of the African Charter on Human and Peoples Rights. While Member States of the European Union affirmed the fundamental importance of asylum at the European Council Meeting in Tampere in 1999, the right to asylum remains conspicuously absent from any of the legally binding regional instruments for human rights protection at the European level. The European Charter of Human Rights does not enshrine the right even to *seek* asylum.⁸⁶

The 2004 European Union Directive adopted⁸⁷ on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted that clearly shows the current position of the nature of the right to asylum.

⁸⁵ Principles and Concepts of international law <http://www.forcedmigration.org/guides/fmo038/fmo038-2.htm#top> [accessed on 3 November,2010]

⁸⁶ *Ibid*

⁸⁷ European Union COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004

Article 13 of the EU Directive provides that member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee ...” Nearly in a similar fashion, its Article 18 of the EU Directive stated that member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with ...”

María-Teresa Gil-Bazo quickly asserted that the EU Directive brings Europe in line with other regions, as it constitutes the first legally binding instrument in Europe of supranational scope that imposes an obligation on states to grant asylum to refugees and other persons in need of protection despite the lack of an international recognition of the right to be granted asylum of universal scope, following the entry into force of the Directive, around 100 of the 146 states parties to the Geneva Convention and/or its Protocol are now bound by an obligation under international law (of regional scope) to grant asylum.⁸⁸

However, the recent decision of the European Court of Human Rights reveals a different interpretation. It appears that the EU Directive 2004/83, which recognised the right to asylum as part of EU, did not alter the jurisprudence of the European Court of Human Rights that asylum decisions. On the case of the Queen on the Application of MK(Iran) v UK Secretary of State for the Home Department, the court decided that ‘ The right to asylum lies pare excellence at the discretion of States, and is not a right of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national.’⁸⁹

Since the adoption of the UDHR, important developments and considerable changes in respect of the right to territorial asylum, both in the UN, the OAU, OAS and European member states have taken place. Despite these

⁸⁸María-Teresa Gil-Bazo, *supra* cited at note 69, page 7

⁸⁹ EU Directive on Refugee status does not enhance asylum rights under Strasbourg Convention « UK Human Rights Blog <http://www.bailii.org/ew.cases.ewca.civ.2010115.html>. [Accessed on 20 April 2010]

development, according to modern refugee and human rights law, asylum is a right of the State and not of the individual, who cannot enter in a foreign country if refused; it is not a duty of the state, that is, State has discretionary power to grant or to refuse it; and finally, it is an affair of States only, and individuals cannot intervene in immigration and asylum issues. Beyond this, no international body has been instituted to control and monitor the application of the international or regional instruments relating to refugees or asylum seekers.⁹⁰

Negative in its principle, as far as the recognition of an individual's right to asylum is concerned; the attitude of states in this connection has at least one positive aspect: in endeavoring to prevent and overcome political obstacles to a liberal practice with respect to asylum, it serves the interests of refugees. Then, the vital question is: what is the impact of these International refugee and human rights instruments on the laws and practice of the states and how could they inspire an international Convention on refugees and asylum that is applicable to and in them?⁹¹

In contemporary international law at the universal scope, States may be under a moral obligation to admit refugees to their territories and to grant them asylum therein and in the municipal law States may even have assumed a legal obligation to do so. But as international law stands today, States have no international legal duty to admit asylum seekers who present themselves at their frontier and ask for asylum and to grant asylum.⁹²

1.7. 2. Non-Refoulement

Non-refoulement is the cornerstone of International refugee law. Whereas states have not accepted the obligation to necessarily admit people to their respective

⁹⁰ Khadija Elmadmad, An Arab Convention on forced Migration: Desirability and Possibilities, International Journal of refugee law, Volume 3 Number 3. 1991, Oxford University press, page 473

⁹¹ D.W.J Greig: The protection of refugees and customary international law, available at <http://www.austlii.edu.au/au/Journals/auyl/brbkintlaw/1978/4.html>

⁹² Ibid

territories, they have created a right of refugees and asylum-seekers to not be returned to a country in which one is likely to be tortured or subject to cruel, inhuman, or degrading treatment. This right is enshrined in various international and regional refugee and human rights instruments.

To put in an expressive manner, while asylum in the form of admission to permanent residence is still resisted by States, the principle of nonrefoulement is now generally accepted as part of international law. The notion of non rejection at the frontier is in the process of acceptance as part of that principle, and carries with in the concomitant duties of the granting of temporary refuge and of burden sharing. The UNHCR has thus played a pivotal role in translating the concept of international protection into legal terms and in convincing States that they themselves will benefit the acceptance of legal obligations towards refugees, including refugee seekers, and towards each other in the interest of "international Solidarity".⁹³

1.7.3. The Humanitarian Nature of Granting Asylum to Refugees

Asylum concern not only the relation ship between refugee and the receiving state but also the relation ship between the country of origin and the hosting states. Recognizing the lacuna, international lawyers and organizations such as the Camegie Endowment for International Peace drafted conventions that specifically dealt with asylum as it affected the rights and duties of both states and individuals. In 1977, a UN Conference on Territorial Asylum assembled in Geneva but did not adopt final document. Since then, the matter "was allowed to rest".⁹⁴

The UN *Declaration on Territorial Asylum* (1967), adopted by the United Nations General Assembly reflects the international consensus that the granting of

⁹³ Ibid

⁹⁴ Atle Grahl-Madsen, *The Status of Refugees in International Law*, 1980, page, 70

asylum is a peaceful and humanitarian act not to be regarded as unfriendly by any other State, and notes that the responsibility for evaluating claims for refugee status rests with the country in which the individual seeks safety. Article I states:

"Asylum granted by a State, in the exercise of its sovereignty, shall be respected by all other States."

Clearly evident here is the main concern of States, which is to prevent the granting of asylum, although resulting from the exercise of a sovereign right the principle of which is not disputed, from being a source of disputes or conflicts between them.

The same concern is reflected in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Unlike the 1951 Convention, which deals essentially with asylum *ex post facto*, the OAU Convention stresses the actual grant of asylum. Article 2 (4) stipulates the grant of asylum is 'peaceful' and humanitarian and should not be considered unfriendly by any member state.

1.7.4. State practices

Despite the absence of legally binding instrument at the international level that entitles refugees to be granted asylum, the practice of States across the globe may come to the aid of the persons concerned.⁹⁵

At the beginning of 2009, some 16.1 million Refugees worldwide have been granted asylum (refugee status or complementary protection or temporary protection) that were forcibly displaced due to conflict, persecution and gross human rights violation, the highest number since the mid-1990s.⁹⁶

⁹⁵ Astri Suhrke *supra* cited at 41, page 3

⁹⁶ This report doesn't include the number of internally displaced persons: UNHCR annual 2009 *Global Trends* report, released 15, July 2010 available at <http://www.unhcr.org/4c11f0be9.html>.

Indeed, the second crucial outcome of the 1951 Convention is the corollary (consequence) that no person should, or can, be forcibly repatriated (refoulemnet) to his own country, the source of his fear of persecution. The principles on non-refoulement, as embodied in Article 33 of the 1951 Convention constitutes the cornerstone of the protection of refugees and, thus, create a specific law of refugees, besides human rights, immigration law and international law. Refugee law, since then exists as a branch international law in parallel with, and rooted in, humanitarian law and human rights. Even for refugees that seek political asylum, the practice of states is normally to grant asylum as a sovereign right to recognized refugees.⁹⁷

1.7.5. The Treatment of Recognized Refugees

The right to asylum is not unequivocally guaranteed, but once asylum and refugee status has been granted, it brings with it at international level a status might entitle the person to the same treatment as nationals of the country concerned, or the most privileged foreigners. Although the 1951 Convention includes broad non-discriminatory norms for persons recognized as refugees, it provides no strict monitoring system regarding the post-recognition treatment. Several reports described discriminatory practices by countries of asylum. The United Nations General Assembly Resolution No. 50\ 152 notes that "in many situations refugee protection was at risk as a result of their rejection, illegitimate expulsion, removal and unjustified arrest, other threats to their physical safety, integrity and welfare, disregard for and failure to guarantee their basic freedoms and human rights. " In short, it can be said that international protection of refugees is currently at stake.⁹⁸

⁹⁷ Helen Lambert, *supra* cited at note 2, Page 4

⁹⁸ *Ibid*

1.8. Actors of International Protection

1.8.1. States

States that have ratified international refugee instruments are primarily responsible for the international protection of refugees. Clearly, only States – in particular those faced with a refugee influx – have the means to admit refugees to safety, ensure respect for the non-refoulement principle, treat the refugees in accordance with basic standards, protect them from physical attack and/or prosecute offenders and provide basic assistance through burden sharing and international solidarity.

Not only do States have the means to effectively protect the refugees – they are also under an obligation to do so. – Treat the refugees in accordance with basic standards-protect them their fundamental human rights based on their obligation of customary and international human rights law.

1.8.2. UNHCR

UNHCR is not just another agency for humanitarian relief. It was established – by U.N. General Assembly Resolution 428(V) of 14 December 1950 – with a mandate to provide international protection to refugees, under the auspices of the United Nations, and to seek permanent solutions to the problem of refugees. UNHCR is thus an operational agency with specific responsibilities in the human rights field. UNHCR assumes such responsibilities, not against States, but in a framework of co– operation with States:⁹⁹

UNHCR's primary purpose is to safeguard the rights and well-being of refugees to ensure that they can exercise the right to seek asylum and find safe refuge in another State, to protect them from refoulement, to return home voluntarily and

⁹⁹ Ruma Mandal, *Supra* cited at note 48

finding durable solutions. By assisting refugees to return to their own country or to settle in another country, UNHCR also seeks lasting solutions to their plight.

- In adopting Resolution 428(V), the General Assembly called upon governments to cooperate with UNHCR in the performance of its functions;
- States parties to the 1951 Convention and 1967 Protocol relating to the Status of Refugees undertakes to facilitate UNHCR's duty to supervise the application of these instruments' provisions;
- States parties to the 1969 OAU Convention, the 2005 European Union Directive, the 1987 Cartagena Declaration and the also undertake to co-operate with UNHCR;
- UNHCR's Statute stipulates that the High Commissioner shall provide for the protection of refugees by promoting the conclusion and ratification by States of international conventions; entering into agreements with States to improve the situation or refugees; assisting governmental efforts; etc.

This does not mean that UNHCR will never be in a position of confrontation with State authorities. UNHCR is an intermediary between the refugees and the authorities, an advocate of refugees' needs and rights. Frictions are inevitable – particularly in a context of emergency in which stress levels are high and quick decisions are required. In final analysis, however, the objective of international protection can only be achieved through co-operation between national authorities and the responsible international organization.¹⁰⁰

¹⁰⁰ Supra cited at note 32

1.8.3. Others Actors

In providing International protection and in seeking solutions to refugee problems, States of asylum are not alone. The refugee problem is, indeed, of concern to the international community as a whole. The responsibilities of other States are evident in the processes leading to durable solutions, such as voluntary repatriation (to the State of nationality) or resettlement (to a third country). In the interim phase, they are reflected in the principles of burden-sharing and international solidarity, as well as in the role entrusted to UNHCR as an intermediary between States, and between the State of asylum and refugees.¹⁰¹

Other non-governmental organizations like the International Federation of Red Cross and Red Crescent Societies, Amnesty international, International Organization of migration, Human Right Watch and other humanitarian NGO's have also made a significant contribution with the care, assistance, maintenance, and protection of refugees or asylum seekers.

In addition, the Committee on Convention against Torture, the Committee on International civil and political rights and other similar committee entrusted in the monitoring of human rights instruments play crucial role in the human right of refugees and asylum seekers.

Despite the existence of systems in place, however, recently the right to seek and enjoy asylum has faced serious challenges in the developed countries. Anxious to exclude green pasture seekers from entering and staying in their country, governments of industrialized nations have adopted a range of new measures to control and restrict access to their territory.¹⁰² On this regard it has been said:

¹⁰¹ Volker Turk and Frances Nichol *Supra* cited at note 13, page , 67

¹⁰² Jan MacAdam ,*Supra* note 51, p. 155

"The right to seek and enjoy asylum from persecution - a core principle of human rights protection and the very foundation of international refugee protection - is under serious threat, not least from the same states who were the primary architects of the international refugee regime fifty years ago. Although the vast majority of refugees continue to seek protection in the world's poorer nations, it is the wealthy industrialized states of Europe, North America, and Australia, that have adopted the most hostile and restrictive refugee policies designed to stem flows and keep people out. The retraction in refugee protection has been particularly pronounced in Western European states."¹⁰³

For refugees fleeing persecution and serious danger, these measures have severely affected their ability to effectively 'seek and enjoy asylum'. On this regarded, former Secretary General Kofi Annan, in Brussels, 29 January 2004 said that

"However, when refugees cannot seek asylum because of offshore barriers, or are detained for excessive periods in unsatisfactory conditions, or are refused entry because of restrictive interpretations of the Convention, the asylum system is broken, and the promise of the Convention is broken, too."¹⁰⁴

¹⁰³ Human Right Watch, '50 years on What future for refugee protection?' ,Available at < <http://www.hrw.org/campaigns/refugees/section-3-1.htm> >, accessed on December 25, 2009

¹⁰⁴ Amnesty International, 'Refugees feature: A dream of protection turned into nightmare', available at < <http://news.amnesty.org/index/ENGPOL30100220042004> >, accessed December 25, 2009

Chapter Two

2. The Protection of Refugee under international Law and Standards

By the second half of 2005, no fewer than 146 of the 191 member states of the United Nations had acceded to the 1951 and the 1967 protocol governing the legal status of refugees, which, under the terms of its mandate, are promoted and supervised by UNHCR. Many countries have also recognized their obligations towards refugees by becoming parties to relevant regional agreements, including the Organization of African Unity's (OAU) 1969 Convention governing the Specific Aspects of Refugee Problems in Africa; the 1984 Cartagena Declaration on Refugees in Latin America; and a variety of European agreements.¹⁰⁵

States have consistently reaffirmed their commitment to refugee protection. However, there remain a number of gaps, mostly arising from long-standing problems such as violations of the principle of non-refoulement; lack of admission and access to asylum procedures; detention practices that violate international standards; lack of registration and documentation; and shortcomings in refugee status determination procedures.

The purpose of this chapter is, therefore, to examine the international refugee regime in detail and also highlight on human rights laws that may assist to provide protection for asylum-seekers and refugees before/ after they have found asylum. In short, apart from analyzing the legal gaps and practical obstacles which present serious risks to refugee protection an attempt will be made to sketch out the outline of available potential remedies by establishing the nexus of refugee laws and relevant international human rights instruments to provide a basic road map to victims and their advocates.

¹⁰⁵ Supra cited at note 29

There are various international and regional refugee and human rights instruments either under the auspices of the UN or the African Union that are vital in the protection asylum seekers and refugees. As a general principle of international law, every treaty in force is binding upon the parties to it and must be performed in good faith. Countries that have ratified the 1951 Refugee Convention and its 1967 protocol, the 1969 OAU Convention and other relevant legal instruments are obliged to protect refugees on their territory according to its terms.¹⁰⁶ Universal principles and customary international law are equally important for providing protection at the various stages of displacement.

Where international protection is denied to refugees or asylum seekers, states parties are, likely to be placed, in a state of illegality *vis-à-vis* their international obligations. The rights of *non-refoulement*, seeking asylum, the right to fair asylum procedure, family unity and nondiscrimination are major component rights in refugee protection and a correlative duty on states to make this possible are themes that will be further elaborated hereunder within international legal framework.

Recalling Article 38 of the Statute of the International Court of Justice (ICJ), Sources of International law or the legal framework underpinning refugee protection is composed of international refugee law, international human rights law and, in certain circumstances, international humanitarian law and international criminal law. In turn, each of these bodies of law is made up of one or more of the following components:¹⁰⁷

1. **Treaties:** These are legally binding agreements among States that can either be open to all countries (universal) or specifically confined to a few States with a

¹⁰⁶ Ms. Kate Jastram and Ms. Marilyn Achiron, *Supra* cited at note 5, page 12

¹⁰⁷ UNHCR: An Introduction to International Protection, *Supra* note 32, page 25

shared interest (usually regional). A treaty is not binding on a State unless the State has chosen to accede to or ratify it and has thereby become a Party to it;

2. **Customary international law:** This body of law consists of practices by States that have become so firmly established that they have become legally binding rules. All countries are considered to be bound by customary international law. Most importantly, refugees are highly affected by the sovereign rights of the receiving state in customary international law to grant territorial asylum which has been widely practiced.

3. **General principles of law:** Where neither a treaty nor custom covers a particular issue, principles considered common to major legal systems throughout the world can be applied. This is the third source of international law explicitly referred to in the *Statute of the International Court of Justice* and there is little agreement about the meaning of the phrase. According to some scholars, it refers to the general principles of international law, such as for example the *Principle of the Humanitarian Character of the grant of asylum to refugee*, the *principle of good faith* and the *principle of non-refoulement*. To others, it means general principles of national law, that is, principles that are common to all or most national systems of law, such as the right to a fair hearing and justice.

4. **Judicial decisions:** made by international and regional tribunals, States' superior courts, and the **opinions of respected academics**. These decisions and opinions assist in the interpretation of international law.

"Soft Law"

Beyond these, there are also a number of instruments, conclusions, and recommendations that reflect political, rather than legal, commitments by States, but that, nonetheless, influence the overall legal framework for refugee protection. These are known collectively as "soft law". Soft law is the body of

standards, commitments, joint statements, or declarations of policy or intention, resolution adopted by the UN General Assembly or, other multi lateral bodies and conferences.

The most important character of soft laws is that they are not binding. Despite this, soft laws have proliferated these days for reasons that they are basically dealing with matters that reflect the new concerns of the international community and matters which are hard for states to reach convergence for various reasons. Although soft laws are not binding; they are expression of the consensus of the international community today, indicative of the trend of development of the obligations and future laws. In other words they lay ground for the gradual formation of customary rules or treaty provisions.

Particularly, the UNHCR's Executive Committee (ExCom) Conclusions annually adopted form part of the framework of the international refugee protection regime. They are based on the principles of the 1951 Refugee Convention and are drafted and adopted by consensus in response to particular protection issues. Gaps in refugee protection have been addressed largely through the Executive Committee of the UN High Commissioner for Refugees (EXCOM).¹⁰⁸

2.1. The Principle of non-refoulement and Other Treaty Obligations

For refugees and those who seek to protect them, this principle has several important facets. This legal principle is an essential framework of protection and

¹⁰⁸ ExCom is a body comprised of 76 governments that meets annually in Geneva. Each year, members discuss a variety of issues relating to international protection and adopt conclusions. Key documents that emanate from EXCOM meetings include the Conclusions on International Protection, annual Notes on International Protection, and background papers prepared by the Executive Committee's Standing Committee. UNHCR's Executive Committee (ExCom) was created by ECOSOC in 1958, following a request from the UN General Assembly, and consists of member States. Its main tasks are to approve the High Commissioner's assistance programs, advice the High Commissioner in the exercise of his/her statutory functions, notably international protection, and scrutinize all financial and administrative aspects of the agency.

a key to the success of durable solutions that can restore a refugee to something approximating a normal life.

The principle of non-refoulement means that a refugee shall not be expelled or returned ("refouler") in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, regardless of whether or not he has been formally recognized as a refugee (Article 33 of the 1951 Convention).¹⁰⁹

This applies also to a person for whom there are substantial grounds for believing that he would be in danger of being subjected to torture. In this connection, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 states,

*"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."*¹¹⁰

Similarly, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006) stipulates,

*"No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance."*¹¹¹

¹⁰⁹ See also Article 3.1 of the Declaration on Territorial Asylum, 1967. This applies also to a person for whom there are substantial grounds for believing that he would be in danger of being subjected to torture. In this connection, Article 3 of the Convention

¹¹⁰ The term "other State" means that to which a person is to be expelled, returned or extradited. See: General Comment No. 1 adopted by the Committee against Torture, 1997 in: "Collection of International Instruments and Legal Texts concerning Refugees and Others of concern to UNHCR, op. cit., Volume 1, P. 587.

¹¹¹ See United Nations General Assembly Resolution (RES) 61/177, December 20, 2006; Human Rights Council Resolution No. 1/1, June 29, 2006.

The non-refoulement principle is governed by five rules in contemporary international law: Fundamentally, no reservations may be made to legal text(s) providing it, given the grave consequences that may result from such reservations.¹¹² Several jurists acknowledge that it is deemed as part of customary international law and consequently a state shall abide by it irrespective of being bound by a conventional text.¹¹³ It is deemed as part of customary international law and consequently a state shall abide by it irrespective of being bound by a conventional text.¹¹⁴ Being of a jus cogens nature¹¹⁵, no agreement shall be made derogating from it and such agreement shall be null and void.¹¹⁶ It serves as a mandatory ground for refusing extradition.¹¹⁷

2.1.2. Non-refoulement and Expulsion

As regards the expulsion of refugees, Article 32 of the 1951 Convention stipulates, "The Contracting States shall not expel a refugee lawfully in their territories (lawful resident implying an asylum seekers who enter legally or a refugee who is already allowed to reside) save on grounds of national security or public order. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security require, the refugee shall be allowed to

¹¹² For example, Article 42 of the 1951 Convention providing for the inadmissibility of making reservations to Article 33.

¹¹³ Conclusions on The International Protection of Refugees adopted by the executive committee of the UNHCR Program, Geneva, 1996, p. 14, No. 6 (28).

¹¹⁴ The Declaration by the States Parties to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, adopted on December 12, 2001, on the fiftieth anniversary of the 1951 Convention states, » The application of the non-refoulement principle has become part of common international law."

¹¹⁵ The preamble of the Mexico Declaration and Action Plan on Strengthening International Protection of Refugees in Latin America described the principle of non-refoulement as being of a jus cogens nature. Ibid, Vol. 3, p. 1221.

¹¹⁶ Article 53 of the 1969 Vienna Convention on the Law of Treaties

¹¹⁷ In cases where a person has fears of being subjected to torture and other cruel, inhuman or degrading treatment or punishment, non-refoulement can serve as a mandatory ground for refusing extradition: South African Development Community Protocol on Extradition (2002), Ibid, Vol. 3, p. 1096 (art. 4/F).

submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

2.1.3. Measures of Protection

Violations of the non-refoulement principle can take place in many cases, including the following:

- Rejecting asylum-seekers at the borders, while they have no alternative to seek asylum elsewhere.
- Expelling or returning of a refugee to a place where he may be subjected to persecution, whether it is his state of origin or any other state.
- Denying the refugee’s possibility to look for a safer place elsewhere, by not giving him appropriate time to do that.

Exceptions to this principle are limited to those provided for in Article 33/2 of the 1951 Convention, namely: If there are reasonable grounds for regarding a refugee as a danger to the security of the country in which he is living, to safeguard population,,¹¹⁸ or should a State decide in any case that exception to the principle stated in paragraph I of this article would be justified, it shall consider the possibility of granting to the persons concerned, under such

¹¹⁸ Article 3/2 of the Declaration on Territorial Asylum, 1967 Article 3/3 of the Declaration on Territorial Asylum, 1967).

conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.¹¹⁹

If a recognized refugee, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country then the state may justified to o so. However, he shall not be expelled to a country, where he may be subjected to the risk of torture or other cruel, inhumane or degrading treatment or punishment or violation of his basic rights.¹²⁰

2.2. Asylum and illegal Entry

The Universal Declaration of Human Rights recognizes the right to seek and enjoy asylum as a basic human right. Without this right the fundamental rights like the right to life (self preservation) and the right to be protected from various forms of torture (affliction) and many others recognized under international laws would be meaningless. In exercising this right, asylum-seekers are often forced to arrive at, or enter, the country of asylum illegally.

Unlike ordinary immigrants, many asylum-seekers cannot obtain proper passports or visas. This fact and the physical and psychological traumas many asylum seekers have experienced, should be taken into account when considering any restrictions on their freedom of movement.¹²¹ It is universally acknowledged that states now recognize the need for aliens to obtain entry visa or prior permission before arrival in their territories. According to Paragraph 1 of Article 31 of the 1951 Convention relating to the Status of Refugees:

¹¹⁹ Article 3/3 of the Declaration on Territorial Asylum, 1967

¹²⁰ Prof. Ahmed Abou-El-Wafa Riyadh ,The Right to Asylum between Islamic Shari'ah and International Refugee Law, A Comparative Study, 2009, available at <http://www.unhcr.org/4a9645646.pdf>,Page 64

¹²¹ Ms. Kate Jastram and Ms. Marilyn Achiron, supra cited at note 5, page 29

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

This means that the non-application of penalties for illegal entry or presence is governed by four conditions:

- The refugees' entry or presence owes, as stated by Article 1, to “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”
- They should present themselves without delay to the authorities;
- They should show good cause for their illegal entry or presence; and
- They should be coming directly from a territory where their life or freedom was threatened. This means that the asylum-seeker arrived directly from his/her home country, from another country where his/her protection, safety and security could not be assured, or from a transit country where he/she was present for a short period of time without having applied for or received asylum there.”¹²²

Paragraph 2 of the same Article adds, “The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”¹²³

¹²² Prof. Ahmed Abou-El-Wafa Riyadh ,, supra cited at note 102, page 22

¹²³ See text in»Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to the UNHCR, UNHCR Regional Office, Egypt, Cairo, April 2006, p 20.

Executive Committee Conclusion 44 on Detention of Refugees and Asylum-Seekers established further rules and set out the legitimate reasons for detaining refugees. It says that, if detention is deemed necessary, it may only be resorted to on grounds prescribed by law:

- To verify identity; to determine the elements on which the asylum claim is based; to deal with cases where refugees have destroyed their documents or used fraudulent documents; or to protect national security and public order. In addition, Conclusion 44 also provides that: detention of refugees should be subject to judicial or administrative review; refugees should not be detained with common criminals; and detained refugees should be provided with the opportunity to contact the UNHCR or non-governmental organizations working with refugees.¹²⁴

2.3. The 1951 Convention and its 1967 Protocol on the Status of refugees

It has been repeatedly said that the 1951 Refugee Convention along with its 1967 protocol is a core of international refugee law as it remains the only universal treaties that define a specific legal regime for those in need of international protection. However, there is strong critic that these instruments have proved extremely resilient and adaptable in the face of great changes in refugee movements in the contemporary world.

It is sometimes remarked that the problem with refugee policy makers is that they cannot count from one to thirty-three. This refers to the fact that, whereas a lot of attention is given to the refugee definition in Article 1A(2) of the Refugee Convention and to the *non-refoulement* obligation in Article 33, very rarely is reference made to any of the other rights and responsibilities referred to in the Convention.

¹²⁴ Prof. Ahmed Abou-El-Wafa Riyadh , supra cited at note 102

In fact the Convention confers tiers of rights on 'refugees' according to the relationship or status of the refugee in the state from which asylum is sought. Those rights adhere to refugees according to a hierarchy of human rights ranging from basic rights to life and liberty to include social and economic rights-the rights recognized by the Refugee Convention in the light of the relevant human rights instruments.

The principle of non-refoulement, which prohibits the return of refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion, is the cornerstone of international protection. It is embodied in Article 33(1) of the 1951 Convention.

In accordance with human rights law, discussed below, *refoulement* is *never* permitted if it would expose the individual concerned to a risk of torture, inhuman or degrading treatment or punishment. Article 33 of the 1951 Convention also applies to asylum-seekers at the border or in the country of asylum until their status has been determined.

The 1951 Convention not only provided an individualized definition of a refugee but also made it clear that it was an instrument for human rights protection. It is an instrument of human rights protection which was intended to implement the basic right to flee persecution and to seek and enjoy asylum, and to enshrine the right against *refoulement* (Art. 33(2)). In contrast to the explicit right of nonrefoulement in article 33 of the 1951 Refugee Convention, the Convention nowhere creates an obligation to receive asylum seekers (despite a passing reference, in the preamble, to "international cooperation" with respect to asylum.

Similarly, several other international human rights instruments refer to asylum but stop short of obligating states to grant it.¹²⁵ In the words of Professor Goodwin-Gill, "States have so far not accepted an obligation to grant asylum to refugees."¹²⁶ Admittedly, article 14(1) of the Universal Declaration of Human Rights reads "Everyone has the right to seek and to enjoy in other countries asylum from persecution" (emphasis added). Even if one regards the Declaration as a source of binding legal obligations,¹²⁷ however, it seems doubtful that this one vague provision was meant to mandate grants of asylum. Further, whether or not the Declaration or any other sources create a right to apply for asylum somewhere, no international instrument establishes an absolute right to receive a decision on the substance of an asylum claim by the country of one's choosing.¹²⁸

2.3.1. Non-refoulement and Procedural Safeguards

The 1951 Convention and the 1967 protocol does not provide any specific guidance as to the procedures to be applied by states when undertaking refugee status determination, leaving it to each Contracting State to establish an appropriate procedure. However, the UNHCR Handbook does recognize that special procedures should be established to examine applications for asylum and

¹²⁵ E.g., paragraph 2 of the Council of Europe Declaration on Territorial Asylum, 1977, referred to the right of member states to grant asylum but pointedly refrained from creating an obligation to do so. Article II of the OAU Convention, entitled "Asylum," admonishes member states to "use their best endeavors . . . to receive refugees" but again imposes no obligation to grant asylum. Article III of the Asian-African Legal Consultative Committee Principles on Refugees, 1966, recognizes a state's "sovereign right to grant or refuse asylum in its territory to a refugee"

¹²⁶ Goodwin-Gill, G.S: The refugee in international law, , page 58

¹²⁷ The Universal Declaration of Human Rights has acquired special moral status in the international community, but debate persists over how much of the Declaration, if any, has become binding international law. Three theories for giving legal effect to some or all of its provisions have circulated in recent years – that the Declaration is an authoritative interpretation of the UN Charter; that the Declaration, or at least selected articles, has now attained the status of customary international law; and that its provisions reflect general principles of law.

¹²⁸ Stephen H. Legomsky, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, Charles F. Nagel Professor of International and Comparative Law Washington University, <http://www.unhcr.org/protect>. Reful3f4de85d4

specifies the basic requirements which procedures should satisfy.¹²⁹ Conventionally, it is generally recognized that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention, if states assume to discharge their international legal obligation in good-faith.¹³⁰

In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure. The necessity to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems from the right to seek and enjoy asylum, as guaranteed under Article 14 of the Universal Declaration of Human Rights, and the responsibilities derived from the 1951 Convention, international and regional human rights instruments, as well as relevant Executive Committee conclusions.¹³¹ The Programme of Action for the implementation of the Agenda for Protection adopted by UNHCR's Executive Committee in 2002 also affirms that States are to grant access to asylum procedures and to ensure that their asylum systems provide for effective and fair decision-making.¹³²

Large questions arise, of course, in deciding what it takes to make a refugee status determination fair. That question has been thoroughly debated both within and outside UNHCR and is especially topical in the light of the States progress on asylum harmonisation. Rather than reinvent the wheel, this paper simply incorporates UNHCR's existing statements on the elements of fair asylum procedure. In contrast to the general claim that international law requires fair refugee status determinations, it is not claimed here that international law requires the particular set of elements endorsed by UNHCR. The latter are

¹²⁹ UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31, May 2001, at paras. 4–5

¹³⁰ Ibid

¹³¹ The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its Conclusions No. 29 (XXXIV) – 1983

¹³² UNHCR Representation in Japan, Fair and efficient asylum procedures: a non-exhaustive overview of applicable international standards, 2 September 2005, available at <http://www.unhcr.org/4aa76da49>

commended nonetheless as best practice criteria. Three specific elements of fair procedure require special mention structured chronologically and follows the asylum procedure from the initial asylum request through to the appeal stage.

2.3.2. Access to fair asylum procedures

Under the 1951 Convention, a State's responsibility is engaged from the moment an asylum-seeker declares his/her intention to seek protection in that State against persecution to its authorities, be it at the border (airport or seaport) or within the territory. As has been underlined repeatedly by the General Assembly and UNHCR's Executive Committee, physical access of asylum-seekers to the territory of the State where they are seeking admission as refugees and, further, access to procedures where the validity of their refugee claim can be assessed are essential preconditions of international refugee protection. If an asylum application is filed at an airport or seaport, the same conditions as in-country applications must be met to ensure that persons in need of international refugee protection have access to fair and effective procedures. In particular, procedural guarantees for applicants, including access to information about the procedure and assistance of interpreters, should be available.¹³³

International refugee protection standards are reflected in individual asylum systems set up by States in accordance with their national judicial and administrative law standards. While different models have been put in place by States, certain core elements are necessary for decision-making in keeping with standards of fairness and due process.¹³⁴

¹³³ Ibid

¹³⁴ Executive Committee Conclusion No. 8 (XXVIII) – 1977, at para. (e)(iii)

Decision-making authority

Given the fact that asylum applications raise issues which require specialized knowledge and expertise, best State practice provides for a clearly identified authority with responsibility for examining requests for refugee status and taking a decision in the first instance. Wherever possible, this should be a single central authority,¹³⁵ which should also be responsible for making decisions on entry. Refugee status determination should be carried out by staff with specialized skills and knowledge of refugee and asylum matters, who are familiar with the use of interpreters and appropriate cross-cultural interviewing techniques. The central refugee authority should also include eligibility officials with training in the treatment of applications by women, children, or applicants who are victims of sexual abuse, torture or other traumatizing events.¹³⁶

Apart from this, since States parties have recognized and accepted the supervisory responsibility of the UNHCR in Article 35 of the 1951 Convention to which they are parties to it, UNHCR, as the guardian of the Geneva Refugee Convention, plays a specific role in providing guidance as to the interpretation of the Refugee Convention. While its guidelines are not legally binding, Article 35 of the Geneva Refugee Convention entrusts UNHCR with the monitoring of the application of the Convention, and therefore places a specific weight on UNHCR's opinion as to the interpretation of the Convention.¹³⁷

Time limits

Formal requirements should not pose an obstacle to the exercise of the right to seek asylum. In particular, an applicant's failure to submit an asylum claim within

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook 1979, re-edited in 1992), was published upon request by the UNHCR Executive Committee to provide practical guidance on refugee status determination to all state parties to the Convention.

a certain time-limit should not of itself lead to the claim being excluded from consideration. Legislation which does not impose time-limits for the submission of asylum applications is clearly best practice.¹³⁸

The circumstances that force people to flee their country are complex and often of a composite nature. Information obtained during an examination of a claim under the 1951 Convention could also be relevant for the examination of complementary/subsidiary protection needs. Such an approach should increase efficiency and reduce the costs of decision-making in asylum matters. Basic procedural guarantees should apply equally to any request for international protection. Therefore, it is advisable that all forms of international protection which are available in a national legal system be decided upon by the same competent authority in one single procedure with the same minimum guarantees. Thus, each case should be considered in its entirety with regard to both 1951 Convention grounds and complementary/subsidiary protection needs.¹³⁹

Appeal or review of negative decision and Other Aspects of Procedural Fairness

Since a fair and effective determination procedure includes the right to appeal a negative decision. For example, European Council On Refugees And Exiles, Guidelines On Fair And Efficient Procedures For Determining Refugee Status,¹⁴⁰ indicates that in the case of any decision not to grant refugee status according to the 1951 Geneva Convention, or any decision not to grant a complementary form of protection, or any decision relating to the determination of state responsibility, the applicant should have the right and the means to appeal, whilst remaining in the country, The right to appeal would be whether asylum- seekers have access to legal assistance. Without legal help, asylum seekers are at the mercy of state

¹³⁸ Supra cited at note 132

¹³⁹ Ibid

¹⁴⁰ EUROPEAN COUNCIL ON REFUGEES AND EXILES, Guidelines On Fair And Efficient Procedures For Determining Refugee Status, September 1999, available at <http://www.unhcr.org>

immigration officials, which is a premise for arbitrariness. Further, although the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner, generally the burden of proof lies on the individual submitting a claim demonstrating that the particular situation of an asylum-seeker falls within the conditions of Article 1A of the Refugee Convention is an arduous endeavor even for a person with a legal background.¹⁴¹

Similarly, the Executive Committee's guidance and UNHCR's experience and expertise recommendations to access to legal assistance and representation, Country of origin information relied upon by the determining authority and access by the applicant to reasons for rejection and other information on file and access by UNHCR to asylum-seekers and information on asylum applications in order to present its views, in the exercise of the Office's supervisory responsibilities under its Statute and Article 35 of the 1951 Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.¹⁴²

2.3.3. Standard of Treatment of Recognized refugees

Although nothing in the 1951 Convention provides that states are bound to grant political asylum to refugees, in practice of most states, persons recognized as a convention refugees are, as a matter of principle, entitled to asylum.¹⁴³ Therefore, the status of refugee leads to asylum and the provisions on expulsion and non-refoulement (Article 32 and 33 of the 1951 Convention) are oblique references to the question of asylum. Both Article 32 and 33, however, provides limits to the principle of non-refoulement and non expulsion on the grounds of national security and public order. Further more, Article 33 doesn't prohibit the return (refoulement) of refugees to countries where they may face fear of persecution but this provision actually creates an obligation to grant at least

¹⁴¹ Ibid

¹⁴² Ms. Kate Jastram and Ms. Marilyn Achiron, *supra* cited at note 5, page 49

¹⁴³ Helen Lambert, *Supra* cited at note 2, page 157

temporary asylum to persons entitled to invoke it, provided that no third state is either obliged or willing to receive them in light of cessation clauses are found in Article A c of the 1951 Convention.

The standards of treatment a refugee can expect from the country of asylum are drawn from a combination of international refugee and human rights laws. The paragraphs below outline what these involve in a country party to the 1951 Convention/1967 Protocol. Since many of the rights concerned flow from international human rights instruments and, indeed, from customary law, similar standards should be upheld by countries that are not Parties to the 1951 Convention and its 1967 Protocol. The main exception is the obligation to provide travel documents, which is a provision unique to the 1951 Convention.

The 1951 Convention also declares that protection must be extended to all refugees without, discrimination, minimum standards of treatment must be observed in relation to refugees, who, for their part, have certain duties towards the State that hosts them, expulsion of a refugee from the country of asylum is of such gravity that it should only take place in exceptional circumstances, on the basis of national security or public order risks;

However, when becoming Parties to the Convention and/or the Protocol, States may expressly mention that they will not apply, or will only apply with modifications, certain articles of the Convention. These reservations cannot, however, be made in relation to key provisions, including Article 1 (the refugee definition), Article 3 (non-discrimination based on race, religion or country of origin) and Article 33 (*non-refoulement*), provisions which all Parties to the Convention and/or Protocol must accept.¹⁴⁴ In recognition of the 'declaratory'

¹⁴⁴ Article 42 on Reservations reads as follows:

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.

nature of refugee status,²⁰ these basic rights under the Refugee Convention are acceded to all refugees, irrespective of their status. To this Article 31, the non-penalization provision which applies to refugees 'unlawfully' in the country; that is, those who have entered or attempted to enter the territory without permission can be added.²² Additionally all refugees are entitled to free access to courts of law 'on the territory of all Contracting States' (Art. 16(1)).¹⁴⁵

Other Convention rights

The 1951 Convention recognizes numerous other refugee rights. They run the whole gamut of fundamental right from the nonrefoulement to the lesser known right of administrative assistance from the host government.¹⁴⁶ Different subgroups of refugees enjoy different sets of rights. Some rights are expressly extended either to all refugees or to those who are physically within the territory of a state party. Among these are freedom from discrimination based on race, religion, or nationality; freedom of religion; certain property rights; access to court; education; the issuance of identification papers; immunity from penalties for illegal entry; and of course nonrefoulement.¹⁴⁷

A second group of rights is reserved for those refugees whose presence in the country's territory is "lawful." These include the right to be self-employed, freedom of movement, and the right not to be expelled other than on national security grounds.¹⁴⁸ Several other provisions grant a right to whatever treatment the state accords its own nationals. These provisions include freedom of religion,

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

¹⁴⁵ Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives Edited by Susan Kneebone Excerpt Monash University, Victoria Cambridge University Press 2010, (<http://www.cambrdg.org/us/catalogue>) (Accessed on 30 December, 2009)

¹⁴⁶ 1951 Convention, arts. 33 and 25, respectively

¹⁴⁷ 1951 Convention, arts. 3, 4, 13, 16.1, 22, 27, 31, and 33, respectively

¹⁴⁸ Id., arts. 18, 26, and 32, respectively.

the protection of the intellectual property regime, legal assistance, public elementary education, public relief, and labor law protections, including social security. Only a few provisions delineate specific rights in non relative terms.¹⁴⁹The main examples are nondiscrimination (on grounds of race, religion, or nationality), access to court, and nonrefoulement.¹⁵⁰

THE RIGHT TO FAMILY LIFE: Dependents of Recognized refugee

Although the right to seek and enjoy asylum in another country is an individual human right¹⁵¹, the individual refugee should not be seen in isolation from his or her family. The role of the family as the central unit of human society is entrenched in virtually all cultures and traditions, including the modern, universal legal 'culture' of human rights.¹⁵²

The only provision in the 1951 Convention specifically dealing with the situation of the family to a refugee is Article 12(2):

"Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State [...]".

Although the 1951 Convention does not specifically address the principles of family unity and protection of the family, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons that adopted the 1951 Convention recommended in chapter IV Part B that "Governments [...] take the necessary measures for the protection of the refugee's family, especially with a view to:

¹⁴⁹ Ibid. arts. 4, 14, 16.2, 22.1, 23, and 24, respectively

¹⁵⁰ Ibid. arts. 3, 16.1, and 33

¹⁵¹ "Everyone has the right to seek and to enjoy in other countries asylum from persecution." The *Universal Declaration of Human Rights*, 1948, article 14(1).

¹⁵² Ms. Kate Jastram and Ms. Marilyn Achiron, *supra* cited at note 5, page 1

1. Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.

2. The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption“.

In addition, Executive Committee Conclusion Number 24 (XXXI) (1981) on Family Reunification states that:

1. In application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.

2. For this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay. [...]

4. Given the recognized right of everyone to leave any country including his own, countries of origin should facilitate family reunification by granting exit permission to family members of refugees to enable them to join the refugee abroad.

5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members.

Prohibition of Discrimination among refugees

Article 3 of the 1951 Convention provides that:

“The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin“.

This means that States Parties to the 1951 Convention must ensure that the rights protected by the Convention are enjoyed by all refugees regardless of their nationality, ethnic or racial origin. For example, freedom of religion (in Article 4) or the right of access to courts (Article 16) must apply to all refugees. Article 3 is a specific expression of the general rule of non-discrimination in human rights law. Human rights instruments usually provide that the rights they recognize must be respected without discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is taken from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

2.4. Strengthening the Protection of refugees through human rights Instruments

Human rights are commonly understood as those rights to which a person is inherently entitled for the mere fact of being human. Although the 1951 Refugee Convention sets minimum standards for the treatment of persons who are found to qualify for refugee status, the protection afforded by human rights instruments ensures that (refugees and asylum seekers) are protected. The relevant refugee laws essentially determine who is eligible for international protection. It is therefore, imperative to see these instruments in some details and how they function.

In general, international law consists of treaties and customary law. However, in the human rights field, certain so-called "soft law" instruments have also had a substantial influence, and they are frequently cited by human rights bodies. "Soft law" can be found in declarations adopted by bodies such as the UN General Assembly, bodies of principles, and conclusions adopted at international conferences and interpretive guidelines adopted by treaty monitoring bodies. For

example, the 1948 universal Declaration of Human Rights, adopted by the general Assembly in 1948, is frequently cited in the decisions and reports of many of the bodies profiled in this study. Moreover, such soft law instruments may be evidence that the norm asserted has become a part of customary international law.¹⁵³

2.4.1. The UN International Covenant on Civil and Political Rights

The ICCPR contains basic provisions for the protection of refugees and asylum seekers applicable at the various stage of displacement. While developments in human rights law may shape interpretations of 'persecution', they may independently form grounds for non removal. Article 3, Article 7 of ICCPR and article 3 of ECHR and article 5 of the ACHPR recognized non-refoulement-complementary protection. External to and independent of the 1951 Convention, these instruments provide a trigger for protection and do not elaborate a resultant legal status. The main problem is that beneficiaries do not receive the same rights as refugees covered by the 1951 Convention and the 1969 OAU Convention.

In so far as there is no legal justification for distinguishing the status granted to 1951 Convention and extra convention refugees, Jan Macadam argues that the 1951 Convention, a "Magna Carta" for the persecuted', needs to be applicable for all the persecuted.¹⁵⁴ It is argued that since the 1951 Convention itself is a specialist human rights instrument, the protection conceptualization it necessarily extends by the development in human rights law, rather than via the Conventional means of a protocol.¹⁵⁵ It therefore acts as a *lex specialis* which applies to persons encompassed by that extended concept, that is, by

¹⁵³ Joan M. Fitzpatrick (editor), *Human Rights protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International mechanisms and Procedures*, Transnational publishers', page 6

¹⁵⁴ Jan Macadam, *Supra* cited at note 51, page 33

¹⁵⁵ *Ibid*

Complementary protection. It doesn't seek to displace the *lex generalis* of international human rights law, rather complements and strengthens its application. This imitates the way in which UNHCR dealt with refugees under its own extended Mandate.¹⁵⁶

It is also worth recalling that many of the civil, political and economic rights guaranteed under the universal human rights instruments are similar to the standards of treatment guaranteed for refugees in the 1951 Convention. Moreover, Recommendation E of the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,¹⁵⁷ drafted originally in light of the Convention's geographical and time limitations, expressed the hope that states would apply the 1951 Convention's provisions regarding treatment of refugees to individuals not falling within the Convention's scope but nevertheless in a similar situation.

Apart from this, there are quite a number of important substantive and procedural provisions that give an in-depth protection to asylum seekers and refugees covered by the international refugee instruments, notably the 1951 Convention and the 1969 OAU Convention. Santhosh Persaud, in his policy and evaluation paper, exhaustively looked in to the ICCPR Committee comments while reviewing state parties' reports and indicate the major avenues through which the ICCPR serve as a legal basis to protect asylum seekers and refugees.

2.4.1.1. Non-refoulement

The core norm of international refugee law is the principle of *non-refoulement* according to which no "state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would

¹⁵⁶ Ibid

¹⁵⁷ See page 33 of Volume I of Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons, UNHCR, 1995.

be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁵⁸ This principle has found entry¹⁵⁹ and has been developed in international human rights law. It is nowadays a norm of customary international law.¹⁶⁰ Not only refugees, for whom the state of refuge has recognized a risk of persecution in the country of asylum, but also asylum-seekers would benefit from the duty of *non-refoulement*, since their claim might be well founded.¹⁶¹ In its jurisprudence, the Committee developed a concept of *non-refoulement* obligations under the ICCPR.¹⁶²

Scope

It is worth to note that refugee law in general and non-refoulement in particular are the natural corollary of recognized and potentially recognizable fundamental human rights. This view has been reiterated in numerous Concluding Observations, Views and two General Comments. The Committee pointed out that States parties are under an obligation to ensure that no person is removed to a country, where her/his right to life or her/his rights under Article 7 risk being violated.

General Comment No. 31 consolidates earlier findings of the Committee; especially that of General Comment No. 20, 39 and summarizes the *non-refoulement* obligations under the ICCPR as follows: Moreover, Article 2 that requires States Parties to respect and ensure the Covenant rights for all persons in their territory and all persons under their control, entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where

¹⁵⁸ Article 33 (1) of the 1951 Convention

¹⁵⁹ Explicitly, e.g. Article 3 CAT, and implicitly by means of interpretation, as done by the Human Rights Committee

¹⁶⁰ Santhosh Persaud, Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights, November 2006, Policy Development and Evaluation Service United Nations High Commissioner for Refugees P.O. Box 2500, 1211 Geneva 2 Switzerland, available at Web Site: www.unhcr.org

¹⁶¹ Sir Elihu Lauterpacht and Daniel Bethlehem: The Scope and Content of the Principle of Nonrefoulement: Opinion. Available at <http://www.unhcr.org>, page 45

¹⁶² Ibid

there are substantial grounds for believing that there is a real risk of irreparable harm, such as those contemplated by Articles 6 and 7 ICCPR, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.¹⁶³

Several points with regard to the scope of the *non-refoulement* obligations under the ICCPR are noteworthy: In contrast to the *non-refoulement* obligation under Article 3 CAT, the ICCPR also covers inhuman or degrading treatment or punishment in addition to torture itself.

The definition presented in General Comment No. 31 leaves room for an extension of *non-refoulement* obligations, since violations of rights “such as” – but not exclusively – those in Articles 6 and 7 are covered. In previous Views the Committee already hinted at the possibility that potentially all rights under the ICCPR could give rise to *non-refoulement* obligations. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.¹⁶⁴

No exception

The *non-refoulement* obligations under the ICCPR are not subject to any exception whatsoever, in contrast to the exceptions foreseen in Article 33 of the 1951 Convention mentioned above. Discussing Canada's report, the Committee left no doubt that national security cannot be invoked to remove persons to a country where they are at risk of violations of their rights under Article 7. The

¹⁶³ Santhosh Persaud, *Supra* cited at note 160, Page 7

¹⁶⁴ *Ibid*

State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under Article 7 ICCPR. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.¹⁶⁵

This difference between the 1951 Convention and the ICCPR has recently gained significance with regard to terrorist suspects. Even measures taken in connection with Security Council resolution 1373 do not dispense states from their obligations.¹⁶⁶

2.4.1.2. Expulsion procedure under Article 13

The main procedural guarantee protecting aliens against expulsion is laid down in Article 13.¹⁶⁷ In a recent View, the Committee declared that with regard to expulsions it considered Article 13 – if applicable – to refugees- it can only be invoked if the alien “lawfully” stays in the territory. Since refugees, who have been recognized by states authorities, are granted the right to stay in the country, they always benefit from the guarantees under Article 13. It is self-evident that states cannot render a stay unlawful by issuing an expulsion order, since this would put the right at the discretion of national authorities.¹⁶⁸

¹⁶⁵ Ms. Kate Jastram and Ms. Marilyn Achiron, *supra* cited at note 5, page 87

¹⁶⁶ Santhosh Persaud, *supra* cited at note 160, page 13

¹⁶⁷ The corresponding proviso in the 1951 Convention is Article 32 (2), which reads as follows: “The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law.

¹⁶⁸ *Ibid*

2. 4.1.3. Flight and access to asylum

There are many reasons why a person may wish to leave her/his home country, such as persecution, general insecurity, natural disasters or the search for better economic opportunities. However, only a person with a well-founded fear of persecution can claim refugee status per Article 1 (A) (2) of the 1951 Convention. The 1951 Convention does not define the term "persecution" but in its Article 33 (1) refers to a threat to "life and freedom". Reading this provision together with Article 1 (A) (2), one must conclude that human rights violations are a strong indication of persecution if they occur on grounds laid down in Article 1 (A) (2) of the 1951 Convention.¹⁶⁹ The development of the understanding of human rights norms can therefore impact on the interpretation of persecution.¹⁷⁰

2.4.1.3. Persecution

The Concluding Observations and Views of the Committee are one source amongst many on the human rights situation in a country. However, reports based on facts gathered on the ground, be it by NGOs or UN institutions, provide a much stronger basis for evaluating the risk of human rights violations and possible persecution. The role of the Committee lies more in the assessment as to whether certain events amount to a human rights violation or not. As an example, if the Committee finds that the detention of a person on grounds of political opinion was arbitrary, that person is most likely persecuted and holders of the same opinion might be at risk of persecution. The development towards a right to conscientious objection to compulsory military service provides a valuable example how human rights and persecution are linked.¹⁷¹

¹⁶⁹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1992, para. 51.

¹⁷⁰ Santhosh Persaud, *supra* cited at note at note 160, page 24

¹⁷¹ Guy S. Goodwin-Gill: *The Refugee in International Law*. 2nd edition, Oxford, Oxford University, Press, 1996. 54 – 59

14 (1), the ICCPR does not guarantee a right to seek and enjoy asylum. Consequently, the duty of *non-refoulement* imposed on States by the ICCPR must not be confused with asylum.¹⁷⁵ Whereas the former prevents a state from removing a person to a situation of danger; the latter describes the act of a state protecting a person by granting her/him refuge on its territory. The Committee, however, relates asylum to Article 6, 7, and 13, seeing it as a measure to guarantee effective protection against *refoulement*. It therefore demanded States parties on several occasions to grant individuals access to asylum procedures. In 2004, the Committee demanded Lithuania respect access to the domestic asylum procedure, in particular, when applications for asylum are made at the border.¹⁷⁶

The Committee not only implicitly promotes a right to seek asylum via Articles 6 and 7 but also pronounced itself on numerous occasions on procedural guarantees in the asylum procedure. In this context, some put forward the application of Article 14 (1),¹⁷⁷ stating that an asylum claim was a suit at law and the critical argument in that context relates to the individual's "rights and obligations": an asylum claim is essential for the realization of an individual's rights.¹⁷⁸

2.4.1.6. Standard of treatment for refugees

In their country of refuge, refugees face manifold problems when trying to adapt to their new environment. Unfortunately, many host communities do not sufficiently acknowledge the plight of refugees and fail to provide a stable and safe environment, which in turn puts the refugees at risk of human rights abuses. The standards laid down in the human rights treaties oblige states to promote human rights and therefore to protect refugees. Primary concerns of refugees, for

¹⁷⁵ Sir Elihu Lauterpacht and Daniel Bethlehem *supra* cited at note 161, page 113.

¹⁷⁶ Santhosh Persaud, *supra* cited at note 160, page 28

¹⁷⁷ *Ibid*

¹⁷⁸ *Ibid*

which the ICCPR provides important rights, are physical security with regard to forced removal (*nonrefoulement*), family unity, non-discrimination and minority rights. In its efforts to promote respect for human rights, the Committee usually concentrates on states' practice and calls for the full respect of rights guaranteed under the ICCPR in light of a specific concern. In the case of Mauritanian refugees in Mali the Committee departed from this practice and recommended that Mali "enter into discussions with the Office of the United Nations High Commissioner for Refugees (UNHCR), with a view to improving the status and conditions of these persons",¹⁷⁹ thus acknowledging UNHCR's expertise as a means to ensure protection.¹⁸⁰

Non-discrimination

Many refugees face discrimination in their daily lives, which impedes their integration and hampers their access to human rights. Articles 2 (1) and 26 prohibit discrimination. The Committee defines discrimination as "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."¹⁸¹ Refugees and asylum-seekers might be discriminated against on many of the above-mentioned grounds, in particular race, color, religion, national origin (which is not the same as nationality) or their status as non-citizens, refugees or asylum-seekers.¹⁸²

While the 1951 Convention only guarantees equal treatment of refugees with other aliens (e.g. Article 15, Right of Association), Article 2 (1) provides for equal

¹⁷⁹ ICCPR comment 25 Mali (CCPR/CO/77/MLI), 16 April 2003, para. 2, printed in Santhosh Persaud, *supra* cited at note 160, page 14

¹⁸⁰ *Ibid*

¹⁸¹ General Comment No. 18 "Non-Discrimination", 10 Nov. 1989, para. 7, printed in Santhosh Persaud, *supra* cited at note 160, page 14

¹⁸² *Ibid*

treatment between nationals and aliens with regard to similar rights guaranteed under the ICCPR (e.g. Article 22, Right of Association). However, the provisions of the ICCPR do not *per se* prohibit any differential treatment of nationals and non-nationals.¹⁸³ Like every other form of differential treatment, it may be justified "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."¹⁸⁴

2.4.2. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture (CAT) has quite an important legal provision for asylum seekers and refugees. In addition to Article 33 of the 1951 Convention governing the principle of non-refoulement, Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of the 1984, which establishes, *inter alia*, that no state shall return a person where there are substantial grounds for believing that s/he would be in danger of being subjected to torture provides the protection of non-refoulement.

It expressly prohibits refoulement: under Article 3 as follows:

"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The term "torture" as defined under Article 1 means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a

¹⁸³ Joan M. Fitzpatrick, *Supra* cited at note 153, page 22

¹⁸⁴ General Comment No. 18 "Non-Discrimination", 10 Nov. 1989, para. 13.

confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application as provided under Art 2(1).

The Committee Against Torture has received some individual complaints on this issue and has established that the non-refoulement obligation is wider than that afforded to those formally defined as 'refugees' under the 1951 convention, such as those who are fleeing clan violence (*Elmi v Australia* [1999] INLR 341).¹⁸⁵

Article 3 would also apply in circumstances where a person would otherwise be excluded from protection under the 1951 Convention, such as those suspected of terrorist activities. As *Helen O'Nions* noted, the CAT has received widespread ratification but few states have felt motivated to ratify the Optional Protocol which would enable greater scrutiny of state practice by the UN Sub-Commission on Torture. Even fewer states have assented to the right to individual petition under Article 22.¹⁸⁶

2.5. The OAU Refugee Convention and other Related Instruments

The International framework for the protection of refugees and asylum seekers are reinforced by treaties which have been adopted regionally. By far the 1969

¹⁸⁵ Dr Helen O'Nions, *The Erosion Of The Right To Seek Asylum*, Senior Lecturer in Law London Metropolitan University, available at < <http://webjcli.ncl.ac.uk/2006/issue2/onions2.html> >, accessed on September, 2010

¹⁸⁶ *Ibid*

OAU Convention and the 1984 African Charter on peoples and human rights are the basic legal instruments in regional Context. Herein under, an attempt will be made to explore basic provisions of these instruments essential for the protection of refugees and asylum seekers that are applicable at the various stage of displacement.

The 1969 OAU Convention Governing the Specific Refugee Problems in Africa complementary to and applied in conjunction with the 1951 UN refugee Convention contains provisions that are even more progressive than any regional or universal instrument governing various aspect of asylum.

Art.2 stresses the right of asylum, and Art. 5 prohibit rejection at the frontier - neither have counterparts in the 1951 Convention. The right to seek asylum, then, is more strongly grounded, and once inside, the presumptive beneficiary enjoys a broad definition of eligibility for refugee status. In addition to "persecution", refugees from generalized violence due to "external aggression", "occupation" and "foreign domination" qualify as well.¹⁸⁷

The other distinct characteristic of the OAU Convention is in the progress it made in the direction of strengthening the position of the individual in relation to asylum. Whereas, in the 1951 Convention and the 1967 Protocol the granting of asylum is left to the discretion of States, the OAU Convention made it an obligation for Member States to "use their best endeavors consistent with their respective legislations to receive refugees and to secure their settlement". (Article II, para. I).

The implications of this provision are two fold. In the first instance, it imposes obligation up on the member States to endeavor to receive and secure settlement for refugees. Secondly, it advances beyond the 1951 Convention,

¹⁸⁷ Article I (2) of the OAU Convention

which deals the status of persons who have already granted asylum, and doesn't in any way address of its actual grant. The major drawback though, is that the reception and resettlement of refugees was made subject to the application of domestic legislation.¹⁸⁸

The African Charter on Human and People's rights¹⁸⁹ has developed the legal position of asylum on the continent even further. Article 12 (3) guarantees the right to seek and be granted asylum 'when *persecuted...*' *This doesn't constitute right to be granted asylum* as such, but given the relative stagnation of this branch of the law, the advance at the normative level cannot be over-emphasized.

Traditional African hospitality has been the basis of acceptance and assistance to refugees in Africa. However, with pressing economic and social problems, asylum countries (Governments and people) tend to be more positively inclined to receive and offer protection to refugees if there is assurance of burden-sharing from the international community and an in-built package for durable solutions. Refugee caseloads which go on for several years without a durable solution may generate tensions and frictions with the host communities.

It also addresses national security concern with the prescription that refugees not to be settled too near the border of their country of origin. In addition, host country is not to permit refugees to indulge in subversive activities against any OAU member State. This prohibition which includes attacks against member states through the press or by radio is so strict that it seems to conflict with Article 17 of the UDHR and Article 7 of the ACHPR, which affirms everyone's

¹⁸⁸ Joe Oloka Onyango, Human Rights, the OAU Convention and the Refugee Crisis in Africa: Frothy years after Geneva printed in International Journal of refugee law, Volume 3 Number 3. 1991, Oxford University press, page, 456,

¹⁸⁹ African Charter On Human And Peoples' Rights (Banjul Charter) ,Adopted on 27 June 1981 Entry into force: 21 October 1986,

right to freedom of expression, and to seek, receive, and impart information and ideas through any media and regardless of frontiers.”

Voluntary repatriation, considered to be the corner stone of African refugee politics, since in the 1967 Addis Ababa Conference is regulated in the OAU Convention by Article 5.¹⁹⁰

The signatory states to the OAU are also obliged to issue to refugees lawfully staying in their territories travel documents in accordance with the 1951 Convention.¹⁹¹ Since the Refugee definition of the OAU Convention is more inclusive than the 1951 Convention, OAU member states may issue Convention travel documents to refugees who do not otherwise qualify for such documents.

Persons not eligible for refugee Status

Like other international refugee instruments, the OAU Convention also contains exclusion provisions. The 1969 OAU Convention replicates, in Article I (5), the language of Article 1F of the 1951 Convention except for a reference to the principles and purposes of the OAU. Moreover, the OAU Convention provides for the ending of refugee protection if a refugee “has committed a serious non-political crime outside the country of refuge after his admission to that country as a refugee” or if a refugee engages in subversive activities against any Member State of the OAU.

Although formulated as “cessation clauses”, these provisions are in effect based on exclusion considerations. Since the OAU Convention complements the 1951 Convention, these provisions should be read within the framework of the 1951 Convention and applied in a manner consistent with the latter. Thus, the

¹⁹⁰ Peter Novel, *Refugees, Law, and Development in Africa* Hein Online -- 3 Mich. YBI Legal Stud. 286 1982 (1988), page 3

¹⁹¹ Article 28 of 1951 Convention

reference to “acts contrary to the purposes and principles of the OAU” should be subsumed within Article 1F(c) of the 1951 Convention, while any activities of a refugee after recognition may give rise to the withdrawal (revocation) of refugee status only if the acts in question come within the scope of Article 1F (a) or (c) of the 1951 Convention.

2.5.1. Non-refoulement and Asylum

As Joe Oloka Onyango has observed, the OAU Convention’s provisions on asylum, contained in Article II, are considered by many scholars as among its most important contributions to refugee jurisprudence in general¹⁹². They combine classical refugee preoccupations with priorities evidently drawn from the politics of international relations and state security. On the legal side, the Member States “shall use their best endeavors, consistent with their respective legislation, to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality¹⁹³.”

Its most crucial provision in terms of classical refugee law, the Convention states that:

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I paragraphs 1 and 2¹⁹⁴.”

Joe Oloka Onyango further commented that this provision on non-refoulement and its prohibition of forcible return goes much farther than the comparable provision in the 1951 Convention. The latter makes an exception in the

¹⁹² Joe Oloka Onyango, *supra* cited at 188

¹⁹³ Article II (1) of the 1969 OAU Convention

¹⁹⁴ Article II (3) of the 1969 OAU Convention governing the specific aspects of Africa

prohibition of refoulement for “the security of the country” arising out of the refugee having been “convicted by a final judgment of a particularly serious crime¹⁹⁵.”

In recent years, as we will see below, in detail the nonrefoulement provisions have been given a boost by the ACHPR, in particular, Article 12 (4) and 12 (5). The former provides for the non expulsion of aliens legally admitted into a State party’s territory, unless in accordance with the law, while the latter extends the prohibition of expulsion to masses of non-nationals, a problem that has affected refugee communities in several instances.¹⁹⁶

The nonrefoulement provision of the OAU Convention is also a reflective of the more liberal approach to the issue than that adopted by the 1951 Convention. Of particular importance is the inclusion within Article 5 of the phrase ‘... rejection at the frontier.’ The absence of such a provision in the international legal regime has enabled several European countries to impose aircraft-sanction and border procedure regulations, and yet not to be in strict sense violation of their non-refoulement obligation under the 1951 Convention. Nevertheless, they have been several occasions where refugees have been turned away at the border-points in Africa, or prohibited entry in to sea-ports.¹⁹⁷

At least legally, while the debate whether States Parties to the 1951 Convention have the obligation not to reject at the boarder remain evolving particularly in Europe, Australia and US, the OAU Convention expressly prohibits, and thereby includes within the scope of its non-refoulement principle, rejection at the border , implying the right to enter. Pointing to this aspect, some scholars have contended that asylum has been established as a right in Africa¹⁹⁸. Joe Oloka argues that the OAU Convention provisions on Asylum are modeled closely on the “United

¹⁹⁵ Joe Oloka Onyango, *Supra* cited at note 188, page 457

¹⁹⁶ *Ibid*

¹⁹⁷ *Ibid*

¹⁹⁸ *Ibid*

Nations Declaration on Territorial Asylum” and their inclusion in the OAU Convention makes them binding upon those States party to it.”¹⁹⁹

Others disagree. These scholars point to various conditions and qualifications reflected in the asylum Article and the Convention’s other provisions and argue that the privilege of a State to admit persons onto its territory according to its discretion remains intact. There is no fundamental right to be granted asylum, but rather asylum is the ‘result of a favor’, the right of specific persons at least to a temporary stay in the country of refuge”.²⁰⁰

There is even concern that the pivotal role assigned to domestic law in the Convention’s asylum provision means that a State, by establishing stringent conditions through such devices, can in effect defeat the intention of the Convention. Perhaps mindful of this uncertainty, as Joe Oloka Onyango noticed²⁰¹, the drafters of the African Charter on Human and Peoples Rights seem to have sought to put the matter beyond dispute. The ACHPR contains by far more forthright and complete provisions on what is specifically referred to as the right to ‘*seek and obtain asylum in other countries* in accordance with the laws of those countries and international conventions.’²⁰². Interestingly, the ACHPR itself also uses the qualification “in accordance with the laws of those countries and international conventions,” thus potentially reproducing here too the debate as to what exactly is the quantum and quality of the rights and obligations established. Even so, it clearly adds to, and thereby strengthens, the legal infrastructure of the asylum regime in Africa.²⁰³

¹⁹⁹ Ibid

²⁰⁰ George Okoth-Obbo, Thirty Years On: A Legal Review Of The 1969 OAU Refugee Convention Governing The Specific Aspects Of Refugee Problems In Africa, Refugee Survey Quarterly, Vol. 20, No. 1, 2001 © UNHCR 2001, available at [http:// www.UNHCR.org](http://www.UNHCR.org), page, 55

²⁰¹ Ibid

²⁰² Article 12 (3) of the African Charter on Human and Peoples’ rights Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

²⁰³ George Okoth-obbo, supra cited at note 200

2.5.2. Regional Solidarity, Co-operation and Burden-sharing

The spirit of the OAU Convention is to accept the principle that African refugees are essentially an African responsibility. The principle of voluntary repatriation is also recognized and in recent years root causes are being addressed and the responsibility of the State of origin is being recognized. Africa, like Asia and Latin America, is today seriously affected by huge refugee problem. Nowhere is a joint effort more necessary to assist in solving them than in the developing countries.²⁰⁴

Taking in to account the central role that the principle and practice of burden-sharing has to play in the protection of refugees, it is somewhat surprising to see that the basis for it in 1951 Convention consists in only a fleeting reference in a preamble paragraph 36²⁰⁵. However, reinforced by the specifically African spirit of solidarity, the OAU Convention clearly establishes the principle of mandatory co-operation among States; this is a central theme of sub-article (4) of Article II that stipulates:

"Where a member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU and such Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum."

This is definitely a contractual obligation but there is pessimism about the practical aspects of which probably still have to be worked out as counterbalances the obligation to provide asylum. The principles expounded in

²⁰⁴ Prince Sadruddin Aga Khan, *Supra* cited at note 8 , page 28

²⁰⁵ This is the fourth preamble which says that "Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which United Nations has recognized the international scope and nature cannot therefore be solved without international co-operation".

this provision have been widely lauded. Yet, in looking at the distribution of refugees among African countries, what Sadruddin Aga Khan and Hathaway consider as solely the function of a geographical accident, wonder the effectiveness of the provisions.²⁰⁶

However, where a refugee has not received the right to reside in any country of asylum, Article 2 (5) of the OAU Convention expressly indicated that a refugee may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangements for his resettlement. In addition, Article 2 (6) dictates that for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

The OAU Convention also assigns a major role to the Administrative Secretary-General of the organization of African Unity. The Secretary-General, as stipulated under Article VII is the repository of the instruments of ratification of the Member States and is the guarantor of the safety of refugees who voluntarily want to return to their respective countries of origin.

The Connection to Human Rights

The African Charter on Human and Peoples' rights, adopted by the OAU in 1981 (hereafter referred as ACHPR),²⁰⁷ and ratified by more than forty African states; making it the most widely accepted regional convention in the world.²⁰⁸

Apart from Article 12 (4) and 13 of the ACHPR, applicable respectively to non-nationals and citizens, the subject of the rights guaranteed therein is a gender-neutral "individual." Theoretically, the ACHPR provisions are applicable to

²⁰⁶ Prince Sadruddin Aga Khan, *supra* cited at note 8 , page, 13

²⁰⁷ African (Banjul) Charter On Human And Peoples' Rights (Adopted 27 June 1981, OAU Doc. Cab/Leg/67/3 Rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986)

²⁰⁸ Peter Novel, *supra* cited at note 190

refugees and asylum seekers through all stages of displacement, including flight, status determination, asylum, and return or voluntary repatriation.²⁰⁹

2.5.3. The Right to 'Seek and obtain 'Asylum in the African Context

Article 12 (3) of the ACHPR recognizes and guarantees asylum as a human right in Africa thereby strengthening the protection of refugees and the institution of asylum in Africa. The full provision reads as follows:

"Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international Conventions".

This provision unequivocally goes one step ahead from the 1969 OAU Refugee Convention but the question is: Doesn't this entail a legal right for an asylum seeker to be granted automatic asylum?

The slight show asserts that the right itself [i.e. the right to seek and obtain asylum] is subject to the laws of those countries asylum is requested and international conventions.

The legal regime of asylum within the African context should not be seen, as a positive right to obtain asylum, but more as one to request asylum and duty of the state to assess asylum claim. It is a right to procedural guarantees.

That is why Joan M. Fitzpatrick seems to hold this opinion.²¹⁰ He argues that to the extent that this provision includes a right to "obtain asylum," is unique in creating an obligation on states parties to grant refugee protection through asylum process. Implied in this provision, therefore, is an obligation on the states parties to the ACHPR to establish institutions and fair procedures for status

²⁰⁹ Joan M. Fitzpatrick, *Supra* cited at note 153, page 20

²¹⁰ *Id.*, page 34

determination.²¹¹ Human rights norms, including Articles 12 and Article 5 on the right to seek asylum and the prohibition of refoulement respectively, would therefore acquire the status of primary laws with which domestic legislation would necessarily need to comply.

He further argues that this entails an extension of the due process guaranteed under Article 7 of the ACHPR to status determination procedures.²¹² Fair procedures in this context would include extending legal assistance to refugees in status determination process. This conclusion is fortified by the provision of article 26 that requires states parties to the ACHPR to “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the AH CPR.”²¹³

The ACHPR is applicable to refugees within the meaning of the 1951 Convention, 1969 OAU Convention as well as to other persons who, despite not fulfilling the criteria in these instruments are nevertheless protected under international human rights law against forced removal or the refusal of entry. The ACHPR doesn't limit the right to seek asylum only for persons covered by these instruments. Arguably, State parties who have a duty under other international human rights instruments, including the ACHPR, the CAT and the ICCPR provisions that envisage the right to refoulement can be invoked by other persons in the refugee situation as a legal base for seeking some sort of status. Practically, as most African states are party to the 1969 OAU Convention, complementary protection has not arisen in this region.²¹⁴

²¹¹ Joan M. Fitzpatrick (editor), *supra* cited at 153

²¹² Article 7 (1) describes the content of minimum procedural guarantees: Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal; (c) The right to defense, including the right to be defended by counsel of his choice; (d) The right to be tried within a reasonable time by an impartial court or tribunal.

²¹³ Joan M. Fitzpatrick, *supra* cited at 153, p. 267

²¹⁴ Ruma Mandal, *Supra* cited at note 48, page 31

2.5.4. Who is a refugee in Africa?

Article I (1) and (2) adopted a two-part definition of refugee, including the 1951 Convention/UNHCR Statute definition as the first part and adding:

"The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

This definition has solved much of the problem which has been so often in Europe and the term *de facto* refugees- by including among the refugee-generating factors the warlike and suppressing events or serious disturbance of the public order which are tragically so common in many parts of the world today. It also avoids other difficulties sometimes encountered under the 1951 Convention's definition when the refugee generating conditions are only found to prevail in part of the country of origin of fundamental right.

It is interesting to note that the language found in the in ExCom Conclusion no.22 (1981) that describes the kinds of people who fall under UNHCR's mandate is nearly similar to OAU's refugee definition That is why UNHCR emphasis that the OAU Refugee Convention, in many respects provides a model for the provision of international protection to all refugees, whether they are fleeing armed conflict, civil strife, persecution, or, as is often the case, a combination of these. The use of objective criteria facilitates the recognition of refugee status on a *prima facie* basis in the case of large refugee flows, a practice that is not inconsistent in theory with the 1951 Convention, but which is at variance with the highly individualized manner in which the latter instrument has normally been applied by States Parties. Such criterion also avoids the

potential inter-State frictions that result from the perception that recognition of refugee status under the 1951 Convention implies criticism of the authorities of the country of origin.²¹⁵

Although the refugee definition in Article I (1) and (2) of the OAU Convention has been incorporated into the legislation of many African states, gaining an understanding of how this definition is actually interpreted is rather problematic given the paucity of functioning individualized refugee status determination procedures in the region.

Nevertheless, it is clear that Article I (2) requires neither the elements of deliberateness nor discrimination inherent in the 1951 Convention definition.²¹⁶ In addition, Article I (2) does not prescribe a particular type of harm that the individual must have suffered or be at risk of. Hence, so long as an asylum seeker has been forced to leave his country of origin for one of the reasons enunciated in Article I(2) of the OAU Convention he is a refugee for its purposes. Of the grounds listed, 'external aggression', 'occupation' and 'foreign domination', while drafted with the struggle against colonialism in mind, are still unfortunately of relevance today in the context of international armed conflicts, including border skirmishes and aiding rebel movements in a neighboring state. As for 'events seriously disturbing public order', this concerns situations where peace and security are undermined to such an extent that the normal mechanisms for preventing, investigating and punishing crime are so ineffective as to leave individuals unprotected by the state. Civil war would be a clear example. Likewise, riots or internal upheavals (including violent acts from paramilitary or localized anti-government groups) may also constitute such events where the authorities are unable to maintain law and order.²¹⁷

²¹⁵ EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME A/AC.96/830 7
September 1994

²¹⁶ The Refugee Definition in Africa and Latin America: The Lessons of Pragmatism,

²¹⁷ Ruma Mandal supra cited at 48, page 13

There is also a question as to whether the public order criterion is relevant in situations where the rule of law has essentially disintegrated in response to massive violations of human rights. Ruma Mandal holds that the nature of public order, for it to be seriously disrupted by human rights violations, would arguably have to be on a scale capable of affecting the very fabric of society.²¹⁸ If, the frequency with which violations are being carried out and the severity of the infringements, i.e., wide scale violations of human rights may also fall within its ambit.

Although, it is possible to envisage a breakdown in public order caused by extreme mismanagement of the economy or a severe environmental disaster (whether man-made or natural), Article I (2) of the OAU Convention does not explicitly cover individuals fleeing poor economic or ecological conditions.²¹⁹ Moreover, there is scant evidence of this refugee definition being applied in such circumstances and the inclusion of natural disasters sits uneasily with the preceding criteria that relate to man-made events such as foreign aggression. However, where a natural disaster is manipulated by the government or other actors to the detriment of the population this may well constitute 'events seriously disturbing public order'.²²⁰

Field of application: "Every person" or "Every African"?

The other issue to consider is the OAU Convention's scope of application. There are two schools of arguments that the OAU Convention is applicable for refugee flee only with in Africa while others view that it possibly applies to refugees who fled from other continent to Africa.²²¹

²¹⁸ Idid

²¹⁹ Ibid

²²⁰ George Okoth-Obbo, supra cited at note 200, page 20

²²¹ Micah Bond Rankin, Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on, LLB Candidate University of Victoria, Faculty of Law Canada, available at <http://www.unhcr.org>,

Micah Bond Rankin strongly argues that the OAU Convention is applicable to every one citing the phrase “*any person*’ as employed in the definition of the term refugee. But again he revealed that State practice seems to the contrary.²²² He further noted that the limited evidence suggests that States take relatively restrictive approach to the definition. The official position of the South African government is that the OAU Convention only applies to African asylum seekers despite the fact the definition uses the words “every person”. The result is “the overwhelming rejection of non-African applicants.”²²³

South Africa has also favored “a particular reading of the OAU definition whereby the properly recognizable refugee...emerges as an African victim of generalized violence.”²²⁴ What appears most lacking in scholarship is a threshold for applying the extended definition. Is the Convention only applicable to African refugees who come from countries where civil war and generalized violence are endemic? It seems so.

The preambular paragraph indicates that the need to adopt the OAU Convention is the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future.²²⁵ The Ethiopian Refugee proclamation stands in an accord with this interpretation. Its Article 4 (3) states that “..... [I]n case of refugees coming from Africa...”²²⁶ This scenario put the confrontation with the reluctance of States to undertake legal obligations towards refugees coming out side Africa but fall beyond the scope 1951 Convention that lead the protection-gap on the broader responsibility of UNHCR.

²²² Ibid

²²³ Ibid

²²⁴ Ibid

²²⁵ First Paragraph, Preamble of the OAU Convention

²²⁶ Refugee Proclamation 209/2004: Ethiopian Refugee Proclamation, Article 4 (3).

2.5.5. Admission and non-refoulement

As recommended in ExCom Conclusion 22 (1981) on Protection of Asylum Seekers in Situations of Large Scale Influx, asylum seekers in situations of mass influx should be admitted into the country to which they present themselves and they should not be subjected to such measures as rejection at the frontier, return to the country from which they fled or in which their safety or liberty may be imperiled.²²⁷ It is generally accepted that protection against refoulement also applies to persons arriving at the border, even in situations of a large scale influx of refugees. The OAU Convention Article II (3) specifically includes a provision prohibiting "rejection at the frontier. Several Executive Committee conclusions have also reaffirmed this principle."²²⁸

2.5.6. Guarantee in the Asylum procedure

The OAU Convention appears to say nothing on the question of procedural standards. Given that the 1951 Convention is also silent on this matter, the norms that have developed in response to this procedural gap for determining its beneficiaries are arguably applicable for the claimants of the 1969 Convention. In this respect, ExCom Conclusions No. 8 (1997) and No. 30 (1983) are instructive. Amongst their recommendations on the basic guarantees necessary in any refugee status determination procedure are the provision of adequate advice on the procedures to asylum seekers and a right of review (with suspensive effect) against a negative decision.²²⁹ This may be very important for individual refugee status determination procedure. One of the most important, foundational questions in the African context then was, and remains today, the problem of

²²⁷ Bonaventure Rutinwa, *Prima facie status and refugee protection*, October 2002, available at <http://www.unhcr.org>

²²⁸ See EXCOM Conclusions No. 6, 22 and 30.

²²⁹ Although not legally-binding, ExCom Conclusions carry significant political weight. Further guidance on procedural standards may also be gleaned from Part 2 of the *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, 1992

managing and attributing refugee status particularly in the massive fashion in which persons spill into exile from their countries of origin.²³⁰

When refugees are pouring across a border, it is impractical if not impossible to examine individual asylum requests. When the circumstances under which large numbers of people flee indicate that members of the group could be considered individually as refugees, it makes sense for the country of asylum to use "*prima facie*" or group status determination. This allows for basic protection and assistance to be extended to those in need in emergency situation, pending arrangements for a durable solution, without initially addressing the question of their status under the 1951 Refugee Convention and Protocol.²³¹

Although group determination has been widely employed over a long period of time, specific procedures have rarely been put in place by which it is to be carried out. There have been a number of EXCOM Conclusions which have addressed the question of asylum procedures but none of them adequately deals with this issue in the context of mass influx. One of the earliest instruments to specifically address the question of asylum procedures is EXCOM Conclusion No 8 on *Determination of Refugee Status* (1977). However, this conclusion was essentially aimed at individual applications for asylum and not group determination in situations of mass influx.²³²

The applicability of the above Conclusion in situations of mass influx was considered by the 1979 Arusha Conference on the African Refugee Problem. After affirming that the definitions of the term 'refugee' contained under Article I paragraphs 1 and 2 of the 1969 OAU Convention were the basis for determining refugee status in Africa, the Conference went on to recommend that in case of individual applications, the determination of status should be done in

²³⁰ George Okoth-Obbo, supra cited at 200, page 56

²³¹ Ms. Kate Jastram and Ms. Marilyn Achiron, supra cited at note 5, page 55

²³² Bonaventure Rutinwa, supra cited at note 227

accordance with the procedure recommended by the Executive Committee of the UNHCR in Conclusion 8 (1977). However, the Conference considered “the application of such procedures might be impracticable in the case of large-scale movements of asylum seekers in Africa a matter which calls for setting up special arrangements for identifying refugees”²³³

In the absence of international instruments providing for standards for recognition of refugees on a *prima facie* basis, states have devised their own procedures under national legislation and state practice.²³⁴

2.5.7. Standards of treatment for *prima facie* refugees

If persons recognized as refugees on a *prima facie* basis are presumed to be refugees within the definitions found under the relevant instruments, it logically follows that their treatment should be in accordance with the standards stipulated under those instruments. For refugees presumed to be refugees under Article 1(2) of the 1951 Convention, their standards of treatment are those set out under Articles 12 to 34 of the same Convention. The same standards apply to asylum-seekers presumed to be refugees under Article I (2) of the 1969 OAU Convention. As Bonaventure Rutinwa rightly notes, “the definition of refugee (under the OAU Convention) ... was expanded ... without any suggestion that the quality or durability of their protection should be diminished as compared to that enjoyed by persons meeting the definition in the 1951 Convention”.²³⁵

African refugee protection mechanism has been often remarked as generous, and not generally dependent on the determination of individual status of a refugee. Under the OAU Convention, persons who meet the criteria of its Article

²³³ The 1979 Arusha Conference on the African Refugee Problem, Recommendation 2 paragraph 4

²³⁴ Bonaventure Rutinwa, supra cited at note 227, page 13

²³⁵ Ibid

I(1) (drawn from the 1951 Convention) are not treated differently from those who met the broader definition contained in its Article I(2).

Therefore, refugees recognized under section I(2) of the OAU Convention are entitled to the same standards of treatment as those recognized under the 1951 Refugee Convention was confirmed by the Arusha Conference which recognized the definitions of the term 'refugee' contained in Article I, paragraphs 1 and 2 of the 1969 OAU Refugee Convention as the basis for determining refugee status in Africa and stressed "the essential need for ensuring that African refugees are identified as such, so as to enable them to invoke the rights established for their benefit in the 1951 Refugee Convention and the 1967 Refugee Protocol."²³⁶ This is irrespective of the procedure by which they were recognized.

African states encouraged by the OAU Convention provision on asylum and Africa's "Tradition of hospitality" towards refugees accepted and granted asylum, mainly on temporary basis including for some 2.1 million refugees at the beginning of 2009.²³⁷

Refugee rights

In addition to the rights to be recognized as a refugee and not to be subjected to *refoulement* refugees are also entitled under international law to certain standards of treatment which include security rights, including protection from physical attack, and basic dignity rights, including protection against discrimination, family unity, and freedom of religion. These rights are not

²³⁶ See Recommendations of the Arusha Conference on the African Refugee Problem, Adopted at the Arusha Conference on the African Refugee Problem, 7-17 May 1979, Arusha, Tanzania, para 2.

²³⁷ UNHCR Global Appeal 2010-2011, 2010 Regional Operations Profile – Africa, <http://www.unhcr.org/ga10/index/html>

enshrined in the 1969 OAU Convention as such, but they derive from the 1951 Refugee Convention and a number of human rights instruments.

Non-Discrimination

The OAU Convention enumerate the principle of non-discrimination requiring member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.²³⁸

Family life

The OAU Convention does not make specific reference to family unity or reunification. Many of its signatories are bound, however, by international and regional human rights and humanitarian law treaties with provisions relating to family unity and reunification. More importantly, in the situations of mass influx envisaged by the OAU Convention, there is no individual status determination because the objective circumstances in the country of origin make the need for protection obvious and/or because the country of asylum is not able to conduct such an examination due to the large number of people involved. There should not, therefore, be an issue of derivative status. Family members, whether together or separated, should be, and in the normal course are, extended recognition on a *prima facie* basis.²³⁹

For example, more than 40 states of the OAU ratified the ACHPR that gives protection for family life.²⁴⁰ Similarly, the African Charter on the Rights and

²³⁸ See Article 3 and 4 of the OAU Convention

²³⁹ see also Executive Committee Conclusions No. 1 (XXVI – 1975), No. 9 (XXVII – 1977), available at <http://www.unhcr.org-45a754072> accessed on 5 January 2009

²⁴⁰ Article 18 of the ACHPR provides that the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.

Welfare of the Child²⁴¹ has an important legal basis as a legal protection family unity and family reunification.

The full provision of Article 23 that deals with Refugee Children, reads as follows:

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.

2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

Apart from this, the Cotonou Declaration and Programme of Action,²⁴² adopted by many African states, urges the competent authorities to cooperate with the ICRC, UNHCR and UNICEF in the tracing and reunification of family members separated so as to preserve family unity.

²⁴¹ African Charter On The Rights And Welfare Of The Child Adopted On 11 July 1990 Entry Into Force: 29 November 1999, In Accordance With Article 47 Text: OAU Document Cab/Leg/153/Rev.2

²⁴² COTONOU DECLARATION AND PROGRAMME OF ACTION UNHCR – African Parliamentary Union – Inter-Parliamentary Union African Parliamentary Conference “Refugees in Africa: The Challenges of Protection and Solutions” (Cotonou, Benin, 1-3 June 2004)

2.5.8. Duration of protection: Voluntary Repatriation, protection from expulsion and the Principle of Non-refoulement

Once a recognized refugee is granted asylum in the sense of temporary residence, the duration of protection from return are governed by cessation clauses found in Article I (4) of the OAU Convention.

Equally, every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as measures taken for the maintenance of public order.²⁴³ The prohibition of so-called "subversive activities" within the refugee and asylum context have been criticised for restricting freedom of expression but others argues that it reinforced the character of asylum and refugee protection as quintessentially humanitarian, friendly and law-based.²⁴⁴ Except on these limitations on the refugee right to enjoy asylum, the duration of protection is in adherence to principle of non-refoulement, the forced repatriation and expulsion of refugees is prohibited.

2.6. The African (Banjul) Charter on Human and Peoples' Rights

Albeit of the protection provided to refugees through the 1969 OAU Convention is relevant at all times, and at the same time the protection provided to refugees through the ACHPR is equally essential. The general foundation for the protection of the human rights of refugees under the ACHPR is, the guarantee of equal protection of the law, life, human dignity, including of all forms of torture, cruel, inhuman and degrading treatment, personal liberty, and fair trial and due process. These norms appertain to all human beings in all situations enjoins states parties "to secure the rights protected in the ACHPR to all persons within

²⁴³ Article 3 (1) of the 1969 OAU Convention

²⁴⁴ George Okoth-Obbo, Director UNHCR Africa Bureau, Q&A: OAU Convention remains a key plank of refugee protection in Africa after 40 years ,News Stories, 9 September 2009, available at <http://www.unhcr.org>

their jurisdiction, nationals or non-nationals (refugees) inclusive).²⁴⁵ Article 1 of the ACHPR expressly provides that:

"The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them"

The African Commission on Human and Peoples Rights also elaborates some of the substantive rights contained in the ACHPR for the benefit of Asylum-seekers and refugees.

2.6.1. Non-refoulement

Article 5 of the ACHPR obliges states parties to refrain from returning asylum seekers or refugees to a place where they may be subject to torture, cruel, inhuman and degrading treatment. The full provision reads as follows:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"

This provision complements the customary law and ICCPR prohibition on torture, cruel, inhuman or degrading treatment or punishment. There is no specific jurisprudence yet on the question of an implied non-refoulement obligation but support is found in the case law of the African Commission on Human and Peoples' Rights.²⁴⁶ In *Modise v Botswana* (Communication No.97/93), the Commission found that deportation to no-man's land between Botswana and South Africa constituted cruel, inhuman or degrading treatment. Bethlehem and Lauterpacht consider that 'there is no reason to believe that the organs

²⁴⁵ Joan M. Fitzpatrick (editor), supra cited at 153, 264

²⁴⁶ Ruma Mandal, supra cited at note 48, page , 27

responsible for interpreting' these regional human rights instruments will take a different line to that of the Human Rights Committee and the European Court of Human Rights in finding an implied prohibition on return:²⁴⁷ A prohibition by the ACHPR on deportation to torture or cruel, inhuman and degrading treatment or punishment may function as a type of de facto asylum, even for those who don't qualify for refugee status besides providing complementary protection to refugees covered under the 1951 Convention and the 1969 OAU Convention.

The state is obliged to comply strictly with due process norms before removing refugees or persons seeking protection as refugees.²⁴⁸ The African Commission on Human and people's Rights has thus held the due process guarantees in Article 7 of the ACHPR to be applicable to the involuntary removal of a refugee from a host state. This implies a duty on the government to extend legal assistance to refugees generally in cases that potentially or actually affect their continued enjoyment of the protection that comes from being afforded refugee status. The Commission has not yet addressed the question of whether Article 7 of the ACHPR extends to status determination.²⁴⁹

Article 12(2) of the ACHPR guarantees the right of every individual when persecuted, the right "to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions." (Article 12 (3)) To the extent that this provision includes a right to "obtain asylum," the ACHPR is unique in creating an obligation on states parties to grant refugee protection through asylum process. Implied in this provision, therefore, is an obligation on the states parties to the ACHPR to establish institutions and fair procedures for status determination.²⁵⁰

²⁴⁷ Ibid

²⁴⁸ Joan M. Fitzpatrick (editor), *supra* cited at 153, page 266

²⁴⁹ Ibid

²⁵⁰ Ibid

2.6.2. Procedural guarantees During Status Determination

Joan M. Fitzpatrick remarked that, fair procedure entails an extension of the due process guarantees in Article 7 of the ACHPR to status determination procedures. Fair procedures in this context would include extending legal assistance to refugees in status determination process mainly in the case of withdrawal of refugee status. This conclusion is fortified by the provision of article 26 that requires states parties to the ACHPR to “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by Article 26 of the ACHPR.”²⁵¹

2.6.3. Protection from arbitrary Expulsion

The ACHPR also prohibits the arbitrary expulsion of foreign nationals. Article 12 (4) provides that : “A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law”. The right not to be expelled without a decision in accordance with the law in the refugee context essential for refugees already allowed to reside permanently or temporary in the country of asylum. When the countries of asylum give decision against the expulsion of recognized refugees, it has to be in adherence with due process of law including the provision of the right to appeal against expulsion order.²⁵²

2.6.4. Protection from Mass expulsion

Finally, the ACHPR under Article 12 sub-Article (5) expressly stated that the mass expulsion of non-nationals (refuges as well) shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups. This provision provides strength to the principle of voluntary repatriation of recognized refugees that is secured by the OAU Convention.

²⁵¹ Id, page, 267

²⁵² Article 12 (4) and (5) of the African Charter on Human and Peoples rights’

CHAPTER THREE

3. The Right to Asylum in Ethiopia: Laws, Policy and Practice

3.1. Overview

Since ancient times, though it never incorporated a right to asylum into a legally binding instrument, Ethiopia has maintained a tradition in providing sanctuary to refugees from nations from far and near- in a "particularly liberal and humanitarian spirit", in full respect of the modern principle of nonrefoulement. One particular example of granting territorial asylum can be inferred dating back in 615 AD where the followers of the Prophet Mohammed, up on his directive, made their way across the Red Sea and were granted asylum from persecution at the court of Aksum.²⁵³

Prof. Ahmed Abou-El-Wafa Riyadh, in his comparative study on "the right to Asylum between Islamic Shari'ah and International Refugee Law" put a fascinating note-on this legacy- as to exercising the right of asylum to Abyssinia implied three rules, which form part of contemporary international law on asylum, namely.²⁵⁴

1) The cause of migration: i.e., that refugee is undergoing persecution prompting or pushing them to immigrate. That was the case of Muslims who were molested and harmed by Quraysh. So Prophet Mohammad (PBUH) advised them to immigrate.²⁵⁵

²⁵³ R. Pankhurst, '*Hands across History*', Selamta, vol. I no. 1, (1983), p. 1 printed in Iman Abdurahman, Evaluating the right of asylum in International and Ethiopian law, page 54

²⁵⁴ Ibn Majah: Abu-Abdullah Mohammad: *sunnan ibn majah*, verified by Mohammad Fu'ad Abdul Baqi, Cairo, printed in Prof. Ahmed Abou-El-Wafa Riyadh, Supra cited at note 102

²⁵⁵ Ibid

"When Islam emerged and believers started to speak out their religion, Quraysh targeted them with torture and mischief, with a view to dissuading them away from their faith. Prophet Mohammad (PBUH) said to them, "Disperse you out into the Earth." "Where shall we go?" They inquired. "Up there," he said, pointing towards the land of Abyssinia. So, a number of them immigrated, some on their own, others in company of their families"

2) The goal of asylum: The principle or moral obligation to protect the oppressed and persecuted. "In this connection, Umm-Salamah, an immigrant, said, *"In Abyssinia, we safely maintained our faith"* whereas according to Ibn Abdul-Barr: *"When those landed in Abyssinia, they felt safe with their faith and stayed in the best homes and enjoyed the best protection."*²⁵⁶

3) Protection from Extradition: Inadmissibility of extraditing a refugee, if such an act would put him at risk of being persecuted in the requesting country.²⁵⁷ It was absolutely inadmissible for the Negus, the Emperor of Abyssinia, to breach a covenant of asylum granted to a refugee.

"In fact, Quraysh, their oppressors, sent 'Abdullah Ibn Abi-Rabee'ah and 'Amr Ibn al-'As, Laden with gifts and precious object to Negus, Emperor of Abyssinia, requesting him to extradite Muslim immigrant to them. In response, Negus said, "No, by God, I won't surrender them. Never shall I allow harm to be caused to those people, who had sought my protection, come to my country and given me preference over others until I call them and ask them about what this man says about them. If it proves true, I would surrender them to them and send them back to their folk. Even if not I'll defend and protect them well as long as they stay with me."

This reflects the principle of nonrefoulement in contemporary international law that is expressly incorporated in Article 33 of the CAT and Article 33 (1) of the 1951 Convention that most jurists, including Professor Ahmed Abou-el-wafa argues as a basis of general principle of human rights and refugee law, as an

²⁵⁶ Ibid

²⁵⁷ Ibid

absolute protection against extradition has to be extended to embrace persons who would be threatened on return with discriminatory treatment on ground of race, religion, membership of a particular social group or political opinion in cases where a person has fears of being subjected to torture and other cruel, inhuman or degrading.²⁵⁸

4) Beyond the substantive protection: The legacy implicated on the Procedural Safeguards, i.e., the decision was taken after these refugees were given chance to present their defense. Professor Ahmed goes on to recall the act of the King, having heard from Muslims and realized the truth of their argument, Negus refused Quraysh's request, addressing Quraysh's emissaries, and *"If even you give a mountain of gold, I won't surrender them to you."* He then ordered their gifts to be returned, upon which they left back home disappointed.²⁵⁹

Ethiopia has maintained its ancient civilization of hospitability of its people and the Government by granting safety seekers protection and receiving refugee populations displaced by war and persecution even at the moments grappling with its economic and developmental difficulties is an expression of its commitment to international standards and humanitarianism.

The right to asylum is a genuine and deeply rooted Ethiopian tradition that the UN refugee Agency has called for reviving, in its 2008 Ethiopia Operation plan as follows: "...[t]he Ethiopian people and their governments have showed a very generous and long asylum tradition. More recently, Ethiopia hosted refugees that in some cases exceeded one million. These numbers decreased very

²⁵⁸ See Executive Committee Conclusion No. 17 (XXXI), 1980; Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* (Opinion), page 12, 20 July 2001, also available at <http://www.unhcr.ch>. ; Karin Landgren, *Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests*, UNICEF, New York USA, June 1999, page 40

²⁵⁹ Cf: Prof. Ahmed Abou-El-Wafa Riyadh, *Supra* cited at note 102

significantly when most of the Somali refugees repatriated between 1997 and 2005, but many more continued to come".²⁶⁰

Refugees in Ethiopia

The Right to Seek Asylum

The right to seek asylum is found in the *1948 Universal Declaration of Human Rights*:

"Everyone has the right to seek and to enjoy in other countries asylum from persecution".

Ethiopia is one of the main refugees hosting country in the world and the number of refugee population is increasing due new arrivals from Eritrea and Somalia. The right to seek and enjoy asylum has been respected in most situations of displacement in the past decades. As indicated in the chart below, as of 30 May, 2010, there are 133, 714 refugees and asylum seekers hosted in thirteen camps throughout the country and in Addis Ababa; 72,054 of them are from Somalia , 33,725 are from Eritrea, 24,481 are from Sudan, 2,731 are from Kenya, 477 are from Democratic Republic of Congo, 93 from Burundi, 71 from Djibouti, 13 from Rwanda, 35 from Uganda and 13,078 were Eritrean, 5,763 were Afar, and the remaining 34 are from Yemen, Zimbabwe, Togo, Burundi, DRC; and other 13 nationalities located mostly in urban areas.²⁶¹

²⁶⁰ UNHCR 2008-2009 Ethiopia Country Operations Plan available at <http://www.Unhcr.org>

²⁶¹ The numbers of refugee population continue to increase due to the arrival of asylum seekers from Somalia and Eritrea in to Ethiopia in each day.

Current population of concern to UNHCR in Ethiopia as of 31 may 2010

Country of Origin	Individuals	Percentage
Somalia	72,054	53.89%
Eritrea	33,725	25.22%
Sudan	24,481	18.31%
Kenyan	2,731	2.04%
Dem. Rep. Congo	477	0.36%
Burundi	93	0.07%
Djibouti	71	0.05%
Rwanda	13	0.01%
Uganda	35	0.03%
Yemen, Zimbabwe	34	0.03%
Togo etc		
Total	133,714	100.00%

Source: UNHCR representation in Ethiopia, Addis Ababa, public information section, May 30, 2010

Ethiopia has pursued asylum policies and practices, which reflect the essential obligations, mandated in 1951 Convention and its 1967 protocol²⁶² and the 1969 OAU Convention. In general, Ethiopia has maintained a generous asylum and refugee policy.

Commitment to the principle of Non-Refoulement

The promulgation of Refugee Proclamation no. 409/2004 that gives life to the two refugee convention is a clear example. The most fundamental principle of non-

²⁶² Ethiopia acceded to the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol on Nov.10, 1969.

refoulement, which is the concern stone for the international protection of refugees, clearly spelt out in simple and expressive manner that goes beyond the 1951 Convention and the OAU Convention.²⁶³

"No person shall be refused entry in to Ethiopia or expelled or return from Ethiopia to any other country or to be subject to any similar measure as a result of such refusal, expulsion or return or any other measure, such person is compelled to return to or remain in a country where:- he may be subjected to persecution or torture on account of his race, religion, nationality, membership of a particular social group or political opinion: or his life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination of events seriously disturbing public order in part or in whole of the country."²⁶⁴

As we will see below, the principle of non-refoulement is well respected by the government of Ethiopia.

The principle and practice of asylum in Ethiopia has been further buttressed by international aid. In fact, an implicit deal was struck whereby Ethiopia admitted such a huge refugee population to its territory and provided the land required to accommodate them. And as a reciprocal gesture (often referred to in the humanitarian community as "burden sharing") donor states provided the funding - much of it channeled through UNHCR - required to feed, shelter, educate and provide health care to the refugees. This can easily be understood from the Ethiopian government Delegation speech to the UNHCR EXCOM:

"... [e]thiopia is hosting over 116, 000 refugees mainly Somalis, Eritrean and Sudanese. Refugee influx into Ethiopia is increasing drastically. The current political and security developments in both Somalia and Eritrea have resulted in

²⁶³ There remain still a debate whether the non-refoulement provision under Article 33 (1) of the 1951 Refugee Convention oblige States including non contracting states to allow the entry of bona fide asylum seeker in to their territory..."The 1969 OAU Convention spell about the obligation of not only contacting States but also member States of the African Union "... not to reject at the frontier..." (Article 2 (3)) The phrase "No one shall be refused entry in to the territory of a State..." do not exist at all in either of two.

²⁶⁴ Proclamation no. 409/2004 - Refugee Proclamation Article 9 (1)

conventions, protocols, declarations together with the 1951 Convention and the 1969 OAU Convention that are issued under the auspices of the United Nations and the African Union give rise to different types of obligations on the part of Ethiopia -to wards asylum seekers and refugees-depending on the nature of the rights guaranteed therein, on the problems that it was meant to overcome or to prevent. ²⁷² These are the parameters/ standards for the protection of asylum seekers and refugees in Ethiopia.

In terms of regional instruments, Ethiopia has made some commitments to refugee protection in its capacity as a member state of African Union that has paramount significance for the protection of refugees in Ethiopia. These includes the Addis Ababa Document on refugees and forced population Displacements in Africa²⁷³, The Arusha Recommendations on the Situation of Refugees in Africa²⁷⁴, Khartoum Declaration on Africa's refugee crisis²⁷⁵ and Cotonou Declaration and Program of action.²⁷⁶ These instruments that recall's commitment for the government of Ethiopia.

Beyond these, as part of its duty to co-operate with UNHCR and to accept its supervisory role under Articles 35 of the 1951 Convention and Article 8 of the OAU Convention, Ethiopia has to take into account UNHCR Executive Committee Conclusions, the Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR guidelines and other UNHCR positions on matters of law when applying these Refugee Instruments. Albeit, these

²⁷² Steiner, Henry J. and Alston, Philip, *International Human Rights in Context: Law, Politics and Morals*, second ed., 2000 p.181

²⁷³ Declaration by a symposium on refugee issues in Africa, held jointly by the OAU and the UN High Commissioner for Refugees in Addis Ababa, Ethiopia, on 10 September 1994

²⁷⁴ Recommendations of the Pan-African Conference, (Arusha, Tanzania, 7-17 May 1979, "The Arusha Recommendations"

²⁷⁵ The Khartoum Declaration on Africa's Refugee Crisis Adopted by the Seventeenth Extra-Ordinary Session of the OAU Commission of Fifteen on Refugees (Khartoum, Sudan, 20 – 24 September 1990);

²⁷⁶ Cotonou Declaration and Program of Action: UNHCR – African Parliamentary Union – Inter-Parliamentary Union (African Parliamentary Conference) "Refugees in Africa: The Challenges of Protection and Solutions" (Cotonou, Benin, 1-3 June 2004)

documents (soft laws) are not legally binding, they must not be dismissed as irrelevant but regarded as authoritative statements whose disregard needs justification.

3.2.2. Proclamation No.409/ 2004- Refugee Proclamation Regulating Refugee Status and the Right to Asylum

The Refugee Proclamation, enacted in July, established the right to asylum and incorporated the provisions of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1969 African Refugee Convention. The Refugee Proclamation prohibited the Government from refusing entry to refugees or asylum seekers or expelling or returning them to any country where they would be at risk of persecution or harm.

The need to promulgate national refugee legislations can be rationalized on various premises. Some of these rationales can be rationalized particular reference to Ethiopia. As Prince Sadruddin Aga Khan remarked, the reluctance of States to enter into international commitments in a field such as that of asylum, even though ancestral traditions in the matter correspond to the humanitarian concern which is now so manifest and so widely recognized, has not prevented some of them from adopting, within the framework of their internal legislation, measures which amount in fact to recognition of an individual right of asylum.²⁷⁷ This is also quite true in the case of Ethiopia.

Substantially, the preamble of the Ethiopia Refugee proclamation- proclamation no.409/2004- (hereafter referred as the Refugee Proclamation), is an expression of Ethiopia's humanitarian policy to provide hospitability, asylum, protection, assistance to refugees is unequivocally recognized.²⁷⁸

²⁷⁷ Prince Sadruddin Aga Khan, *Supra* cited at note 8, page 14

²⁷⁸ See paragraph 1 of the Refugee Proclamation: Proclamation no.409/2004

In addition, the international Refugee Conventions are to be implemented, their rules must be transformed or incorporated in the national legislation of the parties; and the adoption of national Refugee legislation is based on international standards is key in strengthening asylum, making refugee protection more effective and providing a basis for seeking solutions to the plight of refugees, particularly important in areas on which both 1951 Convention and the OAU Convention is silent, such as procedures for determining refugee status and the granting of asylum.

Closely connected with the rationale just considered above, it is further stated in the preamble that the rationale for national refugee legislation: "... [i]t is desirous to enact for the effective implementation of the international refugee Conventions which Ethiopia is a party to and establish a legislative and management framework for the reception of refugees and ensure their protection, and promote durable solutions wherever conditions permit."²⁷⁹ This is also an expression of the Country's Asylum policy- temporary protection- to wards promoting their voluntary repatriation instead of local integration.

Equally important, the inclusion of Article 5 and 6 while adopting Proclamation No. 6/1995 that establish the National security, immigration and refugee affairs authority to be responsible, *inter alia*, in cooperation with the appropriate organs and international organizations (UNHCR), to be responsible for matters relating refugees; and to investigate and cause decisions to be taken on the cases of persons who apply for asylum.²⁸⁰ This is also an indication of the national commitment undertaken by the government of Ethiopia in setting up an authority entrusted to provide asylum for refugees thereby providing international protection in coordination with the UNHCR and the international community.

²⁷⁹ The preamble of Refugee Proclamation No. 409/2004

²⁸⁰ Proclamation No 6/1995: A Proclamation To Provide For The Establishment Of The Security, Immigration And Refugee Affairs Authority

The Refugee Proclamation, which was adopted after the draft was commented by the UNHCR Addis Ababa²⁸¹, incorporate various principles of the International Refugee and Human Rights Convention and , the UNHCR Handbook 'the Handbook on Procedures and Criteria for Determining Refugee status', UNHCR Executive Committee Conclusions (EXC)-in its Substantive and procedural-provisions.

It encompass provisions for the definition of the term "refugee", simply adopting the definitions provided both in the 1951 Convention and the OAU Convention, envisages the legal status of refugees, the rights and obligations of asylum seekers, recognized refugees and the State²⁸². The key protection of non-refoulment, non rejection at the frontier, and the right to seek asylum is guaranteed.' The Refugee Proclamation also contains provisions for the procedure to be adhered for individual and group refugee status Determination and the granting of asylum.²⁸³

However, the Refugee Proclamation doesn't afford full procedural safeguards and guarantees to ensure the rights of refugees including consultation with UNHCR, legal counsel/representation, the right to present his/her case in person and it also doesn't state the order to expel or detain the refugee should be in accordance with a due process in a court of law or administrative regulations.

The necessity to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems from the right to seek and enjoy asylum, as guaranteed under Article 14 of the Universal Declaration of Human Rights, and the responsibilities derived from the 1951 Convention, international and regional human rights instruments, as well as relevant Executive Committee conclusions. Except in the case of fundamental

²⁸¹ George Okoth-Obbo, Supra cited at note 200, page 102

²⁸² Article 20 of the Refugee Proclamation

²⁸³ See Article 2, 9, 12 of the Refugee Proclamation

food to the refugees residing in the camps. There are no other administrative bodies specifically addressing the needs of the refugees.

Though there is a few numbers of NGO's working jointly with ARRA and UNHCR on the protection and assistant to refugees. Unfortunately, like ARRA, almost all of them receive budget from UNHCR.

This has a negative impact on the protection and assistance to refugees when there is reduction of donation from donor countries. Specially, ARRA as a government agent is supposed to have its own budget-be it small or high. There are instance where ARRA was willing to register asylum seekers but UNHCR didn't perceive Eritrean Afar asylum seekers as genuine refugees, instead local Afar. Still those thousands of asylum seekers are waiting to access for the determination of their status.²⁸⁶ It is UNHCR that provide only the list of recognized refugees to WFP so that the latter provide food through ARRA.

3.2. 4. The Legal Status of Asylum Seekers and Refugees in Ethiopia

The Refugee Proclamation's refugee definition conforms to Article 1 (A) of the 1951 Convention and includes the extended definition contained in Article 1 (2) of the 1969 OAU Convention, as well as the 1951 Convention. The Ethiopian government determines the criteria for asylum and protection based on these clauses. The Refugee Proclamation's prohibition of refoulement in Article 9 is identical to that of Art. 33 of the 1951 Convention

The Refugee Proclamation stipulates that a refugee may be expelled for reasons of national security and public order. It includes clauses on temporary detention, family unity, limitations on the right to employment and education²⁸⁷, and

²⁸⁶ Interview with Haileselassie G/Mariam, (Senior protection Officer, ARRA), on 27,05/2010

²⁸⁷ Article 21 (3) states that recognized refugees and their families are subject to the same rights and restrictions as foreigners in respect to wage earning employment and education.

regulates the rights and obligations of asylum seekers and refugees, in particular the right to obtain an identity card and travel documents. It also specifies that recognized refugees, refugee and family members thereof are entitled to the same rights and are subjected to the same restrictions as are conferred and imposed generally by relevant laws of persons who are not citizens of Ethiopia subject to the laws in force in Ethiopia.²⁸⁸

Despite the fact that Article 6 of Proclamation no. 6/1995 envisages Security Immigration refugee Affairs Authority (SIRAA) "... to investigate and cause decisions to be taken on the cases of persons who apply for asylum..." , no where in Ethiopia's legal system is either the term 'asylum' is defined or the obligation to grant asylum envisaged. Although there are no legally binding instruments as regard to right of asylum either internationally or domestically, the practice of Ethiopia is normally to grant asylum as a sovereign right to recognized refugees. In Ethiopia 'asylum' is understood in a border sense temporary protection given by the state of asylum to protect from persecution or serious danger. So, the Ethiopia asylum systems of is largely related to admission and protection (i.e. Asylum) in temporary bases in light of international and Ethiopian refugee law.²⁸⁹

Legally speaking, it appears clear that Procedures for the granting of asylum and for the recognition of the refugee Status are not distinct. Within the Federal office, the recognition of refugee status and the granting of asylum is precisely in the competence of the SIRRA (All applications for asylum as well as for the Status of refugee and wherever made are referred to SIRRA, for decision. Although a technical difference exists between recognition of refugee status and the right of asylum, the decision is taken by SIRRA).²⁹⁰

²⁸⁸ Article 21 (3) of the Refugee Proclamation

²⁸⁹ Iman Abdurahman, Evaluating The Right Of Asylum in International And Ethiopian Law, Page 80

²⁹⁰ See Article 14 (1) Of The Refugee Proclamation And Article 3 (5) of proclamation no. 6/1995 a proclamation to provide for the establishment of the Security, Immigration and Refugee Affairs Authority

SIRAA has since been renamed the National Intelligence and Security Service (NISS). NISS is responsible for first instance refugee status determination. In practice, however, this responsibility falls to the Administration for Refugee and Returnee Affairs (ARRA), an entity established before SIRAA based on a letter of the General Secretary of the Derg regime, replacing the former Refugees and Returnees Commission (RRC). While ARRA is *de facto* a government entity given that NISS (ex-SIRAA) can establish any structures, departments or sections it requires for its work, it nevertheless lacks a constitutive act or standard operating procedures to make it an independent first instance RSD administration.²⁹¹

The Refugee Proclamation's refugee definition conforms to Article 1 (A) of the 1951 Convention and includes the extended definition contained in Article 1 (2) of the 1969 OAU Convention. The Ethiopian government determines the criteria for asylum and protection based on these clauses.

The Refugee Proclamation stipulates that a refugee may be expelled for reasons of national security and public order. It includes clauses on temporary detention, family unity, limitations on the right to employment and education²⁹², and regulates the rights and obligations of asylum seekers and refugees, in particular the right to obtain an identity card and travel documents. It also specifies that recognized refugees, refugee and family members thereof are entitled to the same rights and are subjected to the same restrictions as are conferred and imposed generally by relevant laws of persons who are not citizens of Ethiopia subject to the laws in force in Ethiopia.²⁹³

²⁹¹ UNHCR Representation in Ethiopia, 2007 Annual Protection Report , page 20

²⁹² Article 21 (3) states that recognized refugees and their families are subject to the same rights and restrictions as foreigners in respect to wage earning employment and education.

²⁹³ Article 21 (3) of the Refugee Proclamation

3.2.5. The Nature and Content of Asylum

In terms of the nature and content of asylum and protection afforded to asylum seekers that asylum seekers have the right to remain in Ethiopia until they have exhausted their right of appeal (Articles 20-21). Recognized refugees have the right to remain until the need for protection ceases to exist either due to changed circumstances in the country of origin or because a durable solution has been found. The Refugee Proclamation does not provide for subsidiary or temporary protection or an alternative humanitarian status. Plainly, the granting of refugee status in Ethiopia also necessarily entails the granting of asylum: the right to remain in Ethiopia until the need for protection no longer exists or a durable solution has been implemented.

3.3. The Protection of Eritrean and Somali Refugees in light of International Refugee and National law: A Comparative case Study

The preceding sections will examine the status of people who are forced to flee from Somalia and Eritrea in light of International and National refugee law,²⁹⁴ through looking the current status of forced migration and human rights situation in Somalia and Eritrea to provide country of origin information, which would serve as a spring boards, at least generally, to determine whether asylum seekers from Somalia and Eritrean deserve refugee status or Complementary protection.

²⁹⁴ Terminology

The term **refugees** is used in its generic sense, referring to Somali who left Somalia (South Central Somalia) because of the war and disturbance of public peace ordered and Eritrean nationals who fled due to gross human rights violations fled to Ethiopia. Specific terms referring to legal statuses are also used.

Asylum-seekers are defined as persons who have applied for international protection and are awaiting determination of their claims/applications or a person who is in an asylum-seeking situation but who has not had an opportunity to lodge his/her application for refugee status.

When referring to persons with formal refugee status, the term **recognized refugees** is used, irrespective of whether they are recognized on a *prima facie* basis or according to a refugee status determination

While the international instruments and National law lay down the essential elements of refugee protection in legal terms, it is actual treatment of refugees in the host country that enable one to understand what protection is accorded to refugees. The legal and practical problems encountered by the asylum-seekers and refugees in relation to their treatment in Ethiopia, particularly in the enjoyment of the rights provided under international law and National law, are of significant in determining to what extent international protection is available to them. An attempt to shed light on the contemporary situation of Somali and Eritrean asylum seekers and refugee in Ethiopia²⁹⁵ their actual protection through this case study is made.²⁹⁶

3.3. 1. Situation in Eritrea and Somalia: General Appraisal

The Somalia²⁹⁷ Crisis and the flow of Refugees in Ethiopia

Since the collapse of the Somali state in 1991, clan-based militias and warlords have effectively assumed control of the country and, in many instances, they have acted as agents of persecution. Inter-clan violence has been the primary source of persecution in Somalia and, while members of minority clans often suffered disproportionately, it should be emphasized that members of all clans – including majority clans – were potential targets. According to Amnesty International²⁹⁸:

²⁹⁶ Protection refers the basic rights of Refugees as established in the International Refugee law and Ethiopian Refugee Proclamation and other relevant Human rights standards

²⁹⁷ The territory of Somalia is *de facto* divided into three distinct administrative areas: Somaliland, Punt land and Southern and Central Somalia. Each area is characterized by distinct political, human rights and security situations. For these reasons, in this case study, unless otherwise stated, "Somalia" will refer to the South-Central part of the internationally recognized Republic of Somalia.

²⁹⁸ Amnesty International, Country Report on Somalia, May 2006

“Clan-based violence remains one of the most significant factors negatively affecting voluntary repatriation. Clan-based violence continues to erupt throughout Somalia and, although members of minority clans often suffer disproportionately in clan-based conflicts, all members of all clans in any area with an ongoing power struggle are potential targets”

Almost two decades after the overthrow of President Siad Barre, Somalia remains a failed state with little prospect of a meaningful peace on the horizon. Fierce fighting in Somalia's south and central regions has forced hundreds of thousands from their homes to seek shelter in safer parts of Somalia and in neighboring countries like Kenya, Ethiopia, Djibouti and Yemen. With fighting raging in central and southern Somalia, thousands have sought safety in neighboring Ethiopia. Some 200 Somalis are reported to be arriving every day in need of shelter, water, health care, and education. To help ease congestion in the four camps already hosting some 60,000 Somali refugees in Ethiopia, UNHCR has begun relocating new arrivals to a new camp in south-eastern Ethiopia.²⁹⁹

The war in Somalia is also characterized by inter clan fighting and recently among organized groups across religious line like UIC at that time and very recently Al-shabab. It has been widely reported that these groups came up with new brand of religion and *redefined* every way of life thereby seriously restricting individual freedom and failure to live up to these standards is resulted in severe punishment.³⁰⁰

Their act goes beyond the living. The recent desecration of old graves of Muslims is a testimony to this and clearly shows how much these groups are relentlessly engaged in remolding everything and revising the pre-existing way of life of the Somalis in areas under their occupation. This is concrete proof that *'nothing'* will

²⁹⁹ UNHCR refugee news <http://www.unhcr.org/4b82a3cf9> accessed on February 22, 2010

³⁰⁰ Abstracted from a Somali refugee claim as analyzed by Abiyu Besha, Senior protection Assistant, UNHCR, Sub office Jijiga, unpublished

escape from their demand of compliance to the religion in the way they think would be correct and consequences ensuing from it.³⁰¹

According to these religious groups there are two groups of people in the world. "Muslims and infidels or Hizbul Allah and Hizbul Sheitan" With this dichotomized extreme stance whosoever doesn't belong to them belongs to the other extreme group and he/she will face persecution for their attachment to their pre-existing belief/ religion/ way of life. Even worse, unlike in the past, today the Somali Refugees are faced with moral dilemmas as the persecutors operate under the name of Islam itself and thus making it difficult to gauge the extent of their plight.³⁰²

According to the statement of refugee applicant, Women are supposed to stay at home and can't work and earn their living. Moreover, women are kidnapped and taken to unknown place having their eyes covered by black piece of cloth and are raped by the fighters.³⁰³

Due to the objective reality in Somalia, Ethiopia recognizes refugees from central and southern Somalia on a *prima facie* basis. However, ARRA and UNHCR conduct individual screening for all asylum seekers in order to differentiate Ethiopian ethnic Somalis from Somali asylum seekers and verify identity, as well as linkages with Convention reasons for international protection.³⁰⁴

Given the evolving situation in its neighboring countries, and the need to determine the nationality of the Somali and Eritrean asylum seekers, which share ethnic and linguistic similarities with the local population, Ethiopia is increasingly recognizing the need for individual refugee status determination, based on Article

³⁰¹ Ibid

³⁰² Ibid

³⁰³ Ibid

³⁰⁴ See: UNHCR Advisory on the Return of Somali Nationals to Somalia, November 2005.

4 (1) of the 2004 Refugee Proclamation and Article 1 (A) of the 1951 Convention and the African Convention of 1969.

The flow of Eritrean Refugees in to Ethiopia

The contemporary phase of flight into exile of Eritrean nationals with which this thesis is concerned is much broader. The increasing number of Eritrean being forced into exile as refugees is rooted in developments of a political, military, human rights and broad social and economic nature, which have taken place in the period since Eritrea's independence from Ethiopia. Eritrea formally became a nation state in 1993 following a referendum in which the overwhelming majority of Eritrean voted in favor of independence from Ethiopia.³⁰⁵ In 2007, Eritrea was the world's third largest country of origin for individual asylum-seekers/refugees after Iraq and Somalia.³⁰⁶

Most Eritrean asylum-seekers flee to neighboring Djibouti, Ethiopia and Sudan. The scale of the Eritrean out flux is increasing. In 2007 the US Committee for Refugees and Immigrants estimated around 600 Eritrean were crossing into Ethiopia every month. In 2008 alone, over 8,000 Eritrean sought asylum in Ethiopia. As of May 2009, there were approximately 18,000 Eritrean asylum-seekers and refugees in Shimelba Camp. As of September 30, 2010, there are 36, 593 Eritrean refugees living in five camps and few in urban areas.³⁰⁷

Cause of flight

Several reports indicate that the human right situation in Eritrea is severely

³⁰⁵ Human Rights Watch, Service for Life State Repression and Indefinite Conscription in Eritrea, 2009 available at <http://hrwnyc@hrw.org> (accessed on 19 February, 2010)

³⁰⁶ UNHCR, UNHCR Statistical Yearbook 2007, December 2008, available at <http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html>

³⁰⁷ See the chart above

deteriorating from time to time. According to Human rights watch in its 2009 report:³⁰⁸

"There was jubilation among Eritrean when Eritrea formally gained its independence from Ethiopia in 1993 after a bloody 30-year war. Sixteen years later the dreams that the independent state would be democratic and rights-adhering lie in tatters. Eritrea has become one of the most closed and repressive states in the world. Thousands of political prisoners are detained in prisons and underground cells; there is no independent civil society; all independent media outlets have been shut down; the head of the Eritrean Orthodox Church is in incommunicado detention; and evangelical Christians are rounded up and tortured on a regular basis"

US Department of State Country Reports on Human Rights Practices in Eritrea as follows:³⁰⁹

"There are four major religions in Eritrea: Orthodox Christianity, Islam, Catholicism and the Evangelical Lutheran. For several years, the small community of Jehovah's witnesses has been reported to be harassed, discriminated against and subjected to detention, because of their refusal, on religious grounds, to vote or participate in national service."

Similarly, Ethiopia recognize Eritrean asylum seekers on a *prima facie* basis, given that even in the absence of flight linked to fear of persecution, most Eritrean arrivals have a *sur place* claim (fear of persecution after they left their country) derived from UNHCR's Non-Return Advisory. Even when asylum seekers don't fall in the proper scope of the 1951 Convention, the absence of other complementary forms of protection essentially leads that refugee status is afforded even for persons who would not normally meet the refugee criteria in

³⁰⁸ Human Rights Watch supra cited at note 305

³⁰⁹ US Department of State Country Reports on Human Rights Practices 2002 printed in UNHCR Position on the Return of Rejected Asylum Seekers to Eritrea, January 2004

those cases where a non-return advisory is applicable. This is further justified by the absence of agreement with Eritrean government to receive rejected asylum seekers.³¹⁰

Trends of refugee flows from Somalia and Eritrea: from 30 May-30 September, 2010

Country of Origin	As of 30 May 2010	As of June 2010	As of September 2010	Number of arrivals with in the last 4 Months
Somalia	72054	74605	76411	4357
Eritrea	33725	34528	36593	2868

³¹⁰ see UNHCR Position on the Return of Rejected Asylum Seekers to Eritrea, January 2004; World Refugee Survey, Ethiopia Refugee Report 2005, <http://www.worldrefugee.org/about/refugees.aspx> and UNHCR, ANNUAL protection report on refugees in Ethiopia, 2007

Eritrean and Somali refugee settlement in Camps as of May 30, 2010³¹¹

Somalis	Numbers
	Individuals
Addis Ababa	715
Aw-barre Camp	12,845
Sheder Camp	8,818
Kebrebeyah camp	16,608
Bokolmanyo Camp	17,618
Melkadida Camp	13,683
Dolo Ado transit centre	1,767
Total	72,054
	I
Eritrean	25.22%
	Individuals
Addis Ababa	415
Adi Harush	1,419
My-ayni Camp	10,700
ERT-Afar	11,216
Shimelba camp	9,975
Total	33,725

³¹¹ Source: UNHCR Representation in Ethiopia, public relation section, May 30, 2010

3.3.2. Access to Territory: The right to enter to seek asylum

The most legal problem for refugees and the continuous controversial areas of non refoulement in international law was the question of admission. There is no international instrument of binding character which obliges a state to admit refugees to its territory. The 1951 Refugee Conventional doesn't address the question of admission. The 1969 OAU Convention at least deals with the right of the state to admit refugees and the 'non rejection of individuals at the frontier' in Article II (3).

In Ethiopia, an alien who wants to enter in to the territory shall possess the necessary valid documents as required in Article 3 of the Immigration Proclamation No. 354/2003. However this proclamation has an exception. Article 4 of the same proclamation states: *"No entry visa may be required to enter Ethiopia where such exemption is provided in any other law or a treaty to which Ethiopia is a party."*

Ethiopia is a party to the 1969 OAU Convention which obliges the State not to reject asylum seekers at the frontier and the principle of non-refoulement indirectly deal with non-rejection at the frontier. The Refugee proclamation under Article 9(1) provides that: "No person shall be refused entry in to Ethiopia.... where: - he may be subjected to persecution or torture on account of his race, religion, nationality, membership of a particular social group or political opinion: or his life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination of events seriously disturbing public order in part or in whole of the country."

Therefore, asylum as right to enter to seek asylum (recognition of refugee status) is established in Ethiopia. This legal provision resolve the issue of admission at least at the national level since Ethiopia assume further obligation for refugees to enter and seek asylum.

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Broadly speaking, entering in to Ethiopia for Somali's is not and has never been a major problem for Somali refugees, even for those without valid identity documents. Either the checks are summary or else Somalis are accepted on the basis of their presumed right to protection. Due to the long border distance between Ethiopia and Somalia, it is very difficult in fact to control the border. Mostly, asylum seekers are entering to Ethiopia with out any documents.³¹²

The situation for Eritrean is easier. This can be evidently substantiated that in, nearly 2001 Eritrean asylum seekers are allowed to enter in to Ethiopia from Egypt while they were arrested as an illegal migrant and supposed to be deported to Eritrean.³¹³

"... My delegation is concerned about the forced return of asylum-seekers worldwide with out making prior assessments of their international protection needs. In this connection, my country (Ethiopia) has accepted on humanitarian grounds over 850 Eritrean asylum-seekers who were previously detained and expelled from other countries in 2009..."

At the border, the military/local authorities receive most Eritrean arrivals at the northern entry point and Somali arrivals at the southern entry point, referred them to the Administration for Refugee and Returnee Affairs (ARRA) for status hearings, which then transferred them to a camp.

The principle of non-refoulement is, in principle, well respected in the case of Somalis and Eritrean. In practice, a forced return of (potential) refugees at the border seems never happened. This is what ARRA, UNHCR and other Independent reports unanimously agreed on.³¹⁴

³¹² Interview with Bekel Mugeru , (Protection Officer, ARRA, 25/05/2010)

³¹³ Quoted from statement made by the Ethiopian Delegation to the UNHCR EXCOM 60th session 28 September-2 October 2009, Geneva, printed in Administration for Refugee and Returnee affairs, ARRA up date Vol. III No. XII, September 2009

³¹⁴ see The U.S Department Of State Bureau Of Democracy, Human Rights, And Labor 2008 Country Reports on Human Rights Practices, 2008 Human Rights Reports: Ethiopia, February 25, 2009, <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001>, World-Refugee-Survey, Refugee

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3.3.3. Impunity from Illegal entry

The Universal Declaration of Human Rights recognizes the right to seek asylum as a basic human right. This right is also recognized under the ACHPR to which Ethiopia is a party. In exercising this right, asylum-seekers are often forced to arrive at, or enter, the country of asylum illegally. This principle of asylum is incorporated in Article 31(1) of the 1951 Refugee convention and it is transported in Article 13 (5) of the Refugee Proclamation that provides:

“Notwithstanding the provision of any other law to the contrary, no criminal proceeding shall be commenced or continued against a person who has applied or is about to apply pursuant to this Proclamation on the account of his illegal entry or presence in the country.”

Practically no Somali or Eritrean asylum seeker is accused of illegal entry and this principle is well respected in Ethiopia.³¹⁵

3.3.4. Access to Accommodation

Existing Ethiopia's legislation does not guarantee asylum-seekers the right to accommodation, and there are no legally binding minimum standards on the operation and services of the reception centers. There are four reception centers, at Dalo Ado for Somalia, at Endabaguna for Eritrean and Eritrean Afar refugees in Dallol and Berahle in Afar region and Shedder reception center for Somalis. Basic assistance is only provided at Endabaguna and Dolo Ado reception centre despite the level of assistance currently remains very poor due to financial constraints.³¹⁶

condition in Ethiopia, 2009, http://www.refugees.org/about_refugees/aspx, Administration for Refugee and Returnee affairs, ARRA up date Vol. III No. XII, September 2009 and UNHCR, ANNUAL protection report, 2007

³¹⁵ Interview with Haileselassie G/Mariam, supra cited at note 286; and Bekele Mugeru, supra cited at note 312

³¹⁶ Administration for Refugee and Returnee affairs, ARRA up date Vol. III No XII, Sept. 2009

3.3.5. Recognition of the right to asylum: - Access to procedure

The right to seek asylum is contained in the founding international human rights document, the Universal Declaration of Human Rights. Article 14(1) state that "Everyone has the right to seek and to enjoy in other countries asylum from persecution". More impressively, The ACHPR, to which Ethiopia is also a party, specifically includes "the right, when persecuted, to seek and obtain asylum ..." under its Article 12 (3).

According to the Refugee Proclamation, the right to seek asylum is recognized under Article 14. Asylum seekers required to submit their applications for asylum within fifteen days of arriving in Ethiopia, either to a police station or the nearest ARRA office. An asylum seeker is then issued with an identity card by ARRA attesting to his/her status as an asylum seeker. In practice, the 15 day rule is not applied, as asylum seekers who present a claim within a reasonable time (practice shows up to one year) after entry into the country continue to have their claims determined.³¹⁷ The Proclamation provides for all asylum seekers to be given an opportunity to present their case and assures the service of a qualified interpreter. Decisions of ARRA are to be issued in writing and decided within a reasonable time.³¹⁸

While asylum claims are usually rapidly processed in the case of Eritrean asylum-seeker at the Endabaguna reception center and Somalis who enter at Dolo Ado reception centre, the situation is far from difficult for Eritrean who enter through Afar region and Somalis who enter through Awbarre and Togowuchalie (Eastern camps).

Such differences in legal status reflect discrepancies in asylum and immigration policies and also have an impact on the rights of the persons concerned in their

³¹⁷ Interview with Haileselassie G/Mariam , supra cited at note 286

³¹⁸ Article 14 (2) of the 2004 Refugee Proclamation

host countries, which must be borne in mind when interpreting the results of the study. For example, social assistance is usually only provided to individuals in possession of legal documents which confer a legal status. When all the consequences deriving from insufficient or inappropriate registration are considered, this aspect actually makes it a major problem for all stakeholders. Indeed, registration is linked to various other protections related. Issues: protection against arbitrary arrest or refoulement, access to asylum procedure, distribution of food (ration cards) and a series of other rights.³¹⁹

Refugee Status Determination

The question of which person or persons qualify to be refugees is of fundamental importance; for the question of definition is central to any discussion on refugees and forced migration. This is partly because the determination of refugee status and the implications of that status depend on the definitional parameters one chooses to adopt; but also because, in a more practical sense, this question also determines the categories of refugees who may benefit from the assistance given by the UNHCR.³²⁰

Mean while, neither the 1951 Convention nor the OAU Convention define the term asylum and don't enumerate the legal status of asylum-seeker until final decision of refugee claim is rendered.

The Refugee Proclamation not only defines the term asylum seeker but also enumerate the rights and duties.

"Any person who presents himself at the boarder or frontier claiming to be a refugee or any person is in Ethiopia and who has lodged an application with the competent

³¹⁹ Joëlle Moret, Simone Baglioni, Denise Efonayi-Mäder: The Path of Somali Refugees into Exile, A Comparative Analysis of Secondary Movements and Policy Responses, Swiss forum for migration and population Studies No. 46, page 65

³²⁰ International Journal of refugee law, Volume 3 Number 3. 1991, Oxford University press, page 505

authorities for the recognition of refugee and is waiting a final decision on his application".

Ethiopia simply adopted the refugee definition found in the 1951 and the 1969 OAU Convention as a party to these conventions. The term "refugee" is clearly stipulated in the Refugee Proclamation which simply a verbatim adoption of the refugee definition contained in Article I (A) (2) of the 1951 Convention and Article I of the OAU Convention. Refugee means any person or group who fulfill the criteria under the Provisions of Article 4 or Article 19 of the Proclamation.³²¹ Accordingly Article 4 Provides: ³²²

"Any Person shall be considered as a refugee where:

- 1) Owing to a well-founded fear of being persecuted for reasons or race, religion, nationality, membership of a particular social group or political opinion he is outside his country of nationality and unable or, owing to such fear, is unwilling, to avail himself of the protection of that country;*
- 2) Not having a nationality and being outside his former habitual residence, he is unable, or owing to a well founded fear of being persecuted for reasons or race, religion, nationality, membership of a particular social group, he is unwilling to return to it;*
- 3) Owing to external aggression, occupation, foreign domination or evens seriously disturbing order in either part or whole of his country of origin or nationality, he is compiled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality, in case of refugees coming from Africa." [Only for those who fled from Africa] emphasis added.*

³²¹ Article 2 (7) of Refugee Proclamation No. 409/2004

³²² This provision only includes the inclusion criteria but the exclusion criteria (persons excluded from refugee status are stated under Article 5 such as a person has committed a crime against peace, a war crime or a crime against humanity.... a serious, non-political crimes outside Ethiopia prior to his entry in to Ethiopia etc

Plus Article 19 states:

"If the Head of the Authority considers that any class of persons met the criteria under Article 4 (3) of this proclamation, he may declare such class of persons to be refugees."

The sheer number of refugees fled from Somalia and Eritrea made it necessary to resort to the granting of refugee status on group basis, as the individualized asylum of refugee status determination would have been cumbersome and impractical under the circumstances. The use of group determination is further justified by the grounds in which international protection is generally sought. In most cases the influx in to Ethiopia of the Somalia has taken place against a back ground of war, civil strife or disturbances of public security and disorder, as well as human rights abuse (rape, torture, murder, etc.) with the intention either to humiliate or cleansing particular clan/ clans by rival factions as well as by the extremist religious groups and in the case of Eritrean caused by gross human violation, religious persecution, persecution due to imputed political opinion.³²³

Refugee status is granted in these instances according to the principles of international refugee law and the jurisprudence, which has emerged in the practice of states and of UNHCR as elaborated in, among others, the UNHCR Handbook on Procedures and criteria for determining Refugee Status and the relevant EXCOM conclusions. In addition, Article 1 (2) of the OAU Convention and Article 4 (3) of the Refugee proclamation.

Experience over years has shown that the granting of refugee status on a group basis is susceptible to abuse. This is particularly high in the case of Eritrean Afar and Somalis at Eastern camps, where the crushing poverty, the similarity in terms of culture and physical appearances make it irresistible for the local population to want to pass themselves as refugees.

³²³ UNHCR Eligibility guidance for Somalia, 5 May 2010, HCR/EG/SOM/10/1, also available at <http://www.unhcr.org>

Individual Determination of Refugee Status: The role of UNHCR

EXCOM conclusion 28 (XXXIII)³²⁴ on International protection on the Determination of refugee Status, *inter alia*, with reference to the role of UNHCR in the national refugee Status determination procedure recommended strongly that the UNHCR be involved in the decision making process but left each State free to specify the form and degree of such involvement.

Recalling the UNHCR as the only international (UN agency) authority specialized in the protection of refugees,³²⁵ such protection would with no doubt, be better guaranteed if decisions on the States of refugees at the national level were taken after consultation of the UNHCR and with his/her consent.³²⁶ Ethiopia seems to agree on this point but national practice show some discrepancy.

The Refugee Proclamation under Article 14 2 (E) and 16 (c) expressly indicated that UNHCR shall be invited as an observer in the first instance and appeal stage of refugee status determination. These provisions don't provide any involvement of the UNHCR in the normal procedure, nevertheless, more in practice but various considerably.

At one extreme, it seems that the representative of the UNHCR to be nearly the sole decision maker – in the claim of Somali and Eritrean asylum seekers at the eastern camp. At another extreme, the role of the UNHCR appears confined to that of a simple adviser with no institutional role and no legal effect attached to his/her opinion, which is reflected in the first instance decision on the Eritrean asylum seekers claim at Endabaguna reception centre.³²⁷ This exists in practice and nothing is provided in the legislative instrument. However, UNHCR presence at Endabaguna reception RSD centre is not uniform. The experience and

³²⁴ The Executive Committee of the UNHCR Program (ExCom No. (XXXIII) 1982

³²⁵ Helen Lambert: Seeking Asylum- Supra cited at note 2, page 41

³²⁶ Ibid

³²⁷ Interview with Haileselassi G/Mariam (Senior Protection Office, ARRA) and Melaku Gutema (Assistant protection, UNHCR, on 21/06/2010)

knowledge of the UNHCR being assumed and unquestioned, the representative of the UNHCR give oral or written advice to the government authorities during the decision which has paramount importance despite not binding.

One may question that the UNHCR itself wished to withdraw but one could argue that pressure was so strong that no choice was left. Both the interviewer from the ARRA and UNHCR have opinions on a positive step that UNHCR is not so much involved in the procedure of asylum. However, there is equally competing interest in practice. Given that ARRA mostly involved in the operational activities, it has no specialized department conducting RSD. As UNHCR stated, "a wrong decision may cost the life of an asylum-seeker" and under the present condition, UNHCR has to exert maximum effort in providing capacity building for ARRA Eligibility officers.³²⁸ It may not be very much difficult to assess and give fair decision on the claims of present asylum-seekers taking in to account the objective situation in Somalia and Eritrea. However, there are/will be instances where circumstances dictate to conduct an extensive and critical legal assessment that needs deep knowledge of international refugee and human rights law and the jurisprudence in this specific area.

The researcher argues that UNHCR has to gradually limit it self in direct involvement of the procedure³²⁹, instead focus on providing guidance to asylum seekers on the procedure in place and facilitating their access to fair asylum procedure. The fact that providing international protection to refugees is, above all, the responsibility of states needs to be re-emphasized. Meanwhile, UNHCR can do something with the ball that has to been thrown into bringing the right of appeal in reality, an outstanding problem that will be dealt in depth below.

³²⁸ UNHCR, Annual protection report,2007

³²⁹ This opinion is shared by Anchinshe Mahetme (National protection Assistant, UNHCR sub Office Jijiga), Interview on 16/05/2010 and Mulugeta Tesfaye, Community Service Associate, UNHCR), Interview on 12/05/2010

3.3.6. Denial of Asylum

An asylum-seeker is either recognized as being a refugee according to the 1951 Convention or the 1969 OAU Convention or he is refused the status of refugee and he thus, becomes subject to the status of alien in general. With regards to other forms of protection (e.g. complementary, subsidiary, temporary) there are no complementary forms of protection which essentially means that refugee status is afforded even for persons who would not normally meet the refugee criteria in those cases where a non-return advisory is applicable (Somali, and Eritrea) unless a person fall under the exclusion clause.

A foreigner, to legally live in Ethiopia, should have a residence permit in accordance with Article 15 (1) of the immigration proclamation no. 354/2004. If a foreigner is living in Ethiopia without fulfilling this requirement, that means he is in violation of the provision of the immigration law. As a result, in accordance with Article 5 (7), he will be subject to deportation because one ground for deportation order in violation of the provision of this proclamation and the regulation under it. It will also be subject him a penalty as provided in Article 20 91) (b) of immigration proclamation no.354 (2003) It will also subject him to penalty as provided in Art. 20 (1) (b) of the Immigration Proclamation No. 354/ 2003

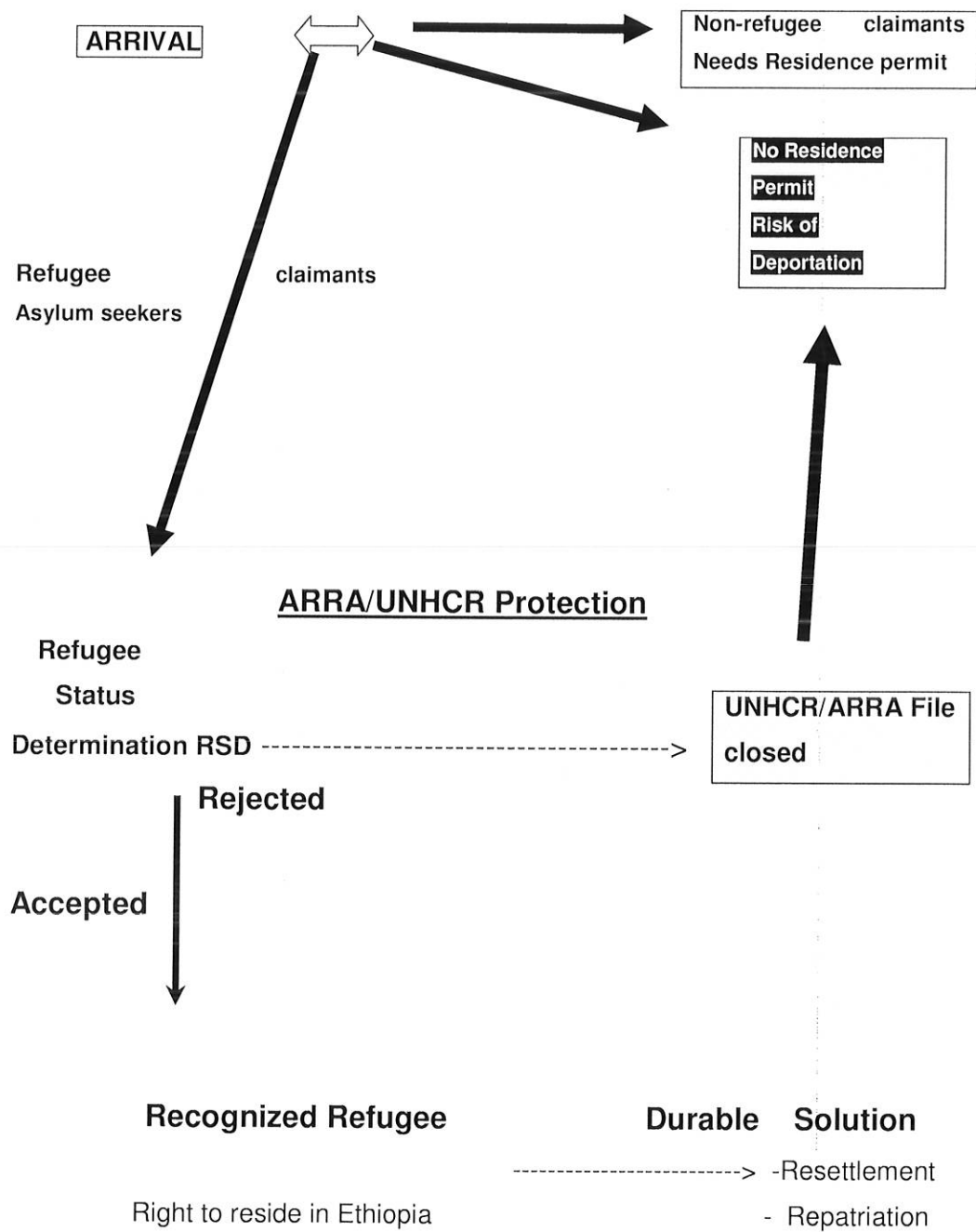


Chart: Legal status for Migrants, Asylum-seekers and Refugees in Ethiopia

3.4. The Grant of Refugee Status and of Durable Asylum

All proceeding whether individual or group status determination for asylum end with a final decision on whether or not the asylum seeker shall be granted a permanent or temporary residence permit. Asylum-seekers recognized as a refugee based on the 1951 Convention or 1969 OAU Convention is granted asylum as well as the status of refugee and the law of the land. Consequently, recognized refugee is entitled to all the rights and benefits arising from the Ethiopian Refugee Proclamation and the international Refugee instruments.

Under the Ethiopian legal regime, refugees recognized under the 1951 Convention or under the OAU Convention are entitled to enjoy the same rights to with no distinction as stipulated in the Refugee Proclamation.³³⁰

Apart from this, the refugee is also entitled to other right specified under the international human rights Conventions subjected to the reservations made by Ethiopia and Nationals laws subject to restrictions imposed by the law.³³¹ The principle of refugee protection is not unilateral: refugees have the duty to respect the laws of the Country.

They are also entitled access to basic humanitarian assistance, food ration, health service etc... which is provided by ARRA, UNHCR, WFP and other Non-governmental organizations until durable solution is found.

Before discussing the basic rights in the grant of asylum and refugee status, the researcher prefers to quickly deal with the principle of family unification which is of high value in the context of the right to asylum.

³³⁰ If it is to be referred as a distinction, it is only in the case of referring cases for resettlement to third country since Resettlement countries insist that a refugee need to be recognized under the 1951 Convention. Otherwise, basic protection including non-refoulement and other rights are guaranteed equally under Article 9 of the Refugee Proclamation

³³¹ See Article 21 (2) of the Refugee Proclamation

3.4.1. The principle of Family unity in the context of the Right to asylum

Factually speaking, losing the support of family particularly disruptive of a refugee's sense of self. The separation of families, especially where some members remains at risk in the country of origin can exacerbate the psychological stress already encountered by most refugees. The shaping of a human system of temporally protection therefore requires respect for the significance of family.³³²

In view of the humanitarian character asylum, various EXCOM Conclusions stressed the reunification of separated refugee families is of paramount importance in the context of the right to asylum.³³³

From human rights point of view, the right to family unity is articulated in various human rights Instruments of which Ethiopia has ratified.³³⁴ Notably, the special protection of parent child relationship as provided by article 22(2) and 20 (3) of the Convention on the right of Child CRC obliges state parties to provide special protection to children" respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact...." More importantly, article 10(1) of the CRC provides:

"...applications by a child or his or her parents to enter or leave a state party for the purpose of family reunification shall be dealt by states parties in a positive, human and expeditious manner"

The unity of family is given clear protection under Article 12 (3) of the Refugee Proclamation. In the context of the right to asylum, it is understood that family unity is invoked, for instance, in the case of "derivative status", namely when the

³³² Joanne van Slem Thorburn, *Supra* cited at note 82, P. 43

³³³ EXCOM Conclusions on the International Protection of Refugees adopted by The Executive Committee of the UNHCR Program, Geneva, 1996», p. 19, No. 9 (28), pp. 55 – 56, No. 24 (32).

³³⁴ Article 16 of the UDHR establishes this right for all peoples, regardless of status. Protection of the family as the natural and fundamental group unit of society is confirmed in the Article 17 (1) of the ICCPR

refugee status granted to a given asylum-seeker meeting the refugee criteria is extended to his/her dependent family members (spouse and children under the age of 18):

"A member of the family of a recognized refugee... shall be permitted to enter and remain in Ethiopia...., and shall be entitled the rights and duties of the rights and subject to all the duties of a recognized refugee."

It is worthy of note that dependents, who qualify as refugees, may be granted the refugee status on their own, rather than derivative refugee status.³³⁵

The practice, especially in the case of Somali refugees at Keberibeyah camp, seems all these legal obligations are forgotten. There are nearly 1230 refugees (in the legal sense), who are spouses and children of recognized refugees but denied to enjoy their human rights and legal right given in the Refugee proclamation. UNHCR follows a soft approach to advocate and safeguard their rights but prefer to register them some times as *"not of concern"* in other times as *"Mandate refugee"*. ARRA seems to have no conclusive reason for denying their rights.³³⁶

UNHCR register them simply as a precondition for the implementation of durable solutions for resettlement so that they will be resettled in the third country. They don't have access to any assistance and share only the monthly ration of their recognized family members. ARRA tolerate them to live in the camp.

3.4.2. The Status of Recognized Refugees

3.4.2.1. The right to reside (Temporary asylum)

³³⁵ Article 12 (5) of the Refugee Proclamation

³³⁶ Interview with Abiyu Beshah ,Assistant protection (UNHCR), on 05/04, 2010

refugee status granted to a given asylum-seeker meeting the refugee criteria is extended to his/her dependent family members (spouse and children under the age of 18):

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As stated under Article 21 (10) (a) of the Refugee Proclamation, every recognized refugee shall be permitted to remain with in Ethiopia. It simply confirms the Ethiopian policy to wards refugees concerning the duration of asylum as implicated in the preamble of the Refugee Proclamation : "... to live in Ethiopia until the need for protection no longer exists or a durable solution has been implemented."

To date, no refugee group has been formally granted the right of permanent residence in Ethiopia and no exception seems to be applicable in the case of Somali and Eritrean refugees.³³⁷

3.4.2.2. Protection from Refoulement

Most significantly, recognized refugees enjoy protection against return to a country where they face a risk of persecution as explicitly provided for in Article 33(1) of the 1951 Convention and Article 9 (1) of the Refugee Proclamation, according to which no State shall:

"expel or return (refouler) a refugee in any manner what so ever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."

Exceptions to the principle of *non-refoulement* are very narrowly defined. It is permitted only in the limited circumstances as provided in Article 33(2) of the 1951 Convention and Article 9 (2), which stipulate in a similar expression that:

"The benefit of the principle of non-refoulement may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is or who, having been convicted by a

³³⁷ Interview with Haile selassie G/Mariam, Supra cited at note 286

final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

The conditions in which Article 33(2) of the 1951 Convention and 9(2) of the Refugee Proclamation may be applicable can only be met if a refugee poses a very serious future danger to the security of the host country – such as a threat to the country’s constitution, territorial integrity, independence or external peace – or if he or she has been convicted by a judgment that is no longer open to appeal of a crime of a particularly serious nature (e.g. murder, rape, armed robbery) and continues to pose a danger to the community of the host State.³³⁸

Article 33(2) of the 1951 Convention and will not apply, however, if the removal of a refugee results in a substantial risk of torture or cruel, inhuman or degrading treatment or punishment. The prohibition of *refoulement* to such treatment is an inherent part of the prohibition of torture and other forms of ill-treatment, as provided for under Article 3 of the CAT, Article 7 of the ICCPR and Article 5 of the ACHPR are subject to no exception as the right to be protected from *refoulement* in the OAU Convention is absolute and non-derogable. Article 5 (3) of the OAU Convention provides that “ No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened...”

It is clear that Article 9 (2) of the non-refoulement provision is contradictory with especially with Article 5 (2) the OAU non-refoulement provision. This apparently raises the issue of conflict of law, as the pertinent conflict of law relates with freedom of movement dealt below.

³³⁸ Department of International Protection, UNHCR, Refugee Status Determination, Identifying who is a refugee, Self-study module 2, 1 September 2005, page 14

3.4.2.3. Protection from Expulsion

According to Article 31 (1) of the 1951 Convention and Article 10(1) of the Refugee Proclamation, a recognized refugee may not be expelled from Ethiopia except for reasons of public order or national security. Article 31 (2) of the 1951 Convention dictates any measures of expulsion must be taken according to the procedures and safeguards in connection with affecting an expulsion order- the refugee shall be communicated to the reasons of the order and given the chance to present and defend his case that affect his status, in a due process of law including the right to appeal.³³⁹

Plainly, the Refugee Proclamation lacks the necessary procedural safeguards; instead authorize the head of SIIRA, the responsible organ for security of the country, to decide on the expulsion order. The only limitation put on the Head of SIIRA as per Article 10 (1) of the Refugee proclamation is to allow the concerned refugee to present his case before making an expulsion order.³⁴⁰ The right of appeal against expulsion order and the duty to inform UNHCR on decisions affected the continued enjoyment of the protection that comes from being afforded refugee status is not available that may lead arbitrary denial of refugee status. That is why Article 35 of the 1951 Convention obliges state parties to cooperate with UNHCR to exercise of its functions, and in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention and the 1969 OAU Convention thereby to provide international protection for refugees.

Once refugees in general had the benefit of an internationally recognized status, as a result of the 1951 Convention and the 1967 Protocol, as well as the 1969 OAU Convention, it was only natural that the supervision of the application of this status should be entrusted to an authority that was also international in character.

³³⁹ See Article 10 (3) of the Refugee Proclamation and Article 32 (2) of the 1951 Convention

³⁴⁰ Article 10 (2) of the refugee proclamation

No one, as the saying goes, should be judged in his own case, which would otherwise have been the position of SIIRA. This is what the principle of international protection of refugees dictates as envisaged under Resolution 428 (V) adopted by the General Assembly of the United Nations on 14 December 1950, which established the Statute of the United Nations High Commissioner for Refugees, instructs the latter to provide protection to refugees within his mandate.³⁴¹

This defense of the refugee's individual rights, against any threat of refoulement, for example, or against any other measure affecting his fundamental and duly recognized rights, protection from expulsion is so obviously part of the function of protection of UNHCR that has never at any time been challenged, even by those Governments which have not signed the 1951 Convention.³⁴²

Even after the expulsion order against the refugee is decided in a due process of law-, the execution of any expulsion order may, if the concerned refugee requests, be delayed for a reasonable period to enable such refugee, to seek admission to a country other than the country to which he is to be expelled.³⁴³ This provision is quite important for refugee that safeguards the right to seek asylum in another country.

Practically, it seems that expulsion of recognized refugee on the ground of public order or national security has never occurred in the case of Somali refugee. There was only one case whereby a recognized refugee from Eritrea who was expelled to Kenya after he was found a threat to national security.³⁴⁴

³⁴¹ Prince Sadruddin Aga Khan, *supra* cited at note 8

³⁴² *Ibid*

³⁴³ See Article 10 (4) of the refugee proclamation

³⁴⁴ Interview with Anchinesh Mahateme, *supra* cited at note 329; and Haile Selassie G/Mariam *supra* at 286

3.4.2.4. Identity Papers

Article 27 of the 1951 Convention and Article 21 the Refugee Proclamation provides recognized refugees are to be issued with an identity document. Practice reveal otherwise. There is no refugee identity documents of any kind issued to the refugee residing in the camps-but -ID cards are issued to refugees in urban areas (Addis Ababa), and are of utmost importance to avoid detention for failing to establish nationality and status.³⁴⁵

Eritrean and Somalis refugees residing in the camp, the only identification the vast majority receives is a family ration card, which usually includes only an indication of the size of the family with marks to punch when rations are received or non-food items are distributed, not their name.

The implication is very strong for refugees who seek safe asylum in an alien country. Most fundamentally, identity documents provided to refugees by the host country certifying their refugee status and legal stay are an essential component in ensuring their effective protection against *refoulement* and their enjoyment of other human rights: to exercise freedom of movement and to escape arbitrary detention.

3.4.2. 5. Freedom of Movement

The question of movement for refugee within their country of asylum is an old and controversial question. The same goes for the question for the question of freedom for refugees to choose their place residence with that country. It is arguably that freedom of movement and freedom of residence are not inherent in the concept of asylum. Yet, the existence (or non-existence) of these freedoms

³⁴⁵ Interview with Haile Selassie G/Mariam, Supra at note 286

affect the very quality of asylum. Asylum with out these freedoms may be as bad as any thing from which the refugee may have fled.³⁴⁶

Traditionally, Freedom of movement in a refugee context has been understood mainly to concern the right freely to move within the country of asylum, and to choose one's place of residence. However, issues pertaining to freedom of movement at present concern in all phases of the refugee movement from the forced uprooting through flight, asylum and eventually return.³⁴⁷

The 1951 Convention expressly states that 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.³⁴⁸

The FDRE constitution under Article 32 (1) states that "any... foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes ...".

However, Article 21 (2) of the Refugee Proclamation contradictorily states that the Head of the Authority (NISS) can "designate areas" where refugees may reside but at a reasonable distance from the border of their country of origin or from their country of former habitual residence.

One may quickly argue that the FDRE Constitution provision prevails over the Refugee Proclamation. However, the practice is clearly in an accord with the latter. Ethiopia practices as a *de facto* policy of encampment for Somali and

³⁴⁶ Atle Grahl-Madsen, *Supra* cited at note 94, page 430

³⁴⁷ UNHCR, Human Rights and Refugee Protection (RLD 5)

Self study manual, October 1995, also available at <http://www.unhcr.org/45a7acb72.html>

³⁴⁸ Article 26 of the 1951 Convention

Eritrean refugees, which obliges the majority of refugees to remain within the confines of refugee camps.

No regulation has formally been issued to designate refugee settlements that further make the residential restrictions of questionable legality. Without embarking on doctrinal debate on the status of international conventions in the Ethiopian legal regime, the FDRE Constitution prevails over the Refugee Proclamation by virtue of Article 9 (1) of the FDRE Constitution that proclaims the supremacy of the Constitution.

Ethiopia required nearly all Eritrean, Sudanese, and Somali refugees to live in camps near their respective borders and required them to obtain permits to leave. The movement of refugees out of the camp is only facilitated by the issuance of a pass permit by the pertinent ARRA camp authorities for a given period and for specific reasons (protection, medical treatment or education etc). The refugees are free to move from place to place within the camp.³⁴⁹

This doesn't mean that refugees are always staying in the camp. Specially, many Somali refugees live in Ethiopian towns and cities like Jijiga, Dire Dawa or Addis Ababa even with the knowledge of the authorities but neither with out pass permit nor Identification card live.³⁵⁰

Very recently, in August 2010, the Ethiopian authorities announced to significantly relax movement restrictions for Eritrean refugees through the introduction of a so called 'out-of-camp' scheme. This new policy essentially

³⁴⁹ Interview with Bekele Mugeru , supra cited at note 312; and Haile Selassie G/Mariam, Supra note at,286

³⁵⁰ UNHCR Press release, UNHCR welcomes Ethiopian decision to relax encampment of Eritrean refugees, <http://www.unhcr.org/4C6128339.html>, August 2010

allows Eritrean refugees to live outside camps and in any part of the country, provided that they met the following conditions:³⁵¹

1) Able to sustain themselves financially or have a close or distant relative or a friend in Ethiopia who commits to supporting them.

2) Any Eritrean refugee residing in an Ethiopian camp and without a criminal record is eligible to benefit from this scheme. Eritrean refugees in Ethiopian camps without a criminal record are eligible under the policy, which according to UNHCR, "is also a response to refugees' wishes and needs for strengthened... relations between the two countries".³⁵²

Given the strict encamping policy towards the Eritrean refugees, this policy has high positive impact on the refugees' chance to live in urban settings, improves their access to services and helps build bridges with host communities. The UNHCR Representative in Ethiopia envisaged that full rollout of the policy will significantly reduce the costs of looking after refugees, as those benefiting from the scheme will be sustaining themselves, mainly through family support mechanisms.³⁵³ One of the Eritrean refugees who have been benefited by this policy speaking to IRIN news reacted as follows:

"Now my dream has come true, God is so gracious. We [Ethiopians and Eritrean] are relatives. We were brothers and sisters but we killed each other for nothing... Thanks to the government of Ethiopia and donors, I am enjoying life in Addis."³⁵⁴

³⁵¹ The UNHCR Refugee News with the Mission of UNHCR Representation In Ethiopia July 2010 Vol. I, No. III

³⁵² IRIN Africa | ERITREA-ETHIOPIA: Refugees embrace life "out of cam...<http://www.irinnews.org/report.aspx?ReportID=90334> (Accessed on June ,2010)

³⁵³ UNHCR Press release, UNHCR welcomes Ethiopian decision to relax encampment of Eritrean refugees, <http://www.unhcr.org/4C6128339.html>, August 2010

³⁵⁴ IRIN Africa | ERITREA-ETHIOPIA: Refugees embrace life "out of cam...<http://www.irinnews.org/report.aspx?ReportID=90334>

However, this new beginning needs to be implemented for Somali and other refugees residing in Ethiopia with out discrimination.

3.4.3. Access to Durable Solution

In achieving its ultimate goal, refugee law needs the task of putting an end to the experience of exile, to be done by assimilating refugees in their previous or new or communities. Voluntary repatriation, Local integration and Resettlement are the traditional instrumental and so they are incorporated in the Mandate of UNCR, which shall assume, in addition with international protection in the function of permanent solution for the problem of refugees. The availability of each of these solutions for Eritrean and Somali refugees will be considered.

3.4.3.1. Voluntary Repatriation: The right to return

The 1951 Convention does not explicitly address the issue of voluntary repatriation, although the cessation clauses are indirectly related. The voluntary character of before the refugee status ends is guaranteed by the duty of non-refoulement.³⁵⁵ The 1969 OAU Convention also addressed itself to durable solutions albeit in an indirect way. Article 2 subparagraphs 1 and 5 noted above allude to local settlement and resettlement respectively. Under Article 5, the Convention makes detailed provisions for voluntary repatriation. Article 5(1) provides: "The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will."

Article 12 (4) and (5) the ACHPR also guaranteed that:

"A non-national (refugees inclusive) legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law..."

³⁵⁵ Article 1(2) and Article 33(1) of the 1951 Convention

Voluntary return builds upon the right to return, guaranteed in Article 12 (4) of the ICCPR and Article 12 (1) (2) of the ACHPR.³⁵⁶ Speaking at the national level, voluntary repatriation is put in as a right in the Ethiopian Refugee Proclamation under Article 23 (1) which states that:

Every recognized refugee has the right, of his own volition, to seek to repatriate from Ethiopia to his country of nationality or former habitual residence in safety and dignity

ExCom Conclusion No. 85 (XLIX) and No.62 (XLI) reaffirm the principle of voluntary repatriation and identify standards for the voluntary repatriation process.

These legal provisions inform the Ethiopian asylum policy that imply voluntary repatriation ultimately leads to the cessation of refugee status, whether on an individual or group basis. The Ethiopian government adheres to the principle of voluntary repatriation and also cooperates with the UNHCR voluntary repatriation activities under the provision on general cooperation in the *1951 Convention*. UNHCR's responsibilities in relation to voluntary repatriation derive from its *Statute* and the degree of UNHCR's involvement in repatriation movements depends on the extent to which the core components outlined above have been satisfied.³⁵⁷

From 1997 and 2005, the government of Ethiopia in coordination with UNHCR, WFP and the self administered government of Somaliland had been promoting voluntary repatriation and launched massive repatriation operation for Somali refugees and as a result 245,000 Somali refugees of different clans had returned to Northwest Somalia in an organized manner.³⁵⁸ UNHCR emphasis voluntary

³⁵⁶ Article 12 (1) (2) of the Refugee Proclamation

³⁵⁷ UNHCR: An Introduction to International Protection, Supra note 32, 149

³⁵⁸ Bulletin of Administration for Refugee/Returnee Affairs, Vol. 1 no. 1, (January 2007), p.4

repatriation as the ideal solution to refugee Problems and the best solution for refugee problem and the agency often provides transportation and a start up package which may include cash grants and practical assistance such as farm tools and seeds.³⁵⁹

However, in view of the continuing generalized violence in Southern Somalia and the prevailing gross human rights violations in Eritrea,³⁶⁰ the current position of ARRA is not advocating voluntary repatriation and UNHCR accords the Stand.³⁶¹ Paradoxically, at the time of writing this thesis, the flow of refugees into Ethiopia kept increasing due to the prevailing human rights violations in Eritrea and the civil unrest in Somalia. Several refugees from Somalia and Eritrea have continued to seek asylum in Ethiopia.³⁶²

To show the situation in a simple and expressive manner, the number of Somali refugees as of May 31, 2010 was 72, 054 but as of September 31, 2010, the number reach 76,000. Similarly, as of May 30, 2010, the total number of Eritrean refugees was 33, 725 but reach 36, 593 as of 31 September, 2010.³⁶³

3.4.3.2. Local Integration eventually Naturalization

In local integration, the country of asylum offers refugees permanent residence with the possibility of eventual citizenship. Its potential as a durable solution is recognized in both the *1951 Convention* and the *1950 UNHCR Statute*.³⁶⁴

³⁵⁹ Bulletin of Administration for Refugee/Returnee Affairs, Vol. 1 No. 1, (January 2007),p. 14

³⁶⁰ UNHCR POSITION ON RETURN OF REJECTED ASYLUM SEEKERS TO ERITREA, UNHCR GENEVA January 2004, , available at WWW.Unhcr.org page 6

³⁶¹ Administration for Refugee and Returnee affairs, ARRA up date Vol. II No. 9, December 2008, page 2, and UNHCR Eligibility Guidelines For Assessing The International Protection Needs Of Asylum-Seekers From Eritrea UNHCR April 2009, UNHCR Ethiopia - Regional Liaison Office for Africa Country Operations Plan Ethiopia 2008-2009

³⁶² Administration for Refugee and Returnee affairs, ARRA, update Vol. III No. XIII, December 2009, page 2

³⁶³ UNHCR representation in Ethiopia, Addis Ababa, public information section, 2010

³⁶⁴ See Article 34 of the 1951 Convention and Article 6 (A) a of the 1950 UNHCR Statute

Naturalization is the final goal of the international protection accorded to refugees, when their repatriation has proved impossible. Consequently, the 1951 Convention invites the Contracting States to facilitate as far as possible the naturalization of refugees by expediting proceedings and reducing the costs of such proceedings.³⁶⁵ Many experts have interpreted the 1969 OAU Convention as being oriented towards temporary protection and eventual repatriation.³⁶⁶

Although in certain countries mainly Western countries, granting citizenship to recognized refugees after a period of time is standard practice, many host states in Africa have nevertheless allowed refugees to remain on their territory for as long as the problems which prompted their flight persisted and some have allowed refugees to settle locally and to integrate into the new communities.³⁶⁷ The latter have concerns about allowing refugees to stay indefinitely on their soil, fearing the impact on scarce resources, the risk of security problems, and potential antagonism towards refugees.³⁶⁸

The problems which arise in this connection concern, in order of importance, the difficulty for the refugee to acquire the nationality of the country of reception, which even when possible in law, is sometimes accorded only with the greatest generosity; the question of the length of prior residence, a kind of trial period imposed on aliens in general before granting them citizenship; and finally, the complexity and cost, in some cases, of the proceedings themselves.³⁶⁹

Local integration is a gradual process that takes place on three levels if there is commitment from the government of the country of asylum: Legal, Economic and Social/cultural aspects.

³⁶⁵ Article 34 of the 1951 Convention

³⁶⁶ Joanne Van Selm-Thorburn, *Supra* cited at note 82, p. 120

³⁶⁷ *Ibid*

³⁶⁸ UNHCR: *An Introduction to International Protection*, *Supra* note 32, page 143

³⁶⁹ *Ibid*

Legal: refugees are granted a progressively wider range of rights, similar to those enjoyed by citizens, leading eventually to permanent residence and perhaps citizenship.³⁷⁰

Under International law, naturalization is generally regarded not as a right, but as a favor which the State reserves the right to accord, or not to accord, to persons fulfilling certain conditions and unable to avail themselves of the provisions of the country's legislation on the acquisition of nationality. This leads to vast differences as regards the possibility for refugees, to become, in their country of residence, full citizens. The attitude of Governments on this question, which is dictated by demographic or political considerations, is sometimes modified by changing circumstances and political developments within the country.³⁷¹

At the national level, the Refugee Proclamation doesn't envisage the right to be granted neither permanent asylum nor citizen ship. However, Article 21 (3) stipulates that recognized refugee, refugee and their family members are entitled to the same rights as conferred generally by relevant laws on persons who are not citizens of Ethiopia. The Ethiopian Nationality law, Proclamation 378/2003 under, Part Two, article 4 explicitly addresses the conditions for naturalization of a foreigner as follows (acquisition of Ethiopian Nationality by law):

- being 18 years of age or above;
- having lived in Ethiopia for at least 4 years;
- ability speak one of the languages spoken in Ethiopia;
- a lawful source of income;
- be of good character;
- have no criminal convictions;
- show that s/he has been or will be released from another citizenship;
- take an oath of allegiance.

³⁷⁰ Supra cited at note 370

³⁷¹ Prince Sadruddin Aga Khan, supra cited at note 8, page 18

In cases of Marriage, a foreigner who is married with an Ethiopian National may acquire Ethiopian Nationality by law if the conditions stated under Article 6 of the proclamation, which is a minimal condition unlike the conditions stated above.³⁷²

Economic: refugees become gradually less dependent on aid from the country of asylum or on humanitarian assistance and are increasingly self-reliant so that they can support themselves and contribute to the local economy. Ethiopia maintains two reservations to the 1951 Convention notably to Articles 17-19 (Right to wage-earning and self-employment as well as liberal professions) and to Article 22 (2) (Right to public education with respect to education other than elementary education) and this reservation is further retreated by the Refugee Proclamation.³⁷³ These reservations make self-sufficiency almost impossible for refugees and seriously impact on their feeling of self-dignity as they become dependant on assistance from UNHCR and other agencies. It also impacts on their ability to integrate locally, not only as they are not allowed to access Government public schools, but also as one of the conditions to be granted Ethiopian citizenship is a legal source of income.³⁷⁴

Even worse, the majority of the refugees to live in isolated refugee camps where their freedom of movement is restricted. These factors preclude refugees from integrating into local communities and from being able to contribute to the economic well-being of their families, forcing them to depend on international assistance.³⁷⁵

Social and cultural: interaction between refugees and the local community allows refugees to participate in the social life of their new country without fear of discrimination or hostility.³⁷⁶ Most Eritrean and Somali refugees in Ethiopia have

³⁷² See Article 6 of Proclamation on Ethiopia Nationality: Proclamation no. 378/2003

³⁷³ See Article 21 (3) of Refugee Proclamation

³⁷⁴ UNHCR Ethiopia, Annual protection Report 2007

³⁷⁵ Ibid

³⁷⁶ Supra cited at note 354

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³⁷⁴ UNHCR Ethiopia, Annual protection Report 2007

³⁷⁵ Ibid

³⁷⁶ Supra cited at note 354

the capacity to locally integrate, as they share the same ethnicity, language and culture with the host population. Informally, a few Somali and Eritrean refugees have intermarried with locals and live outside the camp environment, but none benefit from official legal recognition or naturalization as a result.³⁷⁷

Whether refugees have the interest to apply for Ethiopian Citizenship taking in to account the opportunity to be resettled in the Western Countries or the law is not practically implemented is difficult to draw. Factually, there is no a single refugee who has granted Ethiopian Citizenship.³⁷⁸

At present, local integration of refugees into the Ethiopian community is not possible owing to the encampment of refugees and the lack of authorization for refugees to engage in gainful employment or other forms of self-reliance. In any case, employment opportunities are scarce given Ethiopia's economic situation.

3.4.3.4. Resettlement: Durable solution, Burden sharing and Second asylum

Resettlement involves the permanent movement of refugees to a third country. Although comparatively small numbers of refugees benefit from resettlement, as acknowledged in ExCom Conclusion No. 90 (LII) 2001, it nevertheless serves three equally important functions.³⁷⁹

As a durable solution for larger numbers or groups of refugees: Since Ethiopia does not currently allow refugees to locally integrate; the only durable solutions available to Somali and Eritrean refugees are resettlement. In 2008,

³⁷⁷ Interview with Abiyu Besha , Senior protection Assistant, UNHCR, 5/04/2010;and Haile Selasiie, Suprar note at 286

³⁷⁸ Interview with Mezemur Yared , (Head Legal Head, Main Department for immigration and Nationality Affairs, on 23/05/2010) and Haile Selasiee G/Mariam, supra at note 286

³⁷⁹ UNHCR: An Introduction to International Protection, Supra note 32 , page 46

UNHCR initiated a group resettlement program, which has led to the referral of some 8,200 Somali refugees in Kebribeyah camp, and some 6,900 Eritrean from May'aini, for resettlement in third countries.³⁸⁰

As a protection tool: Besides being a possible durable solution for refugee for whom repatriation appears impossible in the foreseeable future, third-country resettlement can also be a crucial protection tool in cases where danger or insecurity persist in the country where the refugee was first admitted. As its routine protection activity, UNHCR field staffs refer individual cases for the resettlement countries in line with the UNHCR resettlement policy and criteria,

As a mechanism for burden- and responsibility-sharing among States: As the UNHCR Executive Committee has recognized the fundamental role of international solidarity in encouraging a humanitarian approach to the grant of asylum and international protection generally.³⁸¹ Burden-sharing through direct admission of refugees and resettlement plays an important role in enhancing protection generally in countries of first asylum such as Ethiopia which hosted more than hundred thousands of refugees.

The adherence of the principle of burden sharing and international solidarity by resettlement countries has a direct impact on the asylum policy of the host countries in encouraging to continue granting asylum that eventually safeguard the refugee's right to seek and enjoy asylum.

As stipulated in Article 5 (1) of the OAU Convention and Article 28 (1) of the 1951 Convention, the Ethiopian government cooperate with UNHCR and facilitate resettlement operation by issuing refugee Travel documents and exit visa even

³⁸⁰ UNHCR Global Appeal 2010–11 available at <http://www.unhcr.org/Ethiopia/update/Pdf>

³⁸¹ EXCOM Note On International Protection Forty-Fourth Session , A/Ac.96/815 31 August 1993, , Available at <http://Www.Unhcr.Org/Asylum/3ae68d5d10>

for UNHCR "Mandate Refugee" (refugees not recognized by ARRA) which are issued by the immigration authorities upon to a request of UNHCR.³⁸²

3.5. Key finding of the Study

Ethiopia has shown its generous asylum policy for the Eritrean and Somali asylum-seekers and refugees. The practice and the principle of asylum in Ethiopia deserve high appreciation. However, this limited study reveals the following problems identified during the course of the study that needs attention not only for the interest of asylum seekers and refugees but also for the hosting country.

3.5.1. Denial or Delay of access to asylum procedure at Eastern camps

(The Problem of Identification)

In the refugee context, Executive Committee Conclusions have referred repeatedly to the importance of procedures for dealing with asylum requests, notably in order to ascertain which persons require international protection. It also reiterates in paragraph, the importance of ensuring access for all persons seeking international protection to fair and efficient procedures for the determination of refugee status or other mechanisms, as appropriate, to ensure that persons in need of international protection *are* identified and granted such protection.³⁸³

Article 12 (3) of the ACHPR recognizes and guarantees the right to seek asylum as a human right in Africa thereby strengthening the protection of refugees and the institution of asylum in Africa. The full provision reads as follows:

³⁸² Interview with Haile Selassie G/Mariam, supra note at 286 + Abiyu Besha, *Supra* at note, 338

³⁸³ EXCOM Conclusion No. 74(XLV) (I) of 1994

"Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international Conventions".

The Refugee Proclamation states in Article 13 (1) clearly provides that a person who wish to remain in Ethiopia as a refugee [as per the definition of the term refugee in the 1951 Convention/1969 OAU Convention / the Refugee Proclamation] shall apply with in 15 days to NISS or the nearest police station who will be deciding on his application. Further more, Article 14 (1) unequivocally indicated that NISS (ARRA) shall to provide decision on the application.

When the Refugee Proclamation is coupled with the ACHPR, it has a depth value. These provisions guarantee refugee right to seek recognition of refugee status and obtain asylum and Ethiopia has assumed serious obligation.

Practically, Eritrean asylum-seekers at the Northern entry points³⁸⁴ and Somali asylum-seekers at Dollo Ado entry points have timely access for the recognition of their refugee Status.³⁸⁵ Decision on their application is normally granted with in few days [3-10 days] and until then basic assistance is provided. On the other hand, Eritrean and Somali asylum-seekers at the eastern camps do not always have timely access for the recognition of their status. Some times, they are forced to wait for a couple of months.³⁸⁶

ARRA, [some times UNHCR as in the case of Eritrean Afars], put justification that experience over the years has shown that local population are abusing the asylum system. The problem for Somali asylum seekers at the eastern camp are further worsened as frequently witnessed the system is also abused by Somalis

³⁸⁴ Interview with Haile Selassie G/Mariam, Supra at note 286

³⁸⁵ Interview with Eskinder Abera (Assistant Data Management Officer, UNHCR) , on 23 May, 2010

³⁸⁶ Interview with Bekele Mugeru, supra cited at note 312; and Haile Selasiee, supra at note 286

who comes from Somaliland³⁸⁷ enter with genuine asylum seekers. ARRA further put a justification that genuine asylum seekers enter through Dolo Ado rather than travelling long distance and entering through Togochalie or Awbarre entry points.³⁸⁸ .

The researcher strongly shares the concern of ARRA why regular registration system is not practically implemented. In fact, it is very challenging to identify genuine asylum-seekers who fled from Eritrea and Somalia taking in to account the close cultural, physical and facial similarity between Ethiopian Somali and Somalis who fled from Somalia. This is equally a challenging issue in identifying Ethiopian Afars and Eritrean Afars.

The problem of identification of genuine asylum-seekers and suspected Ethiopian national continue as an outstanding problem. But denying or delaying bona find asylum-seekers access for the asylum procedure is a solution?

The researcher suggests that, receiving asylum-seekers at the entry points, persistently updating the country of Origin information's, strengthening the capacity of Staffs responsible for conducting refugee status determination, employing translators who are competent enough to identify dialects would lighten the problem. In addition, those abusive asylum-seekers, who repeatedly tried to be registered as a refugee, be it Ethiopian Nationals or Somali Landers have to be brought to court. Article 386(1) of the revised Ethiopian Criminal law can serve as a legal authority to take appropriate legal action. The responsibility to safeguard the integrity of the Ethiopian asylum system primarily lies on ARRA.

Equally, the perception that persists both on ARRA and UNHCR that the current asylum system provides a convenient cover for locals and abusive asylum

³⁸⁷ Somaliland and Puntland are considered safe by UNHCR and ARRA and no refugee status is granted on Prima facia basis

³⁸⁸ Interview with Bekele Mugeru, Supra at note 312

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³⁸⁸ Interview with Bekele Mugeru, Supra at note 312

seekers from Northern Somalia mainly for seeking assistance ranging from food ration up to the possibility of access to resettlement to the US or Europe should be avoided.

While this view may be based to a significant extent on the unfair stereotyping of asylum seekers (especially those who have traveled in an irregular manner, who are young and male; and who originate from Southern Somalia that are associated with political violence and religious extremism like Alshabab) cannot be entirely discounted. Asylum systems are not immune to abuse, and it would be naïve to believe that locals have ignored the opportunity to consider how the systems might be exploited.

At the same time, apart from the suffering asylum-seekers faced before and during flight, their right to seek asylum, right to access fair and efficient asylum procedure, right for human standard of treatment must be put into perspective. From the researcher professional experience, the overwhelming majority of asylum-seekers are sincere. If anyone is abusing the system, it is not refugees.

Those who insist on their suspicion are not only restricting the rights of genuine asylum seekers but also violating the law of Ethiopia. If locals and especially abusive asylum seekers from Northern Somalia continue to enter and remain in a country undetected, denying access for the asylum procedure would not appear to be the most promising means of achieving that objective.

Non-discrimination is a basic principle of international human rights law³⁸⁹, in general and with regards the right to asylum, in particular. This cardinal principle of non discrimination as enshrined in Article Non-discrimination Art. 3 of the 1951 Conventions, Article IV of 1969 Convention and Article 13 of the Refugee

³⁸⁹ See Art. 2 Universal Declaration of Human Rights

Proclamation should be respected. Article 13 of the Refugee Proclamation put Non-discrimination as a general principle and provides:

"This proclamation shall be applied with out discrimination as to race, religion, membership to a particular social group, or political opinion"

3.5.2. The right of Appeal: Mighty or reality?

Procedures in place in most States recognize that standards of due process require an appeal or review mechanism to ensure the fair functioning of asylum procedures, although the nature of the appeal or review can vary quite widely depending on administrative law standards applicable in the country.³⁹⁰

From human rights perspective, it follows from Article 3³⁹¹ and Article 7 (1) (A)³⁹² 13 the ACHPR that asylum-seekers must be provided with an effective remedy against the decision to refuse their request for asylum. ³⁹³Article 32 (2) of the 1951 Convention, Article 13 of the ICCPR and Article 12 (4) are even more explicit.³⁹⁴ These provisions provide, in indirect terms, that "except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented to submit and be represented for the purpose before competent authority...."³⁹⁵

Further more, EXCOM Conclusion 8(XXVII) insist on the possibility for the asylum seeker to have his case re-examined. EXCOM Conclusion 8 (XXVII)

³⁹⁰ Global Consultations on ec/gc/01/12 International Protection Asylum Processes (Fair and efficient asylum procedure), 31 May 2001, available also at <http://www.unhcr.org/4aa76e039.pdf>

³⁹¹ Contravention of the prohibition of non-refoulement is equal to inhuman treatment and degrading treatment

³⁹² This provision of the ACHPR guarantees the right of every one to an effective remedy before a national organ against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

³⁹³ Article 7 (1) (A) grants aliens lawfully resident in the territory of a State the right to have their case reviewed.

³⁹⁴ Article 32 of the 1951 Convention is applicable only to cases of expulsion, not refoulement

³⁹⁵ Helen Lambert, supra cited at note 2, page 47

leave to State parties a choice between reconsideration of the decision by the same authority, an appeal to a higher administrative authority and appeal to a judicial body. Council of Europe Recommendation No (81) 16, though not excluding the possibility of review by the same authority, does only refer to it as a measure of last resort.³⁹⁶

Finally, EXCOM, Conclusions (3) XXXIV of the UNHCR Executive Committee³⁹⁷ rightly require that the same opportunity be given to asylum-seekers whose applications are considered manifestly unfounded or abusive. As Helen Lambert commented, of the three possibilities suggested, review by the same authority offers the fewer guarantees, while an appeal to an independent court of Law would be much more appropriate.³⁹⁸

This right of appeal is guaranteed in article 14 (3) of the Ethiopian Refugee Proclamation which states that:

"Any asylum seeker, who is aggrieved by the decision of the Authority, may within thirty days of the notification of such decision, appeal in writing to the Appeal Hearing Council established under Article 15 of this Proclamation."

Article 15 of the 2004 Refugee Proclamation establishes the Appeal Hearing Council, consisting of five members representing SIIRA³⁹⁹, the Foreign Ministry, the Justice Ministry and Federal Affairs. The Appeal Hearing Council (AHC) is to appoint a Secretary and UNHCR is to participate as an observer.⁴⁰⁰ According to the law, the AHC must decide on appeals "within a reasonable amount of time",

³⁹⁶ Council of Europe Recommendation on the harmonization of National Procedures relating to asylum (1981)

³⁹⁷ UNHCR EXCOM on the Determination of Refugee Status (1977)

³⁹⁸ Helen Lambert, *supra* cited at note 2, page 48

³⁹⁹ The representative from SIRAA is also the Chairman.

⁴⁰⁰ Article 16 of the 2004 Refugee Proclamation

ensuring that every applicant is able to present his case and is provided with a qualified interpreter. Decisions of the AHC are to be issued in writing.⁴⁰¹

According to the law, the AHC should issue its own rules of procedure. Such procedural guidelines were drafted by UNHCR on the request of the AHC in late 2007 and are adopted in 2008.⁴⁰²

These provisions seem to appear only in legal terms, but not in practice. Despite the Refugee Proclamation under Article 17 establish the AHC in 2004, it was not implemented for 3 years and its implications in practice are still unclear, particularly as regards the "reasonable" period of time within which the refugee will be notified about the Council's decision which is not specified in law. The AHC has started its task in 2007. In 2008, there remained only 23 cases that decision were given on. Under exceptional cases, mainly in the case of Somali rejected asylum seekers at the eastern camps, the only appeal mechanism is to review by a different staff member in the same office of ARRA and UNHCR, usually a colleague of the person who made the original rejection, working under the same supervisors.⁴⁰³

In practice, the implementation of the appeal procedure works fairly well in Addis Ababa but not at the camp level. In 2008, there were 13 appeal cases lodged to the appeal council of which 10 cases were from Addis Ababa. However, access to the AHC for rejected asylum seekers at the northern, Southern and Eastern tip points of Ethiopia is very far from easy that recalls much work needs to be done to make it a functioning entity.

This research indicates that, in practice, various and numerous impediments face prospective appellants in Ethiopia, among other things to inadequate information

⁴⁰¹ Article 17 of the 2004 Refugee Proclamation

⁴⁰² Interview with Haile selassie G/Mariam, *supra* at note 286

⁴⁰³ Interview with Anchinseh Maheteme, *supra* cited at 329

provided to applicants on how to appeal, and to which appeal body; extremely short time-limits within which to appeal⁴⁰⁴; lack of information on how to appeal and with the submission of the appeal; a shortage of legal advisers; a requirement to lodge the appeal in person, which is impossible for some applicants to fulfill in practice; difficulties in obtaining in writing, of rejection decision; and limited physical access to the AHC due to distance and lack of financial resources to travel.⁴⁰⁵

Moreover, the obstacles listed above tend to be exacerbated if the rejected asylum-seeker is in detention, and shortened time limits generally apply despite this doesn't happen in practice.

3.5.3. De facto Refugees: Legal Status or Mere Tolerance? Specific to Somali refugees

The concept of de fact refugees is not employed in the Ethiopian refugee legal regime. It is simply to refer refugees who fled from Somalia but not registered neither by UNHCR nor by ARRA but residing in various parts of Ethiopia.

Factually, the crisis that shock Somalia since the 1990s obviously produced many more refugees than were identified, registered and assisted as such in the various eastern parts of Ethiopia, in towns including the capital city of Addis Ababa. Despite the existence of these groups of refugees is not acknowledging, possibly more numerous than the once recognised and registered.

A research conducted by Swiss forum for migration and population Studies in 2006 indicated that, there are probably 30,000-45,000 unregistered refugees

⁴⁰⁴ Interview with Haileselassie G/Mariam reveals that the Appeal Hearing council apply the 30 days period for lodging appeal

⁴⁰⁵ The researcher has entertained review of rejected cases jointly with ARRA protection Officers but only for few cases and witnessed the difficulty of rejected asylum seekers to lodge appeal

living illegally only in the capital city.⁴⁰⁶ Similar research conducted in 2007 also suggests that about 100,000 refugees live in the territories of Ethiopia harmonized within the population with out having any legal recognition from the government.⁴⁰⁷ It seems that the government of Ethiopia has been concerned very recently. In 2010, SIRRA announced all unregistered Somali de facto refugees living in the towns of Ethiopia to be registered and take a residence permit. Nearly 10, 000 of them are registered and granted temporary residence permit still continues living in towns.⁴⁰⁸

Since the non-returnee advice of UNHCR to South and central Somalia, those defacto refugees are arguably protected from forcefully return to south central Somalia due to the duty to adhere Ethiopia's international obligation to respect the principle of non-refoulement. Others who probably fled from other parts of Somalia (Punt land and Somaliland) are ordinary aliens since those places are currently considered safe by the Ethiopian government and UNHCR. However, merely tolerating or allowing all Somalis to reside without meeting the criteria set for ordinary aliens in the immigration regulation has apparent and compounded negative impact on the host State.⁴⁰⁹

The implication is very clear on the issue of national security, competing natural resources and job opportunities in light of the alarming high cost of living in Ethiopia. Ethiopia's clear restriction on refugee's access to wage earning employment and higher education is stipulated in the Refugee Proclamation. The law has to be amended or shall be enforced.

⁴⁰⁶ Joëlle Moret, Simone Baglioni, Denise Efionayi-Mäde, supra cited at note 319, page 16

⁴⁰⁷ Iman Abdurahman, supra cited at note 289, page 83

⁴⁰⁸ Interview with Mezemur Yared , Legal Head, National Security, Immigration and refugee Affairs, Main Department for immigration and Nationality Affairs, June 20,2010

⁴⁰⁹ The criteria to request residence permit is stated under Article 15 (1) of the immigration proclamation no. 354/2004

3.5.4. The safety and security of Refugees: Safeguarding the right to safe asylum

UNHCR's governing board, the Executive Committee, has stated that the location of asylum seekers should be determined by their safety and well-being as well as by the security needs of the receiving state. More specifically, ExCOM No. 94 (LIII) – 2002 expressly recalled that the host States have the primary responsibility to ensure the civilian and humanitarian character of asylum by, *inter alia*, making all efforts to locate refugee camps and settlements at a reasonable distance from the border of the country of origin.⁴¹⁰ Similarly, the OAU Refugee Convention clearly states that “for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin”.⁴¹¹

The Refugee Proclamation further stated under Article 21 (2) SIIRA can “designate areas” where refugees may reside but at a reasonable distance from the border of their country of origin or from their country of former habitual residence.

However, this is not practically implemented that have an impact on the right to refugees to enjoy safe asylum. Most refugee camps in Ethiopia are established near the border of the refugees' country of origin. Although ensuring the physical safety of the refugees is the primary responsibility of the host country, security issues are one of the major concerns in the discourse of camp refugees. On a general level, when camps are established close to the border of their country of origin, it has high impact on the safety and the security of the refugees that unquestionably put to their right to enjoy safe asylum at stake.

⁴¹⁰ ExCOM Conclusion No. 94 (LIII) – 2002

⁴¹¹ Article II (6) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

Looking to the future, it would evidently be useful for ARRA in refugee-affected regions to work closely with UNHCR in order to identify appropriate sites where refugees might be accommodated in the event of further influxes. At the same time, and with the support of the international community, efforts could be made to relocate those camps which have been established at too close a distance from the refugees' country of origin. In practice, of course, it is not always possible to locate refugee camps the requisite distance from an international border, due to social, political or geographical considerations, but the safety and security of refugees should not be compromised.

CONCLUSIONS AND RECOMMENDATIONS

- This study constituted an initial attempt to gain a better understanding of the situation of Eritrean and Somali asylum seekers and refugees in Ethiopia with the scope limited to perceptions and opinions expressed by UNHCR, ARRA, NISS staffs and the researcher professional experience rather than refugees/asylum-seekers themselves. The researcher by no means claim that the contemporary developments, analyses and policy issues described in the preceding chapter, in themselves, are exhaustive. Taken together, however, they provide as a springboard to draw the following conclusions and with modest recommendations.
- Ethiopia has undergone a long way to find a legal solution to refuge seekers in the Country through acceding to International refugee and Human Rights Conventions that have guaranteed certain basic refugee rights. Moreover, the protection that Ethiopian Law provides to refugees and asylum seekers goes above and beyond the stipulations of the international instruments that unequivocally includes the right of asylum seeker (*bona fides* as a refugee) not to be refused entry to seek, access to procedures for the determination of refugee status, and, if recognized, enjoy asylum in accordance with accepted international standards and the right to reside, members of family thereof to enter and reside in the Ethiopian territory until durable solution is found.
- Ethiopia has also shown generous asylum policy to Somali and Eritrean asylum seekers and refugees in accordance with international law and established principles and standards. The heavy burden carried in particular by Ethiopia is recognized; and notes with appreciation that a country in transition, which, due to its location, host large numbers of refugees and asylum seekers mainly from Somalia and Eritrea, continue to grant asylum and protection to refugees.

- However, this doesn't mean that the Ethiopian asylum system is perfect. There are legal, practical and policy related meaningful gaps that need improvements for all aspects of importance to asylum seekers, refugees, the hosting State and UNHCR.
- The principles of international protection of refugees, the application of international humanitarian principles on which it is based, are being frequently challenged with the view to prevent people from abusing the asylum systems. The right of asylum-seekers to be recognized as refugees and enjoy the minimum guarantees of safety and security to which such person is entitled and to access basic assistance are equally put at stake.
- Procedures for determining refugee Status and for granting asylum in Ethiopia are not yet harmonized and the case study illustrated the extent in which procedures available to asylum seekers vary that needs to promote a single asylum procedures. Procedural safeguards and rights stipulated in the national legislation and some important international standards of fair and efficient refugee status procedures have not been implemented. Fundamentally, the right of appeal remains inaccessible.
- There also remain lack of well established government specialized department in place to conduct Refugee Status Determination; this has led to the continued involvement of UNHCR in refugee status determination. This gap is particularly acute except at the northern entry point, where UNHCR continues to undertake only advisory role and an important step has taken to strengthen the national capacity to process and adjudicate asylum claims. An efficient asylum system can only be attained if supported by institutional capacity, good quality independent and continuous training with the allocation of sufficient resources without compromising procedural fairness: a dual interest of both for asylum-seekers and the hosting country.

- As Ethiopia has ratified both the 1951 Convention and the 1969 OAU Convention, the need to complementary protection regime has not arisen in practice. This is due to the frequent use of group protection mechanisms- prima facie recognition- practice in terms of the actual application of the 1951 Convention and 1969 OAU's refugee definitions individualized assessments is limited. In practice, even those who are not covered by the proper application of the 1951 Convention refugee definition are granted refugee status as demonstrated in the case of Eritrean asylum seekers. In addition to the prohibition of non-refoulement contained in the 1951 Refugee Convention and the 1969 OAU Convention, the Convention against torture and other human rights instruments ratified by Ethiopia also provide for *non-refoulement* obligations. These legal basis can be used to protect people who will not recognized under the refugee definitions but who nevertheless cannot go back to their country because their life or personal freedom may be in danger. However, these complementary forms of protection still need to be incorporated in the Refugee Proclamation.

- Ethiopia has also ratified the Convention against Torture, ICCPR and ACHPR that serve as a complementary protection legal basis of non refoulement for these asylum seekers who don't fall in the proper application of the refugee instruments. This dictate a need to consider the possibility of developing complementary protection mechanism who will not be covered by the 1951 and the 1969 OAU Convention- refugees in the broad sense- with a clear defined rights and obligations taking in to account the expanded mandate of UNHCR. This will help to discharge Ethiopia's obligation to comply with the duty to non-refoulement for persons who come out of Africa since the scope of the 1969 OAU Convention application is only for refugees coming from Africa. Where international protection is denied to persons in need on protection from non-refoulement, states parties are, or are likely to be placed, in a state of illegality *vis-à-vis* their international obligations.

- The practical double-standard of treatment as exhibited in restricting Somali and Eritrean asylum seekers access to the recognition of refugee status and basic humanitarian assistance in the pre-asylum period at eastern camps, and the introduction 'out-of-camp' scheme only for Eritrean refugees at the northern camp is not compatible the principle of non-discrimination that is deeply rooted in international refugee and human rights laws. Refugees are refugees as the right to seek and enjoy asylum when persecuted or face with serious danger are guaranteed equally that also recalls fairness to all persons in need of protection.

- A status between defacto refugees and ordinary alien should be established. The problem of unregistered Somali refugees (refugees in the legal sense) who fled from south central Somalia could be improved if administrative mechanisms could be developed and put in to operation for the assessment of their situations. Side by side, the practice of allowing or tolerating ordinary aliens from other parts of Somalia to reside who probably have received residence permit without meeting the criteria set for ordinary aliens in Ethiopia triggers negative impact on the protection of refugees and the interest of the hosting state. Those persons, and others to come, should enjoy a status based on law, rather than on the generosity or liberalism of the authorities. Otherwise, further deterioration of the labour market and the gradual impoverishment for the population will sooner or latter generate a very intolerable atmosphere that will conducive to restrictive asylum practice.

- The importance of procedural safeguards and rights cannot be overemphasized that serve to rectify a wrong decision which may cost the life of a genuine asylum seeker -at the first instance Refugee status Determination stage- and of a refugee already granted asylum when expulsion order is given. Once again, further procedural guarantee is needed in full compatibility with the 1951 Convention and other relevant principles of international refugee and human rights law. It has to be sensitive to human rights protection aspects since this should be, after all, an exercise of state authority to observe international obligations, a primary responsibility of states parties to human rights Instruments.
- The objectives of controlling persons abusing the asylum system or policy issues- restricting asylum-seekers access to the recognition of refugee status- ought to be reconsidered; some of the objectives are less absolute than others and thus open to modification, which might shift priorities in the reinforcement of establishing regular administrative and legal system. The direct costs and the indirect damages caused by persons abusing the asylum system for unfair advantage and factors creating the opportunity ought to be assessed and effective preventing mechanism has to be established in order to avert the erosion of the institution of asylum.
- The essential rights in the refugees' context, their human and legal right to family unity and non-discrimination as given protection in international law and national law should be fully respected with humanitarian spirit. The practical impediment in restricting the right to obtain derivative refugee status for nucleus family members and denying the right to non-discrimination among refugees in the "out camp policy" arena must be reserved.

For UNHCR Representation in Ethiopia

The role and duty of UNHCR in the international refugee protection regime is crucial. Despite its international dimensions, its implementation takes place at the national level. Some additional recommendations are made recalling UNHCR, the major avenues through which it plays significant role to safe guard the institution of asylum in Ethiopia.

- To lobby with ARRA to set up regular reception and registration centers in the eastern camps due to the continual arrival of asylum-seekers from Eritrea and Somalia.
- Continue providing capacity building for ARRA staffs responsible for refugee status determination and gradually withdraw from direct involvement in the RSD. Instead focus on providing guidance and counseling to asylum seekers and facilitate their access to fair efficient asylum procedure. Refugee status determination should be reminded as a primary responsibility of the Ethiopian Government but UNHCR role as observe should remain intact.
- Advocate for the establishment of complementary protection legal regime based on international and regional human rights treaties ratified by Ethiopia, for those persons in need of international protection who are protected from refoulement and refugees in the broad sense.
- Enhance the capacity of the national asylum system through providing further financial and expertise assistance, the availability of up-to-date country of origin information and trainings to the government organ in charge of refugee status determination.

- Set up a system for asylum-seekers and refugees to access to adequate information, guidance, the resources to appeal and legal counsel at the various stages of asylum procedures.
- Carry out a review of existing procedures for determining status, in collaboration with ARRA, especially in situations of mass influx, with a view to strengthening group status determination procedure.
- Ethiopia's traditional approach to the refugee problem has been noticeable through its "open door" policy, a commitment to the international protection of refugees. Further support by the international Community in adherence to the principle of burden sharing and international cooperation are highly beneficial to lighten Ethiopia's heavy burden given the magnitude of the refugee problem and its impact on the host country. This needs strong advocacy work by UNHCR and others seeking sufficient financial aid for the refugee program in Ethiopia -at the same time- finding more resettlement opportunities for Eritrean and Somali refugees which currently remains the only available durable-desirable solution. If the principal gains subsist equity among states, humane solutions for refugees, the orderly predictably to see more liberal asylum policy in Ethiopia.

Closing Remark

- Finally, the writer prefers to recall the context in which the paramount legal and human rights issues raised in this thesis operate- the refugee right -"...to seek and enjoy asylum when persecuted..." I found no better words to choose than the opening statement at the December 2001 Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol made by

President Vaira Vike-Freiberga of Latvia, who fled her country as a child after the Second World War:⁴¹²

"No one leaves their home willingly or gladly. When people leave their earth, the place of their birth, the place where they live, it means that there is something very deeply wrong with the circumstances in their country. And we should never take lightly this plight of refugees fleeing across borders.

They are signs, they are symptoms, and they are proof that something is very wrong somewhere on the international scene. When the moment comes to leave your home, it is a painful choice . . . It can be a costly choice. Three weeks and three days after my family left the shores of Latvia, my little sister died.

We buried her by the roadside and were never able to return and put flowers on her grave. And I like to think that I stand here today as a survivor who speaks for all those who died by the roadside – some buried by their families and others not. And for all those millions across the world today who do not have a voice, who cannot be heard. They are also human beings, they also suffer, they also have their hopes, their dreams and their aspirations. Most of all, they dream of a normal life . . .

I entreat you . . . when you think about the problem of refugees to think of them not in the abstract. Do not think of them in the bureaucratic language of 'decisions' and 'declarations' and 'priorities' . . . I entreat you, think of the human beings who are touched by your decisions. Think of the lives who wait on your help"

⁴¹² Vaira Vike-Freiberga, President of Latvia and former refugee, opening statement to Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva, 12 Dec. 2001 available at <http://www.unhcr.ch>.

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- The UN Convention relating to the status of Refugees of 1951
- The UN Protocol relating to the status of Refugees of 1967
- The United Nations Declaration on Territorial Asylum of 1967
- Declaration of States parties to the 1951 Convention and / or its 1967 Protocol relating to the Status Refugees of 13 December 2001
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- Immigration Proclamation No. 354/ 2003

5. Annexes

I. List of People interviewed for Chapter Three: Key Informants

No.	Name	Position in their Organization
1	Mr. Haileselassie Geberemariam	Senior Protection Office, Administration for Refugees and Returnees Affairs, Addis Ababa
2	Mr. Bekele Mugeru	Protection Officer, Administration for Refugee and Returnee Affairs, Jijiga
3	Mr. Mezemure Yared,	Legal Head, National Security, Immigration and refugee Affairs, Main Department for immigration and Nationality Affairs
4	Mrs. Anchinesh Mahetem	Assistant Protection officer, UNHCR Representation in Ethiopia, Sub Office Jijiga
5	Mr. Mulugeta Tesefaye	Community Service Associate, UNHCR Representation in Ethiopia, Sub Office Jijiga
6	Mr. Abiyu Besha	Senior Protection Assistant, UNHCR Representation in Ethiopia, Sub Office Jijiga
7	Mr. Melaku Gutema	Protection Assistant, UNHCR Representation in Ethiopia, Sub Office Shire
8	Mr. Eskinder Abera	Assistant Data Management Officer, UNHCR Representation in Ethiopia, Bureau of Addis Ababa

Prima facia (group) Refugee Status determination form



Questionnaires for Determination of Refugees Status

Family size:

No of dependents ()

1.	Name _____	Father's Name _____	G.Father name _____
2.	DOB : _____	POB: _____	Marital Status: _____
3.	IC'S/ HR1 Tribe Sub-clan _____ _____	Clan _____	_____
Only when the two parents are from different Tribes			
4.	HR2/ Tribe _____	Clan _____	Sub-clan _____

4. Family members: Please include the list of nucleus family members who are absent

Full Name	DOB	POB	Clan/sub-clan	R/ship	Current Location

6. IC's Occupation: _____ IC's spouse's Occupation: _____

7. Date of arrival to Ethiopia: _____

8. Date of departure from last place of residence: _____

9. Last place of residence in country of origin: _____

10. Route from last place of residence / Date and Place of crossing the border:

11. How many people did IC travel with (including IC)?

12. Any family members are already registered with UNHCR?
(if so, the case needs to be linked. Name or Progres number should be written.)

13. Reasons/ circumstances of flight

14. Country of origin information (tell me about where you come from, land marks or topographic, clans, warlord, boundaries between the district etc)

15. Special Needs (Vulnerability):

16. Interviewer's comments (Credibility on country of origin information, family composition, route of flight to Ethiopia, Dialect and any link and more..... especially):

17. Exclusion remark: Is exclusion assessment needed? Yes / No. If so, why _____

18. Decision/Recommendation:

The Eligibility Committee decides that IC and dependents are _____ according to the 1969 OAU or the 1951 Convention.

For UNHCR

For ARRA

Name: _____

Name: _____

Title: _____

Title: _____

Signature: _____

Signature: _____

Date: _____

Date: _____