

ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE GRADUATE STUDIES
SCHOOL OF LAW



COMPLIANCE WITH *NON-REFOULEMENT*
IN AFRICA: THE LESSONS FOR ETHIOPIA

By

KACHA MULATU ERKETO

A Thesis Submitted to Addis Ababa University School of Law, in Partial Fulfillment of the Requirements for the Degree of Master of Law (LL.M) in Public International Law, (2019)

Advisor:

Allehone Mulugeta (PhD)

Addis Ababa, Ethiopia

February, 2020

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Declaration

I, the undersigned, declare that this thesis entitled “*Compliance with Non-Refoulement in Africa: The Lessons for Ethiopia*”, is my original work and has not been presented for a degree in any of other University or Organization, and that all sources of materials used have been duly acknowledged.

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Verification

I, Allehone Mulugeta, have read this thesis and approved it for examination.

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Signature: _____

***“In Loving Memory of Refugees all Over the World in Need of Protection, But
Defied and Delivered to their Persecutors by Any Means”***

Acknowledgment

First of all I would like to praise the almighty God. Because, this thesis would not exist without the generous blessing, strength and good health I received from God. Secondly, I am enormously grateful to my advisor Dr. Allehone Mulugeta and his friend Dr. Marina Sharp for their incessant support and guidance. I am indebted to my family, friends and colleagues for their limitless support and inspiration. Last, but not least my deepest gratitude from the bottom of my heart goes to the group; ‘The Syndicate’ for their invaluable friendship and brotherhood ushering my soul.

List of Acronyms

ACHPR	African Charter on Human and Peoples' Right
ARRA	Agency for Refugees and Returnee Affairs
AU	African Union
CAT	Convention Against Torture
CIDT	Cruel, Inhuman or Degrading Punishment and Treatment
CRRF	Comprehensive Refugee Response Framework
DHA	Department of Home Affairs
DRA	Department for Refugee Affairs
DRC	Democratic Republic of Congo
EU	European Union
EXECOM	Executive Committee
FDRE	Federal Democratic Republic of Ethiopia
UNGA	United Nations General Assembly
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IDP's	Internally Displaced Peoples'
IGAD	Intergovernmental Authority on Development
OAU	Organization of African Unity
RAB	Refugee Affairs Board
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
SCA	Supreme Court of Appeal
SCRA	Standing Committee for Refugee Affairs
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
ZSP	Zimbabwean Special Permit

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Abstract

The customary non-refoulement principle prohibits expulsion or return of refugees to a territory where their lives or freedom would be at real risk of persecution. Non refoulement is recognized under international and regional refugee and human rights treaties and has attained international customary law status. Compliance with non-refoulement requires states to ensure temporary admission of asylum seekers to conduct RSD and case by case assessment of the individual situation of asylum seeker and policy and practice of country of return. And any decision to return or deny asylum must be reviewed by independent body. For many decades African states has adhered to this principle. However, this paper argues currently African states often failed to observe their non-refoulement obligation, though practice differs from state to state. In the three African states analyzed in this paper, there is a stark shift towards unreasoned conflation of refugees to terrorist attacks or economic migrant label followed by asylum denial, deteriorated encampment and mass deportation to places where they may face calamities. Thus, the aim of this paper is to record and expose this dehumanization of refugees in Africa and to draw lessons for Ethiopia.

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

It has been eloquently stated that protection from *refoulement* is at the heart of being a refugee and corner stone of international refugee law.¹ The customary *non-refoulement* principle prohibits the expulsion or return of refugees to a territory where their lives or freedom would be at real risk of persecution. The 1951 Convention² (its 1967 Protocol)³ unveils *non-refoulement*. Article 33(1) prohibits states from expelling or returning a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion. However, exceptionally expulsion is allowed whenever the refugee becomes national security threat.⁴

Absolute *non-refoulement* versions were encapsulated under human rights instruments. They prohibit forcible return or transfer of a person to countries where he/she may face torture,⁵ or other cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life.⁶ They are non-derogable and afforded to every individual, irrespective of his/her legal status. Thus, even those who fall under the 1951 Convention exception would be protected from expulsion by these laws. The 1969 OAU Convention Governing the Specific Aspects of Refugee

¹ UNHCR Note on the Principle of *Non-Refoulement* (1997) <<http://www.refworld.org/docid/438c6d972.html>.>

² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (here in after the 1951 Convention)

³ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (hereinafter 1967 Protocol)

⁴ 1951 Convention (n 3) article 33, para2

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, (CAT) article 3

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 6

Problem in Africa (hereinafter 1969 OAU Refugee Convention) goes a step further by adopting broader form of *non-refoulement*.⁷ The 1969 OAU Refugee Convention does not provide exception to *non-refoulement* principle. Those who flee armed conflict were recognized as a refugee and non-rejection at the frontier is recognized as part of *non-refoulement* obligation. Finally, *non-refoulement* has attained Customary International law status,⁸ even states who are not members to the aforementioned instruments were bound by it.

1.2. Statement of the Problem

Non-refoulement is not novel for Africans. The continent is known for its outstanding refugee hospitality for many years.⁹ Crisp describes the time from 1960th-1980thC as a ‘golden age’ of Asylum in Africa.¹⁰ Refugees were few and mainly independence struggle ensues, the newly independent states agitated with Pan-Africanism and colonization hatred receive them with heroic welcome. Many states allow them to remain in their territory permanently and become naturalized citizens. While deportation and expulsion was rare, refugees only repatriate voluntarily.¹¹ However, since 1990th Africa’s known tradition of refugee hospitality starts to shrink. Among others; mass influx due to conflicts, strife, crises, famine added with reluctance of the international community to address such menace in due time escalates the number of displacement in the continent. To add oil on existing fire donor fatigue, lack of responsibility sharing, low economic development, and terrorist attack under the shield of refugees compelled many African states to honor *non-refoulement* through open defiance, despite its absolute nature.

This violation must not be viewed as a development of new norm in Africa allowing *refoulement*. Violation is violation whether committed in Africa or everywhere else and must be condemned. Sovereign right of states to regulate refugees within their territory and to return them if they deem necessary is not absolute one, it must be exercised within the limits of *non-*

⁷ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered in to force 20 June 1974) 1001 UNTS, art II.3.

⁸ Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’, in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, (CUP 2003)87–177.

⁹ UNHCR Global Appeal 2015 Update <http://www.unhcr.org/ga15/index.xml> (accessed 18 February 2019)

¹⁰ Jeff Crisp, ‘Forced Displacement in Africa: Dimensions, Difficulties, and Policy Directions’ (2010) 29 RSQ1.

¹¹ *ibid*4.

refoulement.¹² Compliance with *non-refoulement* requires at least ensuring temporary admission of asylum seekers to conduct fair and effective refugee status determination and case by case assessment of the individual situation of the alien and policy and practice of country of return.¹³ And any decision to return/deny asylum must be challenged/reviewed before an independent and impartial body.¹⁴

1.3. Literature Review

The literature on African refugee situation including *non-refoulement* is not scant. Many have written on the laws and practical problems of refugees in Africa. **D’Orsi** analyzed the refugee legal regime in sub-Saharan Africa and assessed how the institution of Asylum is legally perceived and applied.¹⁵ He contends neither of the two universally binding instrument i.e. 1951 Convention and the 1950 UNHCR Statute have mentioned the right to seek and enjoy Asylum. Rather, it’s UDHR a non-binding instrument and the 1969 OAU Convention advanced the notion of individual right to seek Asylum, but governments in Africa were reluctant to enforce this right. However, his work covers only asylum seekers in sub-Saharan Africa and UDHR has attained the status of international custom and binding one.

Sharp painstakingly scrutinized the legal framework on refugee protection in Africa and institutional elements.¹⁶ She contends that, the 1969 OAU Convention neither broadens nor makes *non-refoulement* absolute as many writers allege. And she concludes that, even though protection differs from state to state in Africa *non-refoulement* often ‘honored in the breach’.¹⁷ However, her book doesn’t cover practice of states and policy solutions.¹⁸ **Rutinwa** examined the retreat from fundamental principles of asylum, rejection at the frontier and expulsion of

¹² ICRC Note on migration and the principle of *non-refoulement*, (2018)

¹³ UNHCR Executive Committee Conclusion No.81 (XLVIII), 1997, Para (h)

¹⁴ UN Human Rights Committee, General Comment No.31, on Article 7, (10 March 1992) Para 15

¹⁵ Cristiano D’Orsi, ‘The AU Convention on Refugees and The Concept of Asylum,’ 3 Pace Int’l L. Rev. Online Companion 220(2012)

¹⁶ Marina Sharp, The Regional Law of Refugee Protection in Africa (1stedn, OUP 2018)

¹⁷ *ibid* 74

¹⁸ *ibid* 5

refugees in Africa¹⁹ and arrived on conclusions somehow similar with **Crisp**.²⁰ They contend the complexity of refugee problems, limited host states capacity, lack of equitable burden sharing, and global North's refugee restrictive policies compelled many African states to close their borders to asylum seekers and expel refugees.

Carciotto and D'Orsi incidentally mentioned that article II (3) of 1969 OAU Convention is a pivotal one by broadening non rejection applies to asylum-seekers within the country of refugee or at the border. But, except the few with open door policy and practice of local integration, many African countries do not comply with *non-refoulement*.²¹ **Hofmann** analyzed African states refugee protection practice.²² He contends the most important African contributions to the development of international refugee law are; extension of refugee definition, broadening *non-refoulement*, and emphasis on voluntary repatriation. He concludes that most African states comply with their *non-refoulement* obligation.

Reports of Amnesty International, Human Rights Watch, UNHCR and US State Departments played a tremendous role for this paper as they come up with detailed cases of *refoulement* in Africa. Because, many of the writers herein before (but not all) addressed *non-refoulement* incidentally while dealing either the general refugee situation²³ or analyzing the laws.²⁴ Even those exclusively dealing on *non-refoulement* addressed one scenario of *refoulement* like asylum denial,²⁵ expulsion due to mass influx or national security protection. Few are written many years

¹⁹ Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (1999) UNHCR New Issues in Refugee Research Working No.5 <http://www.unhcr.org/3db9636c4.pdf> (accessed 22, February 2019)

²⁰ Crisp, (n10)

²¹ Sergio Carciotto and Cristiano D'Orsi, 'Access to Socio-Economic Rights for Refugees: Comparison Across Six African Countries (March 2017) The Scalibrini Institute for Human Mobility in Africa http://sihma.org.za/wp-content/uploads/2017/03/Access-to-socio-economic-rights_refugees.pdf (accessed 17 February 2019) 17

²² Rainer Hofmann, 'Refugee Law in the African Context' (1992) 52 Heidelberg J Intl L 318

²³ Carciotto and D'Orsi (n21)

²⁴ Sharp (n16)

²⁵ D'Orsi (n15); see also Rutinwa (n19)

ago which doesn't reflect the current practice of states.²⁶ Therefore, this work covers both the legal framework and current states practice and is not specific to one scenario of *refoulement*.

1.4. Objective of the Research

1.4.1. General Objective

The main objectives of this research are to:

- Draw on lessons from experience of African countries that are relevant to Ethiopia.

1.4.2. Specific Objective

- Critically scrutiny the legal framework governing *non-refoulement* under international and regional refugee and human rights laws;
- Comparatively analyze the current laws and practice of African countries *non-refoulement* obligation compliance.

1.5. Research Questions

- Does the laws and practice of African states currently comply with their *non-refoulement* obligation under international and regional refugee and human rights instruments?
- 'Who are and to what extent' the beneficiaries of *non-refoulement* under international refugee and human rights laws and regional instruments of Africa?
- Is there any lesson/s that can be drawn for Ethiopia from African countries experiences to comply with its *non-refoulement* obligation?

²⁶ Hofmann (n22)

1.6. Significance of the study

Humanity doesn't have a territory. Whenever states deny asylum-seekers access to their territory or return genuine refugees to a place where they may face persecution, they are subjecting them at least for triple, utmost for double violation of human rights. The trauma they faced in their home country added with harsh conditions encountered in their long desperate journey of seeking safe heaven countries, fuelled by pushback's in the host/destiny state will exacerbates refugees' vulnerability and puts them in hell like situation. Thus, this dehumanization of refugees by states must be condemned, recorded, and exposed to the international community not to repeat such mistakes and to teach others. Therefore, this paper aims to contribute to this area by;

- Documenting *non-refoulement* implementation in Africa and recommending best way out for Ethiopia and others;
- Pointing out the legislative frameworks governing *non-refoulement* under international and regional refugee and human rights instruments.
- Serving as input for further research in the area.

1.7. Methodology

This paper is going to be a comparative study. It makes comparison of three African states laws and practices on *non-refoulement*. The countries are; Kenya, S. Africa, and Cameroon. The author believes these states represent the current practice of the continent. The following criteria's had been chosen for comparison. Domestic measures taken including changes made on legal and policy framework to welcome asylum seekers, establishment of fair, efficient and transparent refugee status determination procedure (including UNHCR involvement) and review mechanism, absence of prosecution or deportation for illegal entry, *prima facie* recognition in time of mass influx, and out-of-camp policy allowing asylum-seekers/refugee freedom of movement; durable solutions devised especially for protracted refugees including local integration, resettlement, and an informed voluntary repatriation based on solely refugees consent; and incidents of expulsion and their causes *inter-alia* donor fatigue, lack of burden sharing, mass influx, and security problems.

This is mainly a doctrinal research employing qualitative methods basically analysis and review of existing literatures, legal rules, decisions of courts, and reports of different organs from comparative and evaluative point of view. In addition, different books, journals, published articles, researches, conference papers, and internet sources are consulted in order to supply up to date information. Empirical outcomes of secondary data collected by UNHCR, Human Rights Watch, Amnesty International, and US Department of state are systematically amassed, analyzed, and compared based on the aforementioned grounds. In the interest of precision and time constraint non doctrinal techniques are not employed in this paper. But, my advisor's expertise knowledge on Africa refugee situations will give us the opportunity to look the problem from the insider point of view.

1.8. Organization of the study

This paper consists five chapters divided into section and sub-sections. Chapter one is destined for introduction. Chapter two analyzes the scope and beneficiaries of *non-refoulement* under international refugee and human rights instruments followed by regional instruments of Africa. Chapter three extensively examines the laws and practices of three African states *non-refoulement* compliance. Chapter four compendiously dissects Ethiopian refugee laws and practices. Finally it will wind up with conclusions, recommendations and lessons for Ethiopia under chapter five.

CHAPTER TWO

NON-REFOULEMENT UNDER INTERNATIONAL LAWS AND REGIONAL INSTRUMENTS OF AFRICA

2.1. Introduction

The customary *non-refoulement* principle prohibits expulsion, return, sending (*refouler*) of a person to a territory where their lives or freedom is at real risk of persecution. *Non-refoulement* is derived from a French term called '*refouler*' meaning 'to send back', or 'to put, or bring back to the former place'.²⁷ This principle is a matter of life and death for refugees and a back bone of international refugee laws.²⁸ It's the 1933 Convention Relating to the Status of Refugee first brought *non-refoulement* under international law realm. However, it was ratified by few countries. Then, the atrocities committed by Nazi regime during World War II and subsequent state refusal to open their doors and welcome thousands of refugees fleeing war/persecution marked a breakthrough calling the international community to establish the principle under international law as a commemoration.²⁹

Today, this principle is enshrined under many international refugee and human rights instruments. Therefore, in this chapter *non-refoulement* under the 1951 Convention/its 1967 Protocol, its exceptions and extra-territorial application were scrutinized. Strenuous effort is made to illuminate the principle under human rights instruments, mainly ICCPR and CAT. *Non-refoulement* as a rule of international custom also meticulously analyzed. Finally, regional instruments of Africa analyzed in detail.

²⁷MerriamWebsterOnlineDictionary,(10thedition)<:<http://www.mw.com/cgi-bin/dictionary?book=Dictionary&va=return>>

²⁸ UNHCR 'Note on Non-Refoulement' (1977)

²⁹Loyd Marcel Minka, 'Implementation of the Principle of Non-Refoulement in Africa. Protection of the Rights of Refugees in Situation of Massive Influx', (Postgraduate Research Paper, 2017)

2.2. International Refugee Instruments

2.2.1. The 1951 Refugee Convention and Its Protocol

The principle that it is fundamentally wrong to push back refugees to a territory where their life/freedom would be at real risk of persecution found its best expression under the 1951 Refugee Convention. Article 33(1) mesmerizingly states:

‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.’³⁰

Non-refoulement protection under article 33 applies to ‘any person’ who fulfils refugee definitional threshold and who doesn’t fall under the exclusion clause.³¹ Refugee is defined as:

‘Any person who... owing to a 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/her nationality and is unable or, owing to such fear, unwilling to avail him/her self of the protection of that country; or who, not having a nationality and being outside the country of his/her habitual residence is unable or, owing to such fear, unwilling to return to it.’³²

Thus, delivering an individual who have the right to be recognized as refugee to his/her persecutors is what we call *refoulement*. Any person who falls under refugee definition becomes

³⁰ The 1951 Convention (n2) article 33(1)

³¹ The following persons are excluded from refugee status determination though they fulfill refugee definition;

- Those receiving protection from a UN agency other than UNHCR (1951 Convention, Article 1D, Paragraph one); or
- Those recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (1951 Convention, Article 1E); or
- Those who have committed certain serious crimes listed under 1951 Convention, Article 1F. (as cited in UNHCR Advisory Opinion on Extra Territorial Application of Non- Refoulement Obligation under the 1951 Convention and Its 1967 Protocol (2007))

³² The 1951 Convention (n2) art 1A(2) (as amended by art I(2) of the 1967 Protocol)

a refugee as soon as it has satisfied the threshold despite he/she is not recognized as refugee by domestic law or his status not yet determined.³³ Because, refugee status determination has only declarative effect and a mere recognition does not make any person refugee, rather a person is recognized as refugee because he/she is a refugee.³⁴ Therefore, *non-refoulement* protection extends not only for recognized refugee, but also includes those whose status is not yet determined or asylum-seekers.³⁵

The wordings prohibiting *refoulement* ‘in any manner what so ever’ under art 33(1) redolently suggest expansive interpretation of the principle to include all scenarios of forcible removal of a person. *Inter alia*; expulsion, deportation, non-rejection at the border, informal transfer or renditions falls under the prohibition.³⁶ Whether extradition falls under the prohibition/not is obscure.³⁷ But, one may argue the general rules of treaty interpretation which vindicates; ‘the wordings of a treaty must be interpreted in line with the object and purpose of a treaty and in the context of the provisions of a treaty as a whole’ supports such expansive interpretation of the prohibition to include extradition.³⁸

Many commentators contend there is no general right to seek and acquire asylum under the 1951 Convention.³⁹ However, this must not interpreted as allowing states to deny asylum-seekers access to their territory, rather states were required to adopt measure short of direct/indirect *refoulement*. In such scenario, granting temporary protection, or sending them to safe third countries, or granting refugee status under certain circumstance recommended.⁴⁰

Conversely, Goodwin-Gill and McAdam were of the view that ‘by and large, states in their practice and recorded views have recognized that *non-refoulement* apply the moment at which

³³ UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, (2011), Para. 28.

³⁴ UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status (1979)’ (Geneva 1992) Para 28

³⁵ UNHCR EXECOM Conclusion No.6 (XXVIII) ‘Non-Refoulement’ (1977) Para.(c)

³⁶ Lauterpacht and Bethlehem (n8)112

³⁷ *ibid*

³⁸ The 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S.33, entered in to force 27 January 1980 (hereinafter ‘1969 VCLT’) art. 31(emphasis added)

³⁹ D’Orsi (n15); see also P. Weis ‘The Refugee Convention, 1951: The Travaux Préparatoires Analyzed with a Commentary’ (CUP 1995)342

⁴⁰ UNHCR(n31)3

asylum-seekers present themselves for entry either within a state or at its border'.⁴¹ In addition, though not binding, the rights of all persons to seek and enjoy asylum from persecution in every country is explicitly guaranteed under UDHR.⁴² Thus, today compliance with *non-refoulement* requires states at least to ensure temporary admission of asylum-seekers in their territory and conduct fair and effective refugee status determination. To assess on case by case basis the individual situation of the refugee and policy and practice of country of return.⁴³ Furthermore, decision to return/deny asylum must be reviewed before an independent and impartial body.⁴⁴

Article 33(1) not only prohibits sending refugee to his/her country of origin or habitual residence in case of stateless person, but also includes 'chain' or 'indirect' *refoulement*. This occurs when host state expelled asylum-seeker/refugee to third transit country where there is high probability the latter transit country may send the refugee to another state/territories where there is a real risk of persecution.⁴⁵ The wordings 'to the frontiers of territories' under article 33(1) is also worth mentioning. Article 33(1) does not specifically mention 'states' or 'countries' instead it prohibits removal to the 'territories' of any other states. Thus, the legal status of receiving territory/state is immaterial to determine state responsibility and *refoulement* to independent territories under other treaties can also fall under the prohibition.⁴⁶

A. National Security Exceptions

Non-refoulement under the 1951 Convention is not absolute. Article 33(2) underscores exceptional scenarios relieving member states from obeying *non-refoulement* obligation. It states:

⁴¹ Guy s Goodwin-Gill and Jane McAdam, 'The Refugee in International Law (3rd edition) OUP (2007) 208, (cited in Sharp (n16))74

⁴² UNGA, 'Declaration on Territorial Asylum', 14 December 1967, A/RES/2312(XXII), Art 1

⁴³ UNHCR EXECOM Conclusion No. 81 (XLVIII) ('General', 1997), Para. (h); see also UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, Para. 4–5

⁴⁴ UN Human Rights Committee, General Comment No. 31, on Article 7, 10 March 1992, Para 15

⁴⁵ Lauterpacht and Bethlehem (n8)121-122; see also Weis (n39)341.

⁴⁶ For instance, under WTO legal regime, 'independent custom territories' can be members to WTO independently from the country where they situate.

‘The benefit of [Article 33(1)] 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/she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’⁴⁷

As we see from the wordings of this provision, the danger must be prospective one, i.e. what matters is the future conduct of the refugee unlike his past conducts, but his past conducts may be taken as material evidence to determine his future conduct.⁴⁸ The threat also must be directed towards the security of host state. Threat to other countries/international community even does not seem to fall under the exception. This kind of interpretation is in line with absolute versions of *non-refoulement* under human rights instruments in which refugees’ conduct is irrelevant to give protection.⁴⁹ However, the humanitarian character of *non-refoulement* rebuffs such kind of expansive interpretation.⁵⁰

Article 33(2) does not explicitly mentioned what kind of acts fall under the exception and the necessary proof required. The only requirement stated is there must be ‘reasonable ground’. This opens a door for many countries to manipulate this fundamental principle by *refouling* genuine refugees under the guise of national security protection, especially after 9/11 horrific tragedy. Lauterpacht and Bethlehem contend, ‘due to the fundamental and humanitarian nature of the principle, the alleged future danger must be very serious one and the threshold applied must be higher than those grave and heinous crimes listed under article 1F of the 1951 Convention’.⁵¹ In addition, authorities assessing the future danger must be genuine enough and corroborated with conclusive material evidence.⁵²

UNHCR is of the opinion that due to the irreparable consequences of returning refugees to places where they face persecution, application of the exception requires utmost care by considering all circumstances of the case.⁵³ Article 33(2) exception is a counterbalancing measures allowing states to compromise impact of pushing-back refugee to persecution *vis-à-vis* their national

⁴⁷ The 1951 Convention (n2) Art 33(2)

⁴⁸ Lauterpacht and Bethlehem (n8) 135

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ *ibid* 136

⁵² *ibid* 135

⁵³ UNHCR (n1)

security protection from perils posed by refugees. Thus, proportionality must be the bench mark to counterbalance the two competing interests.⁵⁴ However, if the decision to *refouler* refugee ends up in risking him/her to torture or cruel, inhuman or degrading treatment or any other non-derogable rights under human instruments the refugees' interests must be weighed and states must obey the principle strictly.⁵⁵

This restrictive interpretation can also be inferred from reluctance of many countries on the inclusion of article 33(2) during 1951 Convention's preparatory work. Countries like USA and France were against the exceptions inclusion, lambasting it as inhuman and contrary to the convention which impairs this fundamental principle.⁵⁶ Left leaning countries like UK, Switzerland, and Israel were hesitant to relinquish their right of pushing-back aliens exceptionally.⁵⁷ Therefore, article 33(2) is an exception and exception must be interpreted restrictively not to counter balance the essence and significance of this fundamental principle. States must be meticulous, vigilant, and act in good faith while assessing whether the individual fall under the exceptions or not.

B. Extra-Territorial Application of Non-Refoulement

The territorial scope of *non-refoulement* under article 33(1) is nebulous. The only geographical indication stated is 'restriction on territories where the refugee may not be sent to, but the exact territory from where the refugee is sent' is not specifically stated.⁵⁸ In *Sales Case*, US Supreme Court held that article 33(1) is applicable only to persons within US territory.⁵⁹ Conversely, UNHCR contends; *non-refoulement* obligation applies wherever a state exercises jurisdiction, *inter alia* at the frontiers of their territory, on high seas or on other states territory.⁶⁰

It is a general rule of treaty interpretation that the meaning of a treaty provision is established by a perusal of their ordinary meaning employed in light of their 'context', 'object and purpose' of the treaty. Subsequent 'state practice' and relevant 'rules of international law' also play a

⁵⁴ Weis (n39)342

⁵⁵ Lauterpacht and Bethlehem (n8)139

⁵⁶ Weis (n39)233-235

⁵⁷ *ibid*

⁵⁸ UNHCR (n31)12

⁵⁹ *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. HCC, Inc., et. al.*, 509 U.S. 155 (1993).

⁶⁰ UNHCR Advisory Opinion (n31)12

breathhtaking role.⁶¹ Thus, ordinary meaning of the term ‘*refouler*’ is to ‘send, or ‘put’, ‘bring’ back to a former place.⁶² It follows that, extra-territorial application of *non-refoulement* is clear from this terms and any restrictive interpretation of the prohibition only to states conducts within their territory can besets the importance of the principle. If the drafters have intended such restrictive application they would have stated it in unambiguous way.⁶³ Such restrictive interpretation is also inconsistent with 1951 Convention and its Protocol humanitarian objects and purpose.⁶⁴

Different international refugee and human rights instruments, regional refugee and human rights instrument adopted after the 1951 Convention and UNHCR EXECOM Conclusions can be taken as indications of subsequent state practice.⁶⁵ However, none of these instruments imposed a restriction on the application of the principle only to conducts of states within their national territory.⁶⁶ UNHCR’s EXECOM has eloquently stated the overarching importance of the principle, irrespective of the fact that the refugee is within the territory of a state or not.⁶⁷ For instance, in its Conclusion No. 15 is has stated: ‘it is the humanitarian obligation of all coastal states to allow vessels in distress to seek heaven in their waters and to grant asylum, or at least temporary refugee, or persons on board wishing to seek asylum.’⁶⁸

International refugee and human rights laws are complementary to one another, because ‘the rights of refugees and basic human rights are highly intertwined. Today’s human right abuse is the cause for tomorrow’s refugee movement.’⁶⁹ Thus, attention must also be paid to developments under human rights instrument, while interpreting article 33(1) *ratione loci*. It follows that, extra-territorial application of human rights obligations is ostensible from hectic

⁶¹ The 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S.33, entered in to force 27 January 1980; art 31(1) & (3) (hereinafter 1969 VCLT)

⁶² UNHCR (n31)12

⁶³ *ibid* 13-14

⁶⁴ *ibid* 14

⁶⁵ *Inter alia*; ICCPR, CAT, and 1969 OAU Convention.

⁶⁶ UNHCR (n31)14

⁶⁷ Conclusion No. 22 (XXXII) ‘Protection of Asylum-Seekers in Situation of Large-Scale Influx’ (1981), at II.A.2; see also Conclusion No. 53 (XXXIX) ‘Stowaway Asylum-Seekers’ (1988), Para. (1) (cited in UNHCR (n31))15

⁶⁸ Conclusion No. 15 (XXX) ‘Refugees Without an Asylum Country’ (1979) Para (c)

⁶⁹ Amnesty International ‘Refugees: Human rights have no borders’ AI Index: ACT 34/03/97.

jurisprudence and decisions of international and regional human rights treaty bodies, and ICJ.⁷⁰ Human rights committee has numerous stated: ‘member states were under obligation to respect and ensure the rights laid down in the covenant to any person under their effective control, though the person is not within their territory’.⁷¹ To sum up, irrespective of their knowledge, states were responsible not only for push-backs committed/omitted in their territory, but also for acts/omissions of their agents (military/civilian) outside their territory either it be at the frontier, high sea, or in the air.⁷²

2.3. International Human Rights Instruments

2.3.1. ICCPR

A complementary form of *non-refoulement* to the 1951 Convention is established under ICCPR. ICCPR prohibits sending a person to a place where he/she may faces real risk of human rights violation, most importantly arbitrary deprivation of life,⁷³ or torture or other cruel, inhuman or degrading treatment or punishment.⁷⁴ *Non-refoulement* under ICCPR is absolute one allowing no exceptions to it.⁷⁵ The prohibitions are stated in the form of rights, entailing positive obligation on state parties to enact legislations and take other necessary measures to safeguard any one from human rights violations.⁷⁶ Though its provisions do not explicitly stated *non-refoulement*, Human Rights Committee concludes *non-refoulement* is implied from ICCPR provisions.⁷⁷

Furthermore, article 13 states: ‘anyone who is lawfully within a territory of state shall not be expelled from that state without due process.’ Thus, protection under ICCPR applies to any person within the territory of the state/under its control or legal status of the individual is irrelevant, it applies to everyone whether he/she is asylum seeker/refugee, national/alien, stateless/migrant.⁷⁸ ICCPR also prohibits indirect *refoulement*.⁷⁹ Human Rights Committee

⁷⁰*Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) ICJ Gen. List No. 131, Para 111; See also Committee against Torture, ‘Conclusions and Recommendations concerning the second report of the USA’, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006 Para 20.

⁷¹ General Comment No. 31 on the ‘Nature of the General Legal Obligation on States Parties to the Covenant,’ U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, Para 10

⁷² UNHCR (n31)19

⁷³ ICCPR (n6) art 6

⁷⁴ *ibid* art 7

⁷⁵ *ibid* art 4(2)

⁷⁶ CCPR General Comment No. 20, Para. 2

⁷⁷ *ibid* Para 9

⁷⁸ General Comment No. 31, Para 10

⁷⁹ *ibid* Para 12

emphasized that states were prohibited to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which 'removal is to be effected or in any country to which the person may subsequently be removed'.⁸⁰

Therefore, it is non-derogable right applicable in all scenarios⁸¹ and even measures taken to protect national security, terrorism,⁸² and armed conflict could not absolve state responsibility.⁸³ Order from superior/public authority could not be invoked as a justification or extenuating circumstances for violations under article 7.⁸⁴

2.3.2. CAT

Prohibition of torture is a customary international rule and attained peremptory /jus cogens norm status.⁸⁵ Article 3(1) of the Convention Against Torture (CAT) underscores this absolute *non-refoulement* version stating: '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.' CAT's scope of protection is narrower than ICCPR, because the prohibition only relates to torture. Committee Against Torture has reiterated absolute nature of *non-refoulement* under CAT, even in time of national security threats.⁸⁶ The prohibition under CAT also extends to indirect *refoulement*.⁸⁷

CAT's article 16(2) blurrily gives prominence to international and national laws over CAT. Cumulative reading of this provision with 1951 Convention's national security exception may infer that derogation from article 3 of CAT is allowed. However, this pseudo interpretation can create ironic grotesque emasculating absolute prohibition of torture. Because, allowing states to subject individuals to torture negates the very importance of the prohibition. That is why Human Rights Committee prohibits making reservation on torture.⁸⁸ Rather, CAT's *travaux préparatoires* seems to imply pen holders of article 16(2) intended to open up room for

⁸⁰ General Comment No. 20 Para 9; see also General Comment No. 31 Para. 12

⁸¹ General Comment No. 29 Para 11

⁸² *Alzery v. Sweden* (2006) Human Rights Committee Decisions U.N. Doc. CCPR/C/88/D/1416/2005

⁸³ General Comment No.31

⁸⁴ General Comment No.20

⁸⁵ *Prosecutor v Delalic* (Judgment) ICTY (16 November 1998) Para 454

⁸⁶ *Agiza v. Sweden* (2005) Committee Against Torture U.N. Doc. CAT/C/34/D/233/2003/2005

⁸⁷ Duffy Aoife, 'Expulsion to Face Torture? Non-refoulement in International Law', (2008 IJRL)380

⁸⁸ General Comment No.20

application of international/national instruments with better protection than CAT.⁸⁹ CAT and ICCPR include more post-return obligation than 1951 Conventions. HRC stated that whenever a state is culpable of *refoulement*, it must make adequate compensation and guarantee non-repetition.⁹⁰

2.4. Customary International Law

One of the sources of international law under article 38(1)(b) of ICJ statute is ‘International custom’.⁹¹ Two requirements must be met for a certain rule to become an international custom i.e. consistent state practice and *opinio juris*. This happens when a state consistently adheres to a certain practice out of a sense of legal obligation.⁹² Thus, human rights *non-refoulement* provisions, basically prohibition of torture and arbitrary deprivation of life incontrovertibly attained customary international law status.⁹³ The prohibition on return to face cruel, inhuman or degrading treatment or punishment is in the process of becoming customary international law at least regionally.⁹⁴ Human Rights Committee prohibited making reservation on covenant/optional protocols provisions forming part of customary international law and a fortiori peremptory norm.⁹⁵

However, whether *non-refoulement* under international refugee law constitutes a customary international law is contentious. *Inter alia*, continuous state practice of refugee *refoulement* leads many to question the principle taking states’ defiance as indication of new norms emergency allowing *refoulement*. But, ICJ stated: ‘in order to deduce existence of customary rule, state conduct in general must be consistent with the rule and any acts of states which contravenes this rule must not be taken as an indication of the emergency of new rule, rather it is a breach to the existing rule.’⁹⁶ Even persistent objectors of the rule if relied on the exceptions as a justification

⁸⁹ Aoife (n87) 378

⁹⁰ *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, UN Human Rights Committee, 15 June 2004, 6.1

⁹¹ The Statute of the International Court of Justice (1945) article 38(1)

⁹² *Continental Shelf Case (Germany v Denmark and Netherlands)* (Judgment) (1969) ICJ Reports, Page 3, Para 74; See also *Nicaragua Case (Nicaragua v US)* (Jurisdiction & Admissibility) (1984) ICJ Reports, page 392, Para.77

⁹³ Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, (1994), Para. 8

⁹⁴ 1984 Cartagena Declaration, Section III(5)

⁹⁵ HRC (n 93)

⁹⁶ *Nicaragua Case (Nicaragua v US)* (Merits) (1986) ICJ Reports, page 14, Para. 186.

for their failures, their perception must be taken as confirming the rule rather than emasculating it.⁹⁷

UNHCR and notable writers vividly stated *non-refoulement* under 1951 Convention and international human rights instruments fulfills international customs threshold.⁹⁸ UNHCR based its conclusion on the practice of non signatory states to 1951 Convention/its 1967 protocol (such as India, Thailand, Bangladesh, and Pakistan) welcoming large number of refugees, even in times of mass influx.⁹⁹ In addition, while supervising practical application of *non-refoulement*, UNHCR noted that most states (both parties/non parties) adhere to this principle believing it as a binding rule. This tacit acceptance can also be inferred from numerous state responses to UNHCR's representations as a justification in cases where states actually returned or intended to expel refugees.¹⁰⁰

Ostensive differences existing on the scope of the principle under international instruments makes things more obscure to establish the exact version and scope of the rule attaining customary international law status. But, this can be avoided by distinguishing the customary principle as developed under international refugee law allowing exceptions vis-à-vis its absolute versions under human rights instruments. Thus, exceptions under international refugee law cannot be applied if the scope of prohibition is on torture, or cruel, or inhuman, or degrading treatment, or other non-derogable customary norms under human right law.¹⁰¹

Though it is contentious, UNHCR's EXECOM contends that *non-refoulement* is acquiring the status of *jus-cogens* norm progressively.¹⁰² *Jus cogens*/peremptory norms of general international law are norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and can be modified only by a subsequent norm of

⁹⁷ *ibid*

⁹⁸ UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law', Response to the Questions posed to UNHCR by the FCC of the F.R. of Germany in cases 2 BvR 1938/93; See also G. Goodwin-Gill, *The Refugee in International Law*, (2nd edition) OUP (1996), pp. 167–171; see also Lauterpacht and Bethlehem(n8) Para 193–219.

⁹⁹ UNHCR (n31)7

¹⁰⁰ *ibid*

¹⁰¹ Lauterpacht and Bethlehem (n8) 149-150

¹⁰² UNHCR EXCOM Conclusion No. 25 (XXXIII) 'General' (1982) Para (b)

general international law having the same character.¹⁰³ Furthermore, peremptory norms of international law prevail over treaty provisions.¹⁰⁴

To sum up, *non-refoulement* is enshrined under the 1951 Convention, ICCPR, CAT and other human rights instruments and out of 206 world states 146, 172, and 164 respectively were members to this treaties. *Non-refoulement* is also recognized under different UNHCR Conclusions, declarations, regional instruments and most importantly UNGA Resolutions.¹⁰⁵ GA Resolutions can be taken as indication of state practice. Because, all UN member states represented in this body and each state has one vote. Decisions are passed by 2/3 majority vote on important questions and majority vote in other questions.¹⁰⁶ It is majority of international community interest manifested whenever Resolutions prohibiting *refoulement* passed. Thus, today incontrovertibly the principle has attained international custom status and even non members to aforementioned treaties bound by it.

2.5. Regional Instruments of Africa

The 1969 OAU Refugee Convention is a relatively short regional instrument governing issues of refugees in Africa, with 15 provisions only. Almost 46 African countries out of the 55 have signed and ratified it. The African Union and its Member States are marking its 50th anniversary in 2019. As its objective and title redolently suggest, the 1969 Convention is enacted to address only the specific aspects of African refugee problems which were not specifically addressed under the 1951 Convention.¹⁰⁷ It follows that, many of its provisions were full of unique triumphs and innovations which were not known in the history of international refugee law. Therefore, in this sub section these innovations compendiously scrutinized. Finally, illumination of *non-refoulement* under the African Charter will be made.

¹⁰³ The 1969 VCLT (n61) art.53

¹⁰⁴ *ibid* art.64

¹⁰⁵ UNGA has endorsed the 2001 Declaration of States party to the 1951 Convention and/or 1967 Protocol and acknowledged ‘... the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.’

¹⁰⁶ Charter of the United Nations (1945) article 18

¹⁰⁷ The 1969 OAU Convention (n7) nomenclature

2.5.1. The 1969 OAU Convention, Its Triumphs and Innovations

A. Broadens Refugee Definition

Among its innovations, the most gloss championing breakthrough, the very celebrated lineament achievement catching international community's attention is its expansive refugee definition under article I(2). It encompasses two refugee definitions. Article I(1) reiterates the 1951 Convention refugee definition, followed by afresh additional definition under article I(2) which states:

*'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'.*¹⁰⁸

Scintillatingly, cognizant of the continents main cause for refugee movements, persons fleeing armed conflict were recognized as refugees. Thus, today many of African countries domestic legislations include both definitions.¹⁰⁹ Article I(2) establishes an objective requirement dependent on situations in the country of origin, rather than emphasizing on individual fear of persecution.¹¹⁰ Unlike 1951 Convention, elements of intentionality and non discrimination were non-existent. Scholars such as Okoth-Obbo contend this definition is broad enough to include protection in situations of mass exodus/mass-influx (inherent in Africa due to internal conflicts and strife's) and prima facie/'at first sight' recognition of refugees or group RSD.¹¹¹ Furthermore, using the same language of article I(2) UNHCR EXECOM concludes that the 1951 Convention must be expansively interpreted to cover mass influx situations.¹¹²

UNHCR employed both definitions in its operation in Africa, but practically UNHCR and states usually employ article I(2) to recognize refugee.¹¹³ Article I(2) is a base for 1984 Cartagena Declaration's adoption which suggest the traditional broadened refugee definition in Latin

¹⁰⁸ 1969 Convention (n7) art I(2)

¹⁰⁹ Sharp (n16)35

¹¹⁰ ibid

¹¹¹ Okoth-Obbo, G. 'Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugees Problems in Africa.' (2001) RSQ, 20: 79-138(cited in D'Orsi and Carciot (n21))13

¹¹² M. Sharp, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions'(McGill Law Journal 2012)103

¹¹³ ibid

America to include: ‘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’.¹¹⁴

B. Advancing Individual Right to Asylum?

An individual right to asylum is non-existent under the 1951 Refugee Convention. Even UDHR, albeit acknowledges rights of individuals to ‘seek and enjoy’ asylum, falls short of establishing the right of any individual to obtain asylum. The 1981 African Charter is an eye opener by recognizing for the first time the ‘right to obtain asylum’ in a binding instrument. It stipulates that: ‘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.’¹¹⁵ Despite its recognition under the African Charter, the traditional international law trend bestowed granting of asylum to be within exclusive discretion of sovereign states. Thus, it is ostensible that today there is no state obligation to grant asylum. By and large individuals have no right to asylum corresponding to their UDHR right to ‘seek and enjoy’ asylum.¹¹⁶

The same logic of regarding asylum grant an exclusive right of state seems followed under 1969 OAU Refugee Convention, though it considerably ‘strengthens the institution of asylum’.¹¹⁷ It states:

‘Member States of the OAU shall use their best endeavors consistent with their respective legislations 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 nationality.’¹¹⁸

Unlike the African Charter, the wording of art II of the 1969 OAU Convention which urges states to ‘use their best endeavors to grant asylum’ is stated as recommendation.¹¹⁹ Thus, intentional avoidance of mandatory language apparently confirms at least absence of state

¹¹⁴ *ibid*

¹¹⁵ African (Banjul) Charter on Human and Peoples’ Right (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) (hereinafter ACHPR) art 12(3)

¹¹⁶ Goodwin-Gill and McAdam (n41)358(cited in Sharp (n16))71.

¹¹⁷ Hofmann (n22) 324

¹¹⁸ 1969 OAU Convention (n7) art II(1)

¹¹⁹ Sharp (n16) 71

obligation to grant asylum, and utmost individuals cannot enforce it as of right against a state when asylum is denied.

Conversely, in the 1995 Pan-African Conference on assistance to refugees and IDPs held in Bujumbura, OAU concludes ‘the granting of asylum should be considered a responsibility and obligation under international law’.¹²⁰ Finally, the 1969 Convention sanitizes the grant of asylum as a ‘peaceful and humanitarian act’ (reiterating Africa’s long history of ‘open door policy’) that ‘shall not be regarded as unfriendly act by any member state’.¹²¹ To sum up, the 1969 Convention does not establish subjective/individual right of refugee to be granted asylum, rather it strengthens and advances the institution of asylum.¹²²

C. Bolstering Non-Refoulement?

Non-refoulement under the 1969 OAU Refugee Convention seems ostensibly absolute, allowing no exception. Many view it as significantly wider than the 1951 Conventions *non-refoulement*. But, this seems superfluous. Sharp overwhelmingly stated the 1969 Convention do not significantly broadens *non-refoulement* as many scholars posit.¹²³ The 1969 Convention introduced a mixed form of *non-refoulement* stated under article 33(1) of the 1951 Refugee Convention and article 3(1) of the UN Declaration on Territorial Asylum.¹²⁴ It states:

*‘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 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 2’.*¹²⁵

Compared to the 1951 Convention, the 1969 Convention’s *non-refoulement* seems broader at least in two basic instances. Firstly, unlike the 1951 Convention, national security exceptions were non-existent. Due to this, many writers perceived 1969 Convention’s *non-refoulement* as absolute one. However, a careful scrutiny of its whole provisions reveals the reverse. Exceptionally, expulsion is allowed under article I(4)f, I(4)g, and I(5)c of the 1969 Convention.

¹²⁰ Gino J Naldi and Cristiano D’Orsi, ‘The Multi-faceted Aspects of Asylum-Law Applicable to Africa: Analysis for Reflection’ (2004) 36 Loy LA Int’l & Comparative L.Rev 115, 136(cited in Sharp (n16) page 72)

¹²¹ 1969 OAU Convention (n7) art II(2).

¹²² Sharp (n16)72

¹²³ *ibid*

¹²⁴ UNGA Res 2312(XXII) (14 December 1967)

¹²⁵ 1969 OAU Convention (n7) art II(3)

It states: The application of the 1969 OAU Convention (including protection from *refoulement*) ceased to exist if a refugee has committed ‘a serious non political crime outside his country of refuge after his admission to that country as refugee’¹²⁶ or has ‘seriously infringed the 1969 OAU Convention object and purpose’.¹²⁷ Furthermore, ‘acts contrary to OAU’s purpose and principle were additional grounds for exclusion.’¹²⁸ However, a refugee who falls under these exclusions might be protected from expulsion by human rights instruments.

Secondly, 1969 OAU Convention’s *non-refoulement* is broader in that; the prohibition includes ‘rejection at the frontiers’. However, currently states in their practice have placed the global refugee regime with the 1969 OAU Convention threshold.¹²⁹ Goodwin-Gill and McAdam reiterated this as follows:

*‘By and large, states in their practice and recorded views have recognized that non-refoulement applies the moment at which asylum seekers present themselves for entry either within a state or at its border’.*¹³⁰

Today application of the principle globally ‘at the frontier’ is incontrovertible and 1969 OAU Convention in this regard is not broader than 1951 Convention.¹³¹

The 1969 OAU Convention is broader in that it prohibits expulsion to places where the life, physical integrity or liberty of a person would be threatened, while the 1951 Convention enumerates life and freedom only. Thus, ‘liberty’ and ‘freedom’ can be equated to mean the same; afresh addition ‘physical integrity’ a little-bit broadens 1969 Convention’s *non-refoulement* if and only if the attack is directed toward the physical integrity of a person.¹³² Therefore, currently 1969 Convention’s *non-refoulement* is not absolute one and significantly wider than 1951 Convention, rather there exist slightly nuanced differences in the scope of protection textually which states in their practice have abated it.

¹²⁶ *ibid* art I(4)f

¹²⁷ *ibid* art I(4)g

¹²⁸ *ibid* art I(5)c

¹²⁹ Sharp (n16)73

¹³⁰ Guy s Goodwin-Gill and Jane McAdam (n41)208, (cited in Sharp (n16))74

¹³¹ *ibid*

¹³² *ibid*

D. Voluntary Repatriation Emphasized

Even though the concept is enshrined early under UNHCR statute,¹³³ GA Resolution,¹³⁴ and International Refugee Organizations Constitution,¹³⁵ the 1969 Convention remains a harbinger and the only regional instrument which strongly emphasized on voluntariness of repatriation. Article V underscores the necessity of voluntary repatriation, which is a core principle¹³⁶ highly intertwined with *non-refoulement* and asylum. It states: ‘The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.’¹³⁷

It established a tripartite maneuver to conduct safe return of refugees by requiring ‘host state, in collaboration with the country of origin, to make adequate arrangements for the safe return of refugees who request repatriation.’¹³⁸ Whereas, ‘the country of origin, on receiving back refugees, shall facilitate their re-settlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.’¹³⁹ Interestingly, strictly prohibits penalization of refugee upon return for having fled their country.¹⁴⁰ If necessary, it requires a call to return home to be made by the country of origin using news media and OAU, assuring the end of any peril upon return.¹⁴¹ Finally, it mandates ‘country of asylum, country of origin, voluntary agencies and international and intergovernmental organizations to facilitate safe return of refugees’.¹⁴²

E. Unveils Responsibility Sharing

The concept of global responsibility sharing appears in the international arena recently with the adoption of New York Declaration in 2016. The 1969 Convention is an eye opener in this regard and ahead of its time by formally articulating responsibility sharing regionally. It is in 1999 the

¹³³ UNGA Res 428(V) (14 December 1950) Annex, Para 1

¹³⁴ UNGA Res 8(1) (12 February 1946)

¹³⁵ Constitution of the International Refugee Organization(adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3, art 2(1)(a)cited in Sharp (n16)79

¹³⁶ Among the trio ‘Durable Solutions’ of UNHCR, Voluntary Repatriation is the one followed by local integration and resettlement, but not on the top of the hierarchy.

¹³⁷ 1969 OAU Convention (n7) art V(1)

¹³⁸ *ibid* art V(2)

¹³⁹ *ibid* art V(3)

¹⁴⁰ *ibid* art V(4)

¹⁴¹ *ibid*

¹⁴² *ibid* art V(5)

second major responsibility sharing appears regionally when EU start to establish its common asylum system.¹⁴³ Article II(4) encapsulates:

*'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 other 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.'*¹⁴⁴

Thus, financial support, political responsibility sharing, and regional resettlement can be taken as such 'appropriate measures'.¹⁴⁵

F. Temporary Protection Formalized

The humanitarian gift of temporary protection is enshrined under article II(5) which states: 'Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his re-settlement in accordance with the preceding paragraph'. Depending on this, many scholars perceived that the kind of protection established under the 1969 Convention is of limited duration. However, the first three lines clearly envisages that temporary protection is afforded to those refugees who have received asylum, but not the corollary right of residence and the last wordings shows that article II(5) is activating the aforementioned provisions on responsibility sharing. Thus, it is the right of residence, but not the protection temporary under the 1969 Convention.¹⁴⁶

¹⁴³ Sharp (n16)76

¹⁴⁴ 1969 OAU Convention (n7) art II(4)

¹⁴⁵ Sharp (n16)72

¹⁴⁶ ibid 78

2.5.2. African Charter on Human and Peoples' Right

Complementary form to 1969 OAU Refugee Convention's *non-refoulement* is provided under article 5 of the African Charter which prohibits; all forms of exploitation and degradation of human particularly 'slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment' (CIDT). Thus, protection under African charter applies to every person,¹⁴⁷ most importantly to refugees as overwhelmingly restated by the African Commission.¹⁴⁸ It follows that, any refugee unlawfully expelled to face torture, or and CIDT can either himself, or refugee associations and NGOs on his behalf brought individual communication procedure against that state. Furthermore, though article 5 doesn't mentioned death, African Commission's hectic jurisprudence beacons the protection also includes return to face death on equal footing with torture and CIDT.¹⁴⁹

Indirect *non-refoulement* obligation can also be inferred from article 18(1) of the African Charter which states: '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 moral.' Article 18 requires that 'states must abstain from any act which can obstruct the family unit', most importantly 'involuntary displacement and arbitrary separation of family members' is prohibited.¹⁵⁰ To sum up, *non-refoulement* is established under article 5 and 18 of the Charter, whereas its important facet 'asylum' is stated under its multi-faceted article 12, which establishes the rights of every one to seek and obtain asylum when persecuted,¹⁵¹ prohibiting unlawful expulsion of aliens,¹⁵² and protecting aliens from mass expulsion¹⁵³ as discussed somewhere in this chapter.

¹⁴⁷ ACHPR (n115) art 2

¹⁴⁸ *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugee in Guinea) v Guinea* comm. No 294/2002, 20th Annual Activity Report of the Af Cm HRP(2005-06) (African Institute) Para 68 (cited in Sharp (n16))130.

¹⁴⁹ Sharp (n16)132

¹⁵⁰ *Sudan Human Rights Organization \$Center of Housing and Eviction (COHRE) v Sudan* comm. no 279/03-296/05, 45th Annual Activity Report of the Af Cm HRP(2009) Para 214. (Cited in Sharp(n16))132

¹⁵¹ ACHPR (n115) art 12(3)

¹⁵² *ibid* art 12(4)

¹⁵³ *ibid* art 12(5)

CHAPTER THREE

COMPLIANCE WITH *NON-REFOULEMENT* IN AFRICA: LAWS AND PRACTICE OF THREE AFRICAN STATES

3.1. Introduction

On its 32nd ordinary session of the Assembly, African Union (AU) declared 2019 as: ‘The Year of Refugees, Returnees and Internally Displaced Persons: Towards Durable Solutions to Forced Displacement in Africa’. UN Secretary General António Guterres while addressing AU’s Assembly stated that ‘Africa hosts nearly a third of the world’s refugees and internally displaced persons. Despite the continent’s own social, economic and security challenges, Africa’s governments and people have kept borders, doors and hearts open to millions in need’.¹⁵⁴ Thus, in this chapter laws and practices of three African countries dissected with the aim of testing to what extent African states are complying with *non-refoulement* obligation and Guterres averments. The countries are Kenya, South Africa and Cameroon respectively.

¹⁵⁴ AU, The 32nd AU Heads of State and Government Summit Kicks Off 10 February 2019(Director of Information and Communication-African Union Commission, Addis Ababa, Ethiopia)www.au.int

3.2. Kenya: ‘Dadaab Dilemma’ and ‘Somalization of terrorist attack’

Kenya is known for its refugee hospitality for many years. As of September 2019 it hosted 482,442 registered refugees and asylum-seeker mainly from Somalia (260,683), S. Sudan, DRC, Ethiopia, Burundi, Sudan, Uganda, Rwanda, Eritrea, and others. 86% of the refugees live in camps mainly Kakuma and Dadaab (world’s largest camp) and the remaining live in urban areas.¹⁵⁵

Kenya is party to 1951 Convention (and 1967 Protocol), ICCPR, CAT, UDHR, 1969 OAU Refugee Convention, and 1981 African Charter. Article 2(5) and (6) of the Kenyan Constitution domesticates ‘general rules of international law, treaties and conventions ratified by Kenya to become part and parcel of Kenya’s law.’ The 2006 Kenya Refugee Act and 2009 Refugee Regulation established a framework to regulate and register refugees under Department for Refugee Affairs (DRA) auspices which works with UNHCR.¹⁵⁶

Kenya’s law requires anyone who wants to stay in Kenya must apply for asylum before DRA and if UNHCR is there parallel registration undertaken. Illegal entry doesn’t bar asylum-application. Registration is followed by RSD process which can be conducted either on *prima facie* or regular basis. Regular RSD applicants scheduled for interview which may take from six months to two years and RSD Officer conducts the interview. Interview is followed by evaluation of evidence collected during interview maneuver by UNCHR and DRA reviewers and they forward recommendations to DRA who passes final decision either granting or denying asylum. Theoretically any asylum-seeker or refugee has the right to appeal any decisions of DRA to Appellate Board, but not yet established. Minister of Interior will grants *prima facie* refugee status within short period and may revoke it.¹⁵⁷ Until 2016, Somalia and S. Sudan refugees were recognized on *prima facie*.¹⁵⁸

¹⁵⁵ UNHCR, Kenya Registered Refugees and Asylum-Seekers, (September 30 2019), <http://www.unhcr.org> (Accessed 12/16/2019)

¹⁵⁶ Amnesty International, No Where Else to Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya (2016) (available at <http://creativecommons.org/licenses/by-nc-nd/4.0/legalcode> (last visited May , 2019)

¹⁵⁷ Refugee Act, Section 3, 11 and Refugee Regulation, Section 4&30; See also Hanibal Goitom , Refugee Law and Policy: Kenya(Law Library of Congress 2016)<http://www.loc.org>> (accessed 11/12/2019)

¹⁵⁸ Amnesty International(n156)

Section 18 of the Refugee Act *juxtaposes* 1951 Refugee and 1969 OAU Conventions *non-refoulement* protection. Article 21(2) of 2017 Kenya's Prevention of Torture Act also encapsulates *non-refoulement*. DRA removes refugee status whenever there is 'reasonable ground for believing' that individual is no longer a refugee or he/she is not a refugee ab initio. DRA may also *refoule* refugees to protect its national security or public order. Section 16(2)(b) allows the Minister in charge of refugees to designate places/areas/camps where refugees may live by restricting their freedom of movement.

Through time Kenya's open door policy overturned and more restrictive policy especially on Somali refugees started. For instance, in 2007 Kenya closed its boundary with Somalia temporarily and forcefully deported more than 400 refugees.¹⁵⁹ In 2012, high profile terrorist attack by Al-Shabab escalates public and political concern over Somali refugee repatriation. DRA Unveiled suspension of asylum-seekers and refugees registration in urban areas and same restriction started in camps in which new arrivals and those with expired document often arrested and a few deported.¹⁶⁰ In 2014 Kenya amended its 2006 Refugee Act and unveiled 'Structural encampment' policy requiring all refugees to be relocated on specified camps as part of a plan to return them to Somalia.¹⁶¹ Drastically the amendment aims to reduce the number of refugees and asylum-seekers in Kenya to 100.000 putting above 400.000 under limbo. Later on Kenya's High Court overturned this decision for being unconstitutional, violating *non-refoulement* obligation and freedom of movement.¹⁶²

In November 2013, tripartite agreement has been signed between Kenya, Somalia, and UNHCR for voluntary repatriation of Somali refugees. In June, tripartite commission announced the population in Dadaab would be reduced to 150.000 populations at the end of 2016. Dadaab is a home for more than 280.000 refugees, out of whom 260.000 were Somali refugees. Since 2014, repatriation of 68.000 refugees from Dadaab is recorded. The international community including

¹⁵⁹ Human Rights Watch, From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis, 30 March 2009, available at: <https://www.hrw.org/report/2009/03/30/horror-hopelessness/kenyasforgotten-somali-refugee-crisis>

¹⁶⁰ Amnesty International, *No place like home: Returns and relocations of Somalia's displaced*, February 2014, Index AFR 52/001/2014, < <https://www.amnesty.org/en/documents/AFR52/001/2014/en/>>

¹⁶¹ Amnesty International (n156)11

¹⁶² *ibid*; see also Hanibal (n157)

UN, UNHCR, US, EU and its members stubbornly romanticize the repatriation as voluntary one and started to facilitate it, knowing that they may face human right abuse up on return.¹⁶³

Amnesty international questioned voluntariness of the repatriation. Firstly, fearing Somalia's security situation, only 25% of the refugees from Dadaab were willing to go home between July and August 2016. Secondly, Somali refugees has been traumatized and pressured by Kenyan authorities to go home by setting extremely tight return time framework and without providing alternative durable solutions for those who wanted to stay. Authorities boldly ordered Somali refugees in Dadaab to go home and if they failed to do so before the dead line, they will end up in losing their financial support.¹⁶⁴ Furthermore, information's supplied to Somali refugees about the actual security situation of Somalia and return process were scant, obtuse, and in some instances misleading.¹⁶⁵

During repatriation, though Somalia's security situation showed improvement in few areas, still the country is ravaged by armed conflict and civil war. In 2016 Somalia is found among most conflict-affected country in Africa.¹⁶⁶ Returnees repatriated between 2015 and early 2016 and who returned back to Dadaab fleeing abysmal condition in Somalia witnessed existence of wide spread violation of human rights, extra-judicial killings, rape, other forms of sexual violence, abduction, disappearances, forced marriage to Al-shabab, and forced recruitment of children's widely to Al-Shabab, clan militia and national army.¹⁶⁷ There exists rife, unprecedented attack on humanitarian organization and aid workers to the extent preventing UN form deploying its peace keeping mission to Somalia.¹⁶⁸

Somalia is not a position to absorb mass influx of returnees at the time. More than 1.1 million IDP's exist in Somalia, leaving little time for authorities and aid organization to respond properly to returnees skyrocket. Thus, most of the returnees sent to the already under-resourced abysmal

¹⁶³ Thomson Reuters Foundation, Review of the Legal Framework Relating to the Proposed Closure of the Dadaab Refugee Camp and the Repatriation of Somali Refugee (Thomson Foundation, November 2017)<www.nrc.no> (accessed 29 May 2019)

¹⁶⁴ Amnesty International (n156)5

¹⁶⁵ ibid

¹⁶⁶ ACLED,, Conflict Trends (No.55) Real-Time Analysis of African Political Violence, (2017)3<<http://goo.gl/nDXZKA>.>

¹⁶⁷ Amnesty International (n156) 5

¹⁶⁸ UNHCR, Position on Returns to Southern and Central Somalia (Update I), (May 2016)6<<http://www.refworld.org/docid/573de9fe4.html>>

IDP camps.¹⁶⁹ The repatriation even does not take into account vulnerable groups like disables and ethnic minority (like Somali Bantu) if returned conspicuously persecuted.¹⁷⁰ Furthermore, repatriation effectuated at the time Somalia encountered worst catastrophic drought in 20 years resulting in acute food shortage, increased malnutrition and mortality rate following cholera and measles outbreak. 12 areas designated by UNHCR as areas of return where among those areas affected by the catastrophe.¹⁷¹

2016 marked a dramatic shift in Kenya's refugee policy. Firstly, Kenya issued a directive revoking grant of *prima facie* status to Somali asylum-seekers and started to apply individual RSD which may takes up-to 3 or more years. Secondly, it issued controversial directive disbanding DRA and requiring Dadaab and Kakuma's closure 'within the shortest period possible'. Subsequently hastened deadline to effectuate the closure set to be November 2016, but latter extended to May 2017.¹⁷² In February 2017 Kenya's High Court quashed the proposed Dadaab's closure as unconstitutional and act amounting to group persecution targeting Somali refugees which is the clear violation of Kenya's obligation under international, regional, and domestic laws. The court overstated the decision violates *non-refoulement* obligation, individual rights of refugees to fair administrative action, and refugees human rights guaranteed under Kenya's constitution. Finally the court overruled the decision as null and void and ordered DRA's re-establishment to allow and register asylum-seekers and refugees.¹⁷³ But, though Dadaab is not closed, authorities continued to reject registration of new asylum-seekers.

Kenya often raised national security threats, lack of responsibility sharing or aid, and slow pace of support to returnees in Somalia. Kenya's international support insufficiency claim seems a watertight, though it does not absolve its responsibility. For a long period, international community adamantly underfunded appeals for refugees in Kenya. In July 2017, only 21% of UNHR's appeal for refugee in Kenya is delivered.¹⁷⁴ Out of the US\$500 million the international community pledged less than 1% of it is funded.¹⁷⁵ Refugee abusive policy of key Kenya's donors (especially EU and its members) has given leverage to push its adamant policy of closing

¹⁶⁹Thompson Reuters Foundation (n163) 21

¹⁷⁰ *ibid* 23

¹⁷¹ *ibid*

¹⁷² *ibid* 9

¹⁷³ *ibid* 47

¹⁷⁴ *ibid* 27

¹⁷⁵ William Ruto, Deputy President, 'World Humanitarian Summit' Istanbul, (May 2016)

Dadaab. EU and its member states funding policy only to countries (like Turkey) who keeps refugees from reaching Europe and their willingness to abuse refugee at home, and meager responsibility sharing accelerated refugee right protection race to the bottom internationally.¹⁷⁶

Kenya's conflation of refugees with terrorist attack seems myopic conjecture. In 2012 Kenya sent its troops as part of AU mission to Somalia. Subsequently, terrorist attack mostly attributed to Al-Shabab increased in Kenya. Most importantly, after 2013 Westgate and 2015 Garissa University attack causing civilian death, authorities publicly attached refugee community to pay the price for the attacks.¹⁷⁷ In 2014, after horrific Westgate attack Kenya conducted a counter-terrorism operation called 'Operation Usalama' in which thousands Somali refugees detained and subjected to gross human rights violation and hundreds of them forcefully deported. However, there is no clear evidence showing refugees involvement in the attacks, rather refugees are used as 'scapegoats'.¹⁷⁸ The three convicted Garissa attack master minds where one from Tanzania and remaining two were Kenya's own citizens.

In March 2017, a special summit held in Nairobi by IGAD's Assembly of Heads and Governments on Somali refugees, a declaration calling for regional approach adopted reaffirming right to seek-asylum, allow local integration and raise support for their voluntary repatriation.¹⁷⁹ However, these commitments remains a dream as refugees still live in impoverished camps where there freedom of movement curtailed and devoid of self reliance opportunities. Financial support is shrinking from time to time and quest to resume resettlement remained tenuous. No refugee wants to return to Somalia.¹⁸⁰

¹⁷⁶ Amnesty International (n156) 6

¹⁷⁷ Amnesty International (n160) Chapter-4

¹⁷⁸ Amnesty International (n156) 11-12

¹⁷⁹ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia, 23 March 2019 <<https://igad.int/attachments/article/2237/Adopted%20Communique%202nd%20NAP%20Stocktake%20Meeting%20.pdf>> accessed 12/16/2019

¹⁸⁰ Paul Odongo, Shut Out and Forgotten, Refugees in Dadaad Appeal for Dignity (MSF 2019) <https://reliefweb.int/reportkenya> last visited 11/12/2019)

3.3. South Africa: Zimbabwean Asylum-Seekers and Refugees

South Africa is party to 1951 Refugee Convention, 1967 Protocol, 1969 OAU Refugee Convention, CAT, and is the only country which doesn't made reservation to the 1951 Convention from Southern Africa. It established a model legal framework to welcome and treat asylum-seekers humanly in line with aforementioned treaties, UDHR and international law by enacting Refugee¹⁸¹ and Immigration¹⁸² Act in 1998 and 2002 respectively. Preamble of S. Africa's constitution provides: 'S. Africa is a diverse state that belongs to everyone living on it'. Astonishingly, *non-refoulement* in South Africa applies not only for refugees, but to all peoples alike.¹⁸³ S. Africa's Supreme Court of appeal (SCA) overstated, 'deportation to another state that would result in imposition of cruel, unusual or degrading punishment is in contradiction with fundamental values of the constitution.'¹⁸⁴ Thus, *non-refoulement* in S. Africa mirrors constitutional values.

The Refugee Act for-granted anyone who communicates his consent to apply asylum must be given the opportunity to do so and immunity from arrest until all rights, including judicial review exhausted.¹⁸⁵ Department of Home Affairs (DHA) conducts RSD on individual basis without UNHCR involvement. The RSD process must be completed within 180 days of filling asylum-application.¹⁸⁶ DHA's Refugee Status Determination Officer (RSDO) conducts interview and reaches decision either granting/ rejecting-asylum. Adverse decision either reviewed/appealed to independent and impartial statutory administrative tribunals namely; Standing Committee for Refugee Affairs (SCRA) and Refugee Appeal Board (RAB) respectively, followed by judicial review.¹⁸⁷ Refugee Act amended in 2008 to include *inter-alia*, gender as ground for persecution and adjudication of determination claims entrusted to Status Determination Committee, instead of RSDO.

¹⁸¹ Refugee Act Number 130 of 1998[hereafter 'Refugee Act'] Section 6

¹⁸² Immigration Act Number 13 of 2002[hereafter 'Immigration Act']

¹⁸³ Refugee Act, Section 2

¹⁸⁴ *Arwah Abdi v. Ministry of Home Affairs*, [2011] ZASCA 2 (SCA) (15 February 2011)

¹⁸⁵ Refugee Act, Section 21(2)(a) and 21(4) respectively.

¹⁸⁶ Regulation 3(1) of Refugee Act

¹⁸⁷ Refugee Act, Section 24(3), 25 and 26.

South Africa is famous for its out-of-camp policy allowing asylum-seekers freedom of movement; education, work, and access to social service while their application pending. Thus, there is no refugee camp in South Africa. Shortly after its Refugee Act enactment and consecutively onwards, it experienced asylum-seekers spike not only from its neighbors, but from entire Africa and abroad. In 2009/2010 only, it received more than half million asylum-applications, registering one-third of asylum-applications globally. Majority of them are from Zimbabwe (81%), Somalia, DRC, Rwanda, Burundi and Ethiopia.¹⁸⁸

This unabated asylum-application skyrocket added with backlogs plagued its decade long democratic asylum-system to enmesh. As a panacea, its Refugee and Immigration Act have been amended in 2011. The amendment brought austere immigration control at the border. Thus, asylum-seekers without valid travel documents and those who traveled through ‘safe third country’ either denied access to territory or pushed-back. This measures exposed asylum-seekers entering via illegal route to violence and manipulation by nefarious gangs around border. UNHCR booed it as an act amounting *refoulement*.¹⁸⁹ Immigration Amendment reduced asylum-application deadline from 14 to 5 days. But, SCA reiterated absence of time limit to apply-asylum¹⁹⁰ and illegal entry doesn’t exonerate from seeking asylum.¹⁹¹

2002 Immigration Act Section 34(1) empowers immigration officers to arrest and detain/deport illegal foreigners without a warrant. However, North Gauteng High Court ruled Section 34(1)(b) and (d) as unconstitutional violating the rights of arrested/detained and accused persons.¹⁹² In 2017 Constitutional Court confirmed this ruling, stating foreigners detained for being illegal must be brought before competent court within 48 hours of arrest to confirm, quash/extend his/her detention warrant and it gives two years to the parliament to deodorize this defect.¹⁹³

¹⁸⁸ UNHCR Report on South Africa, (2011).

¹⁸⁹ *ibid*

¹⁹⁰ *Ersumo v Minister of Home Affairs & Others* 2012 3 SA 119 (SCA); See also *Ruta v Minister of Home Affairs* 2017 ZASCA 186.

¹⁹¹ *Bula & Others v Minister of Home Affairs & Others* 2012 2 SA 1(SCA).

¹⁹² *Lawyers for Human Rights v Minister of Home Affairs* 2016 45 ZAGPPHC

¹⁹³ Olivia Kock, ‘Aspects of South African Refugee Status Determination Process’ (LLM-Dissertation, University of Pretoria 2018)37

The 1998 White Paper unveiled S. Africa's position not to accept as refugees 'individuals fleeing barely poverty or other social, economic or environmental hazards in their home country'.¹⁹⁴ South Africa stands ahead in Africa by receiving nearly 1.4 million asylum-applications between 2000 and 2016. But, iota of them (nearly 81000) received acceptance. DHA fantasized 95% asylum-applicants are not refugees, but economic migrants.¹⁹⁵ In 2014, to deter economic migrants, DHA started issuing Special Work Permit to South African Development Community country asylum-seekers.

In 2009, almost 158,000 Zimbabwean fresh asylum-applications have been rebuffed dubbing Zimbabweans as economic migrants, but not refugees. DHA issued Zimbabwean Special Permit (ZSP) allowing passport holders only to temporarily work in S. Africa. But, ZSP does not entitle permanent residence. Thus, Zimbabweans without proper documentations systematically deported since 2011, despite UNHCR's averment over dire living conditions in Zimbabwe, risk of statelessness if they stay undocumented, social and legal puzzling and discrimination they may encounter upon return. Zimbabweans fled their country not to seek better life, but to survive. Many deported returned back to S. Africa as the country is still under economic shock/inflation and drought. ZSP holders also stayed under oasis as DHA unveiled their permit will not be renewed upon expiry in 2017, but latter extend until 2020.¹⁹⁶

South Africa vied to achieve a policy of single refugee reception office near Mozambique border to wane illegal/economic migrants. Thus, DHA unilaterally closed Cape Town, Port Elizabeth, and TIRRO Refugee Reception Office's (RRO) in 2010, 2011, and 2016 respectively. SCA declared Port Elizabeth and Cape Town RRO's closure as unlawful and ordered DHA to reopen and resume receiving new asylum-seekers by 1 July 2015 and 31 March 2018 respectively.¹⁹⁷ But, DHA doesn't yet reopened Port Elizabeth, despite its appeal to Constitutional Court in 2015 has been dismissed.

¹⁹⁴ Prepared in relation with the drafting of the 1998 Refugee Act, (cited in Sharp (n16))50.

¹⁹⁵ Lonel Zamfir, Refugee Policies in Africa: Open Borders But Limited Integration (EPRS September 2017)<http://www.europarl.europa.eu/thinkthak>

¹⁹⁶ Kock (n193)44; see also UNHCR (n188)3

¹⁹⁷ *Somali Association for S. Africa & Another v Minister of Home Affairs & Others* 2012 5 SA 634(ECP); See also *Minister of Home Affairs & Others v Scalabrini Centre, Cape Town & Others* 2013 4 SA 571(SCA)

Deterrence of illegal and/economic migrant policy reached its pinnacle when Border Management Authority Bill is introduced in 2015. The Authority/Agency substitute RRO's to control migration at border. The crux of the bill if adopted seems to imply total shift towards encampment policy by establishing border post reception/detention centers/camps while asylum-application pending.¹⁹⁸ Immediate right to work and education debarred and refugees can't apply for permanent residence. Malignant applicants detained and rejected-applicants deported.

High unemployment, income disparity and poor social services embarked public sentiment against foreigners, accusing them for taking their jobs and vying for services. Two major xenophobic backlash targeting mainly African migrants occurred in 2008 and 2015 resulting in massive carnage and maiming of foreigners. Nihilistically migrants burnt alive, their shops looted, dozens raped, and thousands uprooted. In 2008, initially government remains deaf-ear until displacement escalated and international community booted, resulting emergency declaration and army deployment to quash violence. In 2015 government intervened from inception by condemning the attack and restoring law and order. However, the tragedy doesn't ends here; even today migrants routinely killed, face discrimination and alienation at work places, hospitals, schools, and taxis by police, government officials and local community.¹⁹⁹

Though their role and impact is debatable, South Africa experienced hastened mobilization of civil societies, human rights groups, NGO's, migrant and traders associations advocating for refugees and migrants rights and interests. They consistently lambaste governments conspicuous by ones absence to halt xenophobia. South African Human Rights Commission and Consortium for Refugees and Migrants in S. Africa come up with investigative reports condemning government's inability to allay xenophobia and recommendations that must be taken. The 2002 Immigration Act condemned for promoting and institutionalizing xenophobia and racism. Lawyers for Human Rights advocates for refugees using courts. In 2015, 129 African CSOs sent an open letter to African Commission on Human and People's Right to pressure S. African

¹⁹⁸ Kock (n193)38-42

¹⁹⁹Crush J., Tawodzera G., Chikanda, A., Ramachandran, S., & Tevera, D. South Africa Case Study: The Double Crisis-Mass Migration from Zimbabwe and Xenophobia in South Africa (ICMPD 2017) <http://pdf.semanticscholar.org> (accessed 08/8/2019)

government to quell attacks, prosecute spear-headers and protect refugees and migrant rights in its soil. Then, resolution against South Africa has been adopted in 2015.²⁰⁰

To sum-up, even after the amendment, overburdened asylum-applications and backlogs has made RSD process inefficient which does not stretch to inquire individual cases of persecution. DHA often failed to windup asylum-applications within 180 days. Neither the Refugee Act nor the regulation set criteria's to reject asylum-claims and no guidance exists to assist RSDO. Thus, from 2000-2013 deportation of more than two million migrants registered, of whom 42% were Zimbabweans.²⁰¹ Many refugees in need of protection either deported or their claim downplayed. Although government in 2017 announced its plan to issue 1million work permits to passport holder asylum-seekers staying not more than 20years, xenophobia is hinderin]g local integration. Despite improvement in some countries of origin experienced, quest for voluntary repatriation and resettlement remains iota though UNHCR identified nearly 89,300 refugees and 184,200 asylum-seekers as people of concern and working with government to enhance voluntary repatriation and resettlement.²⁰²

3.4. Cameroon: Nigerian Refugees

For decades Cameroon is known for always keeping its door open for refugees and dubbed as heaven for persecuted. As of March 2019, including refugees and IDPs Cameroon has 1,184,074 people of concern to UNHCR, hosting 278,884 Central African and 104,248 Nigerian Refugees.²⁰³ Cameroon is party to main international and regional refugee instruments, basically 1951 Convention, 1969 OAU Convention and ACHPR. Domestically, it has adopted refugee law in 2005 (entered into force by decree in 2011). It law obliges Cameroon to open its territory to register asylum-seekers and prohibits their forcible expulsion.²⁰⁴ In time of mass influx, *prima facie* recognition is guaranteed and authorities can conduct individual RSD latter on.²⁰⁵ Registration of all asylum claims, including granting of refugee status and review of appeal is

²⁰⁰ ibid 65-73

²⁰¹ ibid 17

²⁰² UNHCR Operation: South Africa Regional Office, 2018 Year-end Report(2019)

²⁰³ UNHCR Cameroon Factsheet-March 2019 (available at <http://relief.int/report/cameroon/unhcr-cameroon> (last visited July 3/2019)

²⁰⁴ Law on the Status of Refugees in Cameroon No. 006/2005, Article 2 & 7(1)

²⁰⁵ Organization and Functioning of Refugee Status Management Bodies in Cameroon Decree Number 389/2011, art 12<http://www.refworld.org/publisher,NATLEGBOD.,CMR,4f0efbfb2,0.html>

mandated to authorities.²⁰⁶ Practically, Nigerian refugees in Minawao camp registered by UNHCR on *prima facie* basis.

After 50 years of hospitality, Cameroon started to stain its reputation by adopting forced mass return policy especially Nigerian refugees. Since 2013, in the fight to ostracize Nigeria's 'Boko Haram' from northern Cameroon, army started to see Nigerian refugees as Cameroons security threat. In 2014, UNHCR received reports of pushback. After series of attacks on Cameroons Maroua town in July 2015 and repeated suicide attacks on civilians in 2016 and 2017 by Boko-Haram, pushback's reached climax point. Since 2015, above 100.000 Nigerians living around Cameroon-Nigeria border where summarily deported to Nigeria's destitute, displaced and war-torn Borno state. During *refoulement* soldiers often used disproportionate force causing returnees death including children's and weakened having lived for months/years with food and health care meager. Children's were arbitrarily separated from their families.²⁰⁷

Cameroon is also known for out-of-camp policy for decades, allowing refugees to freely move and live with the local communities.²⁰⁸ Shortly after 2015 Maroua attack, authorities colluded to curtail Nigerian refugee's movement by enforcing firm encampment policy. Authorities' unveiled only Nigerian refugees living in Minawao (the only camp designated for Nigerians) would be considered refugees and get aid, and then consistently blocked new asylum-seekers.²⁰⁹ UNHCR recorded forced return of massive Nigerian refugees who crossed Cameroons border without reaching Minawao. Army deported 12,000 refugees in 2015, above 76,500 in 2016, and 4,402 in 2017.²¹⁰ At least 800 deported between January and July 2018.²¹¹ Almost 9000 refugees who entered Cameroon fleeing Boko-Haram's attack in 2019 deported by authorities after two days escorted by Multi-National Joint Task Force. Next day after army departed Boko-Hakaram

²⁰⁶ *Id*, article 7(2) and 8(1)

²⁰⁷ Human Rights Watch, "They Forced Us Onto Trucks like Animals" Cameroon's Mass Forced Return and Abuse of Refugees 2017 [http://reliefweb.int/report>Cameroon](http://reliefweb.int/report/Cameroon)(last visited July 15,2019)

²⁰⁸ Law on the Status of Refugees in Cameroon, article 9

²⁰⁹ HRW (n207)14

²¹⁰ UNHR, Cameroon: Update on the returns in the far north region, (May 2017)1(cited in (n207))

²¹¹ United States Department of State, 2018 Country Reports on Human Rights Practices: Cameroon (March 13, 2019); see also HRW, Cameroon Events of 2018 (2019).

killed 60 peoples. Thus, fearing further attack mass exodus of 35.000 refugees embarked Cameroon.²¹²

Since 2015 UNHCR have been denied access from identifying, registering and transferring asylum-seekers from border to camp. Thus, tens of thousands living in towns and villages of Nigeria's border have been putted under limbo and blocked from seeking-asylum. Many were tortured, abused and thousands forcibly returned to Nigeria by the army alleging them as Boko-Haram member/wives.²¹³ Between 2015 and 2017 soldiers consistently 'encircled dozens of fellow refugees and beat them with metal poles and wooden sticks', 'forced them unto trucks like animals' and upon deportation ranted on them to 'go and die' in Nigeria were many died in the process.²¹⁴ Women's were promised not to be deported in exchange for sex.²¹⁵

UNHCR's successive request to conduct RSD of undocumented Nigerians detained for illegal entry and arranged for deportation abruptly rejected.²¹⁶ This protection blockade policy gives leverage to illegally deport thousands resulting 'black hole' in refugee protection history. Thus, Cameroon is culpable for blocking UNHCR from giving protection and for its conspicuous by ones absence.²¹⁷

Minawao camp is established in 2013 with 20.000 refugee hosting capacity. In 2017, it hosted almost 60.000 refugees in congestion. Between 2015 and 2017 refugees routinely face violence and unlawful detention by the security in and around the camp. Camp living conditions remains dire with food, clean water, and health facility paucity. Refugees who asked basic questions tortured and few died out of the trauma.²¹⁸ Thus, mass exodus from camp protesting food ratio wane and deadlock occurred in April and May 2017. Minawao is functioning beyond its maximum capacity making it difficult to UNHCR & aid organizations to provide food, water and health service. UNHCR's consistent plan of establishing second camp for Nigerian refugees stubbornly rejected since 2016.²¹⁹

²¹² Amnesty International, Cameroon: Refugee Influx from Nigeria(February 07, 2019)2

²¹³ HRW (n207)14

²¹⁴ ibid 38

²¹⁵ ibid 3

²¹⁶ ibid 24

²¹⁷ ibid 21

²¹⁸ ibid 15-16

²¹⁹ Human Right Watch Interview with UNHCR, Abuja, June 30, 2017 (cited in (n207))17

In 2016 UNHCR issued moratorium calling all states to ‘defer/not-to-send-back’ any one to northeastern Nigeria ‘until the security and human rights situation improved considerably’.²²⁰ The same year, as a panacea to Lake Chad Crises ‘Abuja Action Statement’ is adopted by Cameroon, Niger, Chad and Nigeria reaffirming *inter-alia*; significance of *non-refoulement*. Paradoxically days after its adoption, UNHCR identified deportation of 338 asylum-seekers to Nigeria.²²¹ Following suicide attack increment near Cameroons Kolofata and Mora towns in 2017, authorities told Nigerian army officials to take back 887 asylum-seekers from Kolofata. Anomaly, Nigeria’s army corroborated forced return of its own citizens by sending military vehicles were by returnees ended up in Nigeria’s IDP camps.²²²

On March 2017, Tripartite Agreement have been signed between Cameroon, Nigeria and UNHCR committing them to undertake repatriation solely on refugee’s free will and based on relevant information about Nigeria’s existing situation. Thus, above 13,000 refugees in Minawao opted to return between mid-April and mid-June 2017.²²³ But, returnees decided to return as result of dire humanitarian condition in Minawao camp and misinformation by fellow refugees of losing local election registration opportunity unless immediately returned.²²⁴ Refugees were ‘swayed to believe’ about their area of origin as safe allowing them to restart economic activity resulting mass ‘self-organized’ exodus.²²⁵ Ironically, they were returned to militarized IDP camps and villages routinely attacked by Boko-Haram and struggling with aid shortage/meager. Boko-Haram has killed many returnees in the camp. UN and aid groups in Nigeria consistently called to end the forced return alleging it’s too egregious and not in a position to handle mass returnee’s. Thus, on June 2017, UNHCR re-registered 1,300 refugees who returned back to

²²⁰ UNHCR, “International protection considerations with regard to people fleeing northeastern Nigeria (the states of Borno, Yobe and Adamawa) and surrounding region – Update II,” October 2016, <http://www.refworld.org/pdfid/57ebb35c4.pdf> (cited in (n207))

²²¹ UNHCR concerned about return of Nigerian refugees from Cameroon(March 21, 2017) <http://www.unhcr.org/news/briefing/2017/3/58d0e64/unhcr-concerned-return-nigerian-refugees-cameroon.html> (cited in (n207))

²²² UNHCR, Involuntary refugee returns to Nigeria must be avoided, (June 29, 2017) <http://www.unhcr.org/news/press/2017/6/5954bedb4/involuntary-refugee-returns-nigeria-must-avoided-unhcr.html>

²²³ UNHCR, ‘Cameroon: Update on returns from the far north region;’ Human Rights Watch interviews with aid officials, Yaoundé, 28 – 30 June, 2017(cited in (n207))

²²⁴ Human Rights Watch interview with aid officials, Abuja, 22 June, Maiduguri, 25 June and Yaoundé, 29 June, 2017 <http://reliefweb.int/report/cameroon/cameroun-weeklynote-83-03-16-avril-2017>(cited in (n 207))

²²⁵ UNHCR, ‘Cameroon: Update on returns in the far north region,(May 2017)3(cited in (n 207))

Cameroon's Minawao and started awareness creation about Nigeria's places of return which minimized spontaneous returns.²²⁶

Two days after signing the agreement and following months Cameroon continued its routine illegal deportation and asylum denial, while UNHCR continued to re-emphasize its 2016 moratorium. After remaining hush for years UNHCR in 2017 publicly berated Cameroon's illegal deportation of dozen Nigerian refugees since 2015, though authorities denied single case of *refoulement*.²²⁷ Cameroon's law empowered authorities to regulate people's flow to its territory and prevent entry/residence of people posing national security threat.²²⁸ But, Cameroon's asylum blockade and mass deportation of Nigerian asylum-seekers/refugees without establishing their involvement in any of Boko-Haram's attack negates its *non-refoulement* obligation.

Only 6% and 9% of UNHCR's appeal to Central African and Nigerian refugees in Cameroon respectively have been funded by donors. Thus, donor fatigue accelerated Cameroon's obscurantist policy of protection blockade and mass deportation.²²⁹ Even today access to asylum remained problematic as main entry points were closed following 2018 Boko-Haram attack and soldiers deployed at border does not have knowledge about refugees' right. Voluntary repatriation is imaginable as areas of return in Nigeria where still hostile. Though few progress of refugee self reliance witnessed in 2018 with UNHCR's help, Cameroon is still awaiting World Bank aid to activate local integration and resettlement remains untouched.²³⁰

²²⁶ UNHCR, 'Cameroon: Update on returns from the far north region' (2017)(cited in (n 207))

²²⁷ UNHCR Concerned About Return of Nigerian Refugees from Cameroon, (cited in (n 207))

²²⁸ Law on Conditions of Entry, Stay and Exit of Foreigners in Cameroon, No. 043/1990 of February 1, 1997, art 39 <http://www.refworld.org/docid/3ae6b4da1f.html>

²²⁹ HRW (n 207)12-13

²³⁰ UNHCR, Nigeria Regional Refugee Response Plan 2019/2020 <http://www.refworld.org> (accessed 12/12/2019)

CHAPTER FOUR

REFUGEE LEGISLATIONS AND PRACTICE IN ETHIOPIA

4.1. Overview

Ethiopia has long history of refugee hospitality and practiced contemporary refugee protection principles since 7th Century. In 615AD Prophet Mohamed sent his disciples to Ethiopian King Nagashi to seek refuge from their own terrible quarries. In the absences of international law, Ethiopia is a harbinger to welcome Muslim destitute and allowed them to freely exercise their religion, albeit its religion of the time poles-apart. Shortly messengers carrying costly presents sent to sway Nagashi to send migrants back to Mecca. However, after hearing the messengers and migrants in his King's court, Nagashi cognizant of the conspicuous persecution they may face if returned defied to surrender them. Nagashi neither punished them for illegal entry nor their freedom of movement and work curtailed. Their right to return voluntarily respected as Nagashi does not enslaved them and many stayed for long.²³¹

Ethiopia's longstanding open door approach continued to persist until today. As of 31 October 2019, Ethiopia is one of the largest refugee-hosting countries in Africa, sheltering above 700.000 registered refugees and asylum-seekers mainly from South Sudan, Somalia, Eritrea, Sudan and few from Yemen and Syria. Except a few, majority of the refugees lived in 26 camps.²³² Ethiopia is among original signatories of 1951 Convention and 1967 Protocol,²³³ CAT, ICCPR, ACHPR, and 1969 OAU Convention. Article 9(4) of the 1994 FDRE Constitution makes these instruments part and parcel of Ethiopian laws. The new Refugee Proclamation vividly stated refugees and asylum-seekers in Ethiopia can directly benefit and owe onus from these treaties. Agency for Refugees and Returnee Affairs (ARRA) administers refugees and returnees in Ethiopia.

²³¹ Abdulmalik A. Ahmed, 'The 7th Century Unwritten Ethiopian Laws on the Protection of Refugees', (AAU ILS Vol. I 2019)29-30

²³² UNHCR, Ethiopia Fact Sheet (October 2019)

²³³ However, reservation is made on article 8, 9, 17(2), and 22(1) of the 1951 Convention and agreed to consider them as mere recommendation without binding effect.

In 2016 Leaders Summit on Refugees, Ethiopia made nine pledges to enhance the lives and livelihood of refugees and host populous. To put the pledges on ground government has taken important strides. In 2017, Ethiopia takes the lead among a few countries agreeing to implement 2016 Comprehensive Refugee Response Framework (CRRF) of the New York Declaration on Refugees and Migrants and amended its Registration of Vital Events Proclamation 760/2016 to allow ARRA register refugee's vital events. Most importantly, in 2019 it has passed, to borrow UNHCR's expression 'one of the most progressive Refugee Proclamation in Africa'.²³⁴ Thus, in this section comparison between the old Refugee proclamation No.409/2004 and its classic amendment meticulously dissected to champion triumphs of the new Proclamation. Refugee right protection practice also dealt while analyzing the laws.

4.1.1 Triumphs of the New Refugee Proclamation No.1110/2019

A. Bolstering asylum-seekers, family members and non-discrimination definition

Asylum-seekers definition expanded to include group asylum-seekers. In addition to spouses and minor children's, family members bolstered to embrace 'any person' considered as family member based on their home country laws and existence of dependency with refugee/asylum-seeker. The Agency owes responsibility to facilitate family unification.²³⁵ As far as application of the proclamation is concerned both laws prohibit discrimination based on race, religion, nationality, membership of a particular social group or political opinion. Astonishingly 'other similar grounds' of discriminations were prohibited under the new proclamation.²³⁶ However, anomaly the new Proclamation either intentionally avoided or inadvertently omitted to stipulate 'other similar grounds' on refugee definition, RSD, and *non-refoulement* protection provisions.

Both laws embraced 1951 Refugee and 1969 OAU Conventions refugee definition and recognized *prima facie* status. However, article 4(3) of the old Proclamation inserted discriminatory clause stating external aggression, occupation, foreign domination or events seriously disturbing public order are grounds to grant refugee status only for 'refugees coming

²³⁴UNHCR Welcomes Ethiopia Law Granting More Rights to Refugees, January 18 2019<<https://www.unhcr.org/news/press/2019/1/5c41b1784/unhcr-welcomes-ethiopia-law-granting-rights-refugees.html>>(accessed 17/12/2019)

²³⁵ Refugee Proclamation No. 1110/2019, Article 2(8), 2(9) and 14(5)

²³⁶ *Id.*, Article 4

from Africa'. Anomaly non African refugees neither recognized as refugee on grounds of article 4(3) nor on *prima facie* for any other grounds. Such discriminatory clauses are avoided under the new proclamation. Another important addition is recognition of refugee *Sur Place* or extending protection to individuals where conditions granting refugee status has occurred after they left their country of nationality/habitual residence.²³⁷

B. Enhanced Procedural Guarantees of Refugee Protection

Both laws retained the 1951 and 1969 OAU's Refugee Conventions *non-refoulement* with strict and overarching terminologies. Thus, in Ethiopia it is prohibited to *refouler* anyone by any means subjecting him/her to confront persecution in any state. However, practically though not frequent as many African states, few refugees have been expelled to places where they may face calamities. During late Prime Minister Melese Zenawi's regime Eritrean refugees were expelled hating solely their eye colors. Recently in 2019, Syrian refugees entering Ethiopia's territory using a tourist and visitor visa where returned to Syria despite Syria is ravaged by conflicts.²³⁸

Both laws though recognized exceptional scenarios of *refoulement* and expulsion, failed to exhaustively list refugee acts or omissions entailing threat to national security or public order. Unlike the old law, the new Proclamation fascinatingly for granted every recognized refugee/asylum-seeker 'equal right with nationals to bring any justiciable matter and obtain judgment before court or any other competent body with judicial power'. Access to legal counseling and assistance were also important additions.²³⁹ These rights are important especially for recognized refugees whose expulsion/*refoulement* order is arbitrarily passed, but access to interpreter and legal representation on expulsion/*refoulement* trials not specifically mentioned.

C. More Liberalized, Efficient, and Transparent RSD

Both laws allowed 'anyone who is at the frontier, entry point or within Ethiopia entering legally/illegally to apply asylum and be given reasonable time to present his/her case and assisted by qualified interpreter'. However, the new law goes forward by allowing proxy application in case *force majeure* hinders personal application and obliges ARRA to ensure; applicants

²³⁷ *Id*, Article 5, 6 and 21

²³⁸ Borkena, Ethiopia Deporting Syrian Refugees as Street Begging Activity Becomes Suspicious, (December 18, 2019)<http://borkena.com> (accessed 17/12/2019)

²³⁹ Refugee Proclamation (n235) Article 11 and 30

received sufficient information about RSD process and their rights and obligations, interpreter of same gender preference respected, personnel's conducting RSD must have adequate knowledge of Ethiopian and International refugee law and vigilant to cater for particular circumstances of asylum-seekers and selected based on applicants preference of same gender, minor applicants best interest prioritized and UNHCR must be invited to participate as observer. Asylum-seekers access to health facility and legal counseling are also breakthrough additions.²⁴⁰

Maximum asylum application deadline extended from 15 to 30days and even late submission with good cause received. Unlike old Proclamation's 'reasonable time' blurring and 30 days appeal right limit, ARRA must complete its decision within six months and aggrieved asylum-seekers allowed to appeal before Appellate Council within 60days and late appeals with justifiable cause also received. The Council must decide on appeals within 90days. The Council's decision is final unless there is 'error of law' which is appealable to Federal Supreme Court within 30days.²⁴¹ Drastic caveat 'error of law' requirement hinders appeal to ordinary courts possibility. However, one may argue asylum-seekers aggrieved by Council's decision can appeal to ordinary courts without a need to show error of law at least based on article 30 of the new Proclamation or utmost article 37 of FDRE Constitution and article 16 of 1951 Convention.

Applicants have the right to stay in Ethiopia, if failed until they exhaust their appeal right. Grounds for exclusion also scrupulously waned. For instance, acts contrary to object and principle of UN or AU Charter only results in exclusion excluding resolutions and other instruments of these bodies.²⁴²

D. Underscores Durable Solution via Local Integration

In relation to durable solutions the old Proclamation emphasizes only on voluntary repatriation and falls short of stipulations on local integration, resettlement and even on repatriation process. Whereas, recognizing positive impact of refugees on socio-economic development, the crux of the new Proclamation emboldened local integration as major durable solution. To achieve its local integration goal refugees are allowed to work on *inter alia*; industrial parks, agriculture, industry, environmental protection, handicraft, commerce and small and micro finance

²⁴⁰ *Id*, Article 15(4), 16(a-f), 25 and 30(2)

²⁴¹ *Id*, Article 15-19

²⁴² *Id*, Article 23 and 7(3)

enterprises. ARRA issues 5year renewable residential permit for those selected to engage in aforesaid projects and permit local integration of refugees staying above 20years. Government pledged to enhance basic social services of refugees, provide access to vital events registration, education, health services, bank account, driver's license and right to acquire and transfer property. Refugee's right to repatriate with safety and dignity solely on their free and informed volition guaranteed. Refugees/asylum-seekers upon fulfillment of Nationality law thresholds acquire Ethiopian nationality.²⁴³

E. Withering away of encampment policy?

The new Proclamation marked withering away of Ethiopia's orthodox encampment policy and beginning of towards non-encampment refugee inclusive approach by guaranteeing refugees/asylum-seekers right to movement, freedom to choose his/her residence and to leave Ethiopia at any time they pleased. Ironically old Proclamation's infamous practice persisted by allowing ARRA to arrange places/areas within which asylum/seekers and refugees may live exceptionally.²⁴⁴ That is why still the country maintained 26 camps mainly established in border regions/areas struggling with infrastructure meager.

F. Culminates Legal Consistency

After listing iota rights the old Proclamation merely states recognized refugees can benefit from other rights and owe responsibilities under 1951 and 1969 OAU Refugee Conventions. The old Proclamation also omitted and its few provisions contradict or polemical with refugee rights under FDRE Constitution and international and regional refugee instruments Ethiopia is party. For instance, it limits refugee freedom of movement as it requires them to live in camps. Curtails their right to work, marry, education to certain extent and no stipulation on access to justice. Discriminatory policies allowing some Eritrean refugees to live out of camps and denying other nationals practiced by negating principle of equality and non discrimination under the Constitution applicable to everyone including refugees'. However, the new Proclamation compendiously listed rights and duties of refugees exhaustively and moderated those blatant mismatches to comport with international obligations and FDRE Constitution. But, the new Proclamation often requires implementation regulation.

²⁴³ *Id*, Article 24-26, 29,31,33,36, and 40-42

²⁴⁴ *Id*, Article 28

Currently there is a move to activate 2016 Ethiopia Job Compact which aims to create 100.000 job opportunities targeting 30.000 refugees and 70.000 Ethiopians. If effectively implemented, it secures refugees freedom of movement, self reliance and access to work. However, UNHCR identified resettlement as ‘a top priority as conditions for voluntary repatriation are unfavorable for most of refugees in Ethiopia and local integration programs are yet to be put in place.’²⁴⁵

²⁴⁵ UNHCR (n232)2

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

Countries have the right to regulate everyone who may enter or remain in their territory and deport those it deems a threats to its national security. However, this right must be exercised within the limits of incontrovertible customary *non-refoulement* principle which prohibits forcible return of refugees to places where they may face persecution. *Non-refuolemnt* is recognized under many international and regional refugee and human rights instruments, domestic laws and court decisions, UNGA Resolutions and attained customary international law status.

For decades African countries incessantly adhere to this principle by always keeping doors and hearts open to asylum-seekers/refugees, allowing them freely move, work, educate and live with local communities. However, recently there is a stark shift towards asylum blockade, firm encampment where refugee freedom of movement curtailed, and obscurant mass deportation as a mockery beaconing emergence of new regional norm allowing *refoulement*. However, it must not be taken as a sign of new custom's emergency. Violation is violation whether committed in Africa or everywhere else and must be condemned.

Otiose model democratic legislations, sham open door rhetoric without proper pragmatic implementation and inefficient RSD process often lineaments many African countries refugee right protection. They set tightened asylum application deadline and illegal entrants often detained or deported. RSD is conducted by a committee of administrative authorities while UNHCR attends as observer and in some countries even blocked from doing so. The same committee usually with minor change of new faces reviews/hears appeal of its own decision. Except a few (S. Africa) judicial review of failed applicants rarely practiced.

Domestic refugee laws in Africa though recognized exceptional cases of *refoulement* expulsion they failed to comprehensively list acts/omissions entailing national security threat or grounds to reject asylum. This given leverage for African states to conjecturally conflate refugees to terrorist

attacks followed by mass deportation under national security protection or economic migrant label. But, countries often failed to establish reliable evidence showing refugee involvement in any of terrorist attacks. Rather, mass influx followed by resultant donor fatigue accelerated refugee protection race to the bottom in Africa. Whenever states realized that the international community is deaf ear to share responsibility and hosting refugee falls solely on them, they will start illegal deportation. Nihilistically amended their democratic laws to; establish strict border immigration control, wane refugee number in their soil, and close few refugee camps and asylum-seekers reception centers. Thus, African states are using asylum denial, deteriorated encampment/camp situation and mass deportation as tools of asylum-seekers deterrence or immigration control.

Durable solutions especially local integration is often downplayed in Africa. Because, mostly refugees including in protracted situation are perceived as temporary guests waiting their return as soon as situation causing them flee in their home country reinvigorate. Many of repatriations were also nominally voluntary as refugees either compelled to choose their return by placing them in impoverished camps or deceived/misinformed about return places exact situation where they ended up in dire, destitute, and militarized/war-torn IDP camps struggling with aid meager. That is why many returnees return back to host states.

6.2 Recommendations

As a panacea; African states must actively participate with international community and international and regional organizations to timely address causes for peoples flee in Africa and respond either financially or resettlement as soon as states encountered refugee influxes. Structured global solidarity on refugee problems must be enhanced and infamous global north donor states practice of abusing refugees in their territory must be halted not to give leverage to African states. African states must embitter their RSD procedure and judicial or appellate review of rejected applicants must be placed. Illegal entry must not bar asylum-application. Tightened asylum-application deadline must be debarred, if not vicinity of entry points to nearest reception centers, applicant's health condition and security menace hindering asylum-application must be taken into account for late submissions.

Before sending refugees back, authorities must make sure situations in country/place of return warrants their return, must communicate the same to returnees, and final decision to return must

be left to individual returnees. Refugee's freedom of movement must be allowed at least or camp conditions must be embittered. Durable solutions especially Africa's long known traditional local integration must be reactivated to resilient refugees. Therefore, it is the right time for African states to give practical life to their democratic laws in commitment. In this regard, other African states must follow Ethiopia's foot step to implement CRRF in a way that can benefit both the refugees and host community. Awareness creation campaigns on positive impact of refugees on socio-economic development plays a tremendous role in this regard.

The following recommendations or lessons can be drawn for Ethiopia from the experiences of African countries.

- Firstly, Ethiopia must halt its own internal security threats. It must also enhance its collaboration with international, regional and sub-regional bodies including IGAD to respond timely for regional crises causing refugee flight. Implementation Regulation to the new Proclamation must be enacted as soon as possible and the Regulation must exhaustively list grounds to reject asylum.
- Authorities and persons whom first get in touch with asylum-seekers mainly; border/entry officials, military at entry points and law enforcement officers must have knowledge about international human rights and refugee law principles especially *non-refoulement*. ARRA unilaterally or in collaboration with UNHCR must train them on refugee right protection by placing working guidelines on how they can identify, treat and transfer asylum-seekers to appropriate body. Impartial monitoring mechanism at entry points must be placed.
- The Agency conducting RSD is at the heart of asylum claim as it rejects or accepts it. Thus, RSD process must extend to evaluate individual persecution. The ideal way to analyze persecution claim is to focus on a specific group of vulnerable persons. Future refugee legislations must set criteria's exhaustively to reject asylum claims or guidance must be there. Requesting UNHCR to arrange training to; embitter RSD capacity, make RSD decision making fair and efficient, improve access to asylum-system, and upgrade reception facilities strongly recommended.

- Asylum-seekers must be allowed to move and work pending their application. Accelerated procedure must be established for; unaccompanied minors, gender violence victims, sick, applicants whose deportation is ordered, and onward refugees. In cases of application spike, liberalizing tightened application process can dispatches asylum backlogs.
- Strict application of New Proclamation's 30 day asylum application deadline may have devastating impact. ARRA must be liberal in accepting late submissions for 'justifiable cause'. *Inter-alia*; vicinity of entry points to nearby Agency/police stations, conditions hindering asylum applications like applicants health status, and security situations must be taken into account.
- New Proclamations 'error of law' requirement hinders possibility of appeal to ordinary courts on Appeal Council's adverse decisions. Considering the significant impact of refugee status denial, persecution inquiry must not end at statutory tribunals. Thus, judicial review of rejected applicants must be allowed as per article 37 of FDRE Constitution, article 16 of 1951 Refugee Convention, and most importantly article 30 of the new Proclamation allowing asylum-seekers/refugees to bring any justiciable matter before court of law.
- Human rights groups including; Ethiopian Human Rights Commission, non-governmental organizations and attorneys must be allowed to participate (as observers or active participants) on RSD process from the very beginning. They must actively engage in refugee rights protection including free legal aid service to asylum-seekers/refugees and policy suggestion to government. In case of unlawful deportation and asylum-seekers/refugees detention, they must come up with investigative reports. Any refugee unlawfully expelled to face torture, or and cruel, inhuman, or degrading treatment can either himself, or refugee associations and NGOs on his behalf brought individual communication procedure against that state to the African Commission.

- Future constitutional amendment in Ethiopia must explicitly include provisions and principles of refugee protection, especially *non-refoulement*. Furthermore, new Proclamation's whole catching 'other similar grounds' protection clause must be extended on refugee definition, RSD, and *non-refoulement* provisions.
- Currently most of the refugees in Ethiopia live in camps established in remote areas struggling with basic social services and infra structure paucity. Discriminately few refugees live out of camps. Camp quagmire may dissuade refugees to leave the camp either through voluntary return scheme or other illegal routes to places/countries where they may face calamities and persecution. Thus, at least camp situations must be embittered and in line with the Constitution refugee right to movement must be respected indiscriminately by enforcing its non encampment policy.
- New proclamation's article 11(2) allows expulsion incase asylum-seeker pose national security threat or has been convicted by a serious crime. Firstly, national security at risk must be at least Ethiopian or its neighbor's one. 'National security threat' a blurring concept must be interpreted to mean, an ongoing or future threat to Ethiopia's sovereignty, population, territorial integrity, government and democratic institutions. For prospective threats, ARRA must be sure beyond reasonable doubt their probable occurrence and before expulsion other options like detention and criminal prosecution must be exhausted.²⁴⁶ Serious crime under Ethiopian Criminal law are those crimes entailing rigorous imprisonment of 10 and more for young offenders and 5 and above years for adults.²⁴⁷ In addition to seriousness of the crime, ARRA must cater for individual circumstances of the deportee and likelihood of their persecution upon return.
- Just like S. Africa and Kenya, Ethiopian courts must actively involve on *refoulemnt/expulsion* decisions and establish the following principles of refugee protection; anyone who expresses an intention to apply asylum must be given the opportunity to do so, illegal entry must not bar asylum-application, absence of asylum application deadline, and suspected asylum-seekers/refugees must be brought before

²⁴⁶ Zelalem Mogessie Teffera, 'Delimiting the Normative Terrain of Refugee Protection: A Critical Appraisal of the Ethiopian Refugee Proclamation No.409/2004', (AAU ILS Vol. I 2019)73-78.

²⁴⁷ 2004 Ethiopian Criminal Code, Article 168(1) and 478(1)

court within 48 hours of their arrest where the court may accept, reject, or extend his/her arrest.

- In case of mass influx, in addition to *prima-facie* recognition, giving temporary protection as a vehicle towards durable solutions and call for responsibility sharing including safe third state resettlement recommended. In this regard, Rwanda's recent refugee resettlement trend from Libya's hell like situation is worth mentioning.
- Whenever there is a question for voluntary repatriation, authorities must secure exact situation of country/place of return *inter-alia*; security, possibility of persecution and detention upon return (especially Eritreans in which leaving their country to seek refugee elsewhere is criminalized) and availability of necessary living conditions including food, clean water, health facility. All this information's must also be communicated to returnees to make their decision solely based on fully informed consent. Awareness creation campaign in collaboration with UNHCR targeting individual refugees or their leaders also prevents spontaneous return incidents.
- Just like Uganda, integrationist policies must be devised to locally integrate those refugees staying for long in Ethiopia and those unwilling to go home through voluntary repatriation scheme.
- To ostracize xenophobic feeling and incidents any privilege and assistance targeting refugees must also be availed and caters for the host community. National dialogue must be arranged to promote social and economic cohesion of refugees with local populous.

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