ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

THE PROTECTION AGAINST *REFOULMENT* IN THE AFRICAN HUMAN RIGHTS SYSTEM

BY: ALEMAYEHU LEMA TADESSE

February, 2017

Addis Ababa, Ethiopia

ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

THE PROTECTION AGAINST *REFOULMENT* IN THE AFRICAN HUMAN RIGHTS SYSTEM

BY: ALEMAYEHU LEMA TADESSE

ADVISOR: DR.TAKELE SOBOKA BULTO (LL.B, LL.M, MA, PhD,

ASSOCIATE PROFESSOR)

A THESIS SUBMITTED TO SCHOOL OF GRADUATE STUDIES, COLLEGE OF LAW AND GOVERNANCE, SCHOOL OF LAW, ADDIS ABABA UNIVERSITY, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAWS (LL.M IN HUMAN RIGHTS)

ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

SCHOOL OF LAW

February, 2017

THE PROTECTION AGAINST *REFOULMENT* IN THE AFRICAN HUMAN RIGHTS SYSTEM

BY

ALEMAYEHU LEMA TADESSE

APPROVED BY BOARD OF EXAMINERS

Name	**Signature**	**Date**
_____	_____	_____
Advisor		
_____	_____	_____
Examiner		
_____	_____	_____
Examiner		

DECLARATION

ALEMAYEHU LEMA, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged and cited.

Name: **ALEMAYEHU LEMA**

Job: Public Prosecutor

Signature: _____

This thesis has been submitted for examination with my approval as University advisor.

Advisor: **DR. TAKELE SOBOKA BULTO** (LL.B, LL.M, MA, PhD, Associate Professor)

Signature: _____

TABLE OF CONTENTS

CHAPTER THREE

THE LEGAL FRAMEWORK OF THE RIGHT TO *NON-REFOULMENT*

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

*****

Dedicated to all victims of *refoulment*; especially to refugees and asylum seekers who faced violation to their human dignity and lost their precious life due to *refoulment*!!

*****

ACKNOWLEDGMENT

First and above all, I am quite pleased to God for helping me right through my life and in the course of doing this research.

Secondly, I owe indebtedness to my advisor DR. TAKELE SOBOKA for his invaluable advice and encouragement to effectively conduct this study from the beginning to the end. I was inspired to write on the topic of this study by his lecture on the course African Human Rights Law. He has offered me essential materials that are help full for the thesis. Also, he has attentively and carefully read on each part of the drafts and gave me valuable comments. He substantially added remarkable qualities to my work through his comment. This thesis could not have been successful had it not been for his diligent assistance and support.

Thirdly, I would like to thank Jardagaa Jartee Finance Office for their financial grant to conduct the study. My thanks also goes to Oromia Justice Bureau for allowing me had educational leave in the course of the study at Addis Ababa University.

Fourthly, I would like to extend my heartfelt gratitude to my father Lema Taddesse Gamoosaa and my mother Bakashee Duuressaa Ashetee for everything they have done for me since I was born. My heartfelt gratitude also goes to my wife Marartuu Olqabaa Hordofaa for valuable moral and material support she owed me throughout my study. Further my deepest thanks go to Takiluu Dhinsaa, Birruu Galataa and Habtamu Tutturaa Management Committee at Jardagaa Jartee Justice Office for they allowed me take Laptop considering its significance for the study.

Last but not least, I owe thanks to my friends Geetuu Saaqqataa, Margaa Fiqaduu and Kenna Tariku for their important opinion and encouragement in the course of the study. Also, I would like to thank all those who contributed to this thesis directly or indirectly.

LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Charter on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHSG	Assembly of Head of State and Government
AU	African Union
BBC	Britain Broad CAST
CAT	Convention Against Torture
COHRE	Center on Housing Rights and Evictions
CRC	Convention on the Rights of Child
ECOSOC	Economic and Social Council
ECHR	European Convention on Human Right
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Right
FBI	Federal Bureau of Investigation
HRW	Human Right Watch
ICCPR	International Covenant on Civil and Political Rights
IDPs	Internally Displaced Persons
IRRI	International Refugee Rights Initiative
IRIN	Integrated Regional Information Network
NGO	Non-Governmental Organization
OAU	Organization of African Unity
OHCR	Office of High Commissioner for Refugee

OSG	Oromia Support Group
OSGA	Oromia Support Group Australia
RADDHO	Rencontre Africaine Pour la Defense des Droits de l'Homme
SERAC	Social and Economic Rights Action/Center for Economic and Social Rights
SOCEPP	Solidarity Committee for Ethiopian Political Prisoners
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nation
UNGA	United Nation General Assembly
UNHCR	United Nation High Commissioner for Refugee

Abstract

This paper examines the protection against *refoulment* in the African human rights regime. From day to day, for fear of persecution or human rights violations people flee their home country to other in order to seek asylum. On the other hand, the host states forcibly return accepted refugees and asylum seekers to their country of origin or third state. This forced return is known as *refoulment*. Also the research analyses the state practice of *refoulment* of refugees and asylum seekers as well as remedies available for violation of *non- refoulment* that has been taken place in East Africa notably: Kenya, Tanzania, Djibouti, Sudan and Burundi.

Further it explores the legal protection of *non-refoulment* in the African human rights system and its effects that are more sever such as death, torture, enforced disappearance and denial of freedom of movement. The research revealed that although most East African states ratified the OAU Refugee Convention and African Charter which guaranteed the prohibition of *refoulment*, their practice is inconsistent with these laws. Moreover, the research examines the short comings of these two laws and recommends the Assembly of Head of States and Government of AU to amend provisions of these laws inconsistent with human rights. Finally, the study reveals substantive remedies available for violation of the right to *non-refoulment,* and recommends the African Charter and OAU Refugee Convention to incorporate the same.

Key words

Non-refoulment, Refoulment, human right, violations, protection, remedy, refugee and asylum seeker

CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1.BACKGROUND OF THE STUDY

Refugees are among the most vulnerable group of people in the world.[1]As a result, the protection against *refoulment* or return is the cornerstone of refugee protection.[2] In addition, it is a well established norm in the protection of human rights.[3] Refugees' benefits from all human rights like other people, except they cannot safely remain in their home countries.[4] Hence, because of their vulnerability, refugees need special protection that general human rights do not deal with.[5] They face many challenges on their path to a safe destination country such as denial of access to territory, either as a part of a general border closure or by erecting physical barriers while others expel refugees by denying them access to their refugee status determination. There is also the practice of forcibly returning refugees under the pretext of "voluntary" repatriation[6] to place where their human rights violation would be occurred.

After the two world wars, human rights generally as well as refugee law in particular has assumed a remarkable significance.[7] Following World War II, the amount of people facing persecution, lead to the signing of the 1951 Convention Relating to the Status of Refugees.[8] The 1951 Convention Relating to the Status of Refugees[9] (here in after United Nation/UN Refugee

[1]United Nation High Commissioner for Refugees, Relating to Status of Refugees, (September 2011) p.1.

[2]For purposes of this study the word 'refugee' here used to refer to those accepted as refugees via refugee status determination process, asylum seekers and prima facie.

[3] Dina Imam Supaat, "Escaping the Principle of Non-Refoulment": International Journal of Business, Economics and Law, Universiti Sains Islam Malaysia, Vol.2, No.3 (June2013), p.1.

[4] Andrea Konjević, International Obligations of States in the Protection of Refugees in the 21st Century: The Case of Mass Influx of Refugees to Europe, Zagreb, (2016), p.7.

[5]Ibid.

[6] Id,p.1.

[7] Medard RK Rwelamira, "Some reflections on the OAU Convention on Refugees: Some pending issues," The Comparative and International Law Journal of Southern Africa, Institute of Foreign and Comparative Law, Vol.16, No.2 (July 1983), p.160.

[8]Shirley Llain Arenilla, "Violations to the Principle of Non-Refoulment under the Asylum Policy of the United States" Anuario Mexicano de Derecho Internacional, Vol. XV, (2015), p.285.

[9]The 1951 Convention Relating to the Status of Refugees 189 UNTS 137 adopted 28 July 1951 and entered in to force 22 April 1954.

Convention) obliged states to ensure protection of refugees including *non-refoulment* under international law on account of their membership of UN and signature to international refugee and human right instruments.[10] After and before the UN Refugee Convention there were other important international documents at international level [11] that imposes obligations on the respective state parties to respect the principle of *non-refoulment*.

Similarly, African States are obliged for protection of refugees' right to *non-refoulment* under African human rights system based on membership of Organization of African Unity (OAU, now African Union (AU) and signature of the OAU Convention Governing Specific Aspect of Refugees (here in after OAU Refugee Convention)[12], African Charter on Human and Peoples Rights (here in after ACHPR or 'African Charter'[13]and other African human right instruments.[14] Above all, the OAU Convention is an important regional refugee law which complement the UN Refugee Convention by expanding the notion of who is a refugee and reinforces key refugee protection standards including the closely linked principles of *non-refoulment* and voluntary repatriation.[15] Further the OAU Refugee Convention has enabled the provision of asylum status to refugees and the implementation of voluntary repatriation in a way that has consolidated brotherhood and comity among African States.[16] Consequently, the principle of *non-refoulment* is one of the rights guaranteed in the OAU Refugee Convention and ACHPR.

---

[10]A. B. M. Imdadul Haque Khan, "Human Rights Implications of the Principle of Non-refoulment: an Overview", The International Journal of Social Sciences, Vol.24 No.1 (2014), p.62.

[11]Universal Declaration of Human Rights (here in after UDHR), UNGA Resolution 217A(III), December 10, 1948, article 14; International Covenant on Civil and Political Rights (here in after ICCPR), adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966 and entered into force 23 March 1976, article 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (here in after CAT), adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 and entered into force 26 June 1987, article 3.

[12] The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted September 10, 1969, 8 I.L.M. 1288 and entered into force June 20, 1974.

[13]The African Charter on Human and Peoples Rights adopted in Nairobi June 27, 1981 and entered into force 21 October 1986.

[14] African Charter on the Rights and Welfare of the Child (here in after ACRWC), adopted CAB/LEG/24.9/49, July1990 and entered into force 29 November 1999, article 23.

[15] Monette Zard, et al, Refugee and African Commission on Human and Peoples' Rights available at: (https://docs.escr-net.org/usr_doc/Zard_article.pdf) last visited on 20 May 2016.

[16]UNHCR/OAU, The Addis Ababa Document on Refugees and Forced Population Displacements in Africa, Addis Ababa, Ethiopia, (8-10 September 1994), p.4.

Even though, the OAU Refugee Convention and African Charter have imposed on member states an obligation to respect the principle of *non-refoulment*, particularly East African countries have been acting in contrary to this principle and forcibly returning hundreds of refugees and asylum seekers to their country of origin. Thus, this research examines the protection against *refoulment* provided in the African human rights system and analyses the practice of five selected East African countries namely: Kenya, Tanzania, Djibouti, Sudan and Burundi. It most essentially examines remedies available for the violations of the right to *non-refoulment* of refugees and asylum seekers.

1.2.STATEMENT OF THE PROBLEM

Most African States have acceded to the OAU Refugee Convention. Currently among 54 AU member states, 46 States have acceded or ratified the OAU Refugee Convention. Now only 8 African states have not yet acceded to this Convention.[17] The OAU Refugee Convention was established for providing protection to asylum seekers and refugees in Africa. And it has been a strong pillar for refugee protection and solutions in Africa. In addition, the African Charter complements the OAU Refugee Convention in the African human rights regime.[18] Accordingly, both the OAU Refugee Convention[19] and the African Charter[20] imposes obligation on member states to respect the right to *non-refoulment* of asylum seekers and refugees.

However, there have been many instances where refugees and asylums have been returned against their will to places where their lives may be in danger. For example, in late 1996 around 500,000 Rwandan refugees were returned home from Congo Democratic Republic.[21]Furthermore, in 2005 Burundi forcibly returned 6,500 Rwandans, many of whom

[17]AU, List of Countries which have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, Ethiopia, (2016) available at: (https://www.au.int/web/sites/default/files/treaties/7765-sl-oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa.pdf) last visited on May 29,2016.

[18] Magnus Killander, 'African Human Rights Law in Theory and Practice', University of Pretoria: Published in Sarah Joseph & Adam Mc Beth (eds.) Research Handbook on International Human Rights Law, Cheltenham, UK: Edward Elgar (2010), p.397.

[19] OAU Refugee Convention, cited above at note 12, article 2(3).

[20] African Charter, cited above at note 13, article 12(5).

[21]Chronology for Hutus in Rwanda available at: (http://www.refworld.org/docid/469f38d51e.html) last visited on 20 March 2016.

have since returned to claim asylum.[22] Amnesty International also reported that around 350,000 Somali refugees forcibly returned from Kenya to Somalia would be a violation of Kenya's commitment under international law and put their lives in jeopardy.[23] Further, Amnesty International reported that two Ethiopian air force pilots in 2005 have been forcibly returned from Djibouti to their country of origin.[24] The principle of *non-refoulment* is protected in the UN and OAU Refugee Conventions including ACHPR to which Burundi, Kenya, Somalia, and Djibouti and Ethiopia party and have obligation to respect.

From this, it can be observed that the right to *non-refoulment* was not respected and there were no remedies for violation of the right under the OAU Refugee Convention and African Charter. For these reasons, violation of refugee rights needs to be examined and addressed to ensure that refugee's rights are not subjected to double violation.[25] In general, the life of refugees and asylum seekers in East Africa are in danger due to the rampant violations of *non-refoulment* and lack of remedies thereto. For instance, United Nation High Commissioner for Refugees (UNHCR) reported in Mid-Year Trends 2015 that East African countries such as Ethiopia, Kenya, Uganda and Sudan are among the top ten most refugee hosting countries in the world.[26] Based on UNs country group, East Africa constitutes twenty countries such as Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Mayotte, Mozambique, Reunion, Rwanda, Seychelles, Somalia, South Sudan, Uganda, United republic of Tanzania, Zambia and Zimbabwe.[27]

However, for the purpose of this study an emphasis is made on the practice of only five refugee host East African countries mentioned above due to the prevalence of the violation of prohibition

---

[22] Refugee refoulement in the East African Community available at: (http://www.pambazuka.org/human-security/refugee-refoulement-east-african-community) last visited on 10 March 2016.

[23] Crisis Looms for Somali Refugees as Kenya Orders Closure of Dadaab Refugee Camp available at :(https://www.amnesty.org/en/latest/news/2015/04/crisis-looms-for-somali-refugees-as-kenya-orders-closure-of-dadaab-refugee-camp-1/) last visited on 05 March 2016.

[24] Amnesty International, Fear of forcible return, AI Index: AFR 23/001/2005, (15 July 2005), p.1.

[25]Janeth Apelles Chambo, The Principle of Non-refoulment in the Context of Refugee Operation in Tanzania, LLM Thesis: Yaoundé Catholic University, (31 October 2005), p.4.

[26]UNHCR, Mid-year Trends, (2015), pp.6-7.

[27] United Nations Statistics Division Standard Country and Area Codes Classifications (M49) available at: (http://unstats.un.org/unsd/methods/m49/m49regin.htm) last visited on 2 June 2016.

of *refoulment* there. Therefore, this research analyses the practice of these East African countries with regard the violation of the right to *non-refoulment* of refugees and asylum seekers. Moreover, the study examines the effects of the violation of *non-refoulment*, states responsibility and remedies available for the violation of this right.

1.3. RESEARCH QUESTIONS

This research at the end tries to answer the following essential questions:

1. What are the responsibilities of the country of the host and origin countries towards protection of right to *non-refoulment*?
2. What are the effects of violation of the right to *non-refoulment*?
3. Are there available and adequate remedies for violation of the right to *non-refoulment* in the African human rights system?
4. Is there institutional mechanism that redresses violation of *non-refoulment* with in the OAU Refugee Convention?

Based on these research questions some related literatures to this study are briefly examined. Even though there are literatures on the principle of *non-refoulment* at international level,[28] the present research focuses on specific right of refugees of the protection against *non-refoulment* in African human rights regime. As such, from among a set of literatures written about the situation of refugees and asylum seekers in Africa, the researcher has reviewed two most related researches to this study.

First, Gina Bekker examines the protection of asylum seekers and refugees in general within the African regional human rights system.[29] This research mainly focuses on the legal frame work providing for promotion and protection of the right of refugees and asylum seekers accorded in African human rights laws. It further explores the manner in which the institutions charged with supervising the implementation of these treaties have interpreted the rights given to asylum

[28] Vladislava Stoyanova, "The Principle of Non-Refoulment and the Right of Asylum-seekers to enter State Territory", Interdisciplinary Journal of Human Rights Law, Vol.3:1 (2008-2009); see also Shirley Llain Arenilla, cited above at note 8; see also Dina Imam Supaat, cited above at note 3.

[29] Gina Bekker, "The protection of Asylum Seekers and Refugees within the African regional Human Rights System", African Human Rights Law Journal, 13 AHRLJ (2013), pp.1-3.

seekers and refugees in the African human rights law. From this, it is clear that this research is too general in a sense that it focuses on protection of refugees and asylum seekers in Africa as a whole. And it does not specifically address issues related right to *non-refoulment* that are the central theme of the research under consideration.

Second, Bonaventure Rutinwa broadly looks at forced displacement and refugee rights in the Great Lakes region.[30] The study examines the law and the practice with regard to refugee protection in general in the Great Lakes region of Africa. Also, he scrutinized that the protection of refugees are inadequate in the Great Lake regions. The study does not address specifically the protection against *refoulment* in East Africa rather talks general protection of refugees in Great Lake regions only.

When seen in light of the research questions designed by this study, the above researches do not address the protection against *refoulment* in the African human rights laws and remedies available for the violation of the right to *non-refoulment.* Unlike these studies, the study at hand intended on specific right to *non-refoulment* in the African human rights regime by focusing on the laws that protects *non-refoulment* in Africa human rights and the selected five East African state practices of *refoulment*. Moreover, this study particularly focuses on protection against *refoulment*, effects of its human right violations, states responsibility, and addresses remedies available for violations of the right.

1.4. SCOPE AND LIMITATION OF THE STUDY

The scope of this study is only limited to analysing legal protections of the right to *non-refoulment* of asylum seekers and refugees in the African human rights instruments particularly, the OAU Refugee Convention and the African Charter. As such, the analysis is confined to practice of *refoulment* in five selected East African countries namely: Kenya, Tanzania, Djibouti, Sudan and Burundi since 1990's.

The main limitation that the research faced is absence of adequate and up-to-date online data on the violations of the right to *non-refoulment* in the five selected East African countries. Also,

[30]Bonaventure Rutinwa, "Forced Displacement and Refugee Rights in the Great Lake Regions", African Journal of International Affairs, Vol.1 No.2 (1998), pp.12-15.

financial limitation is another challenge to purchase relevant reference materials online that are on sale, but not available in the library. Under pain of these limitations, the researcher tried to collect data from different libraries and free online materials such as reports, books, journals, cases, articles, etc.

1.5. OBJECTIVES OF THE STUDY

The study has both general and specific objectives. The general objectives of this research are:

1. To examine the scope of protection refugees and asylum seekers are accorded in the African regional human right treaties against *refoulment;* and
2. To analyse state practices with the view of identifying the gaps in the regime applicable to the protection against *refoulment* in Africa.

On the other hand, the specific objectives of the study are:

1. To look at the protection available for the victims (asylum seekers and refugees) of *refoulment* specifically in the five selected East African countries;
2. To appraise protection of *non-refoulment* accorded under the African human rights system by the five selected East African states;
3. To analyse the extent to which the right to *non-refoulment* is protected under the OAU Refugee Convention and ACHPR;
4. To look at the justifications for *non-refoulment* under African human rights laws; and
5. To examine the remedies available to victims in cases of violations of the right to *non-refoulment* under the OAU Refugee Convention and the ACHPR.

1.6. METHOD OF THE STUDY

This research will be essentially carried out in the library. Thus, the sources are mainly secondary, but sometimes primary sources are used. It is an inductive analysis as it looks at a particular issue from a general perspective. The researcher used library materials such as books, journals, articles, different international and regional legal instruments deal with the issue of *non-refoulment*. In addition, information, articles and regional case law as well as materials from the internet, regional and international human rights instruments, reports, recommendations and decisions of regional courts and African Commission are used.

1.7. SIGNIFICANCE OF THE STUDY

The topic of *non-refoulment* is one of the most contentious issues that states have to carefully handle. This is because *refoulment* affects refugees' and asylum seekers rights to *non-refoulment* which is a fundamental human rights protection. A significant of undertaking this research was it helps identifying protection given by the laws on the principle of *non-refoulment* of refugees and asylum seekers in the African human right instruments and in showing states practices in violation of *non-refoulment*. Next, it contributes providing awareness for right holders (refugees and asylum seekers) and duty bearers (African states) by elaborating their rights and duties respectively stipulated under African human rights laws. Moreover, the study appraises remedies available for refugees' and asylum seekers concerning violation of the right to *non-refoulment* under the OAU Refugee Convention and ACHPR. Finally, the research recommends both origin and host state ways of better protection and respect refugees' and asylum seekers right to *non-refoulment*. This is to help those African states to reconsider their human rights obligations under international and regional treaties as well as their domestic laws.

1.8. ORGANIZATION OF THE STUDY

The thesis is organized in five chapters. Accordingly, chapter one is the introductory and overview of the study. It gives summary of the study and what is generally to be expected in the study including, background of the study, statement of the problem, research questions, scope and limitation of the study, objectives of the study, methodology of the study, significance of the study and organization of the study.

Chapter two examines general overview of the right to *non-refoulment*. Under this it discusses development of the concept of *non-refoulment*. In addition, contemporary discourse on the right to *non-refoulment* would be discussed briefly.

Chapter three also looks legal frame work protecting the right to *non-refoulment*. It presents the international legal frame work of *non-refoulment* protection especially under the UN Refugee Convention and other international human rights treaties. Furthermore, the Africa legal frame works of *non-refoulment* such as the OAU Refugee Convention and ACHPR would be discussed in detail.

Chapter four explores state practices in East Africa: violations of the right to *non-refoulment* and remedies available in the African instruments. Under this chapter the contemporary instances of violation of the right to *non-refoulment* in five East African countries analysed critically. Further the effects of human right violations of the *refoulment* and states responsibility would be presented in detail under this chapter. The institution that rectifies violation of prohibition of *refoulment* and the remedies available for violation of the right *non-refoulment* in African instruments finalizes the chapter discussion.

The last chapter holds general conclusion, recommendations and questions for further research that help to build the existing practice and law as regards to *non-refoulment* consistent with human right law.

CHAPTER TWO

THE GENERAL OVERVIEW OF THE CONCEPT OF THE RIGHT TO *NON-REFOULMENT*

Introduction

This chapter aims to explore the general overview of the concept of the right to *non-refoulment*. Development (evolution) of the concept and its meaning are introduced at the beginning of the chapter. Next, definition of refugee and asylum seeker are also highlighted. Further, some key arguments on the contemporary discourses of the *non-refoulment* are also examined before conclusion finalizes the chapter.

2.1. DEVELOPMENT OF THE CONCEPT

The imperatives of regulating cross border movements of refugees generate legal principles such as protection and *non-refoulment*.[31] The word *non-refoulment* derives from the French term *'refouler'*, which means *to drive back* or *to repel*, in connection with immigration control, it refers to summary re-conduction to the frontier of those found to have entered illegally and summary refusal of admission of those without valid documents.[32] Thus, the term *non-refoulment* means that states cannot return aliens to territories where they might be subjected to torture, inhumane or degrading treatment, or where their lives and freedoms might be at risk.[33] The term *non-refoulment* that protects individuals from persecution lacks universally accepted definition.[34] But, because it consists of the whole set of obligations of states not to *refoul* every person, it is possible to describe the term in very generic terms the sum-total of the many obligations states have in this respect. Accordingly, it is a notion that prohibits states from

[31] Goodwin-Gill and Mc Adam, The Refugee in International Law, (2007), p.5.
[32] A. B. M. Imdadul Haque, Khan cited above at note 10, p.63.
[33] Ibid.
[34] Alice Farmer, "Non-refoulment and Jus-Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection", George Town Immigration Law Journal, Vol.23 No.1 (2008), p.20.

expelling, returning, extraditing or refusing access to their territory to anyone whose fundamental human rights would otherwise be at risk.[35]

Even though, the term *refoulment* refers expulsion or deportation it is different in certain circumstance. Among others, it is more of a formal process whereby a *lawful resident alien* may be required to leave a state or be forcibly removed.[36] Whereas, expulsion or deportation whatever is the case, the protection of refugees against expulsion or return "*refoulment*" to a country where they fear persecution also constitutes one of the essential elements of the principle of *non-refoulment*.[37]

The development of *non-refoulment* could be associated with the state practices to protect those fleeing autocratic governments in case of the Russian and the Ottoman Empires.[38] In order to understand the *non-refoulment* principle it is useful to revisit the circumstances and reasons surrounding its development.[39] Even though, in 1905 the principle had been enshrined in a United Kingdom (UK) statute that refugees with a fear of persecution for political or religious reasons should be allowed into the country, it was not until later that the idea of *non-refoulment* of such people became widely accepted.[40] The principle of *non-refoulment* gained ground after the First World War (1914-18).[41] It became the concern of international law in early1930's. The1933 Refugee Convention marked the first time a multilateral international treaty contained a *non-refoulment* provision.[42] However, the treaty made the prohibition of *refoulment* applicable

[35] Francesco Messineo, Non-refoulment Obligations in Public International Law: Towards a New Protection Status?, University of Kent, Canterbury, Kent Law School (4 April 2011), p.4 (133); see also Amnesty International British Section Playing Human ftnbaü, 'Coercion to effect 'Voluntary Departure' to 'Safe third Country'(1995), pp.59-61. The core of meaning of Non-refoulment requires States not to return refugees in any manner whatsoever to territories in which they face the possibility of persecution.

[36] Guy S. Goodwin-Gill, and Jane Mc Adam, The Refugee in International Law'(3rd ed.) part 2 Asylum 5 Non-refoulment in the 1951 Refugee Convention, Oxford Public International Law, Oxford University Press, (2015), p. 2

[37]Paul Weis, "Territorial Asylum, International Refugee law", Indian Journal of International Law, (2010), pp.181-182.

[38] Guy S. Goodwin-Gill and Jane Mc Adam, cited above at note 36, pp.117-118.

[39]Jessica Rodger, Defining the Parameters of the Non-refoulment Principle, LLM research paper in International Law (Laws 509), Faculty of Law Victoria University of Wellington (2001), p.3.

[40]Goodwin-Gill, Guy S, The Refugee in International Law, (2nd ed.), Clarendon Press, Oxford, (1996), p.118.

[41]A.B. M. Imdadul Haque Khan, cited above 10, p.63.

[42] Ibid.

only to those refugees received as state authorized arrivals.[43] This Convention under its article 3 explicitly stipulated the principle of *non-refoulment*:

> Each of the contracting parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulment) refugees who have been authorised to reside there regularly, except the identified measures are stated by reasons of national security or public order.

According to this provision, each member state has an obligation not to expel authorized refugees, including "non-admittance at the frontier to avoid *refoulment*."[44] Each state undertook 'in any case not to refuse entry to refugees at the frontiers of their countries of origin.' Among the eight states that ratified the 1933 Refugee Convention, it was only the UK that expressly objected to the principle of non-rejection at the frontier.[45] The refugees from Nazi Germany in 1934-38 also inspired the European countries to abide by the legal principle of *non-refoulment*.[46]

The United Nation General Assembly (UNGA) under its resolution 8(1) declared that subsequent to the Second World War, a new era began.[47] As such, the idea of the general principle of *non-refoulment* was stated by the UNGA in February1946 as "no refugees or displaced people who have... expressed valid objections to returning to country of their origin....shall be compelled to return to their country of origin..."[48] According to this idea, it is prohibited to *refoul* (return) refugees including displaced person to the country of his/her nationality. But, the concept of prohibition of *refoulment* not only prohibits refugees' direct return to their country of origin, but also to third country.[49]

In 1949, the United Nations Economic and Social Council '(ECOSOC) appointed an *ad hoc* Committee to consider the desirability of preparing a revised and consolidated Convention

[43]Ellen F. D Angelo, "Non-Refoulment: The Search for a Consistent Interpretation of Article 33", Vanderbilt Journal of Transnational Law, Vol.42:279 (2009), pp.282-283.
[44] Gilbert Jaeger, "On the History of the International protection of Refugees", Rich Septembre IRRC,Vol.83 No.843, (September 2001), p.730.
[45] Guy S. Goodwin-Gill, Jane Mc Adam, cited above at note 36.
[46]A.B. M. Imdadul Haque Khan, cited above at note 10, 63.
[47] UNGA res.8 (1), 12 Feb.1946, para.(c)(ii).
[48]Paul. Weis, cited above at note 37.
[49]Cordula Droege, "Transfers of Detainees: Legal Framework, Non-Refoulment and Contemporary Challenges", International Review of the Red Cross, Vol.90 No.871 (September 2008), p.677.

relating to the international Status of Refugees and Stateless Persons and, if they consider such a course desirable, draft the text of such a Convention.[50] The *ad hoc* Committee on statelessness and related problems met twice in New York in 1950,[51]and considered so essential that no exceptions were provided as: "no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion."[52]

In the present day, the universal rights of refugees including *non-refoulment* are derived from two primary sources of general standards of international human rights laws and the refugee Conventions itself.[53] The modern codification of refugee's rights was carried out by UN, which took place just after the adoption of the UDHR.[54] From human rights perspective, the prohibition of *refoulment* is meant to prohibit the forcible sending or returning or in any other way transferring a person to a country where he or she may face persecution. From this, it is believed that the principle of *non-refoulment* in human rights context makes it applicable to all persons and not only to refugees or asylum seekers.[55] However, for the purpose of this study the right to *non-refoulment* is approached with a particular reference to refugees and asylum seekers. Having said this much on the concept of the right to *non-refoulment*, it is necessary to look at what constitutes 'refugees' and 'asylum seekers' (bearers of the right to *non-refoulment*) in the legal context. This is dealt with under the subsequent two sections.

2.2. DEFINITION OF A REFUGEE

The definition of a refugee forms the basis upon which a country grants refugee status to a person seeking asylum. If an individual fulfils the requirements of the definition, then he/she is

[50] UN ECOSOC Resolution 248(IX) B, (8 August 1949).
[51] UN Ad Hoc Committee on Refugees and Stateless Persons, Report of the Ad Hoc Committee on Refugees and Stateless Persons,(Second Session) Geneva, (14-25 August 1950) available at:(http://www.refworld.org/docid/3ae68c248.html) last visited on 29 October 2016.
[52] UN doc. E/1850, article 28.
[53] James C. Hathaway cited above at note 44, p.154.
[54] Id,p.75.
[55] The Redress Trust (REDRESS) and The Immigration Law Practitioners' Association (ILPA), Non-refoulment Under Threat, Matrix Chambers, London, (16 May 2006), available at: (http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf) last visited on 22 October 2016.

entitled to recognition as a refugee.[56] For the purpose of the study we use the definition provided by the existing relevant international and regional laws, such as the UN Refugee Convention and its Protocol, OAU Refugee Convention and 1984 Cartagena Declaration. Under the UN Refugee Convention, the term 'refugee' shall apply to any person who:

> Owing to well founded of being persecuted for reasons of race, religion, nationality, member ship of a particular social group or political opinion, is outside the country of his nationality and unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having and a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[57]

According to this provision, refugees are defined by three basic elements: firstly, they are outside of their country of origin or outside the country of their former habitual residence; secondly, they are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted; and finally, the persecution feared is based on at least one of five grounds: race, religion, nationality, membership of a particular social group, or political opinion.

From this one can understand that not every persons or individuals who flee and cross an international border are entitled to have refugee status. The definition stipulates that a person should be outside his or her country. As such, it definitely excludes, for instance, Internally Displaced Persons (IDPs) from receiving international protection under the refugee Convention.On the other hand, refugee definition focuses on individual persecution in exclusion of people fleeing war and civil strife.[58] This means, for instance a victim of individual persecution on the basis of her political opinion is recognized as a refugee, while a farmer who flees the threat of war conditions, however, could be returned to her dangerous homeland.[59]

---

[56] Elizabeth Macharia-Mokobi and Jimcall Pfumorodze, "Advancing Refugee Protection in Botswana Through improved Refugee Status Determination", African Human Rights Law Journal, 13 AHRLJ (2013), p.166.

[57] UN Refugee Convention, cited above at note 9, article 1(A) (2).

[58] Nafees Ahmad, Mapping Refugees Protection under International Law: Legal Desirability and Human Rights Suitability, (3 June 2015), available at: (http://www.countercurrents.org/ahmad030615.htm) last visited on 29 August 2016.

[59] Isabelle R. Gunning, "Expanding the International Definition of Refugee: A Multicultural View", Ford ham International Law Journal, Vol.13:35 (1989-1990), p.37.

The 1967 Protocol to the UN Refugee Convention (here in after 1967 Protocol) further expanded the definition of a 'refugee' stated under the UN Refugee Convention by removing the geographical and temporal limitations of this Convention.[60] These limitations initially restricted the scope of application of the UN Refugee Convention to persons who became refugees due to events occurring in Europe before 1 January 1951.[61] Consequently, the 1967 Protocol expanded the application of refugee definition to the situation of "new refugees" emerged, as a result of events that took place after 1 January 1951.[62]

During the late 1950's and 1960's new refugee groups emerged, in particular in Africa. These refugees were in need of protection which could not be granted to them under the limited time-frame of the UN Refugee Convention.[63] As a result, the OAU Refugee Convention came up with a more expanded definition of the term 'refugee', that is to include: "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/her country in order to seek refuge in another place."[64]

According to this provision persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in states that are parties to OAU Refugee Convention, regardless of whether they have a well-founded fear of persecution.[65] Accordingly, it is clear that the OAU Refugee Convention expanded the refugee definition to encompass a group based conception of equal significance and specifically deals with issues concerning the relationships between refugee producing and refugee-receiving states.[66] Likewise, the 1984 Cartagena Declaration on Refugees expanded refugee definition to include:"persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence,

[60] Protocol Relating to the Status of Refugees, adopted on January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 and entered into force on October. 4, 1967, article 2(1).
[61] UNHCR, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Geneva Switzer Land (September 2011) available at: (http://www.unhcr.org/4ec262df9.pdf) last visited on 02 October 2016.
[62] Fact Sheet No.20, Human Rights and Refugees.
[63] Ibid.
[64]OAU Refugee Convention, cited above at note 12, article 1(2).
[65]Ibid.
[66]Joan Fitzpatrick, "Revitalizing the 1951 Refugee Convention", Harvard Human Rights Journal, Vol.9:229 (1996), p.234.

foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[67]

Further, in Africa, the term 'refugees' under the OAU Refugee Convention also includes people crossing with in regional borders owing to the reasons of being squeezed with random outcomes of armed conflicts or events seriously disturbing public order. In the same manner, Cartagena Declaration of 1984 in Latin American also recognizes refugees who have not involved in crimes against peace, crimes against humanity and war crimes or acts contrary to the purposes and principles of UN.[68] But, for the purpose of this study, the expanded refugee definition of the OAU Refugee Convention is the most appropriate.

2.3. DEFINITION OF ASYLUM

The word "asylum" comes from the Greek word "*Asylon,"* which means 'freedom from seizure'.[69] Historically, the practice of asylum is as old as humanity itself, and the term has been regarded as a place of refugee like Sacred places where one could be free from the reach of a pursuer.[70]

The term "asylum" is not defined in any one of international refugee law and human rights laws; however it has become an umbrella term for the sum total of protection granted by a country to refugees on its territory. For example, UDHR and ACHPR under article 14(1) and 12 (3) respectively stated that "everyone has the right to seek and to enjoy in other countries asylum from persecution." This does not define the phrase asylum rather protects every one's right to seek and enjoy asylum. However, UNHCR to some extent indicated asylum as: "No forcible return (refoulment) to the frontiers of territories where the refugee's life or freedom would be

[67]Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, (22 November 1984) article III, Para.3.
[68]Nafees Ahmad, cited above at note 58, p.5.
[69]Roman Boed, "The State of the Right of Asylum in International Law", Duke Journal of Comparative & International Law, Vol.5:1 (1994), pp.2-4.
[70]Ibid.

threatened for a temporary period, with the possibility of staying in the host country until a solution outside that country can be found."[71]

This means that asylum-seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined.[72] It could refer to someone who is waiting for an answer including someone who has not yet submitted an application, but have the intention to seek asylum. In the due course not every asylum-seeker will be recognized as a refugee, but majority will.[73] For example, in 2015 there were 593 thousand first instance decisions in all European Union member States, and in the same year 75 % of all positive decisions in the 28 European Union countries resulted in grants of refugee status, while for final decisions the share was somewhat lower at 69 %.[74] From this one can understand that not every asylum seeker is a refugee, but majority of them are.

Roman Boed states that the right of asylum has been said to contain certain specific actions of state conduct such as: to admit a person to its territory, to allow the person to sojourn there, to refrain from expelling the person, to refrain from extraditing the person and to refrain from prosecuting, punishing, or otherwise restricting the person's liberty.[75] The researcher agrees with the rights of asylum explored by Boed, since it deals with asylum rights in depth. Currently, debates are going on with regard to the extent to which refugees and asylum seekers are entitled to the protection of *non-refoulment* as will be discussed next.

2.4. CONTEMPORARY DISCOURSE ON THE *NON-REFOULMENT*

This section addresses some apprehensions within contemporary debates on *non-refoulment*, particularly those relating to its customary status and issues triggered by Counter-terrorism. The issue on the international legal status of principle of *non-refoulment* has been debated since the

[71] UNHCR, Refugee Protection: A Guide to International Refugee Law, (2001) p.15 available at: (http://www.unhcr.org/3d4aba564.pdf) last visited on 2 September 2016.
[72] Global Trends, Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, (2008), p.5.
[73] UNHCR, cited above at note 61, p.48.
[74] Asylum Statics available at :(http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics) last visited on 20 June, 2016.
[75] Roman Boed, cited above at note 69.

1960's.[76] Thus the status of *non-refoulment* as a rule of international customary law has been contested for decades. Relentless negative state practices of *non-refoulment* amounted to valid reasons for questioning the existing of the customary rule.[77] However, majority of opinion is that the principle of *non-refoulment* has over time attained the status of customary international law.[78] At the moment, this has led many scholars and UNHCR to conclude that the principle forms part of customary international law.[79]

According to Lauterpacht and Bethlehem, there is no doubt that *non-refoulment* is a rule of international customary law.[80] But, this outlook has not been unanimously acknowledged. For example, some scholars such as James Hathaway claim that customary international law does not come into force until and unless it is supported by widespread and consistent state practices.[81] In the case of *non-refoulment* Hathaway asserts that it is completely unsound to hint that there is anything approaching near common respect among states.[82]

However, the customary rule of *non-refoulment* under the refugee law and human rights law is different. The customary rule that has developed in international refugee law authorizes exceptions to *non-refoulment* for national security.[83] On the other hand, the customary rule in human rights law unconditionally rejects the recognition of exceptions to *non-refoulment*.[84]

With regard to the exception under refugee laws, Paul Weis notes that the principle of proportionality (balancing) must be considered, that is, the danger faced by the refugee due to return must be proportional with the danger the refugee is posing to the security of the country of

[76] Nils Cole Mant, "Non-Refoulment Revised Renewed Review of the Status of the Principle of Non-Refoulment as Customary International Law", European Journal of Migration and Law, Kluwer Law International, Netherland, 5:23-68 (2003), p.23.
[77]Ibid.
[78]Ibid.
[79] Andrew Brouwer and Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide", 21 Refuge 9(2003).
[80]Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulment: Opinion', in E. Feller, V. Turk and F. Nicholson (eds.), Refugee Protection in International Law, Cambridge UP, Cambridge, (2003), p.155.
[81]James Hathaway, The Rights of Refugees under International Law, Cambridge University Press, (2005), pp.363-364.
[82]Ibid.
[83] Sir Elihu Lauterpacht and Daniel Bethlehem, cited above at note 80, pp.149-150.
[84] Id, p.162.

refuge.[85]Also, according to other commentators, states must obey the rule of *non-refoulment* strictly in cases where the refugee is risking exposure to torture or cruel, inhuman or degrading treatment or any risk within the scope of any other non-derogable human rights, even in case where national security of the origin country is at stake.[86] They also claim that refugee law exception would be inconsistent with the humanitarian and fundamental nature of the prohibition against *non-refoulment*. This interpretation is supported through developments on the application of *non-refoulment* as an absolute right in human rights law, regardless of the conduct of the individual.[87]

The obligation of states under international refugee and human rights law toward *non-refoulment* take priority over those derived from other international agreements, for instance in the context of states' efforts to restrain and prevent terrorism.[88] The writer also agrees with the position that duty stipulated under international refugee law and human rights law including prohibition of *refoulment* prevail over any other bilateral or multi-later international agreements for counter-terrorism. This is because the principle of *non-refoulment* under human rights law and international refugee law recognized as customary international law.

Further, despite the absolute prohibition of *refoulment*, the principle of *non-refoulment* has been under threat.[89] Based on their counter-terrorism policies states seems doubt the absolute nature of the principle of *non-refoulment*, reasoning that it can oblige them to keep convicted or suspected terrorist in their land. In this regard, Cordula Droege argues that though states' doubt is a legal concern, it cannot supersede the consideration on which the *non-refoulment* is founded.[90] In case the state decides whether or not to grant extradition, the requested states may face two conflicting obligations.[91] One is the obligation to extradite that come up from a bilateral or multilateral extradition agreement, or obligation to extradite or prosecute that arises from

[85] Paul Weis, The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary, UNHCR, (1990), p.342.
[86]Sir Elihu Lauterpacht and Daniel Bethlehem, cited above at note 80, p.138.
[87] Id, p.135.
[88]UNHCR, Guidance Note on Extradition and International Refugee Protection, Geneva, Switzer land (April 2008), p.12. available at; (http://www.refworld.org/docid/481ec7d92.html) last visited on 29June 2016
[89] The Redress Trust (REDRESS) and ILPA, cited above at note 55.
[90]Cordula Droege, cited above at note 49, p.678.
[91]UNHCR, cited above at note 88, p.11.

international or regional instruments[92] which allow the extradition of a refugee or an asylum-seeker to the requesting state. The other is, an obligation under international refugee and human rights law, which prohibit the extradition of a refugee or an asylum-seeker to the requesting state under the conditions examined already.[93] In such circumstances, the prohibition of *refoulment* of refugee or asylum seekers recognized under international refugee and human rights law prevail over any obligation to extradite.[94] For example, European Court of Human Rights (ECtHR) in Soering vs. UK[95] case for the first time recognized right of refugees against extradition. In this case, the ECtHR held that extraditing a person to a territory may give rise to a violation of article 3 of European Convention on Human Right (ECHR) by UK where there are substantial grounds for believing that the person, if extradited, faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the requesting country.[96]

Conclusion

Eventually, as regards to finding of the study the principle of *non-refoulment* primarily protects refugee(s) and asylum seeker(s).The right to *non-refoulment* became the concern of international law for the first time under 1933 Refugee Convention. The term *non-refoulment* originated from the French term *"refouler"*, which implies forcing a person to return to the place where he had left from. The Second World War new era of development of the principle of *non-refoulment* came in to force at international and regional levels. The term refugee for the first time defined under the UN Refugee Convention. In the meantime, the OAU Refugee Convention also expanded the definition provided in the UN Refugee Convention; however the word asylum is not defined in international or regional laws.

Regarding the international legal status of *non-refoulment* the finding of the study is that, it has been disputed since the 1960's particularly on its customary status. As regards to this, majority of the scholars have agreed that the principle of *non-refoulment* has reached the status of customary international law and it is binding on all states regardless of their member ship to any

[92] Ibid.
[93] Ibid.
[94] Ibid.
[95]Soering vs. United Kingdom (1989) 11 EHRR, 439, para.91.
[96]Ibid.

treaties. Moreover, despite the absolute prohibition of *refoulment* under human rights law, the principle of *non-refoulment* has been under threat in cases where states decide whether or not to grant extradition of refugees or asylum seekers.

CHAPTER THREE

THE LEGAL FRAMEWORK OF THE RIGHT TO *NON-REFOULMENT*

Introduction

This chapter seeks to analyse legal frame work of the right to *non-refoulment*. The international legal frame work of *non-refoulment* introduced at the beginning of the chapter. In this part the protection of *non-refoulment* provided under the international refugee law regime are discussed. The protection of *non-refoulment* guaranteed in other international human rights treaties are also highlighted here. Subsequently, the regional legal framework of *non-refoulment* particularly under the OAU Refugee Convention and ACHPR are also discussed. Conclusion finalizes this chapter.

3.1. THE INTERNATIONAL LEGAL FRAME WORK OF *NON-REFOULMENT*

3.1.1. THE INTERNATIONAL REFUGEE LAW REGIME

3.1.1.1.THE UN REFUGEE CONVENTION

The UNGA has made the UN Refugee Convention to address refugee matters, primarily the principle of *non-refoulment* that constitutes the fundamental international refugee protection. This convention provided the protection to *non-refoulment* of refugee under its article 33 as: "No Contracting State shall expel or return (''refouler'') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[97]

According to this provision the prohibition of *refoulment* stipulated under the Convention is to be valid and acceptable by contracting states essentially if certain conditions are fulfilled. Firstly, the prohibition of *refoulment* stated under article 33 (1) of the UN Refugee Convention is legitimate if the person is *a refugee.* The word refugee applies to any person who meets refugee definition as elucidated in the chapter 2 above. The principle of *non-refoulment* not only protects

[97]The 1951 Refugee Convention, cited above at note 11, article 33 (1).

accepted refugees, but also applies to asylum seekers.[98] It means that, though the protection enshrined under article 33 (1) of the UN Refugee Convention explicitly says 'refugees', through cumulative reading of article 1 (A)(2) and 33 (1) it is further applicable to those asylum seekers who have not had their status formally declared as refugees. A refugee seeking person must not be prevented from entering a country as this would amount to *refoulment*.

Secondly, the *contracting States* shall be bound by the prohibition of *refoulment* that is noted under the provision. Here, the term contracting states refers to all states party to the UN Refugee Convention.[99] It also refers to all state parties to the 1967 protocol including that are not a party to the UN Refugee Convention.[100] The obligation of *non-refoulment* stipulated under article 33 of the UN Refugee Convention is binding on all organs of a state party to the Convention and/or its Protocol as well as any other person or entity acting on its behalf.[101] The Convention is equally binding on every state whether or not a signatory to the Convention or the Protocol. This is due to the fact that the prohibition of *non-refoulment* is considered as customary international law and as such binding on all states regardless of their membership.[102]

Thirdly, though the provision says nothing about entry to a territory, it expressly obliges states not to expel or *refoul* a refugee "...in any manner whatsoever..." This later phrase is applicable to the prohibition of *refoulment* of a refugee to a danger of persecution in any form of forcible removal, such as deportation, expulsion, extradition, informal transfer or "renditions",[103] and non-admission (rejection) of asylum seekers at the frontier.[104]The drafters of the UN Refugee

[98] United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, Summary Conclusions: The principle of Non-Refoulment, University of Cambridge, UK, (2001) p.178.
[99] UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, (April 2015) available at: *(*http://downloads/Documents/3b73b0d63_5.pdf) last visited on 22 September 2016.
[100] 1967 Protocol, cited above at note 60, article I (1).
[101] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulment Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Geneva (26 January 2007), p.4 available at: (http://www.refworld.org/pdfid/45f17a1a4.pdf) last visited on 15 September 2016.
[102] UNHCR, cited above at note 61, p.5.
[103] Francesco Messineo, cited above at note 35, p.9.
[104] Penelope Mathew, "Australian Refugee Protection in the Wake of the Tampa", The American Journal of International Law, Vol.96 No.661 (2002) p.666; see also Guy S. Good Win-Gill, "Non-Refoulment and the New Asylum Seekers", Virginia Journal of International Law, Vol.26:4 (1986), pp.901-902.

Convention indicated the phrase "...in any manner whatsoever..."[105] as intended to prohibit any act of removal or rejection that would expose the person concerned at risk. This means that the formal description of the act is not only limited to acts such as expulsion, deportation, return, rejection, etc, but also allows the application of the *non-refoulment* to other form of removal or rejection.[106]

Based on this indication, since the UN Refugee Convention provision says nothing about the extradition of refugees, in 1980 the UNHCR Executive Committee studied the extradition of refugees and reaffirmed the fundamental character of the principle of *non-refoulment.*[107]According to this Committee, refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds specified under article 1(A)(2) of the UN Refugee Convention.[108] Similarly, the European Convention on extradition also prohibits extradition, if the requested state (the host state) has *substantial grounds* for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of those reasons.[109]

Furthermore, despite the fact that the UN Refugee Convention clearly prohibits direct *refoulment*, it is silent about indirect *refoulment*. Rein hard Marx argues that the act of states either direct or indirect (chain) which constitutes *refoulment* violates article 33 (1) of the UN Refugee Convention. He contends that direct *refoulment* is explicitly stated, while the phrase "…in any manner whatsoever..." implies the prohibition of indirect *refoulment*. He characterizes indirect *refoulment* as forcible removal by host state to a third state where the *refoulment* is

[105] Mustafa Karakaya, "The Protection of Refugees and Asylum Seekers Against Extradition under International Law", Law & Justice Review, Vol.: V, Issue: 1 (June 2014), p.188.
[106] Ibid.
[107] Executive Committee Conclusion No.17 (1980); Report of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/586, para.16 available at: (http://www.burmalibrary.org/docs21/GGG-Non-refoulement-tpo.pdf) last visited on 02 September 2016.
[108] Ibid.
[109] The 1957 European Convention on Extradition, ETS 024, 359 U.N.T.S. 273 entered into force 18 April 1960, article 3(2).

likely, or most of the time to the country of origin.[110] Though indirect *refoulment* is not covered by the refugee definition as provided under article 1(A) of the UN Refugee Convention, it is argued that any one deserves protection under this Convention so long as he/she can show a clear and well-founded fear of persecution.[111]Also, according to Penelope Mattew, chain (indirect) *refoulment* which causes a person to return to another place from which *refoulment* occur is prohibited.[112]

Apart from article 1(A) of the UN Refugee Convention which explicitly say refugees not be returned to country of origin, but the drafters of the Convention clearly intended that refugees not be returned to any country either to their country of origin or to other countries to which they would be at risk.[113] Therefore, the prohibition of *refoulment* stipulated under the above article should be understood to mean return or expel (*refoul*) "...in any manner what so ever..." which includes any danger of persecution that leads to *refoulment*, directly or indirectly.

Finally, article 33 (1) of the UN Refugee Convention prohibits the *refoulment* where refugees' or asylum seekers' life or freedom is threatened based *on race, religion, nationality, membership of a particular social group or political opinion.* This prohibition is valid and acceptable under this Convention, only if life or freedom is endangered based on one of these grounds. Accordingly, the absence of one of these grounds does not impose duty on states. From this it seems that the motive behind the provision is to make grounds other than those listed inapplicable or inadmissible.

In sum, to say the prohibition of *refoulment* is breached under the UN Refugee Convention the four criteria elaborated above must be fulfilled cumulatively.

3.1.1.1.1. EXCEPTION TO THE *NON-REFOULMENT*

The UN Refugee Convention provides exceptions under article 33 (2) that "the refugees right to *non-refoulment* is restricted, if he/she regarded danger to security of the origin country,

[110] Rein Hard Max, "The Criteria of Applying the "International Flight Alternative" Test in National Refugee Status Determination Procedures", International Journal of Refugee Law, Oxford University press, Oxford, Vol.14 No.2/3 (2002), p.197.
[111] Id, p.198.
[112]Penelope Mathew, cited above at note 104.
[113] G.S. Goodwin-Gill & J. Mc Adam, cited above at note 36, p.204.

convicted for serious crime and danger to the community of that country." According to this provision the exception is allowed only in cases where a refugee is found to pose a threat to the country in which he/she claims protection (host) country.[114] It may also apply to those who, albeit being refugees under article 1(A) of the UN Refugee Convention, constitute a threat to the security of the host country.[115]Thus, even though this Convention under its article 42 clearly prohibits making reservations to article 33, the prohibition of *refoulment* is not absolute.

In this regard, the UNHCR claims that, to be considered threats to national security, there shall be specific national security implications, and those national security exceptions to *non-refoulment* shall also be appropriate threats to law and order.[116] Moreover, it expressed the view that the particular crime has to be grave and serious as to justify *refoulment*.[117] These exceptions must be interpreted very restrictively,[118] subject to due process safeguards,[119] and as a measure of last resort.[120]

3.1.1.2.THE DECLARATION ON TERRITORIAL ASYLUM

This Declaration that is adopted unanimously by the UNGA resolution on 14 December 1967[121] also referred to the right to *non-refoulment* in such a way that:

> No person referred to in article 1 (seeking asylum from persecution), shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he/she may be subjected to persecution.[122]

---

[114]Fabiane Baxewanos, Non-Refoulment and Extraterritorial Immigration Control the Case of Immigration Liaison Officers Seminar in International Law, Faculty of Law, University of Vienna, (2013), p.8.

[115]Francesco Messineo, cited above at note 35, p.8.

[116]Shirley Llain Arenilla, cited above at note 8, p.294.

[117] Ibid.

[118]UNHCR, cited above at note 88, para.15.

[119]Id, para.28. This provides that: as this danger should outweigh the risks upon return, UNHCR remarks that such expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.

[120]Id,para15.

[121]Declaration on Territorial Asylum that adopted unanimously by the United Nations General Assembly Resolution 2132 (XXII), (14 December 1967).

[122]Id, article 3; see also Resolution (67) 14 on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, article 2 available at: (http://www.refworld.org/pdfid/3ae6b38168.pdf) last visited 12 July 2016. Recommends that member Governments

This provision has the intention to impose obligation on states not to reject asylum seekers at border line, and entitles every asylum seekers to the right against expulsion or compulsory return (direct or indirect *refoulment*) to where he/she is subject to persecution. As opposed to the OAU Refugee Convention[123] and its 1967 Protocol, [124]the 1967 Declaration on Territorial Asylum under its article 3(2) properly recognizes the possibility of reservations to the *non-refoulment* principle which is "for overriding reasons of national security… as in the case of a mass influx of persons." From this statement there has not been an agreement on the phrase 'mass influx' so far. For instance, as stated in Alice Farmer:"even if UNHCR Global Consultations give absolute respect for *non-refoulment* in mass influx situation there is no consensus until now on the assertion."[125]

3.1.2. THE INTERNATIONAL HUMAN RIGHTS REGIME

3.1.2.1.THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

In December 10, 1948 the UNGA under its resolution 217A (III) adopted the first international human right instrument (UDHR). The Declaration contains different human right provisions for everyone. The right to *non-refoulment* is also impliedly stipulated under this Declaration. Thus the UDHR clearly provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution."[126] This provision presupposes that states are obliged not to send individuals to territories in which they may be persecuted, or in which they are at risk of torture or other serious harm. Here lies the right to *non-refoulment*. However, this may not immediately correlate with the right of every one to seek asylum rather it is clearly confined to what states may lawfully do.[127]

---

should "ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution."

[123]1951 Refugee Convention, cited above at note 9, article 42 (1).

[124]1967 Protocol, cited above at note 60, article VII (2).

[125] Alice Farmer, cited above at note 34, p.12.

[126] UDHR, cited above at note 11, article 14(1).

[127] Guy S. Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulment", International Journal of Refugee Law, Oxford University Press, Oxford, Vol.23 No.3 (2011), p. 444.

Article 14(1) of the UDHR thus envisages the term asylum as protection and gives no further hint as to how it needs to be interpreted other than providing the most significant qualification,[128] that is, the protection offered by asylum shall be caused by persecution and that a person who finds himself in such a risk has the right to seek it in another country.[129] In view of that, the right to seek and obtain asylum is protected by the principle of *non-refoulment.*[130] Hence, a person who possesses an asylum status has a right to *non-refoulment*.

3.1.2.2.THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) does not expressly provide the right to *non-refoulment.* But, Human Rights Committee of this Convention in its decisions regarding article 7 of the same adopted the principle of r*efoulment.*[131] It stipulates the principle of *non-refoulment* in such a way that "no one shall be subjected to torture or to cruel, in human or degrading treatment or punishment."[132] Here according to the Human Right Committee in its General Comment 31 the prohibition of *non-refoulment* is not explicitly stated, but can be implied by interpretation.[133] Similarly, Chantal Thomas asserts that the ICCPR does not contain an explicit prohibition of *refoulment*, but its prohibition against torture has been interpreted as implicitly incorporating the principle under consideration.[134]

In addition, the Human Right Committee in its General Comment 31 has made explicit for member states to the ICCPR "…the enjoyment of Covenant rights is not limited to citizens of states parties but must also be available to all individuals, regardless of nationality or

[128] Fernando M. Marin˜oMene´ndez, "Recent Jurisprudence of the United Nations Committee Against Torture and the International Protection of Refugees", Refugee Survey Quarterly, Oxford, (2015), p.62.
[129] Ibid.
[130] Ibid.
[131] David Weissbrodt & Isabel Hörtreiter, "The Principle of Non-Refoulment: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulment Provisions of Other International Human Rights Treaties", Buffalo Human Rights Law Review, Vol.5, No.1 (1999), p.42.
[132] ICCPR, cited above at note 11, article 7.
[133] Human Rights Committee, 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.12.
[134] Chantal Thomas, "What Does the Emerging International Law of Migration mean for Sovereignty?", Melbourne Journal of International Law,Vol.14, (2013), p.405.

statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the state party.…"[135] Hence, the principle of *non-refoulment* which is impliedly inferred from ICCPR protects any individual which includes refugees and asylum seekers rights to *non-refoulment* including prohibition of extradition or expulsion.[136]

Moreover, the Human Right Committee also under its General Comment 20 clearly referred to article 7 of the ICCPR which impose obligation on states that include the prohibition of *refoulment* as "states parties must not expose individuals to the danger of torture or cruel, inhumane or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulment*."[137] The Human Right Committee further stipulated that the principle of *non-refoulment* shall not be derogated; subjected to no limitation and remain in force even in situations of public emergency. It is also claimed that no justifications or extenuating circumstances may be raised to justify a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.[138] Consequently, *non-refoulment* in these frameworks provides absolute protection for fundamental human rights.[139] For instance, the Human Right Committee in case of *X vs. Sweden*[140] has been affirmed absolute nature of the prohibition of *refoulment* to a risk of torture.[141]

3.1.2.3.THE CONVENTION AGAINST TORTURE

The Convention against Torture (CAT) prohibits expulsion or return (*refoul*) of any person to a place where there is a substantial danger of Torture. Unlike other international human right instruments CAT was the only international instrument that clearly provides the prohibition of *refoulment*. CAT under its article 3 plainly provides that "No state party shall expel, return ('*refouler'*) or extradite a person to another state where there are substantial grounds for believing

[135] Human Rights Committee No.31, cited above at note 133, para.10.
[136] Ibid.
[137] Human Rights Committee, General Comment No.20: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (1992), UN Doc. HRI/GEN/1/Rev.7 (May 12, 2004), para.4.
[138] Id, para.3.
[139] Alice Farmer, cited above at note 34, p.19.
[140] X vs. Sweden, Communication No.1833/2008 (2011), para.10.
[141] Ibid.

that he would be in danger of being subjected to torture."[142] This provision explicitly prohibits any states party to CAT from perpetrating *refoulment* or forced return of any person '*in any manner'* to a place where there are substantial grounds for believing that doing so would expose her/him to torture.[143] In view of that, the prohibition applies to any form of return, rejection, expulsion or refusal, wherever it may occur such as at the border, on the high seas, in an internationalized zone as well as deportation and extradition or any act of transfer whereby effective control over an individual changes from one state to another.[144] Consequently, the principle of *non-refoulment* is normally understood as prohibiting return to country of the origin.[145] But, the principle also in fact prohibits the transfer of a person to any state where she/he may be at risk.[146]

Therefore, the principle of *non-refoulment* which is protected as a core human right under the CAT has an absolute nature and not subject to derogation or exception.[147] This approach is a manifestation of the principle that a state can violate its obligations under human rights law not only by its own acts, but also if it knowingly puts a person in a situation where his or her rights will be likely violated by another state.[148] As regards to torture and *non-refoulment* as stated in the Mendez, the Human Rights Committee recommended that "the state party fulfil its *non-refoulment* obligations and guarantee the right to appeal the issuance of an extradition warrant, where there are substantial grounds for believing that a person would be at risk of being subjected to torture."[149]

As opposed to characteristics referred in the UN Refugee Convention, a person is protected via article 3 of the CAT as: "There are no preclusions for those considered to be criminals, national

[142] CAT, cited above at note 11, article 3(1).
[143]G.S. Goodwin-Gill & J. Mc Adam, cited above at note 36, pp.285-286.
[144]Emanuela-Chiara Gillard, "There's No place Like Home: States' Obligations in Relation to Transfers of Persons", International Review of the Red Cross, Vol. 90 No. 871 (September 2008), p.712.
[145] Ibid.
[146] Ibid.
[147] Fernando M. Marin˜o Mene´ndez, cited above at note 128.
[148]Emanuela-Chiara Gillard, cited above at note 144, p.708.
[149] Fernando M. Marin˜o Mene´ndez, cited above at note 128, p.76.

security risks, or even torturers."[150] According to this provision, the right to *non-refoulment* is absolute and no exceptions may be made to, unlike the UN Refugee Conventions which requires that protection be associated to a fear of persecution for the reason that a person's race, religion, nationality, membership of a particular social group, or political opinion. Furthermore, in contrast to the UN Refugee Conventions, the CAT does not have any provision excluding perpetrators of particularly serious crimes or other undeserving persons from its protection.[151] For example, the Committee against Torture in *Agiza vs. Sweden* case[152] has confirmed that the absolute nature of the prohibition of *refoulment* as provided under article 3 of the CAT.[153]

Similarly, the protection of *non-refoulment* by the CAT interacts with other norms of international human rights law, in particular with those on asylum and refugee protection. All of these different areas mutually complement each other and in turn reinforce the protection offered through asylum and refugee status.[154] Thus, from this someone can understand that any people including refugees and asylum seekers are protected from being subject to *refoulment*.

3.1.2.4.THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

The International Convention for the Protection of All Persons from Enforced Disappearance of 2006 is also the other international human rights instrument which recognized prohibition of *non-refoulment*. The Convention provides that "no state party shall expel, return ("*refouler*"), surrender or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance."[155] This provision expressly foresees *non-refoulment* of 'any person' by prohibiting transfer that may

[150]Joanne Kinslor, "Non-refoulment and Torture: The Adequacy of Australia's Laws and Practices in Safeguarding Fugitives from Torture and Trauma", A1al Forum No 25, (July 2000), p.20 available at: (http://www.austlii.edu.au/au/journals/AIAdminLawF/2000/9.pdf) last visited on 5 October 2016.

[151]UNHCR cited above at note 71, p 18; see also Kelly, Tobias, "Predicting the Future Risk of Torture" This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty, University of Pennsylvania Press, (2012), p.101 available at: (http://www.jstor.org/stable/j.ctt3fj3sz.70) last visited on 8 September 2016.

[152]Agiza vs. Sweden, Communication No.233/2003, (2005), para.13 (8).

[153] Ibid.

[154] Fernando M. Marin˜oMene´ndez, cited above at note 128, p.66.

[155]International Convention for the Protection of All Persons from Enforced Disappearance adopted on December 20, 2006 and entered in to force on 23 December 2010, article 16(1).

expose them to a risk of being subject to enforced disappearance.[156] Here, the phrase "any person" is also applicable to both refugees and asylum seekers.

3.1.2.5.THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Right of the Child (CRC), like the above international human rights instruments, has also adopted the protection against *refoulment*. But, the protection provided under the CRC is only applicable to children (asylum seekers and refugees). Accordingly, article 22 of the CRC enshrines the prohibition of *refoulment* of children.[157] This prohibition of child *refoulment* was elaborated by the Committee on the CRC in its General Comment 6, stating that state parties to the CRC shall not transfer (return) children, if there are substantial grounds for believing that there is a risk of irreparable harm to the child,[158] for example, but by no means restricted to, those contemplated on the right to life in violation of article 6; and article 37 prohibiting torture, cruel, inhuman or degrading treatment or punishment, the death penalty, or arbitrary deprivation of liberty.[159]

3.2. THE AFRICA LEGAL FRAME WORK OF *NON-REFOULMENT*

3.2.1. THE OAU REFUGEE CONVENTION

Though the ACHPR indicates the birth of African human rights regime,[160] the OAU Refugee Convention was the first OAU treaty with what may be broadly named as human rights aspect. Despite the fact that the OAU Convention failed to make use of the word 'rights', and did not

[156]Emanuela-Chiara Gillard, cited above at note 144, p.708.

[157]Convention on the Right of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entered into force (2 September 1990). Article 22 (1) of this Convention stated as:

> States parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

[158] Committee on the Rights of the Child, General Comment No.6,Treatment of Unaccompanied and Separated Children outside their Country of Origin, UN Doc. CRC/GC/2005/6, (3 June 2005), para.27.

[159]Ibid.

[160] ACHPR, cited above at note 13, preamble.

take a direct human rights approach in respect of the protection of refugees as well as asylum seekers, it had important rights inferences which were explained in the following.[161]

In the African human rights system, the principle of *non-refoulment* can be considered as a pillar.[162] The OAU Refugee Convention under its article 2 (3) expressly states protection against *refoulment* of refugees and asylum seekers as: "No person shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in the territory where his life, physical integrity or liberty would be threatened."

According to this provision the prohibition of *refoulment* is acceptable and sound if certain criteria's are fulfilled by member state. Firstly, the principle of *non-refoulment* is applicable to "persons." The OAU Refugee Convention may indeed protect a broader class of persons from *refoulment* than does the UN Refugee Convention.[163] The UN Refugee Convention applies only to a refugee including asylum seekers, where as the OAU Refugee Convention expands to any person including those excluded from the scope of application of the former. Even though the two Conventions contain exclusion clauses, the later under its article 2 (3) provides that 'no person' may be *refouled*, presumably including those who fall within the exclusion clauses of the UN Convention on Refugees.[164] The OAU Refugee Convention as stated under article 1(1 and 2) is applicable to refugee and every person respectively. Therefore, article 2(3) of the OAU Convention prohibits *refoulment* of every person including refugees and asylum seekers as well as those persons excluded from the UN Refugee Convention.

Secondly, the prohibition of the *refoulment* is applicable to those *"...*member states*..."*According to this phrase, all member states have the obligation to be bound by provision of the OAU Convention including the prohibition of *refoulment*. It is true that any member states have the duty to obey the protection against *refoulment* and as such responsible for the violation of the same. But, this does not mean that non-member states to this Convention under consideration escapes responsibility wholly. This is because, UN Refugee Convention binds every state

[161]Gina Bekker, cited above at note 29, p.7.
[162]Elizabeth Macharia-Mokobi and Jimcall Pfumorodze, cited above at note 56, p.167.
[163]E.-C. Gillard, cited above at note 144, p.726.
[164]Ibid.

irrespective of membership on the basis of customary international law as mentioned above. From this, it is clear that though the OAU Refugee Convention imposes duty on host member states not to *refoul* refugees and asylum seekers; it is silent with regards to the duty of receiving states (country of origin). This is one of the gaps of the OAU Refugee Convention, among others, due to which violation of the right to *non-refoulment* by several African states is happening widely. Thus, in order to bridge this gap it is highly advisable to resort to other human rights instruments such as African Charter taking in to account the special nature and vulnerability of refugees and asylum seekers.

Thirdly, the OAU Convention prohibits "...rejection at frontier, return or expulsion..." According to this provision the principle of *non-refoulment* provides that an asylum seeker or refugee should be allowed to enter and remain in the territory and should not be expelled back to a country where he/she is likely to face persecution or death.[165] The OAU Convention further applies both starting at the border and within the territory of the country concerned, and concerns all individuals, whether recognized or not as refugees, pending the determination of their status.[166] This means that the norm of *non-refoulment* covers both non-rejections at the frontier, non-return and applies even to persons who are still inside places where they fear harm.[167] Thus, the OAU Convention explicitly states that the scope of protection of *non-refoulment* extends to admission at the territory of the state.[168] From cumulative reading of article 1 and 2(3) of the OAU Convention, it is obvious that there are no territorial restrictions on states' *non-refoulment* obligations.[169] This indicates that the prohibition of *refoulment* enshrined under the OAU Convention is applicable extraterritorially.

However, under this Convention other than non-rejection at frontier, return or expulsion there are no other express forms of prohibition of *refoulment* such as deportation, extradition and informal

[165]Elizabeth Macharia-Mokobi and Jimcall Pfumorodze, cited above at note 56, p.167.

[166] Cristiano D'Orsi, "Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?" Zaö RV 68, (2008), p.1061.

[167]Bonaventure Rutinwa, "The end of asylum?" The Changing nature of Refugee Policies in Africa", Refugee Survey Quarterly, Vol.21 No.1 and 2, (2002), p.17.

[168]UNHCR, No entry! A review of UNHCR's Response to Border Closures in situations of Mass Refugee Influx, Geneva 2 Switzerland, PDES/2010/07 (June 2010), para.63.

[169] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulment Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Geneva, (26 January 2007), p.15.

transfer or renditions. But, this does not mean that absence of such prohibition of *refoulment* specifically entails as not prohibited under the OAU Refugee Convention. As discussed in the preceding section 3.1 prohibition of *refoulment* includes any forms of forcible return including deportation, expulsion, and extradition and informal transfer or rendition. Thus, this principle also applicable under the OAU Refugee Convention and as such they are prohibited.

Lastly, "...where his/her life, physical integrity or liberty would be threatened..."According to article II (3) of the OAU Refugee Convention, refugees are protected from forced return (*refoulment*) to territories where their *'life, physical integrity or liberty'* would be threatened. Conversely, the UN Refugee Convention under its article 33(1) protects refugees from *refoulmen*t to territories where their '*life or freedom'* would be threatened. As elaborated in the report on the African asylum systems, assuming that freedom and liberty are analogous, the OAU Refugee Convention clearly protects persons from one additional type of *harms* and threats to physical integrity.[170] But, practically protections from threats to physical integrity are implicitly included in protection from threats to life.[171] Thus, to say the violation of the right to *non-refoulment* occurs under the OAU Refugee Convention the criteria elucidated above have to be satisfied together.

In addition, the OAU Refugee Convention does not include exceptions nor allow that national security concerns can excuse a state from its asylum responsibilities though it does permit a state to appeal to other member states in times of emergency.[172] This implies that it encompasses an absolute prohibition of *refoulment* and as such allows for no exception to be made in times of national emergency or while national security is at stake.[173] Likewise, the 1969 American

[170] Amor Boubakri, et al, A Report on the African Asylum Systems, (29 August 2011), available at: (https://www.iarlj.org/general/images/stories/BLED_conference/papers/WP_African_asylum_systems_-_A_Boubakri.pdf) last visited on 22 June 2016.
[171] Ibid.
[172] Refugees' Rights Forum, Policy Paper: The Principle of Non-Refoulment Of a Person to a Place in Which He Is Expected to Suffer danger to Life, Liberty, Persecution or Torture, (June 2008), p.168.
[173] Ibid.

Convention on Human Rights (ACHR) under its article 22 has provided no exceptions to the principle of *non-refoulment*.[174]

3.2.1.1. CESSATION OF THE RIGHT TO *NON-REFOULMENT*

Unlike the UN Refugee Convention, the OAU Convention does not include exception to a national security. Yet, many scholars argue that the OAU Refugee Convention does not provide the principle of *non-refoulment* in an absolute manner.[175] For example, according to article I (4) (f) and (g) the OAU Refugee Convention shall *cease* to apply to any refugee including protection from *non-refoulment*, if he/she has 'committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee' or has 'seriously infringed' the OAU Refugee Convention's purposes and objectives.[176]

The OAU Refugee Convention adds three further grounds to those found in the UN Refugee Convention in respect of *exclusion* as a refugee. A person would cease to enjoy or would not be granted refugee status if s/he has been guilty of acts contrary to the purposes and principles of the Convention,[177] has seriously infringed the purposes and objectives of the OAU Refugee Convention,[178] or has committed a serious non-political crime outside his/her country of refuge prior to admission to that country as a refugee.[179]

In sum, the OAU Refugee Convention complements shortcomings faced by the UN Refugee Convention on the principle *non-refoulment*. The shortcomings of the latter in turn are complemented by the ACHPR and discussed in the next.

[174]American Convention on Human Rights 1969, article 22 (8), It states that "in no case may an alien be deported or returned to a country, regardless of whether or not it is his or her country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his or her race, nationality, religion, social status, or political opinions."
[175] Alice Farmer, cited above at note 34, p.12.
[176]Ibid.
[177] OAU Refugee Convention, cited above at note 12, article I (5) (c).
[178] Id, article I (4) (g).
[179] Id, article I (5) (b).

3.2.2. THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS (ACHPR)

African Charter is adopted by the OAU to stand as the primary human rights instrument for the African continent. Upon receiving the required number of ratifications by OAU member states, the African Charter entered into force five years later on 21 October 1986. The ACHPR is an international treaty that is legally binding on those states that have ratified it and is intended to set international standards that African states are required to observe.[180] All 54 African states except Morocco have accepted the provisions of the African Charter including the protection of *non-refoulment* as formally binding.[181] The protection of *non-refoulment* that guaranteed in scattered form under different provisions of the ACHPR would be discussed in the subsequent manner.

3.2.2.1. THE RIGHT TO DIGNITY AND PROHIBITION OF TORTURE AND INHUMAN TREATMENT

The African Charter protects dignity right of any individual and at the same time bans torture as well as in human treatment of every person including refugee and asylum seeker. The African Charter notes that:

> Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status and which prohibits all forms of exploitation and degradation particularly slavery, slave trade, torture, cruel, in human or degrading punishment and treatment.[182]

Some scholars asserts that article 5 of the African Charter basically protects 'dignity' which is the only right in the ACHPR described as 'inherent in a human being' and then lists certain examples of exploitative practices which would constitute violations of this right without pretending to provide a full list.[183] For instance, victims of rape and sexual abuse are not covered under article 5 though some commentators claim that the victims of such violations are also

[180] African Charter, cited above at note 13.

[181] AU, List of Countries which have signed, ratified/acceded to the ACHPR available at: (https://www.au.int/en/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_0.pdf) last visited on 22 July 2016.

[182] African Charter, cited above at note 13, article 5.

[183] Monette Zard, et al, cited above note 15, p.4.

eligible to seek and obtain asylum. [184] Furthermore, Christof Heyns added aspects of imprisonment have constituted violations of article 5 of the ACHPR such as overcrowding, beatings, torture, excessive solitary confinement, shackling within a cell, 'extremely poor quality food' and denial of access to adequate medical care.[185]

For example, Nyanduga in Marina Sharp explains that, a refugee whose rights are violated by a member states to the African Charter, either *country of origin* or *host state*, can have recourse to the African Commission on human and peoples' rights (African Commission) under the individual communications procedure of particular relevance to refugees under article 5 of the ACHPR. And it has been interpreted as protecting any individual from being expelled or returned to a state where he/she is likely to face torture or cruel or inhuman or degrading treatment.[186] However, African Commission often declare violation of article 5 only on the basis of torture being practised, and criticized for no more information of what actions amounted to being tortured.[187] In the case *Open Society Justice Initiative vs. Côte d'Ivoire*[188] the African Commission declared that Côte d'Ivoire has violated the provisions of article 5 of the Charter.[189]

Accordingly, violation article 5 constitutes *refoulment*, for instance, as discussed in the preceding section under ICCPR Chantal Thomas argued that, prohibition against torture has been interpreted as implicitly incorporating the prohibition of *refoulment* that is also applicable here. Therefore, state parties to the ACHPR are obliged to refrain from expelling or returning (*refoul*) any person including vulnerable groups particularly asylum seekers and refugees to a place where they are likely to be subjected slavery, slave trade, torture, cruel, inhuman and degrading punishment and treatment.

---

[184] Ibid.

[185] Christof Heyns, 'Civil and political rights in the African Charter', in :Murray, The African Charter on Human and Peoples' Rights, The System in Practice, edited by Malcolm D. Evans and Rachel Murray,(1986–2000), pp.150-151.

[186]Marina Sharpe, 'Engaging with Refugee Protection', The Organization of African Unity and African Union since 1963, Research Paper No. 226, (December 2011), pp.26-27.

[187] Christof Heyns, cited above at note 185.

[188] Open Society Justice Initiative vs. Côte d'Ivoire, Communication No.318/06, and para.10.

[189] Id, para.142.

3.2.2.2.THE RIGHT TO BE HEARD

African Charter also provides the rights of every one to be heard[190] including refugees and asylum seekers. Article 7(1) (a) of the ACHPR specifically stipulates the right to appeal to competent national organs of hosting state. The word *appeal* here seems to show primarily to the general right to seek a judicial remedy.[191] The right to seek judicial remedy indicate both the initial right to take a matter to the court and the right to an appeal from a first instance decision to higher tribunals (courts).[192] According to this idea any person including refugees and asylum seekers has the right to take their matters to the court at initial level and appeal with regards to their forcible return (*refoul*) to country of origin or any third country where fear of persecution exist.

For example, in *Organisation Mondiale Contre La Torture and Others vs. Rwanda* case,[193] the complainant was alleged that Rwanda had expelled on security grounds Burundian refugees, who had been granted refugee status in Rwanda without giving them a chance to be heard. This contravenes with the right to an appeal to competent national organs of Rwanda against acts violating victim's fundamental rights, in particular expelling these refugees from Rwanda, without giving them the opportunity to be heard by the national judicial authorities. At the end the African Commission declared that the government of Rwanda has violated the right to be heard which is guaranteed under article 7(1) of the ACHPR.[194] Consequently, such denial of the right to be heard by Rwandan government led to deportation (*refoulment*) of the Burundian refugees to their place of origin where they fear persecution.

[190] African Charter, cited above at note 13, article 7(1).
[191]Chirstof Heyns, cited above at note 185, p.156.
[192]Ibid.
[193]Organisation Mondiale Contre La Torture and Association Internationale Des Juristes Democrates, Commission Internationale Des Juristes (C.I.J) and Union Interafricaine des Droits Des l'Homme vs. Rwanda, Communications No.27/89,46/91,49/9 and 99/93 (1996).
[194] Id, Para.34.

3.2.2.3.THE RIGHT TO FREEDOM OF MOVEMENT AND FREEDOM TO CHOOSE ONCE RESIDENCE

The African Charter under article 12 (2-5) also guarantees the prohibition of *refoulment* of everyone including refugees and asylum seekers. According to article 12(2) of the ACHPR the right to freedom of movement constitutes the right to leave any country as well as one's own and to return to his/her country. The phrase 'the right to return to his/her country' shows an extraterritorial dimension of provision whereby individual rights outside their country of origin is guaranteed.[195] This provision provides that the right to seek or obtain asylum may be subjected to restrictions provided by law in case for protection of national security, law and order, public health or morality. The wording of article 12(2) of the ACHPR seems article 13 (2) of the UDHR.[196]

3.2.2.3.1. THE RIGHT TO SEEK AND OBTAIN ASYLUM

The African Charter in article 12(3) guarantees the right of every individual at the time he/she was persecuted, the right to seek as well as obtain asylum in other countries in accordance with laws of hosting countries and international Conventions. Thus, the right to seek and obtain asylum in article 12(3) clearly establishes the principal basis for the protection of refugees' under the African Charter. This provision is unique in a sense that it provides the right not only to seek, but also to obtain asylum.[197] Likewise, ACHR provides for the right to 'seek and be granted asylum'.[198] Hence, based on the African Charter it may be argued that all AU member states, regardless of whether or not they are party to the OAU Refugee Convention, are obliged to receive refugees and grant asylum.[199]

The provision of article 12 (3) of the ACHPR gives the impression that it does not expressly prohibit return of asylum seekers. But, the African Commission has declared that article 12 (3) of

[195] African Charter, cited above at note 13, article 2.

[196] UDHR, cited above at note 11, article 13(2), which provides that 'everyone has the right to freedom of movement and residence within the borders of each state and everyone has the right to leave any country, including his own, and to return to his country'.

[197] Christof Heyns, cited above at note 185, p.171.

[198]ACHR, cited above at note 174, article 27 (7).

[199] Jamil DdamuliraMujuzi, The African Commission on Human and Peoples' Rights and the Promotion and Protection of Refugees' Rights, African Human Rights Law Journal, 9(2009), p.175.

the ACHPR should be read as including a general protection of all those who are subject to *persecution*, that they may seek refuge in another state.[200] Cristiano D'Orsi also argues that article 12(3) of the ACHPR under the right to seek and obtain asylum, which provides that an individual has the right "to seek and obtain asylum", elsewhere if persecuted.[201] Moreover, the obtaining of asylum is qualified by the clause *"*when persecuted*"* under the purview of the UN and OAU Refugee Conventions.[202]

According to the African Commission article 12 (3) of the ACHPR is reinforced by article 2(1) of the OAU Refugee Convention 'which obliges member states to use their best efforts to receive refugees from other African countries'[203] from where their life is endangered. Hence, it is prohibited to return forcibly asylum seekers to their country of origin. Magnus Killander asserts that to deal with the prohibition of returns of asylum seekers article 12(3) of the African Charter ought to be read together with article 2(3) of the OAU Refugee Convention, which provides that a person may not be returned to a country where his or her life, physical integrity or liberty might be threatened.[204] Furthermore, Jamil Ddamulira Mujuzi also argues that article 12(3) of the ACHPR contains a provision against the mass expulsion of national, racial, ethnic or religious groups. It should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state.[205] Thus, article 12(3) of the African Charter also guarantees the prohibition of return *(refoulment)* of refugees and asylum seekers.

3.2.2.3.2. THE NON-EXPULSION OF ALIENS

The African Charter gives the OAU Refugee Convention boost on the *non-refoulment* provision.[206] The principle of *non-refoulment* is not guaranteed expressly in the ACHPR like in the refugee Conventions. As expressed in the above section under the UN Refugee Convention

[200]MonetteZard, et al, cited above at note 15, p.3.
[201]Cristiano D'Orsi, "The AU Convention on Refugees and the Concept of Asylum", Pace International Law Review on line Companion, Vol.3, No.5 (July 2012), p.237.
[202] Cristiano D'Orsi, cited above at note 166.
[203] Monette Zard, et al, cited above at note 15, p.3.
[204] Magnus Killander, cited above at note 18, p.9.
[205]Jamil DdamuliraMujuzi, cited above at note 199.
[206] Frans Viljoen, International human rights law in Africa, Oxford University Press, Oxford, (2007), pp.389-420.

the prohibition of *refoulment* includes non-expulsion. Similarly, though *non-refoulment* not expressly stated under this section, it is also addressed through non-expulsion. The principle of non-expulsion is guaranteed under article 12 (4) of the ACHPR. According to this provision a non-national legally admitted in a territory of member state to the ACHPR may not expelled except in accordance with the law.

In this regard, Magnus Killander explains that expulsion decisions must be taken in accordance with the law and it must be interpreted in line of the safeguards in article 13 of ICCPR as well as the provisions in the refugee Conventions.[207] This means before expelling any non-national all remedies provided under the law should be exhausted. Further the expulsion must be in line with the article 13 of the ICCPR which provides that:

> An alien lawfully present in the territory of the state party may be expelled there from only in pursuance of a decision on reached in accordance law and shall, except where compelling reasons for national security otherwise required, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and to be represented for the purpose before the competent authority or person especially designated by the competent authority.

The purpose of this provision of ICCPR is undoubtedly to prevent arbitrary expulsions, if the legality of an alien's entry or stay is in dispute.[208] Any decision on this point leading to expulsion or deportation ought to be taken in line with article 13 of ICCPR which say, an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.[209] This expression is also applicable for the African Charter. Moreover, the process of expulsion decision must be compatible with UN Convention and its Protocol,[210] and OAU Refugee Convention.

---

[207]Magnus Killander, cited above at note 18, p.10; see also the UN Refugee Convention, cited above at note 9, article 32 (2), which stated as: The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law, except, for national security the refuge has the right to appeal before any competent authority.

[208]Human Rights Committee, General Comment 15, The Position of Aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 at 18 (1994), paras.9-10.

[209]Ibid.

[210]UN Refugee Convention, cited above at note 9.

For instance, in *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Democrates and Others vs. Rwanda* case, the African Commission declared that Rwanda has been violated article 12 (4) of the ACHPR in violating the prohibition of arbitrary expulsion of Burundian refugees from the country of the asylum to their country of origin. Furthermore, this arbitrary expulsion is also in violation of article 2 and 12 of the African Charter.[211] Accordingly, any member states to the African Charter are obliged to comply strictly with due process norms provided under the ACHPR and ICCPR before expelling (removing) any non-nationals as well as refugees and persons seeking protection as refugees,[212]as provided under article 12 (4) and article 13 respectively.

3.2.2.3.3. THE PROHIBITION OF MASS-EXPULSION OF ALIENS OR NON-NATIONALS

The African Charter under its article 12 (2 and 3) discussed above prohibits the removal of individuals. Whereas, sub-article 5 of the Charter deals with prohibition of mass expulsion of non-nationals. Further, 12 (5) provides that mass-expulsion refers to as "that which is aimed at national, racial, ethnic or religious groups."

Though sub-article 4 and 5 of article 12 seems the same they are different. Some scholars believe that article 12(5) of the ACHPR expands ban expulsion provided under article 12 (4) in the prohibition of expulsion of masses of no-nationals, a problem that has affected group of refugee in several cases.[213] The African Commission commented that, the drafter of the African Charter believed that mass expulsion presented a special threat to human rights.[214] And article 12(5) of

[211]Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Democrates and Others vs. Rwanda, cited above at note 193, para.31; see also Inter-Africaine des Droits de l'Homme and others vs. Angola, Communication No.159/96 (1997) para.20.

[212]Joan M. Fitzpatrick (editor), Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International mechanisms and Procedures, Transnational publishers', p.266 available at: (http://www.globalprotectioncluster.org/_assets/files/tools_and_guidance/protection_of_idps/Human_Rights_Mechanisms_for_IDPs-EN.pdf) last visited on 22 August 2016.

[213]Joe Oloka Onyango, Human Rights, the OAU Convention and the Refugee Crisis in Africa: Frothy years after Geneva printed in International Journal of refugee law, Oxford University press, Vol.3 No.3 (1991), p.457.

[214]Chambo, cited above at note 25, pp.17-18.

the ACHPR expressly prohibits mass expulsion, a recurring problem in many parts of Africa.[215] As a result, the prohibition on mass expulsion in this article has been addressed by the African Commission on numerous occasions indicating that many states do not live up to their undertaking of 'African solidarity'.[216]

Here, whether or not refugees and asylum seekers are benefited from the prohibition of mass expulsion is the issue that must be addressed. According to Christof Heyns in Murray the prohibition of discrimination was provided under article 2 of the African Charter in the context of expulsion of foreigners which is explicitly covered in article 12(5) of the same.[217] The rights guaranteed in the ACHPR are entrusted to every nationals and non-nationals including refugees and asylum seekers equally without any discrimination as illustrated under article 2 of the African Charter. As a result, refugees benefits from the rights provided in the African Charter including the right to non-expulsion during the period of asylum.[218] Notably, in *Union Inter-Africaine des Droits de l'Homme and others vs. Angola*[219] case, the African Commission has found that mass expulsion of non-national constituted a violation of article 12 (5) of the African Charter.[220]

Additionally, the African Commission in *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) vs. Guinea* case[221]held that the treatment of Sierra Leonean refugees by Guinea violated the Sierra Leoneans' right to freedom from mass expulsion.[222] Moreover, in the Rwanda case mentioned above the African Commission also held that there are full evidences in this communication that groups of Burundian refugees have been

[215]Kolawole Olaniyan, Civil and Political Rights in the African Charter: Articles 8-14, in African Charter on Human and Peoples' Rights (2nd ed.), edited by Malcolm Evans and Machel Murray, (1986-2006), p.231.
[216] Magnus Killander, cited above at note 18, p.10.
[217]Christof Heyns, cited above at note 185, p.145-146; see also African Charter, cited above at note 13, article 2 stated as: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."
[218] Marina Sharpe, cited above at 186.
[219] Union Inter-Africaine des Droits de l'Homme and others vs. Angola, cited above at note 211.
[220] Id, para.20.
[221]Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) vs. Guinea, Communication No.249/02 (2004).
[222] Id, para.74.

expelled on the basis of their non-nationality of Rwanda and, thus, the prohibition of mass expulsion provided under article 12 (5) of the African Charter had been violated.[223]

On the other hand, African Charter under its article 23 states that for the purpose of strengthening peace, solidarity and friend relations between the states parties, member states to the African Charter shall ensure that: any individual including refugees enjoying the rights guaranteed under article 12 of African Charter shall not employ in subversive activities against his/her country of origin or any member states to the African Charter, and their territories shall not be used as a bases for subversive or terrorist activities against the people of any other member states to the African Charter.[224] According to this provision refugees and asylum seekers are entitled absolute rights provided under article 12 of the African Charter; but they would lose the rights provided under this provision including the non-expulsion, if the refugees and asylum seekers engaged in subversive activities.

Moreover, similar to the ACHPR, ACRWC is also the other Africa regional human rights instrument impliedly referred prohibition of *refoulment*, but ACRWC hold specifically the child refugee rights particularly the prohibition of their return[225]to place where they fear persecution.

Conclusion

From among the findings of this chapter; it is clearly pointed out that the UN and OAU Refugee Convention explicitly protected the right to *non-refoulment*. From the major human rights instruments only the CAT guaranteed this right expressly; whereas, the UDHR, the ICCPR, the CRC and the ACHPR followed an implied approach in this regard. The right to *non-refoulment* provided under the UN Refugee Convention is not absolute; but it is protected in absolute

[223] Organisation Mondiale Contre la Torture and Others vs. Rwanda, cited above note 193, Para.33.

[224] African Charter, cited above at note 13, article 23 (2).

[225] African Charter on the Rights and Welfare of the Child, cited above at note 14, under its article 23 (1) stipulates that:

> Any child who is refugee or asylum seeker in accordance with relevant international or domestic law "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the charter and other international human rights and humanitarian instruments to which the States are Parties."

This shows that African children benefits from the protection of *non-refoulment* enshrined under the international, regional or domestic laws.

manner and without any exceptions under the OAU Refugee Convention and other regional as well as international treaties.

Most importantly, it is maintained that the OAU Refugee Convention complements the gaps existed under the UN Refugee Convention, and in turn the African Charter complements the gaps faced in the OAU Convention mainly with the prohibition of *refoulment* of refugees and asylum seekers. Also, the prohibition stipulated under the African Charter protects every person as an individual or in mass from expulsion (*refoulment)* including refugees as well as asylum seekers. The last point worth mentioning is that the OAU Refugee Convention imposes an obligation on the host state not to forcibly return (*refoul)* refugees and asylum seekers, but silent about duty of the receiving state (origin). To fill this gap, countries of origin like host states are obliged to respect the right to *non-refoulment* that are guaranteed under both regional and international human rights treaties they ratified/adopted.

CHAPTER FOUR

STATE PRACTICES IN EAST AFRICA: VIOLATIONS OF THE RIGHT TO *NON-REFOULMENT* AND REMEDIES AVAILABLE IN THE AFRICAN INSTRUMENTS

Introduction

This chapter examines state practices in East Africa: violations of the right to *non-refoulment* and remedies available in the African instruments. First, contemporary instances of the violation of the right to *non-refoulment* in selected East African countries particularly Kenya, Tanzania, Djibouti, Sudan and Burundi would be discussed. Second, the effects of violation of the right to *non-refoulment* such as death, torture, enforced disappearance and freedom of movement are considered. Third, state responsibilities for violation of the right to *non-refoulment* are discussed. Fourth, institutional mechanisms to redress the violation of the right to *non-refoulment* in selected East African countries are dealt with. Fifth, the remedies available for the violation of the right to *non-refoulment* are examined before conclusion sums up the discussion in the chapter.

4.1. CONTEMPORARY INSTANCES OF VIOLATION OF THE RIGHT TO *NON-REFOULMENT* IN EAST AFRICA

Many African countries, notably East African countries ratified international and regional human rights instruments in general, and both the UN and OAU Refugee Conventions in particular. Though most countries in East Africa are signatories of the latter two Conventions, violation of the principle of *non-refoulment* is pervasive in this region than elsewhere. For the purpose of this study an emphasis is made on the practice of only five East African countries namely: Kenya, Tanzania, Djibouti, Sudan and Burundi.

4.1.1. KENYA

As discussed in chapter 1, Kenya is the biggest refugee hosting country from among East African countries. So too, Kenya is the country where violation of the right to *non-refoulment* is widely occurred. For example, on 3 January 2007, the Kenyan authorities closed the country's border

that connects with Somalia by rejecting about 4,000 Somalis at the boarder of Somalia, Dhobley town.[226] The authorities also *refouled* about 360 Somali refugees who were waiting at UNHCR's transit camp Liboi for transfer to Dadaab.[227] Kenyan Non-Governmental Organizations (NGOs) estimated that thousands of Somali asylum seekers have been *refouled* by Kenyan security forces in the border area since the border of Somalia was closed. Consequently, some Somali asylum seekers immediately after crossing the border were forcibly returned to Somalia, and others were denied entry altogether. Following the border closure, reports of forcible returns to Somalia increased.[228]

In the same year Kenya also *refouled* the two Ethiopian Engineers Tesfahun Chemeda and Mesfin Abebe who were mandate holding refugees and had been in Kenya since 2005.[229] Though UNHCR granted them refugee status, they could not escape *refoulment*. They were arrested by Kenyan Anti-Terrorist Police on 2 April 2007.[230] On 27 April 2007, the two engineers were taken to Kamukunji police station and detained for the night.

The following day, they were transferred to Giriri Police station. During this time Staff from the UNHCR Protection Unit and members of the United States Federal Bureau of Investigation (FBI) visited them and reassured them they would not be deported.[231] The Oromo Community member instituted habeas corpus trial on behalf of the two refugees and the Nairobi Court ordered that the Attorney General and Police Commissioner should produce them in court.

On 9 May 2007, a senior Nairobi police official and a Kenyan government official told a court that they had already been *refouled* to Ethiopia to face terrorism charges. They produced a Laissez Passer from the Ethiopian Embassy, dated 1 May of the same year, which had obviously been backdated as that day was a public holiday. However, the two men remained in touch with

[226] UNHCR, cited above at note 168, para.308.
[227] Ibid.
[228] Amnesty International, Kenya Submission to the United Nations Human Rights Committee, Index: AFR 32/002/2012, (June 2012), pp.24-25.
[229] Oromia Support Group, Human Rights Abuses in Ethiopia Reports from refugees in Kenya, 60 Westminster Rd, Malvern Worcs, WR14 4ES, UK, (September 2010), pp.43-44.
[230] Death in Ethiopian Custody of Tesfahun Chemeda, after Refoulment from Kenya available at: (https://advocacy4oromia.org/services/advocacy/death-in-ethiopian-custody-of-tesfahun-chemeda-after-refoulement-from-kenya/) last visited on 28June 2016.
[231] Oromia Support Group, cited above at note 229.

Oromo Community of Kenya via telephone from within Kenyan custody for at least two days after the court hearing (May 11, 2007).[232]

Having been cleared of all the issues by the Kenyan Anti-Terrorist Unit and by the FBI, Tesfahun and Mesfin were forcibly *refouled* to Ethiopia at the request of the Ethiopian authorities.[233] After their *refoulment* they were disappeared while in custody of Ethiopian authorities until charged with terrorism on December 2008. The two men were finally convicted on terrorism charges at the end of March 2010. Accordingly, Tesfahun Chemeda was sentenced to life imprisonment and Mesfin Abebe to death.[234] Subsequently, Tesfahun Chemeda at the age of 37 years was executed in *Qaallittii* prison on 24 August 2013. Reports say prior to his death, he was reportedly detained in solitary confinement for up to two years, beaten and tortured.[235]

Furthermore, in January 2008 after many refugees had registered, Kenyan police arrested most of them in UNHCR run transit centres and forced back more than 700 of them from Kenya border towns such as Libio and Kiunga and Garrisa. Further, Kenya closed its border by leaving 5000-7000 stranded on the other side. On May 2008 Kenyan authorities deported Somali asylum seekers to Ethiopia without any court or administrative hearings, and Ethiopian authorities confirmed 41 of them were deported to Ethiopia.[236] On November 2008, Kenyan authorities detained 49 Somalis at Nairobi airport. The detainees needed access to UNHCR, but the authorities denied them access and forcibly returned 23 of them to Somalia. However, after the rest returned, Kenyan NGOs took the case for others before the Kenyan Court and a Court ordered that prohibits their *refoulment* and then Kenyan authorities placed them in Dadab

[232]Ibid.
[233]Death in Ethiopian custody of Tesfahun Chemeda, cited above at note 230.
[234]Oromia support Group, cited above at note 229.
[235] Oromia Support Group (OSG) and Oromia Support Group Australia (OSGA), Joint Civil Society Report Submission for UPR 19th Session, Ethiopia, (September 2013), p.4.
[236]United States Committee for Refugees and Immigrants, World Refugee Survey 2008 Kenya, (19 June 2008), available at :(http://www.refworld.org/docid/485f50ddc.html) last visited on 11August 2016.

refugee camp.[237] In 2009, UNHCR condemned the forcible return of minimum 93 Somali asylum seekers in the border areas in violation of the prohibition of *refoulment*.[238]

In addition, in January 2010, after violent protest in support of a Muslim cleric Abdulla al-Faisal, Kenyan police attacked the Eastleigh neighbourhood in Nairobi particularly an area mainly settled by Somali and arrested arbitrarily many Somali nationals including asylum seekers and refugees with valid documents. But, Kenya defended this act of mass arrest of Somalis in such a way that al-shabab was involved in the violent protest occurred in Kenya. According to NGOs source working with refugees in Nairobi, Kenyan police arrested and transported by truck an unknown number of refugees and asylum seekers back to the border with Somalia and then *refouled* to Somalia without court orders in 2010.[239]

In 2011 following Kenya's military intervention in Somalia, Kenyan government officials have repeatedly and publicly stated their intention to close the Dadaab refugee camps and return Somali refugees across the border into Somalia territory.[240] As a result, in February 2012 Kenyan Minister for Foreign Affairs reportedly informed Reuters that, "we definitely want the refugees to go home."[241] Following this, in July 2012 the Kenyan authorities forcibly returned about 360 Somali refugees, those who were waiting at Liboi for transfer to Dadab camp.[242]

Likewise, Human Right Watch (HRW) reported that in 2014 there were four occasions where Kenyan authorities deported in mass[243] totally 359 Somali's asylum seekers, 83 people on 9

[237]Ibid.

[238] HRW, Joint Letter to the African Commission on Human and Peoples Right Regarding Violations in the Context of Kenyan Counter-Terrorism Operations, (29 May, 2014).

[239]Amnesty International Publications, Kenya Submission to the United Nations Human Rights Committee for the 105th Session of the Human Rights Committee (9–27 July 2012), and Index: AFR 32/002/2012, (June 2012) available at; (http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI_Kenya_HRC.105.pdf) last visited on 6 June 2016.

[240] HRW, cited above at note 238.

[241] Kenya Ministry of Foreign Affairs Report to Reuters available at: (http://uk.reuters.com/article/2012/02/23/uskenya-somalia-refugees-idUKTRE81M1QR20120223) last visited on 7 September 2016.

[242]Amnesty International Publications, cited above at note 239.

[243] HRW, cited above at note 238.

April; 91 people on 17 April; 87 people on 3 May; and 98 people on 20 May[244] have been arrested and expelled from Kenya to Somalia. According to the report Kenyan authorities during the expulsion did not screened the deportees who needed to claim asylum and denied UNHCR access to all the deportees before they were removed to Somalia.[245] One 85 year old man and eight children were among the last to be expelled.

On 20 May 2014, the Kenyan government expelled a further 19 people which the Somali government refused to accept, because they had refugee status, alien cards or were Kenyan. At least three people expelled were documented refugees, while it is reported that others had alien cards, or claimed they had refugee or alien status in Kenya but did not have their documents, or that their documents were confiscated or destroyed following their arrest. Also, Kenya expelled 28 Ethiopians, as well as 6 Ugandan asylum-seekers; they were arrested and returned to Uganda.[246]

Furthermore, Amnesty International reported that in 2015 Dadab refugee Camp hosts at least 600,000 refugees and asylum-seekers, most of whom are Somali.[247] But, the Kenyan Deputy President declared his government's plan to close Dadaab refugee camp within three months from April to June 2016.[248] Consequently, around 350,000 Somali refugees were at risk of being forcibly returned home, which set their lives at risk of human rights abuses, essentially killings.[249] However, the Kenyan High Court on 09 February 2017 quashed the government's plan to close the largest refugee camp, by reasoning that the act was tantamount to group

[244] Amnesty International, Somalis are Scapegoats in Kenya's Counter-Terror Crackdown, and Index: AFR 52/003/2014, (May 2014), p.11.
[245] HRW, cited above at note 238.
[246] Amnesty International, cited above at note 244.
[247] Kenya Amnesty International Report of 2015/2016 available at: (https://www.amnesty.org/en/countries/africa/kenya/report-kenya/) last visited on 24 August 2016.
[248] Ibid.
[249] Ibid.

persecution.[250] Moreover, it is confirmed that in early January 2016, Kenyan security forces deported 25 Ethiopian refugees from Kenya to Ethiopia.[251]

These acts of *refoulment* by Kenya obviously constitute gross violation of human rights of refugees and asylum seekers guaranteed under relevant refugee laws and human rights laws. Obligation of states to respect the principle *non-refoulment* is recognized as a norm of customary international law, and consequently binding on all states regardless of their membership.[252] This obligation is guaranteed under both the UN Refugee Convention[253] with its Protocol, [254]and the OAU Refugee Convention to which Kenya is state party.[255] Under articles 33(2) and 2(3) of the UN and OAU Refugee Conventions respectively provides that state parties are obliged to refrain from forcibly returning refugees and asylum seekers either individually or in mass to a place where they would be at risk of human rights violations in any manner what so ever such as deportation, expulsion, extradition, "renditions" and rejection at the frontier.

As such, Kenya's act of forcibly returning registered Somali and Ethiopian refugees as well as asylum seekers in different occasions notably, in the year of 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016 to Somalia and Ethiopia amounts to *refoulment* in contrary to both Conventions. Also, Kenya's border closure in 2007 to Somali's asylum seekers constitutes *refoulment*. Further, Kenya's forcibly expelling Ethiopian and Somali refugees in the above cases is also in violation of article 32 (1 and 2) of the UN Refugee Convention that obliges state parties not to expel recognized refugees except on grounds of national security or public order and only if decision reached to this effect is in accordance to due process of law. The act of Kenya in expelling these refugees qualifies neither the exceptions nor in line with due process of law.

---

[250] Africa News: Kenyan closure of Dadab refugee camp blocked by High Court available at: (http://www.africanews.com/2017/02/09/kenya-court-quashes-closure-of-dadaab-world-s-largest-refugee-camp/) last visited on 10 February 2017.

[251] Kenya Amnesty International Report of 2015/2016, cited above at note 247.

[252] UNHCR, Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees, HCR/MMSP/2001/09, (16 January 2002), para.4, available at: (http://www.unhcr.org/refworld/docid/3d60f5557.html) last visited on 22August 2016.

[253] Kenya acceded to UN Refugee Convention on 16 May 1996.

[254]Kenya acceded to the 1967 Protocol on 13 November 1981.

[255]Kenya ratified OAU Refugee Convention on 23 Jun e1992.

In addition, the prohibition of *refoulment* (non-expulsion) of every person including refugees and asylum seekers is also guaranteed under article 12(2-5) of ACHPR[256], article 7 of the ICCPR[257]and article 3 of the CAT[258] to which Kenya is party. According to these treaties all member states have an obligation to respect all rights guaranteed there under including the right of non-expulsion of every person (not excluding refugees and asylum seekers). The wide ranging practice of *refoulment* of refugees and asylum seekers by Kenya as outlined above, clearly contravenes these human rights treaties. Similarly, Kenya has denied the right to be heard and the right to appeal of Ethiopian and Somalia refugees and asylum seekers in violation of article 7(1) of ACHPR. Moreover, Kenya is also in violation of principles and African Commissions' Guideline on Human and Peoples' Rights while Countering Terrorism in Africa that states the obligation to prevent terrorism must be carried out in accordance with the state's obligations under international human rights and refugee laws [259] discussed above. Above all, Kenya has failed to observe her own Refugee Act of 2006[260] which guaranteed refugees as well as asylum seekers from forcibly returning to countries where their safety is at risk.

Thus, from the facts of the above cases, Kenya's act of expulsion, extradition and *refoulment* of Ethiopian and Somali citizens who had been accepted as refugees or asylum seekers, including an act of rejection at or closure of border either individually or in mass at different times amounts to violation of prohibition of *refoulment* guaranteed under UN and OAU Refugee Conventions on the one hand, and under international, Africa human rights instruments (to which Kenya is a party) and Kenya's own national refugee law on the other.

[256] Kenya acceded to ACHPR on 23 January 1992.

[257] Kenya acceded to ICCPR on 1 May 1972.

[258] Kenya acceded to CAT on 21 February 1997.

[259]African Commission Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia (21 April to 7 May 2015) , p.12.

[260]Kenya Refugee Act 2006, under its section 18 provides that:

> "No person shall be refused entry into Kenya, or expelled, extradited from Kenya or returned to any other country or to be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where the person may be subject to persecution…"

4.1.2. TANZANIA

A possible breach of the *non-refoulment* principle occurred in Tanzania during the mass exodus of Rwandan refugees following the 1994 crises in Rwanda. For example, in 1995 the Tanzanian government closed its borders to a group of more than 50,000 Rwandans who were fleeing the then renewed violence.[261] The Tanzanian government justified the border closure based on dangers posed to the environment, regional tensions and for national security.[262] Amnesty International reported that Tanzanian State of Affairs continued throughout 1995 and 1996, with the border remaining closed to Rwandan refugees.[263] Its Minister for Foreign Affairs would later elucidate: "We are saying enough is enough. Let refugees go home and no more should come."[264]

After this episode, the Tanzanian government immediately forced Rwandan refugees in whatever way to go back home in an exercise euphemistically referred to as "redirected repatriation."[265] The Tanzanian soldiers forced the Rwandan refugees to turn around, and "redirected" them towards their country of origin where their life and safety was at risk. Afterward, hundreds of thousands of refugees were taken over the border and those who managed to flee into the surrounding countryside were rounded up and tracked back to Rwanda under military escort. During this time totally around 483,000 refugees were forcibly returned to Rwanda. Further early in 1997, 126 Burundian refugees were *refouled* from Tanzanian to Burundi and there to be summarily executed.[266]

Rwandese nationals Bertina Murera and Benjamin Rutabana after hearing that the Rwandese authorities were planning to arrest them, for their involvement in helping former National Assembly Speaker Joseph Sebarenzi Kabuye, fled to Burundi on 24 January 2000. After their flee they applied for asylum in Burundi. However, because of the close relation between Burundi

[261]Roman Boed "State of Necessity as a Justification for Internationally Wrongful Conduct" 3 Yale Human Rts. & Dev.L.J.1, (2000) p.2; see also Jessica Rodger, cited above at note 39.
[262] Roman Boed, cited above at note 261.
[263]Ibid.
[264]George Okoth-Obbo**,** "Does Refugee Protection in Africa Need Mediation?" Track Two, Vol.9 No.3, (November 2000), p.5.
[265]Ibid.
[266]Ibid.

and Rwanda they were not safe to stay there. As a result, UNHCR arranged for the two men to land in Kigoma (Tanzania) on 31 January 2000. The Rwandan authorities fabricated false allegation of crime of *murder* and *robbery* and requested the Tanzanian police to arrest the two men. Consequently, Bertin Murera and Benjamin Rutabana were arrested by Tanzanian police on 4 February 2000 and taken near the Rwandese border to Ngara, and on 5 February 2000 they were forcibly returned to their home country Rwanda without accessing their refugee status,[267] and their whereabouts is unknown. There are unconfirmed reports of their presence in military detention, where they could be at risk of torture or death.[268]

From February 2000 on, the Tanzanian immigration authorities continued to arrest, detain and finally forcibly return hundreds of Burundian and Rwandese refugees living in villages. The areas particularly affected have been Biharmulo district and Ngara. According to Amnesty International report more than 80 Rwandese and 580 Burundian refugees are known to have been forcibly returned to Rwanda and Burundi respectively,[269] whereas, many of other refugees are reported to be in detention in Tanzania awaiting possible *refoulment*.[270] Amnesty International is concerned for the safety of the Burundians who have been forcibly returned and fears they could face serious human rights abuses in Burundi.[271]

Only on April 2000 more than 220 Burundian refugees were forcibly returned to Burundi.[272]In October 2004, the Tanzanian government summarily returned 68 Burundian asylum seekers.[273] Although the order was undertaken by the local authorities, national authorities later defended the action, saying that they did not believe that Burundians should be granted prima facie refugee status. While the government did have discretion to withdraw its group designation of

---

[267] Amnesty International, Forcible return/ fear for safety Rwanda/Tanzania, AI Index: AFR47/07/00 (24 February 2000) available at: (http://www2.amnesty.se/uaonnet.nsf/dfab8d7f58eec102c1257011006466e1/0ca9afa131ad27c5c1256890003340cf?OpenDocument) last visited on 23 August 2016.

[268]Ibid.

[269] Amnesty International, Great Lakes Region Refugees denied protection, AI Index: AFR 02/002/2000, (22 May 2000).

[270]Ibid.

[271]Ibid.

[272]Ibid.

[273] Perspective on Refoulment in Africa available at: (http://www.refugee-rights.org/Publications/Papers/2006/RefoulementinAfrica.April2006.pdf) last visited on 4 July 2016.

Burundians, it did not do so. Even if they had, the Burundians were entitled to an individualized determination of their protection claims.[274]

Furthermore, the UNHCR reported in February 2005 that additional 9 Burundians had been expelled in January 2005. The UNHCR asserted that it had interviewed these asylum seekers.[275] Further Kigali newspapers have reported that approximately 500 Rwandan refugees and Kinyarwanda speaking Tanzanians were expelled in the same month of 2005 to Rwanda.[276] Moreover, at the end of 2012 Burundian refugees living in Tanzania (Mtabila refugee camp) were forcibly returned to their country of origin, Burundi.[277]

From the above cases, we can conclude that Tanzania has grossly violated the prohibition of non-*refoulment* of refugees and asylum seekers in violation of OAU [278] and UN [279] Refugee Conventions as well as 1967 Protocol[280] to which it is state party. Similarly, Tanzania has violated series of human rights instruments it has ratified (including ACHPR,[281] CAT,[282] and ICCPR[283]) in forcibly returning dozens of refugees and asylum seekers to place where they fear violation of human rights. On the contrary, Tanzania's act of *refouling* Burundian refugees and asylum seekers as mentioned above in the years of 1995, 1996, 1997, 2000, 2004, 2005 and 2012 to Burundi, her act of border closure to the same undoubtedly constitutes violation of prohibition of *non-refoulment* recognized under regional as well as international refugee and human rights laws.

For the fact that the prohibition of *refoulment* is recognized as customary international law it obliges any states regardless of membership to cease from an act of *refouling*, returning, extraditing, expelling and rejecting at front refugees to home or any other where they may face

[274]Ibid.
[275]Ibid.
[276]Ibid.
[277] International Refugee Rights Initiative (IRRI) available at ;(http://reliefweb.int/report/united-republictanzania/refugee-returnee-asylum-seeker-burundian-refugees-struggle-find) last visited on 23 August 2016.
[278] Tanzania acceded to OAU Refugee Convention on 10 January 1975.
[279] Tanzania acceded to UN Refugee Convention on 12 May 1964.
[280]Tanzania acceded to 1967 Protocol on 4 September 1968.
[281] Tanzania ratified ACHPR on 8 February1984.
[282] Tanzania has not ratified CAT.
[283] Tanzania acceded to ICCPR on 11 June 1976.

human right violations. Here, though Tanzania is not a state party to CAT it is bound by the principle of *non-refoulment* as provided under article 3 of this Convention where owing to her act of *refoulment*, refugees and asylum seekers face risk of torture and inhuman treatment.[284] Thus, in all above cases Tanzania's acts of *refoulment* of accepted refugees and asylum seekers are considered to be violation prohibition of *refoulment* guaranteed in international and regional refugee Conventions and human rights instruments to which Tanzania is party. Most shockingly, Tanzania has also violated her own Refugee Act of 1998, which among others prohibit deportation of refugees.[285]

4.1.3. DJIBOUTI

Djibouti is also the other East African country accused of violation the principle of *non-refoulment* at different time. Britain Broad Cast (BBC) in its report of 31 August 2003 noted that 1,000 of the 30,000 expected returnees from Djibouti arrived in the Ethiopian town of Dire Dawa on 30 August 2003.[286]In September 2003, the Djiboutian authorities ordered 100,000 illegal migrants to leave the country or apply for asylum.[287] On 9 September 2003 Integrated Regional Information Network (IRIN) sourcing the Ethiopian Minister of Foreign Affairs reported that the Ethiopian government had provided transport and food rations to returnees from Djibouti.[288] On 31 May 2004 UN reported that some 3,000 Ethiopians whose applications were rejected have been deported from the Awar Aousa camp to Ethiopia.[289]

On July 2005 Djibouti has forcibly returned without determining their refugee status the two Ethiopian asylum seeker pilots namely Behailu Gebre and Abiyot Mangudai to Ethiopia.[290]These

[284]P.C.W Chan, "The Protection of Refugees and Internally Displaced Persons: Non-refoulment under Customary International Law?", The International Journal of Human Rights, Vol.10, No.3 (2006), pp.235-238.
[285] Tanzania Refugee Act (1998), article 28(1) (a-d).
[286]Djibouti/Ethiopia: Forced Deportation of Oromo Refugees from Djibouti to Ethiopia, including information on the Awr Aousa refugee Camp and information the Treatment of Deportees by the Ethiopian government (August 2004) available at:(http://www.refworld.org/docid/41501c7723.html) last visited on 12 June 2016.
[287]Ibid.
[288]Ibid.
[289] Ibid.
[290] Refugee Documentation Centre (Ireland) Legal Aid Board, Ethiopia Researched and Compiled by the Refugee Documentation Centre of Ireland (25 March 2011) available at: (http://www.refworld.org/pdfid/4d92fda62.pdf) last visited on 12 June 2016.

pilots alleged that the Ethiopian government ordered them to attack by helicopter opposition demonstrators who were protesting on Ethiopia's election on 15 May 2005 believing that there was electoral fraud. But, they refused to attack and fled to Djibouti taking their military helicopter. They reportedly requested asylum in the Djibouti and pleaded that if they were forcibly returned (*refouled*) to Ethiopia they would be at risk of serious human rights violations such as incommunicado detention without charge or trial, tortured, or others.[291]

Similarly, in 2012 Djibouti also continued in violation of the prohibition of *refoulment* against recognized refugees. For instance, on 31 December 2012, 18 (eighteen) Ethiopian accepted refugees were forcibly returned to Ethiopia.[292] Bedassa Geleta was among the eighteen *refouled* refugees and later detained in Dire Dawa.[293]Moreover, in 2014 following Al-shabab's suicide bombers attack on the restaurant in Djibouti, the Djibouti government officially closed the border with Somalia and declared the new registration and refugee status determination process.[294]

From the aforementioned cases, though a state party to UN Refugee Convention and its protocol, it is obvious that Djibouti's act of *refoulment* of hundreds of refugees and asylum seekers in different occasions is contrary to both instruments.[295] Also, her failure not to ratify the OAU Refugee Convention is a stumbling block to the protection of refugees and asylum seekers by the country.[296] But, Djibouti's violation of the prohibition of *non-refoulment* under UN Refugee Convention *per se* constitutes human rights violations of refugees and asylum seekers under ACHPR[297], ICCPR[298] and CAT.[299] As a result, in violation of this provision, Djibouti *refouled* (expelled) refugees and asylum seekers to their country of origin in all above cases.

[291] Ibid.
[292] Country Reports on Human Rights Practices Djibouti (2015) available at: (http://www.refworld.org/docid/5716127715.html) last visited on 23 June 2016.
[293]Death in Ethiopian Custody of Tesfahun Chemeda, cited above at note 223.
[294]Country Reports on Human Rights Practices Djibouti, cited above at note 292.
[295] Djibouti acceded to UN Refugee Convention and its Protocol on 9 August 1977.
[296] Djibouti signed on 15 November 2005, but not acceded or ratified OAU Refugee Convention.
[297] Djibouti ratified to ACHPR on 11 November 1991.
[298] Djibouti acceded to ICCPR on 5 November 2002.
[299] Djibouti acceded to CAT on 5 November 2002.

4.1.4. SUDAN

As Kenya is host for large number of refugees and asylum seekers mostly from Somalia and Ethiopia, so as Sudan a host for refugees and asylum seekers mostly from Eritrea. Despite the fact that the Sudan government provided protection of *non-refoulment* in some instances[300]there were also circumstances where it has *refouled* accepted refugees and asylum seekers to their home or third countries where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. For example, Amnesty International confirmed that in 2011 the Sudan government reportedly returned more than 300 Eritreans to their country without screening them for refugee status.[301]In addition, according to NGO report in July 2012, Sudan government forcibly returned nine (9) asylum-seekers and one (1) accepted refugee to Eritrea in violation of its *non-refoulment* obligations. Among the 10 *refouled* 6 Eritreans and 3 Ethiopian national asylum seekers, and 1 Ethiopian recognized refugee. They were convicted prior in July 2012 together with 41 others for unlawfully entering Sudan and sentenced to two months prison pending their deportation. Sudan denied all the 51 prisoners their right to appeal on conviction or sentence; also, they were denied access to UNHCR. The report confirmed that Eritreans forcibly returned to their home country face a real risk of human rights violence, such as incommunicado detention, torture including other forms of serious ill-treatment.[302]

According to the UNHCR source at the end of October 2014 Sudan is the main country of asylum for Eritreans and hosted 109,594 Eritrean refugees. On the other hand, UNHCR was deeply concerned that Sudan forcibly returned or *refouled* of Eritrean asylum seekers. For instance, on 30 June 2014, 74 Eritrean asylum seekers after being convicted illegal entry to Sudan they were reportedly sent back to their home country via Laffa border.[303] In this scenario

[300] Sudan Asylum Act (2014).

[301]Country Reports on Human Rights Practices for 2012 United States Department of State Bureau of Democracy, Human Rights and Labor, (2012), p. 28.

[302] NGO Statement on International Protection Agenda Item 5 (a), Executive Committee of the High Commissioner's Programme 63rd Meeting (1-5 October 2012) available at:(http://www.icva.ch/doc00005497.pdf,) last visited on 12 July 2016.

[303]32 Eritreans at Risk of Forced Return from Sudan available at: (http://www.acjps.org/32-eritreans-at-risk-of-forced-return-from-sudan-2/) last visited on 3 June 2016.

the government of Sudan criticized for denying the refugees an access to asylum procedures in order to have their claims reviewed by the competent authorities.[304] Moreover, on 1 June 2015, 32 Eritrean asylum seekers including 14 women and 1 six year old child at risk of threat to their safety forcibly returned after serving two months prison for illegal entry in red sea that borders Eritrea. As of the year of 2015 they were serving 2 months prison sentences, pending deportation after they failed to pay the fine for illegal entry.[305]

In the above cases the act of Sudan in forcibly returning Eritrean refugees and asylum seekers to Eritrea in the year of 2011, 2012, 2014 and 2015, and Ethiopian refugee and asylum seekers to Ethiopia in the year of 2012 undeniably violated the principle of *non-refoulment* in contrary to article 33 (2) of the UN Refugee Convention [306] and its Protocol[307] as well as article 2 (3) of OAU Refugee Convention[308] to which it is a state party. In addition, Sudan has violated article 31 of the UN Refugee Convention in criminalizing illegal entry.[309]In 2012 totally 51 Ethiopia, Eritrea and others nationals, and in 2015, 32 Eritreans were become victims of such illegal measures. Also, Sudan has violated article 12(4&5) and article 7 of ACHPR to which it is a state party,[310] respectively in forcibly expelling, and denying the right to be heard and appeal of Eritrean and Ethiopian refugees and asylum seekers. On top of this, like the three East African countries discussed above Sudan's act of *refoulment* further leads to human rights violation of refugees and asylum seekers as recognized under ICCPR[311], and CAT[312] to which it is a state party. Last but not least, the government of Sudan has violated its own Asylum Act of 2014 in its failure to respect the principle of *non-refoulment*.

---

[304]Ibid.

[305]Ibid.

[306] Sudan is party to UN Refugee Convention on 5 February 1974.

[307] Sudan is party to 1969 Protocol on 5 February 1974.

[308] Sudan ratified OAU Refugee Convention on 24 December1972.

[309] UN Refugee Convention, cited above at note 9, under its article 31 stipulates that any member states:

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

[310] Sudan is state party to ACHPR on18 February 1986.

[311] Sudan acceded to ICCPR on 18 March 1986.

[312] Sudan not acceded or ratified to CAT, but signed on 4 June 1986.

4.1.5. BURUNDI

Burundi has also grossly practiced violation of the right to *non-refoulment* of refugees and asylum seekers guaranteed under different international and regional refugee Conventions as well as human rights instruments. For example, as mentioned above in Tanzania case on 24 January 2000, two Rwandans' namely Bertina Murera and Benjamin Rutabana in fear of their lives in home fled to Burundi and applied for asylum. During this time the two countries have close relationship, as a result, they were not safe to stay there and they transferred to third country Tanzania on 31 January. The Tanzanian police arrested the two men on 4 February 2000 at request of the Rwandan authorities and they were deported (expelled) to Rwanda on 5 February. According to Amnesty International the *refoulees'* where about is unknown[313] and after April 2000, they were found in custody in Rwanda.[314]

Since the beginning of April 2005 approximately 7,000 people have fled Rwanda to seek asylum in Burundi. The UNHCR indicated on 13 May, 2005 that people are fleeing Rwanda "because of fears over the Gacaca tribunals" as well as "threats and rumours of massacres and revenge attacks" in Burundi.[315] However, on 27 April 2005 the Burundian government declared that the asylum seekers from Rwanda would not be granted refugee status.[316] Furthermore, according to International Refugee Rights Initiative (IRRI) report the Burundi and Rwanda government officials on June 11, 2005 agreed to treat asylum seekers from both countries as "illegal immigrants" there by *refoul* them back to their home country.[317] The following days, Burundi quickly acted to deport thousands of Rwanda asylum seekers. As a result, in the two days around 5,000 Rwandan asylum seekers were forcibly returned from Burundi particularly Songore transit camp to Rwanda.[318] Similarly, in the same year on June Burundi began the process of deporting more than 400 Rwandan refugees. However, the process was condemned by the UNHCR and

[313]Forcible return/ fear for safety Rwanda/Tanzania, cited above at note 267.
[314]Amnesty International, cited above at note 269.
[315] Amnesty International Public Statement, AI Index: AFR 16/004/2005, (19 May 2005), p.1.
[316] Ibid.
[317]International Refugee Rights Initiative (IRRI), "Refugee Rights News", Vol.2, Issue 2(July 2005) available at :(http://www.refugee-rights.org/Newsletters/GreatLakes/V2N2RwandaBurundiDeportationUproar.htm) last visited on 12 November 2016.
[318] Ibid.

human rights groups.[319]Moreover, in 2005 Burundi forcibly returned 6,500 Rwandans asylum seekers, many of whom have since returned to claim asylum. In June 2005, Rwanda in turn forcibly expelled the remaining Burundian refugees at gun point.[320]

According to HRW report in between July and September 2009 hundreds of Rwandans fled to Burundi particularly northern provinces of Krundo and Ngonzi to seek asylum.[321] On October 14, 2009 Burundi police loaded on trucks Rwandan asylum seekers and attempted to deport them. Soon after Burundi refugee Agency intervened and stoped the deportation, however Burundi Interior Minister on November 27, 2009 ordered the police to deport 103 Rwandan asylum seekers. [322] Among the deported asylum seekers at least three of them were unaccompanied children whose parents left behind in Krundo. In October 2009 several asylum seekers in Krundo were interviewed by HRW and some of them have really fears of persecution in Rwanda especially risk of double jeopardy (Gacaca Court) and disappearance.[323]

From the above discussion it is clear that Burundi has violated the principle of *non-refoulment* guaranteed under OAU Refugee Convention[324]as well as UN Refugee Convention[325]and its Protocol[326] to which it is state party. This act of Burundi also contravenes with core human rights instruments such as ACHPR, [327]ICCPR[328]and CAT[329]to which it is a state party. Also, Burundi's act of forcibly returning three Rwandan children asylum seekers is in violation of article 23 (1) of the ACRWC that prohibits return of unaccompanied children. But, Burundi has not yet ratified

[319] Refugee Refoulment in the East African Community Pambazuka News available at: (http://www.pambazuka.org/humansecurity/refugeerefoulementeastafricancommunity) last visited on 15 June 2016.
[320]Ibid.
[321] Human Rights Watch, Burundi: Stop Deporting Rwandan Asylum Seekers available at: (https://www.hrw.org/news/2009/12/02/burundi-stop-deporting-rwandan-asylum-seekers) last visited on 18 July 2016.
[322]Ibid.
[323]Ibid.
[324]Burundi is state party to OAU Refugee Convention on 31 October 1975.
[325] Burundi is state party to UN Refugee Convention on 19 July 1963.
[326]Burundi is state party to 1967 Protocol on 15 March 1971.
[327]Burundi is state party to ACHPR on 28 July 1989.
[328] Burundi ratified ICCPR on 8 May 1990.
[329] Burundi is state party to CAT on 18 February 1993.

this later Charter. As such, it is bound by CRC to which it is a state party since 19th October 1990.

4.2. THE EFFECTS OF VIOLATIONS OF THE RIGHT TO *NON-REFOULMENT*

It is clearly noted in the preceding section that refugee law and human rights law are closely related in that both are aimed at protection of the physical safety and human dignity of individuals. In terms of hierarchy refugee law is a special regime of human rights law which falls under the ambit of the general or universal legal regime of human rights. In other words, the relation between the two emanates from the idea of universality, indivisibility, interdependence and interrelatedness[330] of the whole body of human rights. This means that violation of or respect for one form of human rights inevitably entails or paves a room for violation of or respect for another form of human rights.[331]

That is why it is undeniable that violation of the principle of *non-refoulment* is not only contrary to refugee law, but also has an adverse effect upon fundamental human rights entitlements of refugees and asylum seekers. Notably, we have observed that the practice in different states is that refugees and asylum seekers who have been forcibly returned to their countries have been killed, tortured, arbitrarily detained, or forced to live in conditions of extreme insecurity. At this juncture, it is believed that preventing *refoulment* is an effective, and sometimes the only, means of preventing further human rights violations against refugees.[332] Accordingly, this section deals with the impact of violation of the principle of *non-refoulment* by countries of origin upon the fundamental human rights protections of refugees and asylum seekers under different international and regional human rights instruments.

---

[330]Takele Soboka Bulto, "The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights", The University of Tasmania Law Review, Vol.29 No.2 (2010), p.158; see also Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna (25 June 1993), Para.5.

[331]B.C. Nirmal, Refugees and Human Rights, P.3.

[332]UNHCR, Human Rights and Refugee Protection (RLD 5) (October 1995), Memorandum of Understanding with UNICEF IOM/39/96-FOM/42/96, Geneva (13 May 1996), p.2.

4.2.1. DEATH

Forcible return or *refoulment* of refugees or asylum seekers to their country of origin might amount to loss of their life, liberty and security. If this happens the act is in violation of articles 3, 6, and 4 of UDHR, ICCPR, and ACHPR respectively. An interesting innovation in the OAU Convention is the duty placed on the country of origin in relation to returning refugees. Receiving states must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them.[333] However, as discussed in the above section the case of Tesfahun Chemeda is the most notable instance. After forcibly *refouled* by Kenya to Ethiopia, he faced prolonged solitary confinement, loss of liberty and security due to which he eventually executed in Addis Ababa Federal Prison *Qaallittii* in 2013.[334] Ethiopia is party to ICCPR[335]and ACHPR,[336] which recognize the right to life for everyone.

Similarly, forcibly returning of about 350,000 Somali refugees from Kenya would have put them at risk of human rights abuses particularly killings.[337] Somalia is in violation of the right to life protected in the ACHPR,[338] ICCPR[339] to which Somalia state party. In 1997, 126 group of Burundian refugees were *refouled* from Tanzanian to Burundi and there to be summarily executed.[340] Burundi is in violation of the obligation to respect the right to life enshrined under ACHPR[341]and ICCPR[342] to which member state.

The right to life is universally recognised as a foundational human right. The right not to be arbitrarily deprived of one's life is recognised as part of customary international law and the general principles of law, and is also recognised as a *jus-cogens* norm, universally binding at all

[333] Paul Weis, "The Convention of the Organisation of African Unity governing the specific aspects of refugee problems in Africa", 3 Revue des Droits de l Homme 463 (1970).
[334]Oromia Support Group (OSG) and Oromia Support Group Australia (OSGA), cited above at note 235.
[335]Ethiopia is party to ICCPR on 11 June 1993.
[336] Ethiopia is party to ACHPR on 15 June 1998.
[337]Kenya Amnesty International Report, cited above at note 247.
[338] Somalia is party to ACHPR on 31 June 1985.
[339] Somalia is party to ICCPR on 24 January 1990.
[340]George Okoth-Obbo, cited above at note 254.
[341] Burundi is party to ACHPR on 28 July 1989.
[342] Burundi is party to ICCPR on 9 May 1990.

times.[343] Where a person dies in state custody, there is a presumption of state responsibility and the burden of proof rests upon the state through a prompt, impartial, thorough and transparent investigation carried out by an independent body.[344]African Commission in its General Comment 3 declared that the right to life includes the prohibition against *refoulment*.[345] Similarly, the right to life have been interpreted by European Court of Human Rights (ECtHR) to include the prohibition against *refoulment* in case of M.S.S. vs. Belgium and Greece 2011,[346] and R on the application of (ABC a minor Afghanistan) vs. Secretary of State for the Home Department (UK), 2011.[347]

4.2.2. TORTURE, CRUEL AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Well founded fear or threat of persecution for reasons of race, nationality, religion, and membership of a particular social group or political opinion in one's home country is the major ground which forces one to seek a refugee status or asylum in another country. This later country (host state) where refugee or asylum is sought has a duty not to *refoul* or forcibly return a person to his/her country from where she/he fled for fear or threat of persecution against his/her person or body. This presupposes the fact that there is a high likelihood for refugees or asylum seekers to face torture, cruel, and inhuman or degrading treatment or punishment in their home country

[343] African Commission, General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (article 4), para.5 available at: (http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf) last visited on 11 August 2016; see also Communication No. 245/02 Zimbabwe Human Rights NGO Forum vs. Zimbabwe (May 2006) para.143; and Communication No. 74/92 Commission Nationale Des Droits del›Homme et des Libertés vs. Chad (October 1995) para.20.

[344] African Commission General Comment No.3, cited above at note 343, para.37.

[345] Id, para.23.

[346] MSS vs. Belgium and Greece available at: (http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-103050&filename=CASE%20OF%20M.S.S.%20v.%20BELGIUM%20AND%20GREECE.pdf&logEvent=False) last visited on 19 June 2016.

[347] R (on the application of) ABC (a minor) (Afghanistan) vs. Secretary of State for the Home Department, 2011 available at: (http://www.asylumlawdatabase.eu/sites/asylumlawdatabase.eu/files/aldfiles/UK_051%20Judgment.pdf) last visited on 20 June 2016.

as a result of *refoulment* by host country.[348] Hence, it is obvious that *refoulment* would lead to torture or to cruel, inhuman or degrading treatment or punishment of refugees or asylum seekers in a manner incompatible with articles 5, 2&6, and 7 of UDHR, CAT and ICCPR respectively.

Here, in its two cases mentioned above MSS vs. Belgium and Greece[349] as well as ABC (a minor Afghanistan) vs. Secretary of State for the Home Department,[350] The ECtHR also has interpreted that freedom from torture includes the prohibition against *refoulment*. Also, the absolute nature of the prohibition of *refoulment* to a risk of torture and other forms of ill-treatment under article 3 of the European Convention on Human Right (ECHR) has been affirmed by the court in the case of Ramzy vs. Netherlands.[351] A Solidarity Committee for Ethiopian Political Prisoners (SOCEPP), an organisation based in Germany and Canada, in its press release of 22 November 2006, condemned the forced return of four Ethiopians from Sudan, and confirmed that deportation of Ethiopian from Sudan to home can imply that torture and more to Ethiopian refugees.[352] Ethiopia is in violation of CAT[353] and ACHPR.

Similarly, Amnesty International has declared that Eritreans forcibly returned to Eritrea encounter a real risk of being subjected to violations, including incommunicado detention, torture and other forms of serious ill-treatment for the detention conditions in Eritrea are appalling, and in themselves amount to cruel, inhuman or degrading treatment.[354] Also, Eritrea is in violation of CAT[355] and ACHPR[356] which prohibits torture. However, Eritrea has not yet been

[348]Amnesty International hot spot Italy available at: (http://www.statewatch.org/news/2016/nov/ai-hotspot-Italy.pdf) last visited on 22 June 2016.

[349] MSS vs. Belgium and Greece, cited above at note 346.

[350]R (on the application of) ABC (a minor Afghanistan) vs. Secretary of State for the Home Department, cited above at note 346.

[351] Ramzy vs. Netherlands case available at: (http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NLD/INT_CCPR_NGO_NLD_94_9769_E.pdf) last visited on 25 June 2016; see also landmark decision in Soering vs. United Kingdom, cited above at note 95, the ECtHR found that the extradition of the applicant to the United States breached article 3 of the Convention because his detention on death row would constitute cruel, inhuman or degrading treatment.

[352]Refugee Documentation Centre (Ireland), Legal Aid Board, Information on any risks to failed asylum seekers returned to Ethiopia, Ethiopia Researched and compiled by the Refugee Documentation Centre of Ireland (2 December 2009).

[353]Ethiopia acceded to CAT on 14 March 1994.

[354] Amnesty International Public Statement, AFR 54/039/2012 15, (August 2012).

[355] Eritrea is not state party to CAT.

ratified the CAT, since it recognized as customary international law binding on non-state party including Eritrea. Indeed, from the discussion above forcible return of refugees and asylum seekers in the East Africa leads to torture in the country of the origin and it is in violation of prohibition of torture that is guaranteed under CAT which is binding on any member and non-member states.

4.2.3. ENFORCED DISAPPEARANCE

Another serious risk likely faced by refugees in their home country owing to *refoulment* is enforced disappearance in violation of International Convention for the Protection of All Persons from Enforced Disappearance which was adopted on 20 December 2006 by the UNGA and entered in to force on 23 December 2010 as discussed so far. As clearly stipulated under the Convention an act of enforced disappearance happens when a person is:

> Arrested, detained or abducted against his/her will or otherwise deprived of his/her liberty by officials of different branches or levels of government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, followed by a refusal to disclose the fate or where about of the person concerned or a refusal to acknowledge deprivation of his/her liberty, thereby placing such person outside the protection of the law.[357]

According to this definition enforced disappearance means placing a person against his/her will outside protection of the law (deprivation of liberty) by the government directly or indirectly (non-government) refusal to disclose where about of the person concerned. Based on this definition and as discussed in the preceding section the Convention under its article 16 (1) obliges every state party to the Convention not to *refoul* every person including refugee and asylum seeker believing that he/she in danger of being subject to enforced disappearance.

In the aforementioned case of the two Rwandan asylum seekers Bertina Murera and Benjamin Rutabana after forcibly returned by Tanzania on 5 February 2000 to home, they were disappeared until April 2000.[358] Another most notorious case worth mentioning here is the case of Tesfahun Chemeda and Mesfin Abebe, who were disappeared in Ethiopia for more than a year

---

[356] Eritrea is state party to ACHPR on 14 January 1999.

[357] International Convention for the Protection of All Persons from Enforced Disappearance, cited above at note 155, article 2.

[358] Forcible return/ fear for safety Rwanda/Tanzania, cited above at note 267.

until charged on December 2008 after their *refoulment* on April 2007.[359] Moreover, according to the 2014 report by the Special Rapporteur on the situation of human rights in Eritrea, unsuccessful asylum seekers and other returnees, including national service evaders and deserters, face torture, detention and disappearance in Eritrea.[360] These above acts of countries mentioned amounts to enforced disappearance under the above cited Convention and it also amounts to violation of article 6 of ACHPR which guarantees every ones' right against arbitrary arrest and detention that obviously constitutes enforceable disappearance.

4.2.4. DENIAL OF FREEDOM OF MOVEMENT

The right to enter and leave ones country is one of the fundamental human rights recognized for every person under various international human rights instruments. For instance, article 13(2) of UDHR stipulates that everyone has the right to leave any country, including his own, and to return to his country. The Declaration also under article 14 (1) provides everyone has the right to seek and to enjoy in other countries asylum from persecution. The right to leave one's country is also enshrined under article 13 (2) of the ICCPR, which states that "everyone shall be free to leave any country, including his own." Similarly, ACHPR under its article 12(2) provides that the right to freedom of movement constitutes the right to leave any country as well as one's own and to return to his/her country. In addition, article 3 of the 4th Protocol to the ECHR and article 22(5) of the ACHR also contained the same provision. Refugees and asylum seekers like any persons are obviously entitled to this right. That is, they have a right against denial to freely leave or enter one's own country or the country in which they sought refuge or asylum.

In other words, on the one hand, forcible return or *refoulment* of refugees or asylum seekers by host country is in contravention of their right to voluntarily return to one's own country as provided particularly under OAU Refugee Convention.[361] On the other hand, well founded fear of persecution against one's own person or body refugees or asylum seekers likely face in their home country due to *refoulment* is in contrary to their right to leave one's own country and seek refuge or asylum in another. In almost all cases of *refoulment* cited so far, the victims are

[359]Oromia Support Group, cited above at note 229.
[360] UN Office of High Commissioner for Refugees (OHCHR), (2014), p.6
[361] OAU Refugee Convention, cited above at note 12, article 5(1).

undoubtedly subjected to violation of their right to wilfully leave any country, including ones own country, and return to one's own country as well.

The effects of violation of the prohibition of *refoulment* from human rights perspective are not limited to the above mentioned once. Yet they are the most severe and commonly occurred risks of human rights violations faced by *refouled* refugees or asylum seekers. Put in another way, *refoulment* does not only end up with mere expulsion of refugees or asylum seekers out of the country where they sought refuge or asylum. But also, it forces them to face the misery of life from which they once managed to escape. They unquestionably face violation of their fundamental human rights; that is to the extent of permanent loss of liberty such as life imprisonment like in the case of Mesfin Abebe; and torture, prolonged solitary confinement and consequently death like in the case of Tesfahun Chemeda as mentioned above.

In sum, as discussed in the preceding sections of this chapter the practice in different states reveal that refugees and asylum seekers who have been *refouled* to their countries have been killed, tortured, arbitrarily detained, faced enforced disappearance, forced to live in conditions of extreme insecurity, denied right of access to justice and right to movement in contrary to regional as well as international human rights instruments. The responsibilities of states (both host and origin) for violation of the principle of *non-refoulment* on the one hand and infringement of fundamental human rights of refugees or asylum seekers due to *refoulment* on the other will discussed subsequently.

4.3. STATES RESPONSIBILITIES IN VIOLATION OF THE PROHIBITION OF *REFOULMENT*

The traditional norm of international law with respect to states responsibility is horizontal (state-versus-state) regulation of international conduct. However, in the regime of human rights law a radical shift has undergone since late 1940's towards states responsibility both at international and regional level.[362]That is, with the introduction of individual complaint or communication system under both regional and international human rights regimes, vertical (individual-state)

[362] Charter of the United Nations, (1945) adopted on 26 June 1945, in San Francisco, came in to force on 24 October 1945; UDHR, cited above at note 11; American Convention on Human Rights, cited above at note 174.

regulation of state responsibility came into appearance.[363] This means that individual victims or group right holders are entitled to make a direct recourse against[364] any state violators.

Non-existence of duty bearer would lead to empty universal nature of human right for right holders.[365] Thus, a state has the duty to respect, protect and fulfil the rights of refugees and asylum seekers, particularly the right to *non-refoulment*.[366] From this, states' responsibility for violation of refugees' right against *refoulment* envisages the fact that individual asylum seekers or refugee victims can directly take action before human rights tribunals against both host country and their country of origin. However, the issue here is both international and regional regimes of law on refugee (UN as well as OAU Refugee Conventions for our purpose) are silent about obligations of countries of origin (as opposed to host countries) regarding *refoulment*. This means, there is no legal ground to held countries of origin responsible for their direct or indirect contribution in the act of *refoulment* and the risks of human rights violations it entail.

To fill this gap the more holistic approach advisable is to see refugee protections within the wider spectrum of human rights regimes.[367]In fact, state responsibility flows directly from a breach of international law, which may be a breach of an obligation under international human rights law. This is the general principle of law codified in article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts,[368] which reads: 'Every internationally wrongful act of a state entails the international responsibility of that state.' This is mainly attributed to the fact that refugee laws are considered as a branch of human rights law at large as discussed in the above section.[369] Hence, every state, including host countries and countries of

[363] Takele Soboka Bulto, "Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System" 27 SAJHR (2011), pp 253-254.
[364] Ibid.
[365] Id, p.255.
[366]Urgent Action Asylum seekers, Refugees at risk of deportation Djibouti, UA 195/1116, AFR 23/4698/2016,(24 August 2016).
[367]Mewded Mengesha, Human Rights Violations in Refugee Camps: Whose Responsibility to Protect? A case of Ethiopia, Master Thesis, International Human Rights Law 30 higher education credits, Lund University, (Spring 2016), p.8.
[368]Draft Articles on Responsibility of States for International Wrongful Acts, considered by the UN General Assembly Resolution 56/83,UN Doc A/RES/56/83,(28 January 2002).
[369]UNHCR, Resettlement Hand Book division of International protection (revised ed.), Geneva (July 2011), p.14 available at: (http://www.unhcr.org/ressetlement) last visited on 5 October 2016.

origin of refugees or asylum seekers are responsible both under regional and international human rights instruments.

Among others, the ACHPR (article 2 cum. 4, 5, 7 and 12), UDHR (article 13 and 14), ICCPR (article 2 and 7) and CAT (article 3) are the major human rights instruments relevant for our purpose. Under these instruments every state assumes obligations to respect, to protect and to fulfil human rights. In other words states must: refrain from interfering with or curtailing the enjoyment of human rights; protect individuals and groups against human rights abuses; and take positive action to facilitate the enjoyment of basic human rights.[370] The flight of refugees and asylum seekers from their country of nationality is as a result of their governments' inability or unwillingness to fulfil their responsibilities of ensuring respect to all human rights with in their territory.[371] Failure to observe these obligations entails responsibility as provided above under article 1 of Draft Article on Responsibility of States.

Accordingly, host countries are responsible for their failure to respect the right of every person to seek and acquire refugee or asylum status. Besides, they are responsible for their failure to respect the right to *non-refoulment* of persons possessing refugee or asylum status on one hand, and for failure to take positive actions enabling such persons enjoy their rights on the other hand, as provided under article 33 (2) and 2 (3) of UN and OAU Refugee Conventions. In fact, the ICCPR Committee on Human Rights stated that:

> The obligation under article 2 requiring state parties to respect and ensure the covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable damage, such as that contemplated by articles 6 and 7 of the ICCPR, either in the country to which removal is to be effected or in any country to which the person may be subsequently removed.[372]

Whereas, countries of origin are responsible for their direct or indirect contribution in the act of *refoulment* of refugees or asylum seekers on one hand, and for their violation of basic human

[370]Takele Soboka, cited above at note 330, p.168.
[371]UNHCR, Note on International Protection the Executive Committee of the High Commissioner's Program, General Assembly A/AC. 96/830, (7 September 1994), p.4.
[372]Human Right Committee, General Comment 31/80, (29 March 2004).

rights of such group of persons on the other. This being the case, holding states responsible *per se* is not enough. Hence, the institution that entertains states responsibilities for violation of the refugees' right against *refoulment* will be in focus next.

4.4. INSTITUTIONAL MECHANISM TO REDRESS THE VIOLATION OF THE RIGHT TO *NON-REFOULMENT* UNDER AFRICAN HUMAN RIGHT INSTRUMENTS

In the international, regional or national human rights system to talk about violation of human rights is meaningless unless institutions that rectify the violation exist. To talk about human rights violation is meaningless unless there is an institution that rectifies the violation. The issue as to which institution is meant to redress the violation of prohibition of *refoulment* by African states mainly East Africa is to be addressed here. The OAU Refugee Convention failed to provide an institutional mechanism that redress violation of right to *non-refoulment* of refugees or asylum seekers.

To fill the gaps of this Convention we need to refer to ACHPR which guarantees the institution that redress any violation of the OAU Refugee Convention. This is because the rights of refugees including *non-refoulment* are provided under African human rights regime. The African Commission was established under article 30 of the African Charter. This Commission has dual mandate; that is, to promote[373] and protect human and peoples' rights in Africa based on African Charter.[374] It is also authorized under article 45(3) to interpret human rights instruments in the African human rights regime that have been ratified by African countries.[375]According to Jamil Ddamulira Mujuzi, though OAU Refugee Convention was adopted several years before the African Charter, the African Commission interprets the OAU Refugee Convention on the basis of sub-article 3 of article 45 of the later.[376]

The African Charter empowers refugees and asylum seekers as well as NGOs individually petition to the Commission to seek protection of their rights where their rights have been violated including the protection against *refoulment* guaranteed under the OAU Refugee Convention or

[373]African Charter, cited above at note 13, article 45 (1).
[374] Id, article 45 (2).
[375] Jamil Ddamulira Mujuzi, cited above at note 199, p.167.
[376] Ibid.

African Charter.[377] This means that it enables them to seek remedies from the African Commission against host country where their rights are violated and against countries of origin on the basis of continuing violation of their rights based on persecution and flight to other states.[378] For example, as stated in Monette Zard the African Commission in the case of *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) vs. Zambia* declared African states 'to secure the rights protected in the ACHPR to all persons within their jurisdiction, nationals or non-nationals.'[379] Hence African states can be responsible before African Commission for illegal treatment of refugees as well as internally displaced and other nationals and non-nationals.[380]

In fact, the development of the African Commission is considered one step forward for protection of human rights in the African human rights system. The African Commission decided several cases with regard to human rights concern including the rights of refugees and asylum seekers. Yet, it is criticized for it lacks an enforcement organ and for its decisions lack a binding effect.[381] To avoid such problems there are circumstances where by the African Commission can refer cases to the African Court where it considers necessary to do so, for instance in cases involving serious or massive human rights violations, or where the African Commission considers that a state failed to comply with its decision.[382] For example, African Commission referred to the African Court after receiving complaint from NGOs on human rights situation in Libya following 16 February 2016.[383] The existence of institution only is not adequate. Therefore, substantive remedies available for violation of *non-refoulment* in the African human right instruments will be discussed next.

[377]African Charter, cited above at note 13, article 55 (1).
[378]Monette Zard, et al, cited above at note 15, pp.1-2.
[379] Ibid.
[380] Ibid.
[381] Frans Viljoen and Lirette Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation", Journal of African Law, Cambridge University Press, London, Vol.48, No.1 (2004), p.4.
[382] African Commission's Rules of Procedure 118 (1).
[383]African Commission on Human and Peoples' Rights vs. The Great Socialist People's Libyan Arab Jamahiriya Application 004/2011 available at: (http://arcproject.co.uk/wpcontent/uploads/2013/04/CSW-004-2011.pdf) last visited on 10 April 2016.

4.5. REMEDIES AVAILABLE FOR THE VIOLATION OF THE RIGHT TO *NON-REFOULMENT* IN THE AFRICAN INSTRUMENTS

The mere existence of an institutional arrangement empowered to redress the human rights violations of refugees is not enough by itself. There shall also be there a remedy arrangement for the harm sustained by refugees as a result of violation of their rights. The Vienna Declaration provided the principle that every state should provide an effective framework of remedies to redress human rights grievances or violations.[384] Remedy presupposes harm suffered by victim. Accordingly, in the human right concern absence of duty bearer and redress would lead empty promises for right holders (victims).[385]

At this juncture, remedies available for the victims of *refoulment* are addressed next. In the African human rights regime including the OAU Refugee Convention and ACHPR there is no framework of remedy for violation of human rights[386] including *non-refoulment*. However, the ICCPR under its article 2 simply stipulates that states have a duty to provide an effective remedy in case of a violation of the human rights protected in the Covenant and that individuals have a concomitant right. [387] Victims of violation of human rights are entitled in the forms of compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition"[388]separately or in combination.[389] Consequently, refugees as well as asylum seekers who are victims of *refoulment*, are entitled to claim any of the above effective remedies against *refouler* or/and *receiving* states for any sufferings they sustained in the following manner.

[384] Vienna Declaration and Programme of Action, cited above at note 330.

[385] Takele Soboka Bulto, cited above at note 363, p.255.

[386] African Charter, cited above at note 13, only article 21 (2) stipulates expressly that, in cases of spoliation of property, 'the disposed people shall have the right to the lawful recovery of its property as well as to adequate compensation'.

[387]ICCPR, cited above at note 11, article 2(3); see also European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ('European Convention' or 'ECHR') article 5(5), 13 and 41; American Convention on Human Rights, cited above at 169, article 25, 63(1) and 68 which have both recognised explicitly the rights of victims to remedy and redress for violations of their rights.

[388]Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Section IX (Reparation for harm suffered),U.N.A/RES/60/147, (21 March 2006), Principle 18-23.

[389]Draft Articles on Responsibility of States for International Wrongful Acts, cited above at note 368, article 34

4.5.1. COMPENSATION

The *refouled* refugees or asylum seekers just like any victims of human rights violations have a right to recourse compensation from any states participated in the act of *refoulment*. In the African human rights regime particularly OAU Refugee Convention and African Charter as discussed above there is no any provision of the law that deals with remedy for violation of any human rights including *non-refoulment* except article 21 (2) of the African Charter provides that "in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation." Absence of the compensation in these laws doesn't make victims of *refoulment* to remain without claim. African Court Protocol and ACHR under its article 27 and 63 respectively provides remedies that are appropriate, for the payment of fair compensation to the injured party and for the possibility to adopt provisional measures in cases of extreme gravity.[390] In deciding compensation African Court follows the practice of the Inter-American Court which has usually précised the amount of compensation.[391] The African Commission stated the fact that the complainant can claim adequate compensation.[392] But, the African Commission passed over without addressing the issue as to the amount.

However, based on article 60 of the African Charter the African Commission draws inspiration from various provisions of African Charter, Charter of UNs, OAU Conventions, UDHR, ICCPR and other instruments adopted by UNs decides compensation as remedy[393] for victims of *refoulment* in the above cases. For example, ICCPR under article 9 (5) provides that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.' Also, the right to compensation is enshrined under article 5 (5) ECHR, article 85 (1) Rome Statute of the International Criminal Court and article 10 of ACHR. Moreover, Compensation as remedy also enshrined under article 14 of the CAT that victim of the acts of

[390] Protection of Human Rights in Africa: African Human Rights in a Comparative Perspective available at: (http://www.leganet.cd/Doctrine.textes/DroitPublic/DH/ProtectionofHR.Kabange.htm) last visited on 22 July 2016.
[391] Ibid.
[392] Ibid.
[393] Antoine Buyse, Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law, p.8 available at: (http://www.zaoerv.de/68_2008/68_2008_1_a_128_154.pdf) last visited on 12 August 2016.

torture has the right to obtain enforceable right to adequate compensation including rehabilitation.[394]

In case death of the victim as a result of the act of torture, his/her dependants shall be entitled to compensation.[395] The Committee against Torture in its conclusion and recommendation also urges states to provide 'fair and adequate compensation'.[396] Likewise, article 24 of International Convention for the Protection against Enforced Disappearances provides that victims of enforced disappearance have the right obtain reparation that is fair and adequate compensation.[397] The Working Group on Enforced and Involuntary Disappearances has stated that 'in addition to the victims who survived the disappearance, their families are also entitled to compensation for the suffering during the time of the disappearance, and in the event of the death of the victim, his or her dependants are entitled to compensation.'[398] In *Malawi African Association and Others vs. Mauritania*[399] case the communication allege violation of provision of the African Charter.[400] Consequently, the African Commission declared grave violation of human rights from 1989-1992 in Mauritania and recommended compensation to victims.[401] This is also applicable for victims of *refoulment* in the above discussed practices of the five selected East African countries.

4.5.2. RESTITUTION

The UN Principle on Reparation stipulates that purpose of restitution is to restore the victim to the original situation before the violations of international human rights or humanitarian law

[394] CAT, cited above at note 11, article 14 (1).

[395] Ibid.

[396] Committee Against Torture, Conclusions and Recommendations on Saudi Arabia, CAT/C/CR/28/5, (on 28 May 2002), para.8; see also Committee Against Torture, Conclusions and Recommendations on Brazil, A/56/44, paras.115-122, 16 May 2001.

[397] International Conventions on Enforced Disappearance, cited above at note 155, article 24 (4).

[398] Working Group on Enforced or Involuntary Disappearances, Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance, paras.72-74 available at;(http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf) last visited on 29 June 2016.

[399] Malawi African Association and Others vs. Mauritania, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000); see also African Commission, Sudan Human Rights Organisation and Another vs. Sudan (2009) AHRLR 153 (ACHPR 2009) para.299 (4); Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) vs. Guinea, cited above at note 221, para.74.

[400] Malawi African Association and Others vs. Mauritania, cited above at note 399, para.29.

[401] Id, para.142.

occurred. Restitution can be as restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.[402] Further, the Convention on Enforced Disappearance provides that restitution can be for material and moral damages.[403]

Like compensation, restitution is also not enshrined under any provision of the OAU Refugee Convention or African Charter. Similar to the case of compensation discussed above, the African Commission draw inspiration from other international or regional human rights treaties concerning restitution. For example, in *Malawi African Association and Others vs. Mauritania*[404] and *Sudan Human Rights Organisation et al. vs. Sudan*[405] cases the African Commission recommended victims to restitution the rights violated. Thus, similarly victims of violation of *refoulment* can claim restitution as reparation.[406] And the violator states are obliged to provide restitution (such as restoration of liberty, return to place of residence, enjoyment of human rights such as material and moral damages) for the *refouled* refugees and asylum seekers. However, refugees or asylum seekers those died as a result of *refoulment* are not entitled to restitution for they no longer exist.[407]

4.5.3. REHABILITATION

Rehabilitation is also among the other forms of redress for victims of violation of human rights particularly *refoulment* of refugees and asylum. Rehabilitation is guaranteed in many universal treaties and declarations. For instance, CAT under its article 14 (1) refer the victim of an act of torture obtains compensation, including the means for as full rehabilitation as possible. It should be noted that rehabilitation physical or psychological damages. Rehabilitation can also be of a

[402] Basic Principle and Guide line, cited above at note 388, Principle 19.
[403] International Conventions on Enforced Disappearance, cited above at note 155, article 24 (5) (a).
[404] African Commission, Malawi African Association and Others vs. Mauritania, cited above at note 399, para.142.
[405] African Commission, Sudan Human Rights Organisation and Another vs. Sudan, cited above at note 399, para.299 (4).
[406]Antoine Buyse, cited above at note 393.
[407] ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Merits) (Bosnia and Herzegovina vs. Serbia and Montenegro), (26 February 2007), para.460.

social nature such as rehabilitation of their dignity, their social situation and their legal situation.[408]

Absence of rehabilitation as reparation for violation of human rights in the OAU Refugee Convention and African Charter provision does not prevent victim's claim of their right of rehabilitation and African Commission to decide the cases. For example, African Commission in case of *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights vs. Nigeria*[409] and *Purohit and Moore vs. Gambia*[410]and *Sudan Human Rights Organisation et al vs. Sudan*[411] declared in its decisions rehabilitation as reparation for violation of human right committed by states as well as non-states actors. Further the Robben Island Guidelines also urges states to ensure that all victims (direct or family members or communities) of torture and their dependents are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support.[412]The remedy provided under above cases and guide lines also applicable for victims of *refoulment* discussed above in East Africa.

4.5.4. THE RIGHT TO NON-REPETITIVE

The right to non-repetitive is also the other forms of reparation entitled for victims of human rights violation including *refoulment* of refugees and asylum seekers. According to UN Basic Principle of Reparation:

> Guarantees of non-repetition comprise broad structural measures of a policy nature such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial

[408] General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance, E/CN.4/1998/43, (12 January 1998), para.75, which provides that 'legal and social rehabilitation' such as legal rehabilitation through rectification of criminal records, or invalidation of unlawful convictions; see also Basic Principle and Guide line, cited above at note 388, Principle 21; International Convention on Enforced Disappearance cited above at note 155, article 24 (5) (b).

[409]Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) vs. Nigeria, Communication No. 155/96, Para.69

[410] Purohit and Moore vs. Gambia Communication No. 241/01, para.85 (3).

[411] Sudan Human Rights Organisation and Another vs. Sudan, cited above at note 399, para.298 (5).

[412] African Commission, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, (October 2002), at; (http://www.achpr.org/files/sessions/32nd/resolutions/61/achpr32_robben_island_guidelines_eng.pdf) last visited on 10 November 2016.

> independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry and psychological and social services.[413]

Convention of Enforced Disappearance also provided under its article 24 (5) (d) non-repetition. Human Rights Committee on ICCPR argues that changes in relevant laws and practices as well as bringing to justices perpetrators of human rights violations can be considered as guarantees of non-repetition. [414] Similar to this, African Commission in case of Sudan Human Rights Organisation and Another vs. Sudan recommended prosecuting those responsible for the human rights violations guarantees non-repetition.[415]The African Commission also under its General Comment 3 concluded reparation as guarantees of non-repetition.[416] Consequently, victims of violation of human rights especially *refoulment* elaborated above can claim non-repetitive of the acts committed.

4.5.5. SATISFACTION

Satisfaction comprises of a variety of possible measures: from apologies, "full and public disclosure of the truth," and victim memorials, to judicial and administrative sanctions against the responsible parties.[417]The Convention on Enforced Disappearance under article 24 (5) (c) also guarantees satisfaction including restoration of dignity and reputation.

Furthermore, in the case of *Malawi African Association and Others vs. Mauritania* the African Commission having declared the alleged violations also ordered satisfaction for victims and recommended arrangement of independent inquiry to clarify the fate of disappeared persons and to identify the responsible party. This is also applicable to the victims of *refoulment*.[418]

[413]Basic Principle and Guide line, cited above at note 388, Principle 23.
[414]Human Rights Committee, cited above at note 133, para.16.
[415]Sudan Human Rights Organisation and Another vs. Sudan cited above at note 399, para.299 (3); see also Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) vs. Angola, cited above at 211, para.87.
[416] African Commission General Comment No.3, cited above at 343, para.19.
[417] Basic Principle and Guide line, cited above at 388, Principle 22.
[418]Malawi African Association and Others vs. Mauritania, cited above at note 399, para.142.

Conclusion

In sum, the findings of the study is that adoption of a law or ratification of a certain multilateral agreement by states itself counts for nothing save for its paper value. States are duty bound among others, to respect and enforce values and principles of their laws and treaties they ratified. Almost all East African countries under consideration are a state party to OAU and UN Refugee Conventions, and ratified major regional as well as international human rights instruments such as ACHPR, ICCPR and CAT. These laws guarantee the right to *non-refoulment* of refugees and asylum seekers.

But, in violation of this right all of the selected East African countries (Kenya, Tanzania, Djibouti, Sudan and Burundi) have forcibly *refouled* hundreds of refugees and asylum seekers at different times. Furthermore, due to their refoulment, refugees and asylum seekers face sever violations of human rights exposing them, *inter alia*, to death; enforced disappearance; torture, cruel and inhuman or degrading treatment or punishment; and denial of freedom of movement.

Consequently, the host states under consideration in this study, and the countries of origin as well, should be responsible for violation of the right to *non-refoulment*. However, there is no provision addressing the issue of remedy both under the ACHPR and the OAU Refugee Convention. To fill this gap, the African Commission draw inspiration from other international and regional human right instruments that provide remedy in the form of compensation, restitution, rehabilitation, non-repetition and satisfaction.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

This research is believed to be essential in five most important ways. First, helps in identifying relevant laws for protection of right of refugees and asylum seekers to *non-refoulment* in Africa; and in showing the practice of *refoulment* in the five selected East African countries particularly Kenya, Tanzania, Djibouti, Sudan and Burundi. Second, contributes in providing awareness for right holders (refugees and asylum seekers) and duty bearers (African states) by elaborating their rights and duties respectively stipulated under African human rights laws. Third, it is vital in guiding refugees and asylum seekers to claim remedies for violation of their right to *non-refoulment*. Fourth, important in recommending better ways of protection and respect for the right to *non-refoulment* of refugees and asylum seekers, which in turn help the East African states under consideration to reconsider their international and regional human rights obligations. Last, the study highly contributes in advancing the already existing knowledge and in filling the gaps of researches on the principle of *non-refoulment.*

The scope of the study is mainly confined to analysis of the protection of *non-refoulment* in the African human right system focusing on the African Charter and the OAU Refugee Convention with a particular reference to state practices of *refoulment* of refugees and asylum seekers in five selected East African countries. Concerning the methodology, the writer basically relied on the analysis of the protection of right to *non-refoulment* in the OAU/UN Refugee Convention from the perspective of the general framework of both regional and international human rights regime.

With regard to the main findings of the study, the prohibition of *refoulment* is guaranteed under the UN and OAU Refugee Conventions expressly for refugees and asylum seekers. Except the CAT which explicitly guarantees the prohibition of *refoulment* for every person including refugees and asylum seekers, the other international human right treaties are rather followed an implied approach toward the prohibition. Likewise, the African Charter does not explicitly guarantee the prohibition; rather it impliedly provides the prohibition under different provisions. It also failed to provide remedies for the victims of human rights violations including *refoulment.*

Almost all of five selected East African countries under this study are state parties to the OAU and UN Refugee Conventions and the latter's protocol, and major regional as well as international human rights instruments that recognized the prohibition of *refoulment*. However, the practice in these countries shows that the violation of right to *non-refoulment* has been occurring overwhelmingly. Reports by different bodies reveal that these countries have been *refouling* hundreds of refugees and asylum seekers at different times. The *refouled* refugees and asylum seekers face sever risks of human rights violations such as death; enforced disappearance; torture, cruel and inhuman or degrading treatment or punishment; and denial of right to leave and enter ones country. These human rights violations of refugees and asylum seekers caused by *refoulment* entail the responsibility of both host countries and countries of origin.

However, the issue here is, both the OAU and UN Refugee Conventions imposes obligations and the responsibility it entails only on the host states with regard to *refoulment*, but silent about the country of origin. As a result, the researcher strongly argues that countries of origin like host states shall be held liable for violation of right to *non-refoulment* and other human rights violations that are guaranteed under both regional and international human rights treaties they ratified/adopted. Hence, in the case of the five selected East African countries, any *refouled* asylum seekers or refugees are entitled to institute claim for a remedy against the violator states, that is, host and/or country of origin. However, the ACHPR and the OAU Refugee Convention and provide no remedies for human rights violations in general, and violation of the right to *non-refoulment* in particular. As opposed to the former, the later provide no institutional mechanism which redresses the victims of the *refoulment*. To fill these gaps, the African Commission established under ACHPR has been drawing inspirations from other international/regional instruments and redressing the victims in the form of compensation, restitution, rehabilitation, non-repetition and satisfaction. Yet, this Commission lacks an enforcement organ and its decisions lack a binding effect.

5.2. RECOMMENDATIONS

Now it is time for the researcher to recommend course of actions to concerned bodies with the aim of ending human rights violations that are attributed to the violation of the right to *non-refoulment*. Almost all of five selected East African countries under this study, namely Kenya, Tanzania, Djibouti, Sudan and Burundi are state parties to the OAU and UN Refugee Conventions and the latter's protocol, and major regional as well as international human rights instruments that recognized the prohibition of *refoulment*. However, the practice within these countries shows that the violation of the right to *non-refoulment* of refugees and asylum seekers is pervasive.

From this, it is clearly identified by this study that the failure of these countries to comply with their commitment to respect the right to *non-refoulment* is the major obstacle to the protection of human rights of refugees and asylum seekers. Another extreme challenge worth mentioning here is that both the OAU Refugee Convention and African Charter lack provisions clearly dealing with remedies for violation of the right to *non-refoulment.* The OAU Refugees Convention additionally lacks an independent tribunal and enforcement organ thereto. Furthermore, the ACHPR does not explicitly guarantee the prohibition of *refoulment.* Most essentially, both the OAU and the UN Refugee Conventions fail to impose obligations and the responsibility it entails on the country of origin or receiving state with regard to *refoulment*.

Accordingly, the researcher would like to forward the following recommendations relating to the above major gaps and challenges (put in general terms) as identified by the study:

- The Assembly of Head of State and Government(AHSG) of AU shall give a special attention to the overwhelming problem of *refoulment* in Africa particularly in East Africa and thereby issue a specific and binding treaty which addresses this problem from the ground;
- The AHSG of AU shall amend the OAU Refugee Convention in a manner to incorporate the obligations and responsibility of countries of origin regarding *non-refoulment*;
- The five selected East African countries those ratified the OAU and UN Refugee Conventions should respect the prohibition of *refoulment* of refugees and asylum

seekers in any manner what so ever, including non-rejection at front which is nowadays becoming the most common state practice;

- From among the five East African countries dealt up by this paper, Djibouti and Tanzania should respectively ratify the OAU Refugee Convention and CAT both of which clearly address the prohibition of *refoulment*;
- Substantive remedies for violation of human rights particularly *non-refoulment* is not provided in the OAU Refugee Convention and ACHPR. But, it is one step forward that African Commission draw inspiration from other international or regional human rights treaties regarding all substantive remedies for victims of human right violations. Therefore, it is wise to recommend the AHSG of the AU to amend the OAU Refugee Convention and ACHPR, and include expressly all the remedies for the violation of human rights especially the right to *non-refoulment*, in the form of compensation, rehabilitation, restitution, non-repetitive and satisfaction;
- It is a good progress that the African Commission has been entertaining matters relating to violation of right to *non-refoulment*. However, the problem with the commission is that its decisions are recommendatory and non-binding. As a result, it is highly advisable that the AHSG of AU to amend the OAU Refugee Convention and African Charter so as to introduce a tribunal for the hearing of matters arising out of the violation of the right to *non-refoulment* of refugees and asylum seekers; and an independent enforcement body responsible for the implementation of decisions and measures of the tribunal;
- East African countries shall stop violation of the right to non-refoulment of refugees and asylum seekers guaranteed under international and regional treaties with a pretext of bilateral agreements of extradition (at the expense of war on terrorism); and
- The OAU Refugee Convention under its article 2 (3) prohibits "...non-rejection at frontier, return or expulsion..." this provision should be amended by AHSG of AU so as to incorporate any form of forcible removal, such as deportation, extradition and informal transfer or renditions.

Eventually, it is reasonable to conclude that the existing African legal framework for the protection of the right to *non-refoulment* has significant gaps when examined from the perspective of the general human rights regime. Consistency of the national laws and policies of both country of the host and origin concerning the *refoulment* and its effect in light of international and regional standards of the principle of *non-refoulment* needs further research. Furthermore, the issue as to jurisdiction, admissibility and standing relating to matters of *refoulment* required to be researched.

Bibliography

1. Books

Goodwin-Gill, Guy S., and Mc Adam Jane, 'The Refugee in International Law' part 2 Asylum 5 Non-refoulment in the 1951 Refugee Convention, (3rd ed.), (Oxford Public International Law, Oxford University Press, 2015)

Goodwin-Gill and Mc Adam, The Refugee in International Law, (2007)

Guy S, Goodwin-Gill, The Refugee in International Law, (2nd ed.), (Clarendon Press, Oxford, 1996)

Hathaway, James, The Rights of refugees under International Law, (Cambridge University Press, 2005)

Heyns, Christoff, 'Civil and political rights in the African Charter', in the African Charter on Human and Peoples' Rights, The System in Practice, (edited) by Malcolm D. Evans and Rachel Murray, (1986–2000)

Lauterpacht, Sir Elihu and Bethlehem, Daniel, 'The Scope and Content of the Principle of Non-Refoulment: Opinion', in: E. Feller, V. Turk and F. Nicholson (eds.), Refugee Protection in International Law, (Cambridge UP, Cambridge, 2003)

Killander, Magnus, 'African Human Rights Law in Theory and Practice', University of Pretoria, in: Joseph Sarah & Mc Beth Adam (Eds.), Research Handbook on International Human Rights Law, (Cheltenham, UK: Edward Elgar, 2010)

Konjević, Andrea, International Obligations of States in the Protection of Refugees in the 21st Century: The Case of Mass Influx of Refugees to Europe, (Zagreb, 2016)

Olaniyan, Kolawole, 'Civil and Political Rights in the African Charter: Articles 8–14', in: Evans, Malcolm and Murray, Machel (eds.), The African Charter on Human and Peoples' Rights (2nd ed.), (1986-2006)

United Nations High Commissioner for Refugees and the Lauter pacht Research Centre for International Law, Summary Conclusions: The Principle of Non-Refoulment, University of Cambridge, UK, (2001)

Viljoen, Frans, International human rights law in Africa, (Oxford University Press, Oxford, 2007)

2. Journals and Articles

Angelo, Ellen F.D, "Non-Refoulment: The Search for a Consistent Interpretation of Article 33," Vanderbilt Journal of Transnational Law, Vol.42:279, (2009)

Arenilla, Shirley Llain, "Violations to the Principle of Non-Refoulment under the Asylum Policy of the United States", Anuario Mexicano de Derecho Internacional, Vol. XV, (2015)

Bekker, Gina, "The protection of Asylum Seekers and Refugees within the African regional Human Rights System", African Human Rights Law Journal, 13 AHRLJ (2013)

Boed, Roman, "The State of the Right of Asylum in International Law," Duke Journal of Comparative & International Law, Vol.5:1, (1994)

Boed, Roman, "State of Necessity as a Justification for Internationally Wrongful Conduct" 3Yale Human Rts. & Dev.L.J.1, (2000)

Brouwer, Andrew and Kumin Judith, "Interception and Asylum: When Migration Control and Human Rights Collide", 21 Refuge 9, (2003)

Chan, P.C.W, "The Protection of Refugees and Internally Displaced Persons: Non-Refoulment under Customary International Law?" The International Journal of Human Rights, Vol.10, No.3, (2006)

Droege, Cordula, "Transfers of detainees: Legal framework, Non-Refoulment and Contemporary Challenges", International Review of the Red Cross, Vol.90 No.871, (2008)

D'Orsi, Cristiano, "Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?" Zaö RV 68, (2008)

D'Orsi, Cristiano, "The AU Convention on Refugees and the Concept of Asylum", Pace International Law Review online Companion, Vol.3, No.5, (2012)

Farmer, Alice, "Non-refoulment and Jus-Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection", George Town Immigration Law Journal, Vol.23 No.1, (2008)

Fitzpatrick, Joan, "Revitalizing the 1951 Refugee Convention", Harvard Human Rights Journal, Vol.9:229, (1996)

Gillard, Emanuela-Chiara, "There's no place like Home: States' Obligations in Relation to Transfers of Persons", International Review of the Red Cross, Vol.90 No.871, (2008)

Good Win-Gill, Guy S., "Non-Refoulment and the New Asylum Seekers", Virginia Journal of International Law, Vol.26:4, (1986)

Goodwin-Gill Guy S., "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulment", International Journal of Refugee Law, Oxford University Press, Oxford, Vol.23 No.3, (2011)

Gunning, Isabelle R., "Expanding the International Definition of Refugee: A Multicultural View", Fordham International Law Journal, Vol.13:35, (1989-1990)

Hard, Max Rein, "The criteria of applying the International Flight Alternative Test in national Refugee Status Determination Procedures", International Journal of Refugee Law, Oxford University press, Oxford, Vol.14 No.2/3, (2002)

Jaeger, Gilbert, "On the History of the International protection of Refugees", Rich Septembre IRRC, Vol.83 No.843, (2001)

Karakaya, Mustafa, "The Protection of Refugees and Asylum Seekers Against Extradition under International Law", Law & Justice Review, Vol. V, Issue: 1, (2014)

Khan, A. B. M. Imdadul Haque, "Human Rights Implications of the Principle of Non-Refoulment: an Overview", The International Journal of Social Sciences, Vol.24 No.1, (2014)

Macharia-Mokobi, Elizabeth and Pfumorodze, Jimcall, "Advancing Refugee protection in Botswana Through improved Refugee Status Determination", African Human Rights Law Journal, 13 AHRLJ (2013)

Mant, Nils Cole, "Non-refoulment Revised Renewed Review of the Status of the Principle of Non-Refoulment as Customary International Law", European Journal of Migration and Law, Kluwer Law International, 5: 23-68, (2003)

Mathew, Penelope, "Australian Refugee Protection in the Wake of the Tampa", The American Journal of International Law, Vol.96 No.661, (2002)

Mene´ndez, Fernando M. Marin˜o, "Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees", Refugee Survey Quarterly, Oxford University Press, (2015)

Messineo, Francesco, "Non-refoulment Obligations in Public International Law: Towards a New Protection Status?" (2011)

Mujuzi Jamil Ddamulira, "The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights", African Human Rights Law Journal, 9(2009)

Okoth-Obbo, George, "Does Refugee Protection in Africa Need Mediation?" Track Two, Vol.9 No.3, (2000)

Onyango, Joe Oloka, "Human Rights, the OAU Convention and the Refugee Crisis in Africa": Frothy years after Geneva printed in International Journal of refugee law, Oxford University press, Vol.3 No.3, (1991)

Rutinwa, Bonaventure, "Forced Displacement and Refugee Rights in the Great Lake Regions", African Journal of International Affairs, Vol.1 No.2, (1998)

Rutinwa, Bonaventure, "The end of asylum? The changing nature of refugee policies in Africa", Refugee Survey Quarterly, Vol.21 No.1 and 2, (2002)

Rwelamira, Medard RK, "Some reflections on the OAU Convention on Refugees: Some pending issues", The Comparative and International Law Journal of Southern Africa, Institute of Foreign and Comparative Law, Vol.16, No.2, (1983)

Stoyanova, Vladislava, "The Principle of Non-Refoulement and the Right of Asylum-seekers to enter State Territory", Interdisciplinary Journal of Human Rights Law, Vol.3:1, (2008-2009)

Supaat, Dina Imam, "Escaping the Principle of Non- refoulement", International Journal of Business, Economics and Law, Universiti Sains Islam Malaysia, Vol.2, No.3, (2013)

Takele, Soboka Bulto, "The Utility of Cross-Cutting in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights", The University of Tasmania Law Review, Vol.29 No.2, (2010)

Takele, Soboka Bulto, "Patching the "Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System", 27 SAJHR (2011)

Thomas, Chantal, "What does the Emerging International Law of Migration mean for Sovereignty?" Melbourne Journal of International Law, Vol.14, (2013)

Viljoen, Frans and Louw, Lirette, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation", Journal of African Law, Cambridge University Press, London, Vol.48, No.1, (2004)

Weis, Paul, "Territorial Asylum, International Refugee law", Indian Journal of International Law, (2010)

Weis, Paul, "The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa", 3 Revue des Droits del Homme 463(1970)

Weis, Paul, The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary, UNHCR, (1990)

Weissbrodt, David & Hörtreiter, Isabel, "The Principle of Non-Refoulment: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non Refoulment Provisions of Other International Human Rights Treaties", Buffalo Human Rights Law Review, Vol.5, No.1,(1999)

3. Thesis and Research papers

Baxewanos, Fabiane, Non-Refoulment and Extraterritorial Immigration Control the Case of Immigration Liaison Officers, Seminar in International Law: Faculty of Law, University of Vienna, (2013)

Chambo, Janeth Apelles, The Principle of Non-refoulment in the Context of Refugee Operation in Tanzania, LLM Thesis: Yaoundé Catholic University, (2005)

Mewded, Mengesha, Human Rights Violations in Refugee Camps: Whose Responsibility to Protect? A case of Ethiopia, Master Thesis, International Human Rights Law 30 higher education credits, Lund University, (2016)

Rodger, Jessica, Defining the Parameters of the Non-refoulment Principle, LLM research paper in International Law (Laws 509), Faculty of Law Victoria University of Wellington (2001)

Refugees' Rights Forum, Policy Paper: The Principle of Non-Refoulment Of a Person to a Place in Which He Is Expected to Suffer danger to life, liberty, persecution or torture, (2008)

Sharpe, Marina, Engaging with refugee protection, The Organization of African Unity and African Union since 1963, Research Paper No.226, (2011)

4. Internet Sources

African Commission on Human and Peoples' Rights vs. The Great Socialist People's Libyan Arab Jamahiriya Application 004/2011 available at: (http://arcproject.co.uk/wpcontent/uploads/2013/04/CSW-004-2011.pdf) last visited on 10 April 2016

Africa News: Kenyan closure of Dadab refugee camp blocked by High Court available at: (http://www.africanews.com/2017/02/09/kenya-court-quashes-closure-of-dadaab-world-s-largest-refugee-camp/) last visited on 10 February 2017.

African Commission, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, (October 2002) available at: (http://www.achpr.org/files/sessions/32nd/resolutions/61/achpr32_robben_island_guidelines_eng.pdf) last visited on 10 November 2016

African Commission, General Comment No.3 on the African Charter on Human and Peoples' Rights:The Right to Life (article 4) available at: (http://www.achpr.org/files/instruments/general-comments-right-to life/general_comment_no_3_english.pdf) last visited on 11 August 2016

Ahmad, Nafees, Mapping Refugees Protection under International Law: Legal Desirability and Human Rights Suitability, (2015) available at: (http://www.countercurrents.org/ahmad030615.htm) last visited on 29 August 2016

Amnesty International, Forcible return/ fear for safety Rwanda/Tanzania, AI Index: AFR 47/07/00, (24 February 2000) available at:

(http://www2.amnesty.se/uaonnet.nsf/dfab8d7f58eec102c1257011006466e1/0ca9afa131ad27c5c1256890003340cf?OpenDocument) last visited on 23 August 2016

Amnesty International hot spot Italy available at: (http://www.statewatch.org/news/2016/nov/ai-hotspot-Italy.pdf) last visited on 22 June 2016

Amnesty International Publications, Kenya Submission to the United Nations Human Rights Committee for the 105th Session of the Human Rights Committee (9–27 July 2012), Index: AFR 32/002/2012 (June 2012) available at; (http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI_Kenya_HRC.105.pdf) last visited on 6 June 2016

Asylum Statics available: (http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics) last visited on 20 June, 2016

AU, List of Countries which have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa Ethiopia, (2016) available at: (http://www.au.int/en/sites/default/files/treaties/7765-sloau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_6.pdf) last visited on May 29,2016

AU, List of Countries which have signed, ratified/acceded to the ACHPR available at: (https://www.au.int/en/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_0.pdf) last visited on 22 July 2016

Boubakri, Amor, et al, A Report on the African asylum systems, (29 August 2011) available at: (https://www.iarlj.org/general/images/stories/BLED_conference/papers/WP_African_asylum_systems_-_A_Boubakri.pdf) last visited on 22 June 2016

Buyse, Antoine, Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law available at: (http://www.zaoerv.de/68_2008/68_2008_1_a_128_154.pdf) last visited on 12 August 2016

Chronology for Hutus in Rwanda available at: (http://www.refworld.org/docid/469f38d51e.html) last visited on 20 March 2016

Country Reports on Human Rights Practices Djibouti (2015) available at: (http://www.refworld.org/docid/5716127715.html) last visited on 23 June 2016

Crisis Looms for Somali Refugees as Kenya Orders Closure of Dadaab Refugee Camp available at:(https://www.amnesty.org/en/latest/news/2015/04/crisis-looms-for-somali-refugees-as-kenya-orders-closure-of-dadaab-refugee-camp-1/) last visited on 05 March 2016

Death in Ethiopian Custody of Tesfahun Chemeda, after Refoulment from Kenya available at: (https://advocacy4oromia.org/services/advocacy/death-in-ethiopian-custody-of-tesfahun-chemeda-after-refoulement-from-kenya/) last visited on 28 June 2016

Djibouti/Ethiopia: Forced deportation of Oromo refugees from Djibouti to Ethiopia, including information on the Awr Aousa refugee camp and information the treatment of deportees by the Ethiopian government (August 2004) available at: (http://www.refworld.org/docid/41501c7723.html) last visited on 12June 2016

Fitzpatrick, Joan M. (editor), Human Rights protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International mechanisms and Procedures, Transnational publishers' available at: (http://www.globalprotectioncluster.org/_assets/files/tools_and_guidance/protection_of_idps/Human_Rights_Mechanisms_for_IDPs-EN.pdf) last visited on 22 August 2016

Human Rights Watch, Burundi: Stop Deporting Rwandan Asylum Seekers available at: (https://www.hrw.org/news/2009/12/02/burundi-stop-deporting-rwandan-asylum-seekers) last visited on 18 July 2016

International Refugee Rights Initiative (IRRI) available at; (http://reliefweb.int/report/united-republic-tanzania/refugee-returnee-asylum-seeker-burundian-refugees-struggle-find) last visited on 23 August 2016

International Refugee Rights Initiative (IRRI), "Refugee Rights News", Vol. 2, Issue 2 (July 2005) available at: (http://www.refugee-rights.org/Newsletters/GreatLakes/V2N2RwandaBurundiDeportationUproar.htm) last visited on 12 November 2016

Kenya Ministry of Foreign Affairs Report to Reuters available at: (http://uk.reuters.com/article/2012/02/23/us-kenya-somalia-refugees idUKTRE81M1QR20120223) last visited on 7 September 2016

Kenya Amnesty International Report of 2015/2016 available at: (https://www.amnesty.org/en/countries/africa/kenya/report-kenya/) last visited on 24 August 2016

Kinslor, Joanne, "Non-refoulment and Torture: The Adequacy of Australia's Laws and Practices in Safeguarding Fugitives from Torture and Trauma", A1al Forum No 25, (July 2000) available at: (http://www.austlii.edu.au/au/journals/AIAdminLawF/2000/9.pdf) last visited on 5 October 2016

MSS vs. Belgium available at: (http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-103050&filename=CASE%20OF%20M.S.S.%20v.%20BELGIUM%20AND%20GREECE.pdf &logEvent=False) last visited on 19 June 2016

NGO Statement on International Protection Agenda Item 5 (a), Executive Committee of the High Commissioner's Programme 63rd Meeting (1-5 October 2012) available at: (http://www.icva.ch/doc00005497.pdf,) last visited on 12 July 2016

Open Society Justice Initiative vs. Côte d'Ivoire, Communication No. 318/06, available at: (http://www.achpr.org/files/sessions/17theo/comunications/318.06/communication_318.06_eng.pdf) last visited on 10 July 2016

Perspective on Refoulment in Africa available at: (http://www.refugee-rights.org/Publications/Papers/2006/RefoulementinAfrica.April2006.pdf) last visited on 4 July 2016

"Protection of Human Rights in Africa: African Human Rights in a Comparative Perspective" available at: (http://www.leganet.cd/Doctrine.textes/DroitPublic/DH/ProtectionofHR.Kabange.htm) last visited on 22 July 2016

Ramzy vs. Netherlands case available at: (http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NLD/INT_CCPR_NGO_NLD_94_9769_E.pdf) last visited on 25 June 2016

R (on the application of) ABC (a minor) (Afghanistan) vs. Secretary of State for the Home Department, (2011) available at: (http://www.asylumlawdatabase.eu/sites/asylumlawdatabase.eu/files/aldfiles/UK_051%20Judgment.pdf) last visited on 20 June 2016

Refugee Documentation Centre (Ireland) Legal Aid Board, Ethiopia Researched and compiled by the Refugee Documentation Centre of Ireland (25 March 2011) available at: (http://www.refworld.org/pdfid/4d92fda62.pdf) last visited on 12 June 2016

Refugee Refoulement in the East African Community available at: (http://www.pambazuka.org/human-security/refugee-refoulement-east-african-community)Last visited on 10 March 2016

Refugee Refoulment in the East African Community Pambazuka News available at: (http://www.pambazuka.org/humansecurity/refugeerefoulementeastafricancommunity) last visited on 15 June 2016

Resolution (67) 14 on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe (29 June 1967) available at: (http://www.refworld.org/pdfid/3ae6b38168.pdf) last visited 12 July 2016

The Redress Trust (REDRESS) and The Immigration Law Practitioners' Association (ILPA), Non-refoulment Under Threat, Matrix Chambers, London, (16 May 2006), available at: (http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf) last visited on 22 October 2016

Tobias, Kelly, "Predicting the Future Risk of Torture" This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty, University of Pennsylvania Press, (2012) available at: (http://www.jstor.org/stable/j.ctt3fj3sz.70) last visited on 8 September 2016

UN Ad Hoc Committee on Refugees and Stateless Persons, Report of the Ad Hoc Committee on Refugees and Stateless Persons, (Second Session) Geneva, (14-25 August 1950) available at:(http://www.refworld.org/docid/3ae68c248.html) last visited on 29 October 2016

UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, (April 2015) available at *(*http://downloads/Documents/3b73b0d63_5.pdf) last visited on 22 September 2016

UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulment Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Geneva, (26 January 2007) available at: (http://www.refworld.org/pdfid/45f17a1a4.pdf) last visited on 15 September 2016

UNHCR, Refugee Protection: A Guide to International Refugee Law, Geneva, Switzer land, (2001) available at: (http://www.unhcr.org/3d4aba564.pdf) last visited on 2 September 2016

UNHCR, Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, HCR/MMSP/2001/09 (16 January 2002) available at: (http://www.unhcr.org/refworld/docid/3d60f5557.html) last visited on 22August 2016

UNHCR, 'Guidance Note on Extradition and International Refugee Protection,' (Geneva, Switzer land, 2008) available at; (http://www.refworld.org/docid/481ec7d92.html) last visited on 29June 2016

UNHCR, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Geneva Switzer Land (September 2011) available at: (http://www.unhcr.org/4ec262df9.pdf) last visited on 02 October 2016

UNHCR, Resettlement Hand Book division of International protection (Revised ed.), Geneva, (July 2011) available at :(http://www.unhcr.org/ressetlement) last visited on 5 October 2016

United Nations Statistics Division Standard Country and Area Codes Classifications (M49) available at: (http://unstats.un.org/unsd/methods/m49/m49regin.htm) last visited on 2 June 2016

United States Committee for Refugees and Immigrants, World Refugee Survey 2008 Kenya, (19 June 2008) available at: (http://www.refworld.org/docid/485f50ddc.html) last visited on 11August 2016

Working Group on Enforced or Involuntary Disappearances, Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance, available at; (http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf) last visited on 29 June 2016

32 Eritreans at Risk of Forced Return from Sudan available at: (http://www.acjps.org/32-eritreans-at-risk-of-forced-return-from-sudan-2/) last visited on 3 June 2016

Zard, Monette, et al, Refugee and African Commission on Human and Peoples' Rights available at: (https://docs.escr-net.org/usr_doc/Zard_article.pdf) last visited on 20 May 2016

5. Laws

5.1. Domestic Laws

Kenya

Kenya Refugee Act 2006

Sudan

Sudan Asylum Act of 2014

Tanzania

Tanzania Refugee Act of 1998

5.2. International and regional instruments and documents:

International instruments

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Section IX (Reparation for harm suffered), U.N.A/RES/60/147, 21 March 2006

Charter of the United Nations, adopted on 26 June 1945, in San Francisco, came in to force on 24 October 1945

Convention Relating to the Status of Refugees, adopted 28 July 1951and entered in to force 22 April 1954) 189 UNTS 137

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for Signature, Ratification and Accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987

Convention on the Right of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entered into force on 2 September 1990

Declaration on Territorial Asylum that adopted unanimously by the United Nations General Assembly Resolution 2132 (XXII), 14 December 1967

Draft Articles on Responsibility of states for International wrongful Acts, considered by the UN General Assembly Resolution 56/83,UN Doc A/RES/56/83(28 January 2002)

International Covenant on Civil and Political Rights Adopted and opened for Signature, Ratification and Accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976

International Convention for the Protection of All Persons from Enforced Disappearance adopted on December 20, 2006 and entered in to force on 23 December 2010

Protocol Relating to the Status of Refugees, adopted on January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 and entered into force on October 4, 1967

Universal Declaration of Human Rights, UNGA Res. 217A (III), Dec. 10, 1948

Vienna Convention on the Law of Treaties (1969), Adopted on 22 May 1969

Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993

Regional instruments

African Charter on Human and Peoples Rights Adopted in Nairobi June 27, 1981 and Entered into Force October 21, 1986

African Charter on the Rights and Welfare of the Child, Adopted CAB/LEG/24.9/49, July1990 and entered into force 29 November, 1999

African Commission's Rules of Procedure 118

African Commission Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia (21 April to 7 May 2015)

American Convention on Human Rights (1969)

Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984

European Convention on Extradition (1957), ETS 024, 359 U.N.T.S. 273 entered into force 18 April 1960

European Convention on Human Right (1950)

Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Adopted Sept. 10, 1969, and 8 I.L.M. 1288 (entered into force 20 June, 1974)

General Comments, Reports, Concluding Observations and Others

Amnesty International Public Statement, AFR 54/039/2012, (15 August 2012)

Amnesty International, Fear of forcible return, AI Index: AFR 23/001/2005, (15 July 2005)

Amnesty International, Kenya Submission to the United Nations Human Rights Committee, Index: AFR 32/002/2012, (June 2012)

Amnesty International British Section Playing Human ftnbaü, 'coercion to effect 'voluntary departure' to 'safe third country' (1995)

Amnesty International, Somalis are Scapegoats in Kenya's Counter-Terror Crackdown, Index: AFR 52/003/2014, (May 2014)

Amnesty International, Great Lakes Region Refugees denied protection, AI Index: AFR 02/002/2000, (22 May 2000)

Amnesty International, AI Index: AFR 16/004/2005 (Public), (19 May 2005)

Committee on the Rights of the Child, General Comment No.6,Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, (3 June 2005)

Committee Against Torture, Conclusions and Recommendations on Saudi Arabia, CAT/C/CR/28/5, (28 May 2002)

Committee Against Torture, Conclusions and Recommendations on Brazil, A/56/44, (16 May 2001)

Country Reports on Human Rights Practices for 2012 United States Department of State Bureau of Democracy, Human Rights and Labor, (2012)

Fact Sheet No.20, Human Rights and Refugees

Human Rights Committee, 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)

Human Rights Committee, General Comment No. 20: Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment (1992), UN Doc. HRI/GEN/1/Rev.7, (May 12, 2004)

Human Right Committee General Comment 31/80, (29 March 2004)

Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 at 18 (1994)

General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance, E/CN.4/1998/43, (12 January 1998)

Global Trends, "Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons" (2008)

Human Rights Watch, Joint Letter to the African Commission on Human and Peoples Right (ACHPR) Regarding Violations in the Context of Kenyan Counter-Terrorism Operations, (29 May 2014)

Oromia Support Group, Human Rights Abuses in Ethiopia Reports from refugees in Kenya, 60 Westminster Rd, Malvern Worcs, WR14 4ES, UK, (September 2010)

Oromia Support Group (OSG) and Oromia Support Group Australia (OSGA) Joint Civil Society Report Submission for UPR 19th session Ethiopia, (September 2013)

UN High Commissioner for Refugees, Relating to Status of Refugees, (September 2011)

UNHCR/OAU, The Addis Ababa Document on Refugees and Forced Population Displacements in Africa, Addis Ababa, Ethiop1a, (8-10 September 1994)

UNHCR, Mid-year Trends, (2015)

UN ECOSOC res. 248(IX) B, (8 August 1949)

UN doc. E/1850

UNHCR, No entry! A review of UNHCR‟ s response to border closures in situations of mass refugee influx, Geneva 2 Switzerland, PDES/2010/07 (June 2010)

UNHCR, Human Rights and Refugee Protection (RLD 5) (October 1995), Memorandum of Understanding with UNICEF IOM/39/96 - FOM/42/96, Geneva (13 May 1996)

UN Office of High Commissioner for Refugees (OHCHR), (2014)

UNHCR, 'Note on International Protection The Executive Committee of the High Commissioner's Program', General Assembly A/AC. 96/830, (7 September 1994)

Urgent Action Asylum seekers, Refugees at risk of deportation Djibouti, UA 195/1116, AFR 23/4698/2016, (24 August 2016)

6. Cases

International

Charles Chitat Ng vs. Canada, Communication No.469/1991(1994)

ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Merits) (Bosnia and Herzegovina vs. Serbia and Montenegro), (2007)

Soering vs. United Kingdom 11 EHRR, 439(1989)

X vs. Sweden, Communication No.1833/2008 (2011)

Regional

Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) vs. Guinea, Communication No.249/02 (2004)

Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) vs. Angola, Communication No.292/04

Inter-Africaine des Droits de l'Homme and others vs. Angola, Communication No.159/96 (1997)

Malawi African Association and Others vs. Mauritania, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000)

Modise vs. Botswana, communication no.97/93 (1997 and 2000)

Nationale Des Droits del›Homme et des Libertés vs. Chad, Communication No. 74/92 Commission (October 1995)

Organisation Mondiale Contre La Torture and Association Internationale Des Juristes Democrates, Commission Internationale Des Juristes (C.I.J) and Union Interafricaine des Droits Des l'Homme vs. Rwanda, Communications No.27/89, 46/91, 49/91 and 99/93 (1996)

Purohit and Moore vs. Gambia Communication No.241/01

Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) vs. Nigeria, Communication No. 155/96

Sudan Human Rights Organisation and Another vs. Sudan (2009) AHRLR 153 (ACHPR 2009)

Zimbabwe Human Rights NGO Forum vs. Zimbabwe Communication No. 245/02 (May 2006)