

**PROTECTING ERITREAN REFUGEES' ACCESS
TO BASIC HUMAN RIGHTS IN ETHIOPIA: AN
ANALYSIS OF ETHIOPIAN REFUGEE LAW**

by

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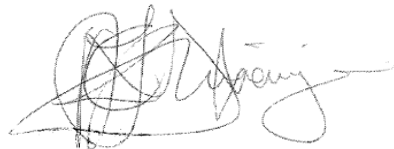
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DECLARATION

I, **Christopher K. Mubanga**, declare that '**Protecting Eritrean refugees' access to basic human rights in Ethiopia: An analysis of Ethiopian refugee law,**' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution. I have also obtained Ethical Clearance for this study, the reference number being ST17, on the Ethical Clearance Certificate dated 4 February 2016.

Signature:



Date: 10 August 2017

Supervisor: Ms Lee Stone

Signature:



Date: 10 August 2017

DEDICATION

This dissertation is dedicated to Eritrean refugees, who strive daily to cope with the challenges of being a refugee and try to make a better life for themselves and their families.

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Attaining a Master of Laws (LLM) degree in International Law has been my life-long dream and I feel so proud that I am finally accomplishing my goal and realising my dream. I would like to thank my wife, Lillian Mwale, who has been very supportive and encouraged me to pursue the Master's Degree programme. Lillian, your emotional support sustained me even during times that I felt like giving up due to pressures of work and many competing priorities. I would also like to thank my children, Joshua, Natasha, Caleb and Emmanuel for the unconditional love and for giving a purpose to work hard and being a pillar for the family.

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LIST OF ACRONYMS AND ABBREVIATIONS

ARRA	Administration of Refugees and Returnee Affairs
AU	African Union
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ECOSOC	United Nations Economic and Social Council
EXCOM	Executive Committee of the UNHCR
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IRO	International Refugee Organisation
OAU	Organisation of African Unity
OCP	Out of Camp Policy
RSD	Refugee Status Determination
SIRAA	Security, Immigration and Refugee Affairs
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
WDYC	Wasai Yikaalo Development Campaign

SUMMARY

Eritrean refugees are compelled to flee their country mainly to avoid forced conscription into indefinite military service, arbitrary arrest and detention for prolonged periods without trial. The majority of Eritrean refugees are young people, who leave their country in search of a better life and sources of livelihoods. The mass migration of Eritrean refugees has started to have adverse effects on the country's socio-economic landscape. The main destination and country of refuge for the majority of Eritrean refugees is Ethiopia.

Although no serious violations of human rights have been reported among Eritrean refugees living in Ethiopia, it is a well-known fact that the Ethiopian Government has not fully extended the internationally accepted rights of those who have been forced to flee their own states, to refugees. For example, freedom of movement for refugees is restricted, which is obviously compounded by the encampment policy, which requires that all refugees should be confined to designated refugee camps. This situation seriously undermines the UNHCR's efforts to enhance refugees' self-reliance, independence, and chances of local integration.

There has not been much research undertaken regarding the Ethiopian Government's legal framework on refugees and its impact on the protection of the rights of refugees. In 2014, Ethiopia hosted the largest number of refugees in Africa. This phenomenon was largely attributed to the Ethiopian Government's 'open door' policy towards refugees. The present study is an attempt to critically examine Ethiopian refugee law and determine the extent to which the national laws protect the rights of refugees. Although the study is limited in scope to the situation of Eritrean refugees, the principles and standards of treatment discussed apply to all refugees living in Ethiopia.

Key Words

International refugee law; refugee; prima-facie refugee status; non-refoulement; domestication of treaties; reservations; human rights; socio-economic rights; durable solutions.

CHAPTER ONE: BACKGROUND AND RATIONALE OF THE STUDY

1.1. Introduction and context

An exponentially high number of people leave Eritrea. Reports indicate that an increasing number of Eritreans are fleeing Eritrea because of serious human rights violations, including the forced conscription into the military of both males and females. Accordingly, many Eritreans ‘feel they are living in a prison camp, rivalled – some say – only by North Korea’.¹ For the majority of refugees from Eritrea, intrinsic factors such as lack of higher education opportunities, unemployment, economic burden, desire to join a family member in another country, and hope for resettlement are all reasons for their decision to flee Eritrea and seek asylum.² Eritrea is also one of only a few countries in the world that still requires its citizens to obtain an exit visa prior to leaving the country.³ Leaving the country thus poses a risk in and of its own. However, despite the life-threatening risks faced while attempting to flee the country and during flight, the overwhelming desperation at an intractable situation has resulted in a continuous exodus from Eritrea.

There are those who cross the Red Sea to request asylum in Yemen (which is itself presently in the midst of conflict), Saudi Arabia, United Arab Emirates and Qatar.⁴ Europe is obviously also an appealing destination. Statistically, Eritreans constitute approximately four percent of the total number of refugees entering Europe.⁵ It is, however, only a minority of Eritreans who make it to Europe. Indeed, the United Nations High Commissioner for Refugees (UNHCR) estimates that an average of 3 000 Eritreans per month leave clandestinely to Eritrea’s neighbour, Ethiopia.⁶

As at December 2015, the UNHCR estimated that the total population of concern in Ethiopia originating from Eritrea was 131 660 people.⁷ Eritrean refugees living in Ethiopia are mainly located in the northern part of the country, approximately 1 200 kilometres north of the capital

¹ The Economist, ‘Why they leave’, accessible at <http://www.economist.com/news/middle-east-and-africa/21587844-eritreans-are-taking-seas-because-worsening-conditions-home-why-they>. Last accessed 20/11/2016.

² Norwegian Refugee Council, (2015), Project Description for Skills Training, Livelihood Development, *Child Protection, and Shelter to Eritrean Refugees in Shire*. UNHCR Sub-Office Shire docs, Ethiopia.

³ Refugee Documentation Centre, *Eritrea*, January 2010, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/11>. Last accessed 9/3/2017.

⁴ Hepner, T.R., (April 2011) Human Tsunamis: Refugees and Failure of Forced Migration Policy, available at <http://www.counterpunch.org/hepner04222011.html>. Last accessed 13/6/2015

⁵ International Organisation for Migration, 14th-20th January 2016, *Mixed Migration Flows in the Mediterranean & Beyond: Compilation of Available Data & Information*, available at <http://data.unhcr.org/mediterranean/regional.php>. Last accessed 3/12/2016.

⁶ UNHCR, (31 August 2015) ‘Briefing Notes: Eritrean Refugee Situation’, UNHCR Sub-Office, Shire, Ethiopia.

⁷ UNHCR, (June 2015) 2015 UNHCR country operations profile – Ethiopia, available at <http://www.unhcr.org/cgi-bin/txis/vtx/page?page=49e483986&submit=GO>. Last accessed 17/1/2016.

city, Addis Ababa. The refugee caseload comprises mainly young adolescents and youths, who continue to arrive in increasing numbers, and tend to move on from Ethiopia to a third country; a situation which presents a major challenge in providing protection. The refugee population is heavily male dominated (72.4%), although many young females also flee Eritrea for reasons much the same as the males.⁸ Inevitably and unfortunately, most of these young people end up as victims of human trafficking.⁹

Currently, four refugee camps in the Northern part of Ethiopia are home to the 131 660 Eritrean refugees in Ethiopia. These camps, located not very far from the Eritrean border, include Shimelba (established in 2004), Mai-Aini (2008), Adi Harush (2010), and Hitsats (2013).¹⁰ Eritreans are required to remain in these camps and their movement outside of the camp is very strictly controlled, which is attributable to the suspicion which Ethiopians harbour against Eritreans, subsequent to Eritrea's war of independence against Ethiopia in the 1960s, much like the suspicion which Somalis harbour against their 'traditional enemy', Ethiopians.¹¹

1.2. Background and problem statement

While there are numerous human rights violations that compel Eritreans to leave the country, the indefinite national service and arbitrary arrests and detention – or fear thereof – is the top push factor for flight. Those fleeing include young people, as well as older people, who leave the country in large numbers, a process that has started to 'deplete entire villages, and which has the potential of negatively impacting the country's social and economic landscape'.¹²

In 1995, National Service Proclamation No. 82/1995 formalized national service in Eritrea. National Service was viewed as a means of giving effect to the historical responsibility that present and future generations shoulder to preserve a free and sovereign Eritrea. It did not take long for national service to deviate from its objective as a nation-building programme to become one of the main drivers spurring thousands of Eritreans to flee the country, despite the perils encountered on escape routes and a future filled with uncertainty in foreign lands.¹³ Article 8 of the Proclamation

⁸ UNHCR, (August 2014) Camp Population Breakdown, UNHCR Sub-Office, Shire-Ethiopia.

⁹ UNHCR, Global Appeal 2014-2015, 2014 UNHCR country operations profile – Ethiopia, available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483986&submit=GO>. Last accessed 5/1/2016.

¹⁰ *Ibid.*

¹¹ D'Orsi, C. (2016) *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven*, Routledge, 239.

¹² Keetharuth, SB, (13 May 2014) 'Report of the Special Rapporteur on the situation of human rights in Eritrea', UN Human Rights Council, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_45. Last accessed 05/01/2016.

¹³ Note 3 *supra*.

stipulates that all Eritreans between the ages of 18 and 40 have the ‘compulsory duty to perform active national service’, consisting of six months of military training and thereafter 12 months of active military service and development tasks in military forces. It goes on to state that reserve duties are foreseen until the age of 50.¹⁴ In 2002, with the announcement of the *Warsai Yikaalo* Development Campaign (WYDC), a national social and economic development effort, the statutory national service of 18 months was extended indefinitely. The result is that all male and female adults must be available to work at the direction of the state in various capacities until the age of 40 – now often 50 or 55 in practice.¹⁵

Given that those fleeing national service and other violations are highly unlikely to apply for exit visas, those who try to flee the country are imprisoned or risk being shot on sight at the border. Refugees who fled to Malta, Sudan, Egypt, Libya, and other countries were forcibly repatriated and have been victims of detention and torture upon return to Eritrea.¹⁶ In light of the pervasive human rights violations in Eritrea and the risk of torture faced by those who are forcibly returned, the UNHCR has advised against all deportations to Eritrea, including of rejected asylum seekers. Accordingly, the *refoulement*¹⁷ of Eritrean refugees should end.¹⁸

Eritrea is bordered by Sudan to the West and Ethiopia to the South. From the 1970s onwards, Eritreans fled the war in Eritrea and sought asylum in Sudan. Once the situation in Sudan deteriorated with the ongoing conflict in Darfur, compounded by the mass deportation of Eritrean asylum-seekers from Sudan in 2011,¹⁹ Eritreans had no alternative but to seek refuge in Ethiopia, notwithstanding their historical hostility.

Ethiopia is not only a party to the major refugee treaties, but is also party to the 1981 African Charter on Human and Peoples’ Rights (African Charter),²⁰ which provides unequivocally for a number of rights which apply to refugees, including the right to freedom of movement (Article 12), the right to work under equitable and satisfactory conditions (Article 15), the right to enjoy

¹⁴ Human Rights Watch, (April 2009), *Service for Life: State Repression and Indefinite Conscriptioin in Eritrea*, available at <https://www.hrw.org/report/2009/04/16/service-life/state-repression-and-indefinite-conscriptioin-eritrea>. Last accessed 09/03/2017.

¹⁵ *Ibid.*

¹⁶ Note 3 *supra*.

¹⁷ This is a standard of international refugee law whose aim is to protect the right of every person to seek asylum and protection from forced return or expulsion to a place where their lives or freedoms could be threatened. A description of the principle of *non-refoulement* is contained in Article 33 of the 1951 Refugee Convention and Article 3 of the 1984 Convention against Torture.

¹⁸ Note 14 *supra*.

¹⁹ D’Orsi, note 11 *supra*, 223.

²⁰ African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67.3/Rev.5, entered into force on 21 October 1986.

the best attainable state of physical and mental health (Article 16), the right to education (Article 17) and the right to equality (Article 19). While no serious violations of human rights of refugees have been recorded in Ethiopia, neither does the Ethiopian government fully protect refugees. Freedom of movement of refugees is restricted, exacerbated by the encampment policy, which requires that all refugees should be confined to designated refugee camps.

This situation seriously curtails the UNHCR's efforts to enhance refugees' self-reliance, independence, and chances of local integration.²¹ Government authorities also occasionally detain refugees for living outside designated areas or working and studying without proper permits. Although the Refugee Proclamation of 2004 entitles refugees to identity documents, the government has not issued them to camp-based Eritrean refugees. More disturbing is the fact that although the Federal Government of Ethiopia is a state party to the 1951 UN Convention Relating to the Status of Refugees (1951 Convention),²² its 1967 Protocol,²³ and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,²⁴ it has made reservations to the 1951 Convention. In particular, the right to employment (Article 17(2)), right to primary education (Article 22(1)) and the right to own property (Article 8) is denied to refugees. This is notwithstanding the fact that the Refugee Convention requires that state parties should not apply exceptional and restrictive measures to refugees regarding the right to own property, the right to primary/elementary education and the right to wage-earning employment. Interestingly, the Ethiopian government does not expressly and categorically state that it has made reservations to the above convention rights, but simply states that 'Subject to the following reservations made under the terms of Article 42, ... the provisions of articles 8, 9 (relating to provisional measures to ensure national security), 17(2) and 22(1) of the Convention are recognized only as recommendations and not as legally binding obligations.'²⁵

Consequently, the state requires refugees to live in designated refugee camps and thus remain entirely at the mercy of the government for public relief and assistance. The Refugee Proclamation authorizes the Head of the Security, Immigration and Refugee Affairs Authority to designate areas as refugee camps. The state of Ethiopia requires nearly all refugees, including Eritreans, to live in camps set up near their respective borders, which is itself highly problematic and antithetical to

²¹ UNHCR, 'Country Operations Plan 2008, Ethiopia'. Available at <http://www.unhcr.org/46f90a6a2.pdf>. Last accessed 9/3/2017.

²² 1951 United Nations Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

²³ 1967 Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

²⁴ 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Doc. CAB/LEG/24.3); 1001 UNTS 45.

²⁵ The Refugee Proclamation No. 409 of 19th July 2004, Federal Democratic Republic of Ethiopia.

the prevailing protection standards. To access medical care or higher education, refugees must obtain a permit that specifies the travel time granted. Refugees who travel outside these areas without authorization risk being arrested and detained by immigration authorities. The Refugee Proclamation requires camp-based refugees to have a ‘pass permit’ or written authorisation from government officials to exit camps.²⁶ As a result, many Eritrean refugees find it difficult to build a decent livelihood and they therefore, yearn for a better life elsewhere. For example, one of the reasons why many Eritrean refugees dream about resettlement or to migrate beyond the refugee camps is related to the poor conditions of their lives compounded by inadequate livelihood opportunities in the refugee camps. According to Horst, the dream for resettlement has increased for many refugees in the African region because of the worsening situations in the refugee camps and the absence of any foreseeable durable solutions.²⁷

For the reasons set out above, this research examines the situation of Eritrean refugees living in Ethiopia. In order to achieve this objective, a detailed analysis of the extent to which the reservations have had a negative impact on Eritrean refugees is undertaken. As such, the research attempts to answer the question of whether such reservations may be made to the Convention, in spite of the object and purpose of the Convention.²⁸ Therefore, the analysis determines the exact parameters of the state’s legally binding obligations with respect to refugees in terms of the general principles of international law.

Although the Ethiopian government has not unequivocally stated its reservation to the 1951 Convention right to freedom of movement (Article 26), it has made provisions in the national refugee law, which restrict movement of refugees through its encampment policy.²⁹ It is a requirement under Article 21 of the national refugee law that refugees are to live in designated areas, located at a reasonable distance from the borders of their country of origin or habitual residence. Furthermore, Article 21(1)(a) of the Refugee Proclamation makes provision for the issuance of identity documents to all recognised refugees. However, to the best of my knowledge, as a representative of UNHCR in Ethiopia, none of the Eritrean refugees living in Ethiopia have

²⁶ *Ibid.*

²⁷ Horst, C., (2011) ‘Vital links in social security: Somali refugees in the Dadaab Camps, Kenya’, *New Issues in Refugee Research, Working Paper no. 38*, UNHCR, Geneva, (2011), available at <http://www.unhcr.org/3af66c884.pdf>. Last accessed 17/01/2016.

²⁸ The Vienna Convention on the Law of Treaties of 1969 specifically states at Article 26 that a state is required to act in good faith and give effect to the obligations which it has assumed. This principle is known as *pacta sunt servanda*.

²⁹ FDRE, Refugee Proclamation No. 409, Article 21(2): ‘Notwithstanding the provisions of Sub-Article (I)(d) of this Article, the Head of the Authority may designate places and areas in Ethiopia within which recognized refugees, persons who have applied for recognition as refugees, and family members thereof shall live, provided that the areas designated shall be located at a reasonable distance from the border of their country of origin or of former habitual residence’.

been issued an identity document. The issuance of identity documents to Eritrean refugees has been a contentious issue between UNHCR and the Ethiopian government. The matter is still unresolved and under discussion.

It is also worth noting that the reservation to the right of freedom of movement is not absolute, but partial, in the sense that Eritrean refugees in particular, are provided with a ‘pass permit’ by the designated government official, which serves as authority for an individual refugee to travel within the boundaries of Ethiopia for a specified period of time. The pass permit is a legal document issued by the Refugee Officer (a designated government official) to a refugee or groups of refugees, to allow such individual(s) to leave the camps and travel to other parts of the country for various reasons. In other words, a pass permit is a legally enforceable document that allows refugees access to freedom of movement within the country. However, Refugee Officers have been conferred the power to refuse to issue a pass permit to a refugee and there is no provision in the national law for a refugee to contest such a decision. In addition, the pass permit has a validity period that, in many cases, does not exceed three months and may be declared invalid if the validity period is exceeded. The concerned refugee may be in violation of the law if the pass permit is declared invalid. Ultimately, a refugee living in Ethiopia is not allowed to leave the camp without authorisation (the pass permit). Failure to comply with this legal requirement is subject to criminal prosecution and incarceration of the accused refugee in a federal prison, as stipulated in Article 25 of the Proclamation.³⁰ It would be interesting to determine how this arrangement has impacted either positively or negatively on the Eritrean refugees’ right to a decent life and livelihood. Given the limited scope of the present study, this specific issue will not be dealt with, although the findings of this study may justify future research into that aspect.

It is important to note, however, that an exception to the encampment policy was provided for in subsidiary legislation in 2009 called the ‘Out of Camp Policy’ that allowed only Eritrean refugees that have demonstrated valid reasons for staying out of camps, such as medical, or serious protection and humanitarian grounds, the right to reside outside of the camps. The main objective of this policy is to respond to the specific protection and/or medical needs of the most vulnerable refugees that cannot be properly addressed in a camp setting. In addition, under the Out of Camp programme, in the case of refugees who have stayed within a camp for six months and are able to demonstrate that they have the ability to sustain their lives without assistance from UNHCR and

³⁰ *Ibid*, Article 25: ‘Whosoever violates or obstructs the implementation of this Proclamation shall be punishable in accordance with the Penal Code of Ethiopia’.

that they have no criminal record, are granted leave allowing them to move out of the camps, and reside elsewhere in the country.³¹

The Refugee Proclamation amplifies the Ethiopian government's reservation to the refugees' rights to education and wage earning employment. Article 21(3) of the Proclamation provides that restrictions imposed on foreigners with regard to education and wage-earning employment shall also apply to refugees. The Refugee Proclamation is, however, silent on the refugees' right to own property and other interests. The study will therefore explore the current practice regarding ownership of property and restitution rights of refugees.

1.3. Research Objectives

The main objectives of the research are as follows:

1. To examine and review the Ethiopian legal framework on refugees and its impact on the enjoyment of civil, socio-economic and cultural rights by Eritrean refugees;
2. To propose recommendations that will assist the legislature and the government of Ethiopia to review the current asylum policy and refugee law so that it is in line with the provisions of international law, to which Ethiopia is a party and in terms of which it has undertaken to give effect to the binding obligations contained therein.

1.4. Research Questions and Hypotheses

1.4.1. Research Questions

The results of the research mainly answer the following research questions:

1. To what extent has the Ethiopian legal system incorporated and domesticated the provisions of international law related to refugees, particularly the rights of refugees to protection of their socio-economic and cultural rights?
2. To what extent does the Ethiopian Refugee Proclamation and other legislation protect the refugees' right to freedom of movement, employment and residence?
3. What is the socio-economic and humanitarian situation of Eritrean refugees living in Ethiopia?

³¹ UNHCR, (September 2013) 'Universal Periodic Review: Ethiopia', Human Rights Liaison Unit, Division of International Protection, UNHCR Geneva, 4, available at <http://www.refworld.org/publisher,UNHCR,,OMN,,,0.htm>. Last accessed 17/01/2016.

1.4.2. Hypothesis

The research results endeavour to establish the veracity of the following hypothesis:

The Ethiopian legal framework pertaining to refugees, which infringes refugees' socio-economic, civil and cultural rights due to government restrictions on the freedom of movement, right to employment and residence is not in line with the provisions of international law related to the protection of refugees and therefore, does not adequately protect the rights of refugees. In particular, the legal framework limits refugees' ability to become self-reliant and thus increasing the risk of being subject to violence, exploitation and human trafficking because it does not favour and promote the right of refugees to choose a place of residence and does not provide for naturalization of refugees who have lived in Ethiopia for many years.

1.5. Research Methodology

Research on refugee law and policy fits naturally with the 'law and geography'³² methodological approach on account of the fact that elements of physical geography, such as borders, boundaries and land are vital in international law because of their link with sovereignty, statehood, self-determination, the margin of appreciation and the principle of subsidiarity. At the same time, migration forms part of the human geographical concept because of the exclusion presented by borders. In the case of Eritrean refugees residing in Ethiopia, these 'borders' are the restrictive policies concerning encampment and the denial of the rights to work and freedom of movement, which deprive the refugees of important socio-economic rights and impede their ability to foster feelings of dignity, self-sufficiency and independence.

In order to assess how the 'borders' imposed by the Ethiopian government negatively affect Eritrean refugees' socio-economic, civil and cultural rights, I engaged in a desk-based review of primary and secondary sources. The most logical starting point was to critically analyse the 1951 UN Refugee Convention as well as the reservations made thereto by Ethiopia. In addition, careful consideration of the 1969 OAU Refugee Convention was necessary given the humanitarian nature and intention behind the treaty. Thereafter, the Constitution of the Federal Democratic Republic of Ethiopia as well as relevant case law and the Proclamations issued by Ethiopia pertaining to refugees and immigration were assessed to determine the extent to which Ethiopia is complying with its international obligations to protect refugees in its territory.

³² Cryer, R., Herve, T. & Sokhi-Bulley, B., (2011) *Research Methodologies in EU and International Law*, Hart Publishing, 92.

The intention of the study was mainly to recommend the repeal of the laws and proclamations which infringe the rights guaranteed in the UN and OAU Refugee Conventions and make further recommendations for comprehensive durable solutions to the situation of Eritrean (and other) refugees in Ethiopia.

1.6. Literature Review

While much has been written and documented regarding the Ethiopian government's open door policy on refugees, which is evidenced by the fact that in 2014 Ethiopia became the largest refugee hosting country in Africa,³³ hosting over 733 000 refugees by the end of 2015,³⁴ not much has been researched and written regarding the extent to which the state of Ethiopia has domesticated the provisions of international law related to the treatment of refugees in the country. This study is an attempt to critically examine Ethiopian refugee and immigration laws and explain in sufficient detail how the national laws have or have not adequately protected the rights of refugees. The study will limit its focus to the situation of Eritrean refugees living in the northern part of Ethiopia.

The most recent study on the protection of refugees in Sub-Saharan Africa – and which specifically highlights the situation in Ethiopia – is that of d'Orsi.³⁵ Starting from the premise that there is a general sense of 'host fatigue'³⁶ by refugee-hosting states, d'Orsi explains that this is exacerbated by the violence within Ethiopian refugee camps, which has been a problem since the early 2000s when Sudanese refugees fled a wave of violence and escaped an Ethiopian refugee camp, thus illustrating that the government does not provide adequate protection and instead abdicates its responsibility to the UNHCR,³⁷ notwithstanding the limited resources of the UNHCR. D'Orsi makes it explicit that refugees are compelled to want to leave the refugee campus due to the restriction on refugees to remain within the camps, the government control of the camps and the 'obvious economic, political and social variables' which negatively impact their existence within the camps.³⁸

³³ According to the UNHCR, in 2014 Ethiopia took the title of the largest refugee-hosting country in Africa. In 2015 the number of people of concern to UNHCR in Africa was 14.9 million with the scale of displacement caused by the upheaval in Central African Republic and South Sudan likely to remain extensive and long-term displacement continuing to keep the numbers high (with many of those refugees fleeing to Ethiopia). See 'UNHCR regional operations profile – Africa', available at www.unhcr.org/pages/4a02d7fd6.html. Last accessed 13/01/2016.

³⁴ UNHCR, (December 2015) 'Ethiopia factsheet', Addis Ababa, available at <https://data.unhcr.org/horn-ofafrica/download.php?id=1784>. Last accessed 13/1/2016.

³⁵ D'Orsi, note 11 *supra*.

³⁶ *Ibid*, 118.

³⁷ *Ibid*, 167.

³⁸ *Ibid*, 239-240.

According to Kibrom, despite the fact that Ethiopia is a signatory to the 1951 Refugee Convention, the 1969 OAU Refugee Convention, the Covenant on Economic, Social and Cultural Rights (ICESCR) and many other international legal instruments on the protection of refugees' rights, Eritrean refugees face immense human rights challenges while living in Ethiopia.³⁹ Among these challenges, Kibrom mentions access to adequate food items, health services, housing, education and freedom of movement in particular. My own observations reinforce Kibrom's findings in that the services that Eritrean refugees are receiving are to a certain extent less favourable than those provided to the Ethiopian nationals. For example, the involvement of government line ministries such as the Ministry of Health in the provision of health services to Eritrean refugees in the camps is very minimal. The clinics in the camp are not managed by the Ministry of Health and hence, not included in the district health services plan. The situation has negatively impacted on the provision of adequate health services to the refugees. This situation is not only peculiar to the provision of health services, but also applies to other sectors such as education.

Berhane's findings during his research among former Eritrean refugees who had returned to Eritrea confirms the fact that Eritrean refugees living in Ethiopia have limited access to basic services.⁴⁰ He claims that the majority (32% of respondents) among former Eritrean refugees reported socio-cultural problems as the major difficulties they faced while living in countries of asylum. In order of importance, this category was followed by political problems (22.7%), no problems (18.7%), economic problems (17.0%), and health/aging/acclimatization problems (8.8%). Females experienced higher proportions of socio-cultural or no problems; males had higher proportions of political and health/aging/acclimatization problems; and economic problems were experienced equally by both sexes.⁴¹

Berhane further states that 27.7% of Eritreans who participated in the study and experienced socio-cultural problems as refugees, lived in Ethiopia. He also asserted that political problems were more important and prominent for those who lived in Ethiopia (34.2%) in comparison to other countries of refuge. On the other hand, only 18% reported that they experienced serious economic problems while living as refugees in Ethiopia.⁴² Statistical analyses of the type presented above certainly provide useful insights into a particular situation under investigation. However, the statistics

³⁹ Kibrom, A.G., (July 2013) Survival rights of Eritrean refugees in Ethiopia: The Shimelba refugee camp case, *AfricLaw*, available at <http://africlaw.com/2013/07/08/survival-rights-of-eritrean-refugees-in-ethiopia-the-shimelba-refugee-camp-case/>. Last accessed 13/01/2016.

⁴⁰ Berhane, K.C., (January 2011) 'Return Migration to Asmara, Eritrea: Readjustment Challenges', *African Migration Journal*, Issue 4, available at http://www.africanmigration.com/issue_04.html. Last accessed 17/01/2016.

⁴¹ *Ibid.*

⁴² Note 40 *supra*.

should also be used with caution due to the fact that there may have been a number of factors affecting the responses provided by the refugees when the investigation was being conducted (particularly since the refugees were no longer in Ethiopia). For that reason, my own research will provide a qualitative study into the socio-economic, socio-political and socio-cultural situation of Eritrean refugees in Ethiopia based on my vantage point of working with the UNHCR in Ethiopia and having first-hand knowledge based on my own observations.

1.7. Brief overview of chapters

Chapter One provides the contextual and background information upon which the analysis of the international and domestic refugee law obligations of Ethiopia in relation to Eritrean refugees is based.

Chapter Two highlights the main sources of human rights for refugees within the ambit of international law. An analysis of the main international legal instruments related to the protection of refugees is undertaken. In this chapter, the 1951 UN Refugee Convention and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa are discussed to determine the effectiveness of these international legal instruments in addressing the evolving problem of refugees in the world and particularly in Africa.

Chapter Three provides an important insight and detailed discussion on the civil, political and socio-economic rights of refugees outlined in the 1951 UN Refugee Convention as the main source of refugee rights. This forms the backdrop against which the subsequent chapter on the realisation of these rights in Ethiopia, takes place.

Chapter Four thus reviews Ethiopian refugee law and policy. The chapter focuses on the extent to which the Ethiopian Constitution and the Refugee Proclamation have guaranteed refugees' access to fundamental human rights whilst living in Ethiopia. The chapter also highlights the state's reservations to the 1951 Refugee Convention and the extent to which the state's reservations have impacted negatively on the protection of refugees. This chapter includes a discussion of the implementation of international refugee law in Ethiopia and the extent to which the provisions of the 1951 UN Refugee Convention in particular, have been domesticated and incorporated into the national legal system.

Last but not the least, **Chapter Five** contains conclusions of the study and provides recommendations. Accordingly, this chapter addresses the political and socio-economic status of Eritrean refugees and how the Ethiopian legal framework on refugees has negatively affected Eritrean refugees' access to sustainable livelihoods and self-reliance.

CHAPTER TWO: INTERNATIONAL PROTECTION OF THE FUNDAMENTAL HUMAN RIGHTS OF REFUGEES

2.1. Introduction

The origin of refugee rights is closely linked to the development of international human rights law. This chapter highlights the main sources of refugee rights and the contribution of the main refugee treaties governing the human rights of refugees. In particular, the chapter introduces the 1951 Refugee Convention as the main foundation of refugee rights.

As a point of departure, the rights of refugees under international law are derived from standards and principles of customary international law and conventions.⁴³ The position of international law is that all rights which accrue to nationals of states should also be extended to refugees. The question that is often raised is whether access to basic rights is assured and applied fairly to all human beings regardless of their status in foreign states. In principle, the cornerstone and authority for international protection of refugees is enshrined in universal human rights law and treaties, which are the most relevant sources of refugee rights.

It was observed in *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, that ‘nothing, surely, is more elementary, than the certainty required for the identity of what is and is not a regulation ...; and we need not be seduced by using humanitarian claims to a spurious popularity of a false origin of law’.⁴⁴ Therefore, it is important to create sustainable criteria to substantiate the importance and relevance of universal human rights law. It is however, necessary to be cognisant of the fact that human rights norms originate to a large extent from either custom or well-known standards or principles of laws contained in international treaties. Each of these will now be discussed in turn with a view towards establishing their role in the protection of the right of refugees.

2.2. Customary International Law

It should be noted that customary international law is necessary for formalising coherent and consistent practice among states. A principle or norm of international customary law is accepted

⁴³ Statute of the International Court of Justice, 59 Stat. 1055 (1945), adopted 26 June 1945, entered into force 24 Oct. 1945 (ICJ Statute), at Art. 38(1).

⁴⁴ *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, 20 May 2003).

as law only if it is recognised as such by states. The majority of states would consider customary international law legitimate only if the norm or standard is universally accepted, which is implied through acceptable and constant practice among states for some time including an indication of the state's willingness to be committed to the obligations stipulated in the agreement or treaty. However, this assumption or position by states has received some criticism. For instance, Lord Hoffmann noted that:

I do not suppose it is probable to apply the guidelines for the improvement of rules of international law concerning the interaction of member states among themselves and with each other (for example, as to how barriers ought to be drawn) to the fundamental human rights of citizens in relation to the position of the state. There are unfortunately many essential rights which could fail this type of check of state practice, and the Refugee Convention is itself an affirmation of this fact. In my view, a distinctive approach is needed. Essential human rights are the minimum rights which a state should concede to its citizens. For the reason of finding out what those basic rights are, international legal instruments are critical although many states in practice disagree with them ... due to the fact they show recognition that such rights must exist.⁴⁵

It is further argued by Hathaway that reliance on inter-state practice is a futile and unreliable source of human rights law because interactions between states with regard to human rights are rare and therefore, unable to establish a constant practice of a norm or standard of international human rights law. In most cases, the remedy a state accords to its own citizens is invariably not as a result of an on-going process of negotiating acceptable international standards of conduct, but arises through ratification of an international treaty governing the international standard of conduct.⁴⁶

In order for refugees to access and enjoy their rights, it is imperative that member states accept the applicable standard as being part of customary international law or a general principle of law. Hathaway contends that a standard of international law is only binding if states commit themselves to it by granting the specific rights to the individuals concerned.⁴⁷ A principle of human rights law will be recognised if it has arisen as a result of state acceptance and consistent practice among states. It is a rule of international law that a norm or custom should first be acknowledged and practiced by states to be considered as a principle of customary international law. For example, in rejecting the motion to prevent the expulsion of Roma refugee claimants from the Czech Republic from becoming a breach of the legal obligation not to frustrate the right of every person to seek refuge, the House of Lords referred to many authoritative guidelines contained in international law and concluded that the practices in question had not yet 'received the assent of states'.⁴⁸

⁴⁵ *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL).

⁴⁶ Hathaway, J.C., (2005) *The Rights of Refugees Under International Law*, Cambridge University Press, 91.

⁴⁷ *Ibid*, at 33.

⁴⁸ *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 27.

However, as a substitute to custom, universally applicable human rights may additionally be considered as general principles of international law.

2.3. General principles of law

As it is commonly understood, a popular precept of law is set up not on the premise of uniform state practice, but with the aid of the distinctive feature of the consistency of domestic laws across a significant range of states. International regulations can validly emerge in such situations due to the fact that states have already consented to the binding authority of the standard practice within their national spheres of governance.⁴⁹

A general principle of law is accepted as a standard of international law if it is widely used in many states. The main test for establishing a general principle of law is to determine whether or not the proposed standard has been widely used and recognised within the legal system of a member state. The proof of intention and willingness of member states to be committed to the norm is simply through acceptance of the practice as a legal obligation. As a principle of international law, treaties signed by member states require that states domesticate the provisions contained in the treaties by enacting relevant national laws, which subsequently forms a definitive part of the national legal system. This is essential to ensure that human rights are protected and it is an obligation of states to report on their efforts in domesticating international human rights law. For instance, states adhering to the Genocide Convention are expected to comply with the obligation to enact national laws and rules to punish all acts meant to eradicate, in whole or in part, a national, ethnic, racial or religious group.⁵⁰ Member states and signatories to the International Covenant on Civil and Political Rights undertake, amongst other things, to defend via national laws, the right of every human being not to be arbitrarily deprived of life.⁵¹ The Convention against Torture calls for powerful legislative measures to prevent acts of torture.⁵² The Slavery Convention; the Supplementary Convention Related to the Abolition of Slavery;⁵³ the International Covenant on Civil and Political Rights; and the Convention on the Elimination of all forms of Discrimination

⁴⁹ Note 46 *supra*.

⁵⁰ Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res. 260A (III), adopted 9 Dec. 1948, entered into force 12 Jan 1951 (Genocide Convention), at Art. V.

⁵¹ International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), adopted Dec. 16, 1966, entered into force 23 Mar. 1976 (Civil and Political Covenant), at Art. 6(1).

⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, adopted 10 Dec. 1984, entered into force 26 June 1987 (Torture Convention), at Arts. 2(1) and 4.

⁵³ Slavery Convention, 60 LNTS 253, done 25 Sept. 1926, entered into force 9 Mar. 1927, at Art. 6, as amended by Slavery Protocol, 212 UNTS 17, done 23 Oct. 1953, entered into force 7 July 1955.

against Women all require states to enact a formal prohibition on slavery and the slave trade in all their forms and to terminate all types of generalized discrimination, outlaw hate propaganda, and establish affirmative safety mechanisms to oppose all form forms of discrimination against vulnerable groups, such as women.⁵⁴

Considering that many member states who are signatories to the above treaties and many other international legal instruments have committed themselves to enacting appropriate specific national legislation giving effect to the international treaties, these undertakings are within the rules of general principles of international law. Furthermore, the UN Charter stipulates obligations on member states to respect and protect human rights for all persons and not only its citizens. Moreover, international regulation and rules all aim to provide protection to refugees from systemic racial discrimination, as well as from being victims of genocide or extreme basic forms of slavery. It is however, worth noting that it is not always sufficient to infer that the human dignity of refugees will be thoroughly safeguarded by simply relying on universally relevant norms of human rights regulations and custom.

Standards and principles of international law generally affirm these rights, and ensure that refugees are protected from arbitrary deprivation of their existence (life), torture, and a broad variety of discriminatory practices. On one hand, the UN Charter, even though regarded as an endless supply of human rights, provides little if anything to this listing. In brief, it is observed that without connection with treaty-based human rights law, and more especially to the Refugee Convention and the Covenants on Human Rights, refugees could be entitled to no more than a bare minimum of rights.⁵⁵

2.4. The Charter of the United Nations

The Charter of the United Nations as a source of human rights sets out human rights obligations of states on the basis that states are considered as ‘trustees’ of the UN.⁵⁶ Under the Charter, states have pledged to ‘take joint and separate action in cooperation with the Organisation’ in the protection of fundamental freedoms and human rights.⁵⁷ The pledge by member states is an indication of states’ intention to be responsible for any violation of human rights in their respective

⁵⁴ Convention on the Elimination of All Forms of Discrimination against Women, UNGA Res. 34/180, adopted 18 Dec. 1979, entered into force 3 Sept. 1981 (CEDAW or Discrimination Against Women Convention), at Art. 6.

⁵⁵ Note 46 *supra*.

⁵⁶ Arts. 75-85 of the UN Charter.

⁵⁷ Arts. 55-56 of the UN Charter.

countries. It should however, be noted that the intentions of the drafters of the UN Charter was to create a 'good faith' obligation among the members of the UN. It may further be affirmed that states have no legal duty to take action without authority from the UN.⁵⁸

In a landmark case, the International Court of Justice (ICJ) ruled that a good faith undertaking to observe human rights ought to be seen as a form of political, and not a legal, duty.⁵⁹ Significantly, it is necessary to note that the UN Charter does not prescribe any legal obligation on its member states to observe human rights and fundamental freedoms. Thus, despite the fact that one of the goals of the UN is to promote and protect human right, member states are not legally obliged or have any legal duty to observe and respect them. Instead, they are simply under a moral duty and sometimes a legal duty (by means of an agreement or treaty), to act in accordance with the provisions and purposes of the UN Charter.

Under the Charter, states are anticipated to honour their human rights pledge, in situations where failure to honour this pledge may jeopardize conditions of stability and well-being between or amongst states. From this perspective, states have not devoted themselves to an all-embracing human rights task, but are duty-bound to recognize human rights if non-compliance might adversely affect relations among states. This interpretation establishes reciprocity of rights and enforceability, since the Security Council is empowered to call for the compliance of states if it is necessary 'for the preservation of international peace and protection'.⁶⁰

In this regard, states are accountable for any actions that are likely to disrupt peaceful and friendly relations among member states. They are not however held accountable for failing to adhere to human rights and therefore it does not really matter whether the disruption of peaceful relationship among members is a violation of a person's human rights or not. In addition, the Security Council would only intervene if the actions of a particular state might lead to the disruption of international peace and security. For instance, it was observed that the state of Nicaragua had no legal duty or obligation to respect human rights. However, the absence of this kind of commitment does not necessarily mean that Nicaragua – or any other state for that matter – ought to violate human rights with impunity. In view of the significance of the human rights concerned in this case, states may be held to have a legal responsibility to protect the human rights that may be violated as a result of its actions. Such legal obligations may encompass criminalising acts of aggression consisting

⁵⁸ Gandhi, P., (1998) 'The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact', *German Yearbook of International Law*, 206.

⁵⁹ *Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14.

⁶⁰ Note 46 *supra*.

of genocide, gross violation of a wide variety of human rights, safety from slavery and racial discrimination. Indeed, it was confirmed in the *Barcelona Traction* case that all states have a legal duty under international law to protect human rights.⁶¹

It is submitted that although not considered an authoritative source of legally binding duties, a more expansive human rights jurisdiction exists within the General Assembly and its associated specialized human rights organs, such as the Commission and Sub-Commission on Human Rights, the High Commissioner for Human Rights, and the Commission on the Status of Women. Moreover, Article 13 of the Charter empowers the General Assembly to conduct research and make recommendations as a measure aimed at assisting in the protection of human rights and fundamental freedoms for all without discrimination on the basis of race, gender, language, or faith.

Furthermore, the General Assembly and its subordinate bodies may scrutinize and deliberate on human rights, they may even propose that states insist on actions against states whose governments are not complying with the principles of the UN to respect and protect human rights.⁶² In situations where a state has not assented to a treaty, a duty to respect human rights may be created due to international pressure exerted by member states of the General Assembly. With respect to refugees specifically, states party to the 1951 Refugee Convention are legally obliged to protect human rights contained in the treaty. The following section introduces the 1951 Refugee Convention as a source of refugee rights.

2.5. State Obligations and Rights under the 1951 UN Refugee Convention

2.5.1. The right to seek asylum

The 1951 Refugee Convention restricts the scope of the definition of a ‘refugee’ to persons who:

... as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having 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 ...

B(1) for the purposes of this Convention, the words ‘events occurring before 1 January 1951’ in article 1, section A, shall be understood to mean either:

⁶¹ *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, [1970] ICJ Rep 3.

⁶² ‘It is the Security Council which, solely, may also call for coercive action ...’: *Certain Expenses of the United Nations* case, [1962] ICJ Rep 151, at 163.

- (a) events occurring in Europe before 1 January 1951'; or
- (b) events occurring in Europe or elsewhere before 1 January 1951.

Importantly, every contracting state shall make a statement at the time of signature, ratification or accession to the 1951 Refugee Convention, specifying which of these meanings it applies for the reason of its duties stipulated in the Refugee Convention.⁶³ It is moreover possible for a state to limit its responsibilities on geographical grounds. A member state to the 1951 Refugee Convention may decide to limit its obligations to grant refugee status to persons whose fear of persecution was as a result of events that occurred during the Second World War or events that occurred before 1 January 1951. It is however, worth confirming that it is the 1967 Protocol Relating to the Status of Refugees, which eliminates the geographical and time limitations.⁶⁴ Consequently, although a good number of states have accepted and acceded to the 1967 Protocol, some countries in Africa, such as Madagascar and Namibia have not adopted the 1967 Protocol and therefore, have no legal obligation to grant refugee status based on the present day practices. The geographical limitation can still legitimately be invoked by these states within the context of the 1951 Refugee Convention definition.⁶⁵

Hathaway concludes that Madagascar chose to invoke the temporary geographic limitation simply to avoid legal obligations in the event that they are required to admit into their territory non-Europeans seeking asylum. The intention behind Article 1(B) is to allow states the right to grant refugee status only to refugees coming from Europe. Despite the fact that the refugee situations have evolved since the end of the Second World War, the provision contained in Article 1(B) is still effective and enforceable. However, the exception to this rule is that the right to invoke Article 1(B) is only available to states that have made a specific geographic reservation at the time of signing the 1951 Refugee Convention and this reservation should have been made before the adoption of the 1967 Refugee Protocol.⁶⁶ For example, an attempt by Hungary to invoke Article 1(B) of the 1951 Convention was declared invalid because Hungary only acceded to both the 1951 Refugee Convention and its 1967 Protocol in 1989.⁶⁷

⁶³ Article 1 of the 1951 Convention Relating to the Status of Refugees.

⁶⁴ Protocol Relating to the Status of Refugees, 606 UNTS 8791, adopted on 31 January 1967, entered into force on 4 October 1967 (Refugee Protocol).

⁶⁵ Note 46 *supra*.

⁶⁶ 1967 Refugee Protocol, Article 1(3): 'The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol'.

⁶⁷ Note 46 *supra*.

It is clear that the above definition is outdated since it refers to ‘events occurring before 1st January 1951...’, signifying that it was developed during a different era without foreseeing today’s mass refugee influxes and migration issues.⁶⁸ However, the 1967 Protocol removes the geographic and time limitation to enable the 1951 Convention to be applied universally.

According to Millbank, the Refugee Convention was enacted on account of the European experience of persecution during the Second World War. The Refugee Convention definition has not changed, despite the fact that the nature of the refugee situation has evolved and become more complex. In this era, refugee movements have been attributed more to civil wars, ethnic tensions, or generalised violence than to displacements due to a single oppressive regime such as the Nazis. The argument advanced is therefore that the 1951 Convention refugee definition does not adequately include measures to address the current refugee realities in the World.⁶⁹

In an effort to safeguard the rights of every person to seek asylum, a standard of international law, popularly known as the principle of *non-refoulement*, was included in the 1951 Refugee Convention. This is a non-derogable right that epitomises the duty on a state to afford a person an opportunity to apply for asylum and to have the assurance he/she they will not be returned to a country or place where it is reasonably believed that his/her life and freedom will be at risk.

2.5.2. The Principle of Non-Refoulement

In line with Article 33 of the Refugee Convention, the obligations of states come into effect as soon as an individual crosses the border into its territory, whether legally or illegally, provided that such an individual is seeking asylum. This is in accordance with the international principle of *non-refoulement*, which prohibits any state from forcibly returning an asylum seeker or refusing anyone entry into its territory if such forcible return or denial of granting entry may subject the person to persecution and/or death if returned to his country of origin.⁷⁰

It was concluded by the African Commission on Human and Peoples’ Rights (ACHPR) in *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, that the arbitrary detention and mass expulsion of Sierra Leonean refugees was a direct

⁶⁸ Note 46 *supra*.

⁶⁹ Millbank, A., (2000) ‘The Problem with the 1951 Refugee Convention’, *Social Policy Group*, available at http://www.aph.gov.au/About_Parliament/Parliamentary. Last accessed 03/02/2017.

⁷⁰ Article 33 states that ‘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, nationality, political opinion or membership of a particular social group’.

violation of the principle of non-refoulment. The brief facts of the case are that the then President of Guinea, Mr Lasana Conté issued a declaration on local media and called for the immediate arrest and detention of Sierra Leonean refugees. The decision resulted in wide spread violence and the majority of the refugees were forcibly repatriated to Sierra Leone against their will and despite the ongoing civil war where they faced the likelihood of persecution and/or death.⁷¹

Under the 1951 Refugee Convention, refugee-receiving countries are obliged to conduct refugee status determination for anyone who seeks refuge and safety on its territory, regardless of whether they meet the refugee criteria or not.⁷² UNHCR has been engaged in developing and standardising guidelines for individual Refugee Status Determination (RSD) in order to assist states in assessing claims for international protection among asylum seekers and determine whether such individuals meet the 1951 Refugee Convention criteria and therefore, should be granted refugee status. Refugee status is granted based on the ‘credibility’ of the refugee claim, which is supported by ‘country of origin information’. Although RSD is a means of screening asylum seekers and ensuring that only deserving cases are granted asylum, unfortunately, this process is only possible in situations of small in-flows of refugees and not practical during a large influx of refugees, where *prima-facie* refugee status determination is applied. The RSD is a UNHCR initiative and the process is not included in the 1951 Refugee Convention.⁷³

For purposes of clarity, it is necessary to reiterate that refugee status is a pre-requisite for a refugee to have access to the Refugee Convention rights and international protection as described in the succeeding paragraph.

2.5.3. Protection and ensuring access to basic rights

States may subscribe to treaties and domesticate the human rights obligations contained in international law, but in many cases fail to ensure that these human rights are actually enforced. Although refugees may not be barred from enjoying their rights, they are often deprived of these human rights and in most states, refugees are required to meet certain formalities such as obtaining a gate-pass or authorisation to live outside the camps, which affects the enjoyment of their freedom

⁷¹ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, Communication No. 249/02, 36th Ordinary Session, December 2004.

⁷² Loescher, G., (1992) *The Asylum Dilemma in the West*, Pennsylvania State University Press, 81.

⁷³ *Ibid.*

of movement, right to employment and education⁷⁴ which are regarded as basic rights to which refugees are entitled, without exception.

While human rights law requires states to respect the rights it sets out in relation to all persons within its jurisdiction or territory, the extent of access and enjoyment of a particular human right may vary depending on the individual's legal position vis-à-vis the state. Thus, while the standard of compliance with human rights law is universal or international, the state retains discretion in its choice of implementation, including whether and how to incorporate treaty provisions into domestic law.⁷⁵ The principle of subsidiarity and the margin of appreciation represent the discretion afforded to states to implement laws as they see fit based on their knowledge of the state's peculiar circumstances. There is therefore a veritable gap between the theory of human rights and the ability to access and enjoy those rights.⁷⁶ As Hathaway notes, 'the divergence between the theory and the validity of international human rights law is strikingly obvious.'⁷⁷ A common problem is that constitutions often guarantee rights only to citizens, making enforcement for non-citizens' rights exceedingly difficult.⁷⁸

While refugees may enjoy and have access to human rights, the Refugee Convention also confers rights on states. For example, under the 1951 Refugee Convention, states have the right to make reservations to provisions of the Convention. This right, unfortunately, impedes the right of refugees to access employment opportunities, education and in most cases enjoyment of their freedom of movement.

2.5.4. States' right to make reservations

Article 42 of the 1951 Refugee Convention gives member states the right to make reservations to the 1951 Refugee Convention at the time of ratification. Specifically, the Refugee Convention stipulates that at the time of signature, ratification or assent, any member state may make reservations to any article of the Convention with the exception of Articles 1, 2, 3, 4, 16(1), 33, 36 and 46. Furthermore, a member state intending to make a reservation has the right to withdraw the

⁷⁴ Hathaway, note 46 *supra*, 91.

⁷⁵ McAdam, J., (July 2006) 'The Refugee Convention as a rights blueprint for persons in need of international protection', *New Issues In Refugee Research*, UNHCR: Policy Development and Evaluation Service, 7.

⁷⁶ UNHCR, (3 July 1998) 'Note on International Protection', A/AC.96/898, 45.

⁷⁷ Hathaway, J.C., (1991) 'Reconceiving Refugee Law as Human Rights Protection', *Journal of Refugee Studies*, Vol. 4, 113.

⁷⁸ ECOSOC Commission on Human Rights, 26 May 2003, 'Prevention of Discrimination: The Rights of Non-Citizens', E/CN.4/Sub.2/2003/23; 'General Comment 15'.

reservation at any given time.⁷⁹ With the exception of *non-refoulement*, access to courts, non-discrimination and freedom of religion, all other basic rights can be excluded or amended by means of making a reservation at the time of signing or ratifying the treaty.

The requirement that refugees lawfully staying in a country of refuge benefit from the equal right to employment as all other foreigners has attracted proportionately the highest number of reservations by states.⁸⁰ There has also been considerable reluctance by member states to fully domesticate and include in national law, the full rights of refugees to enrol in public learning institutions, benefit from social assistance or protection regulations, and experience the freedom to move freely in the country of refuge.⁸¹ It is accordingly submitted that these reservations defeat the very objective of ensuring that refugees do not become an onerous burden on the state of asylum and also seriously impedes the future prospects of refugees.

The Executive Committee of the High Commissioner endorsed an agenda for protection, which requires that ‘member states should make considerable efforts to remove reservations made at the time of accession and, where appropriate, to work towards lifting the geographical limitation’.⁸² In pursuit of this objective, the International Law Commission has prepared a guide for member states to assist in clarifying the most frequently asked questions on reservations to treaties.⁸³

2.6. Legal responsibilities of refugees

Refugees are not above the law and are therefore expected to comply with the national laws of the country of asylum.⁸⁴ At the same time, refugees who violate the laws of the host country should be subject to the same punishment as may be imposed on nationals in similar circumstances.

⁷⁹ 1951 Refugee Convention, Article 42(1-2): ‘At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive. 2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations’.

⁸⁰ ‘Twenty one states have qualified their acceptance of, at the least, a part of Article 17 (salary-earning employment) of the Refugee Convention’. UNHCR, Declarations on the Convention, available at www.unhcr.ch. Last accessed 13/4/2016.

⁸¹ Arts 22 (public education), 24 (labour and social security) and 26 (freedom of movement) have each attracted nine or more reservations.

⁸² ‘Declaration of States Parties to the 1951 UN Convention and/or its 1967 Protocol Relating to the Status of Refugees,’ UN Doc. HCR/MMSP/2001/09, 13 December, 2001, incorporated in Executive Committee of the High Commissioner’s Program, ‘Agenda for Protection,’ UNDoc. EC/52/SC/CRP.9/Rev.1, 26 June 2002, at Part III, Goal 1, Point 1.

⁸³ ‘Report of the International Law Commission on the Work of its 55th Session,’ UN Doc. A/CN.4/537, 21 January 2004, at paras. 170–200.

⁸⁴ Refugee Convention, Art. 2 (General obligations) ‘Every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order’.

Importantly, though, states are prohibited from arbitrarily withdrawing rights of refugees on the premise that the refugee has violated the laws of the state and therefore, should not enjoy the rights and freedoms that are accorded to refugees generally.

It is the understanding of the international community that the legal jurisdiction of the host country does not only apply to its citizens, but extends to all foreigners, including refugees. It is therefore expected that since refugees enjoy the rights and benefits that accrue to nationals, they also have an obligation to the state that provided them with protection by obeying the laws, and performing civic duties.⁸⁵ In addition, the UN Committee on Statelessness has observed that refugees' obligations to pay taxes and military service on equal terms as nationals, is an honest contribution envisaged from a refugee 'living in the host country, provided with international protection and making an earnest living'.⁸⁶

A general obligation to respect the laws and regulations of the host state, included in the 1951 Refugee Convention, constitutes the recognition of the basic responsibility of refugees. The rationale behind the legal obligations of refugees is to ensure that their conduct and behaviour is commensurate with the benefits and privileges granted to them whilst living in the country of refuge.⁸⁷ According to Robinson, the general interpretation of Article 2 is that refugees are not only expected to adhere to the legal guidelines and rules of the host country, but are also not exempted from whatever restrictions that may be imposed on them for purposes of ensuring that national security and public order is maintained.⁸⁸

The unambiguous obligation of refugees to respect the legal system of the host country, prescribed in the 1951 Refugee Convention, is recognition of the refugee's primary responsibility. The purpose behind this duty is to make sure that their behaviour is commensurate with the rights and privileges granted to them while dwelling within the country of refuge.⁸⁹

⁸⁵ United Nations, 'Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems,' UN Doc. E/AC.32/2, 3 January 1950, at 31–33. Chapter IV'.

⁸⁶ *Ibid.*

⁸⁷ UN document. E/AC.32/SR.12, 25 January 1950 at 7, declaration by Mr. Robinson of Israel: 'A refugee becomes a foreigner *sui generis* to whom the draft convention accorded unique reputation and in certain cases even equality with the nationals of the recipient member state. The refugee as a consequence of his status, has acquired certain privileges and it was in the best interest of all concerned to create a balance by conferring upon him greater responsibilities, available at <https://www.scribd.com/doc/105073524>. Last accessed 09/03/2017.

⁸⁸ Robinson, N., (1953) *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, Division of International Protection, United Nations High Commissioner for Refugees, New York, 72, available at <http://www.worldcat.org/title/convention-relating-to-the-status-of-refugees>. Last accessed 09/03/2017.

⁸⁹ *Ibid.*

The general rule however, is that each basic human right should be granted and guaranteed without distinction between refugees, citizens and foreigners. To be sure, the general guarantee contained in the Universal Declaration of Human Rights and other relevant human rights instruments, applies to foreigners and citizens alike.⁹⁰ It is important to note, therefore, that Article 2 of the 1951 Convention does not confer the right on any state to withdraw a refugee's rights simply on the basis that the refugee has failed to adhere to rules and regulations of the country. However, a refugee who is guilty of a grave or serious crime(s) against humanity and therefore, constitutes a danger to national security, may be declared to have forfeited their rights pertaining to their refugee status, as defined in the 1951 Convention.⁹¹

Hathaway asserts that the supporters of the amendment above argued that the essence of this provision was actually to the benefit of refugees in the sense that host states are permitted to protect important national interests without revoking the status of a refugee or expelling a refugee from his country of refuge. A refugee could nevertheless, lose his refugee rights in certain circumstances, such as conduct amounting to a threat to national security, in terms of which he may be expelled from the host state.⁹² This thinking is consistent with that of the UNHCR, which contends that no boundaries to the enjoyment of refugee rights may ordinarily be imposed, unless such omission or commission is so grave that it warrants rejection of a person's application for refugee status or expulsion from the country of refuge.⁹³ In all other circumstances, the concerned states need to continue to facilitate the refugee's access to all rights guaranteed by the Refugee Convention. Therefore, article 2 does not allow the withdrawal of refugee rights for even the most extreme breaches of a refugee's legal responsibility to the host country. Considering that there is no reciprocity of rights and responsibilities under the Refugee Convention, refugees must be dealt with in the same manner as any ordinary human being found to be in violation of the law. Refugees should receive the same penalty as any other ordinary person in similar circumstances and should not be threatened with withdrawal of the precise benefits that come with the status of being a refugee. All rights conferred by the Refugee Convention are to be respected in full until and unless refugee status is either validly withdrawn under Article 1, or the strict requirements for expulsion or *refoulement* are met.

⁹⁰ UN Human Rights Committee, 'General Comment No. 15: The position of aliens under the Covenant', 1986, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004 at 140, para. 2.

⁹¹ UN Doc. A/CONF.2/SR.4, 3 July 1951 at 9, statement of Mr Rochefort of France: 'it should be noted that the measures in question associated with extremely extreme – and, by the way, rare – cases, and are within the category of counter-espionage operations... 'Forfeiture' of his rights by using the refugee could transfer him from the jurisdiction of the Refugee Convention to the legislation currently applicable in the country of asylum concerned'.

⁹² Note 84 *supra*.

⁹³ UN Doc. A/CONF.2/SR.4, July 3, 1951, at 11.

In *Negusie v. Holder*, an Eritrean asylum seeker was denied refugee status on account that he was involved in war crimes and crimes against humanity. The United States Supreme court squashed the decision of the lower court by holding that the court of first instance erred by denying Negusie the right to seek asylum because the exception to the rule contained in the 1980 Refugee Act excluded crimes committed under duress.⁹⁴

Furthermore, it is worth mentioning the 1951 Refugee Convention only justifies expulsion of a refugee on the basis of serious criminal acts that may result in destabilising public order⁹⁵ and in extreme cases, such as having perpetrated crimes against humanity, in which case he may be *refouled*.⁹⁶ The High Commissioner for Refugees alluded to these provisions of the 1951 Refugee Convention on 16 November 1966 when making a submission to the Minister of Foreign Affairs of the Federal Republic of Germany with reference to acts of violence on the officers and premises of the Federal Socialist Republic of Yugoslavia on the territory of the Federal Republic, wherein refugees from Yugoslavia were alleged to have been involved in acts of violence. The Commissioner asserted, inter alia that:

The United Nations High Commissioner for Refugees needs to maintain explicitly that men and women who in their country of asylum have committed violent acts against another state, its government or towards officers or premises of that state, can in no way be considered refugees in terms of the Statute of the United Nations High Commissioner for Refugees and such persons are excluded from measures of international protection.

The High Commissioner further stated on 26 July 1976 that:

It would be beneficial, in this connection, to take into account that it is not the task of the High Commissioner to assist or provide protection to persons that, as a result of their activities, that are contradictory to the ambitions and concepts of the United Nations, have placed themselves out of the ambit of a humanitarian response. Article 2 of the Convention explicitly mentions that refugees have obligations and duties to uphold the rule of law of the country, which has given them refuge. Every action of the High Commissioner is humanitarian and a deliberate effort to reintegrate the refugees in the framework of a network wherein they could recover to the position of a rewarding and peaceful life.⁹⁷

In comparison, the OAU Refugee Convention, which replicates the definition of the 1951 UN Refugee Convention verbatim and even takes it further, thus implying that it is more generous in

⁹⁴ *Negusie v. Holder*, 555 U.S. 511 (2009)

⁹⁵ Art. 32 of the 1951 Refugee Convention: 'The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order'.

⁹⁶ Art. 1(F) and (C): 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (F) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; ... (C) He has been guilty of acts contrary to the purposes and principles of the United Nations'.

⁹⁷ *Ibid.*

nature, does not confer many civil, political or socio-economic rights on refugees. The next section is therefore a discussion of the provisions of the 1969 OAU Refugee Convention and the extent to which the OAU Convention has ensured the protection of the rights of refugees in Africa.

2.7. The 1969 OAU Refugee Convention

In 1969, the Organisation of African Unity (OAU) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa. The 1969 OAU Convention contains an extended definition of a refugee, which includes individuals displaced as a result of external aggression, foreign occupation or events seriously disturbing public order.⁹⁸ This treaty was adopted to suit the prevailing contextual situation in Africa at the time, which was characterised by liberation struggles against colonialism and domination of one race group over another. Instead of conflicts in general subsiding, however, following the adoption of the 1969 OAU Convention, Africa has experienced an upsurge in civil wars and natural disasters, resulting in an unprecedented increase in displaced populations and refugee situations. The expanded refugee definition has accordingly allowed millions of displaced people to seek asylum and safety in neighbouring countries, such as Ethiopia.⁹⁹

The following paragraphs will analyse the meaning and scope of the expanded refugee definition under the 1969 OAU Refugee Convention and its impact on the application of standards and procedures of international refugee law; particularly as these apply to Ethiopia.

2.7.1. Scope and rationale of the OAU Convention

The drafting of the 1969 OAU Refugee Convention started in 1964. At that time, most African countries had not yet attained political independence from colonialism and were actively involved in ‘liberation struggles’, which resulted in the displacement of thousands of people. The number of refugees in Africa more than doubled from around 300,000 in 1963 to almost 700,000 by the end of 1966.¹⁰⁰ A concerted humanitarian response to the massive displacement of populations in

⁹⁸ Art. 1(2) of the OAU Refugee Convention defines a refugee as: ‘every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’.

⁹⁹ Rabkin, M.B., (April 2005) ‘Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on’, *UNHCR Evaluation & Policy Analysis Unit*, available at www.unhcr.org. Last accessed 02/10/2016.

¹⁰⁰ Gallagher, D., (1989) ‘The Evolution of the International Refugee System’ *23 International Migration Review* 583, 23.

Africa was adversely affected by the perceived exclusion of Africa contained in the 1951 Refugee Convention definition, which limited its application to ‘events occurring in Europe prior to 1951’.¹⁰¹

The main reasons for drafting the 1969 OAU Refugee Convention were not documented with sufficient clarity at the time, which has led to the present-day speculation on the rationale for the treaty. Some commentators have said that the 1969 OAU Refugee Convention was an attempt to ‘regionalize’ the refugee definition to the African context¹⁰² while others felt that the 1969 OAU Refugee Convention was drafted because of the deficiencies contained in the 1951 Refugee Convention. Others asserted that the drafting of the OAU Convention was in the spirit of African hospitality and to ensure peace and security among the OAU member states.¹⁰³ This reasoning was based on the assumption that refugees in Africa were using host countries as a base for subversive activities which could result in conflicts between member states.¹⁰⁴

The OAU Convention was adopted on the premise that refugee situations are a ‘source of friction’ and ‘discord’¹⁰⁵ among member states, which were required to be eradicated. Furthermore, the OAU Refugee Convention states that ‘the granting of asylum to refugees is a peaceful and humanitarian act’¹⁰⁶ and obliges host states to settle refugees away from the borders.¹⁰⁷ It could be argued that maintaining peaceful relationships and security among member states was the main objective of enacting the OAU Refugee Convention.

The second reason could be to complement the 1951 Refugee Convention by adopting a regional legal instrument to address specific problems affecting refugees in Africa. It was never the intention of the OAU member states to replace the 1951 Convention, but to simply fill the gap created by the geographic and temporal limitations contained in the 1951 Refugee Convention,¹⁰⁸ as well as to cater for African specificities.

¹⁰¹ Art. 1(A)(1), 1951 Convention Relating to the Status of Refugees.

¹⁰² Gunning, I.R., (1990) ‘Expanding the International Definition of Refugee: A Multicultural View’ 13 *Fordham International Law Journal*, 46-48.

¹⁰³ Note 1 *supra*.

¹⁰⁴ Holborn, L.W, (1973) *Refugees: A Problem of Our Time – The Work of the United Nations High Commissioner for Refugees, 1951-1972*, vol I & II, The Scarecrow Press, 183-188.

¹⁰⁵ 1969 OAU Convention, Preamble, para 3.

¹⁰⁶ 1969 OAU Convention, Art. 2(2).

¹⁰⁷ *Ibid*, para 6.

¹⁰⁸ Note 105 *supra*.

2.7.2. Expanded refugee definition of the OAU Convention

The OAU Convention commences by defining a refugee as a person:

... who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having 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.¹⁰⁹

The expanded OAU refugee definition further states that:

... the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹¹⁰

It is contended that although the expanded definition has widened the grounds for refugee status, it is more objective than subjective. Secondly, the expanded definition is too vague, difficult to determine the main cause of flight, and appears to have been included with the intention of allowing group-based refugee status determination (*prima-facie* determination).¹¹¹ Indeed, the expanded definition is said to be 'objective' because it obliges member states to grant refugee status to any person who leaves his country of origin due to external aggression, occupation, foreign domination or events seriously disturbing public order, regardless of whether or not they meet the 'subjective' criteria of the 1951 Convention that requires that the asylum seeker should justify a well-founded fear of persecution.¹¹² As such, a refugee under the OAU Refugee Convention is not obliged to satisfy the subjective element of fear of persecution because he was compelled to take flight because of the conflict situation in which he found himself. Critics argue that the expanded definition has resulted in mass migration of populations¹¹³ for reasons not directly related to refugee status being justifiably granted.

¹⁰⁹ Art. 1(1), 1969 OAU Refugee Convention.

¹¹⁰ *Ibid*, para 2.

¹¹¹ Note 105 *supra*.

¹¹² Oloka-Onyango, J., (1991) 'Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva', *International Journal of Refugee Law*, vol. 3, 453-460. <http://www.refugeelawreader.org/en/iii-african-framework-for-refugee-protection/iii-1-overview-of-african-regional-legal-instruments-for-refugee-protection.html>. Last accessed 03/10/2016.

¹¹³ Rwelamira, M.R., (1989) 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problem in Africa' *International Journal of Refugee Law Review*, 1, 557-561. <http://www.refugeelawreader.org/en/iii-african-framework-for-refugee-protection/iii-1-overview-of-african-regional-legal-instruments-for-refugee-protection.html>. Last accessed 03/10/2016.

The importance of the subjective element was emphasised in *Kamana, Jimmy v M.C.I.* where it was held that:

the lack of proof going to the subjective detail of the declaration [of refugee status] is a fatal flaw which in and of itself warrants dismissal of the declaration, on account that each factor of the refugee definition – subjective and objective – have to be met.¹¹⁴

Even if case law has justified the importance of the subjective element when granting refugee status on the basis of the 1969 OAU Refugee Convention, in practice the objective element, which is due to the fact that an asylum seeker was compelled to leave his country of origin due to ‘events disturbing public order’ seems to be more important than the individual element of ‘fear of persecution’.¹¹⁵ Moreover, it is argued that the word ‘compelled’ is ambiguous and that the mere fact that ‘events’ in the country of origin is the main reason why someone was compelled to leave his country is not enough to grant refugee status. Both the well-founded fear of persecution and the ‘events’ should be taken into account when reviewing a claim for asylum. It is therefore, necessary to create a linkage between the ‘OAU events’ and the term ‘compelled’ when making a decision.¹¹⁶ On the basis of the above arguments, it would be prudent to recommend a further review and reform of the 1969 OAU Refugee Convention definition.

The expanded definition tends to acknowledge that acts of aggression may occur as a result of non-state actors and also in situations where the government loses its authority.¹¹⁷ While the expanded definition includes events such as external aggression, occupation, foreign domination, and events seriously disturbing public order, one of the deficiencies of the expanded definition is that these ‘events’ lack clear interpretation and definition. They are so broad and generalised that virtually any event could fall within any of the above categories.

According to Rwelamira, the term ‘events’ are intended to include a wide range of ‘man-made’ conditions in a country which may result in mass displacement of people.¹¹⁸ Based on the literal wording of the 1969 OAU Refugee Convention, its drafters had in mind civil wars, generalized violence, external aggression from other states and did not consider people being displaced as a

¹¹⁴ *Kamana, Jimmy v M.C.I.* (F.C.T.D., IMM-5998-98), Tremblay-Lamer, September 24, 1999 at para. 1

¹¹⁵ Rwelamira, note 113 *supra*, 558-559.

¹¹⁶ *Ibid.*

¹¹⁷ Okoth-Obbo, G.,(2001), ‘Thirty Years On: A legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’, *Refugee Survey Quarterly*, Vol.20, 79-138, accessible at <http://www.refugeelawreader.org/en/iii-african-framework-for-refugee-protection/iii-1-overview-of-african-regional-legal-instruments-for-refugee-protection.html>.

¹¹⁸ Note 113 *supra*.

result of natural disasters, which in some cases have been the main reason for disrupting public order.

2.8. Conclusion

Despite being party to the 1951 Refugee Convention and the 1969 OAU Refugee Convention, the state of Ethiopia has made reservations to the 1951 Refugee Convention rights to public education, wage-earning employment, residence rights and freedom of movement. These reservations severely limit the international protection of refugee rights. The right to education and employment in Ethiopia is a preserve of its citizens. It is worth emphasising that foreigners and refugees in Ethiopia are expected to meet stringent legal conditions in order to fully enjoy and have access to civil, political, socio-economic and cultural rights.

Last but not the least, there has been a global advocacy campaign to review the 1951 Refugee Convention definition of a refugee, to be more inclusive and allow for a much wider category of individuals that may be in need of international protection based on modern day situations that may give rise to inflows of refugees. However, it is highly unlikely that the 1951 Convention will undergo amendment given the highly politicised nature of refugee protection across the world over the past few years, such as the mass influx of Syrian refugees into Europe and the concomitant closing of the borders by these European states due to their being overwhelmed. Consequently, the 1951 Refugee Convention remains the main authority and legal instrument on international protection of refugee rights. In the Ethiopian context, the 1951 Refugee Convention is to be read and applied alongside the 1969 OAU Refugee Convention, both of which oblige the state to ensure the protection of refugees and the conferment of fundamental rights.

CHAPTER THREE: REAL AND MATERIAL ACCESS BY REFUGEES TO FUNDAMENTAL HUMAN RIGHTS

3.1. Introduction

This chapter analyses the 1951 Convention and its 1969 OAU counterpart in order to assess the effectiveness of the two international legal instruments in addressing the plight of refugees in Africa generally, with particular focus on Ethiopia. An important feature of the OAU Refugee Convention is that it is a legally binding treaty, whose provisions a state must comply with once ratified or acceded to. As an instrument intended to respond directly to the refugee plight in Africa, its provisions require careful consideration to assess whether it meets this objective.

3.2. The 1951 Refugee Convention as a source of refugee rights

In the case of the 1951 Refugee Convention, the object and context can be derived from its preamble. The preamble is an essential statement from which we can draw conclusions on the treaty's intentions and purposes even though it does not contain important provisions.¹¹⁹

In this regard, the first two paragraphs of the 1951 Refugee Convention contains the human rights element of the treaty:

The High Contracting Parties, considering that the Charter of the United Nations and the Universal Declaration of Human Rights ... have affirmed the principle that human beings shall revel in fundamental rights and freedoms without discrimination, considering that the United Nations has, on various instances, ... endeavoured to assure refugees the widest possible access to the fundamental rights and freedoms, ...¹²⁰

The Preamble to the 1967 Refugee Protocol similarly affirms the fundamental human rights motive of the treaty, and expressly stipulates the goal of member states to ensure 'equality to all refugees', inclusive of those who became refugees due to 'new refugee circumstances which have arisen in the recent past'.¹²¹

While the preamble to the Refugee Convention highlights the human rights purpose and context of the treaty, it is important to also take cognisance of the various conclusions on International

¹¹⁹ *Guinea-Bissau v Senegal*, [1991] ICJ Rep 53, at 142 in which the International Court of Justice relied upon the preamble to a treaty for interpretive purposes, based on the matter of *Rights of Nationals of the United States in Morocco*, [1952] ICJ Rep 176, at 196.

¹²⁰ 1951 Refugee Convention Preamble, paras. 1, 2, 3 and 8.

¹²¹ Refugee Protocol Preamble, paras. 3, 4.

Protection of Refugees issued by member states of UNHCR's executive committee (EXCOM Conclusions) as evidence of the state parties' agreement and commitment to uphold the human rights context and purpose of the Convention.

It must be acknowledged, however, that it is unreasonable to imagine that all member states of the UNHCR Executive Committee have assented to the 1951 Refugee Convention and/or its 1967 Protocol.¹²² One of EXCOM's Conclusions contains a declaration by state parties to the 1951 Refugee Convention that every human being, recognised as a refugee under the 1951 Refugee Convention, is entitled to rights, including human rights, and minimal requirements of treatment. Member states also endorsed the continuing relevance and resilience of the Refugee Convention in ensuring the protection of rights for refugees and acceptable standards of treatment.¹²³ The 1951 Refugee Convention, notably, prohibits the *refoulement* of refugees, and specifically grants refugees the right to enjoy such rights as social security, shelter and many other socio-economic rights.

The 1951 Refugee Convention rights express the basic aspects of the refugee's experiences and plight. The basic rights contained in the 1951 Refugee Convention can be summarised as the individual's rights to seek asylum, to be granted asylum and to be provided with shelter. Refugees should not be reprimanded for seeking safety and are not to be forcibly returned to their country of origin where it is likely that they may face persecution. This is popularly known as the principle of *non-refoulement*.

Besides the human rights and minimum standards of treatment, the 1951 Refugee Convention guarantees a wide spectrum of civil and socio-economic rights. The most important civil rights granted to refugees include the right to property, the right to work, and the right to be treated on equal terms as nationals of the host country. The objective is to ensure that refugees are in a position to provide for their own needs and attain an acceptable level of self-sufficiency.

Last but not the least, the Refugee Convention establishes rights to sustainable durable solutions, meant to assist states and the UNHCR to bring the plight of a refugee to an end. For instance, the promotion and facilitation of a refugee's return to his country of origin should only be undertaken if a refugee has expressed the intention to return (voluntary repatriation) and there is real evidence

¹²² Note 110 *supra*.

¹²³ Declaration of member states to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09, 13 December 2001.

of positive fundamental change in the security situation of the country of origin and the circumstances that forced the refugee to flee or leave in the first place no longer exist. A few of the 1951 Refugee Convention rights are described in the subsequent paragraphs.

3.2.1. The Right to Exemption from Reciprocity

Article 7 of the 1951 Refugee Convention affirms, in paragraphs 1 to 5, that a contracting state shall accord to refugees the same remedy as is accorded to foreigners. After a length of three years' of continuous residence, all refugees shall be exempted from legislative reciprocity while living in the country of asylum. A member state shall continue to accord to refugees the rights and privileges to which they are entitled without subjecting them to reciprocity. The provisions of paragraphs 2 and 3 refers both to the rights and benefits mentioned in articles 13, 18, 19, 21 and 22 of the Refugee Convention and to rights and privileges not expressly included in the Refugee Convention.¹²⁴

Paragraph 1 of Article 7 states generally that in the event that the 1951 Convention does not guarantee a particular human right to be guaranteed to refugees, a member state and signatory to the Refugee Convention is obliged to treat refugees in the same manner as it would treat foreign nationals resident in the country. Under international law, aliens or foreign nationals are entitled to a standard of treatment, which includes, but is not limited to, safety and security of their lives and property. It has often been debated whether the same standard of protection accorded to foreigners should also be applied to refugees because the practice in many states has been to provide protection to foreigners on the basis of their nationality or country of origin. The position under international law however, is that minimum standards of treatment accorded to aliens should also apply to refugees and stateless persons. Refugees are considered aliens *sui generis*.

Paragraph 2 of Article 7 refers to exemption from legislative reciprocity, which should be granted after a refugee has lived in the host country for at least 3 years. The question is whether particular rights conferred on refugees are derived from treaties or incorporated in the laws of the state concerned. The reciprocity may only be considered to have legal effect if it is derived from legislation. Short absences from the country of asylum do not disqualify a refugee from benefiting from the right contained in paragraph 2 unless he/she has been absent for a considerable period. In

¹²⁴ 1951 Refugee Convention, Article 7(1-2): 'Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally. 2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.'

this case, he would not claim the benefits of paragraph 2 upon return. It is an assumption of the law that if a refugee has been outside his country of refuge for more than three years, such a refugee would be considered to have enjoyed and benefited from the provisions of paragraph 2 in that country, on condition that the third country in question is a contracting state of the 1951 Refugee Convention.¹²⁵

On the other hand, paragraph 3 ensures that the other rights and privileges of a refugee who was absent for more than three years, are maintained even though he may not be exempted from reciprocity. The benefits and rights should be accorded to refugees effective from the date of ratification of the Convention.¹²⁶

Paragraph 4, however, imposes an obligation on member states to favourably consider extending wider rights and benefits. States should not be limited to the provisions of paragraph 2, but are obliged to extend a little further and should not be restrained by the time limitation of the minimum of 3 years' residence. Therefore, refugees who have not been resident for a minimum of 3 years may exceptionally be allowed to enjoy the benefits and rights contained in Article 7.¹²⁷

Last but not the least, paragraph 5 emphasises that provisions contained in paragraph 2 and 3 regarding reciprocity not only apply to rights and benefits explicitly mentioned in the Convention, but also extends its effect to benefits and rights not contained in the 1951 Refugee Convention.¹²⁸

3.2.2. Right to Personal Status

In keeping with the spirit of Article 12, paragraphs 1 and 2 of the 1951 Refugee Convention, the legal status of a refugee shall be determined in accordance with the provisions of the relevant and applicable national laws of the country of his domicile or the country of his residence (in the absence of domicile). Rights previously received by a refugee on account of his refugee status and as a person recognised as such, particularly rights pertaining to marriage, will be respected by member states, provided all formalities are complied with in line with the provisions of the law of

¹²⁵ Note 125 *supra*.

¹²⁶ Article 7(3): 'Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State'.

¹²⁷ Article 7(4): 'The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.'

¹²⁸ Article 7(5): 'The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.'

the host country and provided that such a right would have been equally respected in the country of origin had he not become a refugee.¹²⁹

It is important to note that the term ‘personal status’ is not defined in the Convention and its application varies from state to state. However, in the context of refugees, personal status may include family rights such as marriage, divorce, adoption and the right to belong to a family, just to mention a few. It can also imply the capacity of minors to marry, the age of the majority and any such related rights and benefits. However, personal status does not refer to issues of inheritance or succession.

It is a general principle of international refugee law to recognise the legal and personal status of a refugee based on the laws of their country of residence or domicile. This principle is in line with the original provision contained in the 1933 Refugee Convention that recognised the law of the country of domicile as binding and thus having legal jurisdiction over refugees. The 1951 Refugee Convention adopted the position of the 1933 Convention that the law of the country of domicile takes precedence in determining legal matters affecting refugees. It should be noted that states interpret the term ‘domicile’ differently. For example, in most European countries, it means ‘habitual’ while in Anglo-Saxon countries, the word ‘domicile’ refers to a place of habitual residence with the intention of permanently settling in that location. According to Anglo-Saxon law, a domicile is acquired by birth and can be replaced by acquiring a new domicile (domicile of choice). Therefore, everyone has a domicile.¹³⁰

According to the 1951 Refugee Convention, a refugee is assumed to have acquired a new domicile when he is granted asylum in his new country of residence. The main reason or purpose is to ensure that the refugee is protected from the application of the law of his country of origin, which in most cases, may not be favourable. In the event that acquiring a new domicile in a country of asylum is not possible, a refugee is at liberty to claim the domicile of his country of nationality or origin.¹³¹

¹²⁹ 1951 Convention, Article 12(1-2): ‘The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee’.

¹³⁰ Statement of Mr Larsen of Denmark, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 11: ‘With regard to refugees, the Committee had decided that their personal status would be governed by the law of their country of domicile ...’

¹³¹ Statement of Mr Robinson of Israel UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 2: ‘It would hardly be fair to say that a man who had fled from his country with the intention of never going back retained his nationality ... No refugee should be forced to accept the laws of the country of which he was a national.’ Mr Cha of China insisted that ‘refugees should be treated in accordance with the laws of the country which had given them asylum.’

The question of competence of the courts in the country of residence or domicile may sometimes arise in situations where the courts in such countries have jurisdiction over a legal matter affecting refugees or foreigners generally, only if the decision of the court in the country of domicile will be respected and recognised in the foreigner's country of nationality. In the context of refugee law, the practice of the courts has often been that the courts assume jurisdictional responsibility in situations where the question of competence is raised. In such situations, reference has been made to Article 16 of the 1951 Refugee Convention, which provides that refugees shall have free access to the courts of law in the country of residence or domicile.¹³²

The Convention does not expect a refugee to seek legal redress in his country of origin even if that law may be more favourable to address and provide a legal remedy for the legal dilemma. A refugee living in a country of asylum may seek legal redress in that country and should not be expected to go back to his country of nationality for this purpose, especially if going back would subject the refugee to the risk of persecution. Both the complainant and the defendant have the legal right to seek legal remedies or to be heard in the country of asylum where they have acquired domicile.¹³³

3.2.3. The right to own property

Article 13 provides that the contracting states shall accord to a refugee favourable treatment, which means treatment not less favourable than that accorded to foreigners in similar circumstances with regard to acquiring movable and immovable property, including other related rights and privileges.¹³⁴ The standard of treatment to which a refugee is entitled is one which ensures a favourable remedy and the treatment should not be less favourable than that accorded to foreign nationals in similar circumstances. This standard of treatment is also used in Article 16 (access to justice), Article 22 (right to education), Article 21 (housing), Article 18 (informal employment) and Article 19 of the 1951 Convention. States have an obligation to accord the same treatment to refugees as they would generally offer to aliens in comparable situations and such remedy ought not to be less favourable.

¹³² *Ibid*

¹³³ *Ibid.*

¹³⁴ 1951 Refugee Convention, Article 13: 'The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.'

Property rights alluded to in Article 13 should be guaranteed to all refugees regardless of whether they are permanently resident in the contracting state or not. The intention behind Article 13 is to accord refugees all of the rights related to ownership and conveyance of property such as the right to alienate (sell), earn an income from the property owned, restitution in the event of loss of property, and even access to mortgage bonds. Whereas the International Covenant on Civil and Political Rights (ICCPR) provides that ‘all human beings have a right to own property as a sole owner or in partnership with others [and that] no person should be deprived of his assets and property arbitrarily’,¹³⁵ it should be noted that many countries have made reservations to Article 13 and imposed restrictions on the refugees’ right to property. For example, the national laws of Ethiopia and Zambia do not allow refugees to legally own land. In Zambia, certain categories of foreigners (such as investors) may be allowed to own property in association with any Zambian national and in accordance with the applicable laws of the nation.

In addition, every person is entitled to the enjoyment of his property without undue influence and interruption. A person may only be deprived of his property if it is believed that the acquisition of the property, in the first place, was illegal and only if expropriating or repossessing such property would be considered in the best interest of the general public. The repossession of property shall be done in accordance with due process of the law and according to the principles of international law. The above paragraph does not, in any way, replace the right of a state to enact and enforce laws that are vital for regulating the usage of the property in line with the overall interests of the nation, such as to ensure the payment of legal fees or taxes related to the property.¹³⁶

Furthermore, refugees have often had their properties repossessed for failing to adhere to restrictive national laws. For instance, in Kenya and Uganda, refugee-specific laws provide that all animals brought into the country by refugees have to be confined and slaughtered in designated areas and premises.¹³⁷ The legislation in Tanzania further requires that all proceeds from the sale of the slaughtered animal should be paid to the refugee if possible and/or otherwise be used for the support of refugees in general.¹³⁸

¹³⁵ Article 17 of the ICCPR.

¹³⁶ Protocol 1, European Convention on Human Rights and Fundamental Freedoms.

¹³⁷ Khiddu-Makubuya, E., (1994), *National Report for Uganda, International Academy of Comparative Law*, 7-8.

¹³⁸ Maina Peter, C., (1997), ‘Rights and Duties of Refugees under Municipal Law in Tanzania: Examining the Proposed New Legislation’, *Journal of African Law*, available at <https://www.opensocietyfoundations.org>, accessed 26/07/2017.

Although repossessions of properties for refugees are rare, refugees nonetheless, are constantly subjected to restrictions on their right to acquire and enjoy their personal property. In Botswana, refugees are not allowed to own cattle.¹³⁹ The most prevalent restriction for refugees in Africa is with regard to the right to own land. Land acquisition in most African countries is a very sensitive issue and is one of the major reasons for tribal conflicts. In Ethiopia, including Sudan¹⁴⁰ and Kenya¹⁴¹ foreigners (including refugees) are not permitted to own land. Namibia goes further in this case, to even criminalise the sale of land to a foreigner. Anyone found guilty may be prosecuted and sentenced to a term of imprisonment.¹⁴²

On the other hand, there have been instances where refugees have been allowed limited access and rights to own land under customary law. For instance, in Sudan, the security of land tenure for refugees is limited to a term between twelve and twenty-five years.¹⁴³ However, although refugees may be permitted to own land, like in the case of Sudan, the size of the plot of land allocated is usually inadequate for meaningful agriculture production and sometimes restricted to only growing certain types of crops.¹⁴⁴

For purposes of a comparative perspective, the European Convention on Establishment provides in Article 4 that: ‘Nationals of any Contracting Party shall enjoy in the territory of any other Party treatment equal to that enjoyed by nationals of the latter Party in respect of the possession and exercise of private rights, whether personal rights or rights relating to property.’¹⁴⁵ However, ‘any Contracting Party may, for reasons of national security or defence, reserve the acquisition, possession or use of any categories of property for its own nationals or subject nationals of the

¹³⁹ Zetterquist, J., (1990), ‘Refugees in Botswana in the Light of International Law’, *The Research Report Series*, Nordic Africa Institute, The, available at <https://www.barnesandnoble.com/w/refugees-in-botswana-in-the-light-of-international-law-jenny-zetterqvist/1003132018>, accessed 26/07/2016.

¹⁴⁰ Kibreab, G., (1987), *Refugees and Development in Africa: The Case of Eritrea*, Red Sea Press, USA, 73, available at <https://www.cabdirect.org/cabdirect/abstract/19886705765>, accessed 26/07/2017.

¹⁴¹ Implementation of the OAU/UN Conventions and Domestic Legislation Concerning the Rights and Obligations of Refugees in Africa, Final Report of a Conference sponsored by the Refugee Studies Programme, Oxford University, Sept. 14–28, 1986, at 33: ‘In Kenya, land is not granted to foreigners irrespective of status because of the sensitivity of the land issue’.

¹⁴² *The Namibian*, Sept. 18, 2002, ‘Foreigners face farmland squeeze’: ‘The person who sold or otherwise disposed of that agricultural land to the foreign national or nominee owner shall ... be guilty of an offence and be liable on conviction to a fine not exceeding N\$100,000 or to imprisonment for a term not exceeding five years or to both’.

¹⁴³ Implementation of the OAU/UN Conventions and Domestic Legislation Concerning the Rights and Obligations of Refugees in Africa, note 141 *supra*.

¹⁴⁴ Lassailly-Jacob, V., (1994), ‘Government-Sponsored Agricultural Schemes for Involuntary Migrants in Africa: Some Key Obstacles to Their Economic Viability’, in Adelman, H. and Sorenson, J., eds., *African Refugees: Development Aid and Repatriation* 209, at 217.: ‘In the Sudan’s New Halfa scheme ... tenancies were distributed to the newcomers to grow compulsory crops of cotton, wheat and ground-nuts. Lack of control over their allocated farms discourages settlers from fully committing themselves to agricultural production’.

¹⁴⁵ Article 4, European Convention on Establishment.

member states to special conditions applicable to aliens in respect of such property'.¹⁴⁶ It is submitted that such an approach to ownership of property should be included in the African context so as to protect and promote the rights of refugees.

3.2.4. The right to seek legal remedies (access to courts)

The 1951 Refugee Convention declares in Article 16 that a refugee shall have unlimited access to the judicial system of the country of asylum and shall enjoy the same treatment as nationals, in matters related to access to courts of law, legal aid and exemption from *cautio judicatum solvi*. Notwithstanding the fact that refugees have 'free access' to courts, it does not automatically exempt them from the payment of legal fees or fines, which both foreigners and nationals in similar circumstances are expected to pay. The fees or fines should not, however, be higher or different from what the citizens are generally expected to pay. The term 'free access' implies that a refugee has unhindered access to the courts and the legal system, but may be required to pay the necessary costs associated with administrative procedures and requirements. Article 16(1) relates to the refugees' domicile in the country of residence and it is immaterial if their residence in the country of asylum is lawful or unlawful.¹⁴⁷ Importantly, according to Article 42 no reservation may be made to this provision.¹⁴⁸

However, there have been instances where the host government has entirely denied refugees access to the national legal system. For example, Verdirame observed that the Kenyan government, in collaboration with UNHCR, allowed the refugee community to establish traditional courts, which operated outside the Kenyan legal system. The traditional courts passed judgements and all kinds of punishments on the offenders, which included flogging and fines.¹⁴⁹

Sometimes the right of access to courts can be denied as a result of a deficit in the host country's legislation. In Uganda, although the Constitution provides in Article 22 that all persons shall have full access to the legal system and courts, under the Control of Alien Refugees Act, authorities have discretionally powers to relocate refugees to any location in the country and the legislation

¹⁴⁶ *Ibid* article 5.

¹⁴⁷ Grahl-Madsen, A., (1997), 'Commentary on the Refugee Convention 1951', Published by Division of International Protection, UNHCR Geneva, 70, available at <http://www.unhcr.org/3d4ab5fb9.pdf>. Last accessed 3/10/2016.

¹⁴⁸ 1951 Refugee Convention, Article 42: '1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive'.

¹⁴⁹ Verdirmane, G., (2007), 'The Divided West: International Lawyers in Europe and America', *European Journal of International Law*, available at <http://resourcelists.kent.ac.uk/items/59E533B3-8585-3D55-777B>.

does not provided for refugees to contest such a decision before the courts. Similarly, refugees in Uganda do not have the right to challenge an executive order before a judge.¹⁵⁰

Furthermore, refugees should have the right to legal representation in the courts of law and exempted from payment of legal costs to the defendant's lawyers in an event that the plaintiff (in this case a refugee) loses the case in a civil lawsuit. In Zambia, free legal aid or assistance is provided by lawyers who are designated as legal aid lawyers, which is usually a government institution mandated to provide free legal assistance to those who cannot afford to hire a private lawyer. In most cases, the legal aid department fails to provide legal assistance due to resource constraint.¹⁵¹ However, one exception in Africa is Uganda where there are no legal provisions in the national laws for refugees to access legal representative. UNHCR has often assisted refugees to pay their lawyers' bills.¹⁵²

3.2.5. Right to Employment

Article 17 is one of the most important, and perhaps the most contested, articles of the Refugee Convention. A considerable number of states – especially in Africa – have made reservations to Article 17 on the right to employment. The term 'wage-earning employment' essentially refers to a person gainfully employed and who receives a salary or a wage. It however, excludes individuals that are self-employed, as such persons are covered by the terms of Article 18 of the Convention. The provisions of Article 17 are considered to be universally accepted standards with regard to the refugees' right to wage-earning employment.¹⁵³

It should also be noted and understood that refugees are not expected to be treated like nationals when being considered for employment. In many countries, foreign nationals including refugees are required to obtain a work permit before they can be considered for employment and in some cases, refugees are banned from accessing wage-earning employment. Thus, for example, in an effort to prevent the integration of Hutu refugees from Burundi, Tanzania imposed a ban on the employment of refugees.¹⁵⁴ Zambia applied a slightly more elusive and less stringent approach by

¹⁵⁰ Khiddu-Makubuya, E., (1994), *National Report for Uganda, International Academy of Comparative Law*, 9–10.

¹⁵¹ Note 148 *supra*.

¹⁵² Note 150 *supra*.

¹⁵³ 1951 Refugee Convention, Article 17(1): 'The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment'.

¹⁵⁴ Astill, J., *The Guardian*, 14 February 2001, 'UN refugee work in crisis as world ignores Burundi, 18: 'Despite the recommendations of a study conducted in 2001 by the Centre for the Study of Forced Migration at the Faculty of Law, University of Dar es Salaam, the Tanzanian government decided not to expand the employment rights of refugees. Instead, the 2003 National Refugee Policy provided only that the government would "continue to look for solutions

imposing an exorbitant fee for granting of work permits to refugees, which was beyond what the majority of refugees living in Zambia could afford.¹⁵⁵ The Zambian government authorities defended the huge fees by stating that the decision was made as a measure to discourage refugees from moving to urban areas from the camps and to consequently reduce crime in towns attributed largely to the presence of foreign nationals.¹⁵⁶

Refugees however, may be exempt by contracting states from the requirement to have a work permit or may be granted a work permit if they meet the legal requirements set out in Article 17(2).¹⁵⁷ Similarly, refugees may be allowed to work on the same terms and restrictions imposed on foreigners generally. For instance, in Zimbabwe, domestic law provides that refugees ‘shall, in respect of wage-earning employment, be entitled to the same rights and subject to the same restrictions, if any, as are conferred or imposed generally on persons who are not citizens of Zimbabwe’.¹⁵⁸ In South Africa, judicial intervention has ensured that even persons awaiting refugee status verification are entitled to work.¹⁵⁹

Furthermore, exemption from restrictions applies to restrictions imposed on foreigners for purposes of protecting the national labour market. Refugees are therefore, not expected to be exempted from restrictions imposed on foreigners for purposes of safeguarding national security and public order. For example, in South Africa, foreigners are prohibited from being employed in the security and defence industry.¹⁶⁰

The objective of Article 17 is to empower refugees with a stable source of income so that they are less dependent on the state and UNHCR for their livelihoods. According to UNHCR, the promotion and facilitation of refugees’ access to employment and socio-economic rights is

to its unemployment problem and this calls for all stakeholders to join hands in developing a conducive environment for more employment opportunities. As far as refugees are concerned, the government will allow small income generating activities to be undertaken within the camps’’. Personal communication with Cheggy Mziray of the Centre for the Study of Forced Migration, Faculty of Law, University of Dar es Salaam, 3 December 2003.

¹⁵⁵ *Daily Mail of Zambia*, 16 June 2000 ‘Imagine asking a person working as a store attendant or vegetable vendor ... to pay K250,000,’ lamented a DRC refugee ... The absence of permits often resulted in detention by police, a fact that worried ... the regional representative for UNHCR. More than 30 refugees are presently languishing in detention centres, while two Congolese refugees died recently while in detention’.

¹⁵⁶ *Ibid.* quoting Zambian immigration department spokesperson Danny Lungu.

¹⁵⁷ Article 17(2) states: ‘A refugee will be exempted from restrictive measures imposed on foreigners seeking employment if he or she meets the following conditions: (a) continuous residence in the country of asylum of 3 years or more; (b) he/she is married to a national of the country of residence. He/she may not however, claim the privileges of this provision if he/she divorced or abandoned the spouse; or (c) one or more of his children were born in the country of residence’.

¹⁵⁸ Zimbabwe Refugees Act, No. 13 of 1983 at section 12(3), cited in Lawyers’ Committee for Human Rights, African Exodus (1995) (LCHR, African Exodus), at 104.

¹⁵⁹ *Minister of Home Affairs v Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003).

¹⁶⁰ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others*, CCT 39/06, 12 December 2006.

important for the attainment of acceptable levels of self-sufficiency as a sustainable solution and as a means of regaining the dignity of refugees.¹⁶¹

Hathaway asserts that the drafters of Article 17 did not intend to promote this right on grounds of lack of need or benefit, but strictly on account that member states ought to do better without sacrificing important national interest.¹⁶² The Ethiopian Government has made reservations to Article 17 of the 1951 Convention, which accords refugees the right to gainful employment. Eritrean refugees in particular do not have access to wage-earning employment under the current Ethiopian Constitution. In Africa, besides Ethiopia, three other countries (Botswana, Burundi and Sierra Leone) have maintained reservations to Article 17, which are comprehensive and broad, to allow the state to enforce policies of excluding refugees from wage-earning employment generally. Three other countries – Malawi, Zambia, and Zimbabwe – have also made reservations to Article 17, but specifying that refugees will be accorded the same treatment as is given to foreigners in similar circumstances, which in a way, may entail no access to work due to the restrictions imposed on foreigners that are beyond the reach of ordinary refugees.¹⁶³

Restrictions on employment place refugees who are allowed urban residency for reasons not related to employment (for example to enhance access to healthcare, security or resettlement) in a situation of hardship, as they are given no other means of subsistence. Many are compelled to take up employment illegally placing them at risk of detention, deportation and exploitative working conditions.¹⁶⁴

Restrictions also impact negatively on refugees who reside in the designated areas without adequate income-generating opportunities. To supplement rations, many refugees seek casual agricultural and construction work in exchange for foodstuff and other basic necessities.¹⁶⁵

According to Hathaway, states are usually apprehensive that permitting refugees' unrestricted access to the country's labour market may result in reduced wages at the expense of its citizens, which may lead to xenophobia and increased hostility between refugees and the nationals.¹⁶⁶ For its part, UNHCR notes that:

¹⁶¹ UNHCR Executive Committee Conclusion No. 50, (1988), 'General Conclusion on International Protection', at para. (J).

¹⁶² Hathaway, note 46 *supra*, 763.

¹⁶³ See reservations and declarations of state parties, available at www.unhcr.ch, accessed 27/07/2017.

¹⁶⁴ Kuhlman, T., (1994), 'Organized Versus Spontaneous Settlement of Refugees in Africa', in H. Adelman, H and Sorenson, J., eds., *African Refugees: Development Aid and Repatriation* 117, at 128–129.

¹⁶⁵ *Ibid.*

¹⁶⁶ Hathaway, note 46 *supra*, 730.

Any sudden and huge inflow of refugees into a territory of a state, even if the influx is temporary, creates critical pressure on the host country's limited resources. Often times, such inflows of large numbers of refugees happen in very poor communities inside the country of refuge, where the ability to absorb the newly arrived refugees by the host community and the government is seriously curtailed by poor living conditions, high levels of unemployment, inadequate shelter and land. Usually, tensions arise between the international community and the affected host countries on the question of who is responsible for managing such a situation. The result is that many states tend to incline towards prioritising their nationals over foreigners when considering matters such as employment.¹⁶⁷

Joly asserts that refugees are often discriminated against when seeking wage-earning employment.¹⁶⁸ Furthermore, Craven submits that there is no global guarantee of a right to work; instead, there is simply a right to freely search for work.¹⁶⁹ For this reason, Hathaway affirms that states in the less developed world may decide to what extent they will guarantee the right to work to non-nationals. The essence of the obligation to allow refugees to work, contained in Article 17 of the 1951 Convention is more categorical and does not impose any minimum wage or the conditions of such employment.¹⁷⁰ Grahl-Madsen concludes that taking into account the fact that self-employment and professional practice are the only types of work addressed in the 1951 Convention, there can be no doubt that the term wage-earning employment must be understood in its broadest sense so as to include all kinds of employment which cannot be described as self-employment or professional practice.¹⁷¹ Therefore, the decision by some less developed countries to permit refugees to work only as casual labourers is clearly a breach of Article 17 of the 1951 Convention on the Status of Refugees.

3.2.6. Right to Self-Employment

By virtue of the Refugee Convention, contracting states shall accord to a refugee lawfully living in their country, favourable treatment and in any respect, no less beneficial than that accorded to other foreigners in similar situations in relation to self-employment for purposes of improving their livelihoods through active engagement in agriculture, entrepreneurship and establishment of commercial business ventures.¹⁷²

¹⁶⁷ UNHCR, July 7 1989, Implementation of the 1951 Convention and the 1967 Protocol relating to the status of refugees, UN Doc. EC/SCP/54, at para. 11.

¹⁶⁸ Joly, D., (1992) 'Refugees: Asylum in Europe?' *International Journal of Refugee Law*, 58, available at <https://academic.oup.com/ijrl/article/17/2/293/1548262/Human-Rights-Refugees-and-The-Right-To-Enjoy>. Last accessed 3/10/2016.

¹⁶⁹ *Ibid*, 174.

¹⁷⁰ Note 168, *supra*.

¹⁷¹ Grahl-Madsen, note 148 *supra*.

¹⁷² Article 18.

The purpose of Article 18 is that a refugee should, as soon as it is practically possible, regain his self-worth, start earning living, and attain a sufficient level of dignity in the country of asylum.¹⁷³ Attaining acceptable levels of self-sufficiency can result in an enhanced capacity to manage the hardships associated with being a refugee, which is also necessary for his survival whilst living in the country of asylum.¹⁷⁴ Although international law places a duty on states to assist refugees to improve their wellbeing and livelihood, often-times refugees do not receive the perceived support from the state and are expected to fend for themselves.¹⁷⁵

In the life-span of an ordinary refugee, the need to be self-sufficient and to have access to self-employment opportunities occurs at a very early stage and could perhaps be considered as one of the first basic needs of refugees in the country of refuge.¹⁷⁶ Considering that the right of a refugee to wage-earning employment may not be available immediately upon arrival in the country of asylum, the need to ensure that asylum seekers have access to self-employment opportunities whilst waiting to be granted asylum is of paramount importance.¹⁷⁷

In Africa, for instance, the privilege for refugees to have access to arable land and participate in agricultural activities is generally one of the most difficult aspects of the refugee situations that UNHCR continues to contend with and advocate for on behalf of refugees. It is common for refugees to be denied land for agriculture and in some extreme situations even prohibited from engaging in any form of crop production or livestock production.¹⁷⁸ A research conducted among Sudanese and Somali refugees living in camps in the north-western part of Kenya concluded that there are very limited opportunities for refugees to engage themselves in farming and that refugees are not permitted to keep livestock. The rationale behind is to prevent any possible competition with the local population, but this policy has subjected refugees to entirely be dependent on donor aid and assistance for their survival.¹⁷⁹

Although some refugees may have skills that could be used to generate income, the national legislation restricts the ability of refugees to practice and put their skills to good use and re-

¹⁷³ Ohaegbulom, F., (1985), 'Human Rights and the Refugee Situation in Africa', in Shepherd G. and Nanda V. eds., *Human Rights and Third World Development* (1985), at 197.

¹⁷⁴ Forbes Martin, S. and E. Copeland, E., (1988), *Making Ends Meet? Refugee Women and Income Generation*, Refugee Policy Group, Washington, D.C., at 3, available <http://www.worldcat.org/>. Last accessed 28/07/2017.

¹⁷⁵ Hathaway, note 46 *supra*, at 460.

¹⁷⁶ Hathaway, note 46 *supra*, at 156: 'Each of these rights accrues only once a refugee is 'lawfully staying' in the country of reception, while the right to engage in self-employment is owed to refugees who are simply in a state party either lawfully or not'.

¹⁷⁷ Hathaway, note 46 *supra*, at 720.

¹⁷⁸ *Ibid.*

¹⁷⁹ Verdiram, G., (1999), 'Human Rights and Refugees: The Case of Kenya', *Journal of Refugee Studies* 54, at 62, available at <http://resourcelists.kent.ac.uk/items/59E533B3-8585-3D55-777B>. Last accessed 30/07/2017.

establish their trade.¹⁸⁰ For instance, refugees in Botswana complained about the lack of funds for refugees who wish to start a small business enterprise¹⁸¹ and the government's decision to prohibit all non-citizens from operating hair salons and barber shops in the urban areas.¹⁸²

According to Hathaway, 'Zambia has made it practically impossible for refugees lawfully to start a business' by requiring that refugees who have applied for a self-employment permit should produce evidence of a lucrative and registered business as a prerequisite. In addition, refugees should show proof of owning at least US\$ 25,000 worth of assets.¹⁸³

On the contrary, and on a more positive note, traditional land has been allocated to refugees for agriculture production in countries such as Guinea, without involving government bureaucracy. The traditional land owners felt that it was economically in their best interest to allow refugees to engage in agriculture because the ultimate result of such an initiative would be increased food production for all.¹⁸⁴ Similarly, Tanzania responded favourably to the needs of Hutu refugees from Burundi by allocating each family a plot of land for subsistence farming and a few cash crops for income generation. Refugees in Tanzania were also encouraged to engage in skills training such as carpentry.¹⁸⁵

Article 18 of the 1951 Refugee Convention applies to refugees residing in the country of refuge. In this regard, physical presence in the host country is important, regardless of whether such presence is temporary or not, provided the refugee intends to use his presence in the country to improve his level of income through self-employment.¹⁸⁶ However, the refugee is obliged to fulfil conditions required for purposes of carrying out a business, such as obtaining a licence or acquiring a certificate of incorporation of a limited company as stipulated in the applicable laws of the host nation.

¹⁸⁰ Zetter, R., (1995), 'Shelter Provision and Settlement Policies for Refugees: A State of the Art Review', *Africa Institute Studies on Emergencies and Disaster Relief Working Paper No. 2*, Uppsala: The Nordic Africa Institute; SIDA, at 39.

¹⁸¹ *Botswana Daily News*, 13 September 2000.

¹⁸² *The Gazette* (Gaborone), 3 July 2002.

¹⁸³ Hathaway, note 46 *supra*, at 722

¹⁸⁴ Black, R., and Sessay, M.,(1997), 'Forced Migration, Land-Use Change and Political Economy in the Forest Region of Guinea', *African Affairs*, at 602–604.

¹⁸⁵ Sterkenburg, J., et al, (1994), 'Refugees and Rural Development: A Comparative Analysis of Project Aid in Sudan and Tanzania', in Adelman, H. and Sorenson, J. eds., *African Refugees: Development Aid and Repatriation*, at 199–200.

¹⁸⁶ Hathaway, note 46 *supra*.

3.2.7. The Right to Public Education

The 1951 Refugee Convention expects member states to accord to refugees the same treatment as is accorded to nationals in relation to public education. The treatment shall be favourable, but not less favourable than that accorded to foreigners in similar circumstances.¹⁸⁷

The significance of education is seen and appreciated by refugees, right from the moment they arrive in the country of asylum.¹⁸⁸ Soon after arriving in the country of asylum, refugees often mobilise the little available resources and establish temporary schools for their children in order to ensure continuity of education. For example, the first classes for Mozambican refugees in Malawi were ‘held under trees in the absence of appropriate buildings, and teachers had to make do with whatever teaching materials had been brought with the refugees’.¹⁸⁹

The need for the refugee children to resume and have access to education is further encouraged by the foreseeability of repatriation. In this case access to education provides the children with a feeling of continuity and an uninterrupted learning in an event that conditions in the country of origin improve and therefore, they need to return.¹⁹⁰

Furthermore, education becomes even more critical when prospects for repatriation are not available and during protracted refugee situations. For instance, if resettlement to a third country is the most appropriate durable solution, education plays a pivotal role for both adults and refugee children to quickly integrate and survive in their new environment.¹⁹¹ The main area of emphasis in this case is the need for skills training¹⁹² and language lessons,¹⁹³ necessary for refugees to access employment and overcome the challenges associated with poor communication (language

¹⁸⁷ 1951 Refugee Convention, Article 22(1-2): ‘The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education. 2 The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.’

¹⁸⁸ International Extension College and World University Service (UK), ‘Refugee Education: The Case for International Action’ (1986) (IEC and WUS), at 8.

¹⁸⁹ Tolfree, D., (1991), ‘Refugee Children in Malawi: A Study of the Implementation of the UNHCR Guidelines on Refugee Children’, UN High Commissioner for Refugees (UNHCR), at 20, available at <http://www.refworld.org/docid/51e91de94.html>. Last accessed 2/08/2017.

¹⁹⁰ UNHCR, (1994), ‘Refugee Children: Guidelines on Protection and Care’, UNHCR: Geneva, at 31, available at <https://www.unicef.org/violencestudy/pdf/>. Last accessed 2/08/2017.

¹⁹¹ Hathaway, note 46 *supra*, at 584.

¹⁹² Domanski, M., (1997), ‘Insights from the Refugee Experience: A Background Paper on Temporary Protection’, in Hathaway, J.C. ed., *Reconceiving International Refugee Law*, *Journal of Refugee Studies*, Vol. 4, at 22.

¹⁹³ Joly, note 168 *supra*, at 59.

barrier) in a foreign country. In addition, it is important to assist refugees whose post-secondary education was interrupted as a result of being displaced.¹⁹⁴

UNHCR in Ethiopia has estimated that approximately half of the population of school-age refugee children are enrolled in school.¹⁹⁵ The majority of refugees in Africa are located in less developed and poor countries that are struggling to provide quality education for its citizens due to limited resources. As a result, extending opportunities for education to refugees becomes less of a priority for these states and consequently, negatively affecting refugee children's access to quality education.¹⁹⁶ In a landmark case, the decision by the government of South Africa to deny refugee children access to education while waiting for their asylum application to be considered, was reversed and declared unconstitutional by the South African Human Rights Commission.¹⁹⁷

The term 'Public Education' is of paramount importance as it denotes education provided by public schools and managed by government institutions. In the strict application and meaning of the term 'public education', refugees enrolled and pursuing their education at private learning institutions may not claim the rights outlined in Article 22. Article 22 is particularly important to refugee children to ensure their access to education and scholarship. Indeed, paragraph 2 provides that member states have an obligation to accept the authenticity and quality of certificates obtained in the country of origin in order to ensure that refugees have access to tertiary education. This provision does not, however, include recognition of foreign certificates for purposes of recognising a profession or employment.¹⁹⁸

3.2.8. Freedom of Movement and Residence

Article 26 of the 1951 Convention provides that member states should ensure that refugees lawfully in its territory have the right to choose a place of residence and freedom of movement.

¹⁹⁴ Hathaway, note 46 *supra*, at 585.

¹⁹⁵ 'In Ethiopia the gross enrolment rate in primary education for refugees is approximately 42% for girls and 60% for boys. This rate decreases drastically for girls in secondary school to 31% and at post-secondary and tertiary level to 17%. A significant number of girls drop out of school after primary education'. See UNHCR Ethiopia, 2015, 'National Education Strategy 2015-2018', available at <http://www.refworld.org/docid/53e1dd114.html>. Last accessed 4/10/2016.

¹⁹⁶ Pilkington, H., (Nov. 1996), 'The Higher Education of Refugees in Africa: Suggestions', *Refugee Issues*, Vol.3, No.1: 'mass movements of virtually illiterate peasantry fleeing to countries where educational resources are already overburdened to meet even the basic needs of their own citizens, let alone those of outsiders', available at <https://books.google.com/books>. Last accessed 8/03/2017.

¹⁹⁷ *Minister of Home Affairs v Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003), at para. 36.

¹⁹⁸ Grahl-Madsen, note 148 *supra*.

However, these rights are subject to the national laws applicable to foreigners in similar circumstances as refugees.¹⁹⁹

Although refugees are granted refugees status and allowed to enjoy international protection in the country of asylum, restrictions on their freedom movement and their rights to choose a place of residence are usually imposed on them through regulations and legislation. It is often illegal for refugees to live outside designated areas without authorisation. For example, an official in Malawi lamented that refugees were breaking the law that requires that refugees are confined to camps and are not allowed to move freely.²⁰⁰

Zambia, Kenya, Ethiopia and Uganda's national refugee laws have provisions that restricts refugees to camps and criminalise the right of refugees to move freely and to choose a place of residence without express authorisation from the responsible government official.²⁰¹ According to Hathaway, Burundians in Tanzania were not only forced into camps, but 'said their requests to leave the camp in order to locate their spouses and children or to return to their home areas to sell their possessions were repeatedly ... denied by camp commanders.'²⁰²

Hathaway further asserts that enforcing the laws and policies to restrict refugees' free movement and where to live, is becoming increasingly difficult because the refugee camps are not enclosed, allowing refugees to leave the designated camp and become self-settled among the host communities in the surrounding villages.²⁰³ Sommers confirms that most refugees simply become self-settled in violation of the law and are ready to face the consequences of living outside the camps without authorization.²⁰⁴

Furthermore, even in situations where refugees are allowed to live in urban settings and not necessarily restricted to camps, they often times find it hard to enjoy their freedom of movement. In Zambia, for instance, only certain categories of refugees such as professionals, traders and students are allowed to live in urban areas, but not even these persons have the freedom to move

¹⁹⁹ 1951 Refugee Convention, Article 26: 'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances'.

²⁰⁰ Willy Gidala *African Eye News Service*, Nov. 8, 2000, quoting Deputy Commissioner for Relief and Rehabilitation.

²⁰¹ Human Rights Watch, 'Hidden in Plain View,' Nov. 2002: 'Refugees in these countries who violate the rules requiring them to live in camps and who move to urban areas – Nairobi and Kampala in particular – have been essentially abandoned by the host governments, and have been subjected 'to beatings, sexual violence, harassment, extortion, arbitrary arrest and detention'.

²⁰² Hathaway, note 46 *supra*, at 698, quoting Human Rights Watch, July 1999, 'In the Name of Security: Forced Round-Ups of Refugees in Tanzania', at 28.

²⁰³ Hathaway, note 46 *supra*, at 699.

²⁰⁴ Sommers, M., (2001), 'Young, Male and Pentecostal: Urban Refugees in Dar es Salaam, Tanzania,' *Journal of Refugee Studies*, Volume 14, Issue 4, at 348, available at <https://academic.oup.com/jrs/>. Last accessed 6/8/2017.

freely considering that most of them, despite satisfying the criteria, are unable to afford the exorbitant fees for the permit.²⁰⁵

It should be noted that Article 26 is only applicable to persons that have been granted refugee status and therefore, are legally living in the country of refuge. It does not have an effect on the conditions imposed on asylum seekers whose application for legal status is still pending. States should not discriminate between or against refugees when applying Article 26. In as much as a refugee is restricted in his freedom to seek employment, this could additionally entail a limit to select his place of residence.²⁰⁶

3.2.9. The right to seek asylum and protection from forced return (*non-refoulement*)

As one of the most fundamental provisions in the refugee legislative framework, the right of protection from forcible return, or *non-refoulement*, is defined in the following terms:

1. 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.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.²⁰⁷

The words 'to the frontiers of territories where his life or freedom would be threatened' applies to the refugee's country of origin where it is believed that he has a well-founded fear of being persecuted if returned. Furthermore, the words 'in any manner whatsoever seem to include extradition as well and not only denial to be admitted at the frontier. It is however, important to note that the provisions of Article 33 do not apply in situations of mass migration, but applies to individual asylum situations.²⁰⁸

During flight, the only hope of a refugee is to find safety and shelter in a country that is willing to accept him and allow him entry into the territory. However, the problem is that these territories are controlled by states, which restricts access to non-citizens and occasionally may deny refugees

²⁰⁵ Hathaway, note 46 *supra*, quoting *Daily Mail of Zambia*, 16 June 2000: 'Several refugees interviewed for this article at the Commissioner for Refugees' offices revealed that the fees for employment (K250,000) and study permits (K100,000) issued by the government cost 'too much money.' 'Imagine asking a person working as a store attendant or vegetable vendor ... to pay K250,000,' lamented a DRC refugee ... Before 1999, refugees were allowed to reside in urban areas provided they had a valid refugee identity card, and could prove to authorities that they had means of support'.

²⁰⁶ Note 46 *supra*, at 91.

²⁰⁷ 1951 Refugee Convention, Article 33.

²⁰⁸ Grahl-Madsen, note 148 *supra*.

access to the territory or forcibly return refugees to a place where they may face persecution or be killed.²⁰⁹

In *Katambayi and Lawyers for Human Rights v Minister of Home Affairs et al*, the court ordered the government of South Africa to withdraw the order to detain or forcibly return refugees who had travelled to South Africa through a 'safe' neighbouring country. The court in this case intervened to stop the removal of an asylum seeker at OR Tambo International Airport and ordered that the asylum seeker should be allowed to apply for refugee status in South Africa.²¹⁰

In *Amerakane v United Kingdom*, Amerakane was an air-force officer who participated in an attempt to assassinate the King of Morocco. Amerakane fled to Gibraltar, but was denied entry into the territory and forcibly returned to Morocco. Consequently, Amerakane was executed in Morocco. The widow was compensated on grounds that her deceased husband's right to seek asylum and not to be forcibly returned to a place where it is reasonably believed that he may face persecution, was violated. She received payment for damages amounting to £375,000.²¹¹

It should be noted that Article 33 is not a provision that grants a right for an individual to seek refugee status and does not place any obligations on states to grant refugee status to every person that seeks entry into the territory. It only guarantees a person the right of admission or entry into the territory. The state admitting the concerned individual has the right to deny such a person refugee status and has the right to send such a person to a third country that has expressed willingness to provide asylum in accordance with Article 31(2) of the 1951 Convention.²¹²

The individual concerned must constitute a threat to peace and public order in the host country for Article 31(2) to be applied. This may constitute acts of espionage on behalf of his country of origin or spying on behalf of another country as an example. In such a case, he may be returned to his country of origin and/or denied entry at the border.²¹³

²⁰⁹ Hathaway, note 46 *supra*, at 279.

²¹⁰ *Katambayi and Lawyers for Human Rights v Minister of Home Affairs et al.*, Dec. No. 02/5312 (SA HC, Witwatersrand Local Division, 24 March 2002).

²¹¹ 'Amerakane v UK, Decision of 26 March 1963 on Application 1802/1962' *Yearbook of Human Rights* 1963 vol.6, 462; 'Decision No. 2143/64' *Yearbook of Human Rights* 1964 vol.7,328, 330.

²¹² 1951 Refugee Convention, Article 31(2): 'The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country'.

²¹³ 1951 Refugee Convention, Article 31(2): 'The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order'.

In *Hammel v Madagascar*, the committee concluded that the refugee was not granted sufficient time to challenge his expulsion and that the state did not produce compelling reasons to believe that the refugee was a danger to national security.²¹⁴

The word ‘crimes’ constitutes a serious criminal offence. In this case, first the individual must have been convicted, by a final judgement of a competent court, of a serious crime. Secondly, it should be proved that such a person may constitute a danger to the community of the country of asylum. What constitutes a serious crime might be difficult to define, but for the sake of clarity, may include such crimes as rape, paedophilia, murder, armed robbery and arson, just to mention a few.²¹⁵

It should however, be noted that a crime may not, in itself, constitute a threat to national security. The rule of proportionality must be applied. That is, to examine and assess whether the gravity of the peril the refugee may face if he was expelled outweighs the risk of allowing him to live in the country of asylum. Furthermore, to incarcerate the offending refugee and thereafter deport him could amount to double punishment. Generally, persons who were guilty of a non-political offence before their admission to the territory as refugees are exempt from the effects of Article 1F(b). Therefore, only crimes perpetrated in the country of asylum should be considered.²¹⁶

Unfortunately, particularly in Africa, forced expulsion of refugees is a common phenomenon that is carried out arbitrary and usually without following legal procedures. For instance, from 1982-1983, thousands of Rwandan refugees were expelled from Uganda on account that they were not welcome in Uganda because ‘Uganda was for Ugandans’ and accused Rwandan refugees of supporting anti-government rebel groups.²¹⁷ Similarly, President Arap Moi of Kenya ordered the deportation of that all refugees engaged in illegal activities. Thousands of refugees were transported to the Ugandan border.²¹⁸

3.2.10. Naturalisation and Citizenship

Pursuant to the quest for sustainable and durable solutions, the naturalisation of a refugee is also provided for in the Refugee Convention. Accordingly,

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.²¹⁹

²¹⁴ *Hammel v Madagascar*, UNHRC Comm. No. 155/1983, decided Apr. 3, 198.

²¹⁵ Note 148 *supra*.

²¹⁶ Grahl-Madsen, note 147 *supra*.

²¹⁷ Hathaway, note 46 *supra*, at 661.

²¹⁸ Africa Watch, ‘Kenya: Illegal Expulsion of More than 1000 Refugees’, 11 December 1990, at 1–5.

²¹⁹ 1951 Refugee Convention, Article 34.

Article 34 thus includes the duty to facilitate the assimilation and naturalization of refugees as far as possible and to make, specifically, every attempt to expedite naturalization applications and to reduce the possible costs thereof to the extent possible.²²⁰

The term ‘naturalization’ covers additionally, other types of acquisition of nationality. In many states, the required period of domicile for a refugee is much less, compared to other foreign nationals. The UNHRC often adjudicates on behalf of refugees who have submitted an application for naturalization. In Ethiopia, for instance, applicants are expected to show proof that they will renounce their former citizenship before being considered for naturalization²²¹. Refugees are, unfortunately, often times unable and/or unwilling to comply with this requirement.

3.3. Refugee rights under the OAU Refugee Convention

From the outset, the OAU Refugee Convention provides a general right to seek asylum and international protection.²²² It further provides that refugees have a right to be issued with travel documents and to be located in designated areas.²²³ However, unlike the 1951 Refugee Convention, the OAU Refugee Convention lacks provisions on fundamental freedoms and rights for refugees such as the right to education, freedom of movement, employment and housing. The problem with this omission in the OAU Refugee Convention is that the majority of refugees in Africa, and Ethiopia in particular, have been granted refugee status on the basis of the OAU Refugee Convention. It could, therefore, be noted that the OAU Refugee Convention does not adequately protect and safeguard the socio-economic rights of refugees in Africa.

Milner asserts that the absence of fundamental rights in the OAU Refugee Convention could be better explained and understood by examining the rationale behind the adoption of the OAU Refugee Convention and the historical situation of refugees in Africa at the time it was formulated.²²⁴ The absence of fundamental rights in the 1969 OAU Refugee Convention could

²²⁰ *Ibid.*

²²¹ FDRE, Nationality Proclamation No. 378 of 2003, Article 5(7): ‘A foreigner who applies to acquire Ethiopian nationality by law shall: ... be able to show that he has been released from his previous nationality or the possibility of obtaining such a release upon the acquisition of Ethiopian nationality or that he is a stateless person...’

²²² OAU Refugee Convention, Article 2(1): ‘Member States of the OAU shall use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality’.

²²³ OAU Refugee Convention Article 6: ‘Subject to Article III, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. Member States may issue such a travel document to any other refugee in their territory’.

²²⁴ Milner, J., (2004) ‘Golden age? What golden age? A critical history of African asylum policy’, Paper presented to the Centre of Refugee Studies, York University, 3.

therefore, be attributed to the fact its formulation was mainly encouraged by concerns of national security, domestic politics, and international cooperation than humanitarianism.²²⁵ It was a regime preceded by a regime of colonisation and constant struggles for independence by African nations.²²⁶ Refugees in the 1960s and 1970s were fleeing from struggles against apartheid, colonialism and racial domination. It is against this backdrop that the 1969 OAU Convention was developed so as to take into account the realities on the Africa continent.²²⁷

3.4. Conclusion

The 1951 Refugee Convention is the main international legal authority on the rights of refugees. The 1951 Refugee Conventions provides important aspects of international protection of refugee rights and highlights the basic rights that a refugee is expected to have access to during his lifetime. Such basic rights include the need to seek asylum and safety, to be provided with shelter and enjoy freedom of movement in the country of refuge. Under the 1951 Refugee Convention, a person seeking refuge who has crossed the border into the territory of another country, is not supposed to be penalised for seeking protection, nor forcibly returned to his country of origin where it is reasonably believed that he may face persecution. Furthermore, refugees are entitled to a number of basic civil, political and socio-economic rights including the right to employment, right to education, the right to choose a place of residence, right to documentation of their status and access to national courts of law for the protection and enforcement of their rights.

Unlike the 1951 Refugee Convention, the 1969 OAU Refugee Convention does not contain provisions on civil, political and socio-economic and cultural rights for refugees. The 1969 OAU Convention although considered to have a wide application in terms of categories of individuals that may be granted refugee status and apart from protecting the right to seek asylum, does not confer any other rights on refugees and therefore, may not have sufficient authority on the protection of fundamental rights for refugees living in Africa. It may further be argued that refugees in Africa, particularly in Ethiopia, may not have firm ground to claim the 1951 Convention rights because they were granted refugee status based on the 1969 OAU Convention extended definition of a refugee.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Taguekou, K.A., (2014) 'Realising the Socio-Economic Rights of Refugees under International Human Rights Law: A case study of South Africa' LLM Dissertation, Faculty of Law, University of the Western Cape, 29.

CHAPTER FOUR: REFUGEE LAW AND POLICY IN ETHIOPIA

4.1. Introduction

This section is a review of the Ethiopian legal framework on the protection of refugees and the extent to which the various obligations contained in the relevant treaties have been domesticated in the national legal system and more importantly, determine the extent to which the basic rights of refugees are protected in Ethiopia.

Ethiopia's legal framework related to the protection of refugees is a combination of both international and domestic legal instruments. The state of Ethiopia is a party to the 1951 Refugee Convention and its 1967 Protocol, which it assented to on 10 November 1969. The other international legal instruments that compliment and form part of the Ethiopian human rights and refugee law includes the International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of Discrimination against Women (CEDW), the Convention on the Rights of the Child (CRC), and the International Convention on Torture, Inhuman and Degrading Treatment. At regional level, the state of Ethiopia has ratified the African Charter on Human and Peoples' Rights and is also a signatory to the 1969 OAU Convention Governing the Specific Aspects of Refugee problems in Africa.

The ratification of various international and human rights oriented legal instruments is an indication of the state's commitment to be bound by the provisions of international law and to contribute positively to the international obligation of all states in enhancing international protection of refugees and displaced persons. However, in order to enforce the provisions of international law at country level, a state party to the treaties is expected to domestic the international legal instruments through enactment of national legislation and developing policies and institutions to implement the provisions of the refugee law. In this regard, the main domestic legal instruments relating to refugee protection in Ethiopia include the Constitution of the Federal Republic of Ethiopia and the Refugee Proclamation number 409 of 2004. The Constitution of Ethiopia makes provision and recognition of the inherent human rights of foreign nationals, while the Refugee Proclamation deals with specific aspects concerning refugees in the country.

However, notwithstanding Ethiopia's commitment towards ensuring the protection of refugees, it is worth mentioning that Ethiopia has made reservations to the 1951 Refugee Convention relating to the status of refugees. In particular, Ethiopia has made reservations to Article 17(1)(2), which

requires states to accord the same treatment to refugees as to any foreign national residing in the country with regard to wage earning employment.²²⁸ Furthermore, Article 22 imposes an obligation on states to grant refugees the same treatment as accorded to its nationals with regard to public education, while Article 8 requires states to exempt refugees from exceptional measures which may be taken against a person, property or interests of foreign nationals. Finally, Article 26 obliges states to allow refugees to choose their own place of residence and to move freely in the territory, subject to any regulations imposed on aliens in similar circumstances. The following section is a critical review and analysis of Ethiopia's main national laws related to the protection of refugees.

4.2. The Constitution of Ethiopia

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) is the supreme law of the state and therefore, any law or decision of an organ of the state, which is contrary to the provisions contained in the Constitution, shall be declared null and void.²²⁹ The Constitution further provides that 'all international agreements ratified by Ethiopia are an integral part of the law of the land'.²³⁰ Under the current Constitution, all international legal instruments ratified by the state are expected to be 'domesticated' so that they become an integral part of the national legal system. The process of domestication of treaties follows a process of ratification of such treaties by members of the House of Peoples Representatives. Once ratified, the adopted provision(s) of the treaty are enacted as law, and given legal effect.

Furthermore, Ethiopia reaffirms its commitment to safeguarding and promoting human rights by providing a list of basic human rights in Chapter Three of the Constitution in accordance with the provisions contained in the Universal Declaration of Human Rights (UDHR) and all other international instruments adopted by Ethiopia.²³¹

When drafting the Constitution, Ethiopia recognised the universality of international law by highlighting in Chapter Three the need to rely on international legal instruments when the question of interpretation of the law is raised. Although the Constitution is the supreme law of the country,

²²⁸ See reservations and declarations of state parties, available at www.unhcr.ch. Last accessed 27/07/2017.

²²⁹ Article 9(1) of the Constitution of the FDRE: 'The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect'.

²³⁰ *Ibid*, Article 9(4): 'All international agreements ratified by Ethiopia are an integral part of the law of the land'.

²³¹ *Ibid*, Article of 13(2), 'The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia'.

Article 13(2) of the Constitution gives international human rights law supremacy whenever the question of interpretation of international law is raised.²³² We can further infer from this fact that the Constitution of Ethiopia assumes a subordinate position to international law whenever matters of interpretation of the relevant international law are raised. It is therefore, a requirement under the 1995 Constitution of Ethiopia that all national laws relating to specific aspects of international law should be in conformity with the provisions contained in the relevant international legal instrument. In this regard, the Refugee Proclamation of 2004, including its subsidiary legislation should be in conformity with international refugee law, failing which it would have no legal effect and be repugnant to the Constitution of the country.

This means therefore, that the national refugee law should be interpreted in accordance with the provisions of the 1951 Convention on the Status of Refugees. Failure to ensure conformity of the national laws to international legal instruments would be a violation of the Constitution and the state's intention to uphold and protect human rights. The question that still lingers and remains unanswered is to what extent the national laws related to refugees has conformed to the provisions of international law in safeguarding human rights for refugees living in Ethiopia?

On the contrary, however, the 1995 Constitution has unambiguously affirmed the state's reservations to some of the 1951 Refugee Convention rights. For instance, in Article 40 on the right to own property, Article 41 related to economic, social and cultural rights as well as Article 42 on the right to work, the term 'all Ethiopians' is used repeatedly, which could be interpreted to imply that the enjoyment of these rights is only the preserve of the citizens of the country and should not be extended to aliens, including refugees.²³³ This is clearly in direct contradiction to the provision in Article 13 of the same Constitution that requires conformity with international human rights law when interpreting human rights standards. A clear explanation of the meaning and interpretation of Article 13 is necessary to avoid ambiguity.

On the other hand, the term 'every person' is used in the Constitution, particularly in the paragraphs related to human rights, notable exceptions are in paragraphs related to the right to work, the right to own property, and socio-economic rights; reinforcing the state's reservations to the 1951 Refugee Convention rights.

²³² *Ibid.*

²³³ The Constitution of the FDRE, Article 40(1)(3): 'Every Ethiopian citizen has the right to the ownership of private property ... The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange'.

On a positive note, though, with regard to freedom of movement and the right to choose a place of residence, Article 32(1) of the Constitution expressly provides that ‘Any Ethiopian or foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes’. This is clearly in conformity with international law and extends to refugees who are included in the broad definition of ‘a foreign national lawfully living in Ethiopia’, unless expressly stated that refugees are not considered as ‘foreign nationals’. In the absence of such contrary view, refugees should enjoy freedom of movement and the right to choose a place of residence in accordance with Article 32(1) of the Constitution.

Having said that, however, the Refugee Proclamation of 2004, restricts the refugees’ freedom of movement and requires that all refugees should live in designated areas popularly known as ‘camps’ and are not allowed to leave the camp without authorisation. Failure to comply would result in prosecution and possible imprisonment.²³⁴ The Refugee Proclamation is therefore, in violation of Article 32(1) of the Constitution of the Federal Democratic Republic of Ethiopia. It is to a discussion of this Proclamation that I now turn.

4.3. The Refugee Proclamation Number 409 of 2004

In an effort to express its commitment and desire to enact national legislation for the effective implementation of international legal instruments and to establish a legal framework for the protection of refugees, the state of Ethiopia enacted Refugee Proclamation number 409 of 2004. Besides the Constitution, the Refugee Proclamation forms part of the main national legal instrument that specifically deals with issues related to refugees living in Ethiopia. The Security, Immigration and Refugee Affairs Authority (SIRAA) is a government institution delegated with the authority to administer the Refugee Proclamation in all matters related to the management of refugee affairs in the country. The SIRAA is referred to as the ‘authority’ in the proclamation.²³⁵

²³⁴ Article 21(2): ‘Notwithstanding the provisions of Sub-Article (I) (d) of this Article, the Head of the Authority may designate places and areas in Ethiopia within which recognized refugees, persons who have applied for recognition as refugees, and family members thereof shall live, provided that the areas designated shall be located at a reasonable distance from the border of their country of origin or of former habitual residence’.

²³⁵ Article 2(1): “‘Authority’ means the Security, Immigration and Refugee Affairs Authority established by Proclamation No. 6/1995 Article 6(1)’.

The Ethiopian Refugee Proclamation has adopted and combined both the 1951 Refugee Convention and the 1969 OAU Convention definition of a refugee.²³⁶ The expanded definition of a refugee contained in the 1969 OAU Convention and incorporated in the Refugee Proclamation, provides the state with enough leverage to deal with a wide range of situations that may give rise to refugee problems.

Besides providing for individual Refugee Status Determination (RSD), the Proclamation allows for the recognition of ‘groups of individuals’ as refugees without subjecting them to the rigorous Refugee Status Determination process.²³⁷ This is commonly referred to as the “*prima-facie*” refugee status granted to a group of asylum seekers from the same country of origin. It is commonly invoked during mass-influx of refugees that occurs during times of conflict, such as during a civil war.

4.4. Protecting refugee rights in Ethiopia

4.4.1. Right to freedom of movement and residence in Ethiopia

While the Constitution of Ethiopia expressly permits all persons the right to move freely and to choose a place of residence, the Refugee Proclamation restricts refugees’ movement and authorises the head of the authority (SIRAA) to designate areas where refugees should reside.²³⁸ This provision of the Refugee Proclamation is a clear violation of the Constitution of Ethiopia that allows all foreigners to choose a place of residence. As already stated, it is important to qualify the position of refugees with regard to the definition of the word ‘foreigner’ contained in the Constitution and determine whether refugees should be considered as ‘foreigners living in Ethiopia’.

In practice, the state’s encampment policy requires refugees to obtain from a designated government official, a ‘gate pass’ or ‘pass permit’, as authorisation to leave the camp for a specified period of time (in most cases not exceeding two months), to a designated location and for a specified purpose. Refugees who are outside the camp without authorisation or whose ‘pass

²³⁶ See Article 4 of the Refugee Proclamation 409/2004 on the expanded definition of the term ‘refugee’.

²³⁷ ‘If the Head of the Authority considers that any class of persons met the criteria under Article 4(3) of this Proclamation, he may declare such class of persons to be refugees’. Article 19 of the Refugee Proclamation.

²³⁸ Article 21(2) states: ‘Notwithstanding the provisions of Sub-Article (I) (d) of this Article, the Head of the Authority may designate places and areas in Ethiopia within which recognized refugees, persons who have applied for recognition as refugees, and family members thereof shall live, provided that the areas designated shall be located at a reasonable distance from the border of their country of origin or of former habitual residence’.

permit' has expired, risk being arrested and prosecuted in a court of law. The encampment policy has negatively affected the refugees' access to livelihoods due to the limitation on their freedom of movement and residence. It is also worth noting that Eritrean refugees in particular, are not allowed to own land for cultivation. The majority of Eritrean refugees are entirely dependent on UNHCR's assistance for their livelihoods.²³⁹

In line with Article 22 of the Refugee Proclamation, which provides for special attention and protection of women, children, elderly, physically disabled and other vulnerable groups, the Ethiopian government, in close collaboration with UNHCR, developed what is known as the 'Out of Camp Policy' (OCP). According to UNHCR and the Administration of Returnees and Refugee Affairs (ARRA), the main objective of the OCP is to allow extremely vulnerable refugees and students the right to live outside the camp for specified periods for purposes of seeking medical treatment and education respectively.²⁴⁰ It should be noted however, that this policy is currently a 'work-in progress' and only applies to Eritrean refugees living in Ethiopia. This privilege does not extend to refugees of other nationalities. The OCP is also very limited in terms of scope of assistance for the few Eritrean refugees living outside of the camps. During a participatory assessment conducted in March 2016 with Eritrean refugees, the respondents alluded to the fact that the OCP has not fully improved the lives of beneficiary refugees and cited the absence of food assistance and xenophobic tendencies among the local host communities while living outside the camp.²⁴¹

It is also interesting to note that the Ethiopian Nationality Proclamation No.378/2003 provides for naturalisation of foreigners married to Ethiopian citizens. The Nationality Proclamation provides that foreigners married to Ethiopian nationals can apply for citizenship if they meet the criteria.²⁴² In the absence of local integration prospects for Eritrean refugees living in Ethiopia, UNHCR has on several occasions advocated on behalf of Eritrean refugees married to Ethiopian nationals to be

²³⁹ Samuel, H., (May 2014), *Living Out of Camp – Alternative to Camp-Based assistance for Eritrean Refugees in Ethiopia*, Published by Norwegian Refugee Council, available at <http://samuelhall.org/?s=eritrean+refugees>. Last accessed 20/3/2015.

²⁴⁰ 'Until 2009, Ethiopia enforced a strict policy of encampment for all refugees with the exceptions of those who demonstrated reasons for staying out of camps, such as on medical, protection and humanitarian grounds. Since 2009, Ethiopia introduced a new policy known as the "Out of Camp Policy". Under the Out of Camp programme, refugees who have stayed for 6 months in a camp, can demonstrate they can live without assistance from GoE and UNHCR.....and have no criminal record, are allowed to leave the camps, and reside elsewhere in the country': UNHCR, September 2013, 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report', at p.4, Universal Periodic Review: ETHIOPIA, Human Rights Liaison, Unit Division of International Protection UNHCR September 2013, available at <http://www.refworld.org/pdfid/5283488c4.pdf>, last accessed 7/8/2017.

²⁴¹ UNHCR Sub-Office, (March 2016), Participatory Assessment Report, Shire-Indasselasie, Ethiopia.

²⁴² Article 6 of the Ethiopian Nationality Proclamation No. 398 of 2003.

considered for citizenship under the provisions of the Nationality Proclamation.²⁴³ Although a number of Eritrean refugees meet the criteria for citizenship, none of the applicants has ever been considered and granted citizenship. The situation for such individuals is further compounded by the fact that their applications for resettlement are rejected by resettlement countries such as the United States and Canada on the basis that they are married to Ethiopian nationals and therefore, can apply for citizenship that would lead to permanent residence in Ethiopia as a durable solution.²⁴⁴ However, this is far from becoming a reality.

It is clear that the intention of the Ethiopian government is to control and restrict the movement of refugees by confining them to camps. The encampment policy deprives refugees of their right to freedom of movement and more importantly, infringes on their right to choose a place of residence and live a normal life.²⁴⁵ The encampment policy is clearly a violation of international law and Ethiopia's obligation to contribute towards finding durable solutions for refugees.

4.4.2. Refugees' Right to Wage-Earning Employment in Ethiopia

As already stated in the above paragraph, the Ethiopian Constitution only grants its citizens the right to work, including other labour rights. The Ethiopian Refugee Proclamation reaffirms the state's reservation to the right to wage earning employment.²⁴⁶

Refugees can only be considered for wage earning employment when there is no suitably qualified Ethiopian national for the job. The chances for a refugee to be employed and granted a work permit are literally not available under the current law. However, refugees with skills are allowed to put their skills to good use in the informal sector for purposes of income generation. The state has tolerated refugees' participation in the informal sector by not imposing any legal restrictions and allowing refugees to engage in small scale businesses and casual work on condition that such individuals are in possession of a valid 'pass permit' allowing them to be outside the camp for a specified period.²⁴⁷

²⁴³ Note 240 *supra*, at 5.

²⁴⁴ Nationality Proclamation, note 221 *supra*.

²⁴⁵ Samuel, note 239 *supra*.

²⁴⁶ Refugee Proclamation, Article 21(3): 'Notwithstanding the provisions of Sub- Article (1) (d) of this Article, Every recognized, refugee, and family members thereof shall, in respect to wage earning employment and education, be entitled to the same rights and be subjected to the same restrictions as are conferred or imposed generally by the relevant laws on persons who are not citizens of Ethiopia'.

²⁴⁷ Samuel, note 239 *supra*.

The state's reservation on the right to wage earning employment is considered as one of the main reasons why many young Eritrean refugees decide to embark on a dangerous and perilous journey to Europe in search of a livelihood and better standard of living. The main employment sectors and sources of income for the majority of refugees are the construction sector, small-scale businesses, petty trading and opportunities for casual labour provided by NGOs working in the refugee operation. NGOs are the main sources of employment in the camps, representing about 15% of the jobs such as 'social worker' on short contracts of not more than 6 months. Although this provides short term solutions for refugees, especially for women, it raises questions of sustainability as such employment opportunities depend on the life span of the project and subject to availability of funds. In addition, there are very few of such employment opportunities in the camps.²⁴⁸

The encampment policy makes it very difficult for Eritrean refugees to live and work outside the camp. By law, refugees are not allowed to work outside the designated refugee camps. Refugees are required to obtain authorization to travel outside the camps. Failure to obtain such authorization may result in prosecution and a few months in prison or a huge fine. Furthermore, all refugees are expected back in the camp by 6:00pm in the evenings. These restrictions adversely affect refugees' access to the labour market and opportunities for income generation. Although it is illegal for Eritrean refugees to go out of the camp without permission, it is however, not impossible since Eritrean refugees can easily integrate with the local host communities with whom they share the same language and culture.²⁴⁹ In addition, government authorities have not imposed strict control on the above rules. It is worth noting that the Ethiopian law does not permit or allow refugees to own land.²⁵⁰ Access to land is a very sensitive issue and has been a source of conflict between refugees and the surrounding host communities in Ethiopia. As a result, refugees are not very keen to engage in agriculture and livestock as an income generating activity.

4.4.3. Refugees' Right to Public Education in Ethiopia

Similarly, the Ethiopian legal framework has reserved access to public education to its citizens. The Refugee Proclamation affirms Ethiopia's reservation to public education. Refugee children are not exempt from restrictions placed on foreigners with regard to access to education. UNHCR has built schools for refugee children in all the camps and provides 100% of the support required

²⁴⁸ *Ibid.*

²⁴⁹ Note 239 *supra*.

²⁵⁰ The Constitution of the FDRE, note 233 *supra*.

including recruitment and payment of salaries to teachers. Involvement of the Ministry of Education in the provision of education in the refugee camps is very limited and almost non-existent.²⁵¹

The Administration of Refugee and Returnee Affairs (ARRA), a government department, manages primary education in the camps as a UNHCR implementing partner. As stated above, the involvement of the Ministry of Education is very limited and there is very little collaboration between ARRA and the education line ministry. As a result, the quality of education in the refugee camps is seriously compromised.²⁵² The United Nations Committee for the Elimination of Racial Discrimination expressed concern about refugee children's full enjoyment of their right to education and recommended that Ethiopia 'adopt adequate measures' to ensure their equal access.²⁵³

Notwithstanding reservations to the 1951 Refugee Convention on the right to public education, UNHCR applauds Ethiopia for its commitment to refugee education and its generous program for young Eritrean refugees to access university scholarships. The Government provides Eritrean refugees access to universities on financial terms at par with Ethiopian nationals. The government of Ethiopia provides 75% of university tuition costs, while UNHCR contributes the remaining 25%.²⁵⁴ By the end of 2014, a total of 67 Eritrean refugee university students graduated from various universities.²⁵⁵

As far as the right to education is concerned, the 1995 Constitution circumscribes its offer of equal access to publicly funded schools to Ethiopian nationals. The 2004 Proclamation executed Ethiopia's reservation to the 1951 Convention's right to primary education, placing the same restrictions on refugees and their children as on other foreigners. In June, the UN's Committee for the Elimination of Racial Discrimination expressed concern about refugee children's enjoyment of their right to education and recommended that Ethiopia "adopt adequate measures" to ensure refugees' equal access to education.²⁵⁶

²⁵¹ Note 240 *supra*, at 4.

²⁵² UNHCR, 2013, Universal Periodic Review, Office of the High Commissioner for Human Rights' Compilation Report, available at www.refworld.org. Last accessed 20/3/2015.

²⁵³ United States Committee for Refugees and Immigrants, 19 June 2008, 'World Refugee Survey 2008 – Ethiopia', available at <http://www.refworld.org/docid/485f50d171.html>. Last accessed 20/3/2015.

²⁵⁴ Note 184 *supra*.

²⁵⁵ UNHCR Sub-Office, 2014, Country Operations Plan-2014, Shire, Ethiopia.

²⁵⁶ Note 184 *supra*.

In a study conducted in 2011 by Dryden-Peterson, it was observed that provision of education to refugees in Ethiopia was very low in terms of quality and accessibility. Dryden-Peterson further asserts in her report that the government of Ethiopia was not actively promoting education for refugees as a protection tool.²⁵⁷ By the end of 2014, the number of children enrolled at primary school was estimated at 43% of the total school age population of refugee children living in Ethiopia, with an average of 80 students per classroom.²⁵⁸

4.4.4. The principle of non-refoulement

Similarly, the Refugee Proclamation has adopted the principle of *non-refoulement* in Article 9(1), which confirms that:

No person shall be refused entry into Ethiopia or expelled or returned from Ethiopia to any other country or be subjected to any similar measure if as a result of such refusal, expulsion or return or any other measure, such a person is compelled to return to or remain in a country where:

- a) He may be subject to persecution or torture on account of his race, religion, nationality', membership of a particular social group or political opinion: or
- b) His life, physical integrity or liberty would be threatened on account of external aggression, occupation, and foreign domination of events seriously disturbing public order in part or whole of the country.

However, to every legal rule there could be exceptions. According to the Refugee Proclamation, the benefit associated with the principle of *non-refoulement* may not be claimed by a refugee if there are serious reasons to consider such an individual as a danger to national security, or who was once convicted of a particularly serious crime and therefore, may be considered a danger to the community.²⁵⁹ In Article 9(3), the Refugee Proclamation empowers the SIRAA to determine whether an asylum seeker is a danger to national security and therefore, should be denied entry into Ethiopia. It is worth noting that this kind of scrutiny of asylum seekers is only possible during individual RSD and practically impossible when *prima-facie* status determination is used, for granting refugee status as the case may be for Eritrean refugees. To date and to the best of my knowledge, there has not been any reported incidences of *refoulement* of Eritreans at the border. This may probably be due to the fact that all Eritreans are granted asylum on a *prima-facie* basis.

Furthermore, Article 9(3) may be abused by authorities, who may decide to apply the rule arbitrarily if they wish to prevent a person or a group of persons from entry into the country for

²⁵⁷ Dryden-Peterson, S., (November 2011), 'Refugee Education: A Global Review', *New Issues in Refugee Research Series*, UNHCR Policy Development Service, Geneva 2011, available at <http://www.refworld.org/docid/5142ee1c2.html>. Last accessed 4/10/2016.

²⁵⁸ UNHCR Ethiopia, 2015, 'National Education Strategy 2015-2018', available at <http://www.refworld.org/docid/53e1dd114.html>. Last accessed 4/10/2016.

²⁵⁹ Refugee Proclamation, Article 9(2): 'The benefit of this provision may not, however, be claimed by a refugee whom there are serious reasons for regarding as a danger to the national security, or who having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community'.

whatever reasons. The consolation is that the aggrieved asylum seeker or refugee is entitled to launch an appeal in writing to the Appeal Hearing Council against the decision of the SIRAA within 30 days of such a decision.²⁶⁰ Furthermore, any restriction to the protection against *refoulement* should be limited to those exceptional convention reasons. The trend to expand the exceptions would suggest nothing less than the intention to operate in a manner counter to the contemporary understanding of the international community.²⁶¹

Furthermore, the Refugee Convention provides the aggrieved refugee the right to seek an injunction to delay the execution of the decision to be expelled in order to accord sufficient time to the concerned refugee to explore the possibility of seeking refuge in a third country if there are compelling reasons why he cannot return to his country of origin.²⁶² Although the Refugee Proclamation allows the rejected refugee to seek asylum elsewhere, it does not provide a solution in an event that the refugee fails to find safety in a third country of asylum. UNHCR's involvement in this case would depend on whether the concerned individual meets the criteria for refugee status as outlined in the 1951 Refugee Convention. If the concerned individual meets the 1951 Convention grounds for refugee status, he/she would be considered as a 'mandate refugee' and therefore, a person of concern to the organisation. In this case, it would then be up to UNHCR to find a durable solution for the refugee, which could be resettlement to a third country, depending on the circumstances of the case and the willingness of a resettlement country to accept this particular individual.²⁶³

4.5. The socio-economic situation of Eritrean refugees in Ethiopia

The population of Eritrean refugees is predominantly young men aged between 18 and 30 years. These young refugees find it very hard to adjust to life in a refugee camp but are also not prepared to accept the option of returning to Eritrea where they would face harsh punishment, including death for having left Eritrea in the first place.

²⁶⁰ Article 14(3): 'Any asylum-seeker, who is aggrieved by the decision of the Authority, may within thirty days of being notified of such a decision, appeal in writing to the Appeal Hearing Council established under Article 15 of this Proclamation'.

²⁶¹ Admassu, G., (2009), *Refugee Law – Teaching Material*, Justice and Legal System Research Institute, available at www.chilot.wordpress.com. Last accessed 20/3/2015.

²⁶² 'The execution of any expulsion order may, if the concerned refugee requests, be delayed for a reasonable period to enable such refugee, to seek admission to a country other than the country to which he is to be expelled'. Article 10(4) of the Refugee Proclamation 409/2004.

²⁶³ Note 261 *supra*.

The profiles of Eritrean refugees in Ethiopia could be classified in two categories. The first is highly mobile single young male refugees constantly on the move and always contemplating the possibility of migrating abroad. The second category comprise of the elderly, single, female-headed households, and huge families with very limited resources who cannot afford to pay for the treacherous journey to Europe. The highly migratory profile of the refugees regularly affects population demographics and often results in unreliable and unclear data on the actual numbers of Eritrean refugees living in the camps. This further affects planning assistance and resource mobilization.²⁶⁴

As already mentioned, the majority of Eritrean refugees are single young men and women below 30 years of age. This phenomenon has been attributed to the fact that most Eritreans leave their country of origin when they are still young and at the time when they are expected to be forcibly conscripted into the mandatory military service. The elderly (above 50 years) account for a very small percentage. It is also worth noting that there is an increased number of single female-headed households mainly due to the high mobility of the men, who abandon their wives and children in search of a better life abroad. It is easier for the single young refugees to migrate than for those with families. Although migration from the refugee camps reduces the population, it does not prevent the problem of secondary migration.²⁶⁵

Possibilities for durable solutions for Eritrean refugees living in Ethiopia are very limited with only an estimated 1% of the population benefitting from resettlement to a third country of asylum such as Canada and the United States of America. Prospects for local integration within Ethiopia are not available. Eritrean refugees in Ethiopia lack opportunities to thrive and improve their livelihoods in refugee camps, which is one of the reasons why the majority of them migrate to Europe in search of a better life. They are basically stuck ‘in limbo’ unable to return, facing difficulties in Ethiopia, not allowed to locally integrate and risk being victims of human trafficking and the horrors associated with illegal migration.²⁶⁶

The Eritrean refugees living in Ethiopia have a very low level of self-reliance. The majority of refugees are entirely dependent on monthly food rations and targeted assistance provided by the World Food Programme (WFP) and UNHCR respectively. Approximately 43% experience

²⁶⁴ Samuel, note 239 *supra*.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

shortages of food every day due to inadequacy of the food rations they receive. Furthermore, 92% are forced to borrow money to meet their daily needs.²⁶⁷

Limited access to livelihoods and opportunities for income generation is the main reason for hopelessness among refugees, and is considered one of the reasons why young Eritreans are willing to take the risk of secondary migration to Europe at the hands and mercy of [very expensive] human traffickers. Unlike many protracted refugee situations, the Eritrean refugee camps in Ethiopia have not evolved into self-sustaining economic communities. What is also worrying is the fact that the only stable source of income currently, is employment provided by NGO partners, which is not sustainable and largely dependent on availability of donor funding.

Although the majority Eritrean refugees have at least gone through primary education before flight, they lack the skills required to earn a living, which is exacerbated by the fact that access to wage-earning employment is extremely limited. Ethiopia's encampment policy negatively affects the refugees' access to income generating activities and employment. There is an increased feeling of despair and generally high levels of inactivity in the camps especially among the young refugees. This situation creates a dependency syndrome among refugees who are entirely dependent on assistance from UNHCR and its partners. Lack of income generating activities, poverty and high levels of unemployment are among the main factors for secondary migration.

On a positive note, it is worth noting that a considerable number of young Eritrean refugees have benefited and continue to benefit from the basic skills training project popularly known as the Youth Education Pack (YEP), supported and funded by UNHCR and implemented by NGO partners. However, limited opportunities in the refugee camps to practice the newly acquired skills leads to increased levels of despair and anxiety among the refugee population. The overall objective of improving the livelihoods of refugees and reducing secondary movement through skills training has not yet been realized.²⁶⁸

However, having a skill in itself is not a guarantee for employment or access to livelihood activities. As highlighted earlier, due to the limited employment opportunities and the encampment policy, refugees who have benefited from the on-going vocational skills training programme and those who have not, face the same challenge of accessing wage-earning employment. Samuel

²⁶⁷ *Ibid.*

²⁶⁸ Note 239 *supra*.

concluded in his survey that 63% of both groups were unemployed for the past one month and only about 17% are likely to find employment during one calendar year.²⁶⁹

The problem of employment opportunities in the Eritrean refugee camps could be attributed to the low level of economic activity that adversely affect the demand for labour. Unlike most protracted refugee situations in other parts of the world, the Eritrean refugee camps have remained economically stagnant and have not evolved into self-sustaining economic zones or entities that are able to generate considerable requirement for labour.

Linked to illegal migration or secondary movement is the absence of a well-developed economic environment in the refugee camps, which is mainly attributed to the fact that the majority of the refugees are preoccupied with plans for future migration to Europe as opposed to establishing themselves and improving their livelihoods in the camps. In terms of livelihood activities, the most common sources of income include grocery shops, working for NGOs, construction, metal work, wood work, hairdressing salons, restaurants and barber shops.²⁷⁰

For the majority of Eritreans, an oppressive regime and fear of forced conscription in the army is the main reason for flight. The poor conditions in the refugee camps in Ethiopia has greatly contributed to migration and is a major factor taken into account when making a decision whether to stay in a country of asylum or risk taking the dangerous journey to Europe. UNHCR alleges that the encampment policy in Ethiopia is one of the most serious restrictions for refugees to access employment and services outside the camp and affects the refugees' freedom of movement. As a result, many Eritreans, especially the youth, decide to migrate illegally.²⁷¹

4.6. Conclusion

Despite the state's 'open-door' policy and generosity towards refugees, it is worth mentioning that Ethiopia has maintained its reservations to some of the 1951 Refugee Convention rights. Specifically, the state of Ethiopia has made reservations to Article 17(1)(2), which obliges states to accord the same treatment to refugees as to any foreign national residing in the country and to exempt refugees from any restrictive measures imposed on foreigners with regard to wage-earning employment; Article 22 that imposes obligations on states to accord the same treatment to refugees as nationals with regard to access to public education; Article 8 that requires states to exempt

²⁶⁹ Samuel, note 239 *supra*.

²⁷⁰ *Ibid*.

²⁷¹ Note 240 *supra*, at 5.

refugees from exceptional measures, which may be taken against a person, property or interests of nationals of a foreign country and Article 26 that obliges states to allow refugees to choose a place of residence and to move freely in the territory.

This is in direct contradiction to Article 32(1) of the Constitution, which expressly provides that ‘Any Ethiopian or foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes’. This is clearly in conformity with international law and extends to refugees who are assumed to be included in the broad definition of ‘a foreign national lawfully living in Ethiopia’, unless expressly stated that refugees are not considered as ‘foreign nationals’ lawfully residing in the country. In the absence of such contrary view, refugees should enjoy freedom of movement and the right to choose a place of residence in accordance with Article 32(1) of the Constitution. To be sure, refugees in Ethiopia do not have the right to choose a place of residence and to move freely. It is important to qualify the position of refugees with regard to the definition of the word ‘foreign national’ contained in the Constitution in order to ascertain whether refugees should be considered as ‘foreign nationals living in Ethiopia’.

Furthermore, the encampment policy has negatively affected the refugees’ access to livelihoods due to the limitation imposed on their freedom of movement and residence. The majority of Eritrean refugees are entirely dependent on UNHCR’s assistance for their livelihood. It is clear that the intention of the state is to control and restrict the movement of refugees by confining them to camps. This policy is clearly a violation of international law and Ethiopia’s obligation to contribute towards finding durable solutions for refugees.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusions

States subject asylum seekers and refugees to different standards of treatment than nationals. The contemporary understanding of the 1951 Refugee Convention, however, means that refugees should be entitled more or less to the same measure of rights as nationals. However, I am compelled to conclude that that discriminatory treatment between nationals and refugees in Ethiopia is a practice as evidenced in the preceding paragraphs.

Nevertheless, the state of Ethiopia's 'open-door policy' to refugees and asylum seekers has over the years, enabled thousands of displaced persons to seek asylum and refuge in Ethiopia. It is worth noting that the state has made tremendous efforts to nationalise or domestic provisions of international refugee law, but the current legislation still requires further review to ensure that the rights of refugees are adequately protected.

The ratification of international legal instruments related to the protection of the rights of refugees is a clear indication of the state's commitment to comply with the provisions of international law and to positively contribute to its obligation (as a state party to the 1951 Refugee Convention and the 1969 OAU Convention) of enhancing international refugee protection in Africa. In line with the requirement for states to domesticate the provisions of international refugee law, the state of Ethiopia has enacted the Refugee Proclamation of 2004, which is the main national legal instrument and authority on refugee law and other aspects of refugees in Ethiopia. In addition, the Constitution of Ethiopia makes provision and recognition of the inherent human rights of foreign nationals. Although the Ethiopian Constitution does not explicitly mention aspects regarding refugees, it can be assumed that the rights accorded to foreigners contained there-in could also be applied to refugees living in the country. This is however, subject to debate and a matter of interpretation by the relevant legal institutions.

The Constitution further provides that 'all international agreements ratified by Ethiopia are an integral part of the law of the land'.²⁷² Under the current Ethiopian Constitution, all international legal instruments ratified by the state are expected to be 'domesticated' so that they become an integral part of the national legal system. Therefore, it is a requirement under the 1995 Constitution of Ethiopia that all national laws related to specific aspects of international law should

²⁷² Article 9(4).

be in conformity with the provisions contained in the relevant international legal instruments. In this regard, the Refugee Proclamation of 2004 including its subsidiary legislation should be in conformity with international refugee law contrary to which, it would have no legal effect and repugnant to the Constitution. However, the Refugee Proclamation does not fully conform to the requirements of international refugee law and therefore, it should be reviewed and reformed.

Further examination of the 1995 Constitution has revealed a number of inconsistencies. For example, in Article 40 on the right to own property, Article 41 related to economic, social and cultural rights and Article 42 on the right to work, the phrase ‘All Ethiopians’ is used, which could be interpreted to imply that the enjoyment of these rights is only a preserve of the citizens of the state and should not be extended to aliens, including refugees. This is clearly a contradiction to the statement in Article 13 of the same Constitution that requires conformity to international human rights law during interpretation of human rights norms. A clear explanation of the meaning and interpretation of this part of the Constitution is necessary to avoid unjustified violation of the rights of refugees.

In line with the provisions of international law, the Ethiopian Refugee Proclamation in Article 9(1) affirms its obligation and commitment to the principle of *non-refoulement*, which prohibits refusal of entry into the territory or expulsion or forced return of an individual seeking asylum, to a place or country where it is believed such a person may face risk of persecution or death. This is one of the positive attributes of the Ethiopian refugee law. However, exceptions to this rule are outlined in paragraph 2 of Article 9, giving authority to the responsible officer to expel or forcibly return any refugee suspected of being a danger to national security or a danger to the community. In the absence of a mechanism for individual Refugee Status Determination, it may be difficult to make a fair and unbiased decision when deciding whether a refugee is a danger to national security and therefore, does not deserve refugee status.

It is also interesting to note that the Ethiopian Nationality Proclamation No.378/2003 provides for naturalisation of foreigners married to Ethiopian citizens. The Nationality Proclamation provides that foreigners married to Ethiopian nationals can apply for citizenship if they meet the criteria.²⁷³ UNHCR has on several occasions advocated on behalf of Eritrean refugees married to Ethiopian nationals to be considered for citizenship under the provisions of the Nationality Proclamation.

²⁷³ Article 6 of the Ethiopian Nationality Proclamation No. 398 of 2003.

Although a good number of Eritrean refugees meet the criteria for citizenship, none of the applicants has ever been considered and granted citizenship.

The situation for such individuals is further exacerbated by the fact that their applications for resettlement are rejected by resettlement countries such as the United States and Canada on the basis that they are married to Ethiopian nationals and therefore, can apply for citizenship that would lead to permanent residence in Ethiopia as a durable solution. However, this is far from becoming a reality.

Ethiopia in particular, has in many cases failed to protect the rights of refugees and to ensure that refugees have full access to fundamental human rights, such as wage-earning employment, education, housing and freedom of movement. In Ethiopia for example, refugees are required to obtain a gate-pass or authorisation to travel to other parts of the country for purposes of seeking employment and livelihoods. Although refugees may not be barred from enjoying their rights, they are often deprived of these human rights and are required to meet certain formalities, which affects the enjoyment of their freedom of movement, right to employment and education.

5.2. Recommendations

5.2.1. Addressing the gaps of the OCP programme

In line with Article 22 of the Refugee Proclamation, which provides for special attention and protection of women, children, elderly, physically disabled and other vulnerable groups, the Ethiopian Government in collaboration with UNHCR established what is popularly known as the ‘Out-of-Camp’²⁷⁴ scheme through which Eritrean refugees who meet the criteria and are in a position to sustain themselves, are allowed to live outside the camp usually with the help of relatives living abroad or resident within the country. The second objective of the scheme is to allow extremely vulnerable refugees and students to live outside the camp for specified periods for purposes of seeking medical treatment and education respectively.

Through an agreement between UNHCR and the Ethiopian Administration for Returnee Affairs, Eritrean refugees who qualify for higher education have access to scholarship for tertiary education at local universities. Despite the increased number of young Eritrean refugees benefiting from this

²⁷⁴ The mechanism giving refugees the possibility to live outside the camp is a scheme and not a government policy.

scheme, access to gainful employment has been almost impossible, thereby limiting opportunities for self-reliance and income generation.

It should be noted however, that this policy is currently a ‘work-in progress’ and only applies to Eritrean refugees living in Ethiopia. This privilege does not extend to the other nationalities of refugees. The Out-of-Camp scheme is also very limited in terms of scope of assistance for the few Eritrean refugees living outside of the camps. The scheme has not fully improved the lives of beneficiary refugees due to the limited assistance provided to those living outside the camps. As a result, the OCP is not a favourite option for most Eritreans with the exception of students pursuing a course at a higher learning institution.

One of the major gaps of the scheme is that the Eritrean refugees do not have sufficient information on how the scheme operates and how they can benefit from it. Due to the lack of or insufficient knowledge, refugees tend to have unrealistic expectations in terms of assistance and services they are expected to receive while benefitting from the scheme. For example, Eritrean refugees living outside the camp for medical reasons believe that they should be included in the food rations and distributed wherever they may be living. This is however, unrealistic and difficult to implement.

It is therefore, strongly recommended that UNHCR and ARRA should devise a vigorous information sharing campaign with Eritrean refugees, which should start from the time they arrive at the transit centre and continue while living in the camps. In addition, there is need to develop a reference document for UNHCR, ARRA and partners, which clearly states the modalities of the scheme in sufficient detail.

5.2.2. Review and reform the Refugee Proclamation 409 of 2004

While the Ethiopian Government’s efforts to domestic international refugee law is applauded, there is still need to review and reform the current refugee proclamation so that it is in line with the provisions of international law. Particularly, the refugees’ right to employment, education, residence and freedom of movement have not adequately been protected under the current law. In this regard, the Ethiopian Government should lift the reservations made to the 1951 Refugee Convention rights to wage-earning employment, right to choose a place of residence and freedom of movement. Furthermore, another reason for review is the fact that the Refugee Proclamation does not guarantee full rights to refugees living in Ethiopia and its application is not comprehensive in its coverage of matters related to refugees.

The current status is that government line ministries such as the Ministry of Education are not actively involved in the provision of services to refugees. The national refugee law should be reviewed and amended to allow for the involvement of more actors in the provision of services to refugees. For instance, the involvement of the Ministry of Education would ensure that the right of refugees to elementary education is enshrined in the country's national education policy and annual plans, thereby improving refugees' access to quality education in the country.

Whereas the inclusion of the principle of *non-refoulement* in the state's national refugee law is a positive indicator of respect for refugee rights, there are, however, no safeguards in the Refugee Proclamation to prevent possible abuse by the authorities of their powers to determine conditions or situations that should warrant expulsion or denial of refugee status to a particular category of individuals seeking refuge. The power to refuse entry or forcibly return an asylum seeker is vested in one government institution (SIRAA) and the law does not provide for individual Refugee Status Determination. The Refugee Proclamation should be repealed to allow for a process of Status Determination for individual claims/applications for asylum, by an independent body, with representation from UNHCR.

Furthermore, it is recommended that reasons for exclusion or denial of refugee status should be limited to the 1951 Refugee Convention grounds and not merely based on suspicion that the individual may be 'a danger to national security or convicted of a serious crime'. This statement is vague and ambiguous. There is therefore, need to clearly define in the Refugee Proclamation, situations that may be considered a danger to national security and the type of crimes that may be classified as 'serious' and therefore, warrant exclusion or expulsion.

The other aspect of the current refugee law that requires amendment is the discrepancy between the Constitution and the Refugee Proclamation. For instance, although the constitution provides that all national laws should be in conformity with the provisions of the relevant international legal instruments to which Ethiopia is a signatory, the Refugee Proclamation is not fully in conformity with the 1951 Refugee Convention with regard to refugees' access to basic human rights. Therefore, certain aspects of the Refugee Proclamation should be repealed in order to fully conform to the provisions of the Constitution and international refugee law.

5.2.3. Increased access to livelihood and self-reliance opportunities

The existing youth education pack (YEP) project is a starting point for developing a youth-focused livelihood programme among Eritrean refugees. Although the YEP project has been active in addressing the skills-gap, the skills training project does not lead to sustainable livelihoods for the beneficiaries. The result has been the lack of impact of the YEP project on improving the level of self-reliance and livelihoods among Eritrean refugees. The YEP project should be re-evaluated and reviewed in order to incorporate the livelihood and income generation component. Considering that the problem of access to income generation and livelihood is a problem that also affects the host communities, it is important to also include the host communities when designing livelihood projects.

5.2.4. Review and reform of the 1969 OAU Refugee Convention

Protecting the rights of refugees in Africa is further constrained by the fact that the 1969 OAU Refugee Convention does not contain provisions for refugees' access to socio-economic rights. The OAU Refugee Convention does not adequately protect and safeguard the rights of refugees in Africa. Refugees granted asylum on the basis of the 1969 OAU Refugee Convention may be disadvantaged and may not legally claim or fully enjoy the rights contained in the 1951 Refugee Convention. The 1969 OAU Refugee Convention should be reviewed and reformed to include a broad base of human rights for refugees.

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