



**INTERNATIONAL LAW SERIES**  
(VOLUME-I)  
Addis Ababa University - School of Law

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**Refugee Protection in Ethiopia**

**EDITOR**  
**Yonas Birmeta (PhD)**

**2017**



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## **Thematic Research Conference and Proceedings Rules**

*International Law Series* is an annual thematic publication of the School of Law of Addis Ababa University in the field of international laws. It was established by the Academic Committee of the School of Law on December 2, 2016 to publish cross-cutting thematic researches on international law issues pertaining to Ethiopia and to support the graduate programs of the School thereby encouraging staff and student participation in research activities.

Each volume of *International Law Series* covers different themes in priority areas identified by committee of conveners and approved by the Academic Committee of the Law School. Submissions to this volume have been presented in a national conference organized by the School on August 8, 2017 attended by invited faculty members from law schools in Ethiopia and experts from different walks of life. Moreover, each submission has been blind peer-reviewed by experts in the field for substantive merit as per the Addis Ababa University School of Law Thematic Research Conference and Proceedings Rules of 2016.

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## Editor's Note

The maiden volume of International Law Series is devoted to the investigation of issues of international concern which have also practical content for Ethiopia. The different contributions in this first volume explore a variety of issues pertaining to the protection of refugees in Ethiopia. It is evident that refugee protection is a topical issue of concern at the international, regional and national levels. As one of the largest refugees hosting countries in Africa and in the world, it becomes necessary to explore the extent to which the policy, legal and institutional framework for refugee protection in the country is in line with international law. Consequently, the authors of the articles in the present Volume look in to pertinent issues which have far reaching ramifications on refugee protection in Ethiopia and beyond. They reflect up on the background of refugee protection and ways and means whereby it can be further strengthened and enhanced. It is believed that these articles will make a stimulating reading for those who take interest in matters related with refugee protection. It is also the firm belief of the Editor that the articles in this Volume will generate further interest in matters related to refugee protection in Ethiopia.

In his article entitled *The 7<sup>th</sup> Century Unwritten Ethiopian Laws on the Protection of Refugees*, Dr. Abdulmalik A. Ahmed explores the historical and religious background to refugee protection in Ethiopia. He contends that, historically, Ethiopia was the only destination for some refugees who were persecuted on account of their religious orientation. His article attempts to illuminate as to how Ethiopia, as early as the 7<sup>th</sup> century regardless of any international instrument, accommodated refugees and accorded them various protections including freedom of religion, although they adhere to a religious tradition which differs from the mainstream religion practiced in Ethiopia at that time. He goes on to state that Ethiopia has been regarded as the champion in providing

protection for refugees. His article further provides brief historical backdrop concerning refugees in general and the arrival of Muslim refugees in Ethiopia on the basis of both oral and written sources. Dr. Abdulmalik's article commences his analysis by setting forth the rights of refugees as affirmed under international and domestic instruments. The article also attempts to highlight the lessons that can be drawn from the experience of the country in providing sanctuary and catering for the needs of refugees in the absence of any international instrument.

In a contribution entitled '*Delimiting the Normative Terrain of Refugee Protection: A Critical Appraisal of the Ethiopian Refugee Proclamation No. 409/2004*' Dr. Zelalem Mogessie Teferra, examines the Ethiopian Refugee Proclamation (Proclamation No. 409/2004) which constitutes the main legal framework for the protection of refugees in the country. Dr. Zelalem's article begins with an introduction on the Ethiopia's historical and present-day hospitality to refugees. He then shifts attention to a brief assessment of the sources of the Ethiopian refugee law and also a detailed substantive analysis of the provisions of the Proclamation. He contends that the proclamation sets forth several provisions which reflect the country's highly commendable generous humanitarian policy and its obligations under international refugee instruments. Regardless of this, Dr. Zelalem argues that the refugee protection legislation in the country is far from perfect when compared with international and regional standards. His article critically reviews the legislation and highlights its major strengths and shortcomings. Dr. Zelalem concludes his article by taking stalk of the principal normative strengths and weak points inherent in the Proclamation and suggests some specific action points aimed at addressing these existing normative gaps or weaknesses. He also makes some recommendations aimed at normative improvement in the law with a view to enhance the country's refugee protection scheme.

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In another contribution entitled '*The Dynamics of Refugees' Dual- Identity along Ethiopia-South Sudan Border: Challenges, Prospects and Policy Implications*', Moti Mosisa Gutema argues that more than ninety percent of the refugees in Ethiopia have historical, political or ethnic associations with the hosting local communities in the country. He goes on to state that this affiliation has contributed to the increase in the number of refugees with dual-identity in Ethiopia. Moti's contribution analyzes the dynamics of refugees' dual-identity along Ethiopia-South Sudan border focusing on challenges, prospects and its policy implications. To this effect, Moti employed non-doctrinal research approach while relying upon both primary and secondary sources. Moti contends that refugees with dual identity along South Sudan border have multiple implications on inter-state relationship, and on the local and national politics of both states, particularly to Ethiopia. He observes that procedural practices employed in the course of registering and hosting refugees contradicts with Ethiopia's refugee legislation. Moti suggests that this would have multi-dimensional adverse consequences to Ethiopia. Consequently, Moti recommends the concerned bodies dealing with refugee issues to take in to account the scenarios of dual-identity and its long-term impacts on local, national and regional politics.

In his article entitled '*Procedural Guarantees for Refugee Status Determination under Ethiopian Refugee Law*' Jetu Edosa Chewaka argues that mechanisms employed to determine refugee status have profound repercussions on the life and security of asylum seekers. He goes on to state that this is due to the fact that refugee status is determinative as to whether or one is entitled to protection from a forcible return to one's country of origin and is to receive special protection and assistance in rebuilding one's life in the country of refuge. He contends that the determination of refugee status is a precondition for the application of the fundamental rights of refugees enshrined under the international refugee instruments. Jetu's contribution analyzes the normative basis of Refugee Status

Determination (RSD) under the existing national refugee law. His article also sheds light on the set of procedural parameters under the international refugee conventions for the determination of refugee status essentially as an aspect of refugee protection. Jetu contends that the appraisal of the provisions of Ethiopian refugee law reveals that most of the minimum international procedural guarantees are embodied under this law. Nevertheless, Jetu is quick to add that there is clearly a manifest lack of normative basis of procedural guarantees capable of ensuring independent, fair and efficient first instance RSD decision since matters of RSD decision and review of such decision at the appeal level totally rests on the same institution. Jetu submits that the current refugee law should be amended in a way that provides opportunity for asylum seekers whose refugee status claims have been rejected to challenge such negative decisions before competent judicial body through appeal system. Jetu also further suggests that asylum seekers should be provided with free legal assistance during the process of RSD to avoid miscarriage of procedures and justice.

Ephrem Tadesse and Haileselassie Gebremariam's contribution highlights recent developments in refugee protection in Ethiopia. In their contribution entitled *'Towards a Comprehensive Refugee Response Framework (CRRF): Recent Developments on Refugee Protection in Ethiopia'*, the authors elucidate the new policy commitments put forward by the government of Ethiopia during the Leaders' Summit on Refugees in September 2016 and its current implementation. They argue that Ethiopia is selected as one of the few pilot countries to test the Comprehensive Refugee Response Framework (hereinafter referred to as "CRRF") the practical application of which will inform the preparation of a Global Compact on Refugees following the adoption of New York Declaration on Refugees and Migrants. Ephrem and Haileselassie explain the new paradigm shift in refugee protection in Ethiopia deviates from the traditional "care and maintenance" approach to a more

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comprehensive and solutions oriented approach aiming at fostering the self-reliance of refugees thereby easing the burden on the country by according them wider range of rights and opportunities. They contend this process has necessitated the revision of the existing refugee laws. Their contribution discusses the implementation of the CRRF approach in Ethiopia including the draft Refugee Proclamation which is under active consideration at the time of the writing of their article.

Evidently, the present volume does not claim to have covered all the issues pertinent to refugee protection in Ethiopia. Nevertheless, it has attempted to touch upon several issues of importance of international law having practical content to Ethiopia.

I express sincere thanks to all those who made contribution to this volume.

**The Editor,**

*Yonas Birmeta (PhD), School of Law, AAU*

**2017**



# The 7<sup>th</sup> Century Unwritten Ethiopian Laws on the Protection of Refugees

*Abdulmalik A. Ahmed (PhD)\**

## **Abstract**

*These days, one major problem the world is facing is the issue of refugees which some are using it for political consumption, while others are using it as a source of income both by 'sheltering' and smuggling refugees. Ethiopia, historically, was the only destination for some refugees who were persecuted for their faith. This article will try to illuminate how, in the 7<sup>th</sup> century, in the absence of any international instrument, Ethiopia received refugees and granted them their various rights including freedom of religion, though their religion was different from the religion practiced in Ethiopia. Hence, Ethiopia has been regarded as the champion in providing protection for refugees. This paper provides brief history of refugees in general and the arrival of Muslim refugees in Ethiopia in particular based on both oral and written sources. It first discusses the rights of refugees by analyzing international and domestic instruments as well as literatures. Then, it draws lessons from how Ethiopia handled refugees in the absence of any international instrument.*

**Keywords:** people of concern, refugees, rights of refugees, conventions and proclamations on refugees and their rights, Abyssinia and Ethiopia

## **1. Introduction**

The fact that the current number of refugees and displaced people has reached the highest point to surpass the number of refugees and displaced ones during World War II is a witness to how the problem of refugees is currently serious. Thus, in 2013 when the total number of refugees, asylum seekers and internally displaced people was 51.2 million,

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which was described as the highest level of displacement since the Second World War, Antonio Gutierrez, the then UN High Commissioner for Refugees (UNHCR) said “We are witnessing a quantum leap in forced displacement in the world.”<sup>1</sup>

Nevertheless, according to the UNHCR population statistic at the end of 2016 these numbers have reached 67.75 million. Among these the number of refugees was 17,187,488, while asylum seekers were 2,826,508. Internally Displaced Persons (IDP) were 36,627,127, while returnees were 7,063,374. The number of stateless and others was 3,242,207 and 803,134 respectively.<sup>2</sup> These people are commonly referred to, by UNHCR, as people of concern. Before proceeding further it is worthy, therefore, to say few words on who these people of concern are.

**Refugees include:**

1. Individuals recognized under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,
2. Individuals recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;
3. Those recognized as refugees in accordance with the UNHCR Statute;
4. Individuals granted complementary forms of protection;
5. Or those enjoying temporary protection.
6. Since 2007, the refugee population also includes people in a refugee-like situation.

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<sup>1</sup> Sulaiman Momodu, ‘Refugees Turn to Ethiopia for Safety and Asylum’, [Africa Renewal](#), April 2015; Down loaded on June 27, 2017, p.1.

<sup>2</sup> The UNHCR Population Statistic at the End of 2016 available at <[http://popstats.unhcr.org/en/overview#\\_ga=2.46991203.530178623.1498686358-621099140.1498686358](http://popstats.unhcr.org/en/overview#_ga=2.46991203.530178623.1498686358-621099140.1498686358)> accessed visited on June 28, 2017

**Asylum seekers:** this can either refer to an individual whose refugee status has not yet been determined by the authorities but whose claim to international protection entitles him or her to a certain protective status on the basis that he or she could be a refugee, or to persons forming part of large-scale influxes of mixed groups in a situation where individual refugee status determination is impractical.<sup>3</sup>

**Internally Displaced Persons (IDPs)** are people or groups of individuals who have been forced to leave their homes or places of habitual residence, in particular as a result of, or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights, or natural or man-made disasters, and who have not crossed an international border.<sup>4</sup> For the purposes of UNHCR's statistics, however, this population only includes conflict-generated IDPs to whom the office extends protection and/or assistance. Since 2007, the IDP population also includes people in an IDP-like situation. The Oromos and Somalis who are displaced due to generalized violence in the Ethiopian Somali and Oromo Regional States could be examples of IDPs.

**Returned refugees** are former refugees who have returned to their country of origin spontaneously or in an organized fashion but are yet to be fully integrated. Such return would normally only take place in conditions of safety and dignity. Examples are Ethiopian refugees who returned from the Saudi Arabia.

**Returned IDPs** refer to those IDPs who were beneficiaries of UNHCR's protection and assistance activities and who returned to their areas of origin or habitual residence during the year.

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<sup>3</sup> UNHCR, Danish Refugee Council, *Study on the onward movement of refugees and asylum-seekers from Ethiopia*, p.5.

<sup>4</sup> Article 1(k) of the Kampala Convention.

**Stateless Persons** are defined under international law as persons who are not considered as nationals by any State under the operation of its law. In other words, they do not possess the nationality of any State. UNHCR statistics refer to persons who fall under the agency's statelessness mandate because they are stateless according to this international definition, but data from some countries may also include persons with undetermined nationality. Examples are the Rohingya Muslims.

**Others people of concern** refers to individuals who do not necessarily fall directly into any of the groups above, but to whom the UNHCR extends its protection and/or assistance services, based on humanitarian or other special grounds. It seems such kind of categorization is not applied in legislation related with refugees or people of concern in Ethiopia. It seems all are referred to as a refugee as far as Ethiopia is concerned. This article will stick to that.

Thus, Ethiopia has been hosting some 90,000 refugees since the 1990s and in 2011, only in eight refugee camps. As of June 2014, however, the number of refugee camps had spiked upwards to 23. The South Sudanese make up the largest number with a refugee population of 253,030, followed by Somalis (245,326), Eritreans (126,363), Sudanese (35,870) and other nationalities accounting for almost 5,300.<sup>5</sup> Currently, however, these numbers have further skyrocketed. Thus, according to Addis Zeman gazette<sup>6</sup> more than 850,000 refugees from 21 countries have sought refuge in 26 refugee Camps. In the last 6 months of 2017 alone about 60,000 refugees were registered in Ethiopia.

This makes Ethiopia the largest refugee-hosting country in Africa, surpassing Kenya. Sharing borders with Somalia, South Sudan, Sudan and Eritrea which are grappling with conflicts exposed Ethiopia to the

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<sup>5</sup> Supra note 2, p. 1.

<sup>6</sup> Addis Zeman, 76<sup>th</sup> Year No. 304, 11 July 2017, p. 2.

large number of refugee influx. The other reason could be as Philip Marfleet remarks: “the obligation to protect certain displaced people, fugitives and those abandoned by communities of origin has often been seen (by Ethiopians) as a social priority and has been closely associated with the well-being of the wider society”<sup>7</sup>. Thus, it would not be surprise if Ethiopia had hosted the earliest refugees of the 7<sup>th</sup> century Muslims who migrated from Arabian Peninsula. Before dealing with the history of those Muslim refugees, however, it is worth having a look at the history of refugees in general.

## **2. Few Ideas on the History of Refugee Institutions**

Issues of refugees or migration were as old as the history of man. They existed whenever and wherever persecution or manmade or natural calamities forced people to flee their homelands. Hence, “Human beings have migrated since the earliest societies. The first migrants were tribal people in search of food, water and resources. They were not yet refugees or asylum seekers; they were mere gatherers or hunters who began exploring new lands to settle”<sup>8</sup>.

The Bible and the Quran tell us how Jacob or Yakub with his family fled his homeland to Egypt to avoid famine. Furthermore, the two holy books depict how the Israelites led by Mossa or Mosses fled Egypt to free themselves from slavery. As mentioned by Ali<sup>9</sup> the Seven Christian Sleepers of Ephesus fled their homeland and hid in a cave to avoid the persecution by the Romans. Eleven Moslem men and four women’s flight to Abyssinia in the 7<sup>th</sup> Century to avoid the persecution by the

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<sup>7</sup> Philip Marfleet, “Refugees and History: Why We Must Address the Past”, Refugee Survey Quarterly, Vol.26, Issue 3, 2007, p. 138.

<sup>8</sup> “The Protection of Refugees and their Right to Seek Asylum in the European Union”, Institut Européen De L’université De Genève Collection Euryopa, VOL. 70- 2011 p.4.

<sup>9</sup> A. Yusuf, The Holy Quran. (1983), p.730.

Quraysh is another historical instance of individual human beings fleeing their home.<sup>10</sup>

Hence, refugee situation existed in antiquity, though modern refugee protection started at international level with the establishment of the League of Nations (LN).<sup>11</sup> Nevertheless, as the LN defined refugee by categories especially in relation to their country of origin<sup>12</sup> the coverage was limited and mainly focused on Russians, Armenians, Assyrian, Assyro-Chaldean and Turkish refugees. Dr Fridtjof Nansen was initially assigned by the LN as the High Commissioner for Russian refugees in 1921 and his mandate was afterwards extended to other groups.<sup>13</sup>

To cope up with the consequences of World War II the International Organization for Refugees (IOR) was created in 1947 mainly to deal with the problems of refugees in Europe, including registration and determination of status, repatriation, resettlement, and “legal and political protection”.<sup>14</sup> “But notwithstanding its success in providing protection and assistance and facilitating solutions, it was expensive and also caught up in the politics of the Cold War.”<sup>15</sup> Hence, to replace the IOR, the General Assembly of the United Nations, adopting the Statute on 14 December 1950, established the High Commission for Refugees (UNHCR) as per article 22 of its Charter. The main tasks of this

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<sup>10</sup> Haykal, The Life of Muhammad, (2008) p.107.

<sup>11</sup> Gilbert, ‘On the history of the international protection of refugees’, International Review of the Red Cross, Vol. 83 (843) (2001), p. 727 and F. Erika, (2001) ‘International Refugee Protection 50 years on: The Protection Challenges of the Past, Present And Future’, International Review of the Red Cross, September Vol. 83 (843) p.584.

<sup>12</sup> E. Feller, (2001a) Evolution of International Refugee Protection Regime, Journal of Law & Policy, vol.15 (2001) (129) p. 130.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Guy S. Goodwin-Gill, ‘Convention Relating To The Status Of Refugees Protocol Relating To The Status of Refugees’, United Nations Audiovisual Library of International Law, available at <[www.un.org/law/avl2](http://www.un.org/law/avl2)> (2008) p.1.

organization “were to provide international protection for refugees and to seek permanent solutions to their problems by assisting governments in facilitating their voluntary repatriation or their assimilation within new national communities”<sup>16</sup>

In July 1951 a diplomatic conference in Geneva adopted the 1951 Convention relating to the Status of Refugees which was more or less limited to protecting European refugees who had first fled Nazism, and later communism<sup>17</sup>, in the aftermath of World War II. To do away with time and geographic limitation and make it more inclusive this Convention was later amended by the 1967 Protocol as the problem of displacement spread around the world especially in Africa following decolonization. The 1951 Convention as amended by the 1967 Protocol clearly spell out who refugees are and the kind of legal protection, other assistance and social rights they are entitled to receive. They also define refugees’ obligations to host countries and specify certain categories of people, such as war criminals, who do not qualify for refugee status.

### **3. International and Domestic Instruments on Refugees**

#### **3.1. The 1951 Convention and its 1967 Protocol**

The 1951 Convention Relating to the Status of Refugees defines the term “refugee” and sets minimum standards for the treatment of persons who qualify for refugee status. This convention is the foundation of international refugee law. Even though “etymologically speaking, the word *refugee* is linked to the Latin word *refugium*, meaning *refuge* or to flee back, from *re-* “back” and *fugere* “to flee”<sup>18</sup>, the convention as pointed out earlier, had geographical and temporal domain of application, as its definition of a refugee focuses on persons who are outside their country

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<sup>16</sup> *Supra* note 14, p.130.

<sup>17</sup> *Ibid*, p.131.

<sup>18</sup> *Supra* note 8, p.10.

of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951. To lift this geographic and time limitation the 1967 Protocol was drafted and adopted.

Nevertheless, according to the definition of the 1951 Convention and its 1967 Optional Protocol, internally displaced persons (IDPs) – including individuals fleeing natural disasters and generalized violence, stateless individuals not outside their country of habitual residence or not facing persecution, and individuals who have crossed an international border fleeing generalized violence are not considered refugees.

On the other hand, countries in the America and Africa who were experiencing large-scale displacement as the result of armed conflicts found that the 1951 Convention definition did not go far enough in addressing the protection needs of their populations. Consequently, while the Americans came with the Cartagena Declaration the Africans came with the 1969 OAU Convention.

### **3.2. The Organization of African Unity (OAU) Convention**

This convention governs specific aspects of refugee problems in Africa. Thus, it is a regional treaty adopted in 1969 that filled the gap in the 1951 Convention and its 1967 Protocol. Thus, article 1(2) of the convention defines a refugee as any person compelled to leave his/her country *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*. This means that persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in states that are parties to this Convention, regardless of whether they have a well-founded fear of persecution.<sup>19</sup> Thus “the issues of large-scale refugee movements and the

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<sup>19</sup> Ms. Kate Jastram and Ms. Marilyn Achiron (2001) ‘Refugee Protection: A Guide to International Refugee Law, Inter-Parliamentary Union’.

links to armed conflict and internal strife were acknowledged in the 1969 OAU Convention<sup>20</sup>

### 3.3. National Instruments on Refugees

Various legal instruments deal with refugee issues in Ethiopia. The FDRE Constitution<sup>21</sup> is one. Other international instruments Ethiopia ratified also deal with refugee issues. Other specific refugee laws are also issued by Ethiopia. The main national instrument concerning refugee is Proclamation no 409/2004, which adopted many of the provisions of the 1951 Refugee Convention and the 1969 OAU Refugee Convention. Moreover, Immigration Proclamation No 354/2002 and Security, Immigration and Refugee Affairs Authority Establishment Proclamation No 6/1995 may also constitute as additional national instruments to understand how the refugee situation in Ethiopia is handled. Except few differences and reservations<sup>22</sup>, the Ethiopian refugee laws adopt the provisions of the international instruments. Notwithstanding the differences, this article discusses, next, definition, principles, rights and obligations of refugees as they are stated in the international instruments.

## 4. Definition, Principles, Rights and Obligations of Refugees

The definition provided under article 1(2) of the 1951 Convention is broadened by article 1(2) of the 1969 Convention issued by the Organization of African Unity (OAU) adding refugee to mean

*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*

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<sup>20</sup> R. Brett and E. Lester, 'Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead', *IRRC* (2001) Vol. 83 No. 843, p. 714.

<sup>21</sup> See Article (9)(4) and 13(2) of the FDRE Constitution.

<sup>22</sup> See Articles 5(4), 10, 12, 13, 19 and others of Proclamation No. 409/2004.

*of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*

The principles as noted by Feller are:

*refugees should not be returned to face persecution or the threat of persecution – the principle of non-refoulement; protection must be extended to all refugees without discrimination; the problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between states; since the grant of asylum may place unduly heavy burdens on certain countries, a satisfactory solution to the problems of refugees can only be achieved through international cooperation; persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner, and accordingly should not be penalized for having entered into, or for being illegally in, the country where they seek asylum; given the very serious consequences the expulsion of refugees may have, such a measure should only be adopted in exceptional circumstances directly impacting national security or public order; and cooperation of states with the UNHCR is essential to ensure the effective coordination of measures taken to deal with the problem of refugees<sup>23</sup>.*

The first principle in the refugee protection, as it is provided under article 33 of the 1951 Convention, is prohibition of expulsion or return (refoulement) of a refugee. It reads “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”. Even though this article is meant to absolutely ban the expulsion of a person to a country where she or he will face torture or any other inhuman and degrading treatment or punishment, these days “such action may be taken beyond a state’s borders or carried out by individuals or bodies acting on behalf of a state or in exercise of

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<sup>23</sup> Supra note 13, pp. 131-132.

governmental authority at points of embarkation, in transit, in international zones, etc.”<sup>24</sup>

Even though the prohibition on *refoulement* applies in all such circumstances there are, however, exceptional situation where this right may not be applied to some categories of refugees. One is where the refugee is a threat to the security of the host country or where she or he is convicted by a final judgment of a particular serious crime, which constitutes a danger to the community of that country<sup>25</sup>. For instance, if 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.<sup>26</sup> Or he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.<sup>27</sup> Or he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity, or of the United Nations.<sup>28</sup>

The other side of the coin for non-*refoulement* is the application of this principle without discrimination. Hence, protection should be provided to all refugees without discrimination. Race, color, sex, language, religion, political or other opinion, national or social origin, property or disability, birth or other status, etc. should not be considered in treating refugees<sup>29</sup>. It is to be recalled, however, as once broadcasted or watched on the main Stream Medias some EU member countries, such as Hungary, and the President of the United

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<sup>24</sup> E. Feller, V. Turk and F. Nicholson (ed.), ‘Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection’, p.10.

<sup>25</sup> Article 33(2) of the 1951 Convention.

<sup>26</sup> Article 1(5)(a) of the OAU Convention of 1969.

<sup>27</sup> *Ibid*, Article 1(5) (b).

<sup>28</sup> *Ibid*, Article 1(5) (c &d) and Article 5 of the Refugee Proclamation of 409/2004.

<sup>29</sup> Article 3 of Refugee Proclamation No. 409/2004.

States, D. Trump, had refused to allow Syrian refugees but Christians and Yazidis into their respective country.

In summary, the cornerstone of the 1951 Convention, therefore, is the principle of non-refoulement according to which, a refugee should not be returned to a country where he or she faces serious threats to his or her life or freedom. This protection applies to all refugees without any kind of discrimination. This right may not, however, be claimed by those who are reasonably regarded as a danger to the security of the country, or having been convicted of a particularly serious crime, and hence, considered a danger to the community.

Once this right is certain other rights follow including the right not to be expelled, except under certain, strictly defined conditions, i.e. on grounds of national security or public order.<sup>30</sup> Even where the refugee is to be expelled for reasons articulated, the expulsion, as per article 32(2), shall be in accordance with due process of law, i.e. the refugee shall be allowed to submit evidence to clear himself, and appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

The other fundamental right is the right not to be punished for illegal entry into the territory of a contracting State.<sup>31</sup> As noted by G. S. Goodwin-Gill, however, “despite this provision, (refugees) are placed in detention facilities throughout Europe, North America, and Australia, owing to their illegal entry or presence.”<sup>32</sup> The place where and the ground why the detention takes place vary. For instance, the place could

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<sup>30</sup> Article 32(1) of the 1951 Convention, Article 2(3) of the 1969 OAU Refugee Convention, Article 10 of the Refugee Proclamation of 409/2004.

<sup>31</sup> Article 31 of the 1951 Convention.

<sup>32</sup> G. S. Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection’, A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations (2001) p. 1.

be at border points or in airport transit areas. Similarly, refugees “may be detained at the ‘pre-admission’ phase, because of false documents or lack of proper documentation, or they may be held in anticipation of deportation or transfer to a ‘safe third country.’”<sup>33</sup> Amazingly “many States also employ regular jails for the purposes of immigration related detention; in such cases, (refugees) are generally subject to the same regime as other prisoners and are not segregated from criminals or other offenders.”<sup>34</sup> Similarly, though it is not clear if the detention takes place in separate place or with other ordinary detainees, according to article 11 of Ethiopian Refugee Proclamation No. 409/2004,

*a person whose expulsion has been ordered on the ground of national security and public order may be arrested or detained upon the order of the Head of the Authority pending his expulsion if such detention is necessary for purposes of effecting the expulsion order or to ensure that he does not endanger the security or public order of Ethiopia pending the expulsion.*

Article 21 of the Convention<sup>35</sup> deals with the right of refugees to housing. It reads

*“as regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”*

For a refugee to claim this right he or she should lawfully stay in the country where he/she takes refuge. Furthermore, related with this right the refugees may not be accorded the same treatment as that of nationals. They shall, however, be accorded treatment not less favorable than that accorded to non-nationals generally in the same conditions.

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, p. 2.

<sup>35</sup> Please compare this article with Article 11 of the International Covenant on Economic, Social and Cultural Rights.

In dealing with the right to education, the way the treatment accorded to the refugees, however, differ depending on the level of enrolment. A refugee who enrolled in elementary education shall be accorded the same treatment as the nationals.<sup>36</sup> As regards education higher than elementary the treatment accorded to the refugees, however, is less than the national. Nevertheless, for education higher than elementary 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, 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.<sup>37</sup>

Article 23 reads “*The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals*” To be a recognized refugee is, therefore, one of the requirements to enjoy this right. Second, the concerned state should have a social assistance and a welfare schemes enjoyed by the nationals. The 1951 Convention, however, does not define or explain what these social assistances and welfare are. Other international instruments may help us to understand what these rights are. Thus, article 25 of the Universal Declaration of Human Rights provides that

*“Everyone has the right to a standard of living adequate for his health and well-being including the basics of life, medical care and social services, in the event of lack of livelihood due to unemployment, sickness, disability, widowhood, old age, or other circumstances beyond his control”.*

Hence, these rights include, *inter alia*, relief and assistance to persons in need due to illness, age, physical or mental impairment, or other circumstances, as well as medical care. Thus, refugees without sufficient

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<sup>36</sup> Article 22 (1) of the 1951 Refugee Convention.

<sup>37</sup> *Ibid.*, Article 22(2).

resources are equally entitled on the same conditions as nationals to social and medical assistance.

Article 4 of the 1951 Convention accords, to the refugees within the territories of the contracting states, the freedom to educate their religion to their children and practice their religion which is a fundamental right of every human being, and includes the right to freedom of thought, conscience, religion or belief<sup>38</sup>. Broadly,

*All persons have the right to manifest their religion or belief either individually or in community with others and in public or private in worship, observance, practice and teaching, without fear of intimidation, discrimination, violence or attack. Persons who change or leave their religion or belief, as well as persons holding non-theistic or atheistic beliefs should be equally protected, as well as people who do not profess any religion or belief.*<sup>39</sup>

According to the above quotation, however, violations or abuses of freedom of religion or belief, committed both by state and non-state actors, are widespread and complex and affect people in all parts of the world, including Europe.<sup>40</sup>

Article 16 of the 1951 Convention governs the right to access the courts of the contracting states. Hence, according to 16(1) a refugee may not be required to pay court fee to have access to a court of law on the territory of all states parties to the Convention. Furthermore, a refugee, on matters of access to courts, including legal assistance and being free from *cautio judicatum solvi*, i.e., a plaintiff's security for court costs<sup>41</sup> receives the same treatment as a national of the contracting state in which he has his habitual residence. The reason the refugee appears before a court of law could be related with his rights and obligations stipulated in the

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<sup>38</sup> EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief, p.1.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Black Laws Dictionary, 2004, p. 665.

convention or any other instruments or the refugee could be criminally charged. Under such circumstances the refugee “is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.<sup>42</sup>

Article 26 of the 1951 Convention provides that States shall afford refugees the right to choose their place of residence within the territory and to move freely within the State. Meanwhile, Article 28 obliges States parties to issue refugees travel documents permitting them to travel outside the State “unless compelling reasons of national security or public order otherwise require.” Even though freedom of movement is an important issue with regard to protracted refugee situations, some countries practice what is called refugee warehousing – in which refugees are confined to refugee camps, thereby restricting their freedom of movement which may affect their other right, such as access to employment and education. For instances Kenya and Ethiopia specify in their national laws that the movement of refugees throughout the country may be restricted and that refugees may be limited to living in designated areas, namely refugee camps.<sup>43</sup>

Hence, confining the refugees within camps could be one method to restrict their freedom of movement. Besides, refugees’ right of movement may be restricted if they do not possess identity and travel documents. To resolve this, the contracting states are obliged to issue the identity paper to the refugee as per article 27 of the 1951 Convention. On the other hand, since a refugee does not enjoy the protection of the country of his/her nationality, he/she can not avail himself/herself of a national passport for travel. Consequently, as per article 28 of the 1951 Convention the state parties are obliged to issue travel documents

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<sup>42</sup> Article 10 of Universal Declaration of Human Rights.

<sup>43</sup> Article 21(2) of the Refugee Proclamation No. 409/2004 of Ethiopia and Cap 173 & 12(3) of Refugee Act (2014) of Kenya.

to refugees lawfully staying in their territory for the purpose of traveling outside their territory.

The right to freedom of movement, therefore, includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. This right is not, however, absolute. It may be restricted, either by way of derogation under article 4 of the ICCPR, or to protect national security, public order, public health or morals or the rights and freedoms of others, as allowed by article 12(3) of ICCPR.

## **5. The 7<sup>th</sup> Century Muslim Refugees**

Abir stated that “Islam reached the Ethiopian coast in the 7<sup>th</sup> century.”<sup>44</sup> Aksumite Ethiopia, during the reign of King Nagashi, was the first country to experience Islam in the year 615 AD<sup>45</sup>, even the Arabian Peninsula, where Islam was first introduced by Prophet Muhammad, welcomed Islam. Rather the Muslims there in the Arabian Peninsula were persecuted by their own people. Some individuals like Sumayya and her husband were tortured to death.

Though his suffering did not end up in death like Sumayya, Bilal the Abyssinian slave was also tortured by his master Ummayyah ibn Khalaf.<sup>46</sup> He was freed by Abubakar who paid huge amount of money which the master could not resist to accept. All those repressions forced Prophet Muhammad to advise some of his followers to flee to Abyssinia whose ruler, King Negashi, was renowned for his tolerance and generosity, until God led them to a way out of their difficulties. It was in

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<sup>44</sup> Abir, Ethiopia and the Red Sea: The rise and decline of Solomonian dynasty and Muslim-European rivalry in the region, (1980), p. xvi.

<sup>45</sup> Hussein Ahmed, ‘Aksum in Muslim Historical Tradition’, Journal of Ethiopian Studies, (1996) vol. 29 (2) p.53.

<sup>46</sup> *Supra* note 5, p.100.

the hope of finding refuge at the court of the Abyssinian ruler that the first Muslim migrants set sail for the African coast<sup>47</sup>.

Following that advice they immigrated to Abyssinia where they can worship God in peace and freedom. This flight to Abyssinia which included 11 men and 4 women was described as the first Hegira<sup>48</sup>. Among the migrants was Ruqayyah, the Prophet's daughter and her husband Usman the third Caliph.

The Meccans were upset at that exodus of the Muslims to Abyssinia and they immediately sent an envoy (Amr ibn al As and Abdullah ibn Abu Rabi ah) with a lot of gifts to the King of Abyssinia in order to persuade the King to extradite the immigrants to Mecca. They referred to the refugees as "ignoble plebeians from Mecca".<sup>49</sup> They further accused the refugees of abandoning their forefathers' religion, while they neither accepted the King's religion. This could mean they were criminals who are not entitled to be granted the status of refugee. Hence, they were, perhaps, referred to by the envoys as rebels and, therefore, threat to the security of Abyssinia.

The King, however, was wise and decided to find out the reason for himself why those people had migrated from their country leaving behind their beloved ones and home. Both parties were invited to the King's Court and were given chances to present their cases. The first accusation brought against the emigrants was apostatizing from the religion of their people. Neither had they adopted the King's religion. The King gave the chance to the immigrants to respond to that accusation.<sup>50</sup>

Ja'far ibn Abu Talib rose and answered:

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<sup>47</sup> C. Turner, Islam, the Basics, Routledge, (2000), p. 22.

<sup>48</sup> *Ibid*, p. 107.

<sup>49</sup> *Ibid*, p. 52.

<sup>50</sup> *Ibid*, pp. 107-108.

*O King! We were in a state of ignorance and immorality, worshipping idols, eating carrion, committing all sorts of iniquity. We honored no relative and assisted no neighbor. The strong among us exploited the weak. Then God sent us a prophet, one of our own people, whose lineage, truthfulness, loyalty, and purity were well known to us. He called us to worship God alone and repudiate all the stones and idols which we and our ancestors used to worship. He commanded us always to tell the truth, to remain true to trust and promise, to assist the relative, to be good neighbors, to abstain from blood and things forbidden, and to avoid fornication, perjury, and false witness. He commanded us not to rob the wealth of the orphan or falsely to accuse a married woman. He ordered us to worship God and never associate any other being with him, to hold prayer, to fast and to pay the Zakah. We believed in him and what he brought to us from God and followed him in what he enjoined and forbade. Our people, however, tried to sway us from our religion and persecuted us and inflicted upon us great suffering that we might re-enter into the immoral practice of old. As they vanquished and berated us unjustly and made life intolerable for us in Mecca, we choose you and your country and came thither to live under your protection in justice and peace<sup>51</sup>.*

In the middle of the argument the envoy directed the Abyssinian King to ask them what Muhammad taught them about Isa or Christ and his mother Merriam or Marry. The Negus ordered them to respond. They quoted the following verse from the Quran.

*Mary, therefore, pointed to the child as her only answer. Her people asked: 'how can we inquire of an infant in the cradle?' At this, Jesus spoke, 'I am the servant of God to whom He has given the Book and whom He has blessed and commissioned with prophet hood; whom He has enjoined me with holding the prayer and giving the Zakah as long as I live. My mother is innocent and I am neither unjust nor evil. Peace be upon the day I was born; on the day I shall die, and on the day I shall be resurrected.'<sup>52</sup>*

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<sup>51</sup> *Ibid.*, p.108.

<sup>52</sup> Koran, 19:29:33.

When the King asked them more about Jesus the same Ja'far answered "Our judgment of the Jesus is exactly the same as that which was revealed to our Prophet; namely that Jesus is the servant of God, His Prophet, His spirit, His command given unto Mary, the innocent virgin."<sup>53</sup>

Satisfied with their response and presentation the King drew a line with his cane and said with great joy, "Between your religion and ours is really no more difference than this line"<sup>54</sup>, and dismissed the Quraysh envoy with their gifts and allowed the Muslims to stay in Abyssinia as long as they wished practicing their religion. Indeed, King Nagashi proved that protecting refugees is primarily the responsibility of states. What compatibility could one observe between part of the international and national refugee instruments and the judicious way King Nagashi handled the refugee situation to protect the Muslim refugees? The next part tries to shed light on this point.

## **6. Protections Accorded to Muslim Refugees by the 7<sup>th</sup> century Ethiopia**

Those fifteen individuals fled their country because of their persecution by the Quraysh on the ground of their religion. The persecution of those fifteen individuals was not simply a perceived one. Even it was not simply serious and imminent; rather real. It is plausible, then, to think that it had forced them to enter Ethiopia without observing formality requirements. It is also plausible to think the envoy accused the refugees of illegally entering Ethiopia as criminals who should not be granted protection as refugees. May be the King responded 'as they were escaping persecution they were not expected to leave their country and enter Ethiopia in regular manner.' Thus they were not punished for entering King Negashi's domain illegally.

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<sup>53</sup> *Supra* note 52, p.109.

<sup>54</sup> *Ibid*, p. 110.

When the Quraysh accused the refugees of abandoning of their forefathers' religion and accepting a religion that was alien to both their forefathers and the King, he summoned both parties to his Court and let each party presents his case. Hence, the refugees were granted the right to access to a court, one of the basic rights of refugees. After hearing both parties, rising from his throne and facing Ja'far, King Nagashi said "between your religion and ours is really no more difference than this line", the line he drew on the ground using his kingship wand. He then dismissed the Quraysh with their gifts.

When the King refused to hand over the refugees to the Quraysh he implemented one of the principles of modern day refugee law, i.e. *non-refoulement*. He was aware that if the refugees returned to their country at that moment they would face persecution. He neither kept them as captives. In other words their right to return voluntarily was respected as they did relying on wrong information that the Prophet and the Quraysh reached into agreement.<sup>55</sup> On the other hand, some individuals remain behind and lived in Ethiopia for good. In doing so he tried to resolve the refugees' situation in a way these days referred to as "traditional" refugee ways — return, resettlement in a third country or local integration".<sup>56</sup>

Hogg and Abrams defined identity as "people's concepts of who they are, of what sort of people they are, and how they relate to others".<sup>57</sup> Furthermore, Deng, stated that "Identity is used in this book to describe the way individuals and groups define themselves and are defined by others on the basis of race, ethnicity, religion, language, and culture."<sup>58</sup> To start with, the refugees presented themselves in the King's court dressing their turban and clothes that identified them as Muslims.

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<sup>55</sup> *Ibid*, p.107 and *supra* note 45, p. 51.

<sup>56</sup> *Supra* note 18, p. 716.

<sup>57</sup> M. Hogg and D. Abrams, *Social Identifications: A Social Psychology of Intergroup Relations and Group Processes* (1988), p.2.

<sup>58</sup> Deng, Francis M., 'War of Visions: Conflict of Identities in the Sudan', (1995), p.1.

Furthermore, from the argument they had with the Quraysh in the King's court the refugees reiterated who they were, what sort of people they were and how they relate with others, especially with the Quraysh. In doing so they defined themselves from their religious prospective, which gained them acceptance from the King. From the way they were dressed and the argument they presented it can be assumed their identities which were one of the refugee rights were accepted and respected. On the other hand, may be the King had issued them a letter with his seal describing who they were and they were in Abyssinia with his permission so that they may not be harassed as they differ from the local people in the way they dressed .

When King Nagashi rose from his throne, drew a line on a ground to indicate the difference between his religion (Christianity) and Islam, it could be said he was indicating there are common values shared by both religions. Otherwise, he would have rejected the arguments forwarded by the refugees and extradited them. Thus, when King Nagashi allowed the refugees to practice their religion he accorded them one of the basic protections provided by modern refugee laws, i.e. freedom of religion. Hence, it is safe to conclude that some of the refugees who were better in Islamic knowledge taught Islam to their colleagues and may be to others. Furthermore, due to the observation of the right of religion it seems there was a free flow of religious ideas between the refugees and the local Christian scholars. That could be one of the reasons why while, one of the refugees Ubayd Allah b. Jahsh, converted to Christianity, many Ethiopians left for the Arabian Peninsula and accepted Islam.<sup>59</sup>

It is plausible to think other rights as well were granted to those refugees, including the right to work, for instance.<sup>60</sup> From this follows the right to move freely as they had to move from place to place to do business as

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<sup>59</sup> *Supra* note 45, p.50.

<sup>60</sup> Commerce was mentioned by W. Montgomery Watt (1968:100).

traders. It can be assumed their right to housing was respected as they could not be left out without shelter. One can also guess they had access to public relief and assistances till they started working and support themselves. May be some kind of arrangement was made, for that purpose, by the King as they were his guests.

## **7. Conclusion**

To start with, five points deserve to be mentioned. The first one is the fact that Ethiopia was the only country where Muslims sought refuge when they were persecuted by their own people. Ethiopia did not give her back to them and hand over them to their persecutors. Rather she embraced them and allowed them not only to stay but also enjoy other protections. The second point is: in doing so Ethiopia is the first country to promote the protection of refugees where such practice was not known anywhere in the world, especially to practice their religion freely. For that reason Prophet Muhammad had blessed Ethiopia and instructed his followers not to take any kind of act of aggression against her.

Third, Ethiopia is a pioneer in according protection to refugees even well before the existence of any international instrument related with refugee issues. Fourth, the King was a pioneer in fighting corruption as he refused to receive any gift from the Quraysh in exchange for extradition of the refugees. Fifth, it is from that time onwards that Islam was recognized at state level and practiced in Ethiopia and the two religions, Christianity and Islam, have been living side by side with tolerance and assisting each other.

Now the question is what lessons one can draw from the way the Abyssinian King handled the historical confrontation between Islam and those who were determined to wipe it out. The first lesson one could learn is what Prophet Muhammad had said about the King was substantiated by the deeds of the King himself. He was the king who was

ruling in justice. The land, i.e. Abyssinia was the land of truthfulness and its people have been true friends of Islam for a true friend is a friend in need. The second lesson one can draw from the trail is to render justice fighting corruption is indispensable. Had the king acted according to the wish of the Meccans the refugees would have been chained and taken back to Mecca and been executed. Third, Ethiopia is the first country to uphold the right of refugees not only by giving shelter to those who fled from persecution but guarantee them freedom of religion and other refugee rights. Thus, Ethiopia was the first country to guarantee freedom of religion by allowing Muslim migrants to exercise their religion freely and publicly.

# Delimiting the Normative Terrain of Refugee Protection: A Critical Appraisal of the Ethiopian Refugee Proclamation No. 409/2004

Zelalem Mogessie Teferra (PhD)\*

## Abstract

*Ethiopia has long been considered as one of the major refugee-producing countries in the world. Ironically, as of the year 2014, the country is the largest refugee-hosting country in Africa, at the moment, sheltering a total refugee population of nearly a million. This staggering number may be attributed to its geographical proximity to countries, from which both natural and man-made factors, mainly drought, civil war, and political oppression push hundreds of thousands of asylum-seekers to its frontier. However, the country's open-door policy of welcoming refugees is also another major factor that one cannot simply overlook. While this policy is believed to have existed for a very long time, Ethiopia's current refugee-friendly policy is guided by its Refugee Proclamation No. 409/2004, which offers the main legal framework for the protection of refugees in the country. The proclamation contains several provisions that reflect the country's highly commendable generous humanitarian policy and its obligations under international refugee instruments. All the same, the legislation, in comparison to other international and regional standards for the protection of refugees, is far from being perfect. This article critically reviews the Proclamation and highlights its major strengths and shortcomings and by doing so, it seeks to suggest some normative improvements in the law with the view to enhance the country's refugee protection scheme. To this end, the paper begins with an introduction on*

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*the Ethiopia's historical and present-day hospitality to refugees. This is followed by a brief assessment of the sources of the Ethiopian refugee law and then a detailed substantive analysis of the provisions of the Proclamation. Finally, the paper makes a general recollection of the principal normative strengths and pitfalls identified in the Proclamation and concludes with some specific recommendations directed towards addressing these normative gaps or weaknesses.*

**Keywords:** Ethiopia, Refugees, asylum-seekers, *non-refoulement*, expulsion, family unity, national security, public order, rights and duties, durable solutions

## 1. Introduction

Ethiopia has a long history of welcoming and sheltering refugees. The first written record of the country's hospitality to refugees goes back to the seventh century. According to Islamic literatures<sup>1</sup>, in the early years of Islam, Muslims were under the barrel of intense persecution from the ruling tribe (Quraysh) of Mecca and around 615 AD, Prophet Mohammed, to protect his followers and the newfound religion, sent more than eighty people including his daughter, cousins and other disciples to Negus Al-Asham (also known as Armha), the then King of ancient Abyssinia (Ethiopia) for them to seek refuge.<sup>2</sup> Tradition has it that the King welcomed and gave a safe sanctuary to them and when their persecutors from Mecca asked for their forced transfer in exchange for gifts, he was said to have rejected their offer stating that "If you were

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<sup>1</sup> The earliest existing literature providing full account of the story is commonly referred to as the 'Sira of Ibn Ishaq's'. See *W. Montgomery Watt, Muhammad at Mecca (Oxford University Press, 1980), pp. 110–111.*

<sup>2</sup> Haggai Erlich, *Islam, Christianity, Judaism, and Ethiopia: The Messages of Religions: The Fifth Annual Levzion Lecture* (The Hebrew University of Jerusalem, 2013), pp. 4-5; Jon Abink, "An historical anthropological approach to Islam in Ethiopia: issues of identity and politics", *Journal of African Cultural Studies*, Vol.11 (1998), p.111.

to offer me a mountain of gold I wouldn't give up these people who have taken refuge with me."<sup>3</sup>

The country's hospitality to refugees continued during and after WWI where many asylum-seekers and migrants from Europe including the Greek, Armenians, Russians and Turkish were granted refuge.<sup>4</sup> Later after WWII and in the subsequent decades of resistance against colonization, Ethiopia, at the time, the only African independent country, which never succumbed to foreign colonialism, was not only a beacon of freedom but also a safe haven to many fellow Africans, who fled their countries because of colonial oppression and those who were persecuted for their actual or perceived struggle against the colonial powers.

In the 1970s and 80s, Ethiopia's refugee-friendly atmosphere began to wither after the country was hardly hit by one of the worst famines in modern history. The famine was caused by both a protracted civil war between the socialist military junta (also known as 'Derg') and insurgent groups, and severe drought in the northern and to some extent, north western parts of the country.<sup>5</sup> In the subsequent years, this led thousands of Ethiopians to flee their country and seek asylum elsewhere and the country turned from a refugee-hosting to one of the major refugee-producing countries in the world.<sup>6</sup> However, even during this time,

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<sup>3</sup> Jon Abink, *Ibid*; Wondewossen Lemma, "The Ethiopian Refugee Law & Place of Women in It", Refugees Study Programme, Oxford University Repository (1995), p. 7.

<sup>4</sup> Raymond Silverman and Neal Sobania, "Mining a Mother Lode: Early European Travel Literature and the History of Precious Metalworking in Highland Ethiopia", History in Africa, 31 (2004), p. 348; George A. Bournoutian, *A concise history of the Armenian people: (from ancient times to the present)*, (5<sup>th</sup> ed., Mazda Publishers, Inc. Costa Mesa California 2006), p. 354.

<sup>5</sup> Janice J. Bole, "Feast or Famine: Do Ethiopians Have a Choice?", DICK. J. INT'L L. 3 (1986), pp. 103-131.

<sup>6</sup> John Sorenson, "Ethiopia's Refugees", Refuge, Vol. 10, No. 4 (April 1991), pp. 1-5; Munzoul A. M. Assal, "Refugees From and To Sudan, A paper Prepared for the

Ethiopia was receiving refugees from neighboring countries whose conditions were worse than its own citizens. This continued in the time after the current regime came to power in 1991 by overthrowing the Socialist military junta. At the moment, the country hosts the largest number of refugees in Africa, with a record high number of more than 850,000 refugees, mainly from Eritrea, South Sudan, Somalia, Yemen, Burundi, Uganda, and DRC.<sup>7</sup>

This sizeable number may evidently be attributed to the fact that Ethiopia is located in a region often ravaged by natural and man-made disasters, including persistent drought, political oppression and civil war in neighboring countries and in the vicinity of the Horn of Africa. However, the country's usual open-door policy to refugees has also significantly contributed for the unceasing influx of refugees to its border. This policy stems from its humanitarian tradition and also in part, from the symbiotic relationship that, at times, existed between refugees and the country. Throughout its long history, Ethiopia benefited from the contribution of refugees and migrants and this has been reflected in the economic, social and cultural aspects of the country. The influence of the Greek, the Armenians, the Jews and the Arabs is still vivid in the art, religious, language and social life of Ethiopians.<sup>8</sup> In some cases, refugees played a crucial role to connect

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Migration and Refugee Movements in the Middle East and North Africa The Forced Migration & Refugee Studies Program", *The American University in Cairo*, (2007), p.3.

<sup>7</sup> UNHCR, "Ethiopia Fact Sheet February 2017", published on 28 February 2017, p. 1; see also UNHCR, "Ethiopia: Country Operations Plan 2008-2009", (<http://www.unhcr.org/protection/cops/46f90a6a2/unhcr-country-operations-plan-2008-2009-ethiopia.html>) last visited on 20 April 2017, Huaxia, "Ethiopia registers over 54,000 new refugees in first 5 months of 2017", *Xinhua News*, 18 June 2017, ([http://news.xinhuanet.com/english/2017-06/18/c\\_136375101.htm](http://news.xinhuanet.com/english/2017-06/18/c_136375101.htm)) last visited on 20 June 2017.

<sup>8</sup> In this regard, one should mention that the first Ethiopian marshal music band was established by Armenian refugees. Refugees also played a tremendous role in the development of agriculture and industry in the country. See Cynthia Tse Kimberlin, "Diverse Connections as a Model for the 21<sup>st</sup> Century Yared School of Music" in

Ethiopia, a country which largely remained a secluded nation, with the rest of the world and also helped the country in its fight against Italian invasion in early twentieth century.<sup>9</sup>

## **2. Ethiopia's Legal Framework to Protect Refugees**

The protection of refugees and the process of application for and granting of asylum in Ethiopia is governed by both international and domestic laws. International laws include treaties ratified by Ethiopia and customary rules of international law that regulate the rights and duties of asylum-seekers and refugees. On the other hand, the domestic laws of Ethiopia include its constitution, proclamations or other laws which have a direct or indirect bearing on the protection of refugees in the country.

### **2.1. International Treaties and International Customary Law**

At international level, Ethiopia is a State Party to the 1951 Refugee Convention<sup>10</sup>, and its 1963 Protocol<sup>11</sup> and the 1969 OAU Refugee

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Svein Ege, Harald Aspen, Birhanu Teferra and Shiferaw Bekele, Proceedings of the 16th International Conference of Ethiopian Studies, (Trondheim, 2009), pp. 1187-1188. See also Ellene Mocria, Mesfin Messele and Alemayehu Gebre Hiwot *Survey of Culture and Media, Background Documents Country Strategy Ethiopia*, (SIDA, 2003-2007), p. 11; Paul B. Henze, *The Horn of Africa: From War to Peace* (The Macmillan Press Ltd, 1991), p. 74.

<sup>9</sup> Russian refugees, for example, participated in the war against Italians invasion in the 1934-35. Paul B. Henze, *Ibid*.

<sup>10</sup> Convention relating to the Status of Refugees [*hereinafter*, 'the 1951 Refugee Convention'], adopted on July 28, 1951 by the U.N. Conf. of Plenipotentiaries on the Status of Refugees & Stateless Persons convened under U.N.G.A. Res. 429 (V) (Dec. 14, 1950), 189 U.N.T.S. 150 (entered into force on Apr. 22, 1954).

<sup>11</sup> Protocol Relating to the Status of Refugees [*hereinafter*, 'the Refugee Protocol'], adopted by U.N.G.A. Res. 2198 (XXI) (Dec. 16, 1966), Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

Convention.<sup>12</sup> As a Member State to the African Union, there are also some soft laws prepared under the auspices of the OAU (AU) where the country affirmed its commitment in these instruments.<sup>13</sup> Furthermore, Ethiopia is one of those pioneer countries which have ratified the major regional and universal human rights treaties that are applicable to all human beings including refugees. Among those with universal scope include the International Covenant on Civil and Political Rights (ICCPR)<sup>14</sup>, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>15</sup>, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>16</sup>, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>17</sup> At regional level, Ethiopia is a Party to the African Charter on Human and Peoples' Rights (AfCHPR).<sup>18</sup> Of the many rights that are potentially relevant to refugees in the Charter, the AfCHPR, distinct from other human rights treaties ratified by Ethiopia<sup>19</sup>, gives

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<sup>12</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969 [*hereinafter*, 'the 1969 OAU Refugee Convention/OAU Refugee Convention'].

<sup>13</sup> See Recommendations from the Pan-African Conference on the Situation of Refugees in Africa, Arusha (Tanzania), 17 May 1979, Organization of African Unity (OAU), Khartoum Declaration on Africa's Refugee Crisis, (24 September 1990), OAU Addis Ababa Document on Refugees and Forced Population Displacements in Africa (10 September 1994), African Parliamentary Conference, Refugees in Africa: The Challenges of Protection and Solutions, Cotonou, Benin, (1 - 3 June 2004).

<sup>14</sup> International Covenant on Civil and Political Rights (UN General Assembly, adopted on 19 December 1966).

<sup>15</sup> International Covenant on Economic, Social and Cultural Rights (UN General Assembly, adopted on 16 December 1966).

<sup>16</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (UN General Assembly, adopted on December 18, 1979).

<sup>17</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 (10 December 1984).

<sup>18</sup> African Charter on Human and Peoples Rights (adopted in Nairobi, June 27, 1981).

<sup>19</sup> The Universal Declaration on Human Rights (UDHR), for instance, only recognizes the right to 'seek and enjoy' asylum under article 14 (1). The Universal Declaration of

explicit recognition to the right to asylum<sup>20</sup> and prohibits mass expulsion in its strictest terms without exception.<sup>21</sup> In addition, Ethiopia is signatory to the 1949 Four Geneva Conventions and their 1997 Additional Protocols, which contain some provisions relevant to refugees in armed conflict situation.<sup>22</sup>

According to article 9 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), all international agreements ratified by Ethiopia form part and parcel of the law of the land.<sup>23</sup> Despite its resounding clarity, the actual effect of this provision has been

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Human Rights (UN General Assembly, adopted on 10 December 1948). Other relevant international instruments on asylum also fell short of fully codifying the right to asylum. See UN Declaration on Territorial Asylum, (GA Res 2312 (XXII), UNGAOR, 22d Sess. Supp. No 16, UN Doc A/6716, (1967)).

<sup>20</sup> Article 12 (3) of the Charter declares that ‘Every individual shall have the right, when persecuted to seek and *obtain* asylum in other countries in accordance with the law of those countries in accordance with the law of those countries and international conventions.’ (Emphasis added). Despite the relative clarity of this provision, scholars, by citing the limitation clause in the provision (i.e., in ‘accordance with the law of those countries and international conventions.’), have questioned the actual ramification of this provision. See for e.g., George Okoth-Obbo, “Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa”, Refugee Survey Quarterly (2001), vol. 20 (1), p. 89.

<sup>21</sup> Article 12 (5) of the Charter states that “The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups”.

<sup>22</sup> First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Third Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted on 8 June 1977).

<sup>23</sup> The Constitution of the Federal Democratic Republic of Ethiopia, 1995, article 9 (4), Proclamation No. 1/1995, Fed. Neg. Gaz., First Year, No. 1 (*hereinafter*, ‘the FDRE Constitution (1995)’).

a subject of intense debate among scholars.<sup>24</sup> The debate is provoked partly by the existence of another domestic legislation, the Federal Negarit Gazeta Establishment Proclamation No. 3/1995, which requires that ‘all laws of the Federal Government’ shall be published in the Federal Negarit Gazeta, the official law reporter of the Federal Government of Ethiopia.<sup>25</sup> On this basis and other provisions of the Constitution,<sup>26</sup> some scholars have argued that international treaties need to be first published in the Federal Negarit Gazeta for them to have the force of law in the country and that, in any event, remain subordinate to the Constitution.<sup>27</sup> Others have, on the contrary, forcefully averred that the requirement of publication is one of a procedural than substantive

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<sup>24</sup> Ibrahim Idris, “The place of international human rights conventions in the 1994 FDRE Constitution”, Journal of Ethiopian Law, vol. 20, 2000, p. 113-137; Adem Kassie, “Human Rights under the Ethiopian Constitution: a Descriptive Overview”, Mizan Law Review, vol 5, No.1 (2011); Getachew Assefa, “The Protection of Fundamental Rights and Freedoms in Ethiopian Federalism” (paper presented at the proceedings of the first national Conference on Federalism, Conflict and Peace Building, Addis Ababa, 2005), Sisay Alemahu Yeshanew, “The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia”, African Human Rights Law Journal, vol. 8 No. 2 (2008); Assefa Fiseha, “Federalism and the Adjudication of Constitutional Issues: the Ethiopia Experience”, Netherlands International Law Review, (2005).

<sup>25</sup> Article 2 (2) of the Federal Negarit Gazette Establishment Proclamation No. 3/1995 declares that, “all laws of the Federal Government shall be published in the Federal Negarit Gazeta”, and Article 2 (3) of the same states that “all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of laws published in the Federal Negarit Gazeta”. The Federal Negarit Gazeta Establishment Proclamation No. 3/1995, Fed. Neg. Gaz., 1<sup>st</sup> Year, No. 3. (1995)

<sup>26</sup> See article 71 (2) of the FDRE Constitution which proclaims that the President of the country shall proclaim international agreements approved by the House of Peoples’ Representatives in the *Federal Negarit Gazeta*.

<sup>27</sup> See Rakeb Messele, ‘Enforcement of Human Rights in Ethiopia. A Research Subcontracted by Action Professionals’ Association for the People’ (APAP, 2002), p. 15; Awol Alemayehu Dana, “The Right to Protection from Arbitrary Arrest and Detention under the Legal Framework of Federal Democratic Republic of Ethiopia (FDRE)”, Journal of Law, Policy and Globalization, ISSN, vol.48 (2016), pp. 32-33, 38.

one; thus, the fact that an international treaty is not published in the Federal Negarit Gazeta does not annul its force of law.<sup>28</sup>

This paper does not intend to enter into the debate and suffice it to say that, while the practical problems of applying international instruments by domestic courts are understandable, especially when they are not translated into domestic working languages, the debate on whether or not such instruments constitute 'laws' in the domestic system is unnecessary and otiose. This is because first, as stated above, the Constitution, which is the supreme law of the land<sup>29</sup>, categorically makes international instruments ratified by Ethiopia 'an integral part of the law of the land'. It is patently clear that by virtue of ratification, with no additional requirement of publication attached to it, any international agreement automatically assumes the status of a domestic law or becomes part of the Ethiopian legal system. The above mentioned Proclamation No. 3/1995 also talks about 'all laws of the federal government' and predicated on the literal formulation, one may further argue that international agreements ratified by Ethiopia constitute a separate legal regime in their own<sup>30</sup> and cannot be considered as 'laws of the federal government'<sup>31</sup>; hence, they do not require publication in the

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<sup>28</sup> See, for e.g., Sisay Alemahu, cited above at note 24, pp. 16-18.

<sup>29</sup> Article 9 (1) of the Constitution declares that "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." FDRE Constitution (1995).

<sup>30</sup> Peter Sekyere, Bossman Asare, "An Examination of Ethiopia's Anti-Terrorism Proclamation on Fundamental Rights", European Scientific Journal, vol.12, No.1, (2016), p. 3.

<sup>31</sup> One can find support to this argument in articles 2(3), 3 (1) and 6(1) (particularly, in the Amharic versions) of the Federal Courts Proclamation 25/1996 where the formulation "Laws of the Federal Government and international treaties" are used in a provision suggesting that the use of the expression 'laws of the federal government' by the legislature precludes international treaties. In the same sense, see Sisay Alemahu, *cited above* at note 24. However, the most recent proclamation establishing the Office of the Attorney General provides that "federal government laws" means proclamations,

Federal Negarit Gazeta for them to be considered as 'laws' or for the domestic courts to apply them. This Proclamation does not make publication in the Federal Negarit Gazeta a substantive *prerequisite* for executive, judicial or legislative organs to take judicial notice of international instruments ratified by Ethiopia. The Proclamation rather instructs these organs to consider and when necessary, apply all laws that are published in the Federal Negarit Gazeta. This is not tantamount to saying that such organs should not take judicial notice of international instruments unless they are published.

Indeed, the relatively recent jurisprudence of the Cassation division of the Federal Supreme Court, whose decision has a binding effect on all other federal and regional courts including on the regular division of the Federal Supreme Court<sup>32</sup>, affirms that domestic authorities shall take judicial notice of the international obligations of the country in their decisions.<sup>33</sup> It would also be strange and it is even difficult to conceive a situation where a domestic court may reject, for example, a case containing alleged human rights violations protected by an international

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regulations and directives issued by federal government organs empowered and includes international agreements ratified and acceded by Ethiopia". Proclamation No. 943/2016, A Proclamation to Provide for the Establishment of the Attorney General of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, No. 62, 2016.

<sup>32</sup> See Proclamation No. 454/2005, A Proclamation to Re-amend the Federal Courts Proclamation Number 25/1996, article 2 (1), Fed. Neg. Gaz., No. 42, (2005).

<sup>33</sup> In the case of *Mrs. Tsedale Demissie v Mr. Kiflie Demissie*, where the Plaintiff sought to be recognized as the lawful guardian of the child of the defendant, the cassation division of the Supreme Court in accordance with article 9(4) of the FDRE Constitution applied the international principle of 'the best interests of the child', directly citing the UN Convention on the Rights of the Child (1990). The Court made clear that international human rights instruments ratified by Ethiopia form part of the laws of the country pursuant to article 9 (4) of the Constitution. See *Mrs. Tsedale Demissie v Mr. Kiflie Demissie*, (Ethiopian Supreme Court, Cassation Division, No. 23632, 2007), Ethiopian Supreme Court, Cassation Division, p. 3. See also an earlier case: *House of Peoples' Representatives and House of Federation v Dr Negaso Gidada*, (Federal Supreme Court Cassation Division, Files 22980 & 22948, 25 October 2006) (unpublished).

human rights treaty ratified by Ethiopia on the basis that such treaty is not published in the Federal Negarit Gazeta. Even though publication were to be a substantive requirement, it is the duty of the State but not the individuals to publish laws and the failure of the State to do so should in no way be invoked to the detriment of individuals.<sup>34</sup> This is the general spirit of the Constitution<sup>35</sup> and is also consistent with the nature of international obligations the legal status of which cannot be qualified by a domestic law and which rather shall always be discharged in good faith.<sup>36</sup>

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<sup>34</sup> In the same sense, see Sisay Alemahu, cited above at note 24.

<sup>35</sup> Article 13(1) of the FDRE Constitution (1995). This provision reads as follows: “All Federal and State legislative, executive, and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter.” Further, article 13(2) also adds that “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.” This latter provision even seems to suggest that, despite article 9(1)’s clear declaration that the Constitution is the supreme law of the land, international treaties have prominence over any domestic law when it comes to the interpretation of human rights contained in the Constitution. The expression “in a manner conforming to the principles of...international instruments adopted by Ethiopia” clearly signals the Constitution’s self-abdication of its supreme status with regard to issues of human rights. In the same sense, see Tsegaye Regassa, “Making Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia”, *Mizan Law Review*, 3, no. 2 (2009), p. 301, foot note no. 53; Ibrahim Idris (2000), cited above at note 24, p.113. However, Adem Kasie argues that article 13(2) only talks about general “principles” as opposed to “provisions” of international human rights instruments and as such, this provision does not indicate that the Constitution is subordinate to international human rights treaties even in relation to the interpretation of human rights. Adem Kassie (2011), cited above at note 24, p. 48.

<sup>36</sup> See articles 26 and 27, Vienna Convention on the Law of Treaties (adopted in 1969), UN Human Rights Committee, General Comment 3, Article 2 Implementation at the national level (Thirteenth session, (1981), para. 1. See Peter Sekyere, Bossman Asare, “An Examination of Ethiopia’s Anti-Terrorism Proclamation on Fundamental Rights”, *European Scientific Journal*, January 2016, p. 357; Takele Soboka Bulto, “The Monist-Dualist Divide and Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia”, *Journal of Ethiopian Law*, vol. 23, no.1. (2009), pp. 138-146.

## **2.2. The Application of International Legal Instruments on Refugees in the Ethiopian Legal System**

Be the argument on the status of international instruments in Ethiopia as it may, in so far as the refugee instruments are concerned, whether refugees and asylum seekers seeking refuge in the country can directly benefit from international instruments ratified by Ethiopia appears to be beyond question. As elaborated below, the Ethiopian Refugee Proclamation No. 409/2004, not only substantially replicates these instruments but also clearly stipulates that refugees in Ethiopia benefit from other rights and owe duties contained in international and regional refugee conventions to which Ethiopia is a State Party, notably, the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention.<sup>37</sup> Consequently, whatever right is enshrined in these instruments could be asserted by a person who has sought refuge in Ethiopia.

## **2.3. Reservations to the 1951 Refugee Convention**

It shall be noted that while depositing its instrument of signature, Ethiopia has made reservations to some provisions of the 1951 Refugee Convention<sup>38</sup> and later retained the same in the 1967 Refugee Protocol. These provisions are

- Articles 8 – requiring State Parties not to impose exceptional measures on refugees simply on the basis of their nationality (being a citizen of a foreign State);
- Article 9- which allows State Parties to impose provisional measures on refugees in times of grave and exceptional

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<sup>37</sup> See Proclamation No. 409/2004, article 21 (1) (d).

<sup>38</sup> Article 22, Vienna Convention on the Law of Treaties (1969).

circumstances where this is necessary in the interests of national security;<sup>39</sup>

- Article 17 (2) – concerning exemption of refugees from restriction on wage- earning employment; and,
- Article 22 (1) - access to education accorded to refugees in a manner not less favorable than aliens.

In its instrument of ratification, Ethiopia indicated that it would consider these provisions “as recommendations and not as legally binding obligations.”<sup>40</sup> In accordance with the ordinary rule of international law regulating reservations to treaties, such provisions would thus not bind Ethiopia and, consequently, their applicability lies within the discretion of the country.<sup>41</sup> All the same, the reservations cannot be invoked to apply the provisions in a manner that defeats the very object and purpose of the convention.<sup>42</sup>

It is significant to note that, apart from the above international treaties, international customary rules of international law are additional sources

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<sup>39</sup> Considering that this provision is rather permissive, coined in favor of and with a wide margin of discretion granted to State Parties, than a prohibitive one, it is difficult to decipher why Ethiopia made a reservation to it and which aspect of the provision is the subject of the reservation. There is nothing stated in its instrument of ratification. One possible explanation is that the reservation was made with respect to the requirements of showing the existence of ‘necessity’ and ‘war and grave and exceptional circumstance’, as these requirements set a high bar on circumstances that State Parties may have recourse to provisional measures. The reservation may also be directed to the fact that article 9 is only applicable to a particular person thereby precluding the possibility of imposing provisional measures on a group. See Atle Grahl-Madsen, Commentary on the Refugee Convention 1951, Articles 2-11, 13-37 (Published by the Division of International Protection of the United Nations High Commissioner for Refugees October 1997”), pp. 27-28.

<sup>40</sup> UNHCR, Reservations to the 1951 Refugee Convention, pp. 7-8, available at (<http://www.unhcr.org/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html>) last visited on 1 July 2017.

<sup>41</sup> Article 21, Vienna Convention on the Law of Treaties (1969).

<sup>42</sup> Article 19 (c), *Ibid.*

of the Ethiopian refugee law. By their very nature, customary rules of international law are applicable to all States despite the absence of any express consent given thereto.<sup>43</sup> Consequently, in so far as international or regional customary laws are concerned, the fact that Ethiopia never explicitly agreed to such laws does not diminish its responsibility towards refugees, unless it can be demonstrated that it was one of the so called ‘persistent objector’ against the formation of such laws.<sup>44</sup> However, most of the international customary rules protecting refugees are, in one way or the other, incorporated in or have evolved from the treaties to which Ethiopia is already a Party. It is therefore unlikely that Ethiopia could easily shun its responsibility under international customary law by citing the principle of a persistent objector, and I also know of no circumstance that it has ever done so in the past.

#### **2.4. Domestic Refugee Laws of Ethiopia**

In addition to international treaties and customary rules of international law, Ethiopia has some domestic laws relevant to the protection of refugees in the country. The major national refugee law, which is the primary focus of this contribution, is Refugee Proclamation No. 409/2004. Other domestic laws that may have considerable impact on the protection of asylum-seekers and refugees in Ethiopia also include the 1994 FDRE Constitution, Proclamation No 378/2003 on Ethiopian Nationality<sup>45</sup> and Immigration Council of Ministers Regulation No. 114/2004<sup>46</sup>. The Constitution contains several provisions applicable to ‘everyone’ or ‘all persons’ within the jurisdiction of Ethiopia regardless

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<sup>43</sup> Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (1986), *I.C.J. Reports*, paras. 183-186.

<sup>44</sup> Anglo Norwegian Fisheries Case (UK vs Norway), (1951), *I.C.J. Rep.* 116, p. 21.

<sup>45</sup> Proclamation No 378/2003, A Proclamation on Ethiopian Nationality, Fed. Neg. Gaz., 10<sup>th</sup> Year No. 13, vol. 23 (2003), pp. 2505-2511.

<sup>46</sup> Immigration Council of Ministers Regulation No. 114/2004, Fed. Neg. Gaz., 11<sup>th</sup> Year No. 4 (2004), pp. 2918-2928.

of their legal status (i.e., whether they are refugees or not).<sup>47</sup> In the same vein, Proclamation No. 378/2003 has rules governing circumstances where ‘any foreigner’- this theoretically includes refugees- may acquire Ethiopian nationality<sup>48</sup>, and Regulation No. 114/2004 provides for rules concerning travel documents for refugees.<sup>49</sup> Accordingly, a complete analysis of the Ethiopian refugee law may only be made with reference to these domestic laws. Nevertheless, this article does not seek to offer a complete account of all these laws and reference to these laws is made when it deems appropriate and to the extent it is relevant to expound on the provisions of the Refugee Proclamation.

### **3. The Ethiopian Refugee Proclamation No. 409/2004**

#### **3.1 The Genesis of the Refugee Proclamation and its *Raison d’être***

Although Ethiopia has always been a safe haven to asylum-seekers and refugees, it never had a comprehensive legal framework to manage issues of refugees for a long time until the Ethiopian parliament decided to enact the Refugee Proclamation No. 409/2004 in June 2004. Prior to this time, Ethiopia simply had neither concrete national policies nor rules to regulate situations of asylum-seekers and refugees. Given the

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<sup>47</sup> The right to life, the security of a person, and liberty (articles 14-17), protection against inhuman treatment (article 18), rights of arrested and accused persons (articles 19 and 20), right of persons held in custody and convicted persons (article 21), prohibition against non-retroactive application of criminal law and double jeopardy (articles 22 and 23), right to honour and reputation (article 24), right to privacy (article 26), freedom of religion, belief and opinion (article 27), freedom of thought, opinion and expression (article 29), Freedom of assembly, demonstration and petition (article 30), freedom of association (article 31), freedom of movement (article 32), marital, family and personal rights (article 34), the right to access to justice (article 37) are those rights that the Constitution guarantees to ‘everyone’ or ‘every person’. The Constitution has also provisions on the rights of specific vulnerable groups, namely, women and children (article 35 and article 36, respectively).

<sup>48</sup> Article 4, Proclamation No 378/2003 cited above at note 45.

<sup>49</sup> Article 10, Regulation No. 114/2004, cited above at note 46.

country's long history of welcoming and hosting thousands of refugees and its membership to the major international refugee instruments<sup>50</sup>, this lack of domestic legal regime was astonishing and unfortunate, as refugees sometimes ended up being victims of treatments that fell short of international standards.<sup>51</sup> With the dramatic increase of the number of refugees coming from neighboring countries in the late 1990s and the country having faced the inevitable administrative problems in handling asylum applications during the first years of the 21<sup>st</sup> century<sup>52</sup>, the enactment of the Refugee Proclamation thus came as no surprise. It was a direct response to these challenges that were largely occasioned by a glaring normative gap in the domestic law, which had already drawn serious criticisms condemning the precarious situation that the refugees were facing as a result of this gap.<sup>53</sup>

The enactment of the Refugee Proclamation was the culmination of a long legislative process<sup>54</sup> and the result of extensive efforts made by the Ethiopian government to come up with a national law that would incorporate the main universal and regional refugee protection norms into domestic law. The legislative move was also prompted by the need to have clear and detailed provisions for a thorough refugee status determination procedure. At the drafting stage of the Proclamation, the government sought views and technical assistance from different stakeholders including the United Nations High Commissioner for

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<sup>50</sup>Article 35 (2) (c) and article 36 of the 1951 Refugee Convention, for example, anticipate that State Parties would adopt laws and regulations to ensure its application at the domestic level.

<sup>51</sup> Kibret Markos, "The Treatment of Somali Refugees in Ethiopia under Ethiopian and International Law", *Int. J. Refugee Law* (1997) 9 (3): 365-391; Michael J. Toole, Rita Bhata, "A Case Study of Somali Refugees in Hartisheik A Camp, Eastern Ethiopia: Health and Nutrition Profile, July 1988-June 1990", *J. Refug. Stud.* (1992), pp. 313-326

<sup>52</sup> See UNHCR, Country Reports: Ethiopia, 1999-2003.

<sup>53</sup> Kibret Markos, cited above at note 51, pp. 365-391.

<sup>54</sup> The first initiative to have national refugee legislation probably goes back to earlier time but serious efforts to that effect were only made in the closing years of the 1990s.

Refugees (UNHCR).<sup>55</sup> The UNHCR submitted its comments and many of its observations were later accommodated in the final draft.<sup>56</sup> The government's attempt to involve UNHCR during the drafting process was a commendable step and demonstrates a good example of the kind of cooperation envisaged under article 35 of the 1951 Refugee Convention between State Parties and the United Nations.

The Proclamation is divided into five parts: the first part consists of two articles mainly devoted to definitional provisions that clarify the meaning of key terms and notions used in the subsequent parts. The second part is dedicated to those general principles fundamental to international refugee protection and contains a total of ten articles. On the other hand, part three of the Proclamation provides detailed procedures of application for and determination of refugee status and has seven articles. The fourth part specifies the rights and duties of both asylum-seekers and refugees and touches upon issues of durable solutions whereas the last (fifth) part provides miscellaneous provisions prescribing the full force of the proclamation and repeal of other previous laws which are inconsistent with the provisions of the proclamation.

The preamble of the Refugee Proclamation sets forth its goals, and its clauses evidence the country's longstanding liberal policy towards refugees. It forcefully affirms Ethiopia's international commitment to 'providing asylum and protection to refugees' and recalls the country's

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<sup>55</sup> UNHCR is the UN Special Agency for refugees and its mandate, among others, includes provision and promotion of international protection of refugees, assisting in the search for durable solutions for forcefully displaced persons and supervision of the implementation of international refugee instruments. See Statute of the Office of the High Commissioner for Refugees, para. 9, Annex to the UN General Assembly Resolution 428 (V) of 14 December 1950, para. 1, see also articles 35, 36, the 1951 Refugee Convention.

<sup>56</sup> UNHCR, Country Report: Ethiopia, 2000, p. 140.

obligations in the 1951 UN Refugee Convention, its 1967 Protocol and the 1969 OAU Refugee Convention.<sup>57</sup> It identifies the very reason for its enactment as the desire to guarantee ‘the effective implementation of [these] international legal instruments, establish a legislative and management framework for the reception of refugees, ensure their protection, and promote durable solutions whenever condition permit’.<sup>58</sup> Accordingly, its clear purpose is to facilitate the process of refugee status determinations, granting of refuge and protection for deserving persons and reaching durable solutions for them when warranted by the circumstances.<sup>59</sup>

### **3.2. The Personal Scope of Application of the Refugee Proclamation**

The fact of being a refugee is a legal status giving rights and duties to the persons who acquire such status. The institution of asylum, as exclusively humanitarian as it sounds, is not designed to cover all situations or persons in need of a humanitarian protection. Instead, it is a product of both the tenets of humanitarianism and pragmatism- protection is only extended to those people who absolutely deserve it. Within this general spirit, both the 1951 Refugee Convention and the 1967 Refugee Protocol apply to specific individuals who have fled their country of nationality or habitual residence as a result of being persecuted for reasons of their race, religion, nationality, membership of a particular social group or political opinion.<sup>60</sup> On the other hand, the 1969 OAU Refugee Convention broadens the definition of a refugee and extends its protection to persons who have fled their country due to ‘external aggression, occupation, foreign domination or events seriously disturbing

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<sup>57</sup> Preambular paras. 1-2, the Refugee Proclamation.

<sup>58</sup> Preambular paragraph 3, *Ibid.*

<sup>59</sup> Article 1 A (2), *Ibid.*

<sup>60</sup> Article 1 (A) (2), the 1951 Refugee Convention, article I (2), the 1967 Refugee Protocol.

public order in either part or the whole of his country of origin or nationality'.<sup>61</sup> The definition in the latter reflects and is clearly dictated by Africa's grim past and present reality where colonization, war, natural catastrophe, and other forms of internal violence have resulted in large number of refugees on the continent.<sup>62</sup> Unlike in the 1951 Refugee Convention and the 1967 Refugee Protocol, persecution is not the only ground, but one among many other reasons that force people to flee their country, for a person to have a refugee status in the OAU Refugee Convention.<sup>63</sup>

Interestingly, the Ethiopian Refugee Proclamation combines the above two definitions, albeit with a slight amendment to that of the OAU Refugee Convention. A quick glance of article 4 of the Proclamation evidently reveals both Ethiopia's unwavering commitment to the protection of refugees and its strong will to abide by its international obligations. This provision proclaims that any person is considered as a refugee when:

- 1) 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

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<sup>61</sup> Article 1 (2), the 1969 OAU Refugee Convention. This has been used as a model for the Cartagena Declaration on Refugees in the Latin America region. See OAS, Annual Report of the Inter-American Commission on Human Rights, 1984-1985, OR OEA/Ser.L/V/II.66/Doc.10, rev.1 (1985) chapter V(IV), "Declaration of Cartagena", para 3.

<sup>62</sup> There are also no requirements of 'deliberateness or discrimination inherent in the 1951 Refugee Convention'. Medard RK Rwelamira, "Some Reflections on the OAU Convention on Refugees: Some Pending Issues" (1983) 16:2 *Comp & Int'l LJ S Afr*, pp. 166-167; Andrew E. Shacknove, "Who Is a Refugee?" *Ethics*, Vol. 95, No. 2 (Jan., 1985), pp. 275-276; Ruma Mandal, "Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")", Legal and Protection Policy Research Series, (Geneva: UNHCR Department of Internal Protection, 2005) at 13, online: UNHCR: The UN Refugee Agency (<http://www.unhcr.org/435df0aa2.pdf>) last visited on 22 June 2017.

<sup>63</sup> *Ibid.*

- unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
- 2) 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, or
  - 3) 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, in case of refugees coming from Africa.

The first two paragraphs embody the ‘common thread’ that runs through the refugee definitions existing in the 1951 Refugee Convention, the 1967 Refugee Protocol and the 1969 OAU Refugee Convention, whereas the third paragraph adopts the unique features existing only in the latter. The Refugee Proclamation accordingly applies not only to persons who are persecuted and forced to live outside their country of origin because of their ‘race, religion, nationality, membership of a particular social group or political opinion’ but also to those who seek a humanitarian sanctuary in another country as a result of foreign aggression, occupation or events seriously disturbing public order in the country of origin.<sup>64</sup> A person becomes a refugee within the meaning of the Proclamation, as soon as he fulfils these criteria even though his status is yet to be formally endorsed by the relevant authorities.<sup>65</sup> The Proclamation also recognizes the idea of *prima facie* refugees where a class

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<sup>64</sup> In the latter case, individuals seeking asylum in Ethiopia do not need to prove that there exists a persecution directed at them; the mere demonstration that their flight was caused by the existence of a general objectively verifiable situation of foreign aggression or occupation or of events disturbing public order is adequate.

<sup>65</sup> “Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee”. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979), para. 28.

of asylum seekers may be declared to be ‘refugees’ without making an individualized status determination.<sup>66</sup> In comparison to some other domestic laws, the personal scope of application of the Refugee Proclamation is thus laudably broad.<sup>67</sup> Notwithstanding this, the definition of the refugee in the proclamation exhibits some obvious pitfalls and specificities worth commenting.

First, even though the Proclamation follows the expansive definitional approach of the OAU refugee convention, article 4 (3) has qualified the personal domain of its application by including the restrictive clause ‘refugees coming from Africa’. This clause precludes those individuals who are displaced from a non-African country of origin due to reasons of foreign aggression, occupation and events seriously affecting public order. In the Proclamation, these people qualify neither as a refugee proper or a *prima facie* refugee whether they arrive individually or in a group. In view of Ethiopia’s historical and present-day generosity to refugees and commitment to its international obligations, the inclusion

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<sup>66</sup> Article 19 of the Proclamation. Conceptually, the *prima facie* idea “refers to the *provisional* consideration of a person or persons as refugees without the requirement to complete refugee status determination formalities to establish definitively the qualification or not of each individual.” See George Okoth-Obbo, cited above at note 20, p. 119. However, neither the Proclamation nor the practice in Ethiopia suggests that the status of persons who were declared refugees on *prima facie* basis could be reconsidered at a later stage. In practice, once the *prima facie* refugee status is granted, it often remains permanent unless and until the refugee status is cancelled or terminated for other reasons such as the existence of one or more of exclusion or cessation grounds.

<sup>67</sup> For example, the Kenyan Refugee Act of 2006 gives only a *prima facie* refugee status to a person who was forced to leave his country owing to the existence of foreign aggression, occupation and violence in his country. In contrast, the Refugee Proclamation considers the same as a refugee, but not merely ‘a *prima facie* refugee’. (See article 3 (2), Kenyan Refugee Act No. 13 of 2006). However, one can also compare that the Proclamation contains a narrower definition of refugees compared to the South African Refugee Act of 1998, which automatically grants refugee status to dependents of refugees. See South Africa: Act No. 130 of 1998, Refugee Act, 1998 [South Africa], article 3 (c), 26 November 2008.

of this restrictive clause is unfortunate. If ever it is implemented, its application also potentially raises a considerable legal problem in practice. Both the 1951 Refugee Convention and the 1967 protocol expressly forbid discrimination on the basis of 'country of origin' and the OAU Convention itself does not have such clause.<sup>68</sup> The major international human rights treaties to which Ethiopia is a State Party also contain provisions against any form of discrimination exclusively on the basis of national origin.<sup>69</sup> Similarly, the Ethiopian Constitution requires

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<sup>68</sup> Article 3 of the 1951 Refugee Convention declares that "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or *country of origin*". However, the 1951 Refugee Convention and the 1967 Refugee Protocol apply only to those refugees dislocated from their country of origin by persecution for reasons of race, religion, political opinion, membership to a particular social group or nationality. Other grounds of such as foreign aggression, occupation or events disturbing public order are not valid grounds to acquire a refugee status under these instruments. Moreover, article 3 applies only to those persons who already fulfill the refugee criteria and are by definition, refugees. From this, it may be submitted that the prohibition of non-discrimination on the basis of country of origin enshrined in these instruments is not applicable to those persons who fled their countries because of foreign aggression, occupations or factors affecting public order. Further, the non-discrimination provision of the OAU Refugee Convention (article 3) does not specify 'country of origin' in its list of prohibited grounds of discrimination. One may thus contend that the Refugee Proclamation does not in fact contravene the international refugee instruments by introducing unbeknown clause of 'refugees coming from Africa'. Yet, it is unlikely that a differential treatment of refugees on this ground would pass standards of non-discrimination in international human rights treaties Ethiopia is a party and customary international law.

<sup>69</sup> Article 26, ICCPR; article 2, ICESCR; article 2 AfCHPR, see also the International Convention on the Elimination of All Forms of Racial Discrimination Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) (21 December 1965 entry into force 4 January 1969). In armed conflict situations, article 44 of the Fourth Geneva Convention (1949) also prohibits discriminatory treatments against enemy alien refugees solely predicated on '*de jure*' nationality. A similar provision exists under article 8 of the 1951 Refugee Convention, which stipulates that 'With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.'

equal treatment of ‘all persons’ without discrimination on grounds of, *inter alia*, nationality.<sup>70</sup> Moreover, Ethiopia is currently hosting nearly two thousand refugees who have been uprooted by the ongoing armed conflict in Yemen despite the fact that they are not ‘refugees coming from Africa’.<sup>71</sup> The introduction of this restrictive clause in article 4 (3) is therefore likely to run counter to the obligation of Ethiopia in international law and certainly, it is incompatible with the country’s practice of according asylum to all persons who need it irrespective of their national origin. A revision of the Proclamation in the future should definitely excise this clause.<sup>72</sup>

Secondly, the Proclamation’s explicit recognition of the concept of a *prima facie* refugee is estimable.<sup>73</sup> It is congruent with the demands of humanitarianism and dictates of pragmatism. Most of the refugees in Ethiopia come from neighboring countries such as South Sudan and Somalia who flee *en masse* from war, famine, and tribal violence, and this

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<sup>70</sup> Article 25 of the FDRE Constitution (1995).

<sup>71</sup> At the beginning of 2017, Ethiopia received and granted refugee status for over 1600 Yemenis. UNHCR, Ethiopia: Refugees and Asylum-Seekers as of 31 January 2017, February 2017 ([http://reliefweb.int/sites/reliefweb.int/files/resources/Infographics\\_Ethiopiaasof31January2017.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Infographics_Ethiopiaasof31January2017.pdf)), last visited on 19 April 2017, UNHCR, Ethiopia, Fact Sheet, (2016), p. 2 available at: (<http://reliefweb.int/sites/reliefweb.int/files/resources/EthiopiaFactSheetApril.pdf> ) last visited on April 2017; see also ‘Close to 800 Yemeni nationals flee to Ethiopia’ ([https://www.diretube.com/articles/close-to-800-yemeni-nationals-flee-to-ethiopia\\_10760.html](https://www.diretube.com/articles/close-to-800-yemeni-nationals-flee-to-ethiopia_10760.html)), last visited on 23 May 2017.

<sup>72</sup> However, it should be noted that such limitation clause applies only with respect to those persons falling under article 4 (3), not with respect to article 4 (1) and (2).

<sup>73</sup> Neither of the existing international refugee instruments has an explicit provision concerning *prima facie* refugees. There are only some guidelines on *prima facie* recognition of refugee status prepared by UNHCR. See UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/115 June 2015.

has often created a mass influx situation at the country's border.<sup>74</sup> As it is usually the case, individualized assessment and refugee status determination are often impractical during mass influx situations. In this circumstance, granting a *prima facie* refugee status, on the basis of an assessment of the objective situation in the country of origin<sup>75</sup>, to those who appear to have satisfied the general refugee criteria would help the refugees to get the much needed humanitarian protection in good time. It also spares the country from the inevitable difficulties that stem from an individual screening process in a moment of sudden humanitarian crisis. However, the Refugee Proclamation limits the possibility of granting a refugee status based on a *prima facie* approach only to those refugees uprooted by external aggression, occupation or events disturbing public order.<sup>76</sup> Further, getting a *prima facie* refugee status is not an automatic right. Article 19 of the Proclamation gives the discretion to the Head of the Security, Immigration and Refugee Authority (*bereinafter*, 'the Authority') to examine whether or not a group of asylum-seekers may be declared as *prima facie* refugees. Despite such huge latitude of discretion, both reason and logic demand that the Head

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<sup>74</sup> According to UNHCR, for example, between 1 and 11 March 2017, a total of 7,258 South Sudanese arrived at the Ethiopian border with a daily arrival rate of over 661 refugees. UNHCR, South Sudan Situation - Ethiopia Update, 17 March 2017, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/BriefingNoteSouthSudanSituation17March2017.pdf>

<sup>75</sup> See UNHCR, Guidelines on International Protection No. 11, cited above at note 73. See also UNHCR, Protection of Refugees in Mass Influx Situations: Overall Protection Framework, 19 February 2001, EC/G C/01/4, para. 6. available at: <http://www.unhcr.org/3ae68f3c24.html> last visited on 1 July 2017.

<sup>76</sup> Article 19 read together with article 4 (3) of the Proclamation. Although a *prima facie* refugee status is generally applicable to *mass influx* situations, it may also apply to individuals who met the criteria under article 4 (1) and (2). (See UNHCR, Guidelines on International Protection No. 11 (2015), *cited above* at note 73, paras. 2 and 25). Article 4 (3) of the Proclamation itself talks about an individual (see "*his* place of habitual residence ... *his* country of origin ...") (emphasis added). It thus appears that it was not strictly necessary to limit the application of a *prima facie* approach only to those persons covered under article 4 (3) of the Proclamation.

of the Authority should normally make decision upon full considerations of various factors including the urgency of the need for a humanitarian response, potential security concerns to the country, the general objective realities in the country of origin and the possibility of conducting individual status determination without affecting the wellbeing of the refugees.

It is worthy of note that the Proclamation's personal scope of application does not extend to persons who are eligible to benefit from the subsidiary protection scheme available in the European Union's asylum law.<sup>77</sup> This appears to be a deliberate omission, as article 4 (3) of the Proclamation covers most persons who may qualify for subsidiary protection in the EU law. The only difference between the EU Qualification Directive (2011) - the legislation that governs the European system of subsidiary protection, and the Proclamation is that the former does not require the existence of foreign aggression, occupation or events seriously disturbing public order in order for persons to be eligible for subsidiary protection.<sup>78</sup> This precisely means that a person who would likely 'face a real risk of suffering' in his country of origin for reasons not related to foreign aggression, occupation or events seriously disturbing public order may theoretically be denied protection under the Proclamation.

Nevertheless, in practice, the chance that any person facing 'a real risk of suffering' may be refused asylum or protection in Ethiopia is very slim.

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<sup>77</sup> Pursuant to the European Qualification Directive 'subsidiary protection' may be given to "a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown to believe that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face *a real risk of suffering serious harm* ... , and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country". See article 2 (f), EU Qualification Directive 2011/95/EU of 13 December 2011.

<sup>78</sup> *Ibid.*

This is because the phrase ‘events seriously disturbing public order’ is an open and broad formulation, and could accommodate several instances such as civil war and environmental crisis, which may engender ‘real risk of suffering’ in the country of origin.<sup>79</sup> Besides, as we will see below, the principle of *non-refoulement*, in the refugee conventions and international human rights conventions ratified by Ethiopia, proscribes the removal of individuals to places where they may risk persecution or serious violations of their rights and freedoms.<sup>80</sup> A person who faces ‘a real risk of suffering’ in the country of origin is thus unlikely to be sent back on the basis that he does not fulfill the refugee criteria set out under article 4 of the Proclamation. Accordingly, it may be submitted that the Proclamation, more or less, accords asylum-seekers comparable degree of international protection available in the EU asylum law.

It should also be pointed out that article 4 (3) does not require that ‘events seriously disturbing public order’ should affect the whole country of origin. As long as an asylum-seeker vindicates that his flight was caused by such events, whether or not the serious disruption of public order occurred ‘in either part or the whole of his country of origin’, it does not seem to have much importance.<sup>81</sup> In other words, the

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<sup>79</sup> The Arab Convention on Refugees, for example, explicitly mentions “the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof.” (Article 1, League of Arab States, *Arab Convention on Regulating Status of Refugees in the Arab Countries*, 1994). As some of the asylum-seekers from Somalia in Ethiopia are partly dislocated by recurrent deadly drought, there is no reason why such environmental refugees may not be covered under ‘events seriously disturbing public order’.

<sup>80</sup> See section 3.5.1 below.

<sup>81</sup> The Amharic version, however, seems to give more emphasis to the partial or complete disruption of the public order rather than the territory. Pursuant to the Federal Negarit Gazeta Establishment Proclamation No. 3/1995, the Amharic version of all laws published in the Federal Negarit Gazeta is more authoritative and prevails over the English version. Yet, article 4 (3) is a direct replication of article 1 (2) of the OAU Refugee Convention and accordingly, one may still maintain that the geographical domain of the events, whether it covers part or the entire of the country of origin, is of little significance.

Authority may not deny a refugee status to a person relying upon the possibility of ‘internal flight’ or ‘internal relocation’ in the country of origin. As the application of the ‘internal flight alternative’ has often proved to be problematic in practice,<sup>82</sup> this aspect of article 4 (3) may thus be taken as one of the normative strengths of the Refugee Proclamation.

### **3.3. Exclusion from Refugee Status**

Asylum is fundamentally a humanitarian institution whose primary purpose is to give individuals respite from their humanitarian plight.<sup>83</sup> This implies that individuals who endanger its civilian and humanitarian character cannot benefit from it. It is commonly said and rightly so that ‘a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.’<sup>84</sup> Predicated on this general wisdom, all the international refugee instruments ordain that individuals who, due to their conduct, abuse the institution of asylum are undeserving of international protection and shall be excluded from [acquiring] a refugee status.<sup>85</sup> In the same way, the Ethiopian Refugee Proclamation specifies four instances where a person seeking asylum in Ethiopia shall be denied refugee status. Pursuant to article 5 of the Proclamation, a person shall

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<sup>82</sup> For a detailed examination of the matter, see Hathaway, James C. M.Foster, “Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination” in E. Feller et al., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge: Cambridge Univ. Press, 2003), pp. 357-417.

<sup>83</sup> This is reflected in the international refugee conventions. See the 1951 Refugee Convention, Preambular para. 6, and 1969 OAU Refugee Convention, article 2 (2). See also UNHCR, Executive Committee Conclusions on the civilian and humanitarian character of asylum No. 94 (LIII) (2002).

<sup>84</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979), para. 56.

<sup>85</sup> Article 1(F) 1951 Refugee Convention, and article I (5) of the OAU Refugee Convention.

be excluded from refugee status if there are serious reasons to believe that (i) 'he has committed a crime against peace, a war crime or crime against humanity'; (ii) 'he has committed a serious non-political crime outside Ethiopia prior to his entry into Ethiopia'; (iii) 'he has been guilty of acts contrary to the purposes and principles of United Nations or the (O)AU'; or (iv) 'having more than one nationality, he has availed himself of the protection of one of the countries of which he is a national and has no valid reason for not having availed himself of its protection'.<sup>86</sup>

The first three circumstances of exclusion are directly cribbed from the exclusion clauses of the 1951 Refugee Convention and the 1969 OAU Refugee Convention.<sup>87</sup> The last ground of exclusion is rather a unique addition we find only in the Proclamation. The drafters seem to have derived it from article 1(A) (2) the 1951 Refugee Convention and article I (3) of the OAU Refugee Convention which declare that:

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

According to this provision, a person with a dual or multiple nationality cannot be considered to have fulfilled the refugee criterion of 'inability or unwillingness to avail himself of the protection of his country' if he, without cogent reasons, fails to avail himself of the protection of one or more of the countries of which he is a national. The direct consequence of this is that such person shall not be granted refugee status simply because he is not *in need* of international protection. This shall be distinguished from cases of exclusion where persons who otherwise

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<sup>86</sup> Article 5 of the Refugee Proclamation.

<sup>87</sup> Article 1(F) 1951 Refugee Convention, and article I (5) of the OAU Refugee Convention.

fulfill the refugee criteria (and indeed are *in need* of international protection) but are excluded from refugee status because they are undeserving of international protection.<sup>88</sup> If a person with dual or multiple nationalities, without adequate reason, fails to avail himself of the protection of one of his countries of nationality, he may not be considered as a refugee *from the onset*, and accordingly, the issue of exclusion from a refugee status should not arise. However, the Refugee Proclamation has mixed up these two distinct concepts by making a refugee criterion (i.e., with respect to those persons not in need of international protection) an exclusion ground (i.e., those undeserving refugees). It is evidently a drafting problem and requires revision in future amendment ventures.

In applying the exclusion clauses, one should bear in mind the particularly grave consequences that exclusion occasions to the refugees. The refugee conventions and the Refugee Proclamation clearly make exclusion a mandatory exercise once one of the factors of exclusion are believed to be available with respect to a particular refugee.<sup>89</sup> This entails that an excluded person may not be accepted as a refugee anywhere else nor receive any assistance from UNHCR; the reason being that doing so, would jeopardize the integrity of the institution of asylum.<sup>90</sup> If he has

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<sup>88</sup> James C. Hathaway, Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2014), p. 529; UNHCR, “Guidelines on International Protection, Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees HCR/GIP/03/05”, UNHCR (4 September 2003), p. 2.

<sup>89</sup> This can be gleaned from the formulation “*shall* not be considered as a refugee...” in article 5 of the Refugee Proclamation and “...this Convention *shall* not apply to any person...” in article 1 (A) F 1951 Refugee Convention and article I (5) of the OAU Refugee Convention (emphasis added). See also James C. Hathaway and Michelle Foster, *Ibid*, p. 527. However, this does not prevent States from granting stay for excluded persons on other grounds. See UNHCR, Guidelines on Application of the Exclusion Clauses (2003), *Ibid*, paras. 8-9.

<sup>90</sup> ‘...refugee status has to be protected from abuse by prohibiting its grant to undeserving cases. Due to serious transgressions committed prior to entry, the

already been granted refugee status, it shall be immediately revoked.<sup>91</sup> The fact that he might be at risk of persecution is an immaterial consideration so long as there are serious reasons to believe that he was involved in the commission of either of the aforementioned prohibited acts.<sup>92</sup> Nor does his exclusion depend on whether he has been charged or convicted.<sup>93</sup> In all situations, what is rather required is “a serious reason”, beyond a mere suspicion, that suggests his involvement in the commission of such acts.<sup>94</sup> Nevertheless, article 5 of the Proclamation

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applicant is not deserving of protection as a refugee - there is an intrinsic link “between ideas of humanity, equity and the concept of refuge”. Gilbert, Geoff, “Current Issues in the Application of the Exclusion Clauses”, Background paper for an expert roundtable discussion on exclusion organized as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention relating to the Status of Refugees, 2001”, in Erika Feller, et.al (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), p. 2; see also UNHCR, Guidelines on Application of the Exclusion Clauses (2003), *Ibid*, para. 2.

<sup>91</sup> Article 6 (1) of the Refugee Proclamation envisages the possibility that where a refugee status may be cancelled ‘if at any time the authority considers that there are serious grounds for believing that a person who has been recognized as refugee should not have been recognized.’

<sup>92</sup> In the *Mehmet v. Canada*, the Federal Court of Appeals pithily stated that «Exclusion clauses...are completely external to...both the genuineness and the reasonableness of his fear of persecution.” *Canada (Minister of Employment and Immigration) v. Mehmet*, [1992] 2 F.C. 598 (C.A.) (Can. FCA, Apr.1, 1992), p. 606. See also Jennifer Bond, “Principled Exclusion: A Revised Approach to Article 1(F) (a) of the Refugee Convention”, 35 *Mich. J. Int'l L.* 15 (2013), p. 26.

<sup>93</sup> *Moreno v. Canada (Minister of Employment and Immigration) (C.A.)*, [1994] 1 F.C. 298, However, it has been argued that if the applicant has served his sentence for the crime. See *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), Robertson J.A, para. 4.

<sup>94</sup> The phrase “serious reasons” in the refugee conventions has been interpreted in various ways. Canadian Federal Court of Appeals for example considered that an evidence less than the civil “balance of probabilities” standard was required to exclude. (*Ramirez v. Canada (Ministry of Employment and Immigration) (1992) 2 FC 306 (FCA, February 7, 1992)*). In contrast, The US Board of Immigration Appeals required something more than a “probable cause” which has “more evidence for than against”. *Re Anwar Haddam*, 2000 BIA LEXIS 20 (USBIA, December 1, 2000). Hathaway and Foster argue that “as a matter of ordinary meaning and in light of the grave

and the respective provisions of the refugee conventions have an exhaustive list of exclusion grounds. Although these grounds have been interpreted expansively to include numerous contexts<sup>95</sup>, the responsible Authority should apply them meticulously and restrictively keeping the said serious impacts that their application has on the refugees.<sup>96</sup>

### **3.4. Cessation of Refugee Status**

Basically, being a refugee is /supposed to be/ a temporary legal status and the main objective of refugee law is to provide a surrogate protection to persons whose country of origin fails to discharge ‘its basic protective responsibilities’.<sup>97</sup> A refugee status presupposes the severance

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consequences that follow from a decision to exclude requires an affirmative judgment based on evidence that is both clear and convincing”. Hathaway and Foster, cited above at note 88, p. 534.

<sup>95</sup> For instance, ‘crime against humanity’ under article 5(1) was interpreted to cover genocide, even though the two crimes are often articulated in international treaties separately. (See e.g. articles 6 and 7 of the Rome Statute of the International Criminal Court adopted on 17 July 1998.) See UNHCR, *Guidelines on Application of the Exclusion Clauses* (2003), para. 13. In addition, the two other sub-clauses “serious non-political crime” and ‘acts contrary to the purposes and principles of United Nations...’ have been applied broadly so as to include crimes committed in the host country (despite the clarity of the clause that it covers crimes committed outside the country of refuge) and acts of international terrorism, respectively. See *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7, (March 7, 2002) 209 CLR 533, para. 15; *The Attorney-General (Minister of Immigration) v. Tamil X and Anor*, [2010] NZSC 107, New Zealand: Supreme Court, 27 August 2010, para. 82; *Germany - High Administrative Court Nordrhein-Westfalen*, (27 March 2007), 8 A 4728/05.A. See also Gilbert, Geoff, “Current Issues in the Application of the Exclusion Clauses” (2003), cited above at note 90, p. 7; Sandesh Sivakumaran, “Exclusion from Refugee Status: The Purposes and Principles of the United Nations and Article 1F(c) of the Refugee Convention”, *Int. J. Refugee Law* (2014), pp. 350-381.

<sup>96</sup> UNHCR, *Guidelines on Application of the Exclusion Clauses* (2003), *Ibid*, para. 2

<sup>97</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, p. 7; Hathaway, James C., M. Foster, “Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination” in E. Feller et al in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, (Cambridge: Cambridge Univ. Press, 2003), p. 359.

or rupture of the bond of trust or protection that exists between a person and his State. When the state of origin is able and willing to offer its protection, i.e., when the bond of trust, loyalty, protection, and assistance between a citizen and his country of origin is intact or restored<sup>98</sup>, international protection is undesirable. In this regard, the refugee conventions and the Refugee Proclamation contemplate that a refugee status shall cease to exist in circumstances where a refugee has alternative sources of national protection.<sup>99</sup> Whenever it exists and is viable, national protection generally takes primacy over international protection.<sup>100</sup>

Article 7 of the Proclamation envisions four grounds of cessation that are identical with those stated in international refugee law instruments. This provision stipulates that:

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<sup>98</sup> Andrew E. Shacknove, "Who Is a Refugee?" (1985), cited above at note 62, p. 278

<sup>99</sup> See Article 1 (c), the 1951 Refugee Convention, and article I (4) of the OAU Refugee Convention. Note that the OAU Refugee Convention incorporates two additional cessation grounds of a refugee status. Under article 4, the convention states that it ceases to apply to any refugee if "he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee" (4(f)), or "he has seriously infringed the purposes and objectives of this Convention" (4(g)). The former is a direct replication of one of the exclusion grounds under article 1F (b) of the 1951 Refugee Convention and also similarly reiterated in article 5(b) of the OAU Convention. As both exclusion and cessation are consequentially identical in outcome, (i.e., both lead to the deprivation of rights acquired by virtue of refugee status), the inclusion of this ground for cessation purpose seems to engender no problem, except its redundancy. Yet, the second cessation ground in the OAU Convention introduces a new additional reason for Member States to end the application of the Convention to refugees who have "seriously infringed the purposes and objectives of this Convention". As could be inferred from its preamble, the main purposes and objectives of the Convention are *the prevention of frictions among the Member States because of refugees, ensuring the humanitarian character of asylum and discouraging refugees from engaging in subversive activities*. Accordingly, when a refugee commits acts contrary to these objectives, the Convention ceases to apply for him. The range of such acts is unlimited but in any event an act needs to be a *serious* infringement to serve as a cessation ground. (See article I (4) (f) and (5) (b) (g) of OAU Refugee Convention).

<sup>100</sup> UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (2011), para. 106.

A person shall cease to be considered a refugee if

- i) he voluntarily re-avails himself of the protection of the country of his nationality
- ii) he has voluntarily re-established himself in the country which he left or outside of which he remained owing to fear of persecution
- iii) he has acquired the nationality of Ethiopia, or that of another country and enjoys the protection of Ethiopia or the country of his new nationality
- iv) despite the circumstances in connection with which he was recognized as a refugee have ceased to exist (a) continues to refuse to avail himself of the protection of the country of his nationality; or (b) if he has lost his nationality or has no nationality, he is able to return to his country of former habitual residence, but continues to refuse to do so.<sup>101</sup>

Once a person falls in one of the forgoing exceptions, international protection is not justified; hence, a refugee status shall be withdrawn and the refugee cannot claim to have the rights normally derived from such status under the Proclamation or in the refugee conventions. The first three cessation grounds emerge from the refugee's personal and voluntary action while the last ground (s) relate to change of circumstances in the country of origin, which render granting international protection unnecessary. In regard to the latter, the change of circumstances shall be fundamental in the sense that it is capable of removing the very basis of the refugee status, i.e., the well-founded fear of persecution, and there should be a reasonable prospect that such

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<sup>101</sup> Article 7 (1)-(4), the Refugee Proclamation.

change is sustainable for the foreseeable future.<sup>102</sup> Where there is a reason to believe that there is such change of circumstances, the Proclamation allows the Authority to evaluate the situation in the country of origin and decide on the possibility of ceasing refugee status.<sup>103</sup> Such assessment need not be a regular exercise and should not be done to the extent that it causes an enduring insecurity to refugees.<sup>104</sup>

In addition, the Proclamation requires, rather commendably, that the assessment and verification of change of circumstances shall be done in collaboration with the UNHCR and the decision made shall duly specify the ‘consequences and implications for the refugees affected by the cessation of their refugee status, including the right of each refugee to have his/her individual claim for continuing refugee status examined.’<sup>105</sup> The requirement of ‘collaboration and coordination’ with the UNHCR is in line with the general obligation of Ethiopia under the refugee conventions to cooperate with UNHCR.<sup>106</sup> The collaboration helps the country benefit from the technical expertise and general assistance of UNHCR in determining the nature and magnitude of change of circumstances in the country of origin.

The list of cessation grounds in article 7 is exhaustive and no additional reasons may be invoked to terminate refugee status.<sup>107</sup> In all the specified circumstances, the refugee may however be exceptionally allowed to

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<sup>102</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979), para. 135.

<sup>103</sup> Article 8 of the Refugee Proclamation.

<sup>104</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979), cited above at note 102.

<sup>105</sup> Article 8(1)-(3) of the Refugee Proclamation.

<sup>106</sup> See article 35 of the Refugee Convention. See also article II of the 1967 Refugee Protocol.

<sup>107</sup> UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses), HCR/GIP/03/03, 10 February 2003, para 4.

retain his status only if he ‘is able to invoke compelling reasons arising out of previous persecution or fear for his safety justifying his refusal to enjoy the protection of his country of nationality or former habitual residence’.<sup>108</sup> This exception accommodates cases of those refugees who, because of their traumatic experience from previous persecution are unwilling to seek the protection of their country of origin or as a result of such persecution, their social bond with their country of origin is substantially broken to the point that it would be unreasonable to require them to avail themselves of the protection of the country of origin.

### **3.5. Fundamental Principles of International Refugee Protection**

International refugee law is anchored in some fundamental principles without which no meaningful protection to refugees can be achieved. These include the principle of non-discrimination, the principle of *non-refoulement* and prohibition against arbitrary expulsion. The Refugee Proclamation has incorporated all these and other rules of particular significance to strengthening protection to refugees such as the principle of family unity and protection of vulnerable groups.

#### **3.5.1. The Principle of Non-Discrimination**

The principle of non-discrimination is one of the most fundamental principles of international law. The different aspects of this important principle are incorporated in various international human rights and

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<sup>108</sup> See article 7 (5) of the Proclamation. A similar provision exists under article I (C) (5) and (6) of the 1951 Refugee Proclamation. Regrettably, the OAU Refugee Convention does not have a corresponding provision. There is also a slight difference between the Refugee Proclamation and the 1951 Refugee Convention. The latter limits the application of the exception to those cessation grounds emanating from the change of circumstances in the country of origin. In contrast, the Proclamation extends the exception to apply for other grounds of cessation, as well. Practically speaking, the difference is insignificant as a refugee who voluntarily re-avails himself of the protection of his country of origin or acquires Ethiopian nationality is unlikely to invoke the exception of ‘compelling reasons’.

refugee instruments.<sup>109</sup> It is a bulwark against differential treatment of persons situated in similar circumstances.<sup>110</sup> In international refugee law, the principle of non-discrimination is grounded on the basic consideration of refugees as ‘a generic class, all members of which are equally worthy of protection’.<sup>111</sup> It is in this same sense that the principle is integrated in the Ethiopian refugee law under article 3 of the Proclamation, which reads as ‘This Proclamation shall be applied without discrimination as to race, religion, nationality, membership of a particular social group, or political opinion.’

This provision exhibits substantial similarity with article IV of the 1969 OAU Refugee Convention and the discrimination grounds indicated therein are also identical with those persecution grounds in the definition of a refugee. In comparison to the 1951 Refugee Convention, article 3 contains more number of discrimination grounds.<sup>112</sup> Yet, in contrast to international human rights treaties and the FDRE Constitution, the substantive content of non-discrimination in article 3 is narrower in scope in that the prohibition against unjustified distinct treatment is limited to the specified five prohibited grounds of discrimination.<sup>113</sup> While it is true that article 3 deals with discrimination *between and among*

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<sup>109</sup> See articles 2, 3, 14, 25 and 26 of ICCPR, articles 2 and 3 of ICESCR, article 2 of AfCHPR, article 3 of the 1951 Refugee Convention, article IV of the 1969 OAU Refugee Convention.

<sup>110</sup> Mr Mamboleo M. Itundamilamba v. Democratic Republic of Congo, Communication 302/05 2003 (African Commission on Human and Peoples’ Rights, 18 October 2013), para. 98.

<sup>111</sup> James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press New York, 2005), p. 239.

<sup>112</sup> Article 3 of the 1951 Refugee Convention lists only three grounds: race, religion and country of origin.

<sup>113</sup> Article 2 of ICCPR, ICESCR, AfCHPR and article 25 consist of an open-ended list of prohibited grounds of discrimination including “grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status”.

*different classes of refugees*<sup>114</sup>, at the same time, it should not be invoked to license differential treatment between *refugees* and *citizens* or *aliens* with regard to rights available to ‘all persons’ or ‘aliens’ in the human rights treaties and in the FDRE Constitution. Regrettably, article 3 omits ‘national origin’ from the five prohibited grounds of discrimination specified therein. Nevertheless, it shall be recalled that article 3 of the 1951 Refugee Convention strictly prohibits discrimination *between and among refugees* on the basis of their national origin. As it forms part of the law of Ethiopia, article 3 of the Proclamation should be interpreted in congruence with the Convention; thus, discrimination between and among refugees *exclusively* predicated on their national origin should also be prohibited under all circumstances.

### 3.5.2. The Principle of *Non-Refoulement*

The principle of *non-refoulement* is the mainstay of international refugee protection. Absent this cardinal principle, no legal protection to refugees becomes complete. For this reason, the principle of *non-refoulement* is firmly stipulated in different national and international human rights and refugee law instruments.<sup>115</sup> Even though the scope of its application is still debated, *non-refoulement* is considered to be a rule of customary international law.<sup>116</sup> Currently, there is also a growing consensus that the

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<sup>114</sup> See Atle Grahl-Madsen, Commentary on the Refugee Convention 1951(1997), cited above at note 39, p. 8.

<sup>115</sup> See OAU Refugee Convention (1969), article II (3), Inter-American Convention on Human Rights (1969), article 22 (8), UNGA Declaration on Territorial Asylum (1967), article 3, Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee (1966), article III (3), Convention against Torture (1984), article 3, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), article 3, Inter-American Convention on Extradition (1981), article 4 (5).

<sup>116</sup> For a comprehensive study on the issue, see Vincent Chetail, “The Transnational Movement of Persons Under General International Law - Mapping the Customary Law Foundations of International Migration Law” in *V. Chetail & C. Bauloz*, (eds.),

prohibition of *refoulement* has attained the status of *jus cogens* under international law.<sup>117</sup> In international refugee law, the essence of the rule lies in its strict prohibition of removal of persons to places where there is a risk of persecution on account of their membership to a particular racial, national, religious, social or political group.<sup>118</sup> The Refugee

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*Research Handbook on International Law and Migration* (Cheltenham: Edward Elgar Publishing, 2014), pp. 35-41. See also UNHCR Refugee Policy and Practice, "The Principle of *Non-Refoulement* as a norm of Customary International Law", Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases, UNHCR (2 BvR 1938/93, January 1994). See also UNHCR Executive Committee, *Non-Refoulement*, Conclusion No. 6 (XXVIII) (1997); Goodwin-Gill, Guy S., and Jane McAdam, *The Refugee in International Law*, (Oxford University Press, 2007), p. 214; Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of *Non-refoulement*" in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law' UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), p. 37. Sanremo Declaration on the Principle of *Non-Refoulement*, the International Institute of Humanitarian Law (September 2001). *Non-refoulement* is also recognized in other anti-terrorism conventions. See International Convention for the Suppression of the Financing of Terrorism (entered into force 10 April 2002), article 15. See also article 5, European Convention on the Suppression of Terrorism, (entered into force 4 August 1978); Article 14 of Inter-American Convention against Terrorism, (entered into force 7 October 2003).

<sup>117</sup> See Section III of the 1984 Cartagena Declaration; UNHCR, Ex. Com. Conclusions No. 25(XXXIII) (1982), para. C. See also Jean Allain "The *jus cogens* Nature of *non-refoulement*", Int. J. Refugee Law, vol. 13 (4) (2001), pp. 533-558; Guy S. Goodwin-Gill, "Opinion: The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*", IJRL, vol. 23 No. 3 (2011), pp. 443-45, p. 44; Alice Farmer, "Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection" (2008), Georgetown Immigration Law Journal, vol. 23:1; UNHCR intervention before the European Court of Human Rights in the case of T.I. v. the United Kingdom, (ECHR, judgment of 4 February 2000), para. 7. However, there are some persons arguing that *non-refoulement* has not yet acquired the character of a *peremptory norm*. See e. g., Aoife Duffy "Expulsion to Face Torture? *Non-refoulement* in International Law" (2008), International Journal of Refugee Law, pp. 374-339, Rene Bruin and Kees Wouters, "Terrorism and the Non-derogability of *Non-refoulement*", Int. J. Refugee Law, vol. 15 (1) (2003), p. 26. See also *Zaoui v Attorney-General* (No 2, Supreme Court of New Zealand, 2006), para. 51.

<sup>118</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: (<http://www.refworld.org/docid/438c6d972.html>), last visited 2 May 2017.

Proclamation enshrines this principle under article 9, which proclaims that:

1) No person shall be refused entry in to Ethiopia or expelled or returned from Ethiopia to any other country or be subject to any similar measure if as a result of such refusal, expulsion or turn or any other measure, such 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, events seriously disturbing public order in part or whole of the country.<sup>119</sup>

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.

3) The Head of the Authority shall in line with the spirit of this Proclamation and existing Law determine whether serious grounds exist for regarding a refugee as a danger to national security.

In terms of substance, article 9 generally reflects the rule of *non-refoulement* that is enshrined in article 33 and article II (3) of the 1951 Refugee Convention and the 1969 OAU Refugee Convention, respectively. However, the provision also has some peculiar features that are not available in either or both of these conventions and a few comments on these features and exceptions to the rule are in order.

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<sup>119</sup> The English version of this paragraph reads differently: "his life, physical integrity or liberty would be threatened on account of external aggression, occupation, *foreign domination* or events seriously disturbing public order in part or whole of the country" (emphasis added). However, the Amharic version, rightly corrects the formulation by omitting the expression 'foreign domination'.

One of the salient features of article 9 is that the first paragraph makes a distinction between those who are considered as ‘refugees’ in the 1951 Refugee Convention and those additional group of refugees recognized in article I (3) of the 1969 OAU Refugee Convention. With regard to the former, *refoulement* is only outlawed to a country where there is risk of ‘persecution or torture on account of race, religion, nationality, membership of a particular social group or political opinion’. On the other hand, for those falling under the latter group, the prohibition is limited to removal to a country where they may risk threats to their ‘life, physical integrity or liberty’ for reasons of ‘external aggression, occupation, events seriously disturbing public order’.<sup>120</sup> This distinction is evidently drawn from article 4 of the Proclamation. The 1969 OAU Convention from which article 9 (1) (b) is derived does not contain such distinction. It is also not clear why such distinction is made, as threats to ‘life, physical integrity or liberty’ could have been covered by the term ‘persecution’ under article 9 (1) (a).<sup>120</sup> Although the term is nowhere defined in normative terms in any of the international refugee instruments, perhaps for a good reason (of flexible and dynamic application of the concept), the general growing consensus is that ‘persecution’ covers most, if not all, serious violations of human rights.<sup>121</sup>

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<sup>120</sup> Similarly, the explicit reference to ‘torture’ under the first paragraph is somewhat a tautology as torture definitely constitutes persecution.

<sup>121</sup> See James Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991), pp. 104-105 (‘the sustained or systemic violation of basic human rights demonstrative of a failure of state protection’); Goodwin-Gill and McAdam (2007), cited above 116, pp. 90-92 (arguing that the notion of persecution to the minimum includes ‘threats to life and freedom’); H. Lambert, ‘The Conceptualization of ‘Persecution’ by the House of Lords: *Horvath v. Secretary of State for the Home Department*’, vol. 13 (1/2), *International Journal of Refugee Law* (2001), p. 30 (‘the failure (or absence) of State protection against a serious harm, including persistent discriminatory acts’, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979), paras. 51-53 (the Handbook identifies the following acts as amounting ‘persecution’: serious physical harm, loss of freedom, and other serious violations of basic human rights

Furthermore, article 9 is applicable to ‘any person’, regardless of his legal status in Ethiopia, and with respect to ‘any measure’ which has the effect of exposing him to risks of persecution in ‘any country’.<sup>122</sup> Its scope of application thus covers all measures denying access to Ethiopian territory or removal from thereof of both recognized refugees and asylum seekers to any ‘frontiers of territories’ where there is a threat of persecution, whether such place is the country of origin or another country.<sup>123</sup> In this connection, one cannot overlook but appreciate the Proclamation’s explicit proscription of *any measure* that would force asylum-seekers to ‘remain in a country’ where they risk persecution. States normally employ different pre-emptive measures to discourage asylum-seekers from reaching at their border and the clear prohibition by article 9 of those measures which have the effect of compelling asylum seekers to stay in places of persecution signifies the additional strong facet of the Ethiopian refugee law.

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discriminatory treatment which lead to consequences of a substantially prejudicial nature and a combination of numerous harms none of which alone constitutes persecution but which, when considered in the context of a general atmosphere in the applicant’s country, produces a cumulative effect). For purpose of criminal liability, the Rome Statute of the International Criminal Court also defines “‘Persecution’ as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” This may include all norms extending from right to life to freedom from discrimination. Rome Statute of International Criminal Court (1998).

<sup>122</sup> The 1951 Refugee Convention rather talks about ‘refugees’ under article 33. The UNHCR has always interpreted this provision broadly to apply to all refugees who fulfill the refugee criteria whether or not they are formally recognized refugees. See UNHCR, “The Principle of Non-Refoulement as a Norm of Customary International Law”, cited above at 116, 31 January 1994, para. 39, available at: (<http://www.refworld.org/docid/437b6db64.html>), last visited 3 May 2017.

<sup>123</sup> Article 33(1), 1951 Refugee Convention. However, note that article 9(2) makes reference only to ‘refugees.’

### Exceptions to the *Non-Refoulement* Rule

In spite of its cherished fundamental character, the principle of *non-refoulement* is not an absolute norm in international refugee law. The 1951 Refugee Convention envisages instances where State Parties may exceptionally expel refugees to places of persecution.<sup>124</sup> The Refugee Proclamation maintains this exception with regard to a person “whom there are serious reasons for regarding [him] 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.”<sup>125</sup> Accordingly, a refugee may be removed or exposed to places where he may risk persecution if there are serious grounds to believe that his continued presence in Ethiopia jeopardizes national security or, following his conviction for a particularly serious crime, poses a danger to the wellbeing of the community.

However, the validity of this exception in the Proclamation is not incontrovertible. In a stark contrast to the Proclamation, the 1969 OAU Convention does not contain such exception to the rule of *non-refoulement*.<sup>126</sup> Likewise, the Convention against Torture (CAT) makes no exception to the prohibition against *refoulement* of individuals to places where they may be exposed to torture.<sup>127</sup> The contemporary human rights jurisprudence on ICCPR and other human rights conventions also

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<sup>124</sup> Article 33 (2) of the 1951 Refugee Convention.

<sup>125</sup> See above article 9 (2), Refugee Proclamation.

<sup>126</sup> Article II (3), 1969 OAU Refugee Convention. The Convention simply prohibits refugees from involving in subversive activities. Article III (1) of the 1969 OAU Refugee Convention under a caption of ‘subversive activities’ states that “Every refugee has duties to the country in which he finds himself in, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.

<sup>127</sup> Article 3 (1) of the Convention “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

suggests that removal of persons to places where there is a threat to serious human rights violations is objectionable.<sup>128</sup> Moreover, in times of armed conflict, Article 45 of Fourth Geneva Convention (1949) prescribes that “*In no circumstances* shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”<sup>129</sup> This applies for all protected persons whether they are in detention or not. As a State Party to these instruments, Ethiopia is accordingly bound to respect its obligations not to *refoule* persons to places where they may face a threat of persecution without exception. The retention and most importantly, application of the exceptions under article 9 (1) would therefore contravene the country’s legal commitments in these instruments.<sup>130</sup> Notwithstanding this, if and in case, the Head of Authority decides to apply the exceptions, some comments are apposite. From the onset, it

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<sup>128</sup> See e.g., UN Human Rights Committee, *Chitat Ng v. Canada*, CCPR/C/49/D/469/1991, (UN Human Rights Committee, 7 January 1994), paras. 16.1-16.4, *A.J.R. v. Australia*, CCPR/C/60/D/692/1996, (UN Human Rights Committee, 11 August 1997), *Judge v. Canada*, CCPR/C/78/D/1086/2002, (Human Rights Committee, 4 August 2003), para. 10.6. CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), (UN Human Rights Committee, 10 March 1992), para. 9. In its General Comment No. 6, the UN Committee on the Rights of the Child also specified that no child shall be returned to a country where there are “substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 (right to life) and 37 (freedom from inhuman degrading treatment, torture and right to liberty and security) of the Convention.” General Comment no.6, (UN Human Rights Committee, 1 September 2005), para. 27.

<sup>129</sup> Fourth Geneva Convention (1949), article 45, cited above at note 69.

<sup>130</sup> Even with regard to article 33 (2) of the 1951 Refugee Convention, some scholars have strongly argued that the *non-refoulement* exceptions therein have lost their relevance through time and they should be entirely discarded, or their application should be severely circumscribed to the point that they become virtually inapplicable. See also Alice Farmer (2008), cited above at note 117, pp. 28-29; W.A. Schabas, *Non-Refoulement, Human Rights and International Cooperation in Counter-terrorism* (Liechtenstein, 2006), p. 4). Aoife Duffy (2008), cited above at note 117, p. 389.

should be appreciated that the list of possible grounds of *refoulement* under article 9 (2) is exhaustive: includes only the protection of national security and the safety of the community, which are addressed below.

### a) National Security

The notion of national security is inherently an ambiguous concept<sup>131</sup> and the Head of the Authority definitely enjoys a great deal of discretion in interpreting the term. However, national security should be applied only to address *present* or *prospective* threats to the basic national interests of Ethiopia, namely, its territorial integrity, sovereignty, population, government and its democratic institutions.<sup>132</sup> A refugee may not be *refouled*, for example, to deal with “criminal offences without any specific national security implications or local or isolated threats to law and order.”<sup>133</sup>

The determination of whether a refugee constitutes a national security danger to Ethiopia is a forward-looking assessment.<sup>134</sup> This is in a clear

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<sup>131</sup> Helga Haftendorn, “The Security Puzzle: Theory-Building and Discipline-Building in International Security”, *International Studies Quarterly*, vol. 35, No. 1 (Mar., 1991), p. 3 (“Ambiguous both in content and format”); I. Thomas I. Emerson, “National Security & Civil Liberties,” *The Yale Journal of World Public Order* (1982), p. 79 (“amorphous concept distinguishable from the national welfare or the welfare of the society”); Arnold Wolfers, “Discord And Collaboration Essays on International Politics” (1962), p. 24, (“An ambiguous symbol, which may not have any precise meaning at all.”); *CG and Others v. Bulgaria*, (European Court of Human Rights, judgment of 24 April 2008), para. 43 (a concept which is “difficult to give a comprehensive definition”), Schultze also noted that “The concept of national security does not lend itself to a neat and precise formulation”. Charles L. Schultze, “The Economic Content of National Security Policy”, *Foreign Affairs*, vol. 51 (1973), pp. 529-530. See also United States Supreme Court in *United States v. United States District Court* (1972): 407 U.S. 297.

<sup>132</sup> Grahl-Madsen, *Commentary* (1997), cited above at note 39, pp. 235- 236.

<sup>133</sup> UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, (UNHCR, November 1997), section (F).

<sup>134</sup> Lauterpacht and Bethlehem, «The Scope of Non-Refoulement» (2003), cited above at note 116, p. 135 ; Grahl-Madsen, *Commentary* (1997), cited above at note 39, p. 231 ; Vincent Chetail, «Le principe de *non-refoulement* et le statut de réfugié en droit

contradistinction with the exercise under article 5 of the Refugee Proclamation concerning exclusion of refugees, which concerns only their past deeds. In addition, despite the fact that article 9 (2) does clearly specify whose national security shall be at stake, one can discern from the corresponding provision of the 1951 Refugee Convention that it should be the national security of Ethiopia.<sup>135</sup> Admittedly, in an increasingly interdependent world, the security of Ethiopia may not exclusively be a ‘self-affair’ but rather also to a large extent depends on the security of its neighbors. Nevertheless, even in such cases, the removal of a refugee to places of persecution on national security grounds requires the demonstration of a clear danger to the security interests of Ethiopia that may be arising from the conduct of the refugee against other States.

### **b) Public Order**

On the other hand, *refoulement* on the basis of the second exception shall be preceded by a *final judgment* convicting a refugee for ‘particularly serious crimes’.<sup>136</sup> Although the Proclamation does not offer adequate guidance on what ‘a particularly serious crime’ constitutes, it is self-evident that the crime must possess a high threshold of gravity.<sup>137</sup> On

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international» in V. Chetail & J.-F. Flauss (eds.), La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés – 50 ans après : bilan et perspectives, (Collection de l’Institut International pour les Droits de l’Homme, Bruylant, Bruxelles, 2001), p. 41.

<sup>135</sup> See article 33(2), the 1951 Refugee Convention (‘a danger to the security of the country *in which he is*’).

<sup>136</sup> In other words, the conviction needs to be final, i.e., it must be determined by the highest appellate authority. This may nevertheless be presumed if the refugee never appealed and the term of appeal has already expired. See Lauterpacht & Bethlehem, *Ibid.*, p. 139.

<sup>137</sup> The determination of what constitutes a “particularly serious crime” under article 33 (2) of the 1951 Refugee Convention has been a controversial matter. States have interpreted the expression in various ways to the extent that one crime which is considered ‘serious’ in one country is denied that status in another country- leading

one occasion, the Ethiopian Criminal Code defines ‘serious crimes’ as those ‘crimes which are punishable with rigorous imprisonment for five years or more’.<sup>138</sup> The Head of Authority may therefore consider this as a general standard but, of course, given the potential bestial repercussion of *refoulement* to a refugee, the actual order of removal should consider not only the nature of the crime but also the high probability that the risk of persecution may materialize upon his return and his personal situation such as his age, and health.<sup>139</sup> In any event, *refoulement* becomes incompatible with the very objective of article 9 (2) of the Proclamation and article 33 (2) of the 1951 refugee convention if a refugee is adjudged to have committed a particularly serious crime for breaching, for example, traffic regulation, an administrative formality code or even

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to divergent standards of *refoulement*. For example, according to the *Nationality, Immigration and Asylum Act of United Kingdom*, a refugee who is sentenced to a period of imprisonment of at least two years is considered to have committed a particularly serious crime- making him eligible for deportation under article 33(2). On the other hand, the U.S, Australian and even some UK Courts rejected such definitive formulation and opted for a case by case assessment of what constitutes a particularly serious crime. See Section 72 of the *Nationality, Immigration and Asylum Act 2002 Act* (the 2002 Act); see also *Cuong Van Dang v. The Secretary of State for the Home Department*, [2013] UKUT 00043 (IAC). *In re N-A-M- (N-A-M- I)*, the Board of Immigration Appeals held that (1) *In order to be considered a particularly serious crime ..., an offense need not be an aggravated felony...Once the elements of an offense are found to potentially bring it within the ambit of a particularly serious crime, all reliable information may be considered in determining whether the offense constitutes a particularly serious crime, including but not limited to the record of conviction and sentencing information.* *Re N-A-M- (N-A-M- I)*, 24 I. & N. Dec. 336, 337 (B.I.A. 2007). This was affirmed by the Court of Appeals in *Hernan Ismael Delgado v Attorney General*, (U.S. Court of Appeals, 9<sup>th</sup> Circuit Filed October 8, 2008). See *A v. Minister for Immigration and Multicultural Affairs* [1999], Australian FCA 227, para. 43, *R (on the application of) ABC (a minor) (Afghanistan) v. Sec’y of State for the Home Dep’t* [2011] EWHC 2937 (Admin.) (U.K.).

<sup>138</sup> For young offenders, the Criminal code defines a serious crime as an act ‘normally punishable with a term of rigorous imprisonment of ten years or more or with death’. See Articles 168(1) and article 478 (1), ‘The Criminal Code of the Federal Democratic Republic of Ethiopia 2004’, Proclamation No. 414/2004, Fed. *Neg. Gaz.*, May 2005.

<sup>139</sup> In other words, “such a decision should involve a careful examination of the question of proportionality between the danger to the security of the community or the gravity of the crime, and the persecution feared.”

some rudimentary conditions attached to his admission. On the other hand, crimes such as murder, rape, armed robbery, arson are considered to satisfy the requirement of ‘a particularly serious crime’, hence, a refugee involving in such acts may be *refouled*.<sup>140</sup> It is however important to note that the mere conviction of a refugee for a particularly serious crime is not sufficient but it must be additionally demonstrated that his presence in Ethiopia continues to pose a danger to the wellbeing of the community.<sup>141</sup> This also requires an assessment of not only the past deeds of the refugee, but also his current propensity or future tendency to commit similar conduct and pose a continuing danger to the community.

Finally, the exceptions under article 9 (2) do not require that the danger to national security or community must actually materialize in order for *refoulement* to happen. Instead, what is important is to have ‘serious reasons’ to consider that a refugee’s presence in the country would affect the national security of Ethiopia or the safety of the community.<sup>142</sup> Accordingly, it would be arbitrary if refugees are removed to places of persecution on the basis of a mere suspicion.<sup>143</sup> In addition, the exceptions should be interpreted and applied restrictively and be

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<sup>140</sup> Paul Weiss, Paul Weis, *The Refugees Convention, 1951: The Travaux Préparatoires Analyzed* (Cambridge, England; New York: Grotius Publications, 1995), p. 342. See also Lauterpacht & Bethlehem, cited above at note 116, p. 139.

<sup>141</sup> There should be a prospective and concrete “danger of repetition with respect to the serious crime committed for the exclusion clause to apply”. Andreas Zimmermann, et.al (eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011), p.1421.

<sup>142</sup> Under article 9(3) of the Proclamation, the Head of the Authority is mandated to determine if such grounds exist.

<sup>143</sup> Lauterpacht & Bethlehem, ‘The Scope of Non-Refoulement’ (2003), cited above at note 116, p. 139.

considered as “the *ultima ratio* (the last recourse).”<sup>144</sup> In other words, if there are other alternative measures such as detention or criminal charge to address the security or public order threats posed by a refugee, such options should be considered first before a decision to send a refugee to places of persecution is made.

### 3.5.3 Prohibition against Arbitrary Expulsion

In international law, the power of determining who shall enter and stay within the territory of a given State is reserved to the exclusive prerogative of the State itself.<sup>145</sup> The competence of a State to expel individuals from their territory is a corollary right to this prerogative.<sup>146</sup> Expulsion is explicitly regulated in many human rights conventions and other international instruments to which Ethiopia is a State Party.<sup>147</sup> All of these instruments equally prohibit *arbitrary* expulsion of ‘aliens’, a term which encompasses refugees.<sup>148</sup> The 1951 Refugee Convention and the

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<sup>144</sup> *Ibid.* see also Attorney General v. Ahmed Zaoui and Others [2004] NZCA, para. 139, James Hathaway, The Rights of Refugees (2005), cited above at note 111, p. 352; Andreas Zimmerman, cited above at note 141, p. 1422, para. 104.

<sup>145</sup> See the consistent views of the European Court of Human Rights in Nolan and K. v. Russia, (2009), para.114, *K.A.B. v. Sweden*, judgment of 5 September 2013, para. 68; Sufi and Elmi v. The United Kingdom, judgment of 28 June 2011, para. 212. From domestic decisions see *Nishimura Ekiu v. United States* [1982]142 U.S. 651, Gray J., 659, *Attorney-General for Canada v. Cain* [1906] AC 542, 546. It is submitted that “The traditional rationale for such competence lies in the very notion of territorial sovereignty which entails the right of the State to regulate and control activities, goods, capital and persons within its own territory”. See Vincent Chetail, “The Transnational Movement of Persons under General International Law” (2014), cited above at note 116, p. 39.

<sup>146</sup> See *John K. Modise v. Botswana*, AfComHPR, Comm. No. 97/93, (African Commission on Human and Peoples’ Rights, 2000), para.84, *Kenneth Good v. Republic of Botswana*, AfComHPR, Communication No. 313/05 (2005), para. 205.

<sup>147</sup> See ICCPR, article 13, AfCHPR, article 12 (4).

<sup>148</sup> *Ibid.*

Refugee Proclamation also contain similar prohibitions against arbitrary expulsion of refugees.<sup>149</sup>

Similarly, article 10 (1) of the Proclamation provides that ‘a refugee who is lawfully resident in Ethiopia shall not be expelled except on the ground of national security and public order’.<sup>150</sup> In comparison to article 9 (i.e., the *non-refoulement* provision) of the same, this provision concerns only a refugee who is *lawfully* resident in the country. This precludes refugees who are temporarily present in the country or those ‘who have been admitted lawfully but have overstayed the period for which they were admitted or were authorized to stay, or who have violated any other conditions attached to [their] admission or stay’.<sup>151</sup> These refugees may thus be expelled even without showing the existence of national security or public order concerns. However, if a refugee is a ‘lawful resident’<sup>152</sup> of Ethiopia, the only permissible grounds to expel him are national security and public order.

Article 10, like article 9, of the Proclamation does not illustrate the kinds of circumstances or acts of the refugee that will trigger the application of the national security or public order exceptions. It shall nevertheless be reiterated that national security basically covers the foundational elements of the State: the territory, population, government and sovereignty of Ethiopia.<sup>153</sup> The invocation of this ground presupposes the demonstration that ‘the refugee’s presence or actions give rise to an

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<sup>149</sup> Article 32 of the 1951 Refugee Convention. The 1969 OUA Convention does not have a similar provision and is silent on the issue of expulsion.

<sup>150</sup> See also article 32 (1) of the 1951 Refugee Convention.

<sup>151</sup> Paul Weiss (1995) cited above at note 140, p. 91.

<sup>152</sup> By requiring ‘residency’, the Proclamation is more specific than the 1951 Refugee Convention which simply states ‘lawfully in their territory’ (see article 32(2) the 1951 Refugee Convention).

<sup>153</sup> *Cited above at note 132*, see also Atle Grahl-Madsen, “Expulsion of Refugees”, Nordic Journal of International Law, vol. 33, 1 (1963), p. 42.

objectively reasonable, real possibility of inflicted substantial harm to the [Ethiopia`s] most basic interests, including the risk of armed attack on its territory or its citizens or the destruction of its democratic institutions'.<sup>154</sup> On the other hand, public order, albeit a concept no less ambiguous than national security, may be invoked to expel a refugee when a refugee engages in activities that disturb the social order of the country; this is particularly the case if he commits fairly serious offences such as larceny, traffic in drugs, and indulging in political activities and acts prejudicial to the societal interests of the country.<sup>155</sup>

It is crucial to appreciate that a refugee eligible for expulsion under article 10 of the Proclamation may not be exposed to a risk of persecution contrary to article 9 of the Proclamation. So, even if a refugee (for instance, who is unlawfully present in Ethiopia), is theoretically expellable in accordance with article 10, he shall not be expelled if his expulsion has the effect of sending him to persecutory places.<sup>156</sup> In other words, expulsion under article 10 is only permissible to non-persecutory places. As incidentally indicated earlier, the AfCHPR also absolutely bans mass expulsion and no matter how grave the

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<sup>154</sup> James Hathaway, *The Rights of Refugees* (2005), cited above at note 111, p. 679.

<sup>155</sup> See UN Ad Hoc Committee on Refugees and Stateless Persons, "Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Fortieth Meeting Held at the Palais des Nations", E/AC.32/SR.40, Geneva, on Tuesday, 22 August 1950, (27 September 1950), available at: , (<http://www.refworld.org/docid/3ae68c1910.html>), last visited 4 May 2017, pp. 13-20.

<sup>156</sup> Commenting on the corollary provisions of the 1951 Refugee Convention, Hathaway asserts that "Because the duty of *non-refoulement* is not displaced once a refugee is lawfully present in a state party, even a state which has entered a reservation to article 32 cannot expel a refugee without consideration of the consequences of that act.", James Hathaway, *The Rights of Refugees* (2005), cited above at note 111, p. 665.

security or public order threats are, article 10 does not authorize mass expulsion of refugees.<sup>157</sup>

Furthermore, article 10 provides for some procedural guarantees against arbitrary expulsion. Initially, the Head of Authority, before issuing an expulsion order shall allow the concerned refugee to present his case.<sup>158</sup> Once the order is issued, it shall be communicated in writing to the refugee with the reasons specified therein and that the refugee, if the expulsion order is final (i.e. both substantively justifiable and decided in accordance with due process), shall, upon request, be granted adequate time to seek admission elsewhere than the country to which he is to be expelled.<sup>159</sup> This is without prejudice to the possibility that the refugee may be subjected to temporary detention if it is necessary to effect his expulsion or to ‘ensure that he does not endanger the security or public order of the country pending his expulsion.’<sup>160</sup> Needless to say, these safeguards have paramount importance to protect refugees from arbitrary expulsion orders. Yet, they still remain inadequate and fall short

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<sup>157</sup> Cited above at note 21. ICCPR does not have an explicit prohibition of mass expulsion. However, the UN Human Rights Committee has made clear that the right of each alien to a decision in his or her own case and to submit reasons against expulsions would make mass or collective expulsions incompatible with article 13. General Comment 15/27, (UN Human Rights Committee, 22 July 1986), para. 10. See also Concluding Observations on the Dominican Republic, CCPR/CO/71/DOM, (UN Human Rights Committee, 26 April 2001), para. 16.

<sup>158</sup> Refugee Proclamation, article 10 (2).

<sup>159</sup> *Id.*, article 10 (3) (4).

<sup>160</sup> *Id.*, article 11. It needs to be stressed that detention must be temporary and necessary, i.e., there should not be other less severe alternative measures and be proportional to the purpose of effecting the expulsion order or safeguarding national security and public order. From this, it can be discerned that the Proclamation does not allow an indefinite detention of refugees. See also UNHCR, Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention (UNHCR, 2012), available at (<http://www.unhcr.org/refworld/docid/503489533b8.htm>), last visited 23 July 2017.

of international standards on expulsion. For example, the right to appeal against the expulsion order before a competent authority including ordinary courts, the right to legal representation, and the right to have interpreter when necessary are important due process guarantees that are absent from article 10 but should normally be available during expulsion proceedings.<sup>161</sup>

It is also of great interest to note that the Refugee Proclamation does not (for that matter, neither does the 1951 Refugee Convention) provide for similar procedural guarantees against arbitrary *refoulement*. In comparison to expulsion, *refoulement* potentially entails graver consequence, i.e., the removal of a refugee to places of persecution. The creeds of humanitarianism underpinning refugee protection and common sense thus dictate that the procedural safeguards against arbitrary expulsion stated under article 10 should also be available during *refoulement* proceedings carried out pursuant to article 9 of the Proclamation.

### 3.5.4. The Principle of Family Unity

The ‘family is a natural and fundamental group unit of society’ and the State and the society shall assist and protect it.<sup>162</sup> Family unity is central to the protection of the institution of family and inheres in the very ‘group’ facet of the institution and is an integral element of the right to

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<sup>161</sup> The right to appeal before a competent organ, and the right to legal representation are incorporated under article 33 (2) of the 1951 Refugee Convention. The right to access to courts is also guaranteed under article 16 of the same. In addition, article 37(1) of the FDRE Constitution proclaims that “*Everyone* [including a refugee] has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.” (Emphasis added).

<sup>162</sup> Article 16, Universal Declaration of Human Rights (UDHR) (UN General Assembly, adopted on 10 December 1948), article 23 (1), ICCPR, article 13, ICESCR and article 18 (1), ACHPR. See also article 34 of the FDRE Constitution (1995). Unfortunately, neither the 1951 Refugee Convention nor the 1969 OAU Refugee Convention have provisions on family unity.

family life.<sup>163</sup> It is currently considered as an important principle of international law.<sup>164</sup> In the context of refugees, the protection of family unity has paramount importance, as the typical refugee experience is such that persecution often results in the disintegration of the family and forces refugees to live apart from their beloved family members. By enabling refugees to live in safety and to rebuild their normal life with both physical and emotional stability, family unity facilitates the process of finding a durable solution through integration of refugees in the country of asylum.

The principle of family unity requires that the family members of a refugee shall be granted a refugee or similar comparable status in the country of asylum.<sup>165</sup> The Refugee Proclamation recognizes this principle under article 12 for both family members of refugees and asylum seekers. It prescribes that family members of an asylum-seeker or a recognized

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<sup>163</sup> The group character of family is explicitly recognized in UDHR (see the expression ‘group unit’ under article 16 of UDHR). See also Jastram, Kate and Newland, Kathleen, ‘Family Unity and Refugee Protection’ (2003) in E. Feller, V. Türk, and F. Nicholson, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 555-603, available at (<http://www.unhcr.org/3bd3d4a14.pdf>), last visited on 14 June 2017.

<sup>164</sup> *Ibid.* Although the drafting history of the 1951 Refugee Convention suggests that the delegations at the Conference of Plenipotentiaries, which adopted the final text of the convention, considered family unity as ‘an essential right of the refugee’ and that some authors are also referring it as a right, this was not reflected in the final text and family unity in its own does not seem to have attained the status of ‘a right’ yet, rather it is recognized as a principle. UNHCR has also preferred to use the expression ‘principle of family unity’, as opposed to the right to family unity’. UNHCR, Background Note, Family Reunification in the Context of Resettlement and Integration, Annual Tripartite Consultations on Resettlement, Geneva, 20-21 June 2001, (<http://www.unhcr.org/3b30baa04.pdf>); UNHCR, Summary Conclusions: family unity Expert roundtable organized by the United Nations High Commissioner: For Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001. See also UNHCR, Executive Committee, Conclusion No. 24 (XXXII), (1981), para. 1.

<sup>165</sup> *Ibid.*

refugee are entitled to enter and remain in Ethiopia and are subject to all the rights and duties of the asylum seeker or the recognized refugee, respectively.<sup>166</sup> The clear wording of the Proclamation suggests that family members do not automatically acquire a refugee status. If they wish to have a refugee status, they shall apply for recognition as a refugee.<sup>167</sup> The decision on their application, positive or negative, should however not affect the rights and duties that they have already acquired by virtue of their relation with the original asylum-seeker or recognized refugee.

The application of the principle of family unity very much depends on the meaning that we give to ‘family’ and its members.<sup>168</sup> The Refugee Proclamation does not define the notion of family but describes those persons who may be considered as ‘the family members’ of a refugee or an asylum seeker. Article 2 (8) only specifies the spouse and unmarried children under age of 18 as ‘family members’ of a refugee/asylum-seeker. From this provision, there appears to be no possibility for other dependents to be considered as such and this is another weak spot of the Proclamation.

The very restrictive delineation of ‘family members’ in the Proclamation is not only incompatible with the general conception of family in the Ethiopian law but also is discordant with Ethiopian and African traditional views of family. The Revised Family Code of the Federal Government of Ethiopia adopts a wider notion of ‘family’, which includes not only the spouse and underage unmarried children but also other relatives; for example, it establishes an obligation to supply

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<sup>166</sup> Article 12 (1)-(4), the Refugee Proclamation.

<sup>167</sup> Article 12 (5), *Ibid.*

<sup>168</sup> Family is a dynamic and evolving concept whose conception differs across different cultures and jurisdictions and in the course of time. It is ‘infinitely variable and in a constant state of flux’. Diana Gittins, *The family in question: changing households and familiar ideologies* (2<sup>nd</sup> ed., Macmillan 1985), p. 4.

maintenance between ascendants and descendants, and between persons related by affinity in the direct line and between brothers and sisters.<sup>169</sup> Ethiopian or generally African family is also characterized by collectivism and is not limited to a nuclear family. Family members rather include all those extended consanguineal and marital relatives and sometimes others such as close friends who are emotionally, physically and materially dependent on a refugee or *vice versa*. Within this same spirit, in the AfCHPR, family is considered to be ‘a custodian of morals and traditions recognized by the community’<sup>170</sup> and individuals owe a legal duty towards their family and the society including the duty ‘to preserve the harmonious development of the family and to work for cohesion and respect of the family, to respect his parents at all times and to maintain them in case of need’.<sup>171</sup> In this regard, the State has also a corollary duty to assist the family.<sup>172</sup> In the African context, the legal definition of family should thus normally reflect its traditional conception within the society. This is all the more important in Ethiopia, for many of the refugees coming to the country are from other African countries such as Somalia and South Sudan, where kinship and family ties have broad meaning and solid foundation.

It should also be pointed out that the Refugee Proclamation’s restrictive approach towards the composition of family members is also not

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<sup>169</sup> The Family Code also prohibits marriage between persons related by consanguinity in the direct line between ascendants and descendants; in the collateral line, between a man and his sister or aunt; or a woman with her brother or uncle; and for those related by affinity, marriage in the direct line and in the collateral line, marriage between a man and the sister of his wife, and a woman and the brother of her husband is prohibited. See Revised Family Code of the Federal Government, Proclamation No. 213/2000, articles 8, 9 and article 198, Fed. Neg. Gaz., Extraordinary Issue No. 1 of 2000, 4 July 2000.

<sup>170</sup> See article 18(2), AfCHPR.

<sup>171</sup> See articles 27, 29(1), *Ibid*.

<sup>172</sup> Article 18 (2), *Ibid*.

consonant with the *principle of dependency*, a fundamental principle at the core of family unity and family reunification. This precept ‘entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific’.<sup>173</sup> The principle of dependency dictates that the definition ascribed to family should consider, *inter alia*, cultural factors, and the personal situation of the refugee. Going by this principle, the Refugee Proclamation should therefore have extended the eligible members of the family under article 2 (8) in a manner that reflects the aforesaid traditional conception of family in the African society. Admittedly, one cannot understate the potential difficulty of accommodating all the family members of a refugee if the Proclamation fully adopted the traditional conception of family in Africa. Nonetheless, article 2 (8) would do justice if it did, at least, provide a non-exhaustive list of family members and allow the possibility to add other family members of a refugee or an asylum seeker on the basis of a case by case assessment of a refugee’s particular situation.<sup>174</sup>

### **3.5.6. Protection of Vulnerable Refugees**

Generally, refugee-producing situations such as war affect all people but children, the elderly, women and persons with disabilities end up being the major sufferers. For this reason, despite the absence of corresponding provisions in the Refugee Conventions, many international conventions to which Ethiopia is a State Party prescribe special protection regimes to these vulnerable groups that are tailored to

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<sup>173</sup> UNHCR, Background Note, Family Reunification in the Context of Resettlement and Integration (2001), cited above at note 164.

<sup>174</sup> In this regard, one may imagine a hypothetical scenario where a refugee has a single underage younger sister in the country of origin without any other relatives. If we are to follow article 2 (8) of the Refugee Proclamation, the refugee has no any chance of bringing her to Ethiopia and this would be unfortunate result and does not comport with Ethiopia’s generous asylum policy.

their specific needs.<sup>175</sup> Consistent with the country's international commitments in these instruments, the Refugee Proclamation also instructs the responsible immigration authority to put in place measures that 'ensure the protection of women refugees, refugee children, elderly refugees and handicap'.<sup>176</sup>

Although the Proclamation does not indicate or list the kind of measures necessary to the protection of these vulnerable groups, the nature of such measures should obviously consider their physical and emotional vulnerabilities and be directed to address their 'specific protection needs'. Along with other refugees, these groups should benefit from the general protection available to all refugees including protection against arbitrary detention, *refoulement*, discrimination, expulsion, etc., but also they should be accorded special treatments that match their practical and emotional needs. Even though the needs of each person depends on his/her own experience, women refugees generally require, *inter alia*, protection against sexual abuse and access to reproductive health facilities<sup>177</sup>; refugees with disabilities may need mobility aides allowing access to the environment, to transportation and communication technologies,<sup>178</sup> child refugees, often fleeing unaccompanied, need education and a family-like environment and psychological assistance which help them overcome past traumatic experiences and the elderly also, like the others,

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<sup>175</sup> See, for example, Protocol *Additional* to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (*Protocol II*), articles 76-78, (1977), UN Convention on the Rights of the Child [CRC], article 22, (adopted on 20 November 1989).

<sup>176</sup> Article 22, the Refugee Proclamation.

<sup>177</sup> Article 11 (4), CEDAW, *cited above at note 16*, article 76, Additional Protocol II (1977), *cited above at note 175*, see also UNHCR, Guidelines on the Protection of Refugee Women, Geneva, July 1991 available at (<http://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>)

<sup>178</sup> UN Convention on the Rights of Persons with Disabilities (adopted on 6 December 2006). Ethiopia became a party to this convention on 7 July 2010.

need physical and emotional support.<sup>179</sup> Within the limits of the country's resource capacity, the Authority thus shall strive to accommodate the needs of each group.

### 3.6. Rights and Duties of Refugees

It was incidentally indicated earlier that refugee status yields both rights and duties to both recognized refugees and yet-to-be-recognized asylum-seekers. The 1951 Refugee Convention, its 1967 Protocol and the 1969 OAU Refugee Convention provide some general and specific rights and duties applicable to refugees.<sup>180</sup> In these instruments, the general approach is that refugees get increment of rights as they continue to stay longer in the State of asylum, i.e., the more their attachment with the latter deepens, the higher number of rights they are able to enjoy.<sup>181</sup> Accordingly, they not only benefit from the prohibition against discrimination, *refoulement* and arbitrary expulsions but also have the right to practice their own religion, to acquire movable and immovable property and other rights pertaining thereto, respect for their intellectual property rights, right of association, access to courts, right to engage in wage-earning employment, housing, public relief and social security, education, and freedom of movement on equal terms with nationals or aliens.<sup>182</sup> Contracting Parties are also obliged to issue identity papers, and travel documents, to allow transfer of assets, not to impose fiscal charges

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<sup>179</sup> See UN Convention on the Rights of the Child (adopted on 20 November 1989), article 3, Additional Protocol II (1997), *cited above at note 175*. See also UNHCR, Refugee Children: Guidelines on Protection and Care, available at (<http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf>), last visited on 1 May 2017.

<sup>180</sup> Most of the rights are subject to qualification clauses with respect to the extent of the rights and duties; some are guaranteed for refugees on equal par with nationals and some others with aliens. See, e.g., articles 4, 7, 8, 13, 15, 16, 18, 19 of the 1951 Refugee Proclamation, article OAU Refugee Convention does not have similar detailed list of rights.

<sup>181</sup> See James Hathaway, *The Rights of Refugees* (2005), cited above at note 111, pp. 156.

<sup>182</sup> *Ibid.*

other than those which may be levied on nationals and not to penalize refugees on account of their legal entry.<sup>183</sup>

These instruments also impose duties on refugees of which the most fundamental are the duty to respect the laws and regulations of the country of refuge as well as to measures taken for the maintenance of public order and the duty to refrain from involving in subversive activities that disturb public order or national security or affect the humanitarian nature of the institution of asylum.<sup>184</sup> The violation of these duties may result not only in the refugee being subject to administrative or legal measures but also exceptionally, in his expulsion, *refoulement* and exclusion from refugee status.<sup>185</sup>

The Refugee Proclamation under its article 20 and article 21 provides provisions on the rights and duties of asylum-seekers and refugees, respectively.

#### **a) Asylum-Seekers**

The first substantive right is that asylum-seekers who filed application for recognition as a refugee have the right to remain in Ethiopia pending the decision on their application or if their application is declined, until they exhaust their right to appeal.<sup>186</sup> This right can be claimed only by those who have already lodged application for refugee status, which simply means that, in order to benefit from this right, asylum-seekers should ‘present themselves without delay to the authorities’ once they

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<sup>183</sup> Articles 27-31 of the 1951 Refugee Convention.

<sup>184</sup> 1951 Refugee Convention, article 2, the 1969 OAU Refugee Convention, article III.

<sup>185</sup> See sections 3.3 and 3.5 above.

<sup>186</sup> Article 20 (1) of the Proclamation.

arrive in the country.<sup>187</sup> Upon their application, they have the right to get identity card that confirms their status.<sup>188</sup>

However, even those who have not formally applied for asylum continue to benefit from the principle of *refoulement* against rejection at Ethiopia's frontier or from being sent back to places of persecution if they have already crossed the country's border. If they entered or stay in Ethiopia without legal authorization, they may also not be subjected to any penalties on account of their illegal entry or presence.<sup>189</sup> It should be recalled that asylum seekers have further the right to family reunification.<sup>190</sup> While benefiting from these rights, *all asylum-seekers* are obliged to conform to 'the laws in force within Ethiopia'<sup>191</sup>

The Proclamation, apart from these rights and duties, does not explicitly offer other rights or impose duties on asylum seekers. Yet, in comparison to the refugee conventions<sup>192</sup>, its explicit stipulation of rules applicable for *asylum-seekers* is its additional strong feature for which its drafters should take credit.

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<sup>187</sup> See article 31 (1) of the 1951 Refugee Convention.

<sup>188</sup> Article 13 (4) of the Refugee Proclamation.

<sup>189</sup> See the 1951 Refugee Convention, article 31 (1) and the Refugee Convention, article 13 (5). The latter provides a stronger protection regime by not only prohibiting penalties but also all criminal proceedings against a person 'who has applied or is about to apply' for a refugee status without any exception. The former in contrast requires refugees to present themselves 'without delay to the authorities' and 'should show good cause for their illegal entry' in order for them to be spared of punishments for their unauthorized entry or presence. While, generally speaking, it works favourable for asylum-seekers to present themselves to the authorities, the requirements of 'without delay' and 'showing good cause' import subjective requirements open to abuse. The Proclamation's omission of these requirements is commendable. See however, the discussion below under section 3.7.

<sup>190</sup> *Id.*, article 12 (1).

<sup>191</sup> *Id.*, article 20 (2).

<sup>192</sup> Both the 1951 Refugee Convention and the 1969 OAU Refugee Convention do not explicitly talk about asylum-seekers and they do not make distinction between recognized and unrecognized refugees.

## **b) Recognized Refugees**

The Proclamation also provides a terse set of rights for *recognized refugees* including the right to remain in Ethiopia, get identity card and travel documents, and the right to be united with members of their family.<sup>193</sup> Significantly, the Proclamation further states that recognized refugees are ‘entitled to other rights and be subject to the duties contained in the Refugee Convention and the OAU Refugee Convention’.<sup>194</sup> This allows refugees to enjoy other rights not included in the Proclamation but available in the refugee conventions to which Ethiopia is a Party. Accordingly, refugees have rights to intellectual property, right of association, access to courts, right to engage in gainful employment, housing, public relief and social security, education, and freedom of movement, etc.<sup>195</sup>

It should be remembered that these rights are additional to other rights available for all individuals and aliens in international human rights instruments ratified by Ethiopia and in the FDRE Constitution. These include the right to liberty, and security, the right to life, the right to protection against inhuman treatment, and other fair trial rights in cases refugees are charged with crimes.<sup>196</sup> All the same, recognized refugees like asylum-seekers are at all times duty bound to respect the laws in force in the country.<sup>197</sup>

Note that the Proclamation contemplates the possibility where the Head of the Authority may designate places of residence where both refugees and asylum-seekers and their family members live, provided that such

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<sup>193</sup> Article 21 (1) (a)-(c), article 12 (3), Refugee Proclamation, see also article 10 of Immigration Council of Ministers Regulation No. 114/2004.

<sup>194</sup> *Id.*, article 21 (e).

<sup>195</sup> See the limits specified on the enjoyment of these rights under article 21 (3), *Ibid.*

<sup>196</sup> See Source cited above at foot note 47.

<sup>197</sup> Article 21(1) (e), *Ibid.*

places are situated at a reasonable distance from their country of origin.<sup>198</sup> These may include measures that require them to take up residence in refugee camps. The Proclamation however does not indicate the conditions under which asylum-seekers may be encamped in a particular place. Obviously, the Head of Authority should have legitimate practical security, public order or public health reasons to order so. Freedom of movement and choice of residence should be fully respected unless situations warrant restrictions for legitimate reasons.<sup>199</sup>

### **3.7. Refugee Status Determination Procedures**

The Refugee Proclamation devotes its third part to refugee status determination procedures.<sup>200</sup> A quick glance of the provisions reveals that the drafters, by prescribing detailed, sometimes even too specific, procedures to apply for and secure recognition of refugee status, clearly attempted to make sure that asylum-seekers get access to a fair asylum determination process. At the same time, a more probing inspection of the provisions indicates that the Proclamation still lacks some basic attributes of a due process of law the absence of which may be detrimental to asylum-seekers. This paper does not again intend to provide a thorough analysis of the provisions but some general comments are again in order.

Any person who seeks to apply for asylum in Ethiopia has to first present himself before the authorities and lodge his application. Article 13 of the Proclamation specifies that this shall be done within fifteen days from the time such person enters the country lawfully or otherwise.

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<sup>198</sup> Article 21 (2), *Ibid*.

<sup>199</sup> See the FDRE Constitution (1995), article 32 (1), the 1951 Refugee Convention, article 26. See also UNHCR Guidelines on Detention (2012).

<sup>200</sup> Both the 1951 Refugee Convention and the 1967 OAU Refugee Convention does not provide similar procedures. When both conventions were concluded, the assumption was that State Parties would enact their own domestic laws and provide procedures to determine refugee status.

It is not clear what ensues from non-compliance of this time limit but in any event, this should be applied flexibly as different factors such as the distance from entry point to the nearest police station or immigration authority and health issues often facing asylum seekers may impede them from applying for asylum within this time.

If the application is made to a police station, it has to be immediately forwarded to the Authority and the latter shall issue to the applicant an identity card attesting to his status.<sup>201</sup> Following this, the Authority shall assess and decide on the asylum application within a reasonable time.<sup>202</sup> In reaching at a positive or negative decision, the Authority shall ensure that every applicant is given a reasonable time to present his case, and when necessary, provide a qualified interpreter during all stages of the hearing.<sup>203</sup> The Authority shall also examine each application on an individual basis and invite the UNHCR to participate as an observer.<sup>204</sup> The participation of UNHCR evidently ensures the transparency of the process and is another resounding illustration of the Proclamation's progressive attribute. Once a decision is made, it shall be communicated to the asylum-seeker with reasons indicated thereof.<sup>205</sup>

The Proclamation also allows asylum-seekers to appeal before a Hearing Council in case they are dissatisfied by the decision of the Authority.<sup>206</sup> This is clearly an administrative body and one may wonder whether asylum-seekers may have the opportunity to appeal to a judicial body

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<sup>201</sup> Article 13 (2) (4) of the Proclamation.

<sup>202</sup> Article 14 (2), *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.* The Proclamation also requires the same during appeal. *Id.*, article 16 (2).

<sup>205</sup> *Ibid.*

<sup>206</sup> The Hearing Council is a panel of five members composed of representatives from the Authority, the Ministry of Foreign Affairs, the Ministry of Justice (currently, Office of the Attorney General) and two representatives of the Federal Affairs). *Id.*, article 18.

(ordinary regional or federal courts) if the decision of the Hearing Council did not address their grievance. The Proclamation does not have a provision prohibiting them from doing so, and in fact, the 1951 Refugee Convention and the FDRE Constitution guarantees access to courts for ‘everyone’.<sup>207</sup> In view of this, one may conclude that the presence of the Council does by no means prevent asylum-seekers from taking their grievance before a judicial authority. Admittedly, international law does not oblige States to institute a judicial body to process asylum applications or to review the decisions made by administrative organs. However, given the grave consequences that denial of refugee status may entail to asylum-seekers, ordinary courts should be able to review the decision of the Council in case there is manifest arbitrariness in the decision making process. The explicit inclusion of such option in the Proclamation would therefore have definitely created more legal certainty.

It is of greatest interest to note that the Proclamation requires that the records and minutes relating to the asylum application process should remain confidential to protect the safety and security of asylum-seekers. This is an important safeguard given that asylum-seekers may reveal some information that may offend the country of origin and prompt the latter to take revenge against the asylum-seekers, especially if their application is rejected and have to return back or be deported to their country of origin.

Apart from the above, the Proclamation does not provide additional safeguards which might be important to asylum-seekers in the course of the asylum determination process. Notably, the Proclamation does not instruct the provision of medical care (especially, to those who are

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<sup>207</sup> See article 16 of the 1951 Refugee Convention. Article 37 (1) of the FDRE Constitution also declares that ‘Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a *court of law* or any other competent body with judicial power.’ [Emphasis added].

affected by traumatic experiences as a result of persecution), interviews to be conducted by a person of same gender (this is particularly important for women), and when necessary, the provision of legal assistance.

### **3.8. Durable Solutions**

As indicated earlier, by its very nature, asylum is intended to be a temporary protection scheme to persons facing persecution in their home country. For this reason, the need for a durable solution remains a pressing issue until a place where they can live in dignity and peace is found. Internationally, as part of its core mandate, UNHCR works to find durable solutions to the plight of refugees and often attempts to secure one of the three common durable solutions, namely, voluntary repatriation to the country of origin, local integration in the country of asylum or resettlement in a third country. Unfortunately, the Refugee Proclamation recognizes only voluntary repatriation and no provision is made concerning resettlement or the possibility of local integration. However, in some instances, Ethiopia in cooperation with the UNHCR has resettled refugees to other countries including the United States, Canada, Switzerland and Australia.<sup>208</sup> The failure of the Proclamation to provide procedures allowing resettlement seems to be an inadvertent omission. With regard to local integration, the Proclamation on Ethiopian Nationality, No. 378 of 2003 provides the possibility where refugees, as a ‘foreigner’, may acquire Ethiopian nationality through marriage, adoption or normal naturalization procedures.<sup>209</sup> Yet,

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<sup>208</sup> Ethiopia: Over 1600 Eritrean refugees resettled in the US, *Sudan Tribune, Addis Ababa*, December 17, 2009

(<http://sudantribune.com/spip.php?article33495>) [last visited on July 2017].

<sup>209</sup> See articles 4, 5, 6 and 7, Proclamation on Ethiopian Nationality, No. 378 of 2003.

considering the stringent requirements therein<sup>210</sup>, provisions which promote local integration should have been included in the Refugee Proclamation.

#### **4. Conclusions**

Ethiopia is one of those major refugee-receiving countries in Africa, at the moment hosting nearly one million refugees and asylum-seekers. The country's longstanding generous policy towards refugees is now anchored in its Refugee Proclamation No. 409/2004, which constitutes the main legal framework for the protection of persons seeking refuge in Ethiopia. By many standards, the Proclamation is a progressive instrument and a quick review of its substantive provisions reflects both the liberal refugee policy of the country and the major international obligations that Ethiopia owes towards refugees.

Among others, the Proclamation's broad definition of a refugee (which juxtaposes the definitions provided in the 1951 Refugee Convention and the 1969 OAU Refugee Convention), explicit legal protections of vulnerable groups and both recognized and non-recognized refugees (asylum-seekers) and their family members, its exclusion of the idea of 'internal flight alternative' (during the determination of refugee status) from its provisions, and its inclusion of rules allowing the UNHCR to partner with national authorities to promote and facilitate refugee

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<sup>210</sup> Article 5, for example, specifies that 'A foreigner who applies to acquire Ethiopian nationality by law shall: 1/ have attained the age of majority and be legally capable under the Ethiopian law; 2/ have established his domicile in Ethiopia and have lived in Ethiopia for a total of at least four years preceding the submission of his application; 3/ be able to communicate in anyone of the languages of the nations/nationalities of the Country; 4/ have sufficient and lawful source of income to maintain himself and his family; be a person of good character; have no record of criminal conviction; 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; and 8/ be required to take the oath of allegiance.

protection may be cited as some of the major normative strengths of the Proclamation. In addition, one should but commend the Proclamation's attempt to provide some detailed procedures for asylum applications and determination by the authorities, including procedural safeguards whose primary goal is to maintain the transparency of the system and protect the rights of refugees from arbitrary administrative decisions.

On the other hand, a thorough examination of the Refugee Proclamation exhibits some substantive pitfalls which require revisions in future amendment exercises. In this regard, this essay identified the following *major* areas for improvement.

- i) *Definition of a refugee*: Under article 4, with regard to the definition of a refugee, the Proclamation contains a very restrictive and potentially and arguably discriminatory clause: 'refugees coming from Africa'. A revision of the Proclamation in the future should definitely excise this clause. Similarly, the Proclamation's conflation of exclusion grounds with a criterion to identify a refugee under article 5 (IV) requires legislative amendment.
- ii) *Procedural Safeguards*: The Proclamation omits some important procedural safeguards applicable during and after the refugee status determination process and in the course of *refoulement* proceedings. To mention few: the right to appeal before regular courts, the provision of medical assistance (especially, to those who are affected by traumatic experiences as a result of persecution), right to be interviewed by a person of same gender (this is particularly important for women), the provision of legal assistance, etc. are important due process safeguards that are absent from the Proclamation. The current list of the procedural safeguards against arbitrariness in the Proclamation should therefore be revisited. In this regard, there should specifically be a provision in the Proclamation that allows persons subject to *refoulement* order under

article 9 to benefit from those procedural guarantees available for those refugees expellable in accordance with 10 (1) of the Proclamation.

- iii) *Rights and Duties of Refugees*: With regard to the rights of refugees, even though the Proclamation clearly ordains that refugees may claim and be subject to all rights and duties available in international refugee instruments, it does not exhaustively enumerate those rights and duties. A future amended version of the legislation should thus, to the maximum possible, be exhaustive with respect to those rights and duties of refugees if legal certainty is to be maintained.
- iv) *Family Unity*: While the Proclamation commendably prescribes rules on family unity, the description of ‘family’ adopted under Article 2 (8) of the same is too narrow and does not reflect the legal or societal understanding of family in Ethiopia or generally in Africa, where the majority of refugees in the country come from. Nor the existing description of ‘family members’ comport with the country’s liberal policy to refugees. Article 2 (8) therefore needs to be redrafted in a way that allows the Authority, on a case by case basis, to include persons with whom refugees or asylum-seekers have strong physical and emotional attachment.
- v) *Durable Solutions*: the Proclamation lacks comprehensive rules on durable solutions. Even those provisions on repatriation do not sufficiently state the manner or procedures of repatriation. The possibility of resettlement in third countries and local integration are also not envisaged in the Proclamation and should normally be available for refugees in Ethiopia. In the future, some specific rules on these durable solutions should thus be made.

# The Dynamics of Refugees' Dual-Identity along Ethiopia-South Sudan Border: Challenges, Prospects and Policy Implications

Moti Mosisa Gutema\*

## Abstract

*Hosting more than 901,235 registered refugees, Ethiopia is Africa's largest refugee hosting Country. The refugees in Ethiopia come from different neighboring countries, namely Eritrea, Somalia, and South Sudan. More than 90 percent of the refugees have historical, political or ethnic associations with the hosting local communities in Ethiopia, and contributed to the prevalence of refugees with dual-identity. This paper analyzes the dynamics of refugees' dual-identity along Ethiopia-South Sudan border focusing on challenges, prospects and its policy implications. To this end, both primary and secondary sources were used, and non-doctrinal research approach has been followed. The study has found that refugees with dual identity along South Sudan border have multiple implications on inter-state relationship, and on the local and national politics of both states, particularly Ethiopia. Besides, refugee based authorities' (both government and non-government) procedural practice in registering and hosting refugees contradicts with Ethiopia's refugee proclamation - where it serves refugees positively, but, would have multi-dimensional adverse consequences to the state (Ethiopia). Therefore, the paper recommends concerned bodies dealing with refugee issues to take in to account the scenarios of dual-identity and its long-term impacts on local, national and regional politics.*

**Keywords:** Mono-Refugees, Dual-Identity, Local Politics, Inter-State Relationship

## 1. Introduction

Globally, by the end of 2016, a recorded 65.6 million people were displaced as a result of persecution, conflict, violence, or human rights

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violations (UNCHR, 2016). Developing countries host about 86 percent of the world's refugees; and particularly the refugee population in Sub-Saharan Africa constitutes 30 percent of global refugees. The region hosts 3.7 million refugees primarily from Somalia, Sudan, South Sudan, the Democratic Republic of Congo, the Central African Republic, and Eritrea (UNHCR, 2015). With 901, 235 registered refugees, Ethiopia has Africa's largest refugee population, and the country hosts Eritrean refugees along the northern border, Somalis in the East and South, and South Sudanese in the West (USAID, 2018). In January 2018, the number of refugees from South Sudan, Eritrea, and Somalia, has reached 429, 928, 165,510, and 254, 274 respectively (UNHCR, 2018). Out of which more than 90 percent of them have historical and/or ethnic based relationship with the hosting community.

This increasing of refugee population driven by variety of both pushing factors like violations of human rights, direct and structural violence, war, internal conflicts, external aggression, ethnic and religious strife (Boamah-Gyau, 2008), and pulling factors such as ethnic based attachments, political and socio-cultural factors (EASO, 2016). Different studies proved that the refugees allowed to be engaged in a local economy contribute positively towards improving the local economy in different ways (UNHCR, 2004), whereas, there are cases where their presence has lead to insecurity, inter and intra-ethnic conflict, unemployment, and competitions over resources (International Rescue Committee, 2014).

If the refugees have ethnic based relationship with the hosting community, their exodus has multiple effects upon the local, national, and continental politics. Above all, if the refugees are fleeing to their neighboring countries because of their country's political instability, it is hard to achieve a positive relationship between the sending and the hosting communities. This happens if the receiving country has a vested interest from the incoming community; or if the sending country's

government deems that the fleeing refugees are using the hosting country as a place of preparation for the future political movement. Besides, when refugees possess ethnic ties with groups already present in the host society, they may shift the balance of one ethnic group over the other, and exacerbate the prevailing local ethnic based tensions (Atim, 2013). This makes worse the local ethnic problem and has its own implications up on local power balance (Brown, 1996).

## **2. Research Design and Methodology**

As the issue takes descriptive nature and the data were collected through interview, observation and focus group discussion, out of the three approaches (qualitative, quantitative and mixed approach) described by Creswell (2009), qualitative approach was utilized. Both primary and secondary data sources were used where primary data was collected from refugees, local communities, Regional and federal level officers. Secondary data was collected from books, international legislation and guidelines, journal articles, magazines, organizational and institutional publications like UN reports, AU guidelines and reports, and government Progress Reports.

Regarding data gathering tools and instruments, as the qualitative research aims to gain a deep, intense, and holistic overview of the context under study, observation, in-depth-interview and focus group discussion were utilized. The researcher used observation to observe refugee areas and issues around the border. Besides, the researcher has organized four Focus Group Discussions (two with local people and two refugees) in order to elicit the refugee-local community relationship. In addition to this, the researcher utilized snowball sampling for collecting information from refugees living in Addis Ababa.

### 3. South Sudanese Refugees in Gambella Regional State

Gambella, also officially known as Gambella Peoples' Regional state, is one of the nine regional states forming the Federal Democratic Republic of Ethiopia. The region is a home land for five indigenous ethnic groups; Agnewak, Kumo, Majang, Nuwer and Opo (GPRS, 1995), and bordered by South Sudan. The ethnicities living in the region have Ethnic based tie with the South Sudanese People, and this has led to the increasing number of refugees coming from South Sudan over the past three decades. Therefore, on the bases of the structure of refugees' entry in to the region, and the nature of local politics in South Sudan, the historical tracks of South Sudanese refugees in Ethiopia have been classified in to two phases.

**a) South Sudan Refugees Pre- 2013's Civil War:** Some studies claim that the South Sudanese lived in Ethiopia even before 19th century, and put as if the movement of South Sudanese as refugees is a recent phenomenon. For instance, Shin et al (2013) stated that there had never been any data for the registration of South Sudanese as refugees prior to the first civil war of 1955. With the start of the first civil war, Ethiopia hosted several thousands of South Sudanese refugees, and served as military training base for guerilla (Shin *et al*, 2013). In 1967 the number of Sudanese refugee was counted as 20, 0000 (Assefaw, 2006). The second civil war and successive violences of 1983, 1987 and early 1990's (Borchgrevink *et al*, 2009), have increased the number of refugees at increasing rate, and by the late 1980s it has reached about 350,000 refugees (Markakis: 2011; Bayissa, 2010). In the early 1990s, the number of refugees peaked, with the UNHCR and Government of Ethiopia hosting about 550,000 Sudanese refugees, who outnumbered the local community by a ratio of about 3:1 (Borchgrevink *et al*: 2009). The 1991's regime change in Ethiopia had no influence on South Sudan refugees as the incoming

regime (EPRDF) also volunteered to host the refugees (Mengistu: 2005).

In general, the pre-2013's refugees' movement to the western part of Ethiopia had two characteristics. Firstly, as the civil war was more of secession (self determination) politics, all the tribes of the South Sudan were more or less unified and stood together towards the common goal of self determination. Thus, the refugees comprised of multi-ethnic groups like Nuwer, Agnewak, Dinka and Shiluk (Borchgrevink *et al*, 2009). Secondly, though the Nuwer tribe comprised of the majority, the refugees contained many ethnic groups from South Sudan, and their diversity has minimized the level of refugees' impact up on the local politics.

**b) South Sudan Refugees post -2013's Civil War:** Immediately, after recognizing South Sudan's independence from republic of Sudan in July 2011, UNHCR and Ethiopian government facilitated the voluntary repatriation of South Sudanese refugees to their country. Accordingly majority of the refugees had returned to their home land. But, after South Sudan's relative stability for a period of two and half years, the civil war continued taking a new form - where the two major ethnic groups (Nuwer and Dinka) engaged in ethnic-based violence. Specially, the open disagreement between the President, Salva Kiir, from Dinka ethnic group and his vice, Riek Machar, from Nuwer ethnic group exacerbated the case and converted it into open conflict between the two ethnic groups. Thus, as the Nuwers living in South Sudan are geographically closer to the Western part of Ethiopia, and have ethnic based relationship with the Ethiopian Nuwers; the influx of Nuwer refugees increased immediately in the aftermath of the breakout of the war (Momodu *et al*, 2014).

In January 2018 the number of refugees from South Sudan has reached 429, 928 (UNHCR, 2018), and the post 2013's refugee influx

into Ethiopian territory took two distinctive forms. Firstly, the refugees have been from almost one Ethnic Group - particularly from the Nuwer tribe. Secondly, beyond acting as an IGAD's committed member and regional master peace keeper, Ethiopia's engagement with and commitment to the South Sudan's politics has been higher than the previous ones. Thus, the paper examines the dynamics of refugees with dual identity along Ethiopia-South Sudan border, and deal with questions like a) Why is the share of Nuwer Refugees became higher than other Ethnic groups? What are the implications of refugees' dual-identity on inter-state relationship? What are the implications of refugees' dual-identity for local and national politics? What prospects could be drawn out of refugees' dual-identity? What does it imply for national and international refugee laws?

#### **4. The Dynamics of Refugees' Dual-Identity in Gambella Regional State**

As it has been discussed in the above section, this influx of refugees (from South Sudan) to Ethiopia varies in terms of size and ethnic compositions. For instance, refugees during the first, second and third civil wars were from more than three ethnic groups such as Nuwer, Agnewak, Dinka and Shiluk. After 2013, as the civil war took the form of inter-ethnic conflict (between Dinka and Nuer), the refugees' ethnic background was the determining factor to decide about who could flee to Ethiopia as a refugee. Thus, as the South Sudanese Nuwers have ethnic and geographical proximity with the Ethiopian Nuwers, and all most more than 98 percent of refugees from South Sudan were from the Nuwers ethnic group.

Accordingly, although the Agnewak people had been claiming that they constitute the majority in the region up-to mid-1980s (Kurimoto, 2006); the third Population and Housing Census of 2007 revealed that the

Nuwers are the largest ethnic group in the region constituting 143,286 (46%) of the total population (307,096) (CSA, 2007). This shift of balance in demography said to be happened due to the increasing flee of South Sudanese Nuwers to Gambella during the pre- and post 2013's civil war (Kurimoto, 2006). Thus, the Nuwers refugees in Gambella are deemed to be refugees having dual-identity for the following reasons.

Firstly, the refugees are culturally and physically alike with the hosting community, and there is no limitation upon the movement of South Sudanese refugees in the region. The refugees regard and act as if they are in their homeland. One of the reflections observed by the researcher was that many of the refugees have an identity card of citizenship (not refugee-ship) from Gambella Regional State. One of the refugees interviewed in Addis Ababa said: *"I am from South Sudan, but, Nuwer. I do have an identity card of both countries. We are here to attend our college education with my brothers and friends from Gambella"*. This shows that the refugees are claiming to have dual-identity and nationality, and this was even put by Dereje (2014) as there is a rumor that some Nuwer political elites are using the refugees' dual-identity as a means to gain political advantages by issuing Ethiopian identity card to the Nuwer refugees. This has been causing tension between the regional political leadership and the federal institutions of refugee affairs administration.

Secondly, refugees' duality of identity is viable as they have a family network from Ethiopia. In a normal course of life, marriage based relationship in between the Nuwer of Gambella and the Nuwers of South Sudan is the most common one. Whenever there is war in South Sudan they come to Ethiopia as their second homeland not as refugees. For instance, one of the respondents has said *"Immediately after hearing the broke out of war, I went to South Sudan to bring my three kids and my wife"*. He added that he brought them not as refugees, rather, as his family members without any registration and permission. This is due to the

reality that they have had an identity card previously, and they act as refugees and as citizens at the same time.

Thirdly, the rapid increase of Gambella's total population in general, and the shift in balance of power of Nuwer over the Agnewak, specifically, shows the prevalence of refugees' dual-identity in the region. For instance, the housing and population census of 1994 indicated that the Agnewak and the Nuwer constitute about 36 and 11 percent of total population of Gambella regional state respectively. However, the housing and population census of 2007 shows that the share is reversed where the Nuwer and the Anyuwak constitute 46 and 21 percent of region's total population respectively. Due to this, the Anyuwak who advance a historical argument for political entitlement over the region contest the census, and argue that most of the Nuwer in Gambella are not Ethiopian citizens (Dereje, 2014). In other words the Nuwer refugees are counted as the total population of Gambella, and indirectly constituted to the claim of the Nuwers as majority tribe in the region, and contributed to the majority-minority politics of the region.

Fourthly, the refugees have a dual-interest in both South Sudan's and Ethiopia's political scenarios. For instance, one of the interviewees, in talking about the boldness of Nuwers in South Sudan stated *"Though the Ethiopian government is mistreating the Nuwers in Ethiopia by renting their land for investors, the Nuwers in South Sudan are very influential to the level of claiming that they can either totally rule the country (South Sudan) or to be an independent state"*. This statement shows that the refugees are not as refugees of anywhere else/ordinary refugees; rather, they have their own concern from the working political system in Ethiopia - as they claim to belong to one of the big ethnic groups in Gambella.

## 5. The Implications of Refugees' Dual-Identity

Although the extent of refugees' impact on the hosting communities depends on various factors<sup>1</sup>, the mass influx of refugees adversely affects the socio-cultural, environmental, economic, political, and the security of the hosting communities (Maystadt and Verwimp, 2009, Endalkachew; 2016 Awoke; 2013). Atim (2013) and Brown (1996) also noted that the refugees ethnic based relationship with the hosting community exacerbates the prevailing ethnic based local conflicts and tensions. Particularly, the case of dual-identity of refugees along Ethiopia-South Sudan border has some unique implications in different dimensions. The following are some of the implications;

### 1. *Implications on Inter-state Relationship:*

According to Atim (2013), refugees are not simply the unfortunate by-products of war, but may serve as catalysts for conflicts - including conflict between states. He added that *“War and ethnic, tribal and religious violence are the leading causes for refugees fleeing their countries, and this may trigger conflicts between sending and receiving states, and it is more likely to initiate militarized disputes against each other”*. Assefaw (2006) stated that South Sudan and Ethiopia have had nearly a five decades relationship in term of sending and receiving refugees. Even, Addis Ababa was selected for the peace agreement of 1972, and the reluctance of the then president, President Numeri, to abide by the peace agreement has led the rebellion of the 105th battalion soldiers (from Sudan) to cross Ethiopian border. These soldiers established Sudanese People Liberation Movement/Army (SPLM/A) and, stayed to prepare themselves for the second Sudanese civil war (Regassa, 2010). During this period Sudan had a rough relation with Ethiopia. Consequently, Sudan and Ethiopia engaged in a proxy

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<sup>1</sup> Including demography, existing socio-economic patterns of the host community, nature of the hosting community - refugee relations.

war, where Ethiopia supported Sudan Liberation Movement to fight the Sudanese and, the Sudan government started to sponsor the then anti-Ethiopian government guerilla fighters like EPLF, TPLF and OLF (UNHCR, 2000).

By the late 1980s, the second civil war broke out in Sudan and the number of refugees fleeing to Ethiopia had increased to 350,000 (Regassa, 2010). This has exacerbated the civil strike in Sudan, and the number of peoples fleeing to Ethiopian across Ethiopia-South Sudan border increased during the 1990s and 2010s. During civil wars the refugees in Ethiopia were from almost all ethnic groups in South Sudan. Ethiopia was taking impartial side to support all ethnic groups fleeing from South Sudan. The refugees from South Sudan also were coming to Ethiopia without any consideration for their ethnic background, and being from South Sudan was the sole criteria.

Nevertheless, the civil war that broke out in 2013 totally changed the scenarios of violence and the nature of refugees' entry in to Ethiopia. The Sudan versus South Sudan friction was transformed in to Dinka-Nuwer civil war. The refugees fleeing to Ethiopia during this civil war were mainly from the Nuwer ethnic group. This happened because of the presence of geographical proximity and ethnic based relationship between the Nuwers of Ethiopia and South Sudan. Thus, Ethiopian government, both as a neutral government and as a government having ethnic and political based vested interest from the unfolding developments in South Sudan, couldn't protect the refugees fleeing to Ethiopia. This has led many to question the neutrality of Ethiopia in dealing with the South Sudan's' situation, and made the relationship between the two states (particularly Ethiopia versus Salva Kiirs Government) get to a very low point.

This weakening of relationship was reflected in different ways. Firstly, Eritrea condemned Ethiopia's effort to dissuade Uganda from

supporting President Salva Kir, and accused Ethiopia of supporting Reik Machar of the Nuwer ethnic group in the civil war<sup>2</sup>. Secondly, the raid and attack by members of the Murle tribe into Gambela Region of Ethiopia, on Friday, April 15, further complicated the matter as there were rumors that Murles were accompanied by Dinka (the tribe from South Sudan in conflict with Nuwers) (Kelsey, 2016). The victims of the attack in Gambela Region of Ethiopia have also confirmed that few members of the Dinka ethnic group had accompanied the Murle.<sup>3</sup> Thirdly, it has been found that, the Nuwers fighting with the Dinka in South Sudan were found wearing a shirt with Ethiopian flag, and there were rumors that local militias from Ethiopia were helping the Nuwers of South Sudan. Hence, the above conditions created cold-war situation between the South Sudanese president, SalvaKiir (from Dinka), and the Ethiopian government.

## ***2. Implications on Local Politics:***

The recent surge in the number of refugees in some African countries has generated a serious concern throughout the world. Widely perceived as an unprecedented crisis, these flows of refugees have produced a mixture of humanitarian concern of the millions of people forced into exile, and fear for the potential threats to the social, economic and political stability of hosting states (Atim, 2013). Besides, if the host countries' ethnic groups have an ethnic based attachment with the incoming refugees, and the refugees feel that they have dual-identity, it has more political implications and leads to multiple crisis in the long term. Hence, the presence of such refugees has the following implications.

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<sup>2</sup> <http://www.tesfanews.net/ethiopia-supports-machar-against-president-kiir/>

<sup>3</sup> Gunmen Kill Scores of Civilian in Western Ethiopia, official says, April 16 2016.

- ❖ **Implications on Intra-Ethnic Conflict:** Though, some authors tend to understand the relationship between the refugees and the host community through ethnic affinities, AALL (1967), Zartman (1970) and Yeld (1968) argued that ethnic affinity does not guarantee a good or bad relationship between refugees and hosts. For instance, Dereje (2004) stated that the Nuwers' migration to Gambella Region started in the second half of the 19th century. This happened when a section of Nuwer (Jikany) ethnic group migrated to the east from Southern Sudan. He added that the Jikany living in Gambella are divided into three tribes; the Gaajak, the Gaajok and the Gaanguang. In terms of political dominance and utilization of natural resource, the Gaajak and Gaajok compete each other in both countries. For instance, the Gaajok tribes have dominant political status over Gaajok of Southern Sudan, whereas, the Gaajak aspire a dominant status in Nuer politics of Gambella regional state<sup>4</sup>. The minority (Gaajok) group in South Sudan is the majority and powerful tribe in Gambella Regional State.

Irrespective of their competition and friction in both regions, the refugees in Ethiopia come from both clans (Gaajok and Gaajak). One of the interviewees from South Sudan said " *We are here together because we do have the same enemy (the Dinka); but, in our country we were competing each other for power and resource*". Moreover, the rumors among the refugees revealed that the Gambella regional state supports and favors the Gaajok and the refugees of Gaajok feel more freedom than the Gaajak. This has the effect of exacerbating conflict between the two clans living in Gambella Regional State. This was evident from the competition among the Nuwer Refugees coming from South Sudan and the Nuwer in Ethiopia over grazing land, water, and other natural resources (Endalkachew, 2016).

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<sup>4</sup> *Ibid.*

- ❖ ***Implications on Inter-Ethnic Conflict:*** The higher influx of South Sudanese refugees has created tension between different ethnic groups in Ethiopia. Firstly, as it has been indicated in the above section, the Anyuwak people have been arguing based on their seniority and majority status to have access to land. But, recent publications are indicating that the balance of power is tilting in favour of the Nuwers as they constitute 46 percent of total population. The Anyuwak, who advance a historical claim to assume political offices in the region, contest the result of the 2007 census, arguing that most of the Nuwers in Gambella are not Ethiopian citizens (Dereje, 2014). The high proportion of Nuwers in the refugee population in Gambella Region is giving the Ethiopian Nuwers advantage to dominate the political positions and, leave the Anyuwak to feel a minority. This has led to competitions, tensions and even open conflict such as the September 2017 fighting in the city of Gambella.

Secondly, the increasing number of Nuwer refugees in Gambellaa regional state has also created a tension between the 'highlanders'<sup>5</sup> and the Nuwers in Gambella. This is due to the fact that the Nuwers in Gambella are feeling dominance over the resource and politics in the Region. Even sometimes they feel that they belong to South Sudan than to Ethiopia. According to Jucey (2016), due to the killing of the highlanders near the refugee camp by the Nuwer, one of the highlanders stated that Nuwer would like the Gambela region to be part of South Sudan, and condemned the Nuwers engagement in South Sudan's politics to the level of burning Ethiopian flag and raising the South Sudanese flag instead (Jacey, 2016).

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<sup>5</sup> All people with different color from the indigenous people are referred by the indigenous community as highlanders.

### ***3. Implications on Local-Federal Relation:***

Gambella Regional State is one of the nine Regional States of the Federal Democratic Republic of Ethiopia founded in 1991. Formerly, the Anyuak used to dominate political decision making in the Region. But, recently the Nuwer ethnic group emerged as the dominant group constituting more than 46 percent of the total population of the Region and dominating the major decision making positions including the office of the Regional President. There are rumors that the local officials are supporting the Nuwer refugees in different ways – such as by giving identity card, permitting to hold assets, to engage in different business, to hold land, and to freely move in the region.

Contrary to the local officials' open favor for the Nuwer refugees and intentional engagement in supporting the refugees from South Sudan, the federal government has been acting as a neutral agent in negotiating the two competing parties of South Sudan (ReikMachar of Nuwer, and Kir of Dinka). This scenarios has been analyzed by Dereje (2014) as a country with two foreign policies over the same country or as articulated by Kincaid (2010) 'constituent diplomacy'- where the same country with federal state structure set a room for regional states to have diplomacy strategy with neighboring countries with in the frame work of the federal setup. That is why Salva Kiir (the president of South Sudan who is from Dinka ethnic group) disclosed that he was not confident about Ethiopia's neutrality in mediating the disputing parties. Thus, the divergence of practice among the regional and federal structures in Ethiopia has its own implications on the relationship between the federal and regional level decision makers on the areas of refugees and regional integrations.

### ***4. Implications on National Economy:***

According to Martin (2005), Endalkachew (2014) and Wosenu (2013) refugees have different economic impacts on regional economy.

Particularly, problems associated with refugees with dual-identity would not be restricted to the sharing of natural resources. Interview with members of the hosting communities revealed that the refugees are engaging themselves in different activities as a means of livelihood-including the companies operating in the region. As they share the employment opportunities of Ethiopian citizen and natural resource of the local people, it will be followed by multiple regional and national economic dynamics and burdens.

#### ***5. Implications on National Security:***

According to Gil Loescher (1996) refugees are not only the concern of humanitarian problem, but also have political, economical and social contents. He stated that the presence of refugees exacerbates existing internal conflicts in the hosting countries. Particularly, if there is ethnic based cross-border relationship, it is difficult for security officials to control the flow of weapons and armaments. For instance in Gambella Regional state, it is hardly possible to distinguish the Nuwers that came from South Sudan from the local ones. Moreover, the border patrol system is very weak to the level of not preventing armed soldiers from the Murle tribe of South Sudan, from entering and attacking the local community in Gambella Region. So, it is very simple for refugees either to destabilize the region by themselves or to be used as an instrument by any agent having interest with Ethiopian politics. Thus, it is possible to conclude that this dual-identity and free movement of refugees will lead to the creation of local rebels, sponsored terrorisms, and national resistance based military movements.

#### ***6. Implications for National and International Refugee Laws:***

Ethiopia, since ancient times, has been serving as a sanctuary for refugees from far and near - in a liberal and humanitarian spirit, and in a full respect of the modern principle of non-refoulement. This was evidently seen in 615 AD when the followers of Prophet Mohammed

were allowed asylum from persecution Mecca (Pankhurst, 1983). This was not done out of respect legal obligations since there were no laws then. Ethiopia has been serving refugees only from humanistic approach. This has been continued as a legacy of the country to the present day practice in handling refugees - to the extent where different international institutions acknowledged Ethiopia's positive response to the plight of refugees. For instance the UN refugee Agency, in its 2008 Operation plan put Ethiopia as a generous country to refugees.

Ethiopia is a member to the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951, the Protocol Relating to the Status of Refugees of 31 January 1967 and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, done at Addis Ababa on 10 September 1969.<sup>6</sup>

The Ethiopian government has as also proclaimed a law concerning refugees in Ethiopia, part of which reads:

*"No person shall be refused entry in to Ethiopia or expelled or return from Ethiopia to any other country or to be subject to any similar measure as a result of such refusal, expulsion or return or any other measure, such person is compelled to return to or remain in a country where:- he may be subjected to persecution or torture on account of his race, religion, nationality, membership of a particular social group or political opinion: or his life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or in whole of the country."*<sup>7</sup>

The proclamation also sets a procedure for registration as a refugee. Thus, despite some criticism and comments about the treatment of high number of refugees in the country, the country has been paying attention

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<sup>6</sup> Ethiopian Refugee Proclamation, Proc. no, 409/2004.

<sup>7</sup> *Ibid.*

to refugees and developing generous refugee laws. Awoke (2013) has noted the praise by international aid institutions poured to Ethiopian government for being generous in law making and hosting huge number of refugees.

The problem is that the refugees hosted by Ethiopian government have a unique characteristic with regard to their ethnic-based relationship with local people. The Ethiopian law concerning refugees, however, does not address the cases of dual identity refugees and is drafted having in view mono refugees. Due to the dual-identity of refugees, and the gaps in the provisions of the Ethiopian refugee law the followings are some of the practical problems encountered:

Firstly, according Refugee Proclamation No. 409/2004 Article 13 sub No. 1.

*"any person who is at the frontier or any other entry point or within Ethiopia, whether, he has entered the country lawfully or otherwise; and who wish to remain within the country as refugee in terms of the proclamation shall with in fifteen days apply to nearest; a) office of the Authority or b) Police station."*

As per this provision from the Refugee Proclamation, if any one stays more than fifteen days without applying to any of the institutions listed, he/she shall be criminally liable for neglecting the provisions. But, in Gambella regional state, refugees register in to refugee camps if and only when they need protection and facilities from the bodies concerned with refugee affairs (camps). Otherwise, as some have dual-identity and others have dual-nationality, they move freely with in the region, particularly in the Nuwer Zone. One of the refugees living in Gambella has said *"Why I need to register myself to the office. I'm working in Gambella freely without any problem"*. As it is hardly possible to differentiate refugees from non refugees, once they crossed the border they find registering as a refugee optional. Furthermore, most refugees have the region's identity card,

and they do not want to identify themselves as refugees - this has been also confirmed by informants from Anyuwak ethnic group, who claim that the Nuwer ethnic group is growing at an alarming rate.

Secondly contrary to other countries' experience where becoming a refugee is simpler than getting the right to live in the hosting community as an ordinary citizen, in Gambella, becoming a citizen is simpler than becoming a refugee. The criteria set by both national and international actors, couldn't handle the case to process further due to the dual-identity of the refugees. In Ethiopia, refugee status determination process has been guided by Article 4 (1) of the 2004 Refugee Proclamation and Article 1 (A) of the 1951 Refugee Convention, and the African Refugee Convention of 1969. For illustration, Article 4 (3) of refugee proclamation states that for anyone to be a refugee he/she must be in need of protection *"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, he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality, in case of refugees coming from Africa"*.

Contrary to this, as differentiating refugees from non-refugees is hardly possible in the region (Gambella), sometimes the local people living around the refugee camps register as refugees and claim to avail the services being provided to refugees by international institutions. This was also, confirmed by Awoke (2013) who found that Somali and Eritrean asylum seekers which share ethnic and linguistic similarities with the local people are difficult to screen as refugees.

Thirdly, there are three internationally recognized mechanisms and durable solutions to refuge problems. These include voluntary repatriation, resettlement and local integration. Looking at Ethiopian experience regarding the South Sudanese refugees; voluntary repatriations and local integrations have long been used as durable

solutions. Following South Sudan's independence, Ethiopian government in collaboration with UNHCR used voluntary repatriation to return large number of South Sudanese refugees back to their home country. With regard to the local integration alternative, Ethiopian government goes beyond the provisions available and allows them to live as a citizen or as *defecto-refugees* - refugees who fled from South Sudan but not registered by UNHCR or by the Authority for the Refugees and Returnees Affairs (Ethiopia) (ARRA) but living a normal life anywhere within Ethiopia.

## **6. Conclusions**

Hosting 901, 235 registered refugees, Ethiopia is one of the top refugee hosting countries in Africa. One of the unique features of Ethiopia as a refugee hosting country is that it hosts refugees having either political or ethnic based relationship with the hosting community. These refugees come from Eritrean, South Sudan and from Somalia. Not all, but most of these refugees have dual identity and have physical similarity with the local people. Thus, the main purpose of the study was to assess the dynamics of refugees' dual-identity focusing on the status, challenges and policy implications. Finally the following conclusions were drawn from the investigation.

Out of the total refugees in Gambella Regional State, more than 98 percent of them are Nuwer by their ethnic affinity. These refugees have dual-identity in the region where they are alike with local communities physically, and have an identity card indicating that they are the citizens of Ethiopia. The study found that refugees dual-identity have both constructive and negative implications for both local and national economic, social and political situation mainly on inter-state relationship and on the local and national politics. Besides, the process followed by authorities in registering refugees in the region contradicts with Ethiopia's refugee proclamation - where it serves the refugees positively,

but, would have multi-dimensional adverse consequences. Therefore, the paper recommends the following way forwards to the concerned bodies;

- Developing the capacity of boundary protecting (security) agents in terms of skill and resource to limit the entrance of non-refugees.
- Contextualizing Ethiopian refugees' registration and handling laws into Gambellan case where refugees have dual identity.
- Putting some limitations and setting systems of screening out needy refugees from non needy (opportunistic) refugees.
- Creating awareness on national and international refugee laws to the national and international refugee processing organizations so that refugee issues could be managed as per the existing laws.

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# Procedural Guarantees for Refugee Status Determination under Ethiopian Refugee Law

Jetu Edosa Chewaka\*

## Abstract

*Mechanisms employed to determine the status an asylum seeker as a refugee has profound repercussions on the life and security of asylum seekers. This is because refugee status is determinative as to whether he or she is to be protected from a forcible return to his or her country of origin and is to receive special protection and assistance in rebuilding his or her life in the country other than his or her country of origin. Thus, the determination of asylum seekers' refugee status is a condition precedent for the State Parties to ensure the protection of the fundamental rights of refugees enshrined under the international refugee laws. Ethiopia, as a party to both international and regional refugee Conventions, has put in place both national legal and institutional frameworks to administer claims of asylum seekers seeking protection from prosecution. This article analyzes the normative basis of refugee status determination (RSD) under the existing national refugee law. The article also sheds light on the set of procedural parameters under the international refugee conventions for the determination of refugee status essentially as an aspect of refuge protection. The modest appraisal of the provisions of Ethiopian refugee law and its subsidiary rule reveals that most of the minimum international procedural guarantees are embodied under this law. Yet there is clearly manifested lack of normative basis of procedural guarantees capable of ensuring independent, fair and efficient first instance RSD decision since matters of RSD decision and review of such decision at the appeal level totally rests on the same institution. It is contended that to guarantee fair and efficient RSD decisions, the current refugee law should be amended in a way to provide opportunity for asylum seekers whose refugee status claims have been rejected to challenge such negative decisions before competent judicial body through appeal system. It is also further suggested that in view of the*

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*profound repercussions of negative RSD decisions, asylum seekers should be provided with free legal assistance during the process of RSD to avoid miscarriage of procedures and justice.*

**Keywords:** Asylum seekers, Ethiopia, human rights treaty, international refugee law, procedural guarantee, refugee Status determination, UNHCR

## 1. Introduction

Currently, Ethiopia hosts over 889,071 registered refugees in 26 camps—from 19 countries—with the majority originating from neighboring South Sudan, Somalia, Eritrea and Sudan.<sup>1</sup> Due to the ongoing conflicts and instability in neighboring countries such as South Sudan and Somalia, Asylum seekers continue to enter Ethiopia on a regular basis, making it the second largest refugee-hosting country in Africa.<sup>2</sup> The unabated influx of asylum seekers into the Ethiopian territory requires vital administrative steps in determining their status as refugees as defined under the international refugee law. The issue of refugee protection lies at the heart of willingness of states to grant or recognize refugees, as vulnerable persons deserving assistance and protection of providing a safe haven from persecution or from threats that could endanger their life and security.

Despite the recent developments of national security concerns with mass influx of asylum seekers globally, international community has already devised normative frameworks to respond to refugee problems and mass movements across the frontiers of state borders. Instances of such responses include regional adoption of refugee convention dealing with

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<sup>1</sup> Ethiopia: United Nations High Commissioner for Refugees (UNHCR) “*Fact Sheet*” (2017). Available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Ethiopia-October%202017\\_0.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Ethiopia-October%202017_0.pdf)

<sup>2</sup> *Ibid.*

specific aspects of refugee problems in response to the existing situations or prevailing aspects of African refugee problems that resulted in the adoption of the 1969 OAU Convention Relating to the Specific Aspects of Refugee Problems in Africa. Globally, international community, under the auspices of UN Organization come up with the universal refugee protection system through the adoption of universal definition of the term “refugee” in the 1951 Refugee Convention as complemented by the 1967 protocol.

However, these sources of the international refugee law are not comprehensive enough to all issues and problems pertaining to refugees such as application of the law to mass refugee influx and the standards of Refugee Status Determination (RSD) in such case.<sup>3</sup> Rather, it grants a wide margin of discretion to States Parties to respond to the issues that eventually depend on favourable international diplomatic relations and domestic political will of such states.<sup>4</sup>

Against this backdrop, this article analyzes the normative frameworks that set procedural standards and guarantees for RSD in Ethiopian context. The article reviews both binding and non-binding legal documents, which set standards and procedures for RSD as condition precedent for the protection of refugees. Accordingly, the article first highlights the imperatives of RSD as a condition precedent to refugee protection. As such, it explains the justifications for setting and adhering to the minimum procedural standards for RSD in order for rule of law to prevail and underlines the need for strict adherences as set by the

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<sup>3</sup> United Nations High Commissioner for Refugees (UNHCR), *Note on Determination of Refugee Status under International Instruments* (Aug. 1977) Available at: <http://www.unhcr.org/excom/scip/3ae68cc04/note-determination-refugee-status-under-international-instruments.html>

<sup>4</sup> Hofmann, Löhr, ‘Introduction to Chapter V’, in A Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011) p.1089.

international community particularly through the agency of United Nations High Commissioner for Refugees (UNHCR) and international human rights documents. It then further discusses the procedural standards of RSD process and explains minimum RSD standards for the effective and efficient application of the definition of ‘refugee’ as set by international refugee laws. It also reflects on how the process of Refugee Status Determination jeopardizes the rights of refugees and may result in *refoulement (or expulsion)* if the standards set are not strictly adhered. The article more specifically appraises national standards for RSD set out in the Ethiopian refugee law to determine asylum seekers who qualify as refugees as defined by the international Refugee Conventions. Finally, the article provides concluding remarks as a way forward.

## **2. Refugee Status Determination: A Condition Precedent for Refugee Protection**

The respect for international refugee law requires efforts from states at both international and national levels. To attain the important common objective, respect for the rights of refugees, the first vital step is an international commitment to comply with conventions and treaties ratified or acceded to by states.<sup>5</sup> This formal undertakings must however go hand in hand with a serious of legislative and practical measures that each state party is obliged to take at national level in order to ensure that the commitments it has made is correctly put into practice through the adoption and adaptation of its legal systems and setting up the requisite administrative structures. This shows that legislative incorporation may not only in itself be expressly called for but effective implementation requires at least some form of procedures whereby refugees can be identified through a fair and efficient procedure that is essential element

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<sup>5</sup> Jean-François Durieux, ‘The Duty to Rescue Refugees’, *International Journal of Refugee Law*, Vol. 28, No. 4 (2016), p. 650. See also Catherine Phuong, ‘Identifying States’ Responsibilities towards Refugees and Asylum Seekers’. Available at: <http://www.esil-sedi.eu/sites/default/files/Phuong.PDF>

for the full realization and inclusive application of these international instruments.<sup>6</sup> Indeed the Convention and Protocol require no particular procedure for determining refugee status.<sup>7</sup> Instead, each state is supposed to establish its own procedure for evaluating applications for refugee status.<sup>7</sup>

Without impairing the discretion of states to apply the definition of refugee through the adoption of their own protection systems and procedures, based on their own legal framework, there should however be minimum standards for protection of the rights of refugees and procedural standards for RSD for the uniform application of the refugee definition.<sup>8</sup> Furthermore, seen from the perspectives of general principles of law, it is logical to devise mechanisms of enforcing substantive rights through well-established procedural setups without which substantive rights enumerated under national laws, international conventions and protocols are not enforceable. There is an attempt by the international community not only to set the rights of refugees but also in trying to assure minimal standards of procedural fairness in RSD through the agency of the UNHCR.<sup>9</sup> The UNHCR internationally championed in setting commendable RSD guidelines that helps for the uniform application of refugee definition across the world for protection

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<sup>6</sup> Michael Kagan (2002), "Assessment of Refugee Status Determination Procedure At UNHCR's Cairo Office 2001-2002." *Forced Migration and Refugee Studies Working Paper No. 1*, p. 14. Available at: <http://schools.aucegypt.edu/GAPP/cmrs/reports/Documents/RSDReport.pdf>

<sup>7</sup> David J. Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence', *Refugee Survey Quarterly*, Vol. 34 (2015) p. 81.

<sup>8</sup> Azfer Ali Khan, "Can International Law Manage Refugee Crises?," *Oxford University Undergraduate Law Journal*, p. 62. Available at: [https://www.law.ox.ac.uk/sites/files/oxlaw/field/field\\_document/4.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/field/field_document/4.pdf)

<sup>9</sup> Maja Smrkolj, 'International Institutions and Individualized Decision Making: An Example of UNHCR's Refugee Status Determination', *German Law Journal*, Vol 9 No. 11(2008), p. 1782.

of refugee rights. However, whether Ethiopia has taken national legislative steps in guaranteeing the procedural rights of refugees coming to Ethiopia for identifying persons who ought to be entitled to protection as per the minimum RSD standards should be assessed in light of these recommended guidelines. It is with such understanding of the matter that this Article discusses and analyzes the normative frameworks of RSD procedures as a condition precedent for the guarantee of the rights that emanates from the status of being a refugee.

### **3. Procedural Guarantees for RSD under International Law: *Sources of Legal Standards***

This section examines the sources of procedural safeguards in refugee status determination and gives insight on the basis of which the obligations of states are measured as a condition precedent to the protection of refugees. It also reviews standards adopted by the UNHCR in identifying how asylum seekers could be recognized as refugee and considers the minimum standards that guarantees fair and effective procedures for undertaking RSD. Accordingly, the first sub-section highlights the human rights treaty based provisions as legally binding sources of procedural standards for RSD process. The second sub-section provides the RSD jurisprudence developed under the UNHCR mandate as “soft laws” that aims to provide recommended procedural guidelines for states to be applied during the RSD process.

#### **3.1. Human Rights Treaties as Sources of RSD Standards**

In view of the inherent gaps in the international refugee convention, scholars of refugee law and human rights debated on whether human rights treaties provisions could be a potential source of procedural standards for RSD process.<sup>10</sup> Similarly, human rights treaty body

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<sup>10</sup> David J. Cantor, *supra note 7* at 85.

judgments have also strengthened the enquiry into whether procedural standards for refugee status determination may be derived from international human rights law.<sup>11</sup> Yet given that RSD is not referred to explicitly in any human rights treaty, the nature of this enquiry turns rather on how general human rights provisions are interpreted to apply to the particular context of refugee status determination.<sup>12</sup> In this regard, the role of human rights treaty bodies was immense in giving meaning to these provisions through their reasoning.

The procedural standards that guarantee fair and efficient outcome of RSD process involves human rights treaty provisions that includes but not limited to provisions stipulating: the right to have the claim determined by a competent, impartial, and independent authority; the right to a fair process of hearing; access to legal assistance; the right to receive a proper decision and review of such decisions; and the right not to be refouled pending determination of the claim for asylum.<sup>13</sup>

In specific terms, it is submitted that the procedural standards enunciated by “the right to a fair trial” under Article 14 of the ICCPR may apply to the process of RSD.<sup>14</sup> The Human Rights Committee (HRC) of the ICCPR however addressed the issues on the applicability of article 14(1) as a procedural guarantee for RSD process rejecting that asylum-seekers may not challenge the fairness of the national RSD procedures on that specific treaty provision.<sup>15</sup> The HRC however reiterated that “any expulsion that may expose an alien to Article 7 or Article 6 of the ICCPR harm in the destination country as requiring

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<sup>11</sup> *Ibid.* See also M Alexander, ‘*Refugee Status Determination Conducted by UNHCR*’, International Journal of Refugee Law, Vol. 11(2) (1999), p. 253.

<sup>12</sup> David J. Cantor, *supra note 7* at 85.

<sup>13</sup> David J. Cantor, *supra note 7* at 98.

<sup>14</sup> Maja Smrkolj, *supra note 9* at 1792.

<sup>15</sup> David J. Cantor, *supra note 7* at 88-89.

proper evaluation by the expelling State.”<sup>16</sup> The HRC rather pointed that “to the extent that RSD involves an assessment of the risk of serious harm, the national procedures should not be “clearly arbitrary or amounted to a denial of justice” and as such suggested that certain procedural parameters apply to the process of refugee determination by virtue of Article 7 or 6 of ICCPR harm involved. In this context, the HRC has referred to the protections against arbitrary expulsion in Article 13 of ICCPR as guaranteeing an asylum-seeker access to a RSD procedure, a non-suspensive appeal from first-instance decisions, and free legal assistance in both ordinary and accelerated asylum procedures. The HRC in its latest Concluding Observation, has invoked Articles 6, 7, and 13 of the ICCPR in aggregation as guaranteeing all asylum-seekers access to a “fair and efficient” process of RSD and criticized delays in granting access to RSD procedures after registration as an “insufficient procedural safeguards”.<sup>17</sup>

In similar way, the African Charter on Human and Peoples Right (ACHPR) provides with procedural protection for aliens in Article 7(1)—the “right to a fair trial” provision. In one of its asylum claims cases, the African Commission on Human and Peoples’ Rights (ACommHPR) has held that Article 7(1) requires “unfettered” access to the competent national courts in order to challenge the “regularity and legality” of the decision.<sup>18</sup> The ACommHPR viewed article 12(4) of the ACHPR as a guarantee “against the ‘arbitrary’ expulsion of legally admitted aliens through the safeguards of “due process of law” and the right to be heard by a competent court.<sup>19</sup> Yet the reasoning of

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<sup>16</sup> *Id.* at 87.

<sup>17</sup> *Id.* at 89.

<sup>18</sup> *Id.* at 94.

<sup>19</sup> *Id.* at 95. See OAU: African (Banjul) Charter on Human and Peoples’ Rights (Adopted 27 June 1981), Art. 12(4) reads as: “A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.”

ACommHPR on Articles 7(1) and 12(4) as applicable procedural safeguards in RSD process was criticized on two main accounts.

The first critique is that its jurisprudence has mainly focused on access to the courts rather than the decision-making of first-instance bodies.<sup>20</sup> The second related criticism is that the Commission “has not attempted to further specify the procedural elements required of administrative authorities in the context of Article 7(1) or Article 12(4) ACHPR.”<sup>21</sup> In light of the second criticism, it should be noted however that the ACommHPR finds that Article 7(1) of ACHPR as requiring “administrative authorities determining asylum claims to meet the procedural standards set out in UNHCR EXCOM Conclusion No. 8 (1977)” as per its specific interpretative powers under Articles 60–61 ACHPR.<sup>22</sup> Therefore, the Commission made it express that “in the event of the failure of such administrative mechanisms”, the broad right to “a fair trial in the ACHPR not only sets standards for administrative asylum procedures by reference to UNHCR doctrine but also demands access to national courts for the lodging of appeals.”<sup>23</sup>

### **3.2. UNHCR Doctrine as Source of RSD Standards**

As noted before, the 1951 Convention Relating to the Status of Refugees as complemented by the 1967 Protocol was not and is not comprehensive document as it fails to deal with the procedural standards of RSD. Likewise regional refugee conventions such as the 1969 OAU Convention gives discretion to states for recognition of refugee rather than providing the self-executing RSD procedure. For instance, article 1(6) of the latter provides that “for the purpose of the convention, the

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<sup>20</sup> David J. Cantor, *supra note 7* at 95-96.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

contracting state shall determine whether an applicant is a refugee.” Hence, it is left to the State parties and international community, through the agency of UNHCR to fill this legal lacuna in international refugee law.

The UNHCR doctrine through soft law guidance mechanisms sets out minimum procedural protections governing the RSD process.<sup>24</sup> Much of these minimum procedural guarantees generally emanates from UNHCR mandate of international refugee protection whereby the UNHCR provides supportive RSD guidelines and manuals as a recommendation for state parties to adapt and adopt their national legislations governing RSD procedures.<sup>25</sup> The following procedural guarantees have been long crystallized as the UNHCR doctrine founded around the essence of “certain common basic requirements” which were officially declared in EXCOM Conclusion No. 8 of 1977.<sup>26</sup> These “certain common basic requirements” in RSD process includes the following:

- The requirement of competent authority such as immigration officer or border police officer to whom asylum seeker addresses himself at the border or in the territory of a Contracting State;
- Access to information and necessary guidance for asylum seekers as to the procedure to be followed;
- Access to clearly identified and competent authority with centralized legal responsibility for examining requests for refugee status and taking a decision in the first instance;
- The right to qualified interpreter for submitting his case to the authorities concerned;

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<sup>24</sup> *Cecilia M. Bailliet, 'National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within UNHCR Guidelines on International Protection', Emory International Law Review*, Vol. 29 (2015), p. 2060.

<sup>25</sup> Maja Smrkolj, *supra note 9* at 1791.

<sup>26</sup> *See* UNHCR EXCOM, Conclusion on Determination of Refugee Status, Conclusion No. 8 (XXVII), 1977.

- The right to be notified of positive and negative RSD decisions;
- The right to be given a reasonable period of time in cases of negative RSD decisions to lodge appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
- The right to remain in the country pending a decision on his initial request by the competent authority or an appeal to a higher administrative authority or to the courts.

In general, the source of procedural standards as a legal guarantee for fair and efficient outcome of the RSD process could vary from binding yet debatable application of human rights treaty provisions and UNHCR soft law practice with a capacity to influence states normative RSD frameworks. The whole exercise of highlighting on the legal sources of RSD procedural standards boils down the understanding of necessary assurance mechanisms for the objective implementation of fundamental rights of refugees through fair and efficient assessment of their status.

#### **4. Refugee Status Determination in Ethiopia: Applicable Legal Standards of Procedure**

Before embarking on review of the normative standards for RSD, it is imperative to highlight on the evolutions and present conditions of how asylum seekers are recognized as refugees in Ethiopia by reference to institutions and procedural laws. It should be noted that, the way asylum seekers are recognized as a refugee vary from the ancient time to present day given the laws and institutions dealing with Refugee Status Determination. In this regard it has to be noted that the year 2004 was a watershed in that it marks the first normative entrenchment of National Refugee Law addressing the issues of RSD in Ethiopia. Therefore, this section provides a general overview on the historical background and legal regimes governing Refugee Status Determination taking the year 2004 as a turning point in Ethiopian National Refugee Law evolution.

#### 4.1. Pre-2004 Refugee Status Determination Practice

Historical antecedents show the dominant role of the Abyssinian state in providing protection for refugees fleeing religious prosecution from foreign country.<sup>27</sup> The normative basis of providing such sanctuary traces its roots in the “Fetha Negest” (literally to mean “Law of the Kings”) crystallizing the essence of helping those “who took refuge in the house of God”.<sup>28</sup> However, the law of kings was not apt in setting the criteria for refugee status and admissibility procedures comparable to the modern refugee law that screen out asylum seekers from escaped criminals or fugitive of justice. Besides, there are no formal procedures for determining refugee status and no state organ or centralized institution responsible for the protection of refugees either except the good office of the then Ethiopian Orthodox Church which until the departure of Emperor Haile Selassie I was part of the Ethiopian theocratic state machinery.<sup>29</sup> This somehow shows that there existed traditional law, and institution used for the recognition of refugees, and evidences that recognition of refugees traced back to ancient history of Ethiopian traditional refugee protection system.<sup>30</sup> However, to adapt to dynamic changes of human movements, their need to be a mechanism of handling the plight of refugees nationally and internationally by setting of standards and protection requirements in harmonized way. Therefore, being part of the waves of the international dynamic changes, Ethiopia attempted to accommodate refugee concerns by adopting international

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<sup>27</sup> David Benjamin Spielman (2015). *One Law for Us All: A History of Social Cohesion through Shared Legal Tradition Among the Abrahamic Faiths in Ethiopia*. University of California: MA Thesis in African Studies, p.12. Available at: <https://escholarship.org/content/qt5qn8t4jf/qt5qn8t4jf.pdf>.

<sup>28</sup> Goran Melander and Peter Nobel (ed.) *Uppsala Seminar on Legal Aspects of the African Refugee Problem*, (Uppsala: Scandinavian Institute of African Studies, 1977), p.76.

<sup>29</sup> Eyayu Lulseged (1990). “Why Do the Orthodox Christians in Ethiopia Identify their Faith with their Nation?” In Richard Pankhurst et al (eds.), *Proceedings of the First National Conference of Ethiopian Studies*, p. 85.

<sup>30</sup> UNHCR/RLO: “Highlights from Addis Ababa”. *Newsletter*, Vol 1, issue 1 (2007).

refugee laws and establishing *de jure* national institutions responsible for the protection and recognition of refugees. The current Administration for Refugees and Returnees Affairs (ARRA) was established during the Provincial Military Administration Council (PMAC) to enforce the objectives of the then Ministry of Internal Affairs. ARRA in cooperation with UNHCR conducts Refugee Status Determination.

In general, despite the good offices of Church's and the practices of ARRA and UNHCR, Ethiopia did not have domestic legislation governing the specific aspects of refugees including Refugees Status Determination procedures with national standards. Yet it could be said that the 1951 Refugee Convention and the 1969 OAU Convention on refugees including UNHCR Hand Book on Procedure and Criteria for Determination of Refugee Status were the pertinent guidelines until the enactment of the 2004 Refugee Proclamation.

#### **4.2. Post-2004 Refugee Status Determination Practice**

It goes without saying that UNHCR champions refugee issues through the provisions of protection, assistance and long-term solutions while at the same time encourages government to translate the principles enshrined in the 1951 refugee convention and the 1969 OAU convention into national law. The later objective was achieved in 2004 with the enactment of the Refuge Proclamation No.409/2004. It is with the enactment of this Refugee law, that responsible organ for RSD procedures was established as the nationally established institutions and laws to enforce and implement this proclamation in line with the spirit of international conventions adopted by Ethiopia. According to this proclamation, SIRA (Security, Immigration and Refugee Affairs Authority, as established by proclamation No. 6/1995) has an overall prime responsibility on the RSD process.<sup>31</sup> However, currently SIRA is

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<sup>31</sup> Refuge Proclamation No.409/2004, Art.2(1).

changed into National Intelligence and Security Service (NISS) and delegated refugee affairs to ARRA (as per article 7(3) of proclamation No.6/1995), which is actually conducting RSD procedure prior to the enactments of the refugee proclamation.

In nutshell, ARRA/NISS and UNHCR, are the two institutions directly involved in RSD procedures while other implementing partners, such as IOM (International Organization for Migration), DICAC (Development and Inter Church Aid Commission of Ethiopian Orthodox Church), JRS (Jesuit Refugee Service) and Norwegian Refugee Council (NRC) deal with refugee assistance issues in Ethiopia. The normative frameworks derived from the international and national refugee instruments such as the 1951 Refugee Convention, the 1969 OAU Convention, UNHCR Handbook on Procedures and Criteria for Determination of Refugee Status and the Ethiopian Refugee Proclamation including Internal Procedural Guidelines for Appeal Hearing Council guide the procedures of Refugee Status Determination during the indicated period.

### **4.3. Procedural Standards and Safeguards for RSD**

As noted before, given the nature of the risks involved and the grave consequences of an erroneous status determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure. It should be noted that the following discussion is not an exhaustive overview and it is mainly to inform decisions makers and refugee advocates on the relevant national refugee law principles applicable to the current asylum procedures in Ethiopia. The following sub-sections highlights major procedural safeguards and guarantees during or after the RSD process as enshrined under the Ethiopian national refugee law.

### 4.3.1. Access to Asylum Procedures

It is imperative to address issues of access such as how the status of refugees who entered into the territory of Ethiopia is going to be determined. The 1951 Refugee Convention obliges state parties to facilitate access to its authorities starting from the moment an asylum seekers declares his intention to seek protection in that state against persecution.<sup>32</sup> Access to asylum procedure as essential preconditions of refugee protection involves both physical access of asylum-seekers to the territory of the State where they are seeking admission as refugees and access to procedures where the validity of their refugee claim can be assessed.<sup>33</sup> With regard to physical access, branch offices of ARRA receive asylum seekers application from “any person who is at the frontiers (of Ethiopian territory) or any other entry point with in Ethiopia.”<sup>34</sup> The predominant physical access where asylum seekers seek protection in the current reality could be both airport and ARRA offices mainly located in refugee camps found at the outlay where refugees are expected to flow in to Ethiopia. Ethiopian refugee law also designated “nearby police station” as additional physical access points in addition to ARRA offices whereby asylum seekers can also submit their application for refugee status.<sup>35</sup> This is a major departure in terms of physical accessibility as compared to the limited number of ARRA offices since police departments and police officers are more accessible to asylum seekers entering in to the Ethiopian territory.

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<sup>32</sup> See UN High Commissioner for Refugees (UNHCR), *Determination of Refugee Status No. 8 (XXVIII) - 1977*, 12 October 1977, No. 8 (XXVIII) – 1977. Available at: <http://www.refworld.org/docid/3ae68c6e4.html>

<sup>33</sup> UN High Commissioner for Refugees (UNHCR), *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005. Available at: <http://www.refworld.org/docid/432ae9204.html>

<sup>34</sup> Refugee Proclamation, Article 13(1).

<sup>35</sup> *Id.*, Article 13(1) a & b).

The other relevant issues with regard to access to RSD procedure is the implication of period of limitation within which asylum seekers are formally required to submit their application. In other words, whether the expiry of the period of limitation should pose an obstacle to the exercise of the right to seek asylum in case an applicant failed to submit an asylum claim within a certain time limit should be clear. The Ethiopian refugee proclamation employ the term “shall” to emphasize the mandatory requirement of application of refugee status claim “within fifteen days”.<sup>36</sup> Yet it is not decipherable from the readings of the proclamation that an applicant’s failure to submit an asylum claim within fifteen-days should not of itself lead to the claim being excluded from RSD process.

#### ***4.3.2. The Right to Appear Before Competent Decision Making Authority***

The effectiveness of application for refugee status recognition depends on whether asylum seekers are allowed to appear before a clearly identified authority with responsibility for examining requests for refugee status and making a decision in the first instance. Refugee status determination should be carried out by staff with specialized skills and knowledge of refugee and asylum matters including familiarity with the use of interpreters and appropriate cross-cultural interviewing techniques.<sup>37</sup> ARRA is designated as a competent refugee authority to deal with RSD. In order to undertake its RSD function, ARRA established Eligibility Committee, which receives applications from asylum seekers to render first instance eligibility screening.<sup>38</sup> The Eligibility Committee is composed of representative(s) from ARRA and

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<sup>36</sup> *Id.*, Article 13 (1).

<sup>37</sup> UN High Commissioner for Refugees (UNHCR), *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005. Available at: <http://www.refworld.org/docid/432ae9204.html>

<sup>38</sup> The term “Eligibility Committee” is used in Internal Procedural Guidelines for the Appeal Hearing Council circulated on 20 January 2008 as referring to the “first instance body” in the ARRA/NISS.

one representative from UNHCR with observer capacity in order to determine the eligibility of asylum seekers for protection.<sup>39</sup> On the basis of this administrative setup, asylum seekers are provided with the opportunity to present their cases both through formal submission and oral presentation before the Eligibility Committee in the form of interview during which reasonable period of time is given to enable them exhaust their claims.<sup>40</sup> Generally, ARRA is competent to conduct three types of refugee status determination.

The first competence relates the power to undertake individual RSD whereby ARRA conduct screening process on case-by-case examination of asylum claims on scheduled basis as per submitted applications.<sup>41</sup> The second type relates to derivative RSD process in which refugee status may be granted to a person or group of persons derived from the rights of asylum seekers or refugees based on the right to family unity.<sup>42</sup> Accordingly, members of the family of asylum seekers are permitted to apply for derivative refugee status and remain in Ethiopia pending final decision of asylum seekers refugee status claim.<sup>43</sup> Furthermore, member of the family of a recognized refugee permitted to enter and apply for derivative refugee status and remain in Ethiopia based on the right to family unity or independently as per the criterion of refugee definition provided by the law.<sup>44</sup> In such case, asylum seekers are not precluded from such independent application by the mere fact that they apply for

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<sup>39</sup> The Composition of the Eligibility Committee is not clear from the Ethiopian refugee proclamation (2004) as it simply uses the term Authority in practice referring to ARRA and UNHCR to participate as an observer.

<sup>40</sup> Refugee Proclamation Article 14(2) (a &b).

<sup>41</sup> The Refugee proclamation generally regulates RSD on individual bases. See Refugee Proclamation Article 13(3) that requires individual asylum seekers to fill forms designed for that purpose.

<sup>42</sup> Refugee Proclamation, Article 12.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

derivative refugee status or eligible for such status. The relevant issue is who are those categories of person or group of persons that should be considered as eligible for derivative refugee status as a “member of the family” of an asylum seeker or recognized refugee under the right to family unity? Should it consist of nuclear family members or extended family members? Should it include those groups of persons that are determined to have close relationship of social, emotional, and economic dependency with those asylum seekers or recognized refugee?

Ethiopian Refugee proclamation defines family members as “any spouses of the refugee and, any unmarried child of the refugee under the age of eighteen years”.<sup>45</sup> Hence, the family members of asylum seekers or recognized refugee eligible for derivative RSD is limited in scope which is even narrower than members of a given family constituting nuclear family and does not include family members of asylum seekers or recognized refugee that are economically and socially dependent to such refugee or asylum seekers.

The third RSD competence relates to categories of asylum seekers that are subject to *prima facie* protection system, streamlined means of recognizing “manifestly well-founded” refugee claims.<sup>46</sup> The application of *prima facie* RSD is usually undertaken in cases of large-scale influx whereby “all asylum-seekers from particular countries or territories are considered automatically to be refugees, and receive legal protection in

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<sup>45</sup> *Id.*, Article 2(8).

<sup>46</sup> Refugee class of persons to be refugees Proclamation, Article 19: “Declaration of class of Persons as Refugees”. Accordingly, the Head of ARRA may declare any class of persons considered to meet the criteria under Article 4(3) of the refugee proclamation. It however applies to asylum seekers coming from Africa. Article 4(3) reads:

“owing to external aggress on, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality, in case of refugees coming from Africa.”

the country of asylum without individual status determination.”<sup>47</sup> The importance of *prima facie* RSD is its administrative simplicity that easily manages the registration of refugees without necessarily going through thorough interview of all applicants to assess thousands of individual claims. Ethiopian refugee proclamation under Article 19 authorizes ARRA/NISS to declare a group of persons it deems eligible to be recognized as *prima facie* refugees.

#### **4.3.3. The Right to Fair, Impartial and Qualified Interpreter**

It is obvious that RSD process is a daunting task as it involves intensive individual interview process before granting the status. In view of the ramifications of the RSD process, providing asylum seekers with a reasonable time and qualified interpreter is pivotal. The latter safeguard is critical for asylum seekers to ensure correct understanding of an applicants’ testimony as poor interpretation can affect the integrity of applicant’s testimony. The UNHCR standards require the availability of “qualified and impartial interpreters” for refugee applicants.<sup>48</sup> As per Ethiopian refugee law, asylum seekers should be provided with “reasonable time to present their case”<sup>49</sup> before the Eligibility Committee and guaranteed “the presence of qualified interpreter during all the stages of the hearing”.<sup>50</sup>

#### **4.3.4. The Right to Fair and Impartial Decision-Making Process**

The right to fair and impartial decision-making process during RSD is one of the key legal guarantees that ensures asylum seekers equality

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<sup>47</sup> See UNHCR (2001). *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*,(UNHCR Handbook), para 44.

<sup>48</sup> UNHCR (2001), *Asylum-Processes: Fair and Efficient Asylum Procedures* Para.50 (g). The standards allow applicants to request an interpreter of the same gender “to the best extent possible”.

<sup>49</sup> Refugee Proclamation No.409/2004, Art.14(2) (b).

<sup>50</sup> Refugee Proclamation No.409/2004, Art.14(2) (a).

before the law and protects them against any kind of discrimination that would negatively impact the decision on their status. Ethiopian refugee proclamation enshrines the *principle of non-discrimination* under Article 3 as to the applicability of the proclamation. Thus, asylum seekers enjoy legal guarantees under the refugee proclamation “without discrimination as to race, religion, nationality, membership of a particular social group, or political opinion”.<sup>51</sup> In addition to these substantive guarantees, UNHCR is invited to participate during the decision-making process as an observer in which it also extends its legal opinion and recommendation as to the procedure and decision-making process.<sup>52</sup> It should be noted that the RSD decision-making process is entirely the sole administrative responsibility of ARRA. The UNHCR only gives its views but has no power to reverse the decisions of the Committee in case it thinks the decision of the authority is manifestly unfair and impartial, capable of resulting in the refoulement of the asylum seeker. However, one can possibly argue that UNHCR, under its Statute, the 1951 Refugee Convention and its protocol, has a protection mandate or supervisory function in which it may acknowledge asylum seekers as a mandate refugee if it feels that the decision of the ARRA is manifestly unfair and partial.<sup>53</sup>

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<sup>51</sup> Refugee Proclamation, Art. 3.

<sup>52</sup> *Id.*, Article 16(2) and Internal Procedural Guidelines for the Appeal Hearing Council (circulated on 20 January 2008) Article 6. The latter guideline under the same article stipulates that “the UNHCR shall be called without voting rights to each session and meeting of the Appeal Hearing Council. The UNHCR may present observations to clarify points of law, to provide factual information (for example Country of Origin Information or factual evidence in regard to a case as well as to provide any other information and legal advice to assist AHC in reaching an informed decision”.

<sup>53</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Article 8; UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, Article 35.

#### ***4.3.5. The Right to Written Notification of the RSD Decisions***

Applicants whose claims are rejected or accepted should be informed in writing of the first instance RSD decision. In case the asylum seekers claim of refugee status is accepted by the decision maker, such recognized refugee should be informed of implications of the recognition and any additional instructions or steps required by either UNHCR or the host country. In a similar way, the asylum seekers whose claims are rejected should be provided with written notification of negative RSD decision.<sup>54</sup> A written notification of negative RSD decision allows rejected applicants to make an informed decision about whether an appeal is appropriate and to focus appeal submissions on relevant facts and issues. It is argued that written notification of negative RSD decisions should include sufficient details to permit the applicant so that he/she could know the reasons or explanations why the decision maker considers the evidence submitted insufficient. The normative framework under Ethiopian refugee law conforms to the UNHCR doctrine of soft law practice. The Refugee proclamation clearly states that the applicant for refugee claim “to be notified of the decision of the authority including the reason underlying the decision in writing.”<sup>55</sup>

#### ***4.3.6. Access to Legal Advice and Representation during the RSD Process***

In view of the plight of asylum seekers and strangeness to the legal environment of host states, promoting free access to independent legal advice and representation at all stages of RSD process is pivotal. It is understandable that asylum seekers are frequently unable to articulate the elements relevant to their claim without the assistance of a qualified lawyer since they are not familiar with the specific grounds for the recognition of refugee status and the legal system of a host country. The

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<sup>54</sup> See Refugee Proclamation, Article 17(2) (d) and Internal Procedural Guidelines for the Appeal Hearing Council (circulated on 20 January 2008), Article 18.

<sup>55</sup> Refugee Proclamation, Article 17(2) (d).

provision of legal aid is a crucial safeguard to ensure efficiency during RSD process especially in complicated RSD procedures. While the provisions of free legal assistance to asylum seekers is difficult because of resource limitations, the need for legal representation in the event of a negative RSD decision, in some cases under certain conditions should be pursued to ensure international protection of refugees. The right to legal representation at the expense of state under the Ethiopian legal system is a constitutional right reserved for accused persons in criminal cases “if they do not have sufficient means to pay for it and miscarriage of justice would result”.<sup>56</sup> The Ethiopian refugee proclamation nowhere envisages the right of refugees to free legal assistance in RSD process in general and in the appeal process of negative RSD decision in particular.

#### ***4.3.7. The Right to Appeal Negative RSD Decisions***

The right to appeal in cases of negative RSD decision before competent and independent body is also another important procedural safeguards. As noted before, free access to ordinary courts of law is reserved for refugees under the international refugee law and hence the likelihood of asylum seekers access to judicial review of negative RSD decision depends on host countries legal system. The normative framework in Ethiopia is that the review of negative RSD decisions remains an administrative issue and its establishment as an independent review body is nowhere conspicuous under the national refugee legislation. The Ethiopian refugee proclamation provides that “any asylum seeker, who is aggrieved by the first instance decision of the Authority [NISS/ARRA] may within thirty days of being notified of such decision, appeal in writing to the Appeal Hearing Council”.<sup>57</sup> The Appeal Hearing Council (AHC) is established under the proclamation to review or to consider an appeal lodged by asylum seekers whose refugee has been rejected by the

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<sup>56</sup> FDRE Constitution, Article 20(5).

<sup>57</sup> Refugee Proclamation Article 14(3).

first instance body — the “Eligibility Committee”.<sup>58</sup> The AHC consists of National Intelligence and Security Service (NISS) representative as chairperson, and other representative members from the Ministry of Foreign Affairs, Ministry of Justice (now Federal Attorney General), Ministry of Federal Affairs including UNHCR invited to participate as an observer without voting rights, to each session and meeting of the AHC.<sup>59</sup> The composition of AHC is dominated by non-legal expertise except one possibility from the Federal Attorney General. Chaired by ARRA/NISS that also provides a first instance RSD decisions, it is difficult to properly consider AHC as an independent body capable of carrying out external review of the merits of the negative RSD decisions. The AHC Internal Procedural Guidelines<sup>60</sup> stipulates that any person who served in the first instance RSD decision representing ARRA/NISS as member of the Eligibility Committee may not be allowed to entertain the appeal claims of asylum seekers before the AHC.<sup>61</sup> Yet, while it seems that such normative approach would bring about procedural fairness, the likelihood of carrying institutional bias is highly speculated creating impression of apparent partiality, if not real one.

The other important aspects of exercising appeal rights for asylum seekers whose refugee status claim was rejected knowledge of the grounds for appeal to ensure its admissibility before the AHC. According to AHC Internal Procedural Guideline indicated above, the grounds of appeal constitute the following matters. First ground relates to the discovery of new evidence that is material to the refugee claim.<sup>62</sup>

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<sup>58</sup> *Id.*, Article 17 in conjunction with Article 6(2) or Article 14(3).

<sup>59</sup> *Id.*, Article 15 and Article 16.

<sup>60</sup> *Id.*, Article 17(3) which mandates AHC to “issue its own rules of procedure” to conduct its functions.

<sup>61</sup> Internal Procedural Guidelines for the Appeal Hearing Council (circulated on 20 January 2008), Article 8.

<sup>62</sup> *Ibid.*

The discovery of new evidence by itself does not constitute a ground for appeal unless the appellant provide sufficient reasons as to why such evidence or information was not submitted at the time of the original application.<sup>63</sup> The second ground relates to procedural error during first instance RSD decision-making process.<sup>64</sup> One of such procedural error could be the denial of procedural fairness that includes but not limited to the right to be heard and the right to be judged impartially. The third ground of appeal is the commission of “error of law” that occurs when first instance decision resulted in miss-application or miss-representation of the relevant applicable law.<sup>65</sup> It may also result when factual evidence presented during the first instance hearing was disregarded or not given adequate weight thus leading to a misrepresentation.<sup>66</sup>

Generally, the burden of proof lies on the refugee claimant or appellant to show that the above grounds and any relevant supporting evidence in its memorandum of appeal. In order to guarantee procedural due process of law in appeal procedure, like that of first instance decision-making process, the Refugee Proclamation and the Internal Procedural Guidelines for ABC to ensure fairness, efficiency and impartial appeal decision making. This can be evident from article 17(2) of the Refugee Proclamation where by the AHC ensures that the applicant is given reasonable period of time, ensure the presence of qualified interpreter, provide decision within a reasonable period of time, cause the appellant to be notified of its decision and the reasons thereof in writing. In a similar way, AHC Internal Procedural Guidelines under article 8 provides appeal process in the interest of efficacy should not be a reconsideration of the original case but rather focus on the determination of whether any of grounds of appeal exists. Finally yet

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

importantly issues that need to be addressed in the Internal Procedural Guidelines for AHC is the fact that it did not come up with the fate of asylum seekers aggrieved by the negative decisions of AHC. Questions such as could asylum seekers whose refugee status claims are rejected and aggrieved by the decisions of AHC further appeal to ordinary courts for judicial review in the absence of clear provisions in this Guideline?

The writer of this paper has the opinion that access to courts in reality is open to foreigners and such favourable national treatment of aliens should be extended to asylum seekers whose refugee status claim has been rejected before administrative bodies. It is a well-established international and national law principle that decisions of administrative agencies should be reviewed through the process of judicial review of administrative acts by ordinary courts. Also for stronger reasons, the principle of non-refoulement dictates that asylum seekers should not be forced to return to the territory or country where his or her life could be threatened.

## **5. Concluding Remarks**

The key to credible refugee status determination that protects refugees and discourages people who do not have legitimate refugee claim is quality “decision making process done promptly, impartially, and efficiently and with the results enforced including the expulsion of those not in need of protection. Ethiopia ratified the 1951 refugee convention and the 1969 OAU refugee convention respectively and further took a major step in domesticating these international agreements by enacting national refugee law. The national refugee law not only succeeded in the domestication of international refugee laws but also attempted to fill the gaps of international refugee law by addressing the procedures for applying the definition of refugee through the RSD process. Despite this fact, however, the normative frameworks of RSD in Ethiopian fail to address some of the minimum international procedural standards.

A cursory review of the Ethiopian refugee law shows that it is devoid of basic rights such as the right to be assisted by independent legal advisor and appeal before ordinary courts for a judicial review of negative RSD decisions. In order to alleviate the normative gaps of the refugee proclamation that pertains to the RSD, a mechanism through which asylum seekers are allowed to free access to independent legal expert should be devised. It is recommended that Law school free legal aid service outlets are important instruments of aiding asylum seekers to know the legal and administrative process of getting through the process of RSD procedures. With regard to the right to appeal to the ordinary courts, the refugee proclamation should be amended to include the establishment of independent appellate administrative tribunal in charge of refugee claims on both questions of fact and law and finally allow judicial review for fundamental error of law through Federal Supreme Court Cassation system.

# Towards a Comprehensive Refugee Response Framework (CRRF): Recent Developments on Refugee Protection in Ethiopia

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## Abstract<sup>1</sup>

*This article seeks to elucidate the new policy commitments put forward by the government of Ethiopia during the Leaders' Summit in September 2016 and its current implementation. Following the adoption of New York Declaration on Refugees and Migrants, Ethiopia is selected as one of the few pilot countries to test the Comprehensive Refugee Response Framework (hereinafter referred to as "CRRF") the practical application of which will inform the preparation of a Global Compact on Refugees. The new paradigm shift in refugee protection in Ethiopia deviates from the traditional "care and maintenance" approach to a more comprehensive and solutions oriented approach aiming at fostering the self-reliance of refugees thereby easing the burden on the country by according them wider range of rights and opportunities. This process has necessitated the revision of the existing refugee laws. This article, through a descriptive approach, will discuss the implementation of the CRRF approach in Ethiopia including the draft Refugee Proclamation which is expected to be endorsed soon.*

## 1. Introduction: Challenges and Opportunities

Forced displacement in the world today has reached unprecedented level. By the end of 2016, over 65.6 million people were forcibly displaced from their homes including 22.5 million refugees, 40.3 internally displaced persons and 2.8 million asylum seekers, as a result of

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<sup>1</sup> Disclaimer: Opinions reflected in this paper are only attributable to the authors but not, in any way, to UNHCR or ARRA.

persecution, conflict, violence or violation of human rights.<sup>2</sup> This year alone, a record high 10.3 million people including 3.4 million new refugees and asylum seekers have been forcibly displaced.<sup>3</sup> Among the total number of refugees worldwide, about 14.5 million (which is about 84%) are hosted in developing countries, which are mostly neighboring or transit countries from where the refugees are originating. The increase in large scale refugee movement is disproportionately affecting the host countries by overstressing their capacities and affecting their social and economic cohesion and development.<sup>4</sup>

In addition to the large scale movement of refugees, the protracted refugee situation<sup>5</sup> has also shown a steady increase over the years negatively impacting the refugees and the hosting countries alike. By the end of 2016, two thirds of all refugees, constituting around 11.6 million, were in protracted situation in need of durable solutions.<sup>6</sup> Most of the protracted refugee situations are found in African countries, including Ethiopia.<sup>7</sup> This phenomenon has also resulted in a tragic situation of ongoing movement where refugees, unsatisfied with the meager services and provisions in the hosting states and hoping for a better life in developed countries, leave in a massive scale often falling victims to human trafficking and smuggling, organ harvesting, slavery and death *en route* and at the high seas.

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<sup>2</sup> See generally, UNHCR, *Global Trends Forced Displacement in 2016*, 19 June 2017 (available at [www.unhcr.org/statistics](http://www.unhcr.org/statistics))

<sup>3</sup> *Ibid.*

<sup>4</sup> New York Declaration for Refugees and Migrants, UN General Assembly Resolution, A/RES/71/1, 3 October 2016, New York, Par.7

<sup>5</sup> According to UNHCR, protracted refugee situation is defined as “one in which 25,000 or more refugees from the same nationality have been in exile for five consecutive years or more in a given asylum country. For further information see *supra* note 2, p.22.

<sup>6</sup> See *supra* note 2.

<sup>7</sup> *Ibid.*

This large scale movement and complexity of refugee situation is beyond the capacity of refugee hosting countries. A global responsibility sharing and solidarity is needed now more than any time ever in the history of human displacement. Hence, in today's context there is a pressing need to reinforce international cooperation in order to ensure more effective, swift, and comprehensive responses to the needs of refugees for protection, assistance and solutions.<sup>8</sup>

## **2. The New York Declaration and the Leaders' Summit on Refugees**

The United Nations High Commissioner for Refugees (UNHCR) is mandated, as its core objectives<sup>9</sup>, to provide international protection to refugees and other persons of concern and search for durable solutions to their problems.<sup>10</sup> Finding durable solutions helps resolving the myriad of problems refugees are facing and help them lead normal lives again, thereby ending the cycle of displacement. This constitutes an important element of international protection.<sup>11</sup> Traditionally, there are three complementary durable solutions envisaged in the mandate of UNHCR; namely, voluntary repatriation, local integration and resettlement.

The priority and importance given to each of the three durable solutions, however, has been variable over time.<sup>12</sup> Over time, UNHCR expanded

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<sup>8</sup> Volker Türk and Madeline Garlick, 'From Burden and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', International Journal of Refugee Law, Oxford University Press, (2016), Vol. 28, No. 4, pp. 657-658.

<sup>9</sup> UNHCR's mandate is expanded further by subsequent UN General Assembly Resolutions.

<sup>10</sup> See *inter alia* the 1950 Statute of UNHCR and EXCOM, Annual Theme: The Pursuit and Implementation of Durable Solutions, UN Doc. A/AC.96/872, 30 Aug 1996.

<sup>11</sup> See UNHCR, *Resettlement Handbook*, 2011, p. 28.

<sup>12</sup> Martin Gottwald, 'Back to the Future: The Concept of "Comprehensive Solutions"', Refugee Survey Quarterly, (2012), Vol. 31, No.3, p.102'

its approach from refugee oriented and reactive humanitarian interventions into new proactive and comprehensive engagements such as “...*prevention of displacement, the reintegration of refugees and the establishment of partnerships with a variety of international and national actors in different fields such as security, human rights and development.*”<sup>13</sup> The need to address protracted refugee situations impacting millions of refugees worldwide in the recent decades prompted the further expansion of UNHCR approaches to a holistic “comprehensive durable solutions” concept that aims at optimizing the use of the three traditional durable solutions in an integrated and mutually reinforcing manner.<sup>14</sup>

The all-time high global upsurge in forced displacement due to war and persecution, never ending protracted refugee situations and large-scale irregular migration of refugees and migrants in often dangerous circumstances has made refugee issues today a trans-boundary issue that could no longer be left to be addressed solely by the host countries and purely through a humanitarian lens. As such, there is a pressing need to “...*reinforce international cooperation in order to ensure more effective, swift, and comprehensive responses to the needs of refugees for protection, assistance, and solutions...*”<sup>15</sup>

Recognizing the need to find comprehensive solutions to the unprecedented refugee crisis seen today, Heads of States adopted the New York Declaration on Refugees and Migrants during the UN General Assembly meeting held on 19 September 2016 at New York. By adopting the New York Declaration states reaffirmed their global

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Id.*, PP.102-103. for further information see also Conclusions on Protracted Refugee Situations, Conclusion No.109(LXI), 8 Dec.2009; and UNGA, Agenda for Protection, UN Doc. A/AC. 96/965/Add.1, 266 Jun. 2002.

<sup>15</sup> Volker Türk and Madeline Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’, *International Journal of Refugee Law*, 2016, Vol. 28, No. 4, pp.657-658.

solidarity and international cooperation at this time of unprecedented level of forced displacement. The commitments made by members states of the United Nations strongly affirm that protection of person who are forced to flee and support to countries that are hosting them are shared global responsibilities that must be equitably and predictably borne by all.<sup>16</sup>

The New York Declaration, among others, calls up on the UN Refugee Agency (UNHCR) to initiate a Comprehensive Refugee Response Framework (CRRF) in particular situations, in collaboration with relevant States, other UN Agencies and stakeholders. As such it invites the UNHCR to:

...engage with States and consult with all relevant stakeholders over the coming two years, with a view to evaluating the detailed practical application of the **comprehensive refugee response framework** and assessing the scope for refinement and further development. This process should be informed by practical experience with the implementation of the framework in a range of specific situations.<sup>17</sup> (Emphasis added)

The overall objectives of the New York Declaration includes: easing pressure on the refugee host countries which are mostly developing countries; enhancing refugee self-reliance; and expanding durable solutions including access to third country solutions and supporting conditions in countries of origin for voluntary repatriation in safety and dignity. The key elements of the CRRF are ensuring rapid and well-supported reception and admission measures; providing support for immediate and ongoing needs (including protection, health and

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<sup>16</sup> See generally, the New York Declaration for Refugees and Migrants, A/RES/71/1.

<sup>17</sup> New York Declaration for Refugees and Migrants, A/RES/71/1, Annex 1, para. 18 (19 September 2016).

education); assisting national and local institutions and communities receiving refugees; and expanding opportunities for durable solutions.

The CRRF has a broader approach than a typical refugee response. It is multi-stakeholder approach as it engages a wide array of actors including national and local authorities, international and regional organizations and financial institutions, civil society organizations and refugees. It is also inclusive as it combines humanitarian responses and development actions to solidify overall response in a sustainable and comprehensive manner. It envisages a holistic approach by creating a robust nexus between humanitarian responses and development actions to address the needs of the refugees and the host communities. It strives to invest on the resilience of the refugees on one side while enhancing the hosting capacity of host communities by supporting service provision and minimizing aid and promoting self-reliance on both sides while fostering their inter-community linkages. The CRRF also aims at expanding partnerships to non-traditional actors including the private sector and promoting innovations and creativity.

Understanding that countries may have specific refugee contexts, the NY declaration calls up on UNHCR to develop and initiate the CRRF in various situations in consultations with relevant states, other UN agencies and stakeholders. Hence, in consultation with states and in partnership with various stakeholders, UNHCR initiated the practical application of the comprehensive refugee responses in different countries with various refugee situations including Costa Rica, Djibouti, Ethiopia<sup>18</sup>, Guatemala, Honduras, Mexico, the Somalia refugee situation, Uganda and the United Republic of Tanzania.<sup>19</sup>

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<sup>18</sup> The authors learn from their respective offices that Ethiopia has been officially selected as a pilot country for the practical application of the CRRF as of February 2017.

<sup>19</sup> UNHCR, New York Declaration, *UNHCR Quick Guide*, June 2017, p.6.

The CRRF, along with a complementary Program of Action that sets out concrete steps to be taken to operationalize the CRRF, constitute part of the Global Compact on refugees that the states committed in the New York Declaration towards its adoption in 2018. The High Commissioner for Refugees is tasked to include a proposed global compact in his annual report to the General Assembly in 2018 at its 73<sup>rd</sup> session. The Global Compact on Refugees will, in cooperation and consultation with states and key stakeholders, be prepared based on the outcome of the practical application of the CRRF in a range of specific situations; thematic discussions that will inform the development of the Programme of Action and stocktaking of progress made and lessons learnt that identifies best practices in refugee response envisaged in the New York Declaration.<sup>20</sup>

One day after the adoption of New York Declaration, the UN Secretary General and other seven member states including Ethiopia hosted the Leader's Summit on Refugees with the view to increase global responsibility sharing for refugees worldwide and strengthen global capacity to address mass displacement.<sup>21</sup> During the summit, a number of pledges were made including to provide over 4.5 billion dollars to humanitarian assistance; double the legal admission opportunities for refugees to third countries (including UNHCR facilitated resettlement, family reunification visa and educational opportunities); and enact policy changes that will allow refugees to attend school and pursue lawful employment and livelihood activities by 17 significantly refugee hosting countries, including Ethiopia.

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<sup>20</sup> UNHCR, *Towards a global compact on refugees: a roadmap*, 17 May 2017, p. 3.

<sup>21</sup> See generally Summary Overview Document, Leaders' Summit on Refugees, 2016.

### **3. Overview of the CRRF process in Ethiopia**

The foundations for the CRRF process in Ethiopia started a bit earlier before the adoption of the New York Declaration and the pledges made by the government of Ethiopia at the Leaders' Summit, in a form of legislative initiatives. ARRA and UNHCR convened the first meeting on 21 July 2016 to initiate the legislative process to draft a Refugee Regulation to complement the 2004 Refugee Proclamation.<sup>22</sup> Successive Consultations were, then, made to identify the strengths and gaps of the Refugee Proclamation No. 409/2004; examine comparative refugee law jurisprudence and best practices of selected refugee hosting countries<sup>23</sup>; and discuss the way forward to draft the refugee Regulation. The aim was to draft a progressive Refugee Regulation that endows a wide variety of rights and opportunities to refugees and asylum seekers in Ethiopia.

The consultations identified misinterpretation of the Ethiopian Reservations to the 1951 Convention<sup>24</sup>; inadequate standardized procedures and due process guarantees in RSD provisions; and lack of clarity of provisions setting out the rights of refugees and asylum seekers in the 2004 Refugee Proclamation. Accordingly, a draft Refugee Regulation was initiated to fill the identified gaps and provide for rights and guarantees pursuant to international standards and building on comparative best practices of other countries. The provisions envisaged in the Regulation include, among others, those that provide for

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<sup>22</sup> ARRA-UNHCR Consultations: Regulations to the 2004 Refugee Proclamation: Comparative Practices in Selected African Countries and Way Forward, Addis Ababa, 21 July 2016 (Unpublished).

<sup>23</sup> The countries selected based on similar socio-economic and refugee hosting context are Uganda, Zambia and South Africa. Later Kenya was added to the list.

<sup>24</sup> Though the exact text of Ethiopia's reservation to the 1951 Refugee Convention states that "...The provisions of articles 8 (exemption from exceptional measures), 9 (provisional measures), 17 (2) (wage earning employment) and 22 (1)(elementary education) of the Convention are recognized only as recommendations and not as legally binding obligations", it has been erroneously understood to mean refugees do not have the rights to work and education in Ethiopia, among others.

procedural guarantees on Refugee Status Determination, issuance of travel documents and freedom of movement, access to education, access to work, right to association and cooperatives, acquisition of driving license, opening of bank accounts, acquisition of property, operating a small business and naturalization.

The draft Regulation was at a later stage revised to reflect the nine pledges made by the government of Ethiopia during the New York Leader's Summit on Refugees on 20 September 2016. These pledges are policy undertakings by the Government of Ethiopia that aim at improving the lives of refugees hosted in Ethiopia. The pledges could be thematically grouped together into six categories as; out of camp pledges, education pledges, work and livelihood pledges, documentation pledges, social and basic services pledges and local integration pledges.<sup>25</sup> The implementation of the pledges is meant to be progressively realized without entailing additional obligations to Ethiopia under international law. A brief summary of the Pledges is annexed at the end of this article<sup>26</sup>.

To operationalize the pledges by outlining list of activities, key stakeholders and needed resources, a draft "Roadmap for the Implementation of the Pledges" was prepared and presented by ARRA to key stakeholders on 20 February 2017 at ARRA Conference Center. The draft Roadmap has been further refined and developed using inputs from various stakeholders and taking into account contextual and practical considerations. According to the Roadmap, the application of the CRRF in Ethiopia is through the implementation of the Pledges which are in line with the objectives pursued by the international

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<sup>25</sup> Roadmap for the Implementation of the Federal Democratic Republic of Ethiopia Government Pledges and for the practical application of the CRRF in Ethiopia, 27 June 2017.

<sup>26</sup> See also Summary Overview Document, Leaders' Summit on Refugees, 20 September 2016.

community in the New York Declaration (i.e CRRF).<sup>27</sup> The Roadmap also pronounces that the pledges are aligned with the Government of Ethiopia's Growth and Transformation Plan (GTPII) and the current UNDAF.<sup>28</sup>

The Roadmap outlines a list of activities that are essential to operationalize the pledges. These include legal and policy reforms, assessment and analysis, capacity building and technical support, development oriented interventions, emergency response and governance structure. Annexed to the Roadmap are the detailed descriptions of activities under each thematic area along with the time line and key partners as well as the CRRF Governance Structure. At the apex of the Governance Structure is a Steering Committee, chaired by the Office of the Prime Minister and Co-chaired by ARRA, UNHCR and MoFEC that provide direction, guidance and recommendations on the implementation of the Pledges and the application of CRRF in Ethiopia.<sup>29</sup> Key stakeholders, including key government ministries, national and international NGO representatives and donor representatives, with key advocacy role in their respective sectors to galvanize participation of various actors with different expertise requisite for the effective implementation of the CRRF will constitute membership of the Steering Committee.

The other segment of the Governance Structure will be the National CRRF Co-ordination Unit/Secretariat that coordinates the implementation of the pledges through a multi-stakeholder approach.<sup>30</sup> The Co-ordination unit will work closely with the technical groups to ensure a coherent approach. It will in particular ensure that conditions are in place to support the work of technical groups, monitor, evaluate

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.*, pp.10-11.

<sup>30</sup> *Id.*, pp.11-12.

and report on progress, document learning and challenges, commission studies and ensure a broad consultative process towards implementation of the Pledges. The third segment of the Governance Structure is the Technical Committees that falls under the CRRF Coordination Unit.<sup>31</sup> Technical Committees will be established for each thematic area involving government agencies, UN agencies, donors and NGOs, that guide the technical implementation of the pledges and also identify and allocate resources.<sup>32</sup>

The Roadmap sets out concrete steps to be taken for the application of the CRRF in Ethiopia, through the implementation of the pledges as well as governance structure that oversees the process using a multi-stakeholder approach through a nexus between humanitarian and development actors. Existence of an enabling legal framework is a *sine qua non* for the proper and full implementation of these policy commitments expressed through pledges. Hence, legal and policy reforms constitute an important step envisaged in the Roadmap. Hence, the legal revision process carried out in line with this objective is briefly described in the following section.

#### 4. The Legal Revision Process

As stated earlier, the draft Refugee Regulation, which was initiated before the New York Leader's Summit on Refugees, was revised to include the Pledges made by the government of Ethiopia. The revised draft document was presented to relevant stakeholders including government ministries, academic and research institutions at a consultation workshop organized at Eliliy Hotel on 27 February 2017.<sup>33</sup>

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<sup>31</sup> *Id.*, p.13.

<sup>32</sup> *Ibid.*

<sup>33</sup> To be exact, representatives of the Federal Attorney General, Main Department of Immigration and Nationality Affairs, Ministry of Federal and Pastoralist Affairs,

Useful comments and inputs were provided by participants who were used to develop the draft further. ARRA and UNHCR carried out ongoing bilateral consultations with other key stakeholders including MOLSA, Investment Commission, Revenue and Customs Authority and the Attorney General. These consultations were instrumental in shaping the legal revision process through the various deliberations on the substantive as well as procedural aspects of the draft law. In particular, the need to revise the existing Refugee Proclamation to accommodate substantive rights and procedural guarantees of refugees and asylum seekers as per the Pledges and international standards was highlighted.

Side by side, a study visit to Uganda was conducted by a team of experts from UNHCR and ARRA from 22-27, January 2017.<sup>34</sup> The main purpose of the visit was to share the experience of Uganda on their overall refugee operation management in particular focusing on the legal and institutional frameworks with a view to take lessons that would serve as inputs to refine and develop the Ethiopian refugee Regulation in a way that maximizes the benefits of refugees.<sup>35</sup> The team held consultations with Ugandan authorities, UNHCR and Partners operating in the area, visited Kiryandongo and Kyangwali refugee settlements and reviewed relevant policy and legal documents.<sup>36</sup> The team noted, during the visit, that the relaxed regulatory environment and inclusion of wide range of rights in refugee laws enabled refugees and asylum-seekers in Uganda to live a productive and dignified life without putting significant pressure on the hosting capacity of the country. It was quite interesting

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FVERA, Justice and Legal Research Institute, AAU School of Law, ARRA and UNHCR participated in the consultation workshop.

<sup>34</sup> Currently, Uganda is the largest refugee hosting country in Africa with over a million refugees mostly from South Sudan and has been positively acclaimed for supporting the self-reliance of refugees through the settlement approach.

<sup>35</sup> See Study Visit to Uganda: ARRA, UNHCR-Ethiopia Joint Mission Report, 22-27 January, 2017 (unpublished).

<sup>36</sup> *Ibid.*

for the team to observe that a country with a population of 35 million was able to host more than a million refugees. This was possible because of the generous policy of the government that allowed refugees to enjoy wider rights and opportunities thereby enabling them to be not only self-reliant but also positively contributed to the local economy.<sup>37</sup>

Necessitated by the need to expand the rights provisions of the existing refugee Proclamation, integrate the Pledges and the CRRF, and fill existing gaps in the law, a Refugee Proclamation that repeals the Refugee Proclamation no 409/2004 is currently being drafted.

## **5. Salient Features of the Draft Refugee Proclamation<sup>38</sup>**

As stated earlier, the draft Revised Refugee Proclamation, if endorsed, will have the effect of repealing and replacing the Refugee Proclamation No. 409/2004. As such, the draft Proclamation contains many provisions taken from the existing Refugee Proclamation. It also modifies and removes some provisions on refugee status determination while making some additions in accordance with international standards. The provisions related to rights and obligations of refugees are expanded incorporating provisions from the 1951 Convention and the 1969 OAU Convention.

Under the general provisions section, the definition of “family” is expanded to include extended family taking into account the specific context of Africa where family is understood in its broader sense. The Service (see below) is tasked to assess if such understanding of family exists in the cultural background of the refugees and co-dependency exists among the “family members.” Another interesting provision in

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<sup>37</sup> *Ibid.*

<sup>38</sup> It is worth mentioning here that the new Refugee Proclamation is still a draft and its content and structure may change during the legislative process, if at all it comes out as a law.

this section, largely drawn from the pre-existing refugee law, is the distinctions made on the concepts “refugee”, “recognized refugee” and “asylum-seeker”. While the former refers to person(s) who fulfill the refugee criteria under the 1951 UN Convention and/or the 1969 OAU Convention, the latter two terms reflect the status of a person in the cycle of asylum as the one who has applied for refugee status and a person whose status has been determined, respectively. The draft Proclamation recognizes the re-established National Intelligence and Security Services as the primary government body responsible for refugee protection. Despite these and other minor changes, the draft Proclamation largely retains the content and format used in the existing Refugee Proclamation 409/2006 as regards general provisions.

The next part of the draft Proclamation relates to general principles and criteria. Under this part, key principles of refugee protection including the principle of non-refoulement, family unity, non-discrimination and provisions regulating expulsion and temporary detention of refugees and asylum seekers are encapsulated. In addition to the principles, it contains provisions covering the definition of refugee, refugee *sur plus*, exclusion, cancellation/revocation and cessation of refugee status. The refugee criteria under the draft law differs slightly from the existing Refugee Proclamation in that it extends recognition of refugee status based on external aggression, occupation, foreign domination or events seriously disturbing public order to refugees originating outside of Africa. The scope of such recognition under the previous law was restricted to refugees originating from Africa. As a result, it is hoped that refugees from countries afflicted with generalized violence outside of Africa such as in Yemen and Syria will benefit from refugee status without the need to fulfill the 1951 Convention grounds through individual determination.

The next part deals with the procedural aspects of Refugee Status Determination. Here, the newly introduced provisions include, among others, the expansion of the application period to 30 days; the possibility

of late applications on justifiable grounds; the possibility of application by proxy; possibility of withdrawal of application; the time limit for determination of refugee status; due process guarantees during examination of refugee status application; provisions for unaccompanied and separated children, extension of appeal period and possibility of late appeal and the provision on procedural aspects of group recognition or otherwise known as, “*prima facie* refugee status”. The composition of the Appeal Hearing Council is also modified including additional representation.

The most important aspect of the draft Refugee Proclamation is the part dealing with the right and obligations of recognized refugees and asylum seekers. The draft law encompasses a broad range of rights and entitlements for refugees and asylum seekers. The existing refugee Proclamation attempted to list out rights and obligations of refugees and asylum seekers. These include the right to stay in Ethiopia, the right to be issued with identity card and travel document, as well as few other rights scattered throughout the different sections of the Proclamation such as non-refoulement and family unity. However, this list is not comprehensive and as such it has been difficult to implement the rights embodied in the 1951 Refugee Convention and OAU Convention though explicit cross-referencing is made. The draft Refugee Proclamation on the other hand, not only makes reference to rights enshrined in these international instruments but also codifies a range of rights drawn from the 1969 OAU Convention and the 1951 UN Convention. These include, among others, the right to work, the right to education, freedom of movement, the right to property, the right to association, the right to acquire driver’s license, the right to access to banking services, access to justice and the right to be treated in the same circumstance as nationals as regards rationing and fiscal charges. This is believed to make implementation of these rights easier and feasible.

It is a generally known fact that the 1951 Refugee Conventions as well as the 1969 Refugee Convention lay down minimum standards of treatment of refugees and in any case State Parties are encouraged to accord protection above these set minimum thresholds. In this regard, a cursory look at substantive provisions of the draft Proclamation reveals that it has adopted progressive approach by conforming to the standards set out in the Conventions and in some instances going beyond those standards.

## **6. Conclusion**

In this paper, we have tried to give a glimpse of the background, process, structure and implementation of the Comprehensive Refugee Response Framework (CRRF) in Ethiopia, part of a global responsibility-sharing initiative that is aimed at contributing to Global Compact on Refugee. The paper also tried to discuss the pledges made by the government of Ethiopia to enhance protection of refugees and the legislative process initiated to cement these commitments into a legal framework in a form of a Refugee Proclamation that repeals and replaces the existing refugee Proclamation no 409/2004. Attempt is made to give a descriptive account of the drafting process as well as the salient aspects of the new draft refugee Proclamation. With the ever increasing size and protracted situation of refugees in Ethiopia which has little prospect of ending in the immediate future, there is high hope and anticipation that the new CRRF approach adopted in Ethiopia, augmented by the new legal framework (if endorsed), would enhance the protection and self-reliance of refugees easing burden on the country. For the effective implementation of the roadmap of the CRRF, Ethiopia needs the participation of wide range of humanitarian and development actors using a whole of society approach.

## Annex

Pledge 1: ***Expanding the Out-of Camp-Policy***: to expand the Out-of-Camp Policy scheme to all refugees, which was originally reserved to Eritrean refugees, in accordance with the policy and laws of Ethiopia. The pledge intends to benefit 10% of the total refugee population in Ethiopia. If resource allows, the number of beneficiaries is intended to grow progressively.

Pledge 2: ***Access to Employment***: to provide work permits to refugees and to those with permanent residence ID within the bounds of domestic laws, within the bounds of domestic laws and without prejudice to Ethiopia's reservation to the 1951 Refugee Convention.

Pledge 3: ***Work Permits for Refugee Graduates***: to provide work permits to refugee graduates in the areas permitted for foreign workers by giving priority to qualified refugees.

Pledge 4: ***Education***: to provide primary, secondary and tertiary education to all qualified refugees without discrimination and within available resources. Ethiopia also pledges to increase enrollment of pre-school children from 44% to 60%; primary school age children from 54% to 75%; secondary school age children from 9% to 25%; and higher education from 1,600 to 2,500.

Pledge 5: ***Self-reliance, Land Access***: to avail 10,000 hectares of irrigable land to allow refugees and local communities to engage in crop production by facilitating irrigation schemes subject to availability of external financial assistance. This pledge intends to benefit 20,000 households or 100,000 individuals.

Pledge 6: ***Local Integration***: to allow for local integration of protracted refugees who have stayed 20 years or more in Ethiopia as a refugee. The pledge intends to benefit at least 13,000 refugees identified by the Administration for Refugees and Returnees Affairs (ARRA).

Pledge 7: ***Job Creation***: to promote the development of the infrastructure for industrialization to generate job opportunities both for nationals and refugees. Ethiopia is working with partners on the possibility of building industrial parks that could employ 100,000 host communities and refugees.

Pledge 8: ***Basic and Social Services***: to strengthen, expand and enhance basic and essential social services such as health, immunization, reproductive health, HIV and other medical services provided for refugees within the bounds of national law.

Pledge 9: ***Other Benefits***: to provide facilities for refugees to open bank accounts, obtain diving licenses, and other benefits to which any foreigner with legal permanent residence permit is entitled to. Ethiopia also pledges to issue birth certificate to refugee children born in Ethiopia.



