RUAHA CATHOLIC UNIVERSITY

FACULTY OF LAW

Principle of Non-Refoulement and Protection of Refugee in Tanzania

A Research Paper Submitted in Partial fullfilment of the Requirements for the Degree of Bachelor of Law of the Ruaha Catholic University"

By

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CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance by the Ruaha Catholic University, a dissertation paper titled Principle of Non Refoulement and Protection of Refugee in Tanzania in partial fulfilment of the requirement of bachelor degree of (LLB) at Ruaha Catholic University.

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Signed in this.....day of.....2016 at Iringa

DECLARATION

I, MDUSI ERIC G, do hereby declare that this dissertation is my own original work and that to the best of my knowledge, the same has not been previously and is currently not to be submitted for a degree award in any other University by another candidate therein..

…….

Mdusi Eric G

(*Candidate*)

Signed in this.....dayof.....2016 at Iringa.

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I would like to extend my gratitude to my beloved family, starting with my beloved father GEORGE KASSIGA for his monetary support and my mother IRENE KASSIGA for her moral support. Secondly, my supervisor PROSPER MALANGALILA, whom he had been directed me on how to conduct this research.

DEDICATION

I dedicate this legal paper to my beloved father George Kassiga. I thank him for his financial support. Your inspirations, wisdoms, prayers, untiring support and encouragements have brought me to where I am today. My lecturers at Ruaha Catholic University cannot mention all of them for their legal advice.

ABSTRACT

This dissertation paper covers on the principle of non refoulement and protection of refugees in Tanzania as it tries to analyzes on violation of the principle of non refoulement by the government of Tanzania is the result of having not the provision on the principle under or in the refugee Act.

This task is done by initially looking at the history of the concept of non refoulment including the reason for its emergence and its rise and development as it is provided in the second chapter. This is done by exploring the historical legal frame work governing principle of non refoulement International, regional as well as national and domestically.

The third chapter proceeds on to explore and examine on non refoulement and protection of refugee in Tanzania in here the dissertationanalyses the hypotheses on the study on testing failure of aid to refugee hosting areas, on the security package programs, insecurity and the economic burdens also the lack of respect of the principle of non refoulement.

The facts and findings of the law described in the third chapter are the assessed and analyzed in fourth and final chapter of this dissertation. This provide for overall conclusion and recommendation of research with regards to that principle on non refoulnment has not fully provided in the refugee act that makes it customary in nature so it need to be fully provided in the refugees act to ensure proper protection of refugees and their rights in general.

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
AI	Amnesty International
AU	African Union
CAT	Convention against Torture and Other Punishment
CSFM	Centre for Study of Forced Migration.
DFID	Department for International Development
DRC	Democratic Republic of Congo
EXCOM	Executive Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
LCHR	Lawyers Committee for Human Rights
NEPAD	New Partnership for Africa Development
OAU	Organization of African Unity (defunct)
SADC	Southern Africa Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
USCR	United States Committee for Refugees
USDS	United States Department of State

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CHAPTER ONE: GENERAL INTRODUCTION

1.1 Background to the Problem

The word *non-refoulement* derives from the French *refouler*, which means to drive back or to repel. Non-refoulement is a principle of customary international law prohibiting the expulsion, deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons. This law institute is often regarded as one of the most important principles of refugee and immigration law.

Since the principle of non-refoulement has evolved into a norm of customary international law, states are bound by it whether or not they are party to the Convention relating to the Status of Refugees (following as "1951 Convention").This principle is also a part of so-called *jus cogens* (it is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted).[1]

Thus all countries are legally bound by the prohibition of returning refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion, which is the cornerstone of international protection. Is embodied in *Article 33 (1) of the 1951 Convention*.

[1]UNHCR An Introduction to International Protection concern on countries or territories Briefing notes, (2005)

The principle of non-refoulement as contained in the 1951 Convention is not an unqualified principle. There are three *exceptions to it*.

First, a refugee who may pose a danger to the security of the country in which he or she is present may not claim the benefit of the principle.

Second, the principle does not apply to a person who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.

Third, the benefit of the convention is to be denied to any person suspected of committing a crime against peace, a war crime, or a crime against humanity, a serious non-political crime outside the country of refuge, or acts contrary to the purposes and principle of the United Nations.

The principle of non-refoulement obligates states to ensure that a refugee returned to where he might be persecuted. In 1996, the Tanzanian President Mkapa sought reassurances from the Rwandan authorities that returning refugees would not be subjected to treatment amounting to persecution.[2]

Generally, states have been respecting and continue to respect the principle of non-refoulement. They have allowed large number of refugee access to their territory and privilege to remain in their countries pending solutions to their problem. The refugee

[2]Whitaker 340.T Howland (1998) 4 University of California Davis Journal of International and Policy 1 73-101 and Amnesty International 'Protecting their rights: Rwandese refugees in the Great Lakes Region' AI Index: AFR 47/016/2004.

operation in Tanzania is one of UNHCR's largest operations in the world.[3] The operation covers 14 refugee camps in five regions throughout Tanzania. This chapter is not intending to un-earth the history of the refugee operation in Tanzania. It simply endeavors to look at how a country with such developmental deficit has responded to the challenges of refugee protection and assistance in the last decade, with a specific focus on whether the principle of non-refoulement was respected throughout.

There is rich literature on the history of refugee operation in Tanzania, which we are not going to replicate here.[4] Yet, to get a picture of what Tanzania has shouldered in the last decade the following detailed account of refugees movement into Tanzania will put it into a better perspective. It all started with the aftermath of the havoc in Rwanda. For two years consecutively, 1994 and 1995, Tanzania hosted an estimated 752,000 and 730,000 refugees respectively.[5] Severe logistical and environmental challenges faced Tanzania and all refugee agencies.

The situation did not get better in 1996. About 335,000 refugees were hosted in Tanzania at the end of 1996 of whom approximately 240,000 were from Burundi, an estimated 50,000 from Rwanda, about 40,000 from DRC (former Zaire), and 5,000 from other countries. The Rwandans repatriation in December 1996 caused a sudden decrease of number of refugees (compare to 1994 and 1995).107 According to the U.S. Committee for Refugees (USCR), about 180,000 Burundian and Congolese refugees entered Tanzania in 1996. November alone witnessed, some 90,000 refugees arrive in Tanzania.

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[3] By the end of 2004, 10 countries hosting large number of refugees were Islamic Republic of Iran, Pakistan, Germany, Tanzania, USA, China, United Kingdom, Serbia and Montenegro, Chad and Uganda. For more information see UNHCR 2004 Global Appeal Trends.

[4] *Idem*

[5] *Idem*

The effect of civil unrest, which hit Burundi and DRC in 1996 to 1998, affected not only their neighbors but also the international community that supported the refugee operation. During 1997 to 1998 for example, whilst tens of thousands of new Burundian refugees sought safety in Western Tanzania, others departed Tanzania to areas of Burundi where security had improved.[6] While the eruption of civil war in DRC in 1996 to 1997 pushed more than 80,000 Congolese refugees into western Tanzania, a return to relative peace in the latter half of 1997 allowed some 25,000 to repatriate. The renewed war in August 1998 pushed some 20,000 or more new Congolese refugees into Tanzania, including many who had recently repatriated.

At the end of 1998, Tanzania hosted approximately 330,000 refugees from Burundi (260,000), DRC (about 60,000), Rwanda (about 5,000), and Somalia (4,000).[7] August 1998 renewed war in DRC pushed an estimated 20,000 new refugees into Tanzania.

By December 1999, Tanzania hosted approximately 410,000 refugees of whom about 290,000 were from Burundi, 100,000 from DRC, 20,000 from Rwanda, and 3,000 from Somalia. An estimated 130,000 new refugees fled to Tanzania from Burundi and DRC during the year. Despite continued instability in Burundi, some 10,000 refugees repatriated from Tanzania to Burundi with UNHCR assistance during 1999.[8] Thousands of others possibly repatriated spontaneously without help from UNHCR.

Flooded with more than a half-million refugees at the end of 2000, Tanzania topped the list of countries hosted large number of refugees in addition; an estimated 100,000 new refugees arrived in Tanzania from Rwanda, Burundi and DRC in year 2000. In January,

[6] *Idem*
[7] USCR 'World Refugee Survey 1999 country report: Tanzania'.
[8] USCR 'World Refugee Survey 2000 country report: Tanzania'.

alone 24,000 Burundian refugees arrived in Tanzania.[9] Tanzania hosted one of Africa's largest refugee population, approximately a half-million, at the end of 2001 including more than 350,000 from Burundi, nearly 120,000 from DRC, some 25,000 from Rwanda, and more than 3,000 from Somalia.[10] At the same time, it had to deal with an estimated 30,000 new refugees fled to Tanzania from Burundi and DRC.

At the end of 2002, Tanzania hosted over a half-million refugees, including more than 370,000 from Burundi, some 140,000 from DRC, about 3,000 from Somalia, and fewer than 3,000 from Rwanda.[11] In the same year, an estimated 51,000 new refugees entered Tanzania from Burundi, DRC, and Rwanda. Over 54,000 refugees of whom 23,534 (97 per cent of Rwandan refugee population in Tanzania) repatriated voluntarily from Tanzania in 2002.

Some 480,000 refugees were hosted in Tanzania at the end of 2003, including more than 325,000 from Burundi, some 150,000 from DRC, about 3,000 from Somalia, and 2,000 from other countries including Rwanda.[12] An estimated 13,000 new refugees fled to Tanzania in 2003 primarily from Burundi and DRC.[13] UNHCR also assisted voluntary repatriation of some 41,000 refugees mainly to Burundi and Rwanda. In the same year 22,000 babies were born.

[9] USCR 'World Refugee Survey 2001 country report: Tanzania'.
[10] *Idem*
[11] UNHCR 'Tanzania: 24,000 Burundi arrivals in 2 months' Briefing notes, Geneva, 4 February 2000 available at (accessed on 18 September 2015).
[12] USCR 'World Refugee Survey 2002 country report: Tanzania'.
[13] *Idem*

By 31 December 2004, Tanzania hosted approximately 602,000 refugees accordingly ranking the fourth among top ten countries in the world hosting large number of refugees.[14] It also received an estimated 1,500 new refugees mainly from DRC. During 2004, UNHCR assisted to repatriate to Burundi some 83,000 refugees. They had lived in Tanzania for more than a decade. Tens and thousands of Congolese and other Burundians possibly repatriated spontaneously without UNHCR assistance.

Generally, the above refugee movements affect not only the host countries but also, everyone involved in the process of seeking durable solutions for the refugee problem. It affects UNHCR, the international community and Tanzania as host community in the following ways. Firstly, when UNHCR has just spent funds on repatriation, it faces a new challenge to assist the same refugees who have just repatriated and are now returning as new asylum seekers. For example, in August 1998 refugee who repatriated to DRC returned to Tanzania as asylum seekers because of the new fighting. Secondly, such active border movements not viewed positively by Tanzania due to security concern such as possibility of arms proliferation.[15] Thirdly, protracted refugee situations are reviewed burdensome by donor countries especially when other refugee emerging situations elsewhere also demand due attention.[16]

[14] USCR 'World Refugee Survey 2004 country report: Tanzania'. This figure does not include the additional 300,000 to 470,000 Burundians who resided in western Tanzania in refugee-like circumstances without official refugee status for over past three decades.
[15] *Idem*
[16] *Idem*

1.2 Statement of the Problem

Tanzania as many other countries has the principle of non refoulement as merely customary law. It is time that non-refoulement principle be enshrined into national laws relating to human rights and refugees directly and not indirectly as it is the case presently.

As it is, having the non-refoulement in its customary form, the laws do not guarantee safety of refugees within the borders of Tanzania. Tanzanian refugee'slaw, which is guided by the Refugees Act of 1998, provides very little on the principle that is only in section 28 of the Act that provides for deportation of asylum seekers and refugees. Provisions of this section are not enough to cover all the aspects and situations provided by the principle of non-refoulement. Therefore, there is a need for a law that clearly provides and stipulates the demands of the principle to ensure total protection of refugees. So that to avoid gaps that might happen to the violation of the right of refugees. Watching helplessly as the most vulnerable people are returned to places where their lives and freedom is in danger and determined to contribute in the efforts to ensure the principle of non refoulement has motivated the researcher to undertake this researchThis research investigates Tanzanian Government's recent having not the provision in the Refugees Act as the but they follows international commitment with regard to refugees' right to non-refoulement.

Since this principle has become a part of customary international law, it is binding on all countries. As it was mentioned above the international documents dealing with the principle of non-refoulement do not make a precise distinction between a refugee and an asylum seeker. Nevertheless, the following persons are protected under this principle: refugees, persons in refugee-like situation, asylum seekers and potential torture victims.

That means that the principle of non-refoulement is applicable to any refugee, asylum seeker or alien who needs some form of shelter from the state under whose control he/she is.[17]

An important issue concerning the application of the principle of non-refoulement is whether it applies only to a person inside the territory of a state or whether it includes the right to be admitted and on that is to make sure on the same territorry have the non refoulement principle. This issue is closely connected with the two conceptions of the principle of non-refoulement (the narrow one and the broader one). There was consensus in this regard among the states negotiating the 1951 Convention.

1.3 Literature Review

There are literatures on refugee rights including researches on the principle of non-refoulementin Africa. A lot has also been written about the situation of refugees in Tanzania. This research as emphasized above will focus on the lack of respect of the principle of non-refoulementin Tanzania. This focus was motivated by the need to not only document the marked shift of refugee policy and practice in Tanzania, but also the sporadic abuse of refugee rights in particular the right to non refoulement.

Mendel[18] he has extensively looks at refugee law and its actual practice in Tanzania. The obligation of non-refoulementrepresents an important area of overlap between both conventions and, to a lesser extent, the municipal rules. He observed that although

[17]http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law accessed on 21/05/2016
[18] TD Mendel, Refugee law and practice in Tanzania' *International Journal of Refugee Law* Vol.9 No.1 (1997) 45

Tanzanian law and practice broadly conform to the 1969 AU Convention, it breaches 1951 UN Convention obligations. He suggested that for poorer Countries hosting large numbers of refugees, like Tanzania, the 1951 UN Convention is essentially an inappropriate instrument and one, which is substantially ignored in practice. With the legal and practical changes that occurred since 1997, another research is warranted specifically on the respect of the principle of non-refoulement.

Kamanga[19] has carried out a recent examination of the determinants and implications of the Tanzania Refugees Act and He has provided an opportunity to gain insight into how a pre-eminent country of asylum is responding to challenges of refugee protection and assistance. Furthermore, he has provided the possibility to assess the extent to which Tanzania has remained faithful to the 'open-door' Policy for which the country earned international recognition through the Nansen Award in 1983. Although he pointed out the ambiguity of the non-refoulement provisions in the Act, his research does not cover the practical aspect on the respect of the right to non-refoulement.

Rutinwa,[20] The work of Rutinwa explores a retreat from fundamental principles of asylum on the African continent including rejection at the frontier and expulsion of refugees. Yet; there is a need to narrow this into a particular country specific situation.

Whitaker,[21] he has examines the reason behind mass expulsion of Rwandan refugees from Tanzania on December 1996. Apart from the belief that the security situation in Rwanda

[19] K. Kamanga, The (Tanzania) Refugees Act of 1998: Some legal and policy implications' *Journal of Refugee Studies* Vol.18 No.1 (2005) 116
[20] B. Rutinwa, The end of asylum, The changing nature of refugee policies in Africa' *Journal of Humanitarian Assistance*(1999) 23
[21] B. E., Whitaker, 'Changing priorities in refugee protection: The Rwandan repatriation from Tanzania' *Refugee Survey Quarterly* Vol.21 No.1 &2 (2002) 333

was relatively calm; Tanzania's decision to return refugees was driven by the desire to avoid drawing the country into growing regional conflict. Whitaker observes that in the face of complex refugee crisis, international organizations are caught between their humanitarian mission and geopolitical dynamics. Often concerns about principle of non-refoulementcame into direct conflict with political and security priorities, forcing humanitarian aid workers to make difficult decisions. Nevertheless, her research concentrates on mass expulsion of Rwandan refugees and not sporadic expulsion and it will serve as a resource material.

Chaulia,[22] also he approaches the politics of hosting refugees in Tanzania way back before colonialism with the aim of understanding continuity and change in Tanzania's refugee hosting policy. Although he recommended ways to reverse the alarming trend of Tanzanian refugee fatigue, only significant conclusions might be drawn after analyzing the recent trends of sporadic expulsion of refugees.

Stenberg[23] has also analyses the substantive rules of international law relating to the principles of non-expulsion and non-refoulement in relation to Nordic states. He concluded that the principle of non-refoulement constitutes a rule of customary international law, binding on states regardless of their consent. Given the substantive differences between Nordic states and Tanzania, it would be of interest to find out what the analysis of the respect of principle of non-refoulement might reveal.

[22] S. S Chaulia, The politics of refugee hosting in Tanzania: From open door to un sustainability, insecurity and receding receptivity' *Journal of Refugee Studies*Vol.16 No.2 (2003), 159
[23] G., Stenberg, Non-expulsion and non-refoulement: The prohibition against removal of refugee with special reference to article 32 and 33 of the 1951 Convention Relating to the Status of Refugees (1989)

Goodwin-Gill[24] has written extensively on international refugee law and in particular the principle of non-refoulement. Although he acknowledges that in contrast to the 1951 UN Convention, the 1969 AU Convention is remarkable as it declares the principle of non-refoulement without exception. Attentionto this aspect is due.

Therefore, this research has endeavored to analyze the respect of the principle of non-refoulement in view of multi-dimensional problems faced by individuals seeking refugee status in African states particularly in Tanzania.

1.4 Hypotheses

The research tests the following hypothesis:

It appears that violation of the principle of non refoulement by the government of Tanzania is the result of not having the provision on the principle under or in the Refugee Act.

1.5 Objectives of the Research

This research investigates the respect for the principle of *non-refoulement*by the Refugees Act in Tanzania. The main objectives of the research are to:

Assess the Government of Tanzania compliance with its international commitments towards respect for the principle of *non-refoulement*in an effort to enhance promotion and protection of refugee rights in Tanzania

[24] G. Goodwin-Gill Second Edition (1996) 167, RL Newmark *Washington University Law Quarterly*(1993)71

Examine the role of the international community in responsibility sharing with emphasis on how their actions or inactions affect host countries respect to the principle of *non-refoulement*;

Make recommendations that would be useful not only to Tanzania but for other countries and stakeholders in similar situations.

1.6 Significance of the Research

This study is done with different importance. To the researcher, it is done as a partial requirement for successful completion of Bachelor Degree of Law (LL. B) awarded by Ruaha Catholic University (RUCU).

The findings of the study will be helpful for decision makers such as lawmakers who can see the gaps in refugee laws and find ways of making amendments for better laws that suits rights of the refugees. The study can be used as a reference point when making changes in laws relating to refugees.

To other scholars of refugee's law, the study can be useful as a reference and a base for further studies that relates to refugee's rights.

1.7 Research methodology.

The research at hand has predominantly been conducted in library, however both primary and secondary methods of data collection has been employed in obtaining the required information as it outline herein below;

1.7.1 Primary Method of Data Collection

With regards to primary method of data collection, the researcher conducted a few interviews with some of the expertise with sufficient knowledge on the concept of the law of refugees and research matters at hand in sharing their views with the proposed hypothesis of the researcher.

1.7.2 Secondary Method of Data Collection

As pointed out above and as it will be observed throughout the research, a large part of this study was conducted using the secondary methods of data collection by analyzing the legal instruments and the work of legal scholars.

On the other hand, the work of legal scholar consulted in conducting the research includes the works found in text books and those with related topic, academic articles, journals and various papers and reports related also to the paper and relevant academic written materials. These were found in the libraries that researcher visited including the RUCU library

1.8 Scope and Limitation of the Research

1.8.1 Scope of Research

This research is limited to respect of refugee rights in Tanzania, focusing on the principle of *non-refoulement.* The research explores the respect of the right to *non-refoulement*in relation to the relevant international, regional and national instruments. In addition, the research examines the interplay between the principle of *non-refoulement*and responsibility sharing.

1.8.2 Limitation of Research

However due to financial problem and time limit a researcher has made a slight field research to complete this work. This is on financial problem made researcher fail to visit the refugee's field and camps so that could help to get the closer information.

And on the other side of time limit a researcher fail to distribute time to go and the questionnaire because of the time that make the researcher opt the source of information.

CHAPTER TWO: LEGAL FRAMEWORK GOVERNING THE PRINCIPLE OF NON-REFOULEMENT

2.1 Introduction

The term refoulement appears on the title of article 33 of the 1951 UN Convention. It is derived from the French word '*refouler*' which means to drive back, to force back or to refuse entry. According to Goodwin-Gill 'refouler', means 'to drive back or to repel, as of an enemy who fails to breach ones' defenses'.[25]Weissbrodt and Hortreiter are also of the opinion that the word 'refouler' means literally to drive back or repel.[26] Garner defines refoulement as expulsion or return of a refugee from one state to another.[27] Therefore, refoulement in refugee law means the expulsion of persons who have the right to be recognized as refugee.

The reason behind the inclusion of French word 'refoulement' in the final document of the 1951 UN Convention is that during the Conference of Plenipotentiaries the Switzerland delegate Mr. Zutter thought that the wording of article 28 (now article 33(1)) left room for various interpretations, particularly as to the meaning to be attached to the words 'expel' and 'return'.[28] Article 28 of the draft document of the 1951 UN Convention provided that:

'No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion'.

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[25]*Ibid*
[26]D Weissbrodt and I Hörtreiter (1999) five Buffalo Human Rights Law Review 1 2.
[27] B. A Garner (Ed), *Black's law dictionary*, west publisher 2004
[28]Travauxpréparatoire 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the Sixteenth Meeting' 23 November 1951 available at (accessed on 8 September 2015).

In Mr. Zutter's opinion, the word 'expulsion' relates to a refugee already admitted into a country, whereas, the word 'return' ('refoulement') had a vague meaning and could not be applied to a refugee who had not yet entered the territory of a country. Accordingly, article 33(1) would not create any obligations for states parties to admit asylum seekers in case of mass influx. For that reason, it was included in the final draft of the 1951 UN Convention because its non-conclusive meaning and it could not be necessarily applicable to a person who is outside the territory of the state party.

To ensure that the final article reflects what they agreed, delegates at the Conference of Plenipotentiaries adopted unanimously the suggestion of President of the Conference that the French word 'refoulement' be included after the English word 'return'.[29] The delegates also agreed that mass migrations would not be covered by article 33.33 Thus, the guarantee provided for by article 33 is independent of any sovereign decisions of the host state on whether or not to grant asylum. This implies that the moment an individual's asylum application is accepted, the principle of non-refoulement is activated.

This chapter seeks to establish that the basis for the principle of non-refoulement lies in conventions, declarations and UNHCR practices. In turn, this gives basis upon which states are obliged to protect refugees against refoulement.

[29]Travauxpréparatoire 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the Thirty-fifth Meeting' 3 December 1951 available at (accessed on 8 September 2015).

2.2 Legal basis of non-refoulement

Non-refoulement has been defined in a number of international refugee instruments, both at the universal and regional levels.

At the universal level the most important provision in this respect is Article 33 (1) of the 1951 Convention relating to the Status of Refugees, which states that:

"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."

This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I (1) of that instrument. Unlike some provisions of the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State. As to the words "where his life or freedom would be threatened", it appears from the travaux préparatoires that they were not intended to lay down a stricter criterion than the words "well-founded fear of persecution" figuring in the definition of the term "refugee" in Article 1 A (2). The different wording was introduced for another reason, namely to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.[30]

Also at the universal level, mention should be made of Article 3 (1) of the UN Declaration on Territorial Asylum unanimously adopted by the General Assembly in 1967 [res. 2312 (XXII)].

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[30] 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 [accessed 2 June, 2016]

"No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

At the regional level the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 gives expression in binding form to a number of important principles relating to asylum, including the principle of non-refoulement. According to Article II (3):

"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2."

Again, Article 22 (8) of the American Human Rights Convention adopted in November 1969 provides that:

"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions."

In the Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, it is recommended that member governments should be guided by the following principles:[31]

[31] *Ibid*

1. They should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory.

2. They should, in the same spirit, ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Finally, Article III (3) of the Principles concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, states that:

"No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

2.3 International Instruments.

The principle of non-refoulement did not exist before the 1930s.[32]It was first introduced in the 1933 Convention Relating to the Status of Refugees, which, however, was ratified by very few states. Due to the huge number of refugees in Europe resulted from the Second World War, the UN General Assembly passed a resolution stating that refugees should not

[32] Convention Relating to the Status of Refugees to be placed on record in order to dispel any possible ambiguity1933

be returned to their countries of origin when they had 'valid objections'. In addition, this concern led to the drafting of the 1951 UN Convention relating to the Status of Refugees, which embodied the principle of non-refoulement.[33] Since then, it has played a key role on how states parties should deal with asylum seekers and refugees in terms of their universal right to non-refoulement.

2.3.1The 1951 United Nations Convention Relating to the Status of Refugees.

The 1951 UN Convention does not require states parties to admit a refugee to their territory. It, however, contains specific provisions that limit this discretion. Article 33, which is one of the articles in respect of which states parties could not enter a reservation, contains the most significant limitation, the principle of non-refoulement. It provides that:

"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" .

By not expelling refugees, states parties play pivotal role in protecting refugee fundamental human right to life. Enjoyment of all other civil, political, economic, social and cultural rights depends on the right to life. However, there are two exceptions to this principle under article 33(2), which provides that:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in

[33] UNGA Resolution 8(I) of 12 February 1946, paragraph (c) (ii).

which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

Suffice to note that the drafters of the 1951 UN Convention never included any exception to article 33(1)[34]. This shows the weight given to the principle of non-refoulement. As the Canadian delegate Mr. Chance commented, the drafters had regarded article 28 (now article 33(1)) as of fundamental importance to the Convention as a whole.

Notwithstanding the fact that the 1951 UN Convention does not provide for temporary refuge, the duty of states parties not to return those who face threats to their life or freedom implies a duty to provide at least temporary refuge while seeking a durable solution. Consequently, many scholars consider non-refoulement as a principle of customary international law, that is, it is binding on all states, even those that have not ratified the 1951 UN Convention and its 1967 Protocol. While commenting on the judgment of the Haitian refoulement case, Goodwin-Gill emphasized that:

"The principle of non-refoulement has crystallized into rule of customary international law, the core element of which is the prohibition of return in any manner whatsoever of refugees to countries where they may face persecution".

Though many acknowledge that the principle of non-refoulement is accepted as customary, there are concerns about its applicability in situations of mass influx. Simply put, although states may have a duty to accept refugees in general, the rules may differ in respect of situations of mass influx. During the Conference of Plenipotentiaries, the delegates agreed

[34] *Idem*

to the interpretation that the principle does not apply in mass influx situations. Tanzania invoked article 33(2) on national security threats caused by the mass influx on Rwandan refugees in 1994.

One of the major weaknesses of the 1951 UN Convention is that it does not provide for a mechanism under which asylum seekers who fall within the refugee definition can protest or appeal the denial of refugee status by a state party. Lack of this mechanism has made genuine refugees become victims of refoulement. It is also difficult for such refugees to pursue local remedies against the same state, which has denied them protection because of time constraints or the lack of an effective functioning judicial system. The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which re-enacts the principle of non-refoulement, does provide avenue to support such claimants in seeking remedies, though limited only to victims of states parties.

Another weakness of the 1951 UN Convention is the lack of obligation to allow asylum seekers to enter and reside in the territory of a state. Goodwin-Gill commented in the Haitian refoulement case that non-refoulement 'is not so much about admission to a state, as about not returning refugees to where their lives or freedom may be endangered'. The importance of admission however, could not be further stressed in circumstances where borders are closed on the face of asylum seekers.

Article 33 does not guarantee total non-refoulement to refugees as envisaged in Article 28 of the 1951 UN Convention[35]. Yet, with its international customary status, it has

[35] UN Convention article 28 of the 1951

effectively provided protection to millions of refugees who have crossed borders in search for safety.

2.3.2 The 1948 Universal Declaration of Human Rights

The UDHR is the most important document on human rights of a universal character. It establishes natural law principles and concepts, which formulate the basis for concern of the international community in providing the solution to the refugee problems. Article 3 of the UDHR provides for the most important right of which enjoyment or exercise of other rights depends on: the right to life. It provides that everyone have the right to life, liberty and security of person. Refugees' rights to life, liberty and security have been curtailed in their country of origin, thus the motivation to seek asylum in other countries. Countries of asylum therefore have the responsibility to protect these very rights.

While the UDHR is technically not a binding document, its principles have acquired international customary recognition. Together with the UN Charter, states have reaffirmed their commitment to the purposes and principles contained therein including the right to non-refoulement. Hence, states have responsibility to protect refugees against refoulement.

2.3.3 The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The wording of article 3 of CAT is based on article 33(1) of the 1951 UN Convention but only applies to persons who face torture upon return[36]. It provides that no state party shall

[36] UN Convention article 33(1) of the 1951

expel, return ('refouler') or extradite a person to another state where he would be in danger of being subjected to torture. Unlike refoulement in the 1951 UN Convention, CAT guarantees absolute prohibition of refoulement under article 2(2). Furthermore, the CAT provides for the criteria in determining the actual danger or real risk of being subjected to torture.[37]

An important component of the CAT is the Committee against Torture (Committee), a monitoring body initiated to ensure implementation of CAT's provisions.[38]In addressing communications alleging violations of article 3, the Committee has concluded that non-refoulement applied not only to direct expulsion, return or extradition but also to indirect transfers to a third country from which the individual might be in danger of being returned to the country where she or he will be in danger of being subjected to torture.[39]Given the lack of a monitoring body for the implementation of the 1951 UN Convention, CAT plays a vital role in protecting rights of refugee.[40] In *Mutombo v Switzerland*, the Committee held that Switzerland had an obligation to refrain from expelling complainant Balabou Type equation here.Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture. Nevertheless, this institution is intended to be the very last resort. In order for the Committee to accept a communication as admissible, it will be necessary for a complainant to show that she or he has exhausted all available domestic remedies.[41]

[37]Article 3(2).
[38]Article 17.
[39]Mutombo v Switzerland Communication No. 13/1993, U.N. Doc.A/49/44 (1994) 45.
[40] UN Convention article 38 provides that disputes between states parties relating to its interpretation may be brought before the International Court of Justice, it says nothing on individual complaints 1951
[41]Article 13. ICCPR was adopted by UNGA resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. Tanzania acceded to the ICCPR on 11 September 1976.

2.3.4 The 1966 International Covenant on Civil and Political Rights

The ICCPR provides that no one who is lawfully within the territory of a state shall be expelled from that state without due process.94 The importance of ICCPR in ensuring respect of refugee rights including non-refoulement can be seen in two folds: First, it specifies what action must be taken before anyone can be forcibly expelled. Second, it has a monitoring body called Human Rights Committee, where victims may direct incidents of refoulement.[42]This gives refugees an opportunity to seek remedies in case of threats to refoulement.

2.4 Regional Instruments

The 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa.

Refugee movements are caused not only by persecution but also by conflicts such as self-determination struggles, civil wars, change of government and natural disaster.[43] Despite the 1967 Protocol making the 1951 UN Convention applicable to the rest of the world, it nevertheless remained insufficient to cope with rising peculiarities of the African refugee crisis.[44] Therefore, the 1969 AU Convention complemented the 1951 UN Convention not only in terms of refugee definition but also in one of the major six principles of refugee law namely non-refoulement.[45] It provides that:

"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory

[42] States that have become a party to the First Optional Protocol to the ICCPR recognise the competence of the Committee. Tanzania is not a party to the two Optional Protocols to ICCPR.
[43] *Ibid* .
[44] B. T, Mapunda *An Introduction to International Refugee Law*, Dar es Salaam: Hakiardhi 2000
[45] *Ibid*

where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

While the 1951 UN Convention prohibits the expulsion or return ('refoulement') of refugees, the 1969 AU Convention ads 'rejection at the frontier', prohibiting states parties to refuse refugees to cross their borders.[46] This is in line with the UDHR, which provides that everyone enjoys the right to seek asylum, not limiting to actually being on territorial states but could also cover border fronts.[47] The right to non-refoulement in the 1969 AU Convention is also coupled with the liberty to appeal to other states parties to respond appropriately to lighten the heavy responsibility of refugee hosting countries. This is to ensure that states parties protect the fundamental rights of refugees in all circumstances.

In contrast to the 1951 UN Convention, the 1969 AU Convention addresses the issue of receiving and resettling refugees. States parties are requested to use their best endeavors consistent with their respective legislations to receive refugees and secure their resettlement.

This provision was included to ensure that refugee rights are protected even in situations where a state is already hosting large numbers. Linked to the right of non-refoulement is the concept of voluntary repatriation. The 1969 AU Convention stresses the importance of voluntariness of repatriation.[48] Consequently, states parties have an obligation to ensure that no forced repatriation is practiced. This is essential in order to safeguard the fundamental rights of refugees, albeit the practices of some host countries have sometimes

[46] AU Convention, article 2(3).of 1969
[47]F Viljoen in C Heyns (Ed) (2004) Vol.1 488. J van Garderen in Heyns (n 55) 840.
[48] AU Convention, article 2(5) of 1969

been controversial. Some organizations condemned the 1996 Rwandans repatriation from Tanzania due to its involuntary nature.[49]

Other significant features of the 1969 AU Convention include articles 2(1) and 2(5). Article 2(1) provides that sates should use their best endeavors to receive refugees and secure their resettlement. Article 2(5) provides for the grant of temporary asylum. These provisions go a step further than what is provided in the 1951 UN Convention. In the 1951, UN Convention the issue of granting asylum and resettling refugee is left in the discretion of the concerned state and no mention of temporary asylum or a complementary forum of protection is made.[50]

However, like the 1951 UN Convention, there is no mention of any implementation mechanism in the 1969 AU Convention. It is important to note that, the AU has a Bureau devoted to refugee issues. It was established in 1968 to seek educational and economic opportunities for refugees in host countries and ensure realization of the objectives of the 1969 AU Convention.[51] In addition, it has a specific role in issues involving the protection of refugees. The Bureau is like a 'monitoring body' for the 1969 AU Convention. It operates as a secretariat to the Committee of Fifteen (C15) member states, which is the principal, policy-making organ of the AU on all matters relating to refugees in Africa. Yet, refugees continue to be subjected to human rights violations including refoulement without much intervention from the Bureau or from any other AU organs. In addition, many states have not incorporated the principle of non-refoulement in their domestic legislation.

[49]Article 5 of CCPR 1966

[50] Amnesty International and Human Rights Watch condemned the government of Tanzania for forceful returning refugees to volatile situation. For a detailed account of repatriation of Rwandans in December 1996, see Whitaker, supra, note 23, 329-344.

[51] On the Bureau, see J Oloka-Onyango (1994) six International Journal of Refugee Law 1 34-52.

Tanzania has recently incorporated the non-refoulement provision more explicitly in the Refugee National Policy.

Despite complementing the 1951 UN Convention with the best provision on non-refoulement of refugees, incidents involving forcible return to a country of origin have occurred in African particularly Tanzania. As we shall see in chapter three this is a failure by the Government of Tanzania to protect rights of refugees.[52]

2.4.2 The 1981 African Charter on Human and Peoples' Rights

The ACHPR gives the 1969 AU Convention boost on the non-refoulement provision.[53] It specifically provides for the non-expulsion of aliens legally admitted in a territory of a state party, unless in accordance with the law.[54] In addition, it prohibits mass expulsion of aliens.[55] At one point in time, the African Commission on Human and People's Rights (African Commission)[56] commented that, the drafter of the ACHPR believed that mass expulsion presented a special threat to human rights.[57]

The African Commission has addressed incidents of expulsion of refugees and asylum seekers. Some of the expulsion complaints brought before the African Commission includes *Union Interafricaine des Droits de l'Hommeand others v Angola* where the African Commission declared the deportation of West African nationals by the Angolan

[52]Oloka-Onyango,supra, note, 36.
[53] Adopted in 1981 and entered into force on 21 October 1986. Tanzania ratified the ACHPR on 18 February 1984.
[54]ACHPR, article 12(4). For a detailed discussion of the ACHPR, see Viljoen, supra, note 52, 389-420.
[55] Article 12(5) of the ACHPR provides that 'mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups'.
[56] For a detailed discussion on the African Commission, see Viljoen supra, note 55, 420-486.
[57]RencontreAfricaine pour la Défense des Droits de l'Homme v Zambia (2000) AHRLR 321 (ACHPR 1996) 324.

Government a violation of articles 2(4) and 2(5) of the ACHPR.[58] In *Organization MondialeContre la Torture and Others v Rwanda* the Commission observed that article 12(3) is a general provision of all those who are subjected to persecution and article 12(4) protects them from arbitrary expulsion.[59] The Commission found Rwanda in violation of the ACHPR when it expelled Burundian. Like many monitoring bodies, the African Commission is intended to be the very last resort in search for justice. Normally, a complainant must show that he has exhausted domestic remedies for it to be accessed.

2.5 National statutes

2.5.1The 1998 Tanzania Refugee Act

States have the responsibility to protect refugees from actions, which violates their rights. These actions may arise directly from acts or omissions of its government officials and agents, or indirectly where the domestic legal and administrative systems fail to enforce or guarantee the observance of international standards. To be able to fulfill its international obligations under the 1951 UN and 1969 AU Conventions and Tanzania enacted the Refugee Act of 1998 (Refugee Act).[60]

The Refugee Policy has tried to cement the loopholes of the Refugee Act and the current trend of not respecting the principle of non-refoulement. It provides that '[r]efugees will not be expelled from Tanzania except on grounds of national security or public order and in accordance with the applicable principles contained in international instruments'.[61] Nevertheless, both fall short of the standards set up in the 1951 UN and 1969 AU Conventions.

[58](2000) AHRLR 18 (ACHPR 1997) 21.
[59](2000) AHRLR 282 (ACHPR 1996) 282.
[60] It repealed the 1965 Refugee Control Act
[61]Refugee Policy, paragraph 11.

2.6 Exceptions to the principle of non-refoulement

While the principle of non-refoulement is basic, it is recognised that there may be certain legitimate exceptions to the principle.

Article 33 (2) of the 1951 Convention provides that the benefit of the non-refoulement principle may not be claimed by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'. This means in essence that refugees can exceptionally be returned on two grounds: (i) in case of threat to the national security of the host country; and (ii) in case their proven criminal nature and record constitute a danger to the community. The various elements of these extreme and exceptional circumstances need, however, to be interpreted.

With regard to the 'national security' exception (that is, having reasonable grounds for regarding the person as a danger to the security of the country), while the evaluation of the danger remains within the province of the national authorities, the term clearly implies a threat of a different kind than a threat to 'public order' or even to 'the community'. In 1977, the European Court of Justice ruled that there must be a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society (Reg. vs. Bouchereau, 2CMLR 800). It follows from state practice and the Convention travaux preparations that criminal offences without any specific national security implications are not to be deemed threats to national security, and that national

security exceptions to non-refoulement are not appropriate in local or isolated threats to law and order.[62]

With regard to the interpretation of the 'particularly serious crime'-exception, two basic elements must be kept in mind. First, as Article 33 (2) is an exception to a principle, it is to be interpreted and implemented in a restrictive manner, as confirmed by Executive Committee Conclusion No. 7. Second, given the seriousness of an expulsion for the refugee, 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. The application of this exception must be the ultima ratio (the last recourse) to deal with a case reasonably.

For Article 33 (2) to apply, therefore, it is generally agreed that the crime itself must be of a very grave nature. UNHCR has recommended that such measures should only be considered when one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community. Read in conjunction with Articles 31 and 32 of the 1951 Convention, a State should allow a refugee a reasonable period of time and all necessary facilities to obtain admission into another country, and initiate refoulement only when all efforts to obtain admission into another country have failed.

In conclusion, in view of the serious consequences to a refugee of being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33 (2) should be applied with the greatest caution. It is necessary to take fully into account

[62] 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 [accessed 2 June 2016]

all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and reintegration within society.

It should also be noted that such exceptions based on factors relating to the person concerned do not figure in other instruments, neither in the international refugee instruments nor in international human rights law. The 1969 OAU Convention, for example, does not provide for expulsion or refoulement of refugees under any circumstances. Instead, it calls on Member States to appeal to other Member States should they find difficulty in continuing to grant asylum.[63]

In comparison to previous practices where Tanzania consistently respected the principle of non-refoulement, the current practices of the government forceful returning refugees to their country of origin hence exposing them to danger and even death, is alarming.[64] It is an outright abuse of a refugee's fundamental right and should be discouraged.

2.7 Conclusion

According to the principle of non-refoulement, a refugee shall not be forced back to a country where she or he will be in danger of persecution. This principle applies even where the state has not determined the refugee status of a person or where it rejects an asylum seeker. The refugee laws in Tanzania provides for the protection of refugees' right of non-refoulement even when her or his status has not been determined. It is no doubt that the most important tool for the states to protect refugee rights is the principle of non-refoulement. Indeed, the Canadian delegate reminded other delegates during the

[63] 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 [accessed 20 June 2016]
[64] C M Peter (1997) 4 *Journal of African Law* 1 94.

Conference of Plenipotentiaries that the drafters of the 1951 UN Convention had regarded article 33 as of fundamental importance to the Convention as a whole. He categorically said that ‘in drafting it, members of that Committee had kept their eyes on the stars but their feet on the ground.’ It is high time for states parties to look at what members of the Committee saw in 1951 because the refugee situation has changed. Many people have fled and continue to flee in mass for fear of their lives in their own countries.

CHAPTER THREE: NON-REFOULEMENT AND PROTECTION OF REFUGEES IN TANZANIA

3.1 Introduction

This chapter will proceed on examining and analyses the legal implication that is the legal and normative framework concerning the protection of principle of non refoulement. It is done by focusing on the international general and domestically. As the study based on the libraries there for will intent to analyses on approval and disapproval of our hypothesis of which the study was attempting to test.

3.2 Failure of Aid to Refugee Hosting Areas

With absence of provision of principle of non refoulement in refugee act in Tanzania has impact on this principle of non refoulment makes Tanzanian to lacks aids from the international community's as in 2001, UNHCR reported that the long-term hosting of refugees has strained the infrastructure in North Western Tanzania.[65] In addition, the protracted refugee situation has contributed not only to environmental degradation, but also to anti-refugee sentiments in the last decade. To address the impact of refugee presence in host areas, UNHCR undertook a number of initiatives. In the last decade, it provided assistance totaling US$38 million to the refugee hosting areas in Northwestern Tanzania.[66] This assistance targeted programmers such as projects in the environment, education and health

[65] UNHCR 'Global Report 2001' 137

[66]UNHCR 'Report of the national consultation on strengthening protection capacity and support to host communities'
Dar es salaam Tanzania, April 2005 available at <http://www.unhcr.ch/cgibin/ texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=42a070092> (accessed on 18 march 2016).

sectors. Other programmers included administrative support and capacity building to government authorities and programmers to enhance security in and around the camps. This assistance targeted programs such as projects in the environment, education and health sectors. Other programmers included administrative support and camps. For example, in 2004 refugee hosting areas benefited from the construction of 18 secondary schools, medical wards (in Ngara and Kasulu districts) road repairs and reforestation. In addition, camp health facilities were made available to neighboring local communities. WFP, UNICEF and UNDP also had carried out significant assistance programmers to the host communities in North Western Tanzania as well[67].

Nonetheless, these organizations have been facing funding crisis in the last decade. For instance, from 1998 to 2002 lack of donor interest Prevented UNHCR from completing programmers such as road repairs, school renovations and other infrastructures intended to aid refugee-affected areas[68]. This increased anti-refugee sentiments and refoulement incidents on grounds that the international community has become less cooperative.

3.3 Security Package program

To ensure the humanitarian and civil character of refugee camps and refugees' physical security, UNHCR continues to support the security initiatives in Tanzania. In 2004, UNHCR supported the maintenance of a separation facility for armed combatants and 287

[67] Administrative and capacity building programmers benefited the Ministry of Home Affairs, regional and district authorities.
[68] *Ibid*

police officers.[69] The police officers were deployed in the camps with vehicles and communication

equipment's to ensure security in and around refugee camps. Generally, the commitment of the international community in the above programs has not been smooth. UNHCR has had many experiences of funding shortfalls but these did not move the international community to act. For example, UNHCR's failure to develop a new site (at Ilagala in the Kigoma region) allocated by the Government for new Congolese refugees was a result of fund shortfall. It is also reported that the year 2003 'was the third successive year of a significantly reduced budget with no substantial reduction in the number of refugees needing assistance' in Tanzania.

3.4 Insecurity and Economic Burden

Through having not the provision of this principle of non refoulement it may bring insecurity because people might see that when we go to Tanzania we can be refused so they came with the other way that is not required by Tanzania or they can come with the aim of destructing peace and leave. Such as car hijacking happen in other parts of the country, is rampart in western Tanzania because of arms proliferation.

However due to the absence of principle on Non refoulement in Tanzania has encouraged of misconducts. Tanzanian's approach to refugee protection has changed from 'open-door' policy to limited respect of refugee rights. This change is evident in not only sporadic refoulement of refugees but also in restrictive admission policies, decreased durable solution opportunities, and general disregard of other refugee rights. For instance, the ad hoc screening procedure of new prima facie refugees instead of conducting proper refugee

[69] *Ibid.*

status determination is a case in point. Although the Tanzania has tried to justify its refoulement practices as necessary to address the lack of adequate support from the international community. But it is unacceptable to trade-off refugee rights with lame excuses like this.

3.5 The Conceptual Perspective

Under this issue of conceptual perspective, the distribution of the refugee responsibility usually depends on unfortunate geographical position of countries. This may result in some countries like Tanzania to bear a disproportionate share. In anticipation of this situation, the legal framework has provided a solution: responsibility sharing.

The principle of responsibility sharing is recognized in the refugee regime. Bearing in mind the unduly heavy responsibility on certain countries hosting refugees, the preamble of the 1951 UN Convention provides that international co-operation is important in the achievement of a satisfactory solution of refugee problem. It is not binding on member states but its inclusion in the 1951 UN Convention shows its importance.

At the regional level, the 1969 AU Convention also recognizes the importance of responsibility sharing. It provides that in case of difficulty in continuing to grant asylum to refugees, a refugee hosting country may appeal directly to other member states and through the AU to lighten the responsibility in the spirit of African solidarity and international cooperation.[70] This provision was invoked by Botswana, Lesotho and Swaziland with regard to South African refugees who were transferred to Tanzania, Zimbabwe, Zambia

[70]AU Convention, article 2(4) of 1969

and other countries.[71] Furthermore, UNHCR airlifted Rwandan refugees from DRC to Tanzania in the early 1960s because of insecurity.[72] To ensure respect of the principle of *non-refoulement,* resettlement to third countries is considered a powerful tool of effective international responsibility sharing. For that reason the 1969 AU Convention further provides that:

Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with [article 2(4)].

However, lack of procedural guidelines, criteria or set mechanisms, makes it difficult for states requiring such assistance to seek eager ears.

3.6 Lack of Respect of the Principle of non-refoulement

The magnitude and commotion in the Tanzania refugee operation went simultaneously with refoulement incidents. Some of these incidents like the 2004, Tanzania hosted approximately 602,000 refugees accordingly ranking the fourth among top ten countries in the world hosting large number of refugees yet, the sporadic refoulement affecting a victim, family or small group continued unnoticed, undocumented and even publicly non-protested. Refoulements that have been taking place in Tanzania can be characterized in two categories, refoulement of asylum seekers and refoulement of registered refugees.

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[71]Rutinwaquoting M Rwelamira and LG Buberwa 'Refugees in Botswana, Lesotho and Swaziland: Some preliminary notes on their magnitude, characteristics and social support systems' paper presented at the Africa refugee seminar, Arusha 30 July to 3 August 1990 7.

[72] *Idem*

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The study was conducted to look on how the Tanzanian Refugees Act treats refugees in relation to the principle of non refoulement and the gaps contained therein that brings about loopholes for violation of human rights during the times when refugees are refouled back to the countries that they are fleeing from.

The study has found out that the principle of non-refoulement is not fully practically provided for under the Refugees Act. The main cause that the study has revealed being customary nature of the provisions that cover non-refoulement of refugees.

Largely, in the last decade, Tanzanian's approach to refugee protection has changed from 'open-door' policy to limited respect of refugee rights. This change is evident in not only sporadic refoulement of refugees but also in restrictive admission policies, decreased durable solution opportunities, and general disregard of other refugee rights. For instance, the ad hoc screening procedure of new prima facie refugees instead of conducting proper refugee status determination is a case in point. Tanzania should cease its expulsion practices, which violates not only the fundamental principle of non-refoulement, but also other rights such as the right to seek asylum. Tanzania should resort to requesting effective and adequate international community support and this be incorporated into the larger domestic and foreign policy agenda. As a member of the UNHCR Executive Committee and AU Committee of Fifteen (C15) Tanzania should take advantage of this position and appeal for adequate international responsibility sharing. This will not only make effective

use of existing mechanisms but also ensure proper protection of refugees. The international community has sometimes responded to emergencies with such enthusiasm, which ensured respect of principle of non-refoulement and other rights of refugees. The trend of response in the last decade nevertheless shows that such enthusiasm wanes away with a protracted refugee situation while the needs are the same. All states have a responsibility to ensure respect of refugee rights in all circumstances. Refugees are not a 'burden' but a responsibility, to be shared by Tanzania and international community equally. It does not mean that if refugees are not physically in the country then a state has no responsibility toensure respect of their rights. The international community should understand that lack of sufficient responsibility sharing in any operation exposes refugees to a double violation of their rights. Therefore, the principle of responsibility sharing constitute key elements in permitting economically, politically and socially challenged host countries to fully meet their obligations in refugee protection

4.2 Recommendations

The researcher comes with the following recommendations:

Non-refoulement as a principle still exists. No one seems to be saying that it is now legal to return them to a place where they will face persecution. The proliferation of international and regional instruments incorporating the non-refoulement principle is evidence of this. Any new or revamped refugee system therefore needs to retain non-refoulement as its basic foundation. But, as Newmark suggests, and as this paper has illustrated, we need a

'consistent, universal definition' of non-refoulement.[73] In other words, we need to define the parameters. It is therefore necessary to consider, in a practical manner, the best way of achieving this objective.

Changes to the refugee system could be made in various ways. Some have suggested that a protocol to the Refugee Convention could be the way forward.[74] We could even go further and create an entirely new Refugee Convention, which properly deals with new developments like temporary protection and the safe third country idea. Another option would be a General Assembly resolution clarifying the grey areas of non-refoulement. For those concerned that the current international climate would dictate that any revision of the Refugee Convention would result in a severely limited system, this would seem to be the safest option. However, I would suggest that the best way to ensure that we have a workable system, which states are bound to adhere to, is to draft a new Convention. Not only would this provide us with, ideally, a workable and enforceable instrument, but also it would involve having a conference, or a series of meetings, where the views of all states on the refugee issue could be aired. This is incredibly important, as recent efforts have illustrated that there are not just fundamental debates occurring between refugee advocates and states, but also amongst the states themselves. This also would ideally provide us with a global solution. Although moves are being made to harmonize refugee systems, such as temporary protection, on a regional level, the global nature of the refugee problem means that any solution to the current problems needs to be consistent the world over.

At the core of the new Convention should be a re-formulated non-refoulement principle. The current provision, with its two short paragraphs, has clearly not been effective in

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[73] R L. Newmark 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' 71 Wash.U.L.Q.833, 858.
[74] *Ibid*

providing states and advocates with sufficient direction regarding their rights and obligations. A new provision should clearly state what the parameters of the non-refoulement provision are. Although any new provision will ultimately be a result of intense negotiation and compromise, I would argue that it needs to include the following components in order to sufficiently protect the interests of both states and refugees. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[75] The provision should apply to refugees 'wherever found'.

It is imperative that any new provision also settle the issue of extraterritoriality. This is a fundamental problem as it determines at what point a state becomes responsible for refugees. It is arguable, however, that if the opinion of states is leaning one way or the other, it is towards the applicability of non-refoulement extraterritorially. The purpose of the non-refoulement principle is to protect refugees from being returned to a place where their lives could be endangered. Allowing states to turn refugees away at the borders would completely undermine this purpose. From a practical perspective, it needs to be clear from the outset who is responsible for a particular refugee or group of refugees. If, as in the case of the Tampa, they are at sea, there should be rules as to when they come under state jurisdiction. If the current provision specified that the non-refoulement right accrues to a

[75] Convention of governing the specific aspects of refugee problems in Africa (10 September 1969) 1001 UNTS 45

refugee 'wherever found', it would have been clear that by refusing to process the refugees Australia was in breach of its international obligations.[76]

Tanzania has to sit and try out to make a proper acknowledgement of the principle of Non refoulement within the Refugee Act according with the basis of the UNHCR in order to make sure that the refugee's rights are well maintained and observed. This will not only make effective use of existing mechanisms but also ensure proper protection of refugees and their rights in general.

As meticulously suggested by Chen, 'donors should fund Tanzania generously' and hold it accountable to respect international standards of refugee protection.[77] He, however, warns that calls for accountability are more effective when accompanied by a clear commitment. The international donor community should make a long-term commitment to share the refugee responsibility in Tanzania on condition that it observes the rights of refugees. It is necessary to put conditions for a country to observe its international responsibility, because this is the best way to ensure accountability. As suggested, the international donor community needs to link its development assistance with refugee aid and require countries like Tanzania to honor refugee rights before granting aid.[78] The USA for example, has a system to track human rights records of all countries. Tanzania on condition that it observes the rights of refugees. It is necessary to put conditions for a country to observe its international responsibility, because this is the best way to ensure accountability. As suggested, the international donor community needs to link its development assistance with

[76] J. Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 279.
[77]G Chen 'Confinement and dependency: The decline of refugee rights in Tanzania' World Refugee Survey 2005Available<http://www.refugees.org/uploadedFiles/Investigate/Publications_&_Archives/WRS_Archives/2005/Chen_chen.pdf>(accessed on 2 may 2016) 11.
[78]*Idem*

refugee aid and require countries like Tanzania to honour refugee rights before granting aid, The USA for example, has a system to track human rights records of all countries. The condition that a country must comply with refugee legal instruments for it to get development assistance should be linked with such system.

The international community may also play the responsibility-sharing role through making a solid commitment to reimburse Tanzania for costs directly related to the hosting of refugees, such as administrative costs

The condition that a country must comply with refugee legal instruments for it to get development assistance should be linked with such system. This could be on condition that Tanzania allows refugees to participate in economic development activities. For example, the incident of refugees rioting because of the decline in WFP food pipeline could have been avoided if they are involved in economic development activities outside the camp. These activities will not only reduce dependency but also security incidents and environmental degradation, as they are a source of income. As a result, this will allow UNHCR to return to its primary mandate. It will also reduce the anti-refugee and economic burden sentiments in Tanzania.

The international community should extend their responsibility in supporting countries of origin in developing amicable and sustainable situation for the return of refugees. As we have seen, SADC has made efforts to address root causes of refugee flows. Addressing root causes of the problem should entail holding the country of origin responsible for the impact of refugee flows in neighboring countries. The international community should use

the same measures suggested for countries of origin, that is, link development assistance with condition to compensate returning refugees and country of asylum.

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