

**South African legal aspect for voluntary repatriation of refugees**

by

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## **SUMMARY**

The dissertation investigates South Africa's legal aspects pertaining to voluntary repatriation of refugees. The repatriation of Mozambican and Angolan refugees was referred to in order to examine the loopholes in the process of repatriating them. This study moreover examines whether the application of the cessation clause is in contravention of the principle of non-refoulement, which is intrinsically the cornerstone for voluntariness of repatriation. The analysis of international, regional and South Africa's refugee protection framework demonstrates that South Africa affords refugees the protection required by international law. This has been compared with states' practice and case law with regards to refugee protection in countries including Canada and the United Kingdom. Although South Africa, Canada and the United Kingdom have comprehensive legal framework governing refugees' protection, refugees' rights have been violated on numerous occasions. The dissertation consequently concludes that notwithstanding the presence of international, regional and domestic legislations, the rights of refugees are violated due to their vulnerability and the repatriation process ignores the principle of voluntariness on several occasions.

### **Key terms**

Refugees; Voluntary Repatriation; Cessation; Non-refoulement; South Africa; Canada; United Kingdom.

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I declare that “**South African legal aspect for voluntary repatriation of refugees**” is my own work and that all sources that I used or quoted have been indicated and acknowledged by means of complete references.

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## LIST OF ABBREVIATIONS

ACHPR	African Charter of Human and Peoples Rights
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IRB	Immigration and Refugee Board
IRPA	Immigration and Refugee Protection Act
LRF	Lindela Repatriation Facility
MPLA	Popular Movement for the Liberation of Angola
OAU	Organisation of African Unity
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	United Nations Charter
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNITA	National Union for the Total Independence of Angola
UK	United Kingdom
USA	United States of America
WW I	World War I
WW II	World War II

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## CHAPTER 1

### INTRODUCTION AND PROBLEM STATEMENT

#### 1.1 INTRODUCTION

The movement of people throughout history can be categorised into various categories including those related to forced migration. Forced migration is generally due to various reasons including famine, droughts, natural disaster and conflicts.<sup>1</sup> The issue of conflict has marked people's movement who are forced to leave their countries out of fear for their lives, safety, and the safety of their families and loved ones.<sup>2</sup> Since the olden days, war has fundamentally contributed to the movement of people who seek refuge in other territories.<sup>3</sup>

Both World War I (WW I) and World War II (WW II) exposed the problem of the movement of people in particular refugees from the combatant states. The refugees' problem which surfaced after WW I was dealt with according to the norms of the League of Nations (LN) which was required to solve the "successive waves of refugees."<sup>4</sup> The LN was succeeded by the United Nations.<sup>5</sup> The preamble of the United Nations (UN)<sup>6</sup> Charter provides amongst various other things the promotion of "fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women" including refugees from "nations large and small."<sup>7</sup>

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<sup>1</sup> Stenberg *Non-Expulsion and Non-Refoulement* (1989) 19.

<sup>2</sup> See, the introduction and background of the *Zimbabwe Exile Forum and Others v Minister of Home Affairs and Others* [2011] ZAGPPHC 29 [1] 1. (Hereafter "the *Zimbabwe Exile Forum case*").

<sup>3</sup> Zimmermann *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) 41. See also Collins *An Analysis of Voluntariness of Refugee Repatriation in Africa* (1996) 1. See also, Bakewell *Refugee Repatriation in Africa: Towards a Theoretical Framework?* (1996) 16.

<sup>4</sup> Weis P "The Refugee Convention 1951: The Travaux Préparatoires Analysed with a commentary" by Dr Paul Weis; <http://www.unhcr.org/4ca34be29.html> (accessed 15 October 2012). See also, Collins (1996) 20.

<sup>5</sup> Collins (1996) 20.

<sup>6</sup> Hereafter "the UN".

<sup>7</sup> See, the Preamble of the UN Charter. "The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on

This contributed to the creation of a legal framework which governs, protects and solves the problem of refugees.

The people, who move to other countries evading persecution, conflict, natural disasters, etc. in their countries of origin, often require crossing borders of other countries. This creates a myriad of social and legal problems including changes in the legal regime governing the affairs of these people who become refugees in the recipient countries. That is to say, the legal regime of the recipient countries becomes the applicable law on these refugees and not the legal regime of the countries of their origin.

Notwithstanding, the international nature of refugees' problems makes it mandatory to have an international approach to domestic refugee problems. This international approach has developed legal mechanisms to protect refugees and establish durable solutions which include resettlement, integration and repatriation.

Repatriation can either be voluntary or involuntary as a result of change in the circumstances which have initially caused the refugees to escape from their home countries. The United Nations High Commissioner for Refugees (UNHCR)<sup>8</sup> considers that durable solutions for refugees include resettlement; integration and voluntary repatriation. The latter remains the most durable solution.<sup>9</sup> The repatriation of refugees is therefore the most durable solution when it is executed on the voluntary basis signifying the free will of refugees.<sup>10</sup> This was also emphasised by the UNHCR when it affirmed 1992 as the "Year of Voluntary Repatriation."<sup>11</sup>

However, in many instances refugees are repatriated under conditions which are not conducive for sustained return. Consequently, refugees are repatriated without being afforded an opportunity to decide whether to return to the country of origin or not, and this contradicts the voluntary nature of repatriation.

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International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter." <http://www.un.org/en/documents/charter/intro.shtml> (accessed 26 November 2012).

<sup>8</sup> Hereafter "UNHCR".

<sup>9</sup> Harrell-Bond "Repatriation: Under What Conditions Is It The Most Desirable Solution For Refugees? An Agenda for Research." 1989 32 *African Studies Review* 41.

<sup>10</sup> Zieck *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (1997) 2.

<sup>11</sup> Zieck (1997) 2.

Prior to the constitutional dispensation following the democratic elections of 1994, South Africa was a refugee producing country with regards to its majority black population.<sup>12</sup> In the meantime, the apartheid government did not recognise refugees in the country. South Africa did not apply the internationally acceptable principles for refugee and human rights protection. In one of its effort to keep refugees outside South Africa, the apartheid government erected a high voltage fence on its borders.<sup>13</sup>

The new constitutional government that came after the 1994 democratic government brought the Interim Constitution. The Interim Constitution<sup>14</sup> of South Africa established compatible normative rules for human rights and refugee protection. The Interim Constitution also introduced the Bill of Rights. The position of South Africa towards human rights protection was tested in the *State v Makwanyane*<sup>15</sup>. This landmark constitutional case abolished the death penalty in South Africa because it is inhuman, degrading as well as a cruel punishment which is also inconsistent with the Interim Constitution.<sup>16</sup>

The relevance of the *Makwanyane* case in respect of refugees is that everyone on South African soil enjoys human rights protection irrespective of his/her nationality.<sup>17</sup> Further, the *Makwanyane* case made reference to the fact that since customary international law is law in South Africa, it is therefore imperative to consider international instruments dealing with human rights protection. Consequently, the legal framework governing refugees in South Africa can be categorised into three categories including:

1. Constitutional norms.
2. Statutory norms:
  - Refugee Act 130 of 1998.

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<sup>12</sup> Refugee Rights Project *Sustained Advocacy for Empowered Refugees: Rights Manual* (2004) 10.

<sup>13</sup> Human Rights Watch *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (1998) 29.

<sup>14</sup> Constitution of the Republic of South Africa Act 200 of 1993 (hereafter "Interim Constitution"). The Interim Constitution of 1993 was the outcome of the multiparty discussion.

<sup>15</sup> *State v Makwanyane* 1995 (6) BCLR 665 (CC) [7] at 3-4 (hereafter "the *Makwanyane* case").

<sup>16</sup> *Makwanyane* case [151] 94-95.

<sup>17</sup> *Ibid.* [8] 4.

- Immigration Act 13 of 2002.
  - South African Citizenship Amendment Act 17 of 2010.
  - Promotion of Administrative Justice Act 3 of 2000.
  - Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
3. International norms.
- The 1951 Convention and its 1967 UN Protocols
  - The Convention Governing the Specific Aspects of Refugee Problems in Africa 1969.
  - The Universal Declaration of Human Rights (UDHR) 1948.
  - The International Covenant on Civil and Political Rights (ICCPR) 1966.
  - Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT) 1984.
  - African Charter on Human and Peoples Rights 1981.
  - The European Convention on Human Rights 1950.
  - United Nations Committee on Human Rights.
  - The African Commission on Human Rights and People's Rights.

## **1.2. RESEARCH PROBLEM**

Refugees' plight is to enter into the country wherein their rights can be protected. Their protection in the country of refuge includes the right not to be returned back to the country where their lives or dignity will be endangered. When a refugee reaches his/her sanctuary, the application for asylum becomes possible. Based upon the circumstances a refugee may be recognised as a refugee and consequently granted a refugee status. However, a refugee status is not a permanent solution because it can be terminated according to certain requirements. One of these requirements is due to the changed circumstances in the situation of the country of origin.

Notwithstanding, refugees are faced with some form of involuntary repatriation in one way or another. Some of the methods which are considered involuntary repatriation include rejection at the frontier, deportation, expulsion and extradition. In spite of the commitments of South Africa to afford refugees with proper protection, it is recorded that refugees e.g. from Zimbabwe were repatriated or deported without properly

ascertaining their asylum eligibility.<sup>18</sup> Non-Governmental Organisations alleged that South Africa imposes a higher level criterion for Zimbabwean asylum seekers.<sup>19</sup>

South Africa has on several occasions sought to return refugees in contravention of the principle of non-refoulement. In the case of *Mayongo v Refugee Appeal Board*,<sup>20</sup> South Africa sought to repatriate Mr Mayongo to Angola due to the fact that the circumstances which led him to flee have come to an end. This was despite Mayongo indicating that although there is a change of circumstances in Angola, his life would still be in danger should he return to Angola.

Similar circumstances to that of Mayongo were observed in the case of *Van Garderen v Refugee Appeal Board and Others*,<sup>21</sup> where the asylum seeker was denied a refugee status due to the change of circumstances in the country of origin.<sup>22</sup>

The *Mayongo* and the *Van Garderen* cases highlight the issue of cessation of refugee status due to changed circumstances in the country of origin, and a situation where there are compelling reasons arising out of previous persecution for refugees refusal to return. The crucial question at this stage is who actually decides on repatriation. Is it the country of refuge without the consent of the refugee or is voluntariness by the refugee a requirement?

In the case of *Mohamed v The President of the Republic of South Africa*,<sup>23</sup> the South African Government extradited Mohamed to the United States of America (USA).<sup>24</sup> Mohamed was to be tried in the USA for an offence where if convicted there was a

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<sup>18</sup> Goodwin-Gill andand McAdam *The Refugee in International Law* (2007) 231.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Mayongo v Refugee Appeal Board and Others* 2007 JOL 19645 (T) (hereafter “*Mayongo case*”).

<sup>21</sup> *Van Garderen v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) (hereafter “the *Van Garderen case*”).

<sup>22</sup> The *Van Garderen case* 4-5.

<sup>23</sup> *Mohamed v The President of the Republic of South Africa* 2001 (3) SA 893 (CC). (Hereafter “the *Mohamed case*”).

<sup>24</sup> Hereafter “USA”.

possibility of the death sentence due to his alleged terrorist attack on the USA embassy.<sup>25</sup>

The tension between strengthening diplomatic ties and violating the rights of refugees or asylum seekers also came under scrutiny in the *Zimbabwe Exile Forum and Others v Minister of Home Affairs and Others*.<sup>26</sup> This involved asylum seekers from Zimbabwe who protested at the Chinese embassy in South Africa and were therefore detained at the Lindela Repatriation Facility (LRF) pending deportation.<sup>27</sup>

The cases cited above indicate that South Africa acted in contravention of the principle of non-refoulement by involuntarily repatriating or extraditing refugees or asylum seekers. It is therefore imperative to investigate whether South Africa's actions were justified either under the domestic or international law governing the protection of refugees.

Notwithstanding the principle of non-refoulement, South Africa and the UNHCR embarked on the organised voluntary repatriation processes concerning refugees from Mozambique and Angola. South Africa's first experience with the "voluntary" repatriation of refugees was when the Mozambicans were repatriated in 1994.<sup>28</sup> This repatriation was not completely successful because no proper study was conducted with regards to the refugees' willingness to return.<sup>29</sup> Dolan argues that most Mozambican refugees did not wish to repatriate and yet the tripartite agreement was entered into by South Africa, Mozambique and the UNHCR to repatriate the Mozambicans.<sup>30</sup>

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<sup>25</sup> The *Mohamed* case.

<sup>26</sup> The *Zimbabwe Exile Forum* case 4-5.

<sup>27</sup> The *Zimbabwe Exile Forum* case [5] 3.

<sup>28</sup> Polzer "Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa" (2007) 19 *Int'l J. Refugee L* 23.

<sup>29</sup> Dolan "Repatriation from South Africa to Mozambique-undermining durable solutions?" (1999) 86.

<sup>30</sup> *Ibid.* 98.

Furthermore, South Africa, Angola and the UNHCR signed a tripartite agreement on 14 September 2003 for “voluntary repatriation of Angolan” refugees.<sup>31</sup> The 1969 OAU Convention stresses the “voluntary character” of repatriation, yet, the tripartite was signed without consulting the refugees to determine their readiness to be repatriated.<sup>32</sup> In fact, the only study which was conducted showed that the majority of Angolans were not yet willing to return whilst others wished to return later when the situation in Angola is stable.<sup>33</sup> Once again, the repatriation of the Mozambicans and the Angolans seemed to lack voluntariness by refugees before it was implemented.

South Africa has a model Constitution in the world which guarantees human rights protection. South Africa is also a party to several treaties protecting vulnerable groups such as refugees. It is with great concern that besides the undertaking by South Africa to protect refugees, refugees are still refouled in contravention of international instruments which South Africa is party to.

In the *Mohamed* case the Constitutional Court emphasised South Africa’s international obligation in terms of the international instruments as well as the Constitution of the Republic of South Africa.<sup>34</sup>

South Africa is not the only country that plays a role in the refugee protection communities. Many countries including Canada and the United Kingdom (UK)<sup>35</sup> receive refugees or asylum seekers. One of Canada’s setbacks in refugee protection was in 2002 when Canada reached an agreement with the USA to forbid the people who entered the USA to enter Canada, but rather to return them to the USA.<sup>36</sup> This was not received well by the refugee lobbies and it was seen as a violation of the principle of the non-refoulement contemplated in the 1951 UN Convention.<sup>37</sup> Canada

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<sup>31</sup> Tripartite Agreement on voluntary repatriation of Angolan refugees between the UNHCR, the Government of the Republic of Angola, the Government of the Republic of South Africa <http://www.refworld.org/docid/447e99f50.html>. (accessed 5 May 2015).

<sup>32</sup> Handmaker and Ndessomin “Implementing a durable solution for Angolan refugees in South Africa” (2013) 137.

<sup>33</sup> *Ibid.* 147-8.

<sup>34</sup> The *Mohamed* case [59] 917.

<sup>35</sup> Hereafter “UK”.

<sup>36</sup> Lacroix “Canadian refugee policy and the social construction of the refugee.” (2004) vol. 17, no. 2 *Journal of Refugee Studies* 147.

<sup>37</sup> *Ibid.*

has developed a strategy to keep refugees away from its shores by requiring that nationals from refugee producing countries must obtain visas before entering Canada.<sup>38</sup> This is in stark contrast with the protection of refugees because a country which is persecuting a person cannot offer that person a visa to move out of the country.<sup>39</sup> More often than not persecution is committed by the government. This then makes it difficult for a refugee who escapes persecution to still get a visa from the persecuting regime.

Canada dealt with the issue of cessation and changed circumstances in the case of *Suleiman v Canada*.<sup>40</sup> Suleiman was a Tanzanian national whose refugee application was rejected in Canada due to the reason that there was a change of circumstances in Tanzania.<sup>41</sup> The Immigration and Refugee Board (IRB) found that although Suleiman suffered past persecution, there is a change of circumstances in Tanzania.<sup>42</sup> The *Suleiman* case is similar to the *Mayongo* case where South Africa sought to refoule Mayongo, notwithstanding the court finding that Mayongo suffered serious previous persecution.

The issue of balancing national security against the interest of that of a refugee came under the spotlight in the case of *Suresh v Canada*.<sup>43</sup> Suresh was a refugee in Canada from Sri Lanka and was declared danger to national security in Canada due to allegations that he funded terrorism movements and ought to be deported.<sup>44</sup> In the case of *Suresh* the Supreme Court of Canada held that extradition to torture without assurance that the death sentence will not be imposed violates article 3 of the CAT. Similarly to the South African case of *Mohamed*, the question is whether Canada's actions were justifiable under domestic and international law?

Other than South Africa and Canada being a party to the international and regional instruments barring refoulement, the UK has at times found itself contravening the very same conventions which the UK is party to. In 2002 the UK helped to build a fence that was to form a barrier for refugees willing to enter Britain and seek

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<sup>38</sup> Hathaway *The Rights of Refugees under International Law* (2005) 293.

<sup>39</sup> Hathaway (2005) 291-2.

<sup>40</sup> *Suleiman v Canada* 2004 FC 1125 [7] 2. (Hereafter "the *Suleiman* case").

<sup>41</sup> *Ibid.* [7] 2.

<sup>42</sup> *Ibid.* [7] 2.

<sup>43</sup> *Suresh v Canada* 2002 SCC 1 [1] 3. (Hereafter "the *Suresh* case").

<sup>44</sup> *Ibid.* [1] 3.

asylum.<sup>45</sup> The actions of the UK are similar to that of apartheid South Africa when an electrified fence was utilised to bar the Mozambican refugees from entering South Africa.

The UK has also deported Zimbabwean asylum seekers without following the due processes.<sup>46</sup> Visa requirements were also employed to bar Zimbabwean refugees into the UK. Regarding visa requirements, if a person manages to get a visa from the same country that he/she claims persecution from, it therefore puts his/her refugee claim into question.<sup>47</sup> The actions of the UK using visa requirements to bar refugees are similar to the norms applied by Canada.

The issue of cessation of refugee status was highlighted in the case of *Hoxha v Canada*.<sup>48</sup> Hoxha was tortured and shot at by the soldiers in Yugoslavia.<sup>49</sup> He then fled to the UK where he applied for asylum and his application was denied due to changed circumstances in the country of origin.<sup>50</sup>

In the case of the *European Roma Rights Center and Others v Immigration Officer and Others*,<sup>51</sup> the issue of non-refoulement was adjudicated upon. This case involved the challenge by the European Roma Rights Center of the UK practice of pre-entry clearance screening of asylum seekers from the Check Republic of Roma ethnic origin.<sup>52</sup>

The issue of national security interest in the UK came before the European Court of Human Rights (EctHR)<sup>53</sup> in the case of *Chahal v UK*.<sup>54</sup> Chahal was detained pending

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<sup>45</sup> Hathaway (2005) 282.

<sup>46</sup> *Ibid.* 87.

<sup>47</sup> See, Tony Blair, "Asylum, A Peace and Progress Briefing Paper" <http://www.peacenadprogress.org/briefings/p%26BriefingAsylum%26Immigration.pdf+Tony+Blair,+Asylum/> (accessed 24 December 2012).

<sup>48</sup> *Hoxha v Canada* [2002] EWCA Civ 1403 (Hereafter "the *Hoxha* case").

<sup>49</sup> *Ibid.* [2] 2.

<sup>50</sup> *Ibid.*

<sup>51</sup> *European Roma Rights Center and Others v Immigration Officer and Others* 2003 EWCA Civ 666 (hereafter "the *Roma Center* case").

<sup>52</sup> The *Roma Center* case [3] 2.

<sup>53</sup> Hereafter "EctHR".

<sup>54</sup> *Chahal v UK* 1997 23 EHHR 413 (hereafter "the *Chahal* case").

deportation as it was alleged that his presence in the UK was “unconducive to public good by reason of national security.”<sup>55</sup> Chahal applied for asylum because he feared persecution, should he be deported to India.<sup>56</sup>

The case of *Soering v UK*<sup>57</sup> resembles the South African *Mohamed* case because it similarly involved extradition where the death sentence on conviction could be applied. Soering was detained in the UK pending extradition to the USA while there was a risk that Soering would be subjected to the death penalty upon being extradited to the USA.<sup>58</sup> Soering made an application against his deportation. The assurance by the USA that the death sentence will not be carried out was unsatisfactory.<sup>59</sup>

Challenges experienced by refugees are usually not borne for lack of rules applicable to them. The problems that leave refugees exposed to abuse are borne out of incorrect application of such rules. The above mentioned countries, South Africa, Canada and the UK indicate that regardless of the availability of an international legal framework for refugee protection, the wrongful application of these frameworks remains a huge concern.

The UN has developed legal frameworks for the protection of refugees where the 1951 United Nations Convention Relating to the Status of Refugees,<sup>60</sup> and its 1967 Protocol are central to the normative rules protecting refugees. The United Nations General Assembly (UNGA)<sup>61</sup> Resolution 2312 (XXII) of 1967 relating to the

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<sup>55</sup> *Chahal v UK* 1997 23 EHRR 413 [25] 7.

<sup>56</sup> The *Chahal* case [26] 7.

<sup>57</sup> *Soering v. UK* 1989 11 EHRR 439 [16] 5 (hereafter “the *Soering* case”).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* [22] 7.

<sup>60</sup> The Convention was approved at a special UN Conference on 28 July 1951 and entered into force on 22 April 1954. (hereafter “the 1951 UN Convention”) <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html> (accessed 26 November 2012).

<sup>61</sup> Hereafter “UNGA”.

Declaration on Territorial Asylum also provides for rules towards the protection of refugees.<sup>62</sup>

Some of the most relevant provisions towards the protection of refugees under the 1951 UN Convention include the definition of a refugee, the principle of non-refoulement, an exception to the principle of non-refoulement, and the cessation clause.<sup>63</sup> The principle of non-refoulement is therefore the building block of the refugee protection and strengthens the principle of voluntary repatriation.<sup>64</sup>

African states have also developed legal frameworks which govern the refugee problems in Africa. The Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Organisation of African Unity of 1969,<sup>65</sup> became a central legal instrument which offers legal guidelines for the protection of refugees.<sup>66</sup> In addition to the provisions of the 1951 UN Convention, the 1969 OAU Convention provides for an expanded definition of a refugee and voluntary repatriation clause.

The 1969 OAU Convention was commended as the instrument which offers the best solution for African refugee problems.<sup>67</sup> It was furthermore commended as the first international refugee instrument to codify the principle of voluntary repatriation.<sup>68</sup> The 1969 OAU Refugee Convention, conversely, did not manage to solve all the refugee problems including voluntariness of repatriation programmes.<sup>69</sup> The example of involuntary repatriation is but one concern which frequently faces the African

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<sup>62</sup> See, the United Nations General Assembly Resolution 2312 (XXII) of 1967 relating to the Declaration on Territorial Asylum, Article 3. <http://www.umn.edu/humanrts/instree/v4dta.htm> (accessed 30 January 2013).

<sup>63</sup> See articles 1, 33.1, 33.2 and 1.C.5 and 1.C.6 of the 1951 UN Convention.

<sup>64</sup> Beyani C “The Role of Human Rights Bodies in Protecting Refugees” in Bayeski A F (ed) *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (Martinus Nijhoff Publishers Netherlands 2006) 1.

<sup>65</sup> Hereafter “the 1969 OAU Convention”.

<sup>66</sup> The 1969 OAU Convention.

<sup>67</sup> Okoth-Obbo “Thirty years on: a legal review of the 1969 OAU Refugee Convention” (2000) *Afr. Y.B. Int'l L* 2.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid* 2.

continent. It subsequently, remains one of the major challenges relating to the difficulties and complications of refugees.

The cessation clause provides for the cessation of refugee status once its requirements are met.<sup>70</sup> These requirements entitle the host country to repatriate the refugees without their consent.<sup>71</sup> In stark contrast, the UNHCR only promotes the repatriation that is “voluntary” instead of mandatory repatriation under the cessation clause.<sup>72</sup> The concern and question is, which provisions are applicable to voluntary repatriation since the 1951 UN Convention, which is the only binding international refugee instrument, does not provide for voluntary repatriation.

After the fall of the apartheid government, the South African democratic government has joined the international community efforts towards the protection of refugees. In 1996, South Africa ratified both the 1951 UN Convention and the 1969 OAU Convention.<sup>73</sup> In 1998, South Africa passed the Refugee Act 130 of 1998,<sup>74</sup> which puts international obligation into effect within the domestic sphere of South Africa.<sup>75</sup> The Refugee Act incorporated the provisions of the 1951 UN Convention and the 1969 OAU Convention within the domestic sphere.

Other relevant instruments which are applicable towards the protection of refugees accepted by South Africa include the Universal Declaration of Human Rights (UDHR),<sup>76</sup> the European Convention on Human Rights (ECHR),<sup>77</sup> the International

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<sup>70</sup> Hathaway (2005) 929.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Handmaker (2008) 143.

<sup>74</sup> Hereafter “the Refugee Act”.

<sup>75</sup> Handmaker and Ndessomin “Solução Durável? Implementing a Durable Solution for Angolan Refugees in South Africa” (2008) at 143.

<sup>76</sup> Hereafter “the UDHR”.

<sup>77</sup> Hereafter “the ECHR”.

Covenant on Civil and Political Rights (ICCPR),<sup>78</sup> as well as the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT).<sup>79</sup>

Canada has additionally made an undertaking to provide protection for refugees. This undertaking has been done by becoming a party to the 1951 UN Convention and its 1967 Protocol.<sup>80</sup> Before 1976 Canada had no refugee policy in place and its refugee determination was done on an *ad-hoc* basis.<sup>81</sup> In 1978 an Immigration Act came into being and it was not long before Canada's respectable refugee service was recognised.<sup>82</sup> Since its inception, Canada is known for its sterling work on the protection of refugees and consequently received recognition in 1986, being awarded the Nansen Medal.<sup>83</sup>

Canada then incorporated the refugee definition as provided by the 1951 UN Convention into the 1976 Immigration Act, as well as the 2001 Immigration and Refugee Protection Act (IRPA)<sup>84</sup> as amended by Protecting Canada's Immigration System Act (Bill C-31) of 2012.<sup>85</sup> Canada ratified the ICCPR in 1976 as well as the CAT in 1987.<sup>86</sup> The IRPA incorporates not only the 1951 UN Convention but its 1967 UN Protocol, the CAT as well as the ICCPR.<sup>87</sup> The incorporation of these instruments

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<sup>78</sup> Hereafter "the ICCPR".

<sup>79</sup> Odhiambo-Abuya and Nyaoro "Victims of Armed Conflict and Persecution in South Africa: Between a Rock and the Hard Place" (2009) *Hastings Int'l and Comp. L.* 24. See also, Olivier "The New Asylum Law in South Africa" (2002) *J. S. Afr* at 652-3.

<sup>80</sup> Dauvergne "International Human Rights Law in Canadian Immigration Laws -The Case of the Immigration and Refugee Board of Canada" (2012) *Ind. J. Global Legal Stud* at 305.

<sup>81</sup> Lacroix (2004) *J. Refugee Stud* 147.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Hereafter "the IRPA".

<sup>85</sup> Goodwin-Gill and McAdam (2007) 43. Macklin "A safe country to emulate? Canada and European refugee" (2013) 100, 117.

<sup>86</sup> The *Suresh* case [66] 41.

<sup>87</sup> Goodwin-Gill and McAdam (2007) at 43. Galloway "Criminality and State Protection: Structural Tension in Canadian Refugee Law" (2003) 114. See also, McAdam *Complementary Protection in International Refugee Law* (2007) 129.

into Canada's domestic legislation implies that Canada cannot refole refugees to face persecution.<sup>88</sup>

Congruently to South Africa and Canada, the United Kingdom<sup>89</sup> is one of the countries with its own fair share of refugee challenges. The ECHR and the 1951 UN Convention constitute the major legal framework for refugees in the UK because the UK is a party to both Conventions.<sup>90</sup> In order to give effect to these international and regional conventions, the UK has enacted domestic laws to give effect to both the above Conventions within the UK's domestic sphere. The ECHR was incorporated into the UK Human Rights Act 1998 which came into force in 2000.<sup>91</sup>

The UK Courts confirmed that no UK law should be enacted in order to be in violation of the 1951 UN Convention.<sup>92</sup> The British Courts and the Constitution do not provide sufficient input concerning the asylum procedures.<sup>93</sup> This provided that the current loophole is supplemented by the British being bound by the ECHR.<sup>94</sup>

### **1.2.1 SAFE RETURN**

Safety is one of the main reasons why people run away from their country to seek refuge in a foreign country. Hence, safety is still the most important factor in the determination of safe passage back to the country of origin. The most important

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<sup>88</sup> Sante "Central American Refugees: a consequence of war and social upheaval" (1989) 102.

<sup>89</sup> United Kingdom (hereafter "the UK").

<sup>90</sup> See, Tony Blair, "Asylum, A Peace and Progress Briefing Paper" (2005) 1. <http://www.peacenadprogress.org/briefings/p%26BriefingAsylum%26Immigration.pdf+Tony+Blair,+Asylum/> (accessed 24 December 2012).

<sup>91</sup> British Institute of Human Rights *Your Human Rights-A guide for Refugees and asylum seekers* (2006) 7. See also, O 'Sullivan "The Intersection between the International, the Regional and the Domestic: Seeking Asylum in the UK" (2009) 229, 240.

<sup>92</sup> Zimmermann (2011) 41.

<sup>93</sup> Cerna and Wietholtz "The case of the United Kingdom" (2011) 199.

<sup>94</sup> *Ibid.*

principle governing voluntary return is that repatriation must be carried out “in safety and with dignity.”<sup>95</sup>

Although international law does not support torture and abuse of human rights, the legal framework ensuring the safe return of refugees is insufficient.<sup>96</sup> Another “central issue” in the matter of voluntary return and a state’s mandatory return is who actually decides?<sup>97</sup> Does it mean that once the return can be carried out in safety and dignity, then the refugee does not have a choice except to return to the country of origin?

Although the protection of refugees is of paramount importance, the application of repatriation rules seems to indicate that repatriation takes preference over protection.<sup>98</sup>

### **1.2.2 VOLUNTARINESS**

Voluntariness touches at the core of the legal aspect for voluntary repatriation of refugees. The concept of voluntariness of repatriation is not provided by the 1951 UN Convention, it is therefore only provided by the UNHCR Statute.<sup>99</sup> The 1951 UN Convention simply provides for “safe return”.<sup>100</sup> The 1951 UN Convention therefore encourages host countries to implement the cessation clause objectively without considering the subjective concerns of refugees.<sup>101</sup>

The conflict between voluntary repatriation and safe return has been argued by B.S. Chimni as follows:

“It is my view that to replace the principle of voluntary repatriation by safe return, and to substitute the judgment of States and institutions for

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<sup>95</sup> Cwik “Forced to Flee and to Repatriate? How the Cessation Clause of Article 1C (5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice” (2011) *Vand. J. Transnat’l Law* 711.

<sup>96</sup> Goodwin-Gill and McAdam (2007) 497.

<sup>97</sup> *Ibid.*

<sup>98</sup> Takahashi “The UNHCR Handbook on voluntary repatriation: the emphasis of return over protection” (1997) *Int’l J. Refugee L* 593.

<sup>99</sup> Chimni *From resettlement to involuntary repatriation: Towards a critical history of durable solution to refugee problem* (1999) 1.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

that of the refugees, is to create space for repatriation under duress, and may be tantamount to violating the principle of non-refoulement.”<sup>102</sup>

Hathaway argues that although the UNHCR Statute provides for voluntariness of repatriation, this provision does not do away with the powers conferred upon states under the cessation clause in terms of the 1951 UN Convention.<sup>103</sup>

### **1.3 RESEARCH QUESTIONS**

The purpose of this study was to investigate the following aspects concerning refugee protection in South Africa:

- What does the South African Legal Framework governing the protection of refugees and the influence of the international refugee and human rights law entail?
- The South African Legal Framework with specific reference to voluntary repatriation and its application in refugee protection poses another question; the notion of safe return versus voluntary repatriation. Which framework is applicable?
- The research also investigates whether the application of the cessation clause by South Africa is in contravention of the principle of non-refoulement; the cornerstone for refugee protection.
- What is the effect of extradition, expulsion and deportation on the principle of non-refoulement.
- Do the refugee and human rights legislations apply concurrently to offer adequate refugee protection?

### **1.4 SCOPE OF THE RESEARCH**

This research will be based on organised voluntary repatriation which takes place with the involvement of the government concerned as well as the UNHCR, and not referring to the spontaneous refugees where refugees return without the direct involvement of the governments and the UNHCR concerned. The focus will be on the

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<sup>102</sup> Chimni “The Meaning of Words and the Role of UNHCR in Voluntary Repatriation” (1993) *Int’l J. Refugee L* 454.

<sup>103</sup> Hathaway “The Meaning of Repatriation” (1997) 9 *Int’l J. Refugee* 553.

refugee repatriation after the new constitutional dispensation in South Africa. The study will exclusively focus on voluntary repatriation and not on resettlement and integration. The study will furthermore analyse voluntary repatriation simultaneously with the principle of non-refoulement. The principle of non-refoulement will encompass actions such as rejection at the frontier, expulsion, deportation and extradition.

## **1.5 SIGNIFICANCE**

Firstly, this signifies to the understanding of the South African legal aspects for voluntary repatriation of refugees. Secondly, this is to endeavor to emphasise the point of interest for further research on specifically, areas of inadequate refugee protection.

## **1.6 LITERATURE REVIEW**

The South African legal framework governing the protection of refugees rests on the international refugee laws, regional refugee laws, as well as human rights laws. The 1951 UN Convention and its 1967 UN Protocol are the primary sources of the international refugee protection regime.

Other than international conventions governing refugee protection, regional instruments moreover contributed to the development of refugee law in South Africa. Regional instruments which are part and parcel of South Africa's refugee regime include the 1969 OAU Convention and the ECHR.

The South African legal framework for the protection of refugees is also intertwined with the human rights law which includes among other things the UDHR, ICCPR, CAT, and ACPHR.

The analysis of South African case law on refugees suggests that state practice is often not compliant with the international refugee protection instruments. This was evident in the *Mohamed* case, the *Mayongo* case, and the *Van Garderen* case. Case law on refugees in other countries such as Canada and the UK also suggests the contravention of international instruments which protects refugees. Case law indicates that violation of refugees' rights occurs irrespective of the international instruments barring violation of refugees' rights.

There are more studies completed by different scholars internationally regarding the principle of voluntary repatriation which is also relevant to South Africa. Goodwin-Gill is one of the leading international scholars who wrote extensively on the issue of voluntary repatriation. Goodman-Gill and McAdam argue that the core element of voluntary return is voluntary choice by the refugee.<sup>104</sup> The same argument is advanced by writers such as Chimni,<sup>105</sup> Morjoleine Zieck,<sup>106</sup> and Cwik<sup>107</sup>.

Hathaway<sup>108</sup> cautions however, that the reference to voluntariness of repatriation by the UNHCR does not get rid of powers conferred upon the state to return refugees without their consent, with the implication that safeguards their protection. Hathaway argues that repatriation in terms of the 1951 UN Convention does not require voluntariness by the refugee, and once its requirements are met, the refugee should repatriate.

Handmaker and Dosso Ndessamin<sup>109</sup> argue that the Angolan repatriation from South Africa was not voluntary as refugees were not yet ready to return to Angola. Nonetheless, the tripartite agreement to repatriate was entered into by South Africa, Angola, and the UNHCR. The argument is furthered that the Angolans were not given alternatives or choices in the repatriation matter.<sup>110</sup>

Similar sentiments were argued by Dolan in that the Mozambican refugees did not wish to repatriate and yet the tripartite agreements were entered into by the governments concerned, and the UNHCR.<sup>111</sup> The UNHCR also terminated the provision of food parcels to Mozambican refugees in South Africa, in so doing

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<sup>104</sup> Goodman Gill and McAdam (2007) 494.

<sup>105</sup> Refer to Chimni (1999).

<sup>106</sup> Zieck (1997) 2.

<sup>107</sup> Cwik (2011) 711.

<sup>108</sup> Hathaway (1997) 9 *Int'l J. Refugee* 553.

<sup>109</sup> Handmaker and Dosso Ndessamin (2013) 147-8.

<sup>110</sup> *Ibid.* 144.

<sup>111</sup> Dolan (1999) 98.

inducing refugees to return.<sup>112</sup> South Africa deported about 310 000 Mozambican refugees in 1993-1996.<sup>113</sup>

The ECtHR and the HRC adjudicate on cases of human rights violation. This implicates that the human rights law can operate alongside refugee law to offer comprehensive refugee protection. The South African case of *Makwanyane* also emphasised that everyone including refugees enjoys human rights protection in South Africa.<sup>114</sup>

This research is aimed at supplementing the existing scholars' arguments and to establish why the state practices suggest the infringement of the principle of voluntariness of repatriation, regardless of the availability of the legal framework of non-refoulement.

## **1.7 RESEARCH METHODOLOGY**

### **1.7.1 DESIGN**

This is a descriptive research whereby the South African legal framework for voluntary repatriation will be investigated. The point of departure will be to examine the international and regional legal framework for refugees and human rights protection, the legislative framework for all countries involved in this study, particularly South Africa, Canada, and the United Kingdom.

The principle of voluntary repatriation and the most relevant legislative framework will be explored and followed by the state practice with regards to the voluntary repatriation of refugees. Writings and research by experts on the inquiry will also be undertaken and their diverse views are analysed and compared.

### **1.7.2 RESEARCH METHODS**

The research will mainly be conducted through a literature review of books, journals, articles, legislations and case law. Comparative methods will be applied in this research.

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<sup>112</sup> Kent "Evaluating the Palestinians' Claimed Right to Return" (2012-2013) *U. Pa. J. Int'l L* 233.

<sup>113</sup> *Ibid.* 257.

<sup>114</sup> The *Makwanyane* [7] 3-4.

## CHAPTER 2

### THE LEGAL FRAMEWORK GOVERNING THE PROTECTION OF REFUGEES

#### 2.1 BACKGROUND

The development of refugee law regime has been influenced by earlier refugee regimes such as the international aliens law, as well as the League of Nations.<sup>115</sup> These earlier regimes have led to the proliferation of other regimes to protect refugees and human rights. International human rights law offers international human rights protection where such rights cannot be offered by the country of nationality.<sup>116</sup> In the same context international humanitarian law is relevant to refugees because it offers effective protection and humanitarian assistance to refugees.<sup>117</sup>

However, states, academics as well as institutions are still reluctant to view these branches of law as interrelated.<sup>118</sup> In 2006, the General Assembly encouraged states to offer protection which is in line with the UDHR, the ICCPR, as well as the 1949 Geneva Conventions.<sup>119</sup>

In an effort to solve the continuing challenges facing human kind, including refugees as a result of WW I and II, the United Nations Charter (UNC)<sup>120</sup> was adopted on 26 June 1945.<sup>121</sup> The UNC's approach to the protection of human rights is evident in its preamble by making reference to "we the people" and not "we the states".<sup>122</sup> The preamble of the UNC provides that:

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<sup>115</sup> Hathaway (2005) 75-83.

<sup>116</sup> *Canada v Ward* 1993 2 RCS 2 [c] 691 (hereafter "the Ward case"), *Pushpanathan v Canada* 1998 SCR 1 [56] 1022-3 (hereafter "the Pushpanathan case"). McAdam J "The Refugee Convention as A Rights Blueprint for Persons in Need of International Protection" (2008) 267.

<sup>117</sup> Hathaway (2005) 119-20.

<sup>118</sup> McAdam (2008) 264.

<sup>119</sup> Goodwin-Gill G S "Forced Migration: Refugees, The Refugee, Refugees, Rights and Security" (2008) 13.

<sup>120</sup> Hereafter "the UNC".

<sup>121</sup> Charter of the United Nations and Statute of the International Court of Justice, 1945.

<sup>122</sup> De Wet E and Vidmar J *Hierarchy in international law* (2012) 16.

“We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women ...”

The reference to “we the people” and not “we the states” was an endeavor to elevate the protection of human rights above that of the states.<sup>123</sup>

Another milestone in the development of the international refugee regime was the adoption of the UDHR.<sup>124</sup> These developments led to the UN proposing the international protection of stateless persons and refugees.<sup>125</sup> This ultimately then led to the establishment of the UNHCR and the 1951 UN Convention.<sup>126</sup> The 1951 UN Convention was later modified by the 1967 Protocol.

This chapter therefore deals with the international legal framework, that is, the international refugee law as well as international human rights law which shaped the South African constitutional and statutory norms for the protection of refugees.

Since South Africa became a democratic state, it has moved away from global isolation into the global community. The South African legal framework governing refugees has been influenced by this global community and can be categorised into three categories i.e. international norms, constitutional norms and statutory norms.

## **2.2 THE UNIVERSAL DECLARATION ON HUMAN RIGHTS**

The UDHR was adopted and proclaimed by the General Assembly Resolution 217 A (III) of 10 December 1948.<sup>127</sup> It became the first non-binding instrument to introduce the concept of the right to asylum.<sup>128</sup> In its preamble, the UDHR provides for the

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<sup>123</sup> *Ibid.*

<sup>124</sup> Zieck (1997) 23.

<sup>125</sup> Hathaway (2005) 91. See also Collins (1996) 20.

<sup>126</sup> *Ibid.*

<sup>127</sup> Goodwin-Gill “Forced Migration: Refugees, Rights and Security” (2008) 3.

<sup>128</sup> D’Orsi “The AU Convention on Refugees and the concept of asylum” (2012) 3 *Pace Int’l L. Rev* 226. Sharpe “The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions” (2012-2013) *McGill Law Journal* 103. Hathaway (2005) 119.

protection of human rights, “in the dignity and worth of the human person and in the equal rights of men and women”.<sup>129</sup> The UDHR subsists as the principal human rights protection instruments and most of its provisions have also been recognised by some as having reached the level of customary international law.<sup>130</sup>

Article 5 of the UDHR<sup>131</sup> provides that “no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” Article 14(1) of the same declaration,<sup>132</sup> tackles the right to asylum as follows: “everyone has the right to seek and to enjoy in other countries asylum from persecution.”

The right to seek and enjoy asylum as provided by the UDHR does not impose the legal obligation on states to grant asylum.<sup>133</sup> This is due to the fact that the UDHR does not have a binding effect on states parties.<sup>134</sup> The right to asylum in the UDHR reflects “more accurately the right of the state to grant asylum rather than the state’s duty to honor an individual’s request for asylum”.<sup>135</sup>

The UDHR also provides for the right to leave and return to one’s country and this right is linked to the principle of voluntary repatriation.<sup>136</sup> Article 13(2) of the UDHR provides that “everyone has the right to leave any country, including his own, and to return to his country.”

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<sup>129</sup> See, the preamble of the UDHR.

<sup>130</sup> Kidane “Managing Forced Displacement by Law in Africa: The Role of the New African Union IDP’s Convention” (2011) 44. *Vand. J. Transnat’l L* 7 fn 13. D’Orsi *Specific Characteristics and Challenges of Refugee and Asylum-Seeker Protection in Sub-Saharan Africa: Lesson Learnt in Search of a Better Future* (2013) 3.

<sup>131</sup> The UDHR.

<sup>132</sup> The UDHR. See also, Zieck (1997) 26.

<sup>133</sup> Naldi and D’Orsi “The Multi-faceted Aspects of Asylum-Law Applicable to Africa: Analysis for Reflection” (2014) 3 *Loy. L.A. Int’l and Comp. L. Rev* 122.

<sup>134</sup> *Ibid.*

<sup>135</sup> Bledsoe and Boczek *The International Law Dictionary* 89 as quoted in Naldi G J and D’Orsi (2014) 3 *Loy. L.A. Int’l and Comp. L. Rev* fn 36.

<sup>136</sup> D’Orsi (2013) 409.

## **2.3 THE ROLE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

The UNHCR is a humanitarian organisation which was established on 14 December 1950 by the UN General Assembly Resolution 428 (V) and therefore became the leading agency in providing assistance and protection to refugees.<sup>137</sup> The UNHCR has been awarded the Nobel Peace Prize on two occasions, in 1954 and in 1981, for its sterling work on refugees.<sup>138</sup>

The UNHCR replaced the International Refugee Organisation.<sup>139</sup> It became the agency which provides “international protection” and seeks “permanent solutions for the problem of refugees”.<sup>140</sup> The UNHCR Statute provides protection for refugees as provided by earlier treaties as well as those refugees as a result of “events occurring before 1 January 1951”.<sup>141</sup> The UNHCR moreover assists in the supervision and implementation of the refugee protection instruments.<sup>142</sup>

### **2.3.1 THE ROLE OF THE COMMISSIONER**

The UNHCR Statute provides for functions and responsibilities of the Commissioner as well as the definition of persons of interest to the UNHCR.<sup>143</sup> The role of the Commissioner is mainly focused on the protection of refugees by finding permanent solutions to the plight of refugees including their repatriation, integration and resettlement.<sup>144</sup> Integration of refugees can be a twofold approach, either it is locally in the country of refuge or it is in the country of origin after return.<sup>145</sup>

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<sup>137</sup> Venzke *How interpretation makes international law: on semantic change and normative twist* (2012) 87. See also, Van Selm, Kamanga, Morrison, Nadig, Špoljar-Vržina and Van Willegen *The Refugee Convention at Fifty, A view from forced migration studies* (2003) 12. UNHCR *Refugee Protection: A Guide to International Refugee law* (2001) 21.

<sup>138</sup> Venzke (2012) 88.

<sup>139</sup> Goodwin-Gill and McAdam (2007) 20.

<sup>140</sup> D’Orsi (2013) 11. See also, Goodwin-Gill and McAdam (2007) 20.

<sup>141</sup> Goodwin-Gill and McAdam (2007) 21.

<sup>142</sup> Wouters (2009) 39.

<sup>143</sup> UNHCR (2001) 22. D’Orsi (2013) 343.

<sup>144</sup> Chapter 1 (1) of the UNHCR Statute. See also, D’Orsi (2013) 343.

<sup>145</sup> D’Orsi (2013) 345.

The UNHCR Statute on voluntary repatriation provides that the High Commissioner shall provide for the protection of refugees falling under the competence of his Office by assisting governmental and private efforts to promote voluntary repatriation or the assimilation within new national communities.<sup>146</sup>

The general provisions in Chapter 1 of the UNHCR Statute also call upon states to co-operate with the UNHCR in protecting refugees and to promote voluntary repatriation.<sup>147</sup>

Refugee status is not a permanent solution. Hence, the refugee status ceases to exist under certain circumstances. This can be one of the reasons that the Statute of the UNHCR provides for the cessation of refugee status.

### **2.3.2 CESSATION OF REFUGEE STATUS**

Article 6 A (ii) (e) and (f) of the UNHCR Statute provides for the cessation of refugee status and provides that the competence of the High Commissioner shall cease to apply to any person defined in section A above if:

“(e) He can no longer, because the circumstances in connexion with which has been recognized as a refugee have ceased to exist, claim grounds other than those of personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked; or

(f) Being a person who has no nationality, he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist and he is able to return to the country of his former habitual residence, claim grounds other than those of personal convenience for continuing to refuse to return to that country.”

The Statute of the UNHCR contributed immensely to the improvement of the legal regime intended to refugee protection.<sup>148</sup> This ultimately, then also paved the way for the establishment of the 1951 UN Convention.<sup>149</sup>

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<sup>146</sup> Chapter II 6 B 8 (c) of the UNHCR Statute.

<sup>147</sup> Chapter 1 (1) of the UNHCR Statute.

<sup>148</sup> Goodwin-Gill and McAdam (2007) 19.

## 2.4 THE 1951 UNITED NATIONS CONVENTION

The 1951 UN Convention was initially suggested at the UN Conference of Plenipotentiaries which met in Geneva in 1951.<sup>150</sup> During this Conference of Plenipotentiaries it was discussed that a draft convention should be made which will consolidate all previous efforts towards the protection of refugees into one consolidated instrument for the protection of refugees.<sup>151</sup> This led to the adoption of the 1951 UN Convention on 28 July 1951.<sup>152</sup>

During the 1951 Conference of Plenipotentiaries, states emphasised that there is no right to asylum.<sup>153</sup> The Conference also did not guarantee the principle of non-refoulement.<sup>154</sup>

The 1951 UN Convention was also influenced by the 1948 UDHR.<sup>155</sup> The UDHR is the first instrument to introduce the concept of the right to seek and enjoy asylum. Notwithstanding the latter, it cannot be seen as legally binding to member states.<sup>156</sup> Although the concept of the right to and the enjoyment of asylum are not provided by the 1951 UN Convention, it has influenced principles i.e. non-refoulement found in the 1951 UN Convention. The refugee regime under the auspices of the 1951 UN Convention concentrated more on specific rights of the refugees that are not fully covered by the human rights regime.<sup>157</sup> The 1951 UN Convention is the principal international treaty which provides protection for refugees.<sup>158</sup>

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<sup>149</sup> *Ibid.*

<sup>150</sup> McAdam (2007) 29.

<sup>151</sup> See introductory note by the office of the UNHCR *Convention and Protocol Relating to the Status of Refugees* (1996).5. Stenberg (1989) 59. See also, McAdam (2007) 29.

<sup>152</sup> See introductory note by the office of the UNHCR (1996) 5. See also, Stenberg (1989) 59.

<sup>153</sup> Goodwin-Gill and McAdam (2007) 204.

<sup>154</sup> *Ibid.* See also, Stenberg (1989) 172.

<sup>155</sup> Hathaway (2005) 75. McAdam (2008) 271.

<sup>156</sup> D'Orsi (2013) 4-5.

<sup>157</sup> Hathaway (2005) 75.

<sup>158</sup> D'Orsi (2013) 17.

## 2.4 DEFINITION OF A REFUGEE

In its initial phase, the definition of a refugee in terms of the 1951 UN Convention was limited to people who became refugees “as a result of events occurring before 1 January 1951.”<sup>159</sup> This particular definition furthermore, contained a geographical limitation to “events occurring in Europe”.<sup>160</sup>

Article I of the 1951 UN Convention provides that the term “Refugee” shall apply to any person who:

“As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>161</sup>

Article I of the 1951 UN Convention extends further and provides, in an alternative way, that the reference to time frame “events occurring before 1 January 1951” shall mean, either “events occurring in Europe before 1 January 1951”; or “events occurring in Europe or elsewhere before 1 January 1951.”<sup>162</sup> The impact of such time framework and geographical limitations can be seen in the exclusion of refugees from Africa and elsewhere.<sup>163</sup>

The 1951 UN Convention emerged during the aftermath of WW II.<sup>164</sup> Consequently, the definition of the 1951 UN Convention clearly indicates that it was formulated

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<sup>159</sup> Goodwin-Gill and McAdam (2007) 36. See also, Stenberg (1989) 60.

<sup>160</sup> *Ibid.* See also Collins (1996) 20.

<sup>161</sup> 1951 UN Convention.

<sup>162</sup> *Ibid.* See also, Zieck (1997) 28.

<sup>163</sup> Stenberg (1989) 61.

<sup>164</sup> UNHCR (2001) 9. Stenberg (1989) 59, 172.

focusing mainly on European refugees.<sup>165</sup> The time frame also indicates that it was designed specifically for events occurring before 1 January 1951.<sup>166</sup>

#### **2.4.1 RIGHTS OF REFUGEES**

The 1951 UN Convention provides for specific rights for refugees which are required to be protected by the signatory country of refuge.<sup>167</sup> These rights include among other things, the right of the refugees to be treated with the same standard of treatment that other non-nationals or nationals receive from the host state,<sup>168</sup> and the right to non-refoulement.

##### **2.4.1.1 Non-Refoulement**

Significantly, this research is the right provided by the principle of non-refoulement in terms of article 33.1 of the 1951 UN Convention. This right has been said to constitute part of customary international law although other scholars hold a different view.<sup>169</sup> Article 33.1 of the 1951 UN Convention provides that:

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

Article 33.2 of the 1951 UN Convention provides for an exception to the principle of non-refoulement and states 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 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.”

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<sup>165</sup> Goodwin-Gill and McAdam (2007) 36. See also UNHCR (2001) 9.

<sup>166</sup> *Ibid.* Zieck (1997) 28.

<sup>167</sup> D’Orsi (2013) 17.

<sup>168</sup> *Ibid* 19.

<sup>169</sup> *Ibid* 20.

The protection of rights of refugees i.e. non-refoulement, will however not be realised when other important interests come into play e.g. when the refugee constitutes a threat to the host country. This is the exception to the principle of non-refoulment. A refugee has the right to enter the country and seek asylum and not be returned to the country of origin at high seas which are not provided for in the 1951 UN Convention.<sup>170</sup> Rights such as rights not to be punished for illegal entry also strengthen the principle of non-refoulement.<sup>171</sup>

#### **2.4.1.2 Cessation**

Article 1.C.5 and 6 of the 1951 UN Convention also makes provision for the cessation of refugee status in the following circumstances:

“(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee has ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee has ceased to exist, able to return to his country of habitual residence.”

The cessation of refugee status in terms of the 1951 UN Convention clearly indicates that the granting of refugee status is not a permanent solution as it has to come to an end when certain requirements are met.<sup>172</sup> This sentiment was echoed well by the first High Commissioner for Refugees, Gerrit Jan van Heuven Goedhart who stated that refugee status should “not be granted for a day longer than absolutely necessary, and should come to an end.”<sup>173</sup>

In order to protect the rights of refugees who might still be in need of protection regardless of cessation of status, article 1.C.6 of the 1951 UN Convention provides

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<sup>170</sup> D'Orsi (2013) 23-4.

<sup>171</sup> See article 31 of the 1951 UN Convention. UNHCR *The 1951 UN Convention and Relating to the Status of Refugees and its 1967 Protocol* (2011) 4.

<sup>172</sup> Johnson *Ceased Circumstances and the End of Refugee Status: The Use of Article 1C (5) in South Africa* (2012) 4.

<sup>173</sup> Johnson (2012) 4.

for an exception to cessation due to “compelling reasons arising out of previous persecution.” This implies that regardless of the cessation of status, a refugee who still needs protection will not be refouled back to a place where his/her life might be in danger.

## 2.5 THE 1967 PROTOCOL

In an effort to broaden the scope of the 1951 UN Convention, the General Assembly 2198 (XXI) adopted the 1967 Protocol after it has been approved by the Economic and Social Council Resolution 1186 (XLI) of 18 November 1966.<sup>174</sup> The 1951 UN Convention’s applicability was restricted to the time frame of “events occurring before 1 January 1951” in Europe.<sup>175</sup> The 1967 Protocol, in an effort to broaden the scope of the 1951 UN Convention, removed this time frame from the Convention.<sup>176</sup>

Although the 1967 Protocol was adopted in order to broaden the scope of the 1951 UN Convention, it remains, however, a separate instrument from the 1951 UN Convention.<sup>177</sup> The 1967 Protocol is not an amendment to the 1951 UN Convention; it is a treaty on its own.<sup>178</sup> This has the implication that a state can accede to one and not the other.<sup>179</sup> This resonates with articulation of Paul Weis who said that “with the entry into force of the Protocol there exist, in fact, two treaties dealing with the same subject matter.”<sup>180</sup>

The definition of a refugee under the 1967 Protocol above makes reference to the refugee definition in terms of 1951 UN Convention with certain exception concerning the time and place of its application. The only difference provided by the 1967 Protocol to the definition in the 1951 UN Convention is with respect to time and place. In other words, the 1967 Protocol has extended the definition of a refugee in a

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<sup>174</sup> See General Assembly Resolution 2198 (XXI) adopted on the 16<sup>th</sup> of December 1969 <http://www.un-documents.net/a21r2198.htm> (accessed 20 April 2015). See also, Goodwin-Gill and McAdam (2007) 36. See also, the UNHCR (2001) 8.

<sup>175</sup> Article I of the 1951 UN Convention.

<sup>176</sup> Goodwin-Gill and McAdam (2007) 36. See also, the UNHCR (2001) 8. See also, Stenberg (1989) 61-2. See also, Zieck (1997) 28.

<sup>177</sup> The UNHCR (2001) 10. See also, D’Orsi (2013) 26.

<sup>178</sup> Hathaway (2005) 111.

<sup>179</sup> D’Orsi (2013) 27. See also, Hathaway (2005) 111.

<sup>180</sup> Hathaway (2005) 111.

manner which applies to every refugee irrespective of time and geographical location.

## 2.6 THE 1969 OAU REFUGEE CONVENTION

The problem of refugees was not only limited to European communities, Africa also had, and still has refugee problems. The main refugee protection treaty in Africa is the 1969 OAU Convention.<sup>181</sup>

During the post-colonial era, the African states faced challenges of conflicts which eventually led to the displacement of people and the emergence of refugees.<sup>182</sup> The inefficiencies of refugee protection as provided by the 1951 UN Convention in Africa prompted the need to adopt an instrument which was intended to address the challenges facing the African refugees.<sup>183</sup> African states saw an urgent need for refugee protection and drafted and adopted the 1969 OAU Convention,<sup>184</sup> which became the only regional binding instrument, which provides for refugee protection.<sup>185</sup>

Before the drafting and adoption of the 1969 OAU Convention, a commission was set up to investigate aspects concerning the refugees in Africa.<sup>186</sup> The result of this commission, with the input of the UNHCR, was a draft Convention which was later prepared as a final draft and therefore adopted by the Assembly of Heads of States and Governments.<sup>187</sup> During the period countries which did not yet ratify the 1951 UN Convention and its 1967 Protocol were advised to do so. These instruments

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<sup>181</sup> Makhema *Social Protection for Refugees and Asylum Seekers in the Southern African Development Community* (2009) 19.

<http://www.siteresources.worldbank.org/SOCIALPROTECTION/.../SP.../0906.pdf> (accessed 27 April 2013).

<sup>182</sup> The UNHCR (2001) 13. See also, Collins (1996) 22.

<sup>183</sup> Rwelamira "Some reflection on the OAU Convention on Refugees: some pending issues" (1983) 16 *Comp. Int'l L.J. S. Afr* 155. See also Collins (1996) 22. See also, D'Orsi (2013) 57-8.

<sup>184</sup> The UNHCR (2001) 13.

<sup>185</sup> *Ibid.* 9. See also, Sharpe (2012-2013) *Mc Gill Law Journal* 98.

<sup>186</sup> Rwelamira (1983) 16 *Comp. Int'l L.J. S. Afr* 155.

<sup>187</sup> *Ibid.*

remained the main international treaties which protect refugees. Consequently, the realisation of The 1969 OAU Convention complements the latter instruments.<sup>188</sup>

The 1969 OAU Convention was concluded on 10 September 1969, during the Sixth Ordinary Session in Addis Ababa to deal with refugee matters in Africa.<sup>189</sup> The 1969 OAU Convention entrenches the principle of non-refoulement and has a binding effect on member states.<sup>190</sup>

The 1969 OAU Convention therefore entered into force on 20 June 1974.<sup>191</sup> The 1969 OAU Convention also broadens the definition of the refugee, other than the one provided by the 1951 UN Convention and the UNHCR Charter, in order to provide for the protection of refugees in the African context.<sup>192</sup>

The 1969 OAU Convention has been commended as the first refugee treaty to codify the principle of voluntary repatriation.<sup>193</sup> It has also been commended as the instrument which offers the best solution for African refugee problems.<sup>194</sup> The Resolution on Voluntary Repatriation<sup>195</sup> supplements the 1969 OAU Convention by making provisions for “legal and practical” matters which are important for repatriation but not covered in the 1969 OAU Convention.<sup>196</sup>

### **2.6.1 RESOLUTION ON VOLUNTARY REPATRIATION OF AFRICAN REFUGEES**

The Resolution on voluntary repatriation was reached in 1975 at the Twenty Fourth Ordinary Session after the progress that was made in decolonising the African States and considering the need for refugees to return and rebuild their countries of

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<sup>188</sup> *Ibid.* See also, D’Orsi (2013) 59-60. See also, the Preamble of the 1969 OAU Convention.

<sup>189</sup> Van Selm *et al* (2003) 18. See also, Collins (1996) 22. See also, Sharpe (2012-2013) *McGill Law Journal* 100.

<sup>190</sup> Van Selm *et al* (2003) 18.

<sup>191</sup> D’Orsi (2012) 3 *Pace Int’l L. Rev* 223.

<sup>192</sup> Okoth-Obbo (2000) 8 *Afri. Y.B. Int’l L.* 2. See also, Collins (1996) 23.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.* 57.

<sup>195</sup> CM/Res.399 (XXIV) Resolution on Voluntary Repatriations of African Refugees, Twenty Fourth Ordinary Session in Addis Ababa, Ethiopia, from 13 to 21 February 1975.(Hereafter Resolution on Voluntary Repatriation)

<sup>196</sup> Articles 5 and 6 of the 1951 UN Convention.

origin.<sup>197</sup> It emphasised the need for the repatriation to be voluntary. The Resolution on voluntary repatriation, therefore, appealed to Member States to:

- Respect the voluntary nature of repatriation.
- Encourage the refugees to return to the country of their origin out of their own free will.
- Encourage Member States to co-operate with the UNHCR and other voluntary agencies that assist in voluntary repatriation.
- Allow persons of mixed marriages to decide freely and voluntarily on repatriation.
- Urge the international organisation to fund the repatriation and reintegration.<sup>198</sup>

### **2.6.2 THE DEFINITION OF REFUGEE UNDER THE 1969 OAU CONVENTION**

Article 1 of the 1969 OAU Convention provides that the term “Refugee” shall mean every person who:

“1. Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

2. 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.”

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<sup>197</sup> Resolution on Voluntary Repatriations.

<sup>198</sup> Article 3. a-e of the Resolution on Voluntary Repatriations.

The first part of the definition of a “refugee” under the 1969 OAU Convention, resembles that of the 1951 UN Convention save for additional protection on the second part of the definition.<sup>199</sup>

### **2.6.3 THE RIGHTS OF REFUGEES**

The 1969 OAU Convention provides for human rights protection with specific reference to refugees as well.<sup>200</sup> The principle of non-refoulement remains by large the cornerstone of the rights of refugees.

#### **2.6.3.1 Non-Refoulement**

Article 2.3 of the 1969 OAU Convention concerns the principle of non-refoulement and provides that:

“No person shall be subject 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, paragraph 1 and 2.”

The provision on non-refoulement in terms of the 1969 OAU Convention is at most the same as that which is provided by article 3.1 of the UN Declaration on Territorial Asylum.<sup>201</sup> This has the implication that the principle of non-refoulement in terms of the 1969 OAU Convention is broader than that provided by the 1951 UN Convention.<sup>202</sup> However, the provision of non-refoulement in terms of the 1969 OAU Convention is not absolute.<sup>203</sup>

The explicit differences between the 1969 OAU Convention and the 1951 UN Convention with regards to non-refoulement is that unlike the 1951 UN Convention,

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<sup>199</sup> Sharpe (2012-2013) *McGill Law Journal* 100.

<sup>200</sup> D’Orsi (2013) 75.

<sup>201</sup> Sharpe (2012-2013) *Mc Gill Law Journal* 106. See also, D’Orsi (2013) 60.

<sup>202</sup> Sharpe (2012-2013) 100.

<sup>203</sup> *Ibid.* 106.

the 1969 OAU Convention does not provide for the exception due to national security.<sup>204</sup>

The 1969 OAU Refugee Convention, article 5.1 provides for voluntary repatriation:

“The essential voluntary character shall be respected in all cases and no refugee shall be repatriated against his will.”

The provision on voluntary repatriation effectively strengthens the principle of non-refoulement, due to its requirement on voluntariness by the refugee to return.<sup>205</sup> This is also in line with the provision of the UNHCR Statute which provides for voluntariness in repatriations.<sup>206</sup>

### **2.6.3.2 Cessation**

Article 1.4.e of the 1969 OAU Convention provides that this Convention shall cease to apply to any refugee if:

“he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality ...”

Cessation under the 1969 OAU Convention resembles that of the 1951 UN Convention except that the 1969 OAU Convention does not provide for the exception to cessation due to “compelling reasons arising out of previous persecution.”<sup>207</sup> This subsequently means that the necessity for refugee protection will no longer be upheld under protection rights once the cessation has been invoked.<sup>208</sup> This implies that the rights of refugees in terms of the principle of non-refoulement would be violated. The cessation under those circumstances will violate the rights of refugees not to be returned to a place where their lives will be in danger.

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<sup>204</sup> *Ibid.* See also, D’Orsi “Sub-Saharan Africa: is a new special regional refugee law regime emerging? (2008) 68 *ZaöRV* 1069.

<sup>205</sup> Sharpe (2012-2013) *McGill Law Journal* 109.

<sup>206</sup> *Ibid.* 110.

<sup>207</sup> *Ibid.* 100. See also, Johnson (2012) 6.

<sup>208</sup> Johnson (2012) 6.

## 2.7 International Human Rights Instruments

Human rights protection and refugee rights protection are two sides of the same coin. They are inseparable. There can never be a refugee's issue without violation of human rights. International human rights instruments have a tremendous influence on refugee protection. The UNGA monitors the human rights and refugee challenges and proposes universal protection through conventions, declarations and resolutions.

### 2.7.1 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECHR has contributed immensely towards the development of the principle of non-refoulement, despite its lack of explicit reference to it.<sup>209</sup> The ECHR was adopted in 1950 and became operational in 1953 to give effect to rights provided for within the UDHR.<sup>210</sup>

Article 3 of the ECHR provides that "no one shall be subject to torture or inhuman or degrading treatment or punishment." Despite the ECHR's lack of explicit reference to non-refoulement, any state which returns a person to a country where there are substantial grounds that such a person may be tortured or treated inhumanly, such a state will be in breach of article 3 of the ECHR.<sup>211</sup> These sentiments were also echoed in the South African Constitutional Court in the *Mohamed* case.<sup>212</sup> The decisions of the European Court on Human Rights (ECtHR) has also strengthened the principle of non-refoulement when interpreting article 3 of the ECHR, as observed in the *Soering* case, as well as the *Chahal* case.<sup>213</sup>

### 2.7.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR was adopted in 1966 and entered in force in 1976. The Covenant is an integral instrument to the human rights protection regime which is binding on states parties.<sup>214</sup> The ICCPR enhances the refugee protection in that it extends protection

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<sup>209</sup> Wouters (2009) 187.

<sup>210</sup> *Ibid.* 190.

<sup>211</sup> *Ibid.* 188.

<sup>212</sup> The *Mohamed* case [59] 917.

<sup>213</sup> Wouters (2009) 187.

<sup>214</sup> *Ibid.* 361.

not offered by the 1951 UN Convention.<sup>215</sup> The Human Rights Committee (HRC)<sup>216</sup> is the implementer and interpretative tool in cases involving the application of the ICCPR.<sup>217</sup>

The ICCPR, just like the ECHR does not explicitly provide for the principle of non-refoulement.<sup>218</sup> However, article 6, which provides for the right to life and article 7, which provides for the prohibition on torture and other cruel, inhuman or degrading treatment or punishment is of relevance to the principle of non-refoulement.<sup>219</sup> Furthermore, the Second Optional Protocol to the ICCPR which came into effect in 1991 abolishes the death penalty within states parties.<sup>220</sup> The HRC, on its 1992 General Comment, has interpreted and applied articles 6 and 7 of the ICCPR to include non-refoulement.<sup>221</sup> Article 7 of the ICCPR which is more relevant to the principle of non-refoulement provides that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

In an effort to elevate the principle of non-refoulement, in 1992, the HRC, on its General Comment no: 20 on article 7 of the ICCPR expressed its recognition of non-refoulement and stated that states should not by their action expose individuals to torture, cruel inhuman or degrading treatment.<sup>222</sup>

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<sup>215</sup> Hathaway (2005) 121.

<sup>216</sup> Hereafter “HRC”.

<sup>217</sup> Wouters (2009) 364.

<sup>218</sup> *Ibid.* 359. See also, Taylor S “Offshore barrier to asylum seeker movement: the exercise of power without responsibility?” (2008) 110.

<sup>219</sup> Wouters (2009) 359.

<sup>220</sup> *Ibid.* 379.

<sup>221</sup> The 1992 CCPR General Comment No. 20 <http://www.refworld.org/docid/453883fb0.html> (accessed 13 April 2015). D’Orsi (2013) 237. See also, Wouters (2009) 359.

<sup>222</sup> *Ibid.* See also, Wouters (2009) 360. See also, D’Orsi (2013) 237.

Furthermore, on its General Comment Number 31 of 2004 on the legal obligations, the HRC decided that states parties to the ICCPR should not return the person where he or she may be exposed to harm.”<sup>223</sup>

In order to express its concern for protection of refugees, the HRC, on its Concluding Observation on Tanzania, held that:<sup>224</sup>

“no refugee be returned to another State unless it is certain that, once there, he or she shall not be executed or subjected to torture or other form of inhuman treatment (articles 6 and 7).”

This implies that the rights in terms of articles 6 and 7 of the ICCPR are also applicable to refugees. Wouters observes that when it is discovered that a person is a refugee, measures should be taken not to refole the refugee to a country where his or her rights in terms of articles 6 and 7 of the ICCPR would be infringed.<sup>225</sup>

In order to strengthen the absolute nature of the rights under article 7 of the ICCPR, the HRC confirmed in its Concluding Observation on Canada in 1999 that:

“The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from...”<sup>226</sup>

### **2.7.3 THE 1967 UN DECLARATION ON TERRITORIAL ASYLUM**

Other than the UDHR, the UN Declaration on Territorial Asylum<sup>227</sup> also recognises the right to asylum.<sup>228</sup> The UDHR’s influence impacted upon the right to asylum

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<sup>223</sup> HRC. 2004 CCPR General Comment No. 31 [80] <http://www.refworld.org/docid/478b26ae2.html> (accessed 13 April 2015).

<sup>224</sup> Wouters (2009) 395.

<sup>225</sup> *Ibid.*

<sup>226</sup> HRC. 2006 CCPR Concluding Observation on Canada (accessed 13 April 2015).

<sup>227</sup> Declaration on Territorial Asylum, UNGA resolution 2312 (XXII) (1967). <https://www1.umn.edu/humanrts/instree/v4dta.htm> (accessed 6 May 2015).

<sup>228</sup> Sharpe (2012-2013) *Mc Gill Law Journal* 104.

which manifested/established the first international instrument to provide the right to asylum.<sup>229</sup>

Article 1.1 of the 1967 UN Declaration on Territorial Asylum provides that:

“Asylum granted by the State, in the exercise of its sovereignty, to persons entitled to article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.”

Article 1.2 provides the exception to the right to seek and enjoy asylum:

“The right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”

Article 3 of the 1967 UN Declaration on Territorial Asylum on non-refoulement provides that:

“no person referred to in article 1, paragraph 1, shall be subject 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 subject to persecution.”

#### **2.7.4 THE 1981 AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

The African Charter on Human and People's Rights (ACHPR) was adopted by the OAU in 1981 which is the principal African human rights instrument.<sup>230</sup> Article 12 of the ACHPR provides for the right to seek and enjoy asylum from persecution as well as the right to return to one's own country of origin.<sup>231</sup> The right to seek and enjoy

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<sup>229</sup> Naldi and D'Orsi (2014) 3 *Loy. L.A. Int'l and Comp. L. Rev* 123.

<sup>230</sup> Kidane (2011) 44 *Vand. J. Transnat'l L* 55, 75.

<sup>231</sup> Article 12.2 and 12.3 of the ACHPR.

asylum from persecution expanded on the 1969 OAU Convention which urged states to accommodate asylum seekers in their territories.<sup>232</sup>

The ACHPR then led to the establishment of the Human Rights Court.<sup>233</sup> The 2008 Protocol on the Statute of African Court of Justice and Human Rights, created a court system to hear human rights cases as well as other cases.<sup>234</sup>

The Human Rights Court has dealt with different cases on issues such as voluntary return, the right to asylum, implementation of the cessation clause, as well as repatriation.

### **2.7.5 THE 1984 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING PUNISHMENT**

The CAT was adopted by the General Assembly in 1984 and became operational in 1987 in order to forbid torture.<sup>235</sup>

The CAT is one of the international instruments which have contributed immensely towards the development of the principle of non-refoulement in that it absolutely bars refoulement to torture.<sup>236</sup>

Article 3.1 of the CAT provides:

“No State Party shall expel, return (“Refoule”) 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.”

The principle of non-refoulement in terms of article 3 of the CAT is influenced by article 33 of the 1951 UN Convention, and applies only to circumstances where the

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<sup>232</sup> Articles 2.1 and 2 of the 1951 OAU Convention. See also, Bekker “The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System” (2013) 13 *Afri. Hum. Rts. L. J* 7-8.

<sup>233</sup> Bekker (2013) 13 *Afri. Hum. Rts. L. J* 5 and 9. Kidane (2011) 44 *Vand. J. Transnat'l L* 75-6.

<sup>234</sup> Kidane (2011) 44 *Vand. J. Transnat'l L* 76.

<sup>235</sup> Muntingh L *Guide to UN Convention against Torture in South Africa* (2011) 9. See also, Wouters (2009) 426.

<sup>236</sup> Sharpe (2012-2013) *McGill Law Journal* 131. See also, Wouters (2009) 425.

person would face torture upon return.<sup>237</sup> Article 3 of the CAT provides protection irrespective of the person's nationality or legal status and cannot be derogated.<sup>238</sup>

Article 3 of the CAT also provides for protection against expulsion or deportation of an alien, extradition of a criminal, and all forms of involuntary removal to face torture without exception, even where a person is regarded as a threat to national security interest.<sup>239</sup> The protection under article 3 of the CAT is similar to article 7 of the ICCPR in that they absolutely bar refoulement, even where the national security interest is at stake. In order to strengthen the absolute character of article 3 of the CAT, article 2.2 of the CAT provides that:

“no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

The absolute character of article 3 of the CAT was also emphasised in the South African Constitutional Court judgment in the *Mohamed* case.<sup>240</sup>

## 2.8 SOUTH AFRICA'S REFUGEE LEGAL FRAMEWORK

Before South Africa ratified the 1969 OAU Convention and the 1951 UN Convention, the Aliens Control Act 69 of 1991 was still in place which to a larger extent was in contravention of the international obligations towards refugees.<sup>241</sup> South Africa ratified the 1969 OAU Convention on 15 December 1995, and the 1951 UN Convention and its 1967 Protocol on 12 January 1996.<sup>242</sup>

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<sup>237</sup> Wouters (2009) 425.

<sup>238</sup> *Ibid.* 434, 439. See also, Taylor (2008) 110.

<sup>239</sup> *Ibid.* 502, 505.

<sup>240</sup> The *Mohamed* case [59] 917.

<sup>241</sup> Olivier (2002) 2002 *J. S. Afr* 651. See also, Handmaker “Advocating Accountability: The (Re) forming of a Refugee Rights Discourse in South Africa” (2007) 25 *Neth. Q. Hum. Rts* 57. The Aliens Control Act was exclusionary and did not have provisions to accommodate refugees in terms of international law.

<sup>242</sup> Handmaker (2007) 25 *Neth. Q. Hum. Rts* 55 fn 3. See also, Maluwa “South Africa and the African Union” (2005) 2 *Int'l Org. L. Rev* fn.38.

On 9 July 1996, South Africa ratified and became a party to the ACHPR,<sup>243</sup> similarly to the UDHR which provides for the right to asylum.<sup>244</sup> South Africa has also ratified the ICCPR as well as the CAT in 1998.<sup>245</sup>

The ratification of international instruments by South Africa has the implication that South Africa, other than to refrain from measures which undermine the objectives of e.g. the CAT, has a positive duty under international law<sup>246</sup> to take measures which will ensure that the objectives of the CAT are not undermined.<sup>247</sup> This was evident in the *Mohamed* case when the South African Constitutional Court decided that South Africa infringed Mohamed's constitutional rights, by sending him to a state where he might be sentenced to death if found guilty.<sup>248</sup>

Although the Constitution makes provision against torture, South Africa is yet to enact domestic legislations that criminalise torture as required by the CAT.<sup>249</sup> Article 2 of the CAT stipulates:

- “1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”

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<sup>243</sup> Article 12.3 states that “every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.”

<sup>244</sup> Olivier (2002) 2002 *J. S. Afr* 653. See also, Maluwa (2005) 2 *Int'l Org. L. Rev* fn.27. Sharpe (2012-2013) *Mc Gill Law Journal* 104.

<sup>245</sup> Odhiambo-Abuya (2009) 32 *Hastings Int'l and Comp. L* 24. See also, Olivier (2002) 652-3. See also, Muntingh (2011) 37. See also, Taylor (2008) 111.

<sup>246</sup> Muntingh (2011) 10.

<sup>247</sup> *Ibid.*

<sup>248</sup> The *Mohamed* case [59] 60, 917.

<sup>249</sup> Higson-Smith, Mulder and Masitha *Human Dignity has Nationality: A Situational Analysis of the health needs of exiled torture survivors living in Johannesburg* (2006) 19.

The ratification of international instruments by South Africa paved the way to the enactment of the Refugee Act 130 of 1998 which came into force in 2000.<sup>250</sup> The Immigration Act 13 of 2002 was promulgated to bring the Aliens Control Act 96 of 1991 in line with the international accepted standards concerning immigration.<sup>251</sup> The Aliens Control Act was declared to be in conflict with the Constitution.”<sup>252</sup>

### **2.8.1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996**

The South African Constitution, more specifically, section 10 of the Bill of Rights, is highly inclusive in that it offers the protection to everyone, including asylum seekers and refugees.<sup>253</sup> Section 7 of the Bill of Rights makes provision to the effect that everyone in South Africa is entitled to human dignity, equality and freedom.<sup>254</sup>

The Constitution makes provisions for the status of international law in South Africa. Section 231(4) of the Constitution provides.<sup>255</sup>

“Any international agreement becomes law in the republic when it is enacted into law by national legislature...”

The provision of section 231 of the Constitution was also confirmed by the Constitutional Court in the *Glenister v President of the Republic of South Africa*<sup>256</sup> case, where it was held that the international agreement should be enacted into law by the national legislature.<sup>257</sup>

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<sup>250</sup> Tuepker A "On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice" (2002) 15 *J. Refugee Stud* 412.

<sup>251</sup> Lawyers for Human Rights *Monitoring Immigration Detention in South Africa* (2010) 2.

<sup>252</sup> Wa Kabwe-Segatti A "Reforming South African Immigration Policy in the post-apartheid period (1990-2006): What it means and what it takes" (2006) 69.

<sup>253</sup> Section 10 of the Constitution. See also, D'Orsi (2013) 146-7.

<sup>254</sup> Section 7 of the Constitution. See also, Chaskalson A "Dignity As A Constitutional Value: A South African Perspective" (2010-2011) 26 *Am. U Int'l .L Rev* 1380, 1394-5.

<sup>255</sup> Section 231(4) of the Constitution.

<sup>256</sup> *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC). Hereafter "the *Glenister case*".

<sup>257</sup> The *Glenister case* [43] 20-21.

Other sections of the Constitution make provisions for status of international law in South Africa. Section 233 provides that South African courts should interpret the legislations in such a way that they are in compliance with international law instead of being in conflict with international law.<sup>258</sup> Section 233 has the implication that when interpreting the Refugee Act, regard should be had to international instruments which deal with the protection of refugees.<sup>259</sup> Section 232 elevates the status of customary international law as law in South Africa, unless it is inconsistent with the Constitution or Act of Parliament.<sup>260</sup>

The relationship that exists between South African law and international law as provided by the Constitution therefore empowers the South African courts to apply international law when interpreting the Refugee Act.<sup>261</sup> Although South Africa is a party to the most relevant treaties which protect refugees, South Africa has at times refouled refugees or asylum seekers against its international obligations of non-refoulement.<sup>262</sup>

### **2.8.2 THE SOUTH AFRICAN REFUGEE ACT 130 OF 1998**

The Refugee Act 130 of 1998<sup>263</sup> provides protection of the refugees by recognising their rights within South Africa.<sup>264</sup> The Refugee Act provides among other things for the definition of a refugee, non-refoulement and the cessation of refugee status. The Refugee Act has been amended by the Refugee Amendment Act.<sup>265</sup> Both Refugee Amendment Acts however, did not amend the provisions of the definition of a refugee; the principle of non-refoulement, as well as the cessation of refugee status nor did it insert the provision on voluntary repatriation.

Section 6(1) of the Refugee Act provides that the Refugee Act should be interpreted in line with the 1951 UN Convention and the 1967 Protocol, the 1969 OAU

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<sup>258</sup> See, section 233 of the Constitution.

<sup>259</sup> Johnson (2012) 9.

<sup>260</sup> See, section 232 of the Constitution.

<sup>261</sup> Olivier (2002) 653-4.

<sup>262</sup> Taylor (2008) 120-121.

<sup>263</sup> Hereafter "the Refugee Act".

<sup>264</sup> D'Orsi (2013) 168.

<sup>265</sup> Refugee Amendment Act 33 of 2008 and subsequently Refugee Amendment Act 12 of 2011.

Convention, the 1948 UDHR, as well as other relevant conventions and agreements which South Africa is party to. This subsequently, ensures the implementation of international law in South Africa.

### **2.8.2.1 Definition of a “Refugee”**

Section 3 of the Refugee Act provides that a person qualifies for refugee status for the purpose of this Act if that person:

“(a) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it; or

(b) 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.”

The above definition of a “refugee” encompasses the definitions contemplated in both the 1951 UN Convention and the 1969 OAU Refugee Convention.<sup>266</sup>

### **2.8.2.2 Rights of “Refugee”**

#### **2.8.2.2.1 Non-Refoulement**

Section 2 of the Refugee Act deals with the principle of non-refoulement and provides that:

“notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition,

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<sup>266</sup> Olivier (2002) 655-7. See also, Tuepker (2002) 412. See also, D’Orsi (2013) 168.

return or other measure, such person is compelled to return to or remain in a country where: “(a) he or she may be subject to persecution on account of his or her race, religion, nationality, political opinion, or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.”

It seems that the principle of non-refoulement as the cornerstone of refugee protection has developed to a level where it can be regarded as customary international law.<sup>267</sup> Furthermore, the Refugee Act seems to entrench the principle of non-refoulement far beyond what international law provides.<sup>268</sup>

#### 2.8.2.2.2 Cessation

The Refugee Act also provides for the cessation of refugee status. It provides in section 5(1) (e) that:

“a person ceases to qualify for refugee status for the purpose of this Act if:

(a) he or she voluntarily avails himself or herself of the protection of the country of his or her nationality; or

(b) having lost his or her nationality, he or she by some voluntary and formal act requires it; or

(c) he or she becomes a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality; or

(d) he or she voluntarily re-establishes himself or herself in the country which he or she left; or

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<sup>267</sup> Olivier (2002) 667. Sharpe (2012-2013) *Mc Gill Law Journal* 105. Johnson (2012) 2. Wouters (2009) 1. See also, Taylor (2008) 116.

<sup>268</sup> *Ibid.* 668.

(e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.”

Section 5(2) provides that subsection (1)(e) does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.<sup>269</sup> The exception in terms of section 5(2) reflects a humanitarian approach by South Africa since it is based not on future persecution but the previous persecution which still reflects upon the refugee psychology.<sup>270</sup>

The provision on cessation as well as the exception in terms of the Refugee Act is in compliance with the 1951 UN Convention.<sup>271</sup>

#### 2.8.2.2.3. Voluntary Repatriation

Voluntary repatriation is one of the major provisions provided by the 1969 OAU Convention<sup>272</sup> as opposed to the 1951 UN Convention. Although South Africa has undertaken to enact the Refugee Act which is in compliance with both the 1969 OAU Convention and the 1951 UN Convention, the Refugee Act did not incorporate the provision of voluntary repatriation as provided by the 1969 OAU Convention.<sup>273</sup> In practical terms, South Africa has overlooked the guiding principle in article 5 of the 1969 OAU Convention which prescribes the voluntary nature of repatriation. Nevertheless, it is still a question of the direct implementation of a treaty in South Africa, until the incorporation of provisions of the international treaty into the domestic legislation to be binding within South Africa.<sup>274</sup>

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<sup>269</sup> Refugee Act.

<sup>270</sup> Johnson (2012) 10.

<sup>271</sup> Olivier (2002) 654-5. Johnson (2012) 8.

<sup>272</sup> Article 5 of the 1969 OAU Convention.

<sup>273</sup> Section 231(4) of the Constitution. See also, the *Glenister* case [90] 43.

<sup>274</sup> Odhiambo-Abuya (2009) *Hastings Int'l and Comp. L* 3. See also, Section 231(4) of the Constitution. See also The *Glenister* case [90] 43.

### **2.8.3 THE IMMIGRATION ACT 13 OF 2002**

The Immigration Act 13 of 2002<sup>275</sup> was enacted to regulate the admission of the persons to, their residence in, and departure from the Republic; and to provide for other matters connected therewith.<sup>276</sup> The Immigration Act was amended by the Immigration Amendment Act<sup>277</sup> in 2004 and the Immigration Amendment Act<sup>278</sup> in 2011. Section 23 of the Immigration Act was substituted by the Immigration Amendment Act 2004, to provide for issuing an Asylum Transit Permit at the port of entry, to enable an asylum seeker to apply for asylum in South Africa.<sup>279</sup>

### **2.8.4 PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000**

The Bill of Rights in the South African Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedural fair.<sup>280</sup> The Promotion of Administrative Justice Act<sup>281</sup> gives effect to the provision of the Bill of Rights with regards to just administrative action.<sup>282</sup> The word everyone above includes all persons in the Republic of South Africa. This would also include refugees or foreigners whether legally or illegally present in the Republic.

## **2.9 CONCLUSION**

This chapter illustrates that the human rights regime preceded the development of the refugee regime. It illustrates further how the development of the international human rights regime led to the development of the international refugee regime. This chapter also highlights the relevance of the principle of non-refoulement to the voluntary repatriation of refugees.

The UDHR is the earliest international human right instrument which led to the development of the refugee regime. Of utmost importance to refugee protection, the

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<sup>275</sup> Hereafter the Immigration Act.

<sup>276</sup> See short title of the Immigration Act.

<sup>277</sup> Immigration Amendment Act 19 of 2004.

<sup>278</sup> Immigration Amendment Act 13 of 2011.

<sup>279</sup> Immigration Amendment Act 2004.

<sup>280</sup> Section 33 of the Constitution.

<sup>281</sup> Hereafter "PAJA".

<sup>282</sup> See the short title of PAJA.

UDHR provides for a right to seek and enjoy asylum from persecution in another country although it does not create legal obligation on the states as the UDHR is however, not binding on Member States.

On the contrary, the legally binding instruments which provide for refugee protection, that is, the 1951 UN Convention and its 1967 Protocol make no mention of a right to asylum.<sup>283</sup> The 1951 UN Convention is the principal refugee protection treaty and was modified by the 1967 Protocol to make it universally applicable.

The UNHCR is the agency tasked with the protection of refugees and promotes durable solutions to the plight of refugees. Voluntary repatriation is regarded by the UNHCR as the most durable solution to the plight of refugees. Furthermore, the UNHCR is an agency responsible for supervising and implementation of refugee instruments.<sup>284</sup>

In the meantime, the human rights regime developed parallel to the refugee regime. There are several human rights treaties, including the ECHR, ICCPR, the UN Declaration on Territorial Asylum, and the CAT, that either directly or indirectly bars refoulement. Consequently, refoulement that will lead to torture, inhuman, degrading treatment of punishment is prohibited.

The decisions of the ECtHR as seen in the *Chahal* and *Soering* cases also strengthen the principle of non-refoulement. The HRC which enforces the provisions of the ICCPR also recognises the principle of non-refoulement as seen in its Conclusion Observations and General Comments.

The uniqueness of challenges facing African refugees also saw the development of the refugee protection regime on the African continent in the form of the 1969 OAU Convention, the ACHPR, as well as the Human Rights Court which adjudicate human rights abuse cases.

It is evident that the South African refugee regime is influenced by international norms, constitutional norms and statutory norms. International norms include both refugee and human rights regime. South Africa is party to the refugee treaties as well as the human rights treaties.

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<sup>283</sup> D'Orsi (2013) 259.

<sup>284</sup> *Ibid.*

The South African Constitution provides for the bill of rights, similar to one provided by the international human rights instrument(s) and empowers the legislature to enact laws that provide for international treaties as well as recognising that customary international law is law in the Republic. South African case law also highlights the application and interpretation of international law as seen in the *Mohamed* case, to mention but a few.

States and academics, however, are reluctant to view refugee regime and human rights regime as intertwined. However, the interpretation of the refugee and human rights regime by the ECtHR and the South Africa Constitutional Court suggest that these two regimes are intertwined. The conclusion that can be made is that the international refugee law and human rights law operate alongside each other and therefore provide essential interpretative tools to the principle of voluntary repatriation.

## CHAPTER 3

### LEGAL FRAMEWORK GOVERNING VOLUNTARY REPATRIATION

#### 3.1 BACKGROUND AND STATUTE

The principle of voluntary repatriation of refugees was incorporated into the UNHCR Statute which was established as a consequence to forced repatriation occurred in WW II.<sup>285</sup> Voluntary repatriation of refugees is governed directly and indirectly by different statutes within the international sphere as well as on the regional plane. Although voluntary repatriation is not directly mentioned in the 1951 UN Convention, which is the principal refugee protection treaty, the 1951 UN Convention has certain provisions which place voluntary repatriation in the context of refugee protection.<sup>286</sup>

One of the provisions of the 1951 UN Convention which places voluntary repatriation in the context of refugee protection includes the non-refoulement which is the cornerstone of refugee protection.<sup>287</sup> Many scholars on international level state that the principle of non-refoulement has attained the status of customary international law. This indicates at the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, which its applicability is embedded in customary international law.<sup>288</sup>

The UNHCR Statute provides for voluntary repatriation; however, the provisions of the UNHCR Statute do not constitute a binding treaty on states. The 1969 OAU Convention is by far the only instrument that specifically provides for the principle of voluntary repatriation and therefore creates legal obligation on member states.<sup>289</sup> Although international human rights instruments do not provide for voluntary repatriation, it has entrenched the principle of non-refoulement which

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<sup>285</sup> See, Zieck "Voluntary repatriation: paradigm, pitfalls, progress."

<sup>286</sup> Kent (2012-2013) 34 *U. Pa. J. Int'l L.* 178. See also, Bialczyk A *Voluntary Repatriation and the Case of Afghanistan: A Critical Examination* (2008) 4.

<sup>287</sup> Zieck (1997) 29. See also, article 33.1 of the 1951 UN Convention. See also article 3.1 of the CAT. See also, article 3.1 of the 1967 UN Declaration on Territorial Asylum.

<sup>288</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (2001) <http://www.unhcr.org/419c74d64.pdf> (accessed 25 April 2015).

<sup>289</sup> Article 5 the 1969 OAU Convention.

quintessentially, constitutes the foundation for voluntary repatriation.<sup>290</sup> Such instruments include article 3 of the 1984 CAT; article 7 of the 1966 ICCPR; article 12.3 of the 1981 ACHPR, as well as the ECHR.<sup>291</sup> In addition to the refugee and human rights regime, declarations and resolutions which apply in specific regions entrench the principle of non-refoulement.<sup>292</sup>

The human rights regime has contributed immensely to the development of the refugee protection regime. In other words, the refugee protection regime cannot be applied in isolation. The latter refugee protection regime approach ultimately functions in conjunction with the human rights regime. The Declaration of States Parties to the 1951 UN Convention and the 1967 Protocol reaffirmed the importance of the role that the human rights regime and the regional instruments such as the 1969 OAU Convention and the European Council Conclusions.<sup>293</sup>

The complementary nature between the refugee regime and human rights law were also echoed by the South African Constitutional Court in the *Mohamed* case where the Constitutional Court held that the recognition of human rights by the states should be visible in all state action.<sup>294</sup> Although South Africa is party to the 1969 OAU Convention which provides for voluntary repatriation of refugees, South Africa does not encompass domestic legislation which provides for voluntary repatriation of refugees.

This chapter deals with the legal framework governing refugee protection specifically, voluntary repatriation. This chapter furthermore elaborates the cessation clause and

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<sup>290</sup> Hathaway and Gammeltoft-Hansen “Non-refoulement in a world of cooperative deterrence” (2014) 106 *Law and Economics Working Papers* 2 fn 4. See also, Sharpe (2012-2013) *Mc Gill Law Journal* 105.

<sup>291</sup> Creedon “‘The Exclusion Clause’ and The Intersection of International Criminal Law and The Refugee Convention” (2015) 18 *Trinity C. L. Rev* 1. See also, Goodwill-Gill and McAdam (2007) 208-10.

<sup>292</sup> Goodwin-Gill and McAdam (2007) 211. See also, UNHCR (2011) 5.

<sup>293</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (2001) <http://www.unhcr.org/419c74d64.pdf>. (accessed 25 April 2015). Worster “The evolving definition of the refugee in contemporary international law” (2012) 30 *Berkeley J. Int’l L* 115. Worster (2012) 30 *Berkeley J. Int’l L*. 115.

<sup>294</sup> The *Mohamed* case [48] 913.

non-refoulement because these principles are core determinants of voluntariness of repatriation.

### **3.2 REPATRIATION**

Field defines repatriation as “returning refugees to their home country when it is safe, organized and facilitated by UNHCR to ensure greater security and re-integration”.<sup>295</sup> Long states: repatriation should not be just a return; it should be an integrated political process which facilitates return with the restoration of all rights of the refugee in the country of return.<sup>296</sup> Repatriation is the frequently applied solution and is regarded as the most durable solution to the plight of refugees.<sup>297</sup> The international human rights regime is also a proponent of repatriation as seen in the provision of the UDHR which provides for the right to leave and to return to one’s own country.<sup>298</sup> The right to leave and to return to one’s own country is closely related to voluntary repatriation.

#### **3.2.1 CESSATION OF REFUGEE STATUS**

Voluntary repatriation usually follows after the declaration of cessation of refugee status by the country of refuge. The cessation of refugee status is preceded by the change of circumstances in the country of origin e.g. in the case of the end of hostilities, signing of peace treaties, and recognition of human rights.

Articles 1.C.5 and 6 of the 1951 UN Convention provide for the cessation of refugee status due to changed circumstances.<sup>299</sup> Articles 1C.5 and 6 of the 1951 UN Convention make provision for the cessation of refugee status in the following circumstances:

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<sup>295</sup> For further reading refer to Field “Bridging the gap between refugee right and reality: a proposal for developing international duties in the refugee context” (2010) 22 *Int’l J. Refugee L* 555.

<sup>296</sup> Long *The Point of No Return: Refugees, Rights, and Repatriation* (2013) 175.

<sup>297</sup> Hansen, Mutabaraka and Ubricao *Repatriation, Resettlement, Integration: A Study of the Three Refugee Solutions* (2008) 17. See also, Harrell-Bond (1989) *African Studies Review* 41.

<sup>298</sup> Article 13.2 of the UDHR. Hansen *et al* (2008) 18.

<sup>299</sup> 1951 UN Convention.

“(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee has ceased to exist continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A1 (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee has ceased to exist, able to return to his country of habitual residence.”

Article 1.C of the 1951 UN Convention provides for the cessation of refugee status if the circumstances which caused the refugee to flee his or her country of nationality have come to an end.<sup>300</sup> It also provides that under such circumstances mentioned above, the refugee does not have a choice but to avail him or herself to the protection of the country of nationality.<sup>301</sup>

The cessation in terms of the 1951 UN Convention, however, is not absolute, article 1.C.5 of the 1951 UN Convention further provides exception to the cessation clause and states that refugees who can provide “compelling reasons arising out of previous persecution” will be excluded to the application of the cessation clause.<sup>302</sup>

Cessation of refugee status also includes the loss of refugee status, return to the country of origin, as well as rights attached to such a status.<sup>303</sup> It is for this reason that the cessation of refugee status should be determined on an individual refugee, and not on the generalisation since refugee status is an individual status.<sup>304</sup> The individual determination of the cessation of refugee status will also be of assistance

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<sup>300</sup> Goodwin-Gill G S and and McAdam J (2007) 139.

<sup>301</sup> *Ibid.*

<sup>302</sup> Article 1.A.1 of the 1951 UN Convention.

<sup>303</sup> Goodwin-Gill and McAdam (2007) 139.

<sup>304</sup> *Ibid.*

in deciding whether a specific refugee is to be exempted from the cessation of refugee status in terms of the cessation clause.<sup>305</sup>

Hathaway observes that the application of the cessation clause is a straightforward exercise.<sup>306</sup> He observes that once the requirements of article 1.C.5 have been complied with, the states parties are therefore entitled to repatriate all refugees who no longer need protection.<sup>307</sup> Hathaway further observes that other than the application of the cessation clause, the host country must also apply the international human rights law.<sup>308</sup> This is done, he observes:

“account must be taken of the former refugees’ right to security of person; to be free from cruel, inhuman, or degrading treatment; and not to be subjected to arbitrary or unlawful interference with his or her family life.”<sup>309</sup>

Goodwin-Gill and McAdam observe that in deciding on the applicability of the cessation of refugee status, it is of utmost importance to look at why the individual fled his or her country of origin and whether that reason has ceased to exist.<sup>310</sup> Further that it is equally important to determine whether there is actual protection for the refugee in the country of origin.<sup>311</sup> After it has been confirmed that the reason which caused the flight has ceased to exist and that there is actual protection in the country of nationality, it will be unfair for the refugee to reject protection in the country of his or her nationality.<sup>312</sup>

Chapter 2 6.A.2 of the UNHCR Statute provides for the cessation of refugee status due to changed circumstances.<sup>313</sup> The provisions of cessation in terms of the UNHCR statute are more or less the same with that of the 1951 UN Convention.

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<sup>305</sup> *Ibid.*140.

<sup>306</sup> Hathaway (2005) 929.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*

<sup>310</sup> Goodwin-Gill and McAdam (2007) 140.

<sup>311</sup> *Ibid.*.

<sup>312</sup> *Ibid.*

<sup>313</sup> Statute of the UNHCR.

When it comes to the interpretation of the exception to article 1.C. 5. of the 1951 UN Convention, the UNHCR and the UNHCR Executive Committee have positioned themselves.<sup>314</sup> The UNHCR has observed, in its 1979 Handbook, that during the drafting of the 1951 UN Refugee Convention, most refugees were statutory refugees.<sup>315</sup> Nevertheless, an exception to article 1.C. 5 of the 1951 UN Convention signifies “a more general humanitarian principle” capable to be applied to all refugees.<sup>316</sup>

The UNHCR provides in its paper on the change of circumstances that the cessation clauses were comprehensive and should be applied stringently.<sup>317</sup> It further argued that emphasis should be placed on ...

“the level of democratic development in the country, its adherence to international human rights (including refugee) instruments and access allowed for independent national or international organizations freely to verify and supervise the respect for human rights”.<sup>318</sup>

The UNHCR’s Executive Committee Conclusion No. 69 provides that the determination and application of the cessation clauses are the responsibility of the country of refuge even though the UNHCR should be involved.<sup>319</sup> The Executive Committee also provides that States can also use the declaration for the cessation of refugee status by the UNHCR as a guideline to the determination and application of the cessation clause.<sup>320</sup> The UNHCR observed that voluntary repatriation often rejects the need for the UNHCR to follow the procedural aspects for the cessation clause.<sup>321</sup>

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<sup>314</sup> Goodwin-Gill and McAdam (2007) 145.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

<sup>318</sup> Conclusion adopted by the UNHCR Executive Committee no. 69 of 1992 on The international protection of refugees <http://www.refworld.org/pdfid/4b28bf1f2.pdf>. (accessed 3 May 2015).

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.*

<sup>321</sup> Goodwin-Gill and McAdam (2007) 140.

The UNHCR is tasked with the supervisory mandate to the 1951 UN Convention.<sup>322</sup> Consequently, the establishment of the appropriateness of implementing mandatory repatriation is instructive requirements on host states.<sup>323</sup> The UNHCR's requirement is that before the host state can mandate repatriation, the host state must establish whether the change which occurred in the country of origin is substantial and long-lasting.<sup>324</sup> It also encourages the host state to wait for at least the minimum of eighteen months after a change in the country of origin to determine the durability of the change before implementing mandatory repatriation.<sup>325</sup> The UNHCR also advises that the change which was brought about violently should call for an extended time frame for implementing repatriation.<sup>326</sup>

### **3.2.2 THE CONDITIONS OF REPATRIATION**

Repatriation of refugees should be conducted by the country of refuge, the country of origin and the international refugee agencies.<sup>327</sup> It is crucial that the conditions which have caused the refugees to flee must have changed substantially in the country of origin and there should be respect for human rights and rule of law.<sup>328</sup> This is intended to prevent the backflow of refugees to the country of asylum.

The international refugee law requires that repatriation should be conducted on a voluntary basis and in the manner which takes into account the safety and dignity of the refugee.<sup>329</sup>

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<sup>322</sup> Cwik (2011) 44 *Vand. J. Transnat'l Law* 711.

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> Naldi and D'Orsi (2014) 3 *Loy. L.A. Int'l and Comp. L. Rev* 148.

<sup>328</sup> *Ibid.*

<sup>329</sup> Bradley *Refugee Repatriation: Justice, Responsibility and Redress* (2013) 16-17. Eschbach "The Refugee Convention and the Convention Against Torture: Failures of China and the United States" (2014) 13 *Wash. U. Global Stud. L. Rev* 362 fn 45. See also, Cohen and Bradley "Disasters and Displacement: Gaps in Protection" (2010) 1 *J. Int'l Human. Legal Stud* 130. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (2001) <http://www.unhcr.org/419c74d64.pdf> (accessed 25 April 2015).

### 3.2.2.1 Voluntary Repatriation

Voluntary repatriation is regarded as the most durable solution to the plight of refugees.<sup>330</sup> The UNHCR's *Refugee Protection: A Guide to International Refugee Law* defines voluntary repatriation as a "return to the country of origin based on the refugees' free and informed decision".<sup>331</sup> The *UNHCR's handbook* describes physical, legal, material, and reconciliation as the principal components of the principle of voluntary repatriation.<sup>332</sup> Voluntary repatriation as a durable solution often follows the change of circumstances in the country of origin which has caused the refugee to flee, and the signing of a peace agreement is but one of the indications of possible voluntary repatriation.<sup>333</sup>

The 1951 UN Convention does not provide for voluntary repatriation.<sup>334</sup> The 1951 UN Convention, however, provides for the principle of non-refoulement of a refugee to a place where his or her life would be in danger or persecuted.<sup>335</sup> The interplay between voluntary repatriation and the non-refoulement suggests that for voluntary repatriation to occur, subjective fears by the refugee plays a role.<sup>336</sup> This means that when the refugees have fear to return to their country of origin, return should not be promoted. However, on the contrary, states are allowed to implement the cessation of status and repatriate refugees once the requirements of the cessation clause have been met.<sup>337</sup>

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<sup>330</sup> Kidane (2011) 44 *Vand. J. Transnat'l L* 31.

<sup>331</sup> UNHCR (2001) 134.

<sup>332</sup> UNHCR *Handbook for repatriation and reintegration activities* (2004) para 1.1.

<sup>333</sup> UNHCR (2004) para 1.1. UNHCR (2004) para 3.1.

<sup>334</sup> Bouchet-Saulnier, Brav, Olivier *The practical guide to humanitarian law* (2007) 383. See also, Bialczyk (2008) 4.

See Zieck *Voluntary repatriation: paradigm, pitfalls, progress* <http://www.prsg.oxfordjournals.org/content/233333.short.pdf> (accessed 5 May 2013). See also, Hathaway (2005) 917-18. See also, Hansen *et al* (2008) 17.

<sup>335</sup> Article 33 of the 1951 UN Convention. See also, Eschbach (2014) *Wash. U. Global Stud. L. Rev* 358. See also, Hansen *et al* (2008) 18.

<sup>336</sup> Hansen *et al* (2008) 18.

<sup>337</sup> *Ibid.* 18.

The 1951 Convention permits the host states to establish an end to the status of refugees and mandate repatriation.<sup>338</sup> This is evident on the provision of articles 1C.5 and 6 of the 1951 Convention which provide for the cessation of refugee status. Hathaway observes that states parties to the 1951 UN Convention has no obligation to provide protection where the refugee's country of origin is safe for return. When the circumstances which caused the refugee to escape have "ceased" to exist as provided by the cessation clause, the refugee does not have the protection of the country of refuge anymore. The refugee can therefore be repatriated back to the country of origin and voluntariness by the refugee is not a requirement. Repatriation in this situation does not amount to refoulement as there is no risk on the refugee's life. Both the 1951 UN Convention and the UNHCR Statute require that there must be a change in the circumstances which has caused the flight before refugee protection can be withdrawn.<sup>339</sup>

It is however, not clear whether the threshold for the required change to facilitate voluntary repatriation and that required to mandate repatriation by host states is similar.<sup>340</sup>

Chapter 1.1 of the UNHCR Statute provides that the UNHCR shall co-operate with a government concerned to facilitate voluntary repatriation of refugees. It is assumed that the circumstances which caused the flight have changed and consequently, the requirements for refugee protection have ceased to exist. The UNHCR Executive Committee's sight with regards to cessation is that refugee status can only be terminated:

"(q) where a change of circumstances in a country is of such a profound and enduring nature that refugees from that country no longer require international protection, and can no longer continue to refuse to avail themselves of the protection of their country..."<sup>341</sup>

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<sup>338</sup> Cwik (2011) 44 *Vand. J. Transnat'l Law* 711.

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> Conclusion adopted by the UNHCR Executive Committee no: 69 of 1992 on International Protection of Refugees <http://www.refworld.org/pdfid/4b28bf1f2.pdf>. (accessed 03 May 2015). Hathaway (2005) 922.

The UNHCR acknowledges the cessation of refugee status due to the “fundamental change of circumstances” in terms of article 1.C.1 of the 1951 UN Convention. When the UNHCR is convinced that the changes in the country of origin are substantial, it may promote voluntary repatriation and cease its assistance programs.<sup>342</sup> However, to the contrary, the UNHCR seems reluctant to explicitly acknowledge states powers to mandatory repatriate refugees when the requirements for the cessation clause have been complied with.<sup>343</sup>

Hathaway observes that the failure to explicitly acknowledge the consequences of the cessation clause by the UNHCR is “disingenuous.”<sup>344</sup> The fact that refugee protection is a temporary measure which is dependent on the existence of the need for protection; it needs to be explicitly acknowledged by the refugee agency.<sup>345</sup> Failure to acknowledge this may at times have a negative result for the protection of refugees who might still be in need of protection, regardless of the cessation of the refugee status.<sup>346</sup>

The UNHCR also advocates that repatriation is lawful only when it is “voluntary” and can be done “in safety, and with dignity.”<sup>347</sup> This, Hathaway observes, shows the UNHCR’s failure to distinguish between repatriation in terms of the 1951 UN Convention which does not require voluntariness and the UNHCR’s institutional mandate to promote repatriations that are voluntary.<sup>348</sup>

Repatriation often takes place from one underdeveloped country, which does not on its own have the resources to repatriate, to another underdeveloped country.<sup>349</sup> These countries are therefore forced to repatriate under the terms of the UNHCR which only takes part in repatriations which are voluntary.<sup>350</sup> Repatriations are therefore done under the institutional mandate of the UNHCR and not on the terms of the 1951 UN Convention.

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<sup>342</sup> Cwik (2011) 44 *Vand. J. Transnat'l Law* 711.

<sup>343</sup> Hathaway (2005) 928.

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.* 928-9.

<sup>347</sup> *Ibid.* 929.

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.* 931.

<sup>350</sup> *Ibid.*

The application of repatriations under the institutional mandate of the UNHCR, which only promotes voluntary repatriation, rather than the 1951 UN Convention, which does not require voluntariness, has also had a negative impact on the development of repatriation under the 1951 UN Convention.<sup>351</sup> This is because the UNHCR is also involved in repatriations which do not meet the requirements of the cessation clause in terms of the 1951 UN Convention.<sup>352</sup> It is also evident in the UNHCR Executive Committee which has “instructed” the UNHCR that:

“(e)...from the outset of a refugee situation, the High Commissioner should at all times keep the possibility of voluntary repatriation for all or part of a group under active review and the High Commissioner, whenever he deems that the prevailing circumstances are appropriate, should actively pursue the promotion of this solution.”<sup>353</sup>

The UNHCR’s institutional mandate is to promote only voluntary repatriation. Although, this is contrary to the cessation clause in terms of the 1951 UN Convention, the failure to develop and acknowledge rules of mandatory repatriation in terms of the cessation clause under the 1951 UN Convention, has opened a loophole for governments which desire to avoid the requirements for the cessation clause.<sup>354</sup> On the other side, governments which intend to avoid its international obligation for refugee protection use the UNHCR’s institutional mandate to fulfill their repatriations which are not really voluntary in nature.<sup>355</sup> These governments as a result, rely on the UNHCR’s institutional framework to the detriment of the refugees.<sup>356</sup>

The lack of clarity with regards to the differences between the UNHCR’s institutional mandate for voluntary repatriation and the states’ mandated repatriation, consequently the cessation clause, has indeed caused some disarray in refugee

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<sup>351</sup> Hathaway (2005) 931.

<sup>352</sup> *Ibid.*932.

<sup>353</sup> Conclusion adopted by the UNHCR Executive Committee no. 40 of 1985 on International Protection of Refugees <http://www.refworld.org/pdfid/4b28bf1f2.pdf> (accessed 3 May 2015). Hathaway (2005) 932.

<sup>354</sup> Hathaway (2005) 935.

<sup>355</sup> *Ibid.*933.

<sup>356</sup> *Ibid.* 935.

law.<sup>357</sup> These differences, which are, voluntary repatriation in terms of the UNHCR and mandated repatriation, and the cessation clause in terms of the 1951 UN Convention should be clearly distinguished.<sup>358</sup>

The UNHCR has also encouraged governments to apply its institutional mandate for its repatriations programs.<sup>359</sup> This may also induce the governments which relied on the cessation clause to swing away from its stipulations in favour of the UNHCR's institutional mandate.<sup>360</sup> A case in point is e.g. the Zambian Government, where concern was about the Angolan refugees being exposed to mines on their return.<sup>361</sup> Zambia was not yet convinced that it was safe for the Angolan refugees to return to Angola due to the exposure to mines, yet, the UNHCR convinced Zambia that efforts would be taken to safeguard the refugees on the return to avoid mines.<sup>362</sup> This indicates how the UNHCR can influence states to make use of its institutional mandate rather than the cessation clause in terms of the 1951 UN Convention.

### **3.2.2.2 The Role of the UNHCR**

The role of the UNHCR is to provide international protection and provide permanent solutions for refugees.<sup>363</sup> The UNHCR does this by facilitating, promoting and encouraging voluntary repatriation.<sup>364</sup>

The UNHCR is moreover involved in the reintegration of refugees into their communities, rehabilitation and hence monitoring their safety after return.<sup>365</sup> The UNHCR also assists governments with the transportation of the refugee and provides grants to assist refugees who return to start their lives back home.<sup>366</sup>

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<sup>357</sup> Hathaway (2005) 938.

<sup>358</sup> *Ibid.*

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.* 938-9.

<sup>363</sup> Chapter I (1) of the UNHCR Statute.

<sup>364</sup> *Ibid.*

<sup>365</sup> Bialczyk (2008) 7. UNHCR *Protecting refugees and the role of the UNHCR* (2008) 20. See also, Aubin 'Safe Repatriation' *Protection of Unaccompanied Minors and Separated Children* (2008) 2. See also, UNHCR (2004) para 1.1.

<sup>366</sup> UNHCR *Protecting Refugees and the Role of the UNHCR* (2012) 20. Aubin (2008) 2.

### **3.2.2.3 The Contractual Nature of Repatriation**

Organised repatriation is always preceded by the tripartite commission which establishes the tripartite agreement.<sup>367</sup> The tripartite agreement therefore constitutes such “special agreements” and consists of three parties, hence the tripartite.<sup>368</sup> The tripartite agreement outlines the responsibilities of each party to the agreement and constitutes a contractual obligation between the country of origin, the country of asylum, and the UNHCR.<sup>369</sup> Furthermore, the tripartite outlines the legal and practical matters concerned with voluntary repatriation.<sup>370</sup> The tripartite agreement constitutes a legally binding contract on signatories and forms the foundation and framework for voluntary repatriation.<sup>371</sup>

The tripartite agreement outlines several steps to maintain the rights of refugees. These steps outline the responsibilities of the country of origin e.g. providing amnesty, the responsibilities of the country of asylum e.g. ensuring voluntariness of repatriation, and the mandate of the UNHCR e.g. facilitating and promoting repatriation.<sup>372</sup>

The tripartite agreement further outlines the conditions and implementation of repatriation including reintegration, rehabilitation, reconstruction and legal safety.<sup>373</sup> Chapter 2.8.b of the UNHCR provides that the High Commissioner shall provide for the protection of refugees falling under the competence of his office by:

“Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;”

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<sup>367</sup> UNHCR (2004) para 2.3, 2.4.

<sup>368</sup> D’Orsi (2013) 420.

<sup>369</sup> *Ibid.* Aubin (2008) 10. UNHCR (2004) para 4.1.

<sup>370</sup> Bialczyk (2008) 6.

<sup>371</sup> UNHCR (2004) para 4.1. Bialczyk (2008) 6.

<sup>372</sup> Aubin (2008) 10-11.

<sup>373</sup> UNHCR (2004) para 2.3.

South Africa's first tripartite agreement was in 1993 between Mozambique and the UNHCR.<sup>374</sup> The latest tripartite which South Africa signed was in 2003 between Angola and the UNHCR.<sup>375</sup>

### 3.3 THE INTEGRITY OF REPATRIATION

The *Oxford Advanced learners Dictionary* defines the term integrity as, "the quality of being honest and having strong moral principles" and, "the state of being whole and not divided"<sup>376</sup>. In the repatriation process integrity refers to both life and physical integrity.<sup>377</sup> The integrity of repatriation therefore means that refugees should not be repatriated to a place where their lives and security would be placed at risk<sup>378</sup>.

Several scholars have proposed for balancing the voluntariness, safety and protection principles as a result of the decline in ethical standards for refugee protection.<sup>379</sup> Voluntariness, safety and dignity are the core principles for ethical repatriation.<sup>380</sup>

The integrity of repatriation is sometimes clouded by circumstances which surround the repatriation. Such circumstances could e.g. be where the UNHCR is under financial strain or political pressure, resulting in the fact, that they cannot offer support to some refugees within the host countries; it might even induce the UNHCR to repatriate refugees.<sup>381</sup> A case in point is that of the Angolan repatriation which was influenced among others in order "to ease logistical pressure on both the [host] government[s] and UNHCR, which have had to look after a rapidly expanding refugee population in a time of dwindling resources."<sup>382</sup> Repatriation under these

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<sup>374</sup> De la Hunt L A "Refugee Migration to South Africa" <http://www.queensu.ca/samp/transform/Hunt.htm> (accessed 23 June 2014).

<sup>375</sup> Tripartite Agreement on voluntary repatriation of Angolan refugees between the UNHCR, the Government of the Republic of Angola, the Government of the Republic of South Africa <http://www.refworld.org/docid/447e99f50.html>. (accessed 5 May 2015).

<sup>376</sup> Hornby *Oxford Advanced Learner's Dictionary of Current English* (2005) 776.

<sup>377</sup> Bradley (2013) 52, 108.

<sup>378</sup> Mujuzi "Rights of Refugees and Internally Displaced Persons in Africa" (2012) 180.

<sup>379</sup> Long (2013) 5.

<sup>380</sup> *Ibid.* 175.

<sup>381</sup> Hathaway (2005) 937.

<sup>382</sup> *Ibid.*

circumstances does not comply with the international refugee protection regime as this compromises the mandate of the UNHCR which is to promote voluntary repatriation.

### **3.3.1 VOLUNTARINESS OF REPATRIATION**

Notwithstanding the fact that there is no specific definition on what voluntary repatriation or return means, this term generally means that refugees return to their country of origin out of their own free will.<sup>383</sup> The UNHCR's guide to international refugee law defines voluntary repatriation as the "return to the country of origin based on the refugees' free and informed decision".<sup>384</sup>

Voluntariness touches at the core of the international protection for refugees as well as the voluntary repatriation for refugees.<sup>385</sup> Voluntariness is the lack of "physical, psychological or material pressure" which influences the decision of the refugee.<sup>386</sup> Voluntariness refers to "a freely expressed wish based on full knowledge of the facts".<sup>387</sup> This moreover, entails that the refugee must know that he or she may opt not to return to the country of origin and still not lose his or her refugee status.<sup>388</sup> This however, is not supported by the 1951 UN Convention which empowers the states to mandatory repatriate refugees once it has established that there is a change of circumstances in the country of origin and that refugees no longer need international protection.

Per analogy, the extradition of Mohamed is a striking example on the violation of the requirement to protect those who may face torture or capital execution. In this context, the Constitutional Court of South Africa held that the voluntary decision by Mohamed to be extradited to the USA was not based on the full knowledge that he could refuse to be extradited to face torture in the USA.<sup>389</sup> This is therefore, a

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<sup>383</sup> Smit *The property rights of refugee and Internally displaced person: Beyond Restitution* (2012) 100.

<sup>384</sup> UNHCR (2001) 134.

<sup>385</sup> UNHCR *Voluntary Repatriation: International Protection* (1996) para 2.3.

<sup>386</sup> Cwik (2011) 44 *Vand. J. Transnat'l Law* 711.

<sup>387</sup> See, Zieck *Voluntary repatriation: paradigm, pitfalls, progress* <http://www.prsg.oxfordjournals.org/content/23333.short.pdf> (accessed 5 May 2013).

<sup>388</sup> *Ibid.*

<sup>389</sup> The *Mohamed* case [62] 919.

violation of the voluntariness principle which requires the free will based on the full knowledge of the facts.

Voluntariness of repatriation can be determined by among other things, the legal status of a refugee within the host country as a lack of legal status might indicate involuntariness of return.<sup>390</sup> The recognition of refugee status is a good indication to determine voluntariness.<sup>391</sup> Consequently, the refugees whose status is not legally recognised will be more vulnerable to abuse and will lack international protection. This may force the refugees to return to the country of origin despite the dangers they may face there.

Voluntariness should be based on the conditions in the country of origin and country of asylum which may influence the refugee's ability to make informed decisions based on his or her free will.<sup>392</sup>

Previously, voluntary repatriation was regarded as one of the solutions which were not viable to protect the plight of refugees because it was regarded impossible to achieve.<sup>393</sup> However, when the 1950 UNHCR Statute was adopted, there was a mind shift with regards to voluntary repatriation.<sup>394</sup> It was then regarded as the most viable solution to the plight of refugees especially during the 1990's.<sup>395</sup>

Conclusion No.18 of the UNHCR Statute stresses quintessentially that the intrinsic voluntary character of repatriation should always be maintained.<sup>396</sup> This is also more in line with the provision on voluntary repatriation by the 1969 OAU Convention. The right of an individual to return to the country of origin is regarded as the most

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<sup>390</sup> Cwik (2011) 44 *Vand. J. Transnat'l Law* 711.

<sup>391</sup> *Ibid.*

<sup>392</sup> Bialczyk (2008) 16.

<sup>393</sup> Smit (2012) 101.

<sup>394</sup> *Ibid.*

<sup>395</sup> *Ibid.* See also, Bakewell (1996) 5.

<sup>396</sup> Conclusion adopted by the UNHCR Executive Committee No: 18 of 1980 on International Protection of Refugees <http://www.refworld.org/pdfid/4b28bf1f2.pdf>. (accessed 3 May 2015). See also, Bakewell (1996) 11.

fundamental right if it is indeed free, voluntary and being assessed on an individual basis.<sup>397</sup>

In order to ensure the voluntariness of repatriation, the UNHCR should be allowed access to refugees and the refugees *vice versa* allowed access to the UNHCR with the view of exchanging information to enable refugees to make informed decisions about their return.<sup>398</sup>

### **3.3.1.1 Safe return**

Safe return is the return to the place of origin where there is personal safety without reprisal, legal safety, material safety and physical security.<sup>399</sup> The notion of safe return is not dependent on the voluntary decision by a refugee to return but by the conditions in the country of origin which are conducive for the return such as legal safety, material safety as well as physical safety.<sup>400</sup> This is in line with the mandatory repatriation in terms of the 1951 UN Convention which does not require a voluntary decision by the refugees.

The cessation clause in terms of article 1.C of the 1951 UN Convention only requires a safe return and no mention is made of voluntary repatriation.<sup>401</sup> Voluntariness of repatriation is only provided for in the UNHCR's Statute.<sup>402</sup> As observed, therefore, by Hathaway "it is a wishful legal thinking to suggest that a voluntariness requirement can be superimposed on the text of the Refugee Convention".<sup>403</sup>

Hathaway argues that it is the obligation of the country of refuge to satisfy itself that refugees will be protected in the country of origin, only then it can terminate refugee status.<sup>404</sup> It would then appear that the notion of safe return took a "continuum"

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<sup>397</sup> Goodwin-Gill and McAdam J (2007) 494. See also, Bakewell (1996) 5.

<sup>398</sup> UNHCR (1996) para 4.1.

<sup>399</sup> Bouchet-Saulnier *et al* (2007) 384. See also, Aubin (2008) 2. UNHCR (2004) para 1.1.

<sup>400</sup> Chimni (1999) 60, 55.

<sup>401</sup> *Ibid.*

<sup>402</sup> *Ibid.* 60.

<sup>403</sup> *Ibid.*

<sup>404</sup> *Ibid.*

between voluntary repatriation and involuntary repatriation, and therefore became the “middle ground”.<sup>405</sup>

Chimni cautions however, that the 1951 UN Convention was drafted when the international community had the perception that every refugee wishes to return home.<sup>406</sup> This is in spite of the inclusion of the cessation clause within the 1951 UN Convention.<sup>407</sup> This is the reason advanced by Chimni why voluntariness was not included in the 1951 UN Convention.<sup>408</sup>

Goodman-Gill and McAdam observe that:

“The promotion of voluntary repatriation by governments is seen as suspect, particularly when presented in the context of ‘safe return’, rather than on the basis of the voluntary choice of the individual.”<sup>409</sup>

The Statute of the UNHCR provides for the states to assist the UNHCR to promote voluntary repatriation of refugees.<sup>410</sup> This is an indication that the UNHCR expects the host states to observe the concept of voluntariness in its repatriation programs.<sup>411</sup>

Another “central issue” in the matter of voluntary return and safe return is who actually decides?<sup>412</sup> The voluntary return seems to imply that the refugee decides to return voluntarily, irrespective of the conditions at the country of origin.<sup>413</sup> The “safe return” seems to imply that when the government has decided that the situation is safe at the country of origin for safe return, the refugee does not have any choice but to return home.<sup>414</sup> Chimni states that:

“It is my view that to replace the principle of voluntary repatriation by safe return, and to substitute the judgment of States and institutions for that of the

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<sup>405</sup> *Ibid.* 55. See also, Goodwin-Gill and McAdam (2007) 496. See also, Bakewell (1996) 5.

<sup>406</sup> Chimni (1999) 60-61.

<sup>407</sup> Chimni (1999) 61-2.

<sup>408</sup> *Ibid.* 61.

<sup>409</sup> Goodwin-Gill and McAdam (2007) 494.

<sup>410</sup> *Ibid.* 61. See also, Chapter 2.8.C of the 1950 UNHCR Statute.

<sup>411</sup> *Ibid.*

<sup>412</sup> Goodwin-Gill and McAdam (2007) 497. See also, Bialczyk (2008) 24.

<sup>413</sup> Goodwin-Gill and McAdam (2007) 497.

<sup>414</sup> *Ibid.*

refugees, is to create space for repatriation under duress, and may be tantamount to refoulement.”<sup>415</sup>

Even though the protection of refugees is of paramount importance, the application of repatriation rules seems to indicate that repatriation takes preference over protection.<sup>416</sup> This appears in most cases because the country of refuge would repatriate refugees without first satisfying itself that the conditions in the country of origin are safe for return.<sup>417</sup> A case in point is that of Rwandese refugees from Tanzania where the Tanzanian Government and the UNHCR encouraged the Rwandese to repatriate while there was still abuse of human rights in Rwanda.<sup>418</sup>

### **3.3.1.2 Imposed return / Involuntary Return**

During September 1996, the UNHCR through its Director of Division International Protection, Denis McNamara, made it public that there are circumstances which can induce the UNHCR to acknowledge involuntary repatriation.<sup>419</sup> McNamara announced the doctrine of “imposed return” which implied that refugees could be sent back to the country of origin even if the conditions are not conducive for return.”<sup>420</sup> This notion has been borne in anticipation of situations which might compromise the voluntariness of repatriation.<sup>421</sup> The UNHCR also acknowledged in one of its publications that the majority of refugees who have returned to their country of origin have done so under some form of undue influence.<sup>422</sup>

Chimni observes that the main reason why third world countries repatriate refugees against their will is due to the fact that they are poor and cannot afford to care for refugees.<sup>423</sup> This situation is exacerbated by lack of burden sharing in caring for refugees.<sup>424</sup> Now, as a case in point, will be that of Tanzania when it abandoned its

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<sup>415</sup> Chimni (1993) 454.

<sup>416</sup> Takahashi (1997) 9 *Int'l J. Refugee L* 593.

<sup>417</sup> *Ibid.*

<sup>418</sup> *Ibid.*

<sup>419</sup> Chimni (1999) 55,63.

<sup>420</sup> *Ibid.* 63.

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*

<sup>423</sup> *Ibid.* 66.

<sup>424</sup> *Ibid.*

“open door policy” because of financial constraints and the lack of burden sharing by other states.<sup>425</sup> Chimni calls this “unfortunate but understandable” because it is impractical to expect a poor country to host a large number of refugees without any assistance.<sup>426</sup>

In a situation where there is lack of protection and basic necessities, refugees often choose to return home to suffer there instead of suffering in a foreign country.<sup>427</sup> Hence, it cannot be said that refugees returned to the home country voluntarily.<sup>428</sup>

Imposed/involuntary return involves two phenomena, that is, the objective approach and the subjective approach. The objective approach is based on the actual change of circumstances in the country of origin in determining the termination of refugee status. Subjective approach considers the refugee’s status of mind with regards to the willingness to return, despite the change of circumstances in the country of origin which warrants the termination of refugee status.

The supporters of safe return consider the objective change of circumstances in the country of origin, and tend to ignore the subjective state of refugees to determine the termination of status.<sup>429</sup> Hathaway is a supporter of safe return as well as the objective approach towards status determination of refugee status.<sup>430</sup> Long observes, however that safe return cannot override voluntary repatriation.<sup>431</sup> Chimni observes that objectivism which considering only the change of circumstances in the country of origin, ignores the personal circumstances and experience of the refugees when deciding whether to terminate or afford refugee protection.<sup>432</sup> Lyotard named objectivism as “an extreme form of injustice in which the injury suffered by the victim is accompanied by a deprivation of the means to prove it.”<sup>433</sup>

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<sup>425</sup> Chimni (1999) 66.

<sup>426</sup> *Ibid.* 67.

<sup>427</sup> *Ibid.*

<sup>428</sup> *Ibid.*

<sup>429</sup> *Ibid.* 61.

<sup>430</sup> *Ibid.*

<sup>431</sup> Long (2013) 136.

<sup>432</sup> Chimni (1999) 61.

<sup>433</sup> *Ibid.* 61-2.

Chimni furthermore observes, that the objective interpretation of the cessation clause in terms of the 1951 UN Convention promotes the idea that it is for the state only, to determine the change of circumstances in the country of origin,<sup>434</sup> consequently leading to an uncertain result.<sup>435</sup> To the contrary, the UNHCR interplays both the objective and subjective elements in determining the refugee status, in that it promotes voluntary decisions by the refugees to return whilst also considering the changed circumstances in the country of origin.<sup>436</sup>

Objectivism leads to the subjective elements of refugees taken into consideration when refugees decide to go home.<sup>437</sup> However, when refugees decide to stay, the subjective element is ignored.<sup>438</sup> Furthermore, when one suggests that the UNHCR should not promote voluntary repatriation without first inquiring whether the return is safe; even if refugees decide to go home on their own, one is charged with ignoring the will of refugees.<sup>439</sup> In the same vein, when refugees decide to stay in the host country their “voices” are ignored.<sup>440</sup> This, “heads I win and tails you lose” approach needs to be discarded.<sup>441</sup>

### **3.4 VOLUNTARY REPATRIATION AND THE 1969 OAU CONVENTION**

The 1969 OAU Convention is the only instrument which codifies the principle of voluntary repatriation.<sup>442</sup> Article 5 of the 1969 OAU Convention provides for the voluntary repatriation of refugees.<sup>443</sup> The 1969 OAU Convention specifically provides that, “the essentially voluntary character of repatriation shall be respected *in all cases*

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<sup>434</sup> *Ibid.* 62.

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.*

<sup>437</sup> Hansen *et al* (2008) 18. See also, Chimni (1999) 62.

<sup>438</sup> Chimni (1999) 62. See also, Goodwin-Gill and McAdam (2007) 497. Hansen *et al* (2008) 18.

<sup>439</sup> Chimni (1999) 62.

<sup>440</sup> *Ibid.*

<sup>441</sup> *Ibid.* 63

<sup>442</sup> Jonas “Reflections on the Refugee Protection Regime in Africa: Challenges and Prospects” (2012) 14 *U. Botswana L.J.* 92.

<sup>443</sup> 1969 OAU Convention. Edwards “Temporary Protection, Derogation and the 1951 Refugee Convention (2012) 13 *Melb. J. Int’l L* 610. See also Collins (1996) 23.

and *no refugee* shall be repatriated against his will...”<sup>444</sup> This is more in line with voluntary repatriation as provided by the UNHCR Statute. The African region’s refugee instrument, the 1969 OAU Convention, encourages member states to open their borders for refugees and give them protection until it is possible to voluntarily repatriate the refugees.<sup>445</sup>

Voluntary repatriation cannot be realised if the right to return as provided for by the international human rights instruments, is not recognised.<sup>446</sup> The 1969 OAU Convention does not have a provision which provides for the right to return. Nonetheless, article 12.2 of the ACHPR may supplement these legal *lacunae* as an integral human rights instrument pertaining to African people.<sup>447</sup>

### **3.4.1 CESSATION AND THE 1969 OAU CONVENTION**

As a general rule, the fulfillment of the cessation requirements entails that the refugee does not have the protection of the refuge country anymore.<sup>448</sup> This implies that the circumstances which caused the refugee to escape have “ceased” to exist and the country of origin becomes a viable and safe home. The refugee can therefore be repatriated back to the country of origin and voluntariness by the refugee, is not a requirement.<sup>449</sup> It is consequently, logical to refer to the “return” under these circumstances as “repatriation” and voluntariness by refugees is not a requirement.<sup>450</sup>

Article 1.4.e of the 1969 OAU Convention is equivalent to “the right of cessation due to a fundamental change of circumstances found in the Refugee Convention.” There is, however, uncertainty within state parties to the 1969 OAU Convention.<sup>451</sup> The uncertainty is due to the fact that the 1969 OAU Convention does not elaborate on how article 5. 1 of the 1969 OAU Convention is to be reconciled with article 1.4.e of

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<sup>444</sup> Article 5.1 of the 1969 OAU Convention.

<sup>445</sup> Hathaway (2005) 118.

<sup>446</sup> Naldi and D’Orsi (2014) 3 *Loy. L.A. Int’l and Comp. L. Rev* 149.

<sup>447</sup> *Ibid.* 122, 149.

<sup>448</sup> Hathaway (2005) 920.

<sup>449</sup> Hathaway (2005) 921.

<sup>450</sup> *Ibid.*

<sup>451</sup> *Ibid.*

the 1951 Convention.<sup>452</sup> These words “in all cases” in Article 5.1, could also be interpreted to mean, that states are not entitled to repatriate even if there is no longer the risk of persecution in the country of origin, except where the refugee voluntarily consent to.<sup>453</sup>

It is with the greatest concern that the South African refugee legislations do not provide for voluntary repatriation also. In spite of the fact that South Africa is a party to the 1969 OAU Convention which provides for voluntary repatriation, South Africa has yet to incorporate this principle within its domestic legislations.

The South African Refugee Act provides, however, for the cessation of status when there is a change of conditions in the country of origin. This will ultimately, lead to the notion of safe return which is not tantamount to voluntariness by the refugees.

### **3.5 CONCLUSION**

Repatriation refers to the return of refugees to the country of origin. Field and Long confirm, however, that repatriation is not just a mere return of refugees back home, it should be conducted in a durable manner which recognises the rights of refugees and integrates them to their former society. This highlights the principle of voluntary repatriation.

This chapter has established that there is no international legal framework binding on states which provides for voluntary repatriation of refugees with the exception of the regional 1969 OAU Convention.<sup>454</sup> The 1969 OAU Convention has not yet been accepted by the international community as a principal refugee treaty. Consequently, voluntary repatriation is not regarded by the international community as binding but rather seen as a humanitarian principle.

The 1951 UN Convention, which is the principal refugee treaty does not provide for voluntary repatriation, it instead, provides for the cessation of refugee status. Both the UNHCR and the 1951 UN Convention, acknowledge the cessation of refugee’s status due to “changed circumstances,” as well as the exception due to “compelling

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<sup>452</sup> *Ibid.* See also, D’Orsi (2008) 68 *ZaöRV* 1069.

<sup>453</sup> Hathaway (2005) 921. See also, D’Orsi (2008) 68 *ZaöRV* 1069-1070.

<sup>454</sup> D’Orsi (2013) 419. Bialczyk (2008) 7.

reasons".<sup>455</sup> Both the 1951 UN Convention and the UNHCR Statute require that there must be a change in the circumstances which has caused the flight before refugee protection can be withdrawn.<sup>456</sup>

The UNHCR only subsequently promotes voluntary repatriation as a result of the cessation of status. The 1951 UN Convention also provides for cessation due to the change of circumstances in the country of origin where refugees no longer need international protection. Under the cessation clause in terms of the 1951 UN Convention, voluntariness by a refugee is no longer relevant. Hathaway and Goodwin-Gill agree that refugees who no longer need international protection should be repatriated to the country of origin.

As rightfully observed by Hathaway, the difference between voluntary repatriation in terms of the UNHCR Statute and the states powers to mandatory repatriate refugees, is the reason why the cessation clause is unclear. The UNHCR only promotes voluntary repatriation. The question arises: what are the consequences which follow when refugees refuse to repatriate after the declaration of the cessation of refugee status?

Repatriation in terms of the 1951 UN Convention thrives on the notion of safe return. Safe return does not require voluntariness by the refugees to repatriate. Chimni, Goodwin-Gill and McAdam suggest that to disregard voluntariness by refugees and concentrate on safe return will lead to the violation of the non-refoulement principle. Hathaway is of the view that when it is safe for refugees, states must withdraw international protection. South Africa is one of the countries which follow the concept of safe return.

The South African Refugee Act does not provide for the voluntary repatriation which is more in line with the 1951 UN Convention. However, the adherence of the 1969 OAU Convention requires states parties to observe the voluntariness principle, as a guiding principle in the repatriation process, which is integral to the human rights protection afforded to refugees.

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<sup>455</sup> Article 1.C.5 of the 1951 UN Convention. Conclusion adopted by the UNHCR Executive Committee No. 69 of 1992 on International Protection of Refugees <http://www.refworld.org/pdfid/4b28bf1f2.pdf> (accessed 3 May 2015).

<sup>456</sup> Cwik (2011) 44 *Vand. J. Transnat'l Law* 711.

## CHAPTER 4

### VOLUNTARY REPATRIATION: STATES' PRACTICE

#### 4.1 BACKGROUND OF STATES' PRACTICE

Chapter two examines the legal framework dealing with refugee protection. It further explores states' practice in applying the legal framework governing refugee protection i.e. voluntary repatriation, non-refoulement, and cessation.

The previous chapters have demonstrated the different legislative frameworks which govern refugee protection as well as the voluntary repatriation at various different levels including international, regional, and domestic spheres. The actual protection of refugees or lack of protection thereof, however, can only be determined by the actual states' practice or the correct implementation of the legislative framework.

The voluntariness of repatriation is determined by analysing several states' actions which include the declaration of the cessation clause which impacts largely on refugees, deportations, extraditions, and refoulement.

The principle of non-refoulement which is essentially the axis of refugee protection, may possibly be breached by a number of actions, particularly these measures which are designed to prevent refugees from arriving at a specific country.<sup>457</sup> It can also be breached by returning the refugees after arrival as well as actions which are intended to induce the refugees to repatriate in the guise of what is called voluntary repatriation.<sup>458</sup>

The principle of non-refoulement, which prevents the return of refugees, seems to have developed considerably to the extent that it can be regarded as a customary international law.<sup>459</sup> Notwithstanding the fact, several states have indicated their intentions to protect refugees and observe the principle of non-refoulement, this undertaking nonetheless, resulted in numerous breaches.<sup>460</sup>

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<sup>457</sup> Hathaway (2005) 318.

<sup>458</sup> *Ibid.*

<sup>459</sup> D'Orsi (2013) 20. See also, Hathaway (2005) 248.

<sup>460</sup> D'Orsi (2013) 20. See also, Hathaway (2005) 229.

The UNHCR has also observed that states' failure to protect refugees is not as a result of the unavailability of the international refugee regime, but is a result of states' breaching their obligations under international refugee regime.<sup>461</sup> The refugee protection mechanisms governing voluntary repatriation, non-refoulement, and cessation have been dealt with by countries including Canada, South Africa, and the UK. These latter mentioned countries are parties to international refugee protection treaties, regional refugee protection treaties as well as human rights treaties which provide for the protection of human rights and refugees.

## **4.2 SOUTH AFRICA**

### **4.2.1 BACKGROUND AND STATUTES**

Prior to the new democratic dispensation which followed the 1994 elections, South Africa was a refugee producing country.<sup>462</sup> However, South Africa made every effort to prevent refugees from entering South Africa, especially from Mozambique. South Africa erected a 3000 volts electrified fence and razor wire fence at the border with Mozambique.<sup>463</sup> The other part of the border which was not protected by the fence, constituted a part of the Kruger National Park which also barred Mozambican refugees from entering South Africa.<sup>464</sup> This action constituted refoulement of refugees from Mozambique by South Africa.<sup>465</sup>

The constitutional dispensation has made a fundamental policy shift regarding refugees. South Africa became party to the main international refugee instruments. Consequently, refugees are protected under South African law.<sup>466</sup> Since the advent of the democratic republic, South Africa has since engaged in two voluntary

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<sup>461</sup> Hathaway (2005) 229.

<sup>462</sup> Refugee Rights Project (2004) 10. See also, Handmaker (2007) 25 *Neth. Q. Hum. Rts* 54. Sinclair *International Refugee Treaties and their Implications for the South African States* (1998) 2.

<sup>463</sup> Hathaway (2005) 282. See also, Odhiambo-Abuya and Nyaoro (2009) 32 *Hastings Int'l and Comp. L* 3. See also, Handmaker (2007) 25 *Neth. Q. Hum. Rts* 55. Human Rights Watch (1998) 29.

<sup>464</sup> Odhiambo-Abuya and Nyaoro (2009) 3. See also, Handmaker (2007) 25 *Neth. Q. Hum. Rts* 55. See also, Human Rights Watch (1998) 29

<sup>465</sup> D'Orsi (2013) 466.

<sup>466</sup> Refugee Rights Project (2004) 10. Olivier (2002) 650.

repatriations of refugees from Mozambique and Angola with the assistance of the UNHCR. South Africa, through its state practice, has demonstrated how it deals with issues concerning non-refoulement and the cessation of refugee status, which are the cornerstone of refugee protection.

#### **4.2.2 NON-REFOULEMENT AND THE EXCEPTION**

Non-refoulement, which prevents countries from returning refugees to a country where they may face persecution, remains the core refugee protection principle. Upon the establishment of its presence in South Africa in 1991, the UNHCR criticised the South African Government's violation of the principle of non-refoulement when it prevented Mozambican refugees into its territory.<sup>467</sup>

During the period of civil war in Mozambique which ultimately resulted in generating Mozambican refugees, South Africa was not party to either the 1951 UN Convention and its 1967 Protocol nor to the 1969 OAU Convention.<sup>468</sup> In 1993 the UNHCR and the South African Government signed the Basic Agreement in order to afford asylum seekers and refugees international protection in terms of refugee instruments.<sup>469</sup> In the same year, South Africa signed a tripartite agreement with the UNHCR and the Mozambican Government for the voluntary repatriation of Mozambicans.<sup>470</sup> Only a small percentage of Mozambican refugees participated in the voluntary repatriation which consequently rendered the voluntary repatriation a failure.<sup>471</sup>

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<sup>467</sup> D'Orsi (2013) 465-6. See also, Handmaker (2007) 25 *Neth. Q. Hum. Rts* 55.

<sup>468</sup> Ziek (1995) 339.

<sup>469</sup> D'Orsi (2013) 466. See also, Handmaker (2007) 25 *Neth. Q. Hum. Rts* 58 fn 15. Olivier (2002) 651. See also, *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) [61] 31. See also De la Hunt "Refugee Migration to South Africa" <http://www.queensu.ca/samp/transform/Hunt.htm> (accessed 23 June 2014). Human Rights Watch (1998) 29.

<sup>470</sup> De la Hunt L A, "Refugee Migration to South Africa". See also, Steinberg *A mixed Reception: Mozambican and Congolese Refugees in South Africa* (2005) 13.

<sup>471</sup> D'Orsi (2013) 467. See also, Fontana B *The State of Migration Research in South Africa* (1997) 18. See also, Human Rights Watch (1998) 30, See also, Handmaker (2007) 58, Steinberg *A mixed Reception: Mozambican and Congolese Refugees in South Africa* (2005) 12.

The failure of the Mozambican repatriation was due to the fact that most Mozambicans were still traumatised by the effect of a prolonged civil war in their home country and subsequently, these refugees did not wish to return home.<sup>472</sup> Furthermore, the repatriation plan of the UNHCR did not offer other options to repatriation.<sup>473</sup> Mozambican refugees were left with no option than to repatriate.<sup>474</sup> The majority of Mozambicans who did not participate in the voluntary repatriation were forcefully deported by the South African Government.<sup>475</sup>

Another setback in 2005 occurred during the repatriation of refugees from Zimbabwe. The life in Zimbabwe was inflicted by torture, intimidation, rape, killings, harassment and violent attacks at the hands of the Government which affected millions of people who then fled to South Africa.<sup>476</sup> These violations of human rights were committed during what was called “Operation Murambatsvina,” which means, “Operation Clean Filth”.<sup>477</sup>

When the Zimbabweans sought sanctuary in South Africa, South Africa returned thousands of Zimbabweans at the Musina border without giving them an opportunity to apply for asylum.<sup>478</sup> The Zimbabweans were deported back to Zimbabwe by the South African Government, despite the human rights abuses which caused the flight of refugees, in contravention of the principle of non-refoulement.<sup>479</sup>

South Africa was not convinced that the refugees’ lives would be in danger if returned to Zimbabwe, notwithstanding the human rights abuses in Zimbabwe.<sup>480</sup> The South African Government’s stance was that the situation in Zimbabwe does not warrant

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<sup>472</sup> D’Orsi (2013) 467.

<sup>473</sup> *Ibid.* 465.

<sup>474</sup> *Ibid.* 467.

<sup>475</sup> D’Orsi (2013) 468. Human Rights Watch (1998) 29.

<sup>476</sup> The Documented Experiences of Refugees, deportees and asylum Seekers in South Africa: A Zimbabwean Case Study <http://www.cormsa.org.za/wpcontent/uploads/research/sadc/report%on%20the%20treatmentof%20zimbabwean%20refugees%203.pdf>

See also, Human Rights Watch *Neighbors In Need Zimbabweans Seeking Refugee in South Africa* (2008) 62, 63.

<sup>477</sup> D’Orsi (2013) 245. Human Rights Watch (2008) 62.

<sup>478</sup> *Ibid.* Goodwin-Gill and McAdam (2007) 231. See also, Human Rights Watch (2008) 82.

<sup>479</sup> *Ibid.* 82,83.

<sup>480</sup> *Ibid.*

granting asylum.<sup>481</sup> The UNHCR also observed that the majority of the Zimbabweans are not refugees, however, the UNHCR emphasised that those Zimbabweans who are refugees should be protected against refoulement.

The situation of refugees from Zimbabwe in South Africa was not according to the required measures by the law. This is possibly due to the huge number of refugees from that country. In this regard, the Minister of Home Affairs cited that the Government is overwhelmed by the sudden flow of refugees hence, the refoulement and non-issuing of asylum seeker permits.<sup>482</sup> In the *Zimbabwe Exile Forum* case, an application was made to the High Court to prevent South Africa from arresting, detaining and deporting Zimbabweans who were protesting at the Chinese Embassy in Pretoria.<sup>483</sup>

The application was based on, that the arrested Zimbabweans be released from detention and be granted temporary asylum seeker permits.<sup>484</sup> Furthermore, that they were not issued with asylum seeker permits after applying for asylum and that they are entitled to be released from the LRF pending the appeal process.<sup>485</sup> Despite the argument of the Minister of Home Affairs, the Court held that the failure to issue asylum seeker permits after detainees applied for asylum, as well as detention pending the appeal processes, is in conflict with both the Refugee Act and the Constitution.<sup>486</sup>

The weakness in the application of refugee legislation in South Africa led to refugees being refouled which is in fact, contrary to South Africa's international obligation not to refoule refugees.<sup>487</sup> The Immigration Officers' lack of understanding refugee legislations led to the inconsistent interpretation and application of the legal framework governing refugees, which has exacerbated the situation of the refugees.<sup>488</sup>

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<sup>481</sup> *Ibid.* 8.

<sup>482</sup> The *Zimbabwe Exile Forum* case [22] 10.

<sup>483</sup> The *Zimbabwe Exile Forum* case [5] 3.

<sup>484</sup> *Ibid.*

<sup>485</sup> *Ibid.* [8] 4-5.

<sup>486</sup> *Ibid.* [52] 27-28

<sup>487</sup> Hathaway (2005) 287.

<sup>488</sup> *Ibid.* See also Human Rights Watch (2008) 83, 85.

Another weakness in the practical application of refugee legislation in South Africa is due to the fact that the protection of refugees is entrusted upon border guards or detention center officers.<sup>489</sup> Consequently, these officials are ineffective and unsuccessful in executing South Africa's international obligation towards refugee protection.<sup>490</sup>

There are a number of case law examples which indicate that South Africa refouled refugees in contravention of the international principles of non-refoulement. For example, the practice of detention at the LRF pending deportation to the country of origin is in contravention of the international refugee protection.

In the case of *Abdi v Minister of Home Affairs*,<sup>491</sup> the appellants sought an order to interdict the South African Government from deporting them to Somalia where they feared persecution.<sup>492</sup> This was subsequent to their leaving South Africa to Namibia during the xenophobic attacks.<sup>493</sup> In Namibia, they were arrested and were to be deported to Somalia via South Africa.<sup>494</sup> While at the OR Tambo International Airport, they petitioned the Court to interdict their deportation.<sup>495</sup> The first appellant was the registered asylum seeker and the second appellant a recognised refugee in South Africa.<sup>496</sup>

The South Gauteng High Court held that deportation was not done by South Africa. The deportation was done by the Namibian Government since the appellants were arrested in Namibia after they left South Africa without notifying the authorities because they feared xenophobia.<sup>497</sup>

The appellants then appealed against the decision of the South Gauteng High Court to the Supreme Court of Appeal and the appeal was upheld and the respondents were ordered to release the appellants from custody at the OR Tambo International

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<sup>489</sup> Hathaway (2005) 319.

<sup>490</sup> *Ibid.*

<sup>491</sup> *Abdi v Minister of Home Affairs* 2011 ZASC 2 (Hereafter the *Abdi* case).

<sup>492</sup> *Ibid.* 4.

<sup>493</sup> *Ibid.* [6] 5.

<sup>494</sup> *Ibid.* [7] 5.

<sup>495</sup> *Ibid.* [5] 4.

<sup>496</sup> *Ibid.* [17] 8-9.

<sup>497</sup> *Ibid.*

Airport.<sup>498</sup> The second appellant was to remain in South Africa in accordance with his status as a refugee, and the first appellant was to remain in South Africa pending the asylum application and therefore exhausting all the appeal procedures.<sup>499</sup> The Appeal Court held that passengers of international flights who land in South Africa can have recourse to South African courts.<sup>500</sup> The Court held that to hold differently would be inconsistent with South Africa's international obligation.<sup>501</sup>

In certain circumstances, such as extradition to a country where a fugitive may face the death sentence, such extradition can amount to refoulement. A case in point is that of Mohamed. In the *Mohamed* case, the Constitutional Court held that, to extradite the person under the circumstances such as where one may be sentenced to death, is inconsistent with the Constitution of the Republic of South Africa.<sup>502</sup>

Mohamed was a Tanzanian national who was arrested in South Africa in connection with the terrorist attack on the US embassy in Dar es Salaam and was extradited to the USA and stood trial in the Federal Court in New York for murder charges.<sup>503</sup>

The appellant's contentions were that his extradition to the USA was in breach of the South African Constitution in that it infringed upon his right to life, dignity and not to be subjected to inhuman, degrading and cruel punishment.<sup>504</sup> This was due to the fact that there was a possibility that if convicted, Mohamed might be sentenced to death and South Africa failed to seek assurance that death will not be imposed should Mohamed be found guilty.<sup>505</sup>

The Court held that South Africa infringed Mohamed's rights in terms of section 10, 11 and 12(1)(d) of the Constitution, that is, the right to human dignity, to life and not to be treated or punished in a cruel, inhuman or degrading way.<sup>506</sup> The Court's ruling in the *Mohamed* case is in line with the Constitutional Court's ruling in the

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<sup>498</sup> *Ibid.* [38] 20.

<sup>499</sup> *Ibid.*

<sup>500</sup> The *Abdi* case [22] 10.

<sup>501</sup> *Ibid.*

<sup>502</sup> The *Mohamed* case [47] 913. See also, Muntingh (2011) [47]. *Abdi* [27] 10.

<sup>503</sup> The *Mohamed* case [1] 6.

<sup>504</sup> *Ibid.* [3] 6.

<sup>505</sup> *Ibid.* [38] 13.

<sup>506</sup> *Ibid.* [54] 915. See also, Muntingh (2011) 47.

*Makwanyane* case where it was held that everyone has a right to human dignity, to life and not to be treated or punished in a cruel, inhuman or degrading way.<sup>507</sup> It is the commitment of South Africa under international law particularly, article 3 of the ECHR and article 3 of the CAT, not to send someone to a country where he might suffer degrading punishment.<sup>508</sup>

In support of its ruling, the Constitutional Court also made reference to the ECtHR in the *Soering* case and the *Chahal* case where the Court held that the state which knowingly extradites a person to another state where such a person may be tortured, acts in contravention of article 3.1 of the CAT, as well as article 3 of the ECHR, irrespective of the prohibited conduct of such a person.<sup>509</sup> The Court further held that the South African Government should have sought assurance from the USA Government that the death sentence would not be imposed if Mohamed was to be convicted.<sup>510</sup>

#### **4.2.3 CESSATION AND THE EXCEPTION**

The determination of cessation of refugee status in South Africa encompasses the international, regional and domestic instruments which include the 1951 UN Convention, the UNHCR Statute, the 1969 OAU Convention, and the Refugee Act of 1998.<sup>511</sup>

The Refugee Act is the principal legislation which deals with the issue of cessation in South Africa. Its provision on cessation closely resembles that of the 1951 UN Convention.<sup>512</sup> The procedural aspect of cessation is dealt with in terms of the Promotion of Administrative Justice (PAJA) Act 3 of 2000 which ensures that everyone has a right to fair, lawful and reasonable administrative action.<sup>513</sup> PAJA ensures that refugees are to be given reasons for the rejection of asylum applications and refugees' status. Furthermore, PAJA gives refugees the right to have recourse to

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<sup>507</sup> The *Makwanyane* case [26] 18.

<sup>508</sup> The *Mohamed* case [55] 16, [59] 17.

<sup>509</sup> *Ibid.* [56]-[57] 916. The *Abdi* case [26] 10.

<sup>510</sup> The *Mohamed* case [47] 913. Muntingh (2011) 47.

<sup>511</sup> Johnson (2012) 3.

<sup>512</sup> *Ibid.* 7.

<sup>513</sup> *Ibid.* 14. See also, PAJA. See also, section 33(1) of the Constitution.

the Appeal Board to challenge e.g. the decision of the Home Affairs Determination Officer.<sup>514</sup>

The South African refugee legislation framework offers the widest protection possible because it encompasses international refugee legislations as well as international human rights instruments.<sup>515</sup> It is however, the application of these protection instruments which remains a challenging aspect within South Africa's jurisdiction.<sup>516</sup>

Following the unsuccessful implementation of voluntary repatriation by South Africa and the UNHCR was the declaration of the cessation of refugee status for Mozambicans in 1996. In addition to the Mozambican repatriation experience, South Africa hosted refugees from Angola and engaged in a repatriation process of those Angolans. South Africa, Angola and the UNHCR signed a tripartite agreement on 14 September 2003, for the "voluntary repatriation of Angolan" refugees.<sup>517</sup> The tripartite agreement followed the end of hostilities caused by the civil war in Angola.<sup>518</sup>

The UNHCR announced that the Angolan refugees' status will cease from 30 June 2012 which was later extended to 31 August 2013.<sup>519</sup> Many Angolans were still reluctant to voluntarily repatriate to Angola despite the deadline for the cessation of refugee status.<sup>520</sup>

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<sup>514</sup> Amit (2010) 18.

<sup>515</sup> Johnson (2012) 18.

<sup>516</sup> *Ibid.*

<sup>517</sup> Handmaker and Ndessomin (2008) 143.

<sup>518</sup> See Redden "SA will help Angolan Refugees Return Home"<http://sanews.gov.za/south-africa/sa-will-help-angola-refugees-return-home> (accessed 23 June 2014)

<sup>519</sup> *Ibid.* See also, Siegfried "Cessation of refugees status for Angolans, Rwandans refugees in South Africa" <http://safpi.org/news/article/2013/cessation-refugee-status-angolan-rwandan-refugees-south-africa> (accessed 23 June 2014). See also, "The Angolan Cessation – Historical background and current thoughts" <http://scralabrinicentrecapetown.wordpress.com/201305/21/angola-cessation/> (accessed 23 June 2014)

<sup>520</sup> Siedfried "Loss of refugee status leaves many Angolans undocumented in South Africa" <http://reliefweb.int/report/south-africa/loss-refugee-status-leaves-many-angolan-undocumented-south-africa> (accessed 23 June 2014). See also "The Angolan Cessation – Historical background and current thoughts" <http://scralabrinicentrecapetown.wordpress.com/201305/21/angola-cessation/> (accessed 23 June 2014).

The highlight of this cessation was e.g. in the *Mayongo* case where the applicant was an Angolan national and his father was killed by the National Union for the Total Independence of Angola (UNITA) after he changed his political alliance from UNITA to the Popular Movement for the Liberation of Angola (MPLA), and Mayongo and his uncle were forced to consume the remains of his father by members of UNITA.<sup>521</sup> Mayongo was also tipped that he was going to be killed by UNITA members because he was suspected of collaborating with rebels.

The appellant argued that although the war is over in Angola, he still fears for his life as people may retaliate for the actions of his late father in Angola.<sup>522</sup> The appellant also receives medical treatment in South Africa. The medical evidence indicates that his condition would deteriorate should he be repatriated to Angola.<sup>523</sup>

The Refugee Status Determination Officer (RSDO) refused to grant the applicant a refugee status which subsequently, led to the fact that the appellant approached the Refugee Appeal Board (RAB) which correspondingly, dismissed his application, resulting in the appellant's appeal to the Transvaal Provincial Division.<sup>524</sup>

The appeal was upheld and the applicant was recognised as a refugee in terms of section 3 of the Refugee Act 130 of 1998, and was granted asylum in terms of section 24(3)(a) of the Refugee Act of 1998 because there were compelling reasons arising out of previous persecution. The Court held that the RAB emphasised on the cessation clause in terms of section 5(1)(e) of the Refugee Act, and did not consider as to whether compelling reasons arising out of previous persecution in terms of section 5(2) of the Refugee Act applies to the accused.<sup>525</sup>

The circumstances of the past persecution, supported by medical and psychological evidence, indicated that the applicant's past persecution indeed amounted to sufficient compelling reasons.<sup>526</sup> There is furthermore, no indication that the applicant

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<sup>521</sup> The *Mayongo* case [3] 2.

<sup>522</sup> *Ibid.*

<sup>523</sup> *Ibid.*

<sup>524</sup> *Ibid.* [4] 3.

<sup>525</sup> The *Mayongo* case [9] 6.

<sup>526</sup> *Ibid.*

at all would still receive a similar standard of treatment for his depression should he be returned to Angola.<sup>527</sup>

In almost comparable circumstances to that of Mayongo, in the *Van Garderen* case, the RSDO rejected the asylum seeker's application on the grounds that there is a change in the circumstances in the Democratic Republic of Congo.<sup>528</sup> Furthermore, that the war was over and that there was a transitional government and a prospect of a democratically elected government.<sup>529</sup>

The RSDO held that the fear no longer exists that the appellant's life will be in danger and rejected the claim on reasons based, not well-founded.<sup>530</sup> The appellants appealed the decision to the RAB which confirmed the decision of the RSDO.

However, on appeal to the High Court, the High Court held that the RAB has made an error in requiring high standards of proof from the applicants to prove the belief of a well-founded fear of persecution.<sup>531</sup> The High Court furthermore, held that there was existing evidence of unrest and rape of women in the DRC as a result of integration of rival forces.<sup>532</sup> The court further held that there is no evidence which confirmed that the circumstances which call for cessation has been met.<sup>533</sup>

The actions of the South African Government demonstrate that despite its undertaking to observe the principle of non-refoulement, South Africa still acts in contravention of its international obligation. The challenges of implementing the international refugee protection instruments are not only limited to South Africa. First world countries such as the UK which played a leading role in the South African legal development; it can be said that even such countries are similarly affected in its efficacy of implementing these international refugee protection instruments correctly.

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<sup>527</sup> *Ibid.*

<sup>528</sup> The *Van Garderen* case.

<sup>529</sup> *Ibid.* 4-5.

<sup>530</sup> *Ibid.* 6.

<sup>531</sup> The *Van Garderen* case 25.

<sup>532</sup> *Ibid.*

<sup>533</sup> *Ibid.*

## 4.3 UNITED KINGDOM

### 4.3.1 BACKGROUND AND STATUTES

The UK has influenced countries in the common law jurisdiction such as South Africa and Canada with regards to legal development.<sup>534</sup> The UK has, however, recently experienced tension between managing the protection of refugees simultaneously with maintaining its territorial integrity by determining whom to admit within its territory.<sup>535</sup>

The UK has ratified the 1951 UN Convention in 1954 and acceded to the 1967 Protocol in 1968.<sup>536</sup> The UK follows a dualist legal system.<sup>537</sup> This has the implication that international treaties must be incorporated within the domestic sphere to have a binding effect on the UK.<sup>538</sup> The UK has signed the ECHR in 1951 and strengthened the principle of non-refoulement beyond the one provided by article 33 of the 1951 UN Convention.<sup>539</sup> Consequently, the people who are subject to refoulement under the 1951 UN Convention, are still entitled to the protection on human rights grounds under article 3 of the ECHR.<sup>540</sup>

In order to make the provisions of the ECHR binding within the UK, the UK has incorporated the provisions of the ECHR into the HRA which became operational in 2000.<sup>541</sup> Based on the nature of human rights protection, the ECHR, HRA and the 1951 UN Convention operate alongside one another.<sup>542</sup>

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<sup>534</sup> O'Sullivan (2009) 228, 259.

<sup>535</sup> *Ibid.* 228.

<sup>536</sup> *Ibid.* 236.

<sup>537</sup> O'Sullivan (2009) 236.

<sup>538</sup> *Ibid.*

<sup>539</sup> British Institute of Human Rights (2006) 7. See also, Stevens *UK Asylum Law and Policy: Historical and Contemporary Perspective* (2004) 150-1.

<sup>540</sup> Saul "Protecting Refugees in the Global World 'War on Terror'" (2013).

<sup>541</sup> British Institute of Human Rights (2006) 8. See also, Gibney "The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy" 20. See also, Ziegler and Huber "Introduction: Current Problems in the Protection of Human Rights-Perspective from Germany and the UK" (2013) 1. See also, Birkinshaw "Terrorism, Secrecy and Human Rights" (2013) 233.

<sup>542</sup> British Institute of Human Rights (2006) 6, 12.

The 1951 UN Convention and its Protocol has not been “expressly incorporated” in the UK municipal laws, however, the content of the legislations and rules which are implemented in asylum and immigration laws has led the courts to conclude that the 1951 UN Convention has become part of the UK asylum and immigration laws.<sup>543</sup> Rule 16 of the Statement of Changes in Immigration Rules provides that the UK should act in a manner consistent with the provisions of the “1951 UN Convention, and its 1967 Protocol when dealing with refugees.”<sup>544</sup>

Notwithstanding, the fact that the ECHR is particularly not concerned with asylum, it does however strengthen the principle of non-refoulement and provides for protection beyond that provided by the 1951 UN Convention.<sup>545</sup>

#### **4.3.2 NON-REFOULEMENT AND THE EXCEPTION**

The concept of voluntary repatriation of refugees has always revolved around non-refoulement and the cessation of status. Breaching the non-refoulement principle, can occur in different ways including deportation and extradition. With the exception of the refugee regime the non-refoulement is also governed by the international human rights regime which covers everyone including refugees.

The practice of the UK regarding refugees raises serious concerns. Although, the UK is a party to international law treaties which bar refoulement, the UK has transgressed the principle of non-refoulement on numerous occasions. In the *Soering* case, the UK detained Soering pending extradition to the USA while there was a risk that Soering would be subjected to the death penalty upon being extradited to the USA.<sup>546</sup>

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<sup>543</sup> Goodwin-Gill and McAdam (2007) 44. See also, Bailey (1989) 59. *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* 2004 UKHL 55 [40] 36.

(Hereafter “the 2004 *Roma Rights Center* case”).

<sup>544</sup> Rule 16 Statement of Changes in Immigration Rules of 1983. The 2004 *Roma Rights Center* case [40] 36.

McAdam (2007) 136-137.

<sup>545</sup> *Ibid.* 136-137.

<sup>546</sup> The *Soering* case [16] 5.

The matter was taken on appeal to the ECtHR where the Court held that to extradite Soering would also be in violation of article 3 of the ECHR.<sup>547</sup> This decision was taken, notwithstanding the assurance by the USA prosecutor that Soering would not be subjected to the death penalty if convicted, due to the fact, that the assurance by the USA was not absolute.<sup>548</sup> The Court held that the UK has the responsibility to protect a person in terms of section 3 of the ECHR even if the UK is not the perpetrator because the right in terms of section 3 of the ECHR is absolute.<sup>549</sup>

The UK's Immigration, Nationality and Asylum Act provides for an exception to non-refoulement in section 55 based on reasons that article 1.F of 1951 UN Refugee Convention is applicable or based on national security concerns.<sup>550</sup>

The issue of national security interest in the UK came before the ECtHR in the *Chahal* case. Mr Chahal was detained pending deportation because it was alleged that his presence in the UK was "unconducive to public good by reason of national security."<sup>551</sup> Mr Chahal applied for asylum because of the fact, that he feared persecution should he be deported to India.<sup>552</sup> His application for asylum was rejected.

The ECtHR held that although article 33.2 of 1951 UN Convention authorises the state to expel a refugee if he poses a risk to the security of the country, and the Court held furthermore, that it would be wrong to expel a refugee back to the country where his life would be in danger.<sup>553</sup>

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<sup>547</sup> *Ibid.* [88] 22-8. See also, Gibney (2003) 39. See also, McAdam (2007) 137.

<sup>548</sup> Wouters (2009) 188, 293. See also, the *Soering* case [128] 46. See also, Wouters (2009) 293.

<sup>549</sup> British Institute of Human Rights (2006) 15. See also, Mathew "Resolution 1373-A call to pre-empt Asylum Seekers? (or 'Osama, the Asylum Seeker' )" (2008) 21.

<sup>550</sup> Goodwin-Gill and McAdam (2007) 240-41.

<sup>551</sup> The *Chahal* case [25] 7.

<sup>552</sup> *Ibid.* [26] 7.

<sup>553</sup> Hathaway (2005) 354. See also, Gibney (2003) 21. Wouters (2009) 289. McAdam (2007) 137.

The Court additionally held that the security concerns of the host country cannot override the principle of non-refoulement.<sup>554</sup> It further held that since article 3 of the ECHR absolutely prohibits torture, inhuman, and degrading treatment by state parties, the principle of non-refoulement must also be absolute.<sup>555</sup>

The UK is highly critical of the majority decision in the *Chahal* case.<sup>556</sup> In 2008, the UK has since tried to get the *Chahal* case overturned by arguing in the case of *Saadi v Italy*,<sup>557</sup> that the state should be allowed to balance the national security interest against that of the refugee, after the UK joined the hearing as a third party.<sup>558</sup> However, the decision of *Chahal* was confirmed by the ECtHR in the 2008 *Saadi* case.<sup>559</sup>

The *Saadi* case confirmed once more that non-refoulement to torture is absolute and cannot be derogated under any circumstances.<sup>560</sup> The UK's argument that the ECtHR should endorse the "balancing act" principle was rejected.<sup>561</sup>

In April 2009, the UK detained ten men from Pakistan on suspicion of terrorism.<sup>562</sup> Because of lack of sufficient evidence these men could not be tried.<sup>563</sup> The UK opted to deport these men based on the fact that they constituted a threat to national security of the UK.<sup>564</sup>

Abid Naseer, an alleged ringleader opposed the deportation on the grounds that he would face the risk of torture and inhuman treatment in Pakistan.<sup>565</sup> The Special

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<sup>554</sup> Padmanabhan "To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non Refoulement" (2011-2012) 80 *Fordham L. Rev* 75.

<sup>555</sup> Padmanabhan (2011-2012) 80 *Fordham L. Rev* 75. See also, Birkinshaw (2013) 241. See also Stevens (2004) 146.

<sup>556</sup> O'Sullivan (2009) 265.

<sup>557</sup> *Saadi v Italy* 2008 49 EHRR 30 (Hereinafter "the *Saadi* case")

<sup>558</sup> The *Saadi* case [117] 27, [139] 33. See also, Jenkins "Rethinking Suresh: Refoulement to Torture under Canada's Charter of Rights and Freedoms" (2009-2010) 47 *Alta. L. Re* 126.

<sup>559</sup> The *Saadi* case [141] 33-4. See also, O'Sullivan (2009) 236, fn210.

<sup>560</sup> The *Saadi* case [138] 32.

<sup>561</sup> Jenkins (2009-2010) 47 *Alta. L. Rev* 126.

<sup>562</sup> Padmanabhan (2011-2012) 80 *Fordham L. Rev* 75.

<sup>563</sup> *Ibid.*

<sup>564</sup> *Ibid.*

<sup>565</sup> *Ibid.*

Immigration Appeals Commission ruled in favour of Naseer but later, after evaluating the intelligence report, ruled against Naseer, that his presence in the UK indeed constituted a national security risk.<sup>566</sup> This is an indication that notwithstanding the examples of the *Chahal* and *Saadi* cases, the UK still acts in contravention of the principle of non-refoulement to torture.

In the *Rehman* case, the Court held that the UK cannot protect people who are a threat or a security risk of another country in fear of contravening article 33.<sup>567</sup> *Rehman* was a Pakistani national who was a legal resident in the UK.<sup>568</sup> The UK made an order to deport him based on the fact that he was a danger to national security, and *Rehman* then appealed against this decision. His appeal was dismissed.<sup>569</sup> In his judgment, Lord Hoffmann stressed “the need for international co-operation against terrorism as a legitimate point of view”.<sup>570</sup>

The UK has also extended its control beyond its territory.<sup>571</sup> The British Royal Navy has intercepted people *en route* to the UK at the Mediterranean Sea. In so doing, the UK acted contrary to its international obligation against refoulement.<sup>572</sup> Furthermore, the UK has also deployed its immigration officials in foreign countries in order to identify people wishing to seek asylum in the UK. In this manner, the UK denied those people the opportunity to reach the UK for the purpose of seeking asylum.<sup>573</sup> Consequently, the nature of the function of the immigration officials is preemptive which is intended to oversee the validity of travel documents, regardless the requirements intended for the protection the refugees.<sup>574</sup>

During the middle of 2001, the UK has also sent its immigration officials to the Prague Airport in the Czech Republic to “pre-clear” passengers and intercepts those

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<sup>566</sup> Padmanabhan (2011-2012) 80 *Fordham L. Rev* 75-6.

<sup>567</sup> Hathaway (2005) 265.

<sup>568</sup> *Secretary for Home Office Department v Rehman* [2001] UKHL 47 [1] 1. (Hereafter the *Rehman* case)

<sup>569</sup> The *Rehman* case [26] 8-9.

<sup>570</sup> The *Rehman* case [46] 14.

<sup>571</sup> Hathaway (2005) 659-60.

<sup>572</sup> *Ibid.*

<sup>573</sup> Hathaway (2005) 659-60. See also, Goodwin-Gill and McAdam (2007) 377.

<sup>574</sup> Goodwin-Gill and McAdam (2007) 377.

who intended to travel to the UK to apply for asylum.<sup>575</sup> The activities of the UK immigration officers, who identified and intercepted people who wished to travel to the UK and seek asylum, was put to test in the European Roma Rights Center.<sup>576</sup> The European Roma Rights Center is the NGO which deals with the protection of the rights of the Romani people in Europe.<sup>577</sup>

The European Roma Rights Center appealed the decision of the UK Court which ruled that “pre-clearance” does not constitute refoulement. The central question was whether the actions of the UK to “pre-clear” asylum seekers of Roma origin at the Prague Airport in the Czech Republic, contravened the UK’s international obligation in terms of the 1951 UN Convention or customary international law.<sup>578</sup>

The Court of Appeal held that the UK did not breach its international obligation for refugee protection in terms of article 33 of the 1951 UN Convention.<sup>579</sup> It held that refugees as referred to in the article, in fact, refers to refugees who are outside their country of origin, and did not refer to someone who is still inside his or her own country.<sup>580</sup> In other words, the “pre-clearance” at the Prague Airport was not considered a refoulement because those nationals were still in their own country and were never refouled or returned to any country.<sup>581</sup>

In his dissenting opinion Lord Justice Laws held that the “pre-clearance” at the Prague Airport is contrary to the UK’s obligation under international law, and evidently more accentuated in the Roma nationals because they are treated less favourably compared to non-Roma nationals.<sup>582</sup>

Wouters observes, that article 33 of the 1951 UN Convention does not provide for the geographical limitation as a qualification for refoulement, and that these words, “in

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<sup>575</sup> Goodwin-Gill and McAdam (2007) 378. Taylor (2008) 119. See also, *The Roma Rights Centre* case [3].

<sup>576</sup> Hathaway (2005) 308. See also, Goodwin-Gill and McAdam (2007) 378.

<sup>577</sup> *The Roma Rights Center* case [4].

<sup>578</sup> *Ibid.*

<sup>579</sup> Hathaway (2005) 308. See also, Wouters (2009) 49. *The Roma Rights Center* case [31].

<sup>580</sup> Hathaway (2005) 308. See also, Goodwin-Gill and McAdam (2007) 378. *The Roma Rights Center* case [31].

<sup>581</sup> *The Roma Rights Center* case [31].

<sup>582</sup> See, *the Roma Rights Centre* case [109-10] 34.

any manner whatsoever,” are an indication that it was not the intention of the drafters to exclude those who are still in their national territories.<sup>583</sup>

The finding of the majority in the Court of Appeal was however, overturned by the House of Lords in the 2004 *Roma Rights Center* case.<sup>584</sup> In paragraph 36 of the 2004 *Roma Rights Center* case, Lord Steyn articulated as follows:

“Following the principles affirmed by the House of Lords in [*Nagarajan v London*] Regional Transport [2000] 1 AC 501, there is in law a single issue: why did the immigration officers treat Roma less favourably than non-Roma? In my view the only realistic answer is that they did so because the persons concerned were Roma. They discriminated on the ground of race. The motive for such discrimination is irrelevant: [*Nagarajan v London Regional*]...”<sup>585</sup>

Although the House of Lords did not find for the appellant in terms of the issue of asylum, the House instead found for the appellant in respect of discrimination against the Roma nationals.<sup>586</sup>

Lord Steyn held that since the UK has ratified the International Convention<sup>587</sup> against racial discrimination; the UK has therefore breached its international obligations when it discriminated against Roma nationals at the Prague Airport.<sup>588</sup> Lord Steyn further held, that since the UK has ratified the ICCPR, which prohibition of discrimination on several grounds including race; the UK has as a result breached its international obligations at the Prague Airport.<sup>589</sup>

In the same vein, the UK breached the provision of article 33 of the 1951 UN Convention, when it removed the refugee claimant from Zimbabwean members of the opposition party, against the advice of its own Foreign Office which advised of the

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<sup>583</sup> Wouters (2009) 49-50.

<sup>584</sup> The 2004 *Roma Rights Center* case).

<sup>585</sup> *Ibid.* [36] 34.

<sup>586</sup> *Ibid.* [104] 67.

<sup>587</sup> International Convention on the Elimination of All forms of Racial Discrimination (1966).

<sup>588</sup> The *Roma Rights Center* 2004 case [44] 39.

<sup>589</sup> *Ibid.* [44] 39-40. Article 26 of the ICCPR.

risk such return possess.<sup>590</sup> Moreover, the Human Rights Watch observed in 2012, that failed asylum seekers who have genuine asylum claims were deported from the UK to Tamil where they were arrested, detained, and tortured.<sup>591</sup>

In another effort to prevent refugees from entering the UK and seek asylum, the UK and France built a double fence in 2002 to close the gap utilised by refugees to enter the UK.<sup>592</sup> This resulted in refugees being rejected or refouled.<sup>593</sup>

#### **4.3.3 CESSATION AND THE EXCEPTION**

Refugee status is not a permanent solution to the plight of refugees. It comes to an end when certain requirements are met and the host country may invoke the cessation of status.<sup>594</sup> In the UK, the cessation of refugee status is regulated by the Immigration Rules.<sup>595</sup> The Immigration Rules provide more or less similar provisions of the cessation of refugee status to article 1.C.5 of the 1951 UN Convention.<sup>596</sup>

Paragraph 339A of the Immigration Rules provides for cessation through voluntary action by the refugee, as well as the state invoking cessation of status due to the change of conditions in the country of origin. The Immigration Rules, however, do not provide for “compelling reasons” as an exception arising out of previous persecution.<sup>597</sup>

The cessation of the status of refugees in the UK is better illustrated by the *Hoxha* case. Hoxha appealed against the Secretary of State because of the Home Department rejecting his application for asylum. Hoxha was a refugee when he left

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<sup>590</sup> Hathaway (2005) 321, 287.

<sup>591</sup> Podezfa and Manicom “Avoiding Refoulement: The Need to Monitor Deported Failed Asylum Seekers” (2012) 2 *Oxford Monitor of Forced Migration* 11.

<sup>592</sup> Hathaway (2005) 282.

<sup>593</sup> *Ibid.* 361.

<sup>594</sup> UK Border Agency *Policy Guidance and Casework Instruction: Cancellation, Cessation and Revocation of Refugee Status* (2008) 15.

<sup>595</sup> Immigration Rules Part 11  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428684/Immigration\\_Rules\\_-\\_Part\\_11.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428684/Immigration_Rules_-_Part_11.pdf). (Accesses 07 June 2015)

<sup>596</sup> UK Border Agency (2008) 15.

<sup>597</sup> O’ Sullivan (2009) 272.

his country and his asylum was accepted by the Home Department.<sup>598</sup> The rejection of asylum was due to the change of circumstances in the country of origin and furthermore, that the country of origin was safe for return.<sup>599</sup>

The contention of the appellants was based on the “compelling reasons arising out of previous persecution” due to the suffering they have endured at the hands of soldiers and the raping of Hoxha’s wife.<sup>600</sup>

When it comes to the cessation of refugee status, the English Court of Appeal held that, “aspirations are to be distinguished from legal obligations.”<sup>601</sup> The Court held that where the provision of the legislation is clear, the language of the text should be applied unless there is an overwhelming indication through state practice which supports deviation to the letter of the provision.<sup>602</sup> The Court of Appeal held that the exception of cessation in terms of article 1.C.5 refers to a situation where a person has been “recognized” as a refugee.<sup>603</sup> Further, that the appellants were not recognised as refugees, and for that reason, the exception to cessation is not applicable to them.<sup>604</sup>

The Court held that the aspiration of the UNHCR should not be read into the provision of article 1.C.5.<sup>605</sup> Added to that, had the international community wished to deviate from the provision of article 1.C.5, it should have been explicit within the 1967 UN Protocol since the international community had an opportunity to do so.<sup>606</sup> The appeal was therefore dismissed.<sup>607</sup>

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<sup>598</sup> The *Hoxha* case [2], [3].

<sup>599</sup> *Ibid.* [5].

<sup>600</sup> *Ibid.* [12].

<sup>601</sup> *Ibid.* [48].

<sup>602</sup> Hathaway (2005) 943. See also, the *Hoxha* [46], [47] 13.

<sup>603</sup> The *Hoxha* case [24].

<sup>604</sup> *Ibid.* [32], [33].

<sup>605</sup> Hathaway (2005) 943.

<sup>606</sup> *Ibid.*

<sup>607</sup> The *Hoxha* case [56].

## 4.4 CANADA

### 4.4.1 BACKGROUND AND STATUTES

Angela Delli Sante observes, that during 1981-1986, Canada has admitted a substantial number of refugees from Salvador and Guatemala, who fled persecution and civil unrest in their own countries.<sup>608</sup> Canada also received a Nansen Award from the UNHCR for its sterling work in providing refuge for the persecuted.<sup>609</sup> Canada is one of the countries which offer the resettlement of refugees.<sup>610</sup>

Galloway observes, since then, that tension developed between Canada's protection for refugees and refoulement as a subsequent result of criminal elements by refugees.<sup>611</sup> This tension has since received attention in the enactment of the 2001 Immigration and Refugee Protection Act (IRPA) and cases such as the *Suresh* and *Ahani*.<sup>612</sup>

Canada has signed the 1951 UN Convention in 1969.<sup>613</sup> Canada then incorporated the refugee definition as provided by the 1951 UN Convention into the 1976 Immigration Act, as well as in section 2(1) of the IRPA as amended by Protecting Canada's Immigration System Act (Bill C-31) of 2012.<sup>614</sup> Canada ratified the ICCPR in 1976, as well as the CAT in 1987.<sup>615</sup> The IRPA incorporates not only the 1951 UN Convention but its 1967 UN Protocol, the 1984 the CAT, as well as the ICCPR.<sup>616</sup>

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<sup>608</sup> Sante (1989) 102-3.

<sup>609</sup> Dauvergne "How the Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2012-2013) 58 *McGill L.J.* 666. Macklin "Asylum and the Rule of Law in Canada: Hearing the Other (Side)" (2009) 79-80.

<sup>610</sup> Hansen *et al* (2008) 14.

<sup>611</sup> Galloway (2003) 109.

<sup>612</sup> *Ibid.*

<sup>613</sup> Worster (2012) 30 *Berkeley J. Int'L* 125. See also, Macklin (2009) 79.

<sup>614</sup> Worster (2012) 125 30 *Berkeley J. Int'L* 125. Goodwin-Gill and McAdam (2007) 43. See also, Macklin "A safe country to emulate?" (2013) 100, 117.

<sup>615</sup> Dauvergne (2012-2013) 58 *McGill L.J.* 665. See also, The *Suresh* case [66] 41.

<sup>616</sup> Worster (2012) 30 *Berkeley J. Int'L* 125. See also, Goodwin-Gill and McAdam (2007) 43. Galloway (2003) 114. See also, McAdam (2007) 129.

The incorporation of these instruments into Canada's domestic legislation has the implication that Canada cannot refoule refugees to face persecution.<sup>617</sup>

The CAT provides that "torture cannot be justified by any exceptional circumstances".<sup>618</sup> Canada also incorporated within its domestic legislation, the ECHR in order to improve refugee protection.<sup>619</sup>

Although Canada interprets the 1951 UN Convention restrictively, Canada applies a humanitarian approach to refugee protection, and also protects refugees who would otherwise not qualify as refugees under the 1951 UN Convention.<sup>620</sup>

Regardless of Canada's stance on refugee protection, Canada has at times infringed its international obligation towards refugee protection. This was evident in the *Abdulle v Canada* case where the Court held that although the applicant may stand to be persecuted in Somalia, so is every Somalian.<sup>621</sup> The applicant will not be singled out for belonging to the Haba-Gedir sub-clan.<sup>622</sup>

#### **4.4.2 NON-REFOULEMENT AND THE EXCEPTION**

Non-refoulement is the core axis which determines the voluntariness of repatriation. One cannot address voluntary repatriation without addressing non-refoulement concomitantly. There are several case law examples which highlight Canada's practice towards *non-refoulement* i.e. the *Suresh v Canada*, and the *Németh v Canada* cases.

In Canada, the principle of non-refoulement is provided by section 115(1) of the IRPA. The *Suresh* case is the first to appear before the Supreme Court of Canada with regards to international protection against refoulement to torture.<sup>623</sup>

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<sup>617</sup> *Sante* (1989) 102.

<sup>618</sup> *Ibid.*

<sup>619</sup> Goodwin-Gill and McAdam (2007) 221.

<sup>620</sup> Sexton "Political Refugees, Non-refoulement and State Practice: A Comparative Study" (1985) 18 *Vand. J. Transnat'l L* 790.

<sup>621</sup> *Abdulle v Canada* 1993 67 FC (Hereafter "the *Abdulle* case").

<sup>622</sup> The *Abdulle* case 3.

<sup>623</sup> Van Ert "Torture and the Supreme Court of Canada" (2014) 65 *U.N.B.L.J* 26.

Similarly to the approach by the UK courts, the Canadian courts held that national security interest is relevant in determining whether to refoule or not.<sup>624</sup> When it comes to issues of national security, the Supreme Court of Canada, in the *Suresh* case conceded that the seriousness of the security threat to the state should be weighed against the interest of a refugee.<sup>625</sup>

In the *Suresh* case, the court acknowledged that the deportation to torture is not permissible.<sup>626</sup> It correspondingly acknowledged that the state's interest should be balanced against the refugee's interest as provided by the Canadian Charter.<sup>627</sup> The court held that deportation may only be allowed in "exceptional circumstances."<sup>628</sup> The Court held that in balancing relevant factors, i.e. section 7 of the Canadian Charter of Rights and Freedoms, should be taken into consideration when there is still a likelihood that a person may be returned to a place where he may face torture..<sup>629</sup>

The *Suresh* case decision, however, ignored the earlier ruling of the ECtHR in the *Chahal* case which provided that non-refoulement to torture is absolute and cannot be derogated under any circumstances.<sup>630</sup>

Wouters observes, however, that despite the global concern regarding terrorism, article 33.2 of the 1951 UN Convention, should be interpreted restrictively since it does not provide for the exception to non-refoulement due to national security of other countries.<sup>631</sup> The Article 33.2 exception refers to situations where the national security risk of the host country is at stake. Wouters argues therefore, that the threat to national security must be posed by the refugee to the country of refuge.<sup>632</sup>

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<sup>624</sup> Padmanabhan (2011-2012) 80 *Fordham L. Rev* 97.

<sup>625</sup> The *Suresh* case [31] 24-5. See also, Hathaway (2005) 265.

<sup>626</sup> The *Suresh* case [75] 45.

<sup>627</sup> The *Suresh* [58] 47. See also, Padmanabhan (2011-2012) 80 *Fordham L. Rev* 97. See also, Macklin (2009) 116

<sup>628</sup> The *Suresh* [78] 47. Padmanabhan (2011-2012) 80 *Fordham L. Rev* 119. See also, Galloway (2003) 132. Macklin (2009) 116.

<sup>629</sup> The *Suresh* [78] 47. See also, Macklin (2009) 116.

<sup>630</sup> Jenkins (2009-2010) 47 *Alta. L. Rev* 148.

<sup>631</sup> Wouters (2009) 115.

<sup>632</sup> *Ibid.*116.

When it comes to the national security concern, the Supreme Court of Canada held that the fact that an individual is a member of a certain organisation alone cannot be a basis for refouling such an individual.<sup>633</sup> The return should be warranted after a fair determination that such an individual indeed, poses a risk to national security.<sup>634</sup>

The exception to the principle of non-refoulement is provided for by section 115(2) of the IRPA. As regards the exception to the principle of non-refoulement, the Canadian Supreme Court found that refoulement as a result of national security concern may be considered, even if they are not directly linked with Canada.<sup>635</sup> The Court further held that the threat to national security of another state affects the security of the Canadian state.<sup>636</sup>

In 2010, in the case of *Németh v Canada*,<sup>637</sup> in what seemed to be a positive development in recognition of human rights principles in interpreting the principle of non-refoulement, the Supreme Court allowed the appeal and remitted the matter to the Minister of Justice.<sup>638</sup> The Supreme Court held that the Minister of Justice applied an incorrect legal principle and did not consider the relevance of Canada's human rights obligations to non-refoulement.<sup>639</sup> The Supreme Court held that extraditing a refugee to a place where he or she fled requires a careful analysis which should take into account the human rights treaty obligations of Canada.<sup>640</sup>

The *Németh* case highlights the link between the 1951 UN Convention concerning non-refoulement, the human rights treaties, and Canada's international obligation to refugee protection. The *Németh* case, however, did not comment on the relevance of the *Suresh* case as an exception to non-refoulement in terms of section 115(2) of the IRPA.<sup>641</sup> This has the implication that although the *Németh* case highlighted the importance of the human rights treaty obligation by Canada, non-refoulement to

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<sup>633</sup> Hathaway (2005) 348.

<sup>634</sup> *Ibid.* 348.

<sup>635</sup> Goodwin-Gill and McAdam (2007) 237.

<sup>636</sup> Hathaway (2005) 265.

<sup>637</sup> *Németh v Canada* (2010) SCC 56. (Hereafter "the *Németh* case").

<sup>638</sup> The *Németh* case [123] 340-1.

<sup>639</sup> *Ibid.* [86] 325.

<sup>640</sup> *Ibid.* [86] 325

<sup>641</sup> Van Ert (2014) 65 *U.N.B.L.J.* 32.

torture or inhuman and degrading treatment does not have an absolute application in Canada.

Although article 3 of the CAT renders the principle of non-refoulement to torture absolute, the decision in the *Suresh* case has the consequence that non-refoulement to torture is not absolute in Canada.<sup>642</sup> The HRC expressed its concerns on its concluding observations on Canada's returning persons to torture. The HRC expressed that *non-refoulement* in terms of the ICCPR is absolute and that under no circumstances can one be returned to a place where he or she may face torture, cruel or degrading treatment, irrespective of what the person might have done.<sup>643</sup>

Canada, similar to the UK, also infringed its international obligation against non-refoulement by practicing what is called "pre-arrival screening".<sup>644</sup> Canada did this by deploying immigration officials to other countries to ensure that only people with legitimate documents travel to Canada.<sup>645</sup> This was done specifically with regards to the Roma refugees by placing visa requirements when they need to enter Canada.<sup>646</sup>

The challenge with "pre-arrival screening" was that people who were eligible for refugee status were denied the opportunity to enter Canada and apply for asylum due to the lack of proper documentation.<sup>647</sup> Canada has been withdrawing and reinstating its visa requirements for Roma nationals during 1994-2007 to control the flow of asylum seekers into Canada.<sup>648</sup> This signifies that Canada's approach towards the Roma asylum seekers has been enforced to repel them.<sup>649</sup>

In the period between 1996 and 2002, Canadian immigration officials intercepted over 40 000 people who had the intention to travel to Canada because they did not possess valid documentations.<sup>650</sup> The number of asylum seekers in Canada has

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<sup>642</sup> McAdam (2007) 130.

<sup>643</sup> Concluding Observation of the Human Rights Committee (article 7 of the ICCPR) on Canada (2006). See also, Jenkins (2009-2010) 47 *Alta. L. Rev* 147.

<sup>644</sup> Goodwin-Gill and McAdam (2007) 377. See also, Wouters (2009) 140-1.

<sup>645</sup> Goodwin-Gill and McAdam (2007) at 377. See also, Macklin (2013) 99

<sup>646</sup> Galloway (2003) 109, 130. See also, Macklin (2009) 104. See also, Macklin (2009) 80.

<sup>647</sup> Goodwin-Gill and McAdam (2007) 377. See also, Macklin (2009) 80.

<sup>648</sup> Macklin (2009) 106-109.

<sup>649</sup> *Ibid.* 128.

<sup>650</sup> Goodwin-Gill and McAdam (2007) 337.

declined significantly by 2011 due to strategies employed by Canada to ward off would be asylum seekers.<sup>651</sup>

#### **4.4.3 CESSATION AND THE EXCEPTION**

The cessation of status in terms of the refugee protection regime follows after the change of conditions in the country of origin. The host country is empowered to mandate repatriation. Although the state can mandate repatriation due to the change of conditions in the country of origin, mandated repatriation is not absolute. Certain exceptions such as “compelling reasons” arising out of previous persecution still have to be considered as illustrated in chapter three above.

Canadian refugee laws also make provision for cessation of refugee status in a similar manner as the 1951 UN Convention, and empower the Minister to make a determination of cessation when there is no longer a protection need for a refugee.<sup>652</sup> Section 108(4) of the IRPA also provides for an exception to the cessation of refugee status “due to compelling reasons arising out of previous persecution.”<sup>653</sup>

The issue of cessation of refugee status was dealt with in the case of *Suleiman v Canada*.<sup>654</sup> In this case, the Immigration and Refugee Board (the Board) rejected Suleiman’s application for refugee status due to the cessation of refugee status, as a result of the change of conditions in the country of origin.<sup>655</sup> The Board went on to rule that the exception to cessation as provided by section 108(4) of the IRPA is also not applicable.<sup>656</sup> The Board also made reference to the leading *Obstoj* case and that Suleiman did not meet the standard test set in the *Obstoj* case which requires that the claimant must have suffered “appalling and atrocious treatment” to qualify for exception.<sup>657</sup>

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<sup>651</sup> Macklin (2009) 13.

<sup>652</sup> Dicker and Mansfield *Filing the Protection Gap: Current trends in Complementary Protection in Canada, Mexico and Australia* (2012) 35. See also, Goodwin-Gill and McAdam (2007) 142.

<sup>653</sup> Goodwin-Gill and McAdam (2007) 145. See also, Dicker and Mansfield (2012) 36.

<sup>654</sup> The *Suleiman* case 26.

<sup>655</sup> *Ibid.* [7].

<sup>656</sup> The *Suleiman* case [9].

<sup>657</sup> *Ibid.*

In the *Obstoj* case, the Federal Court held that regard should be had to the humanitarian approach when interpreting the exception to the application of the cessation clause.<sup>658</sup> Furthermore, that even if there is no fear for future persecution, this exception should be applied in situations where the extent of past persecution was so serious that to expect the person to go back to that country would be unreasonable.<sup>659</sup> This was also confirmed in the *Suleiman* case.<sup>660</sup>

On review, the Federal Court in the *Suleiman* case held that the issue of whether “compelling reasons” exist has to be decided on a case by case basis, considering all relevant circumstances and taking into account the “humanitarian grounds, unusual or exceptional circumstances.”<sup>661</sup> The Court went further, and held that the Board failed to consider all relevant circumstances, including medical evidence and this is visible in the Court accepting that Mr Suleiman suffers post-traumatic stress but still rules that the standard set in the *Obstoj* case for the exception to apply was not met.<sup>662</sup>

#### **4.5 CONCLUSION**

Evidently, in all three jurisdictions namely Canada, South Africa and the UK are parties to international and regional refugee treaties, as well as international and regional human rights treaties which protect refugees and all persons within their jurisdiction. These treaties include the 1951 UN Convention and its 1967 Protocol, the CAT, the ICCPR, the ECHR, the 1969 OAU Convention, and the ACHPR, to mention but a few.

All jurisdictions have in one way or another incorporated the provisions of the international and regional treaties within their domestic legislations. This has the implication that these treaties become binding on state members. It is also evident, that there is no distinct line between refugee and human rights protection. This is due to the fact that the refugees are more often than not a result of human rights violations. Consequently, refugee law and human rights law have become intertwined.

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<sup>658</sup> Goodwin-Gill and McAdam (2007) 147.

<sup>659</sup> *Ibid.*

<sup>660</sup> The *Suleiman* case [13].

<sup>661</sup> *Ibid.* [16].

<sup>662</sup> *Ibid.* [22].

This furthermore, incorporates that all jurisdictions boost a legal system where the rule of law and separation of powers prevail. Their domestic legislations also provide administrative and legal processes wherein persons are able to challenge the actions and decisions of the executive through appeals.

There is evidence to show that the international obligations of states to protect refugees and persons within their jurisdictions have been violated on numerous occasions. The increase in international terrorism has also influenced the states to interpret the provisions of the 1951 UN Convention restrictively, to exclude members which are perceived to be a national security risk and contrary to human rights treaties which protect everyone against torture, irrespective of the offence they might have committed. The absolute nature of refoulement to torture has been confirmed in cases of the ECtHR i.e. the *Chahal*, *Suresh* and *Saadi* cases. The South African Constitutional Court has also used the *Chahal* and *Suresh* cases in interpreting the absolute nature of refoulement to torture.

International law recognises that refugee status is not a permanent solution. It has to come to an end at a certain stage and when certain requirements are met. There is also evidence of practice in all jurisdictions where states apply the cessation clause restrictively, resulting in the fact that humanitarian obligations with regards to specific cases of refugees are ignored.

This chapter further reveals that the principle of non-refoulement and the cessation of refugee status are the core determinant of the voluntary nature of repatriation. Voluntary repatriation which does not take into account the principle of non-refoulement and the cessation of refugee status, is indeed flawed and resulting in the contravention of the international refugee protection regime.

## **CHAPTER 5**

### **PURPOSE, SUMMARY, CONCLUSION AND RECOMMENDATIONS**

#### **5.1 PURPOSE OF THE RESEARCH**

The focus of this limited scope dissertation intended to examine to whether South Africa's legal aspect for voluntary repatriation of refugees offers a reliable, adequate legal basis for voluntary repatriation compared to the international framework and practice. The research also investigates two other issues such as:

- The application of the cessation clause by South Africa which is required to be balanced with the measures relating to the non-refoulement, which is the cornerstone for refugee protection.
- The extradition or expulsion by South Africa of a person to face torture due to national security interest without first obtaining assurance that torture or death will not be imposed is in contravention of the principle of non-refoulement.

Since there are no sufficient international instruments dealing directly with the principle of voluntary repatriation except for the UNHCR Statute and the 1969 OAU Convention, it became compulsory to explore various other instruments which strengthen the principle of non-refoulement. It is crucial to explore how human rights instruments complement the refugee instruments with regards to voluntariness of repatriation.

The human rights instruments of relevance in this study are the UDHR, the ECHR, the ICCPR, and the CAT. These instruments are analysed to explore whether they contain provisions which ideally, enhance the principle of voluntary repatriation.

The practice of the South African government with regards to the voluntariness of its repatriation laws are analysed and contrasted to similar jurisdictions of i.e. Canada and the UK.

#### **5.2 SUMMARY**

The world has seen the development of refugee protection legislations which followed WW II. These developments include the conclusion of the 1951 UN Convention and its 1967 Protocol, as well as the 1969 OAU Convention. The UNHCR also emerged

as a supervisory body with regards to refugee protection. These conventions ultimately construct the legal basis for refugee protection.

The 1951 UN Convention concentrated more on the European refugees within a specific time frame, thereby excluding refugees from Africa and elsewhere. This consequently, necessitated the establishment of the 1969 OAU Convention which focused specifically on challenges affecting African refugees.

The human rights law has also developed parallel to the refugee regime. The main focus of the human rights law is to offer protection to people whose rights are violated worldwide. The instruments governing human rights protection include the UDHR, the ECHR, the ICCPR and the CAT. These conventions form the basis of human rights protection.

More often than not, the refugee regime and human rights regime overlap. This is consequently, because both regimes have as its purpose the protection of humans whose rights are notwithstanding, somehow infringed. The majority of countries worldwide are party to these refugee conventions and human rights conventions. Canada, South Africa, and the UK are some of the countries who are parties to these conventions.

In all jurisdictions in this study, there have been practices which infringe on the refugee protection regime through refoulement and the cessation of the status of the refugee.

### **5.2.1 VOLUNTARY REPATRIATION**

Provision on voluntary repatriation is only provided for by the UNHCR Statute, as well as the 1969 OAU Convention. The 1951 UN Convention does not provide for voluntary repatriation of refugees. There are, however, provisions of the 1951 UN Convention which shape the principles of voluntary repatriation i.e. the principle of non-refoulement and the cessation of refugee status.

The countries of concern in this research, that is, Canada, South Africa, and the UK share a common law heritage and are parties to the international refugee instruments as well as international human rights instruments. The provisions of the international refugee and human rights treaties have been incorporated within the domestic

legislation in all countries of concern. These treaties are hence, applicable in the domestic sphere of these countries.

South Africa is party to both the 1951 UN Convention and the 1969 OAU Convention. Canada and the UK are not parties to the 1969 OAU Convention which is the only legal treaty which provides for voluntary repatriation. South Africa also incorporated major provisions of these conventions into the Refugee Act. South Africa did not however incorporate the voluntary repatriation clause within its Refugee Act. Therefore, the international community as well as South Africa does not provide for an adequate legal framework which specifically deals with the voluntary repatriation of refugees.

It is evident that in all jurisdictions, governments have engaged in acts which contravened the principle of voluntary repatriation. South Africa has taken part in two organised voluntary repatriations with the assistance of the UNHCR. This was done after the cessation of refugee status and by signing the contractual agreements in the form of a tripartite agreement including South Africa, Mozambique, and the UNHCR, and once more, South Africa, Angola, and the UNHCR.

Except organised voluntary repatriations, Canada, South Africa and the UK have acted in contravention of the principle of voluntary repatriation on numerous occasions which were eventually challenged in the courts of law. These contraventions typically occur as soon as states implement the cessation of refugee status due to the change of conditions in the country of origin, or acting on the exclusion of refugee status due to a national security threat, as provided by the 1951 UN Convention.

There is also the lack of clarity by the UNHCR as to how these provisions of the UNHCR Statute in relation to the cessation clause is to be reconciled with its mandate to promote only voluntary repatriation. The issue arises: How do states ensure that repatriation is voluntary when it is done under the cessation of refugee status in terms of the 1951 UN Convention which does not require voluntariness by the refugee.

### **5.1.2 CESSATION**

It has been observed throughout this study that refugee status is not a permanent solution. It has to come to an end at a certain stage. This sentiment was echoed well by the first High Commissioner for Refugees, Van Heuven who stated that refugee status should “not be granted for a day longer than absolutely necessary, and should come to an end”.<sup>663</sup> The course of action wherein the status of a refugee is terminated is through the invocation of the cessation clause. The cessation clause is provided by the 1951 UN Convention, the UNHCR Statute, as well as the 1969 OAU Convention.

To this point, this study has revealed that in all three jurisdictions i.e. Canada, South Africa and the UK, the domestic legislations provided for the cessation of refugee status due to a change in conditions in the country of origin. In South Africa, section 5 (e) of the Refugee Act provides for the cessation of refugee status due to a change in circumstances which caused the flight. Furthermore, section 5(2) of the Refugee Act provide for the exception to the cessation of refugee status, which is based on compelling reasons arising out of previous persecutions.

The UK’s application of cessation as provided for by the 1951 UN Convention and the Immigration Rules is similar to the one provided in South Africa’s Refugee Act with the exception that the Immigration Rules do not provide for the compelling reason exception. Rule 339 (A) (v) and (vi) of the Immigration Rules provides for the cessation of refugee status due to changed circumstances although Rule 339 (C) (iii) provides exception due to substantial grounds for believing that he will face serious harm if returned.

The difference between the exception clauses provided by the two jurisdictions above is that the exception clause provided by South African jurisdiction has a humanitarian element as it protects even refugees who do not fear future persecution. On the contrary, the UK only provides exception where there is a prospect of future persecution on the refugee and as a consequence, this has the implication that the refugee who still suffers the effects of past persecution might still be forced to return to his or her country of origin.

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<sup>663</sup> Johnson (2012) 4.

In Canada, the cessation of refugee status is provided for by section 108 (1) (e) of the IRPA, while the exception to cessation of refugee status is provided by section 108(4) of the same Act. The provisions of Canadian cessation are similar to the South African cessation of refugee status in that Canada also protects refugees from returning due to the seriousness of their past persecution, even if there is no prospect of future persecution on the refugee. This also exhibits a humanitarian approach by Canadian jurisdiction.

It has been further observed, that in three aforementioned jurisdictions; states mandate repatriation after the cessation of status and disregard the compelling reason exception. This was seen in the *Mayongo* case by South Africa, the *Suleiman* case in Canada and the *Hoxha* case in the UK.

South Africa sought to repatriate Mayongo to Angola due to the fact that there was sufficient evidence of a change of circumstances in his country of origin, notwithstanding that he had compelling reasons arising out of his previous persecution. This was also despite the fact that the South African exception to the cessation of refugee status also provides for compelling reasons arising out of previous persecution.

Canada applied the cessation clause in the *Suleiman* case due to changed circumstances in the country of origin but nonetheless, failed to consider the exception due to compelling reasons. The courts, however, interpreted the provisions of the cessation clause in favour of the refugees in that there were adequate compelling reasons in both cases not to invoke the ceased circumstances clause.

The 1951 UN Convention as well as the 1969 OAU Convention provide for the cessation of refugee status on similar grounds. The difference is however, that unlike the 1951 UN Convention, the 1969 OAU Convention does not provide for exception to cessation due to “compelling reasons arising out of previous persecution”.<sup>664</sup>

Notwithstanding the provision on cessation and its exception in terms of the Refugee Act, it is in the application of these provisions by South Africa which often creates uncertainties. In the *Mayongo* case, South Africa sought to deport him due to the fact that there were circumstantial evidence to impart that he was no longer as a person

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<sup>664</sup> Sharpe (2012-2013) 95-147 100. See also, Johnson (2012) 6.

with a refugee status. The reason was consequently due to the civil war which ended in Angola.

The UK is not a party to the 1969 OAU Convention and is therefore not bound by the principle of voluntary repatriation as provided therein. The UK, as a party to the 1951 UN Convention applies the cessation clause which does not require voluntariness by the refugee. The *Hoxha* case application of the cessation clause was to the effect that “aspirations are to be distinguished from legal obligations.”<sup>665</sup> The court held that the UNHCR’s recommendation do not constitute legal obligations to states. Further, that where the language of the Statute is clear, deviation is not warranted unless there is substantial evidence to the contrary.

Canada’s cessation of refugee status due to a change in the circumstances is provided by section 108 (1) (e) of the IRPA. The exception to cessation due to compelling reasons arising out of previous persecutions is provided by section 108 (4) of the IRPA. In the *Suleiman* case the Court held that in order to ascertain whether exception in terms of section 108 (4) is applicable, all circumstances must be taken into account, and every case be assessed on its own merits. Furthermore, that the Court should consider humanitarian grounds as well as unusual circumstances.

The Court further held that it is inconceivable that the IRB would find that Suleiman suffers from depression and post-traumatic anxiety, yet rule that his condition does not qualify protection under 108 (4) of the IRPA.

### **5.1.3 NON-REFOULEMENT**

South Africa is party to several international instruments which entrench the principle of non-refoulement including the 1951 UN Convention, the 1969 OAU Convention, the ECHR, the ICCPR, and the CAT. Canada and the UK are also parties to the above international instruments except for the 1969 OAU Convention.

The 1951 UN Convention and the 1969 OAU Convention are the major refugee protection instruments which provide for the principle of non-refoulement which South Africa has ratified. The provision on non-refoulement, however, is not without restrictions. The significance here is that these refugee conventions do not absolutely

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<sup>665</sup> The *Hoxha* case [48].

guarantee the principle of non-refoulement. To the contrary, the provisions of non-refoulement in terms of human rights instruments i.e. the ICCPR, the ECHR, and the CAT, are fundamentally absolute.

The principle of non-refoulement can be inherently seen as the cornerstone of refugee protection. Whether the refugee, asylum seeker or an alien is returned, extradited, deported or expelled, the most relevant principle to be infringed is that of non-refoulement. Whether repatriation is voluntary or involuntary, the principle to be infringed upon is that of non-refoulement. The principle of non-refoulement can therefore be seen to have developed to the extent that it can be regarded as a customary international law.<sup>666</sup>

It often occurs that conflict arises between the protection of human rights of an individual or refugee, and the national security or public interest. When such a matter arises the issue is which interest should be weighed heavier than the other? State practice of countries like Canada, South Africa, and the UK can be seen to ascend towards protecting the national interest at the expense of refugees evident in the *Mohamed, Chahal* and *Suresh* cases.

In South Africa's domestic sphere, the issue of non-refoulement to torture is covered by the right to human dignity entrenched in section 10 and the right not to be punished in a cruel, inhuman or degrading way as entrenched in section 11 of the Constitution. These sections also reflect the provision of article 3 of the ECHR, the CAT, the ICCPR and the ACHPR which South Africa is party to and which purport that no one shall be subject to torture or inhuman or degrading treatment or punishment.

In spite of the above provisions against non-refoulement, the South African Government extradited Mohamed to the USA to face charges wherein if he was convicted the death sentence was a potential verdict. This was against the South African Constitution as well as the international obligation of non-refoulement.

The Constitutional Court in the *Mohamed* case confirmed the decision in the *Makwanyane* case that the death sentence constitutes torture, inhuman or degrading treatment or punishment. The Court went further and held that by sending Mohamed

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<sup>666</sup> Hathaway (2005) 248.

to the USA to face the death sentence if convicted, South Africa infringed not only the Constitution but the ECHR, and the CAT which South Africa is party to.

The decision of the Court indicates that South Africa as a signatory to conventions against non-refoulement has a duty not to act in such a way which might assist another state to infringe the rights of refugees. By extraditing Mohamed to the USA without seeking assurance that the death penalty would not be imposed, South Africa is somehow connected to the subsequent action and its consequences. This sentiment was echoed in the ECtHR in the *Soering* case where the Court held that the state which knowingly extradites a person to another state where such a person may be tortured, acts directly in contravention of article 3 of the CAT irrespective of the prohibited conduct of such a person.<sup>667</sup>

The Supreme Court of Canada also held in the *Suresh* case that extraditing a person to the country where such a person might be sentenced to death infringes article 3 of the CAT.

The judgment of the South African Constitutional Court, the ECtHR, as well as the Canadian Supreme Court shows that the content of non-refoulement to torture in terms of article 3 of the CAT is absolute. It is therefore concluded that Canada, South Africa, and the UK continues to infringe their international obligations under the principle of non-refoulement.

### **5.3 CONCLUSION**

In deliberating the above observations, the underlying assumptions revolve around the absence of an adequate international legal framework. In other words, it is the lack of such a framework which was supposed to deal with the principle of voluntary repatriation. The UNHCR Statute as well as the 1969 OAU Convention make provision for voluntariness of repatriation but fail to provide clear cut guidelines on how to apply such provisions. Canada, South Africa, and the UK do not have domestic legislations which regulate the principle of voluntary repatriation of refugees.

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<sup>667</sup> The *Mohamed* case [56-57] 916. See also, the *Abdi* case [26] 10.

South Africa's lack of provision in its Refugee Act as well as its practice with regards to repatriation, therefore highlight that South Africa's legislative framework do not offer a reliable, adequate legal basis for voluntary repatriation of refugees.

Although the South African Refugee Act provides for the cessation clause and non-refoulement compliant with international standards, it is in the actual practice where South Africa contravenes international human rights obligations. It can be concluded that the application of the cessation clause by South Africa impacts and indicates at the violation of the principle of non-refoulement, accordingly observed in the cases of *Mayongo* and *Van Garderen*.

The South African approach in the *Mayongo* case is similar to the Canadian approach in the *Suleiman* case. In both these cases Canada and South Africa, applied the cessation clause due to changed circumstances in the country of origin but failed to consider the exception due to compelling reasons. The courts, however, interpreted the provisions of the cessation clause in favour of the refugees, in that there were compelling reasons in both cases not to invoke the ceased circumstances clause. One can therefore conclude, that the independence of the judiciary and the rule of law offer a valuable contribution to the development of refugee protection in both countries.

Furthermore, it can therefore be concluded that the South African government uses the blanket approach in applying the cessation clause in terms of section 5(1) (e) of the Refugee Act without investigation circumstances of an individual case. One can also conclude that South Africa's main goal once cessation is invoked is to repatriate. This is supported by the *Mayongo* case, and the question arises why South Africa accepted the seriousness of *Mayongo's* past persecution and notwithstanding, still in the same vein sought to repatriate him.

The South African Constitution as supported by the Constitutional Court judgments guarantees the right to life without exceptions. Provisions of the human rights conventions such as the ECHR, and the CAT which South Africa is party to, absolutely bar refoulement to torture, inhuman and degrading punishment.

One can therefore conclude that when South Africa extradites or expels a person to face torture due to national security interest, without first obtaining assurance that the

death penalty will not be imposed is in contravention of the principle of non-refoulement.

In all three jurisdictions in this study practices occur which infringe the principle of non-refoulement. There is also reluctance by all states in the study to consider the absolute nature of non-refoulement, particularly when dealing with human rights issues such as non-refoulement to torture which also affect refugees.

The influence of human rights treaties on the development of refugee protection has the implication that the refugee protection regime cannot be applied in isolation, that is without giving regard to human rights regime. The interaction between refugee regime and human rights law were also echoed in the South African Constitutional Court in the *Mohamed* case.<sup>668</sup> One can therefore conclude that human rights as well as the refugee regime can be applied harmoniously in order to offer the best possible protection for refugees.

It is also imperative that every state protects its national against acts of terrorism or threat to its security. It is also evident that the international communities have faced in some way or another acts of terror. This therefore influences states to be vigilant in their approach to non-nationals or refugees.

#### **5.4 RECOMMENDATIONS**

Although the South African Refugee Act has no provision on voluntary repatriation, South Africa as an African frontrunner in advancing human rights should propagate reformation that will seek to reconcile the provision on cessation and voluntary repatriation. South Africa should therefore amend the Refugee Act to insert a voluntary repatriation clause. South Africa should also create provisions intended to harmonise the principle of voluntary repatriation with mandatory repatriation as a result of cessation.

The UNHCR should also develop guidelines which will clarify the relationship between voluntariness of repatriation and mandatory repatriation as a subsequent cessation of refugee status.

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<sup>668</sup> The *Mohamed* case [48] 913.

South Africa should interpret the human rights regime and the refugee regime simultaneously and not as separate regimes. These regimes should be interpreted holistically because these regimes offer protection to refugee and human rights concurrently. Consequently, South Africa should therefore implement refugee protection treaties in conjunction with human rights treaties in order to afford refugees the best protection possible.

South Africa should provide adequate training to the staff members at the LRF to enable them to apply international acceptable standards for refugee protection. Non-African states i.e. Canada and the UK should subsequently also be inspired by the 1969 OAU Convention, which can be a crucial process in the way to expand on the principle of voluntary repatriation and also harmonise the provision of voluntary repatriation ensuing the cessation of refugee status.

States must co-operate with one another and share the burden of hosting refugees to ease the pressure on other states in hosting refugees. South Africa should use its influence on the African continent as well as internationally to request assistance in hosting refugees. This will ease the burden on South Africa and prevent refoulement due to the pressure of hosting large numbers of refugees. This should be employed to improve tolerance by South African citizens towards foreign nationals, which will then prevent hostilities such as xenophobia.

South Africa should therefore encourage member states of the 1969 OAU Convention to amend the Convention and insert a provision which provides for the exception due to compelling reasons as provided by its counterpart, the 1951 UN Convention. Consequently, member states not having incorporated the exception to cessation into their domestic legislations should be encouraged to do so.

South Africa should also apply the exception to the cessation clause in good faith instead, and not to the contrary, refoule or deport refugees without first ensuring whether they qualify under the exception clause. South Africa ought to, at all times endeavor to deal with each case on its merits and refrain from the blanket approach to the refugees' situations.

States should find alternative approach to combat international terror without endangering those who are in need of protection, that is, refugees. The international community should co-operate with one another and offer protection to refugees other

than just paying lip service to the phenomenon of refugee protection. Voluntary repatriation should be applied as it is and not as a disguise for forced return.

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