



**International
Refugee
Rights
Initiative**

PERSPECTIVES ON REFOULEMENT IN AFRICA

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The right to non-refoulement, the right not to be returned to a country where one might face persecution, is the cornerstone of the international regime of refugee protection—if the right to non-refoulement is violated and a refugee is expelled from the country of asylum, any discussion of other rights protections is rendered moot.

While many African countries continue to host large numbers of refugees without violating the principle of non-refoulement, there have been some very worrying instances of refoulement on the continent over the past few years. The trend seems to point towards an increasing wariness on the part of African states to host refugees. It is important, however, to parse out and explore the dynamics which are pushing instances of refoulement and other violations of refugee rights where they occur.

The paper is divided into three sections. First, the unique legal architecture in Africa relating to refugees and return is explored. Second, the paper highlights three instances of refoulement on the continent. Third, it uses the ground work laid by these examples to tease out some of the factors driving refoulement in Africa.

An African Approach to Non-Refoulement

The right of non-refoulement is well-established in international law. In fact, many consider this norm to be part of customary international law, binding even for those states which have not embraced either the 1951 UN Convention relating to the Status of Refugees (1951 Convention) or other treaties.

In Africa, however, this international consensus is supplemented by a distinctive regional approach, enshrined in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) and the African Charter on Human and Peoples' Rights (the African Charter).

The OAU Convention

Expanding the scope of non-refoulement protection

The OAU Convention expands the scope of non-refoulement principle in a number of ways.

First, it applies protection against refoulement to a broader category of people by expanding the definition of refugee to include those fleeing war and internal disturbances.

Second, the OAU Convention clearly explicitly states that the scope of protection against non-refoulement extends to admission to the territory of the state. Article 2(3) of the OAU Convention states that “[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in the territory where his life, physical integrity or liberty would be threatened.” This recognition explicitly broadens the obligation in the 1951 Convention

“not to expel a refugee lawfully in their territory.”¹ In fact, at the time of the drafting of the 1951 Convention there was a clear difference of opinion amongst states on whether this implied a duty to admit refugees. State practice and legal arguments over the years have supported a broader interpretation of the non-refoulement to include admission into the territory of a state, at least for as long as it takes to determine whether any need for protection may exist. The development of this interpretation may, however, be due in part to the explicit recognition contained in the OAU Convention.

Absolute protection

An additional difference between the African regional and international regimes of protection against refoulement can be found in the exceptions to the principle are treated. The 1951 UN Refugee Convention allows for an exception to the non-refoulement guarantee on the grounds of “national security or public order.”² No similar exception to the non-refoulement obligation is found in the OAU Convention. Neither is there an explicit provision describing the circumstances within which expulsion can take place.³

This can perhaps be explained through referring to a unique element of the OAU Convention—the recognition that when refugee obligations become onerous states may appeal for assistance to other states.⁴ The OAU Convention stipulates that “other member states shall in the spirit of African solidarity and international cooperation take appropriate measure to lighten the burden of the Member state granting asylum” (Article II 4). This solidarity may be seen as an alternative mechanism for addressing the possibility that hosting certain refugees may pose a threat to states—rather than allowing expulsion, the OAU Convention encourages states to call on the international community for assistance.

Recognition of the voluntary nature of repatriation

The OAU Convention recognizes the essentially voluntary character of repatriation in article 5. This was an innovation in international law. While the 1951 Convention includes a negative obligation on states not to forcibly return refugees, it does not include a similar positive obligation to ensure that “the voluntary character of repatriation shall be respected in all cases.”⁵

The African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights also addresses refoulement. Not only does the Charter reaffirm the right to seek “and obtain” asylum⁶, it also bans mass

¹ 1951 Convention, art. 32 (1).

² Ibid, art. 32 (2).

³ At the same time it is important to note that the OAU Convention does permit restrictions on refugee rights *within the host State* which may go beyond those contemplated in the 1951 UN Convention.

⁴ OAU Convention, art 2(4).

⁵ OAU Convention, art 5(1).

⁶ A broader expression of the scope of the right to asylum than set out in the International Covenant on Civil and Political Rights.

expulsion and provides that any non-national “legally admitted” can only be expelled with “a decision taken in accordance with the law.”⁷

Recent Cases of Refoulement in Africa

In its annual *World Refugee Survey* for 2006, launched in June, the US Committee for Refugees and Immigrants rated five African countries with a grade of D or F. The USCRI defines a D grade as “significant” refoulement. The Central African Republic and Egypt received D grades. This paper will explore those countries which received an F grade, Burundi, Tanzania and South Africa. The USCRI explains that these grades are given in countries where there were at least 100 cases of refoulement during the year.

Burundi

One of the most shocking instances of enforced return in the recent past occurred in Burundi in June 2005. Between March and June of 2005, UNHCR estimated that 8,000 Rwandan Hutus had entered Burundi looking for asylum between March and June of 2005. Many of these asylum seekers expressed concerns about the implementation of the *gacaca* court system. The *gacaca* courts are communal mechanisms based on traditional reconciliation mechanisms designed to promote justice and reconciliation in the wake of the 1994 genocide. Many of the asylum seekers, however, alleged that *gacaca* could be unfairly manipulated by Tutsi to persecute any Hutu, regardless of whether or not they had taken part in the genocide.

The Rwandan government dismissed these claims—asserting that the fears of Hutus were based on unsubstantiated rumors or, more sinisterly, a desire to evade justice.

On June 11, 2005 a meeting between representatives of the Rwandan and Burundian government concluded that the recent arrivals were “illegal immigrants.” What followed was an incredibly quick deportation exercise in which about 5,000 Rwandans were removed. UNHCR and local organizations were blocked from observing the exercise. Despite this, eyewitnesses observing the repatriation exercise from afar reported that they observed asylum seekers jumping out of trucks to avoid deportation. There were also reports of Rwandan military involvement in the operation.

UNHCR pointed out in response to the exercise that the claims of individuals should have been assessed and that it should have been allowed to monitor the proceedings. Under the circumstances, they considered that the operation “constitut[ed] a violation of the principle of non-refoulement.”⁸

⁷ African Charter, Art. 12

⁸ UNHCR, “UNHCR urges Burundi to stop involuntary returns,” June 14, 2005.

Tanzania

To the East, Burundi's neighbor Tanzania hosts more refugees than any other nation on the continent. UNHCR's estimates place this number at 350,000; the US Committee for Refugees and Immigrants estimates the number to be 549,000.

Despite a long tradition of generous welcome towards refugees, Tanzania's attitude towards the displaced has hardened.

In the wake of a massive influx of refugees from Rwanda following the 1994 genocide, Tanzania began to take a series of extreme measures to keep refugees out. In 1995, Tanzania closed its border to fleeing Burundians and Rwandans.

The Rwandan population has been a consistent target of efforts to induce return. In 1996, following the relatively safe return of thousands of Rwandans in the wake of the destruction of refugee camps in eastern Zaire (now the Democratic Republic of Congo), the UNHCR and the government of Tanzania issued a statement on December 5, 1996, declaring that Rwanda was safe and that a repatriation program would be completed by the end of the year. Previous efforts to repatriate the refugees had met with very limited success, a fact that the UNHCR blamed on the presence of intimidators in the camps. Some 5,000 Rwandan refugees had repatriated by December 12, when at least 35,000 refugees began marching *en masse* deeper into Tanzania. This effort to avoid repatriation was met with force by the Tanzanian military, which turned the group back and forced them to the Rwandan border. Many abuses were reported in the course of the repatriation efforts, including the alleged burning of a church where refugees had sought refuge. UNHCR in the end came out in support of the repatriation while questioning, if not directly criticizing, the use of the military.⁹

In total, approximately 470,000 refugees were repatriated during the exercise.¹⁰ The only refugees who were officially permitted to remain in the country were reportedly some fifty refugees who approached the government and pleaded not to be returned. Thousands of others managed to escape repatriation unofficially by seeking refuge outside the camps or by posing as Burundians. These individuals were transferred to Mwisu camp pending review of their claims.

Similar threats to deport all Rwandans were issued in 1999 and 2002 amid harsh rhetoric. The President of Tanzania, Benjamin William Mkapa characterized the refugee situation as "unbearable."¹¹ In 2002, Tanzanian Minister for Home Affairs Mohammed Seif Khattib was quoted as saying that all 22,000 Rwandan refugees in the country should repatriate by the end of the year and that anyone refusing to return would be "interrogated

⁹ USCR, *Refugee World Survey 1997* and Beth Elise Whitaker, "Changing priorities in refugee protection: the Rwandan repatriation from Tanzania," February 2002.

¹⁰ US Committee for Refugees and Immigrants, *World Refugee Survey 1997*.

¹¹ IRIN, "BURUNDI-RWANDA-TANZANIA: Meeting held of voluntary repatriation of refugees," January 15, 2002.

and [have] steps taken against them.”¹² The current president, Jakaya Kikwete, has continued to call for repatriation, has continued to call for return, claiming that “a country like Burundi is now peaceful. Burundian refugees have no reasons to continue living in refugee camps.”¹³

This hostility is echoed at the local level, where the district coordinator for Kibondo in 2005 ordered all Burundian refugees to produce letters explaining why they could not return¹⁴

In October 2004, the Tanzanian government summarily returned 68 Burundian asylum seekers. Although the order was undertaken by the local authorities, national authorities later defended the action, saying that they did not believe that Burundians should be granted prima facie refugee status. While the government did have discretion to withdraw its group designation of Burundians, it did not do so. Even if they had the Burundians were entitled to an individualized determination of their protection claims.¹⁵ The UNHCR reported in February 2005 that a further nine Burundians had been expelled in January. The UNHCR asserted that it had interviewed these asylum seekers.¹⁶

Kigali newspapers have reported just this month that approximately 500 Rwandan refugees and Kinyarwanda-speaking Tanzanians were expelled to Rwanda. Many of the refugees said that their property was confiscated in the process. The Rwandan minister for Foreign Affairs said that the Tanzania authorities had “on the operation to evict all Kinyarwanda-speaking Tanzanians and Rwandan refugees and destroying or seizing their property.”¹⁷ It is not clear whether any of these individuals were officially-recognized.

In the context of the harsh rhetoric used by the government and the documented incidents of forced return, it is clear that refugees are under increasing pressure to repatriate. In this context the voluntary nature of return programs may be called into question.

South Africa

The third African country to receive an F in relation to refoulement policy in Africa is South Africa. This was based, at least in part, on the deportation of thousands of Zimbabweans who were, according to USCRI, not given adequate opportunity to prove that they were asylum seekers. Reports indicate that 2,000 Zimbabweans are being deported from South Africa each week, many of whom slip back across the border on a regular basis.¹⁸

¹² Asia Intelligence Wire, “‘All 22,000’ Rwandan refugees in Tanzania set to return home by year end,” October 10, 2002.

¹³ “Kikwete calls for speedy repatriation of refugees,” *The Guardian* (Tanzania), January 17, 2006.

¹⁴ USCRI, *World Refugee Survey 2006*, p. 95.

¹⁵ Rutinwa, Identifying Gaps in Protection Capacity, March 2005.

¹⁶ UNHCR, UNHCR Concern on Forced Return of Burundians, February 1, 2005; USCRI, “Contrary to International Law, Tanzania Continues Forcible Returns of Burundian Refugees,” February 4, 2005.

¹⁷ Baguma, Stephen and Charlotte Kyakwera, “Govt, Tz in Talks,” *The New Times*, June 12, 2006.

¹⁸ UN Integrated Regional Information Network, “South Africa: More Zimbabweans seek asylum,” June 21, 2006.

The situation of Zimbabwean asylum seekers is made particularly difficult by the fact that there has been a long-term and well-documented influx of Zimbabweans coming to South Africa in search of economic opportunity. The sheer number of Zimbabweans in South Africa is daunting, and according to UNHCR, Zimbabweans constituted 38% of all asylum applicants.¹⁹

Although the South African government contends that the deportees are “illegal” immigrants, and not refugees, numerous human rights organizations have expressed concern about this assessment. In November 2005, Human Rights Watch issued a report called “Living on the Margins: Inadequate protection for refugees and asylum seekers in Johannesburg.” The report highlighted a number of obstacles that were faced by asylum seekers in obtaining recognition as refugees. These included long backlogs in the processing of asylum claims and difficulties even in accessing refugee reception offices (RROs). For example, asylum seekers entering South Africa are given a temporary permit authorizing a 14 day stay in order to allow them to present themselves to a refugee reception office, which should issue an asylum seeker permit. In practice, however, access to RROs is often not possible within the stipulated 14 days, due to long lines.

In addition, a number of organizations have asserted that there are worrying signals about the ways in which Zimbabwean applications are approached. Solidarity Peace Trust reported in November 2004 that Zimbabweans were forced to line up separately from other asylum seekers in entering the RRO. They also estimated that on a particular day in October 2003 when they observed the RRO only five of the approximately 500 Zimbabweans were able to access the centre.²⁰ They also argued that refugees faced skepticism from officials at all levels of the process and that there was, in particular, a lack of understanding of the situation in Zimbabwe. For example, advocates have observed that as soon as an asylum seeker mentions a lack of food or resources in Zimbabwe, they are determined to be an economic migrant, without due regard for the manipulation of assistance by the Zimbabwean government.

What is driving refoulement?

Despite the progressive legal protections of refugees in African law, a leading African expert, Bonaventure Rutinwa, reflecting on the state of affairs in 1999, in the aftermath of Rwanda, asserted: “The non-refoulement norm is virtually a dead letter in Africa.”²¹

The current state of affairs may be less conducive to such a statement of despair, but the incidents of refoulement in the region are certainly continuing for concern about the non-refoulement principle. A more detailed examination of the factor threatening the health of the principle

¹⁹ Ibid.

²⁰ Solidarity Peace Trust, “‘No War in Zimbabwe’: An Account of the Exodus of a Nation’s People,” November 2004.

²¹ Rutinwa 1999.

Failure to integrate norms

One factor which allows for refoulement is the limited integration of the international non-refoulement norm into national law and practice.

For example, in Tanzania, the national refugee legislation contains a more restrictive definition of non-refoulement than international law. Tanzanian law provides only that “no order shall be made to deport an asylum seeker or refugee” if the competent officials are of the opinion “that such person will be tried and punished for an offence of a political character or is likely to be subjected to physical attack.”²²

More important than this subtle legal distinction, however, is the fact that many immigration officers do not know about or fully understand how the non-refoulement provision should affect their jobs.

Bonaventure Rutinwa, in his assessment of protection capacity in Tanzania, reported that recognized refugees may be deported if they are unable to produce documents attesting to that fact. He noted that immigration officials took the position that if someone was unable to produce documentation he or she must simply be unauthorized. While the refugee department was sometimes contacted when a person claimed to be a refugee, immigration officers did not think that this was required.

In the case of South Africa, similar concerns were raised by Human Rights Watch. In an environment where immigration officers are focused on enforcement and unaware of the sensitivity of asylum cases, genuine refugees who are simply undocumented might be deported. This problem is exacerbated by delays in the issuance of documentation and the lack of training of, and cooperation between, police and immigration officials could lead to refoulement.

Regional Politics

Another factor driving refoulement is regional politics. Countries in the region, as outside it, react to asylum seekers in the context of their international relations with regard to the country of origin of the refugees or asylum seekers. In each of the situations described above, the sending nation is trying hard to present itself as “safe.” Rwanda has seen the return of displaced populations as critical to its self-image as a new rights-respecting and ethnically-harmonious nation. The Comprehensive Peace Agreement in Sudan has given the government of Sudan ammunition to assert that the situation there is under control. Similarly the government of Zimbabwe has attempted to present asylum claims as merely the efforts of its opponents to malign its good name on the international stage.

It is important also to remember that this pressure on states is not new. The apartheid government in South Africa, for example, was able to strong-arm certain governments

²² Kamanga, Khoti, “The Tanzania Refugees Act of 1998: Some Legal and Policy Implications,” *Journal of Refugee Studies*, Volume 18, No. 1.

into returning certain refugees.²³ This pressure was acknowledged in the OAU Convention, which provides that the grant of asylum is a peaceful and humanitarian act which should not be regarded as unfriendly by any member state.²⁴

Certainly states may have their own reasons for wanting to promote a view of neighboring countries as “safe.” This is the case of South Africa, for example, with regard to Zimbabwe. The government has taken an approach of quiet diplomacy in addressing the crisis, and it is clearly invested in not showing that policy to be a failure. Also, with almost three million Zimbabweans living in South Africa already and asylum cases seriously backlogged, the government is undoubtedly concerned about opening the floodgates.

Tanzania, however, has a proud tradition of fending off international pressure, for example from apartheid South Africa or even from its own colonial British leaders whose commands not to shelter refugees from the Portuguese colony of Mozambique were ignored by generous local populations.²⁵

Local politics

Given Tanzania’s proud tradition of resistance to international pressure it seems unlikely that this alone could be driving the pressure to return. This brings to the fore the internal political forces that are driving refoulement.

For example, in Tanzania, once welcome partners in development under Nyerere, refugees are now presented as threats to physical and economic security. Some of this concern about security is warranted; there were certainly violent elements among the refugee outflow from Rwanda, and Burundian refugees in Tanzania have reportedly supported and participated in various rebel movements. Innocent refugees have been branded as criminals as a result of Tanzania and the international refugee regime’s failure to address very real security concerns.

There is in fact international machinery for addressing these security concerns. Both the 1951 UN and OAU Conventions provide for the exclusion from refugee status of individuals who have committed serious international crimes. While these look at past actions, and not future threats, those who have committed crimes are often the instigators of new ones. Additional other provisions, such as an exception to non-refoulement in the 1951 Convention and the burden-sharing and safe location of camps’ provision of the OAU Convention are intended to address security threats. International humanitarian law also requires a strict separation of armed or military elements from refugee populations: military or armed activity or status is incompatible with refugee status.

In describing Africa’s previously generous record of refugee hosting, scholars often make

²³ Rutinwa, “The end of asylum? The changing nature of refugee policies in Africa,” May 1999.

²⁴ 1969 OAU Convention governing the specific aspects of refugee problems in Africa, art. 2(2).

²⁵ Sreeram Sundar Chaulia, “The Politics of Refugee Hosting in Tanzania: From Open Door to Unsustainability, Insecurity and Receding Receptivity,” *Journal for Refugee Studies*, June 2003.

reference to the fact that yesterday's refugees were seen as freedom fighters strategically retreating before returning to the struggle, and therefore enjoyed widespread public support associated with their cause. Today's refugees may also be seen as retreating forces, but in the fractured ethnic and political context of today's wars, these refugee warriors do not enjoy the sympathy of host populations. On the other hand they may be demonized as "infecting" the host country with their nation's strife.

The perception that refugees are security threats has hardened public attitudes towards refugees, but it has also been argued that geopolitics have fuelled the perception of refugees as threats to economic security. Economic crisis in Africa has increased competition over resources. In addition, some scholars have pointed out that IMF structural adjustments forced many governments to gut social programs, making even the limited assistance offered to refugees by aid agencies a source of tension.

Ethnic and political tensions and the scapegoating of refugees have also been fueled by the rise of competitive politics in Africa. As parties have had to compete for votes, they have increasingly tried to mobilize their own bases of support against real or imaginary outside threats. The growth of xenophobia has incited host populations to strike out against refugees as well as encouraging more enforcement and control-minded immigration policies which are hostile to refugees.

International politics

Another factor which has driven refugee refoulement in Africa has been international politics.

In some ways the international discourse on refugee issues has only endorsed the security concerns of host states. For example, the UN Security Council has recognized that refugee flows may constitute "threats to international peace and security."²⁶ To a certain extent this is a recognition of fact and a positive step because it opens the door for more robust international action in crisis situations; it has also underlined the extent to which refugees may be regarded as threats.

The international "war on terror" has only intensified this viewpoint. While this has had the greatest impact in the West, South Africa also deported at least one Jordanian for terror ties despite the fact that he had applied for asylum. The full extent of the impact has not, however, been fully explored from mass expulsions in Djibouti; increased surveillance of urban refugees in Kenya; changes in resettlement operations and a rise in the number of deaths of those working with refugees on the front lines. This is an area where further collaborative research between groups in the Global North and South might be useful.

Another element of international policy which is allowing an erosion of standards is the numerous attempts in Europe to deflect its responsibility to Africa. This has taken the form of readmission agreements, summary returns and discussion of external processing

²⁶ See UN Security Council Resolution 1296.

or regional protection zones in Africa. Incidents like the October 2004 and March 2005 deportations from the Italian island of Lampedusa to Libya without proper screening or the chance to apply for asylum is a clear indication that Europe is trying to shift the refugee “burden” to Africa. In an atmosphere of increasing wariness towards refugees, the impression that these individuals are Europe’s unwanted cannot be helpful. In addition, deporting asylum seekers to Libya, a nation with no national asylum system and a poor human rights record including instances of refoulement, signals that rights may be sacrificed to expediency.

The way forward

In considering the way forward it is important to note that there are rays of hope. While this year five countries were graded with a D or F, by the USCRI’s *World Refugee Survey*, 2006 more, a total of eight, received grades of A or B. Benin resisted calls by the Togolese authorities to return roughly 30,000 of its nationals. Chad continued to host more than 200,000 Darfurian refugees, even as violence in that region spilled over into its borders.

One mechanism that could be used is increased monitoring and engagement from NGOs. USCI grades are products of the information available, and so countries which are more vigorously monitored are more likely to receive poor grades. South Africa, for example, is rated with an F, but this is in part because numerous South African NGOs are documenting and advocating for better policies.

It is also important to consider the possible advantages of transnational research and advocacy. The International Refugee Rights Initiative is, for example, working on a discussion paper which will attempt to illuminate the connections between African and European asylum policy. We hope that the paper will be launched at a small discussion session in late 2006 and that this discussion will help to promote cooperative advocacy. There are already examples of this type of advocacy succeeding. In 2003, Swiss and Senegalese NGOs banded together to defeat an accord that would have allowed the return of any undocumented asylum seeker to Senegal.

Another place where a regional focus might be useful is in the use of African institutions. One of the historical failings of the refugee conventions have been the lack of an adequate supervisory mechanism. In Africa, this may be remedied to a certain extent by the existence of the region’s human rights mechanisms, the African Commission on Human and Peoples’ Rights and newer institutions like the African Court and the African Peer Review Mechanism, created under NEPAD.

Indeed, the role of international institutions is critical in understanding the operation of the protection of refugees in Africa. Globally, a shift has occurred in the conduct of international policy, which has resulted in the absolute sovereignty of states being eroded and the role of international actors, from multilateral institutions, to corporations and NGOs increasing. Although states maintain a prominent role, international institutions like the UNHCR often have an even greater impact on the quality of protection

experienced by refugees. The new AU Constitutive Act, which explicitly recognizes the right for the African Union to intervene in member states “in respect of grave circumstances.”²⁷ This recognition opens the door for even greater engagement of multi-lateral institutions, and the AU in particular, in the protection of rights within states.

NGOs can also be very useful and active in creating community outreach and public awareness campaigns intended to combat xenophobia. One IRRI project which attempts to delve into this issue a bit more obliquely is a project which we are taking on jointly with the Social Science Research Council in New York. This project will attempt to juxtapose social science and activist research to illuminate a broader understanding of the nexus between citizenship and forced migration, both in understanding how contested identities can fuel conflict but also in understanding how local conceptions of community belonging can determine possibilities for the integration of refugees.

²⁷ AU Constitutive Act, art. 4(h).