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A CRITUQUE OF THE REFUGEES ACT OF 2006 IN RELATION TO THE NORMS OF INTERNATIONAL REFUGEE LAW, INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW.

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Abstract

The work attempts to do a critical analysis of the Uganda Refugee Act of 2006 in the context of the norms of international Law

Introduction:

The legal framework for the protection of Refugees is multi-disciplinary that borrows rules from International Refugee Law (IRL), International Human Rights Law (IHRL) an International Humanitarian Law (IHL).[1] In 2006 Uganda passed the new Refugees Act that was intended not only solidify its Refugee law protection but also domesticateits international obligations.[2] The Act has now been in operation for almost 10 years having passed the requisite Regulations in 2010.[3] This paper intends to make a critical examination on the extent to which the Refugees Act conforms to Uganda's treaty obligation under IRL, IHRL and IHL. This paper argues that the Act does not optimally address Uganda's treaty obligations under the above three legal regimes having failed to address the most fundamental of them; *'the norm of nonrefoulement'*.

ii) The Interdependency between IRL, IHRL and IHL in the Protection of Refugees.

The international legal framework for the protection of refugees is primarily composedof three interrelated and mutually reinforcing body of rules they are; IRL, IHRL and IHL.[4] The interplay among the three body of rules can never be denied. As Antonio andSanchez reiterate, that there are instances during an armed conflict where the three bodyof rules operate successively and/or concurrently.[5] Indeed, in instances where a refugeeis trapped in an armed conflict, he will need the protection of IRL as a refugee, he will

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[1] Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights, "Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law in the Context of Armed Conflict" (2004) Available at https://www.refworld.org/docid/4a54bc03d.html [accessed 4 April 2020]

[2] See: The Long title to the Refugees Act of 2006 Laws of Uganda.

[3] The Refugees Regulations of Uganda S.I No. 9 of 2010.

[4] Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights, "Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law in the Context of Armed Conflict" (n.1) Page.7

[5] Pablo Antonio, Fernandez-Sanchez, "The Interplay between International Humanitarian Law and Refugee Law" (2010) Vol. 1 Issue 2 Journal of International Humanitarian Legal Studies. Available at: https://brill.com/view/ioumals/ihls/1/2/article-p329 5.xml?language=en. [accessed on 4/4/2020]

be a victim of a conflict for which IHL will come into play and ultimately the overbearing protection of IHRL that is always available for all humans in times of peace and war.[6] The general application of IHRL did not go unnoticed by the ICJ in its ***Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory***, the Court expanded the argument in this sense:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. [7]

Arguments have also been advanced that the interplay among the three body of rules are rooted in the very nature of protection of humanity espoused by the three legal regimes.[8] Moreover, regardless of their separate paths of development and application, they all converge in the protection of certain values and principles, viz the prohibition of torture, prohibition of indiscriminate killings, freedom from discrimination on account of race, political affiliation, country of origin and religion among others.[9] Consequently it is not surprising that the Convention on the Rights of a Child which isan IHRL instrument was designed to cover the rights of a child within the three areas of IRL, IHL, and IHRL.[10] Lastly on this matter, it has been argued and rightly so that the spontaneous growth of the refugee problem has transcended the limits set by the 1951 Convention as well as the 1967 Protocol to the extent that a multi-disciplinary approach is required to regulate the international refugee problem. [11] Truthfully, at the time of the writing of the convention together with its Protocol, several refugee issues have emerged that were never envisioned by their framers.[12] New root causes of refugee problems such as non-international armed conflicts have been recognised by the Additional Protocol II to the Geneva Conventions[13] but missing within the Convention as well as the Protocol; issues

[6] Stephane Jaquemet, "The Cross-fertilization of International Humanitarian Law and International Refugee Law" (2001) Vol. 83 No. 843 IRCC.

[7] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004.

[8]ICRC, "Humanitarian Law, Human Rights and Refugee Law-Three Pillars" (2005) Available at: https://www.icrc.org/en/doc/resources/documents/statement/6t7g86.htm. [Accessed on 4/4/2020].

[9] See: Articles 2, and 6 of the International Covenant on Civil and Political Rights 1966, Common Article 3 of the Geneva conventions 1949 and Articles 3,5, 32 and 33 of the UN, Convention on the Status of Refugees 1951.

[10] See: The Preamble to the Convention on the Rights of a Child of 1989, Article 2 deals with the obligation of state party to address the Rights of a child within the Convention, Articles 38 and 39 deal with the rights of a child during an armed conflict together with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000 and Article 22 of the Convention deals with child- refugees.

[11] Rechel Bret and Eve Lester, "Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking-ahead-A non-governmental organisation's view" (2001) Vol. 83 No. 823. Available at https://www.semanticscholar.org/paper/Refugee-law%3A-and-Brett-Lester/241e1c9b7f2eb1a6a50370d2f5f32b9678292f7d. [Accessed on 4/4/2020]

[12] Ibid.

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977.

to do with large scale refugee movements were all not addressed. Indeed some of these problems have been addressed by the later refugee instruments such as such the Organisation of African Union Refugee Convention[14] and the Cartagena Declaration on Refugees[15] but both operate at the regional level and as such they lack universal applicability and acceptability. Therefore to address all these issues IRL had to borrow the legal rules from the dependable and ever evolving IHL and IHRL.

iii) The Legal Framework Governing Refugees in Uganda.

Uganda has been a refugee hosting country for a very long time having had its first batch of refugees in the 1930s before its independence. [16] Sharpe and Namusobya contend that over 7000 refugees from Cyprus, Italy, Palestine, Poland and Syria found their way into Uganda the then British Protectorate in the late 1930s only to be repatriated or to be resettled later by the British imperialists in Europe.[17] Ahimbisimweon the other hand traces Uganda's experience with refugees after the Second World War having hosted European refugees from countries like Germany, Romania and Australia including 7000 Prisoners of War from Poland and were settled by the Britishcolonialists at Nabyeya the present day Masindi district and Kojja (Mpuge) the presentday Mukono district.[18] The International Refugee Rights Initiatives (IRRI) recounts the history of refugees in Uganda with the official establishment of cross boarder boundary by the British government in 1914 between Uganda's West Nile and Southern Sudan to stop the massive influx of South Sudanese into Uganda. [19] This consequently necessitated the enactment of the Control of Refugees from Sudan Ordinance of 1955 that was later replaced by the Postindependence legislation, the Control of the Alien Refugees Act (CARA) of 1960.[20]

Both the CARA and the Control of Refugees from Sudan Ordinance have been described as legislations that viewed the refugee problem as being temporal that

[14] Organisation of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, (OAU Refugee Convention) 10 September 1969, 1001 U.N.T.S. 45, Available at http://www.rewfold.org/docid/3ae6b36018.html [accessed 4 April 2020]

[15] UN High Commissioner for Refugees (UNHCR), The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America, June 2013, PPLA/2013/03, available at: https://www.refworld.org/docid/51c801934.html [accessed 4 April 2020].

[16] Marina Sharpe and Namusobya Salima, "Refugee Status Determination and the Rights of Recognised Refugees under Uganda's Refugees Act 2006" (2012) Vol. 24 Issue No.3 International Journal of Refugee Law (Oxford University Press). Available at:https://www.rsc.ox.ac.uk/files/files-1/er-refugee-status-determmation- rights-africa-2010.pdf. [Accessed on 4/4/2020].

[17] Ibid

[18] Frank Ahimbisbwe, "The Legal Status of Refugee Protection and State Obligations in Uganda" (2016) Available at https://www.researchgate.net/publication/312027607 The Legal Status of Refugee Protection and State Obl igations in Uganda [accessed on 5/4/2020]

[19] IRRI, "Uganda's Refugee Policies: The history, the Politics and the way forward" (2018) Rights in Exile Policy Paper. Available at: https://reliefweb.int/report/uganda/rights-exie-policv-paper-ugandas-refugee-policies- history-politics-way-forward. [accessed on 5/4/2020]

[20] Ibid.

required an ad hoc based solution.[21] Mwalimu described the CARA as an ***'Act based on control rather than protection'*** and as such it explains why the minister was givenwider discretionary powers by the Act.[22] [23] Indeed the long title to the CARA explains everything it provided, it stated ***"An Act to make provision for the proper control of alien refugees, for regulating their return to their country of residence and for making provision for their residence while in Uganda"***[23] Nevertheless by the time it was enacted Uganda had never ratified or acceded to the 1951 Refugee Convention.

Be that as it may, Uganda continued to be a host of refugees from its neighbours givenits strategic location within the Great Lakes region.[24] Indeed starting with 1952-1960 following the Mau Mau uprising in Kenya, Uganda housed refugees from Kenya.[25] In 1959 over 78,000 Rwandese escaping the civil war trekked into Uganda as refugees.[26] Again in 1950s and 1960s in the Democratic Republic of Congo following the assassination of Patrice Lumumba, the civil strife that ensued afterwards led to an estimated 23,000 Congolese refugees into Uganda. [27] Again in 1955 the Anyanya uprising within the then Anglo-Egyptian Condominium of Sudan led about 80,000 South Sudanese to cross into Uganda.[28] On the other hand, Ugandans have also faced a similar trajectory following the seizure of power by Idi Amin in 1971 that led to a massive influx of Ugandan refugees into South Sudan.[29] Similarly, after the overthrowof Idi Amin in 1979 and the devastating effects of civil war following the NRA war additional refugees were created. Moreover it has been stated that by 1985, 7% of the entire Uganda's population were leaving as refugees.[30]

However, in the positive turn of events, Uganda in 1976 acceded to the United Nations Convention Relating to the Status of Refugees of 1951,[31] as well as the Protocol to the Convention of 1967.[32] Subsequently Uganda also acceded to the regional refugee law

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[21] Maria Sharpe and Namusobya Salima (n. 16)

[22] C.Mwalimu, "The Legal Framework on Admission and Resettlement of African Refugees with an Emphasis on Tanzania, Kenya and Uganda", (2004) Emory International Law Review 464.

[23] Control of Alien Refugees Act of 1960 Cap.62 Laws of Uganda Repealed by the Refugees Act of 2006.

[24] Zachary Lomo, Andrew Nagagga and Lucy Hovil, "The Phenomenon of Forced Migration in Uganda: An Overview of Policy and Practice in an Historical Context" (2001) Refugee Law Project Working Paper No. 1. Available at https://refugeelawproiect.org. [accessed on 5/4/2020]

[25] Ibid

[26] Zachary Lomo, Andrew Nagagga and Lucy Hovil (n.24) page. 5

[27] Ibid.

[28] Ibid

[29] IRRI, (n.15) page.4

[30] Ibid.

[31] UN, Convention Relating to Status of Refugees adopted on the 28th day of July 1951 (herein after referred to as the 1951 Convention). The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to resolution 429(V), adopted by the General Assembly of the United Nations on 14 December 1950. Uganda acceded to the Convention on 27, September 1976 with reservations on Articles 7, 8, 9, 13, 15, 16, 17, 25 and 32. Available at https://treaties.un.org/Pages/ViewDetailsll.aspx?src=TREATY&mtdsg no=V- 2&chapter=5&Temp=mtdsg2&clang= en. Accessed on 4/4/2020.

[32]UN, General Assembly, Protocol Relating to the Status of Refugees adopted on the 31st day of January, 1967, United

instrument, the OAU Convention Governing Specific Aspects of Refugee Problems in Africa of 1969.[33] Indeed Uganda also ratified/or acceded to various IHRL instruments including; the International Covenant on Civil and Political Rights (ICCPR)[34], the International Covenant on Economic Social and Cultural Rights (ICESCR) [35] , International Convention on Elimination of All Forms of Racial Discrimination (CERD)[36], Convention Against Torture and Other Cruel Inhumane and Degrading Treatment or Punishment (CAT) [37] , the Convention on the Rights of the Child [38] , Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)[39], the African Charter on Human and People's Rights of 1986, African Charter on the Welfare of the Child of 1999, and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003. Additionally Uganda is also a signatory to various IHL instruments that is the Four Geneva Conventions and the Additional Protocols to the Conventions. [40] Moreover Uganda being a party to the various instruments attracts serious treaty obligations mostly after domestication.[41] [42] Malcom Shaw reiterates the fundamental principle of treaty law of '***pacta sunt servanda'*** meaning that ***'the treaty bind parties to them and they must fulfil their treaty obligations in good faith'***[41] This was also reaffirmed in Article 26 of the Vienna Convention on the Law of treaties that rests on a belief that in the absence of an understanding that the parties would perform their treaty obligations, in good faith there would be no reason why parties would enter into those obligations in the first

Nations, Treaty Series, vol. 606, p.267, available at: https://www. refworld.org/docid/3ae6b3ae4.html [accessed 4 April 2020]

[33]Organisation of African Unity (OAU), Convention Governing Specific Aspects of Refugee Problem in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, available at: https://www. refworld.org/docid/3ae6b36018.html [accessed 5 April 2020]

[34]International Covenant on Civil and Political Rights opened up for signature on 16 December 1966, entered into force 23 March 1976. Uganda acceded to the Convention on 21 June 1995.

[35]International Covenant on Economic Cultural and Social Rights opened up for signature on 16 December 1966 entered into force 3 January 1976 and Uganda acceded to the Convention on the 21st April 1987.

[36]International Convention on Elimination of All Forms of Racial Discrimination opened up for signature in 1965 and entered into force January 4 1969. Uganda acceded to the Convention on 21, December 1980.

[37]Convention Against Torture and Other Cruel Inhumane and Degrading Treatment or Punishment opened up for signature on 10 December 1984 entered into force June 26 1987 and Uganda acceded to the Convention on 26 June 1987.

[38]Convention on the Rights of the Child entered into force 2 December 1990 and Uganda ratified the Convention on 16 December 1990.

[39] Convention on Elimination of All Forms of Discrimination Against Women adopted in December 1979 and entered into force 3 September 1981.

[40] Uganda Acceded to the Geneva Conventions on 18 May 1964 and to both Additional Protocols on 13 March 1991. The Geneva Conventions were incorporated into domestic law in 1964 through the Geneva Conventions Act. The Additional Protocols have still todate not incorporated into domestic law nevertheless Uganda would be bound by their provisions since most of them constitute of a body of Customary International Law.

[41]See: Article 123 of the Constitution of Republic of Uganda 1995 (as amended); and the Ratification of Treaties Act Cap. 204 Laws of Uganda.

[42]Malcom N. Shaw, "International Law" Cambridge University Press 8th Ed 2017 Page 685

place.[43]

Uganda having been a party to those enormous treaties had no choice but to discard the CARA which some believed was not in line with the new Constitution of 1995 and the preceding regional and international treaty obligations.[44] It follows that after intensive consultations and discussions, which were kick started in 1998, the Refugee's Act as well as the Refugee Regulations were enacted in 2006 and 2010 respectively. [45] Moreover, the passing of the Refugee Act was long overdue given the massive numberof refugees Uganda was hosting by the time it was passed.[46] [47] This explains why the Act was welcomed by majority of the refugee activists. Stefano Severe the then UNHCR representative in Uganda remarked while at the ceremony to mark World Refugee Day; ***"Asylum seekers have been accorded a very good law, which embodiessome of the best regional tenets on refugee law"*** Apollo Nsibambi the then Ugandan Prime minister also noted; ***"The Refugees Act 2006 epitomizes Uganda's unwaveringliberal policy towards refugees who seek protection here until they feel it is safe for them to return to their countries of origin".***[47] Indeed the Refugees Act and Regulations have been hailed by UNHCR as ***"unquestionably constituting the most progressive refugee law in Africa''***[48]

Despite the Act being branded as the most progressive law on the African soil, this paper intends to examine the degree to which it conforms with IRL, IHRL, and IHL legal regimes. This paper argues that some of the standards set by the Refugees Act fall short of its regional and international obligations set forth under the above international legal regimes.

iv) The Refugees Act and IRL Framework:

As I earlier stated Uganda is a signatory to the Refugee Convention of 1951, the Protocol to the Convention of 1967 and the OAU Refugee Convention of 1969. The preceding international and regional instruments respectively form the fresh and bloodof IRL that Uganda could possibly be a signatory. The question would then be, to what extent has the Ugandan Refugee Act represent the preceding instruments owing to the fact that it was enacted to domesticate those instruments. Indeed the Long title to the Refugees Act provides: *"**An Act to make new provision for matters relating to refugees, in line with the 1951 Convention relating to the status of refugees and other***

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[43] Ibid

[44] Refugee Law Project, "A critique of the Refugees Act 2006" Available at https://www.refugeelawproiect.org/files/legal resources/RefugeesActRLPCritiaue.pdf. [Accessed on 5/4/2020]

[45] Ibid.

[46] According to the official statistics of UNHCR Uganda was hosting about 140,000 refugees all from the neighbouring countries of Burundi, DRC, Kenya, Rwanda and South Sudan.

[47] UNHCR, "Uganda's progressive Refugee Act becomes Operational" Vanesssa Akello 22 June 2009. Available at https://www.unhcr.org/news/latest/2009/6/4a3f9e076/ugandas-progressive-refugee-act-becomes-operational.html. [accessed 5/4/2020]

[48] UNHCR (2018) CRRF: Review of Practical Application in Uganda.Geneva:UNHCR

international obligations of Uganda relating to the status of refugees...”[49]

I wish to state just like other commentators that the Refugees Act provides for what is more closer that is provided for within the preceding instruments given the fact it is an offshoot of the two conventions.[50] Moreover the 1951 Refugee Convention provides for the bare minimum/baseline for which member states could co-opt or maximise and not otherwise.[51] I therefore wish to highlight within this study some of the few areas which I believe the Act falls short of some of the legal norms of IRL.

1. Who is a refugee?

A person qualifies to be a refugee as soon as he meets the criterion set by the definition of who is a refugee under the 1951 Refugee Convention on Refugees as well as its Protocol. [52] Therefore any definition set by any legislation should bring out the definition of who a refugee is with precision otherwise persons may be denied of their right to asylum due to ambiguities created by the law. The definition of who is a refugee under the Uganda Refugees Act is set under section 4 of the Act. However, if we are to look at the *‘UNHCR hand book on procedures and criteria for determining the refugee status ’,* the definition of who a refugee is should include a refugee “sur place” which is elusive under the Ugandan Refugee Act.[53] A refugee “sur place” refers to that person who left his country not as refugee but who becomes a refugee at a later date.[54] This might happen where circumstances develop in his country of origin that would manifest the development of a well-founded fear of prosecution in case he returns home. Therefore, with the exclusion of such categories of refugees, our Refugees Act falls short of the IRL standards.

2. The Refugee Status Determination provided for within the Act.

As Jahid reiterates, the procedures for determining the requirements of who qualifies to be a refugee were not set by the 1951 Convention.[55] Moreover it was presumed that contracting states would set up the administrative arrangements and procedures to determine who should be granted a refugee status or not.[56] However such procedures have to be curtailed in a friendly manner given the vulnerability and serious difficulties the refugees encounter while they are in an alien environment. Otherwise such

[49]The Refugees Act of 2006 Laws of Uganda
[50] Sharpe and Namusobya (n.17) Page. 565
[51]See: Article 5 of the 1951 Refugee Convention.
[52]Rafiqul Islam and Jahid Hossain (eds), “An Introduction to International Refugee Law” Martinus Najhoff Publishers 2013 page.37
[53]UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the Protocol Relating to the Status of Refugees” Available at https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [accessed 6/04/2020]
[54] Ibid
[55]Rafiqul Islam and Jahid Hossain (eds) (n.52) page 37
[56] Ibid.

technicalities would defeat the purpose of the discretion and consequently lead to the denial of the refugee status to the would be potential refugees. For example section 19 (1) of the Refugees Act provide for a *'30 day rule '* upon arrival in Uganda for which a refugee would make a written application to the Eligibility Committee for the grant of the refugee status. The above section sets two requirements the *first* requirement is the time frame for which a refugee is supposed to proffer his application that is within his first 30 days upon arrival in Uganda and *secondly* the form of the application, that is it must be in writing. Surely this is unrealistic given the state of refugees that cross into Uganda majority of whom being illiterate and vulnerable.[57] It therefore goes without saying that as a result of the lack of flexibility with such rules many asylum seekers would be denied the refugee status which fundamentally negates the intention of the framers of the 1951 Refugee Convention.

3. The status given to the UNHCR in regards to Administrative matterswithin the Act.

The office of the UNCHR is creature of the Statute of the UNHCR having been enactedin 1950 by United Nations General Assembly Resolution.[58] The office of the UNHCR among others functions provide international protection to refugees for and on behalf of the United Nations.[59] Moreover the UNCHR has in each and every contracting state a country representative that performs its functions.[60] The agency works closely with host governments to protect and assist refugees and to find long-term solutions to their problems.[61] Paradoxically under the Act, the UNHCR is given a third party role of beingan observer. This wouldn't be a problem given the fact that it operates on a voluntary and on a non-political basis.[62] That said however and considering the expertise it wieldswithin the refugee issues it should have been considered for a pivotal role within the refugee administration. Moreover in Uganda the office of the UNHCR performs functions such as forwarding applications to the Eligibility Committee for those applying for refugee status [63] , to attend where necessary the proceedings of theEligibility Committee as well the Appeals Board among others.[64] It follows that the Agency has no committee where it is a member to the extent that the refugee administrative structure is only left to the Ugandan politicians who lack the technical knowledge within the refugee field.[65] This negates the spirit for which the organization

[57]Refugee Law Project (n.44) page. 13

[58] Statute of the Office of the United Nations High Commissioner For Refugees adopted by the General Assembly Resolution 319 (IV) on 3rd December 1949.

[59] ibid

[60]UNHCR, "Government as Partners" Available at https://www.unhcr.org/governments-as-partners.html [accessed on 6/4/2020]

[61] Ibid

[62] See: Article 1 of the Statute of the Office of UNHCR.

[63] See: Section 19 (2) & (3) of the Refugees Act.

[64] See: Section 18 of the Refugees Act

[65] Ibid Section 11 of the Act

was created; a more inclusive role is needed to be given to the office of the UNHCR.

The Refugees Act and IHRL.

The Universal Declaration of Human Rights as well the Vienna Declaration and Programme of Action emphasize the inherent right of man to enjoy human rights as his/her entitlements by virtue of being born human. [66] These rights are universal, indivisible, interdependent and interrelated.[67] Indeed the UN Charter in its preamble proclaims the protection of human rights and respect of fundamental freedoms for all without distinction as to race, sex, religion and language.[68] Again Article 14 of the UDHR provides for the rights of individuals to seek and apply for asylum in other countries for the sole purpose of escaping persecution from their countries of origin.[69] In General Comment No. 15 the Human Rights Committee (HRC) enlightened that the enjoyment of rights provided for within the convention is not only limited to citizens of state parties but must be applicable to all individuals regardless of their nationality or stateliness.[70] Moreover, the UNHCR Executive committee in Conclusion No.82 calls on states to treat asylum seekers and refugee with fidelity to human rights and refugee law standards set out in the various international instruments.[71] [72]

That well said, Uganda as we noted is a signatory to most of human rights instruments that make provisions for different rights that are also owed to refugees. In addition, within the Refugee law framework, there are specific rights that are provided for as *lex specialis*[12] Indeed even the Ugandan refugee Act has some provisions that address refugee rights.[73] However, the question would then be, to what extent does the Ugandan Refugee Act confirms to the IHRL regime. This paper argues that the Ugandan Refugee Act does not optimally address most of the norms guaranteed under the IHRL having failed to maintain the most fundamental of them; the right of non refoulement as seen below.

Lauterpacht opines that non refoulement is a principle that prohibits states from

[66] UNHCR, "Human Rights and Refugee Protection (RLD 5)" 1995 Available at https://www.unhcr.org/3ae6bd900.pdf [accessed on 7/4/2020]

[61] See: Paragraph 5 of the Vienna Declaration and Programme of Action 1993.

[68]Charter of the United Nations, Done at San Francisco on 26 June 1945 and entered into force on 24 October 1945.

[69]Universal Declaration of Human Rights passed by United Nation General Assembly Resolution 217 A (III) on 10 December 1948.

[70]Office of the High Commissioner For Human Rights, "CCPR General Comment No.15: The Positions of Aliens Under the Covenant" Adopted at the Twenty-seventh session of the Human Rights Committee on 11 April 1986. Available at https:www.refworld.org/docid/45139acfc.html. [accessed 7 April 2020]

[71]UNHCR, "Safeguarding Asylum No.82 (XLVIII)-1997 Executive Committee 48th session. Contained in United Nations General Assembly Document No.12A (A/52/12/Add.1 17th/October 1997. Available at:https//:www.unhcr.org/excom/excon/3ae68c958/safeguarding-asylum.html. [accessed 7/April/2020]

[72]See: From Article 3-34 of the Refugee Convention of 1951.

[73] See: Section 29 of Refugees Act 2006.

returning a refugee or asylum seeker to a territory where there is a serious risk that hisor her life will be threatened on account of race, religion, nationality, membership of particular social group or social opinion.[74] Moreover by definition a refugee is that person who has left his country of origin and is unable and unwilling to return becauseof a serious threat to his life or freedom.[75] Therefore any attempt to return the refugee to his/her country of origin would mark the beginning of the violation of the rest of his rights.

The principle of non refoulement is provided for within the different international law instruments some being human rights in nature and others under Refugee law. It is addressed under the 1951 Refugee Convention,[76] the OAU Refugee Convention,[77] the Cartagena Declaration,[78] the CAT,[79] ICCPR,[80] the American Convention on Human Rights, [81] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[82] among others.

Indeed, the principle of non-refoulement in the context of Refugee law has gained the status of Customary International Law (CIL) according to Lauterpacht having had a general and consistent state practise as well as opinion juris.[83] Moreover, the exceptions provided for under Article 33(2) of the 1951 Refugee Convention that relate to national security and public safety can only be invoked in strict compliance with the law, the state must have taken all reasonable steps to see that the refugee can be admitted in a third party state, and that the return does not pause a danger of torture or cruel, inhuman and degrading treatment to the person of the refugee which is a non-derogable norm under human rights law.[84] It follows however that under IHRL the principle of non-refoulement by way of extradition, deportation or expulsion or rejection at the frontier has gained the status of a Jus Cogens in cases where it calculated that it pauses serious

[74]Elihu Lauterpacht and Daniel Bethlehem, "Refugee Protection in International Law: UNHCR Global Consultations on International Protection" Erikka Feller, Volker Turk and Frances Nicholson (eds) Cambridge University Press (2003) Page. 68

[75] UNHCR Inter-Parliamentary Union, "A Guide to International Refugee Protection and Building State Asylun Systems" Handbook for Parliamentarians 2017. Page 17

[76] See: Article 33 of the 1951 Refugee Convention.

[77] See: Article 2(3) of the OAU Convention on Refugees.

[78] See: Section 3 Para. 5 of Cartagena Declaration. The Declaration noted that it has reached at the level of Jus Cogens

[79]Article 3 of the CAT

[80]Article 7 of the ICCPR.

[81] See: Article 22(8) of the American Convention on Human Rights 1969.

[82] See: Article 3 of the Convention.

[83] Elihu Lauterpacht and Daniel Bethlehem (n.74) Page. 140. See also Nicaragua vs. United States 1986 I.C.J 14

[84] Ibid page. 152 See: the case of the Case of Chalal Vs. United Kingdom 108 ILR 385, Soering vs, United Kingdom Application No.14038/88

threat of torture cruel, inhuman and degrading treatment.[85] [86] This is based on the judgment of 2012 in *Barcelona* vs. *Senegal*[86] for which the ICJ had ruled that the prohibition against torture had gained the status of Jus Cogens and logically accordingto different jurists, this also applies to the principle of non-refoulement.[87] [88]

It is important to note that under Article 42 of the 1951 Refugee Convention no reservations are allowed in respect to the principle of non refoulement. I hasten to add however, that Uganda while acceding to the 1951 Refugee Convention together with its Protocol, made reservations over Article 32 which provides for the expulsion of the refugee from its territory. The reservation reads *" Without recourse to legal process the Government of the Republic of Uganda shall, in the public interest, have the unfettered right to expel any refuge in her territory and may at any time apply such internal measures as the Government may deem necessary in the circumstances; so however that any action taken by the Government of the Republic of Uganda in this regard shall not operate to the prejudice of the provisions of article 33 of this convention"*[88] Moreover, section 28 of the Refugees Act which guarantees the rights of refugees provided for under international instruments acknowledges the above reservations. The section provides; *"Subject to this Act and any reservations enteredby Uganda to any international or regional instrument, every refugee is entitled to the rights and shall subject to the obligations provided for or specified in the Geneva Convention, the OAU Convention and any other Convention or instrumentrelating to the rights and obligations of refugees to which Uganda is a party "*

Sharpe and Namusobya while examining the above reservation expressed their fears that the reservation made by Uganda pertaining Article 32 of the 1951 RefugeeConvention was invalid.[89] They opined and rightly so that it could be hard to conceive a situation where a refugee is returned to his country of origin and such act does not amount to refoulement.[90] Further, by critically looking at the reservation, it removes thedue process of the law and the right of any refugee to challenge the expulsion decisionreached by the minister before the courts of law. Moreover the refugee may also be refouled by way extradition provided for under section 41 of the Refugee Act. The Uganda's Refugees Act unlike other international instrument does not prohibit

[85] Tamas Molnar, "The Principle of non-refoulement under International Law: Its Inception and Evolution in a nutshell" (2016) Available at: https://pdfs.semanticscholar.org. [accessed 7 April 2020]

[86] Questions Relating to the Obligation to Prosecute or Extradite (Belgium vs. Senegal) 20th July 2012

[87] Tamas Molnar (n.85) Page.54

[88] United Nations Treaty Collection, Convention Relating to the Status of Refugees, Status as at:07-04-2020. Available at https://treaties.un.org/Pages/ViewDetailsll.aspx?src=TREATY&mtdsg no=V-"&chapter=5&Temp=mtdsg2&clang= en#EndDec. [accessed on 7 April 2020]

[89] Sharpe and Namusobya (n.17) page.564

[90] Ibid

extradition where it would pause a threat of torture to the person of a refugee.[91] [92] The Act leaves the minister to exercise his discretion to either extradite or not so long as the extradition legal process is followed. For example, Article 3 (2) of the European Convention on Extradition prohibits extradition *'if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose ofprosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that thatperson's position may be prejudiced for any of these reasons'.*[91] Similarly, Article 4(5) of the 1981 Inter-American Convention on Extradition precludes extradition when *'it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudicedfor any of thesereasons '.*

It therefore goes without saying that indeed the Refugees Act does not uphold dearly the principle of non refoulement. However, I wouldn't have minded had the Ugandan government maintained its Refugees Act in theory specifically with the principle of non refoulement and operated otherwise like it had done when it realised that the CARA was not in line with its international obligations.[93] This is not happening! Ahimbisibwe decries the plight of Rwandan refugees that have been forcefully repatriated on gun point back to Rwanda on account of their origin and political orientation.[94] He quotes the studies made by one of the leading refugee scholars Barbra Harrell Bond who recounts that on July 14 2010 over 1,700 Rwandan refugees were returned to Rwanda on gun point. [95] More recently the former Inspector General of Police of Uganda General Kale Kayihura was charged for aiding and abetting the kidnap and repatriatingof Rwandan exilees and refugees.[96] It is believed that one of the returnees Lt. Joel Mutabazi, a former presidential body guard who was allegedly returned back toRwanda in 2013 is now serving a life term sentence for ***""plotting to kill president Kagame"***[97]

The Right to a Fair Hearing.

Article 10 of the UDHR, Article 14 of the ICCPR and Article 7 of the AfCHPR provides

[91] Even the Extradition Act of Uganda of 1964 Cap. 117 does not have any provision that bars extradition based on threat of torture by the receiving state.

[92] European Convention on Extradition 1957.

[93] Sharpe and Namusobya (n.17) page. 562

[94] Frank Ahimbisibwe, "Rwandan Refugee Rights in Uganda: Analysis of the Law and Practise" (2016) Available at https://papers.ssrn.com/soI3/papers.cfm?abstract id=3042373. [accessed on 7 April 2020]

[95] Ibid.

[96] Abubakari Lubowa, "Gen Kayihura Charged with three counts, remanded" Daily Monitor News Paper 24/August/2018.

[97] Ivan Ashaba & Gerald Bareebe, "Uganda: A police chief on trial and deepening suspicions with Rwanda" African Arguments.Org. Available at: https://africanarguments.org/2018/09/10/uganda-police-chief-kavihura- trial-deepening-suspicions-rwand/ [accessed on 8 April 2020]

for the right to a fair hearing. This right entails the applicant having a right to be represented by a lawyer before a tribunal and the right to appeal in case he is dissatisfied with the tribunal's decision.[98] Section 19 of the Refugees Act provides that a person who enters Uganda as an asylum seeker has a right to apply before the Eligibility Committee to be granted the refugee status. Indeed a person dissatisfied with the decision of the Eligibility Committee can appeal to the Appeals Board only onquestions of law under section 21 of the Act. Where the appeal has been lodged, the Appeals Board can under Article 17 (2) confirm the decision of the Eligibility Committee, set aside the decision of the Eligibility Committee and refer back the casefor a rehearing or dismiss the appeal. Moreover, the decision of the Appeals Board is final under section 21 of the Act. This brings us to question whether justice can be served where the refugee has only one option of returning to the Eligibility Committee.The Applicants should be granted the right of appeal to courts of law as an appeal is creature of statute otherwise the way the trial process is set, it violates the right to a fairhearing and as such it does not confirm to the rights set by IHRL.

Omission of some of the Welfare rights provided for under the 1951 Refugee Convention.

Lastly on this matter, some rights that are provided for under the 1951 Refugee Convention were omitted within the Refugees Act. Articles 20, 21, 23, and 24 concerning the welfare of refugees were not included within the Refugees Act. Surely if the 1951 Refugee Convention provides for the bare minimum, how some of the rights contained thereunder could be omitted.

The Refugees Act and IHL.

IHL which is made up of Hague and Geneva laws was formed on the basis of humanity and the urge to see that the basic form of human rights are observed during an armed conflict, thereby limiting the negative effects of armed conflicts.[99] The application of IHL and subsequently IRL can never be disregarded. Moreover, situations of armed conflicts and violence are the major causes of refugee movements as of today. [100] Stephane Jaquemet reiterates that by anti-ethically looking at Article 9 of the 1951 Refugee Convention though it allows in exceptional circumstances to suspend the application of the Convention in times of war, it brings out the conclusion that the

[98] Communication No.323/06 of African Commission, Egyptian Initiative for Personal Rights and INTERIGHTS vs Egypt Dec. 2011.

[99] Rafael Nieto Navia, "International Pre-emptory Norms (Jus Cogens) and International Humanitarian Law". Available at https://ucl.rl.tails.com/items/EEE1BA2A-134C-507B-5E4E-37EA9C71C17E.html [accessed on 5 April2020]

[100] UNHCR, "Handbook on Procedures and Criteria For Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees" (Guidelines on International Protection No.12) (n.53) Page. 218

Convention is not only applied in times of peace but also in times of war.[101] Therefore the concurrence, the compatibility and the progressive system development of the two legal systems can offer a better protection of the refugees.[102]

As I had noted in my earlier submissions that Uganda is a signatory to Geneva Conventions and as well as it Protocols. And by the time Uganda enacted the Refugees Act of 2006 it had already ratified as well as domesticated the IV Geneva Conventions.It therefore follows that I intend to critically analyse to what extent has the Refugees Act of 2006 conform to the legal regime of IHL. This paper again argues that the Refugees Act does not confirm to the standard set by IHL.

The Principle of Non-Refoulement.

As I had earlier stated in my past coverage that the principle of non refoulement prohibits the return of an asylum seeker in manner be it by way of extradition, expulsionor rejection at the frontier to the country of his origin where there is high risk of tortureor threat to his life.[103] This rule has already become part of CIL and to some jurists acquired the state of Jus Cogens for which no derogation would be allowed.[104]

It follows that Article 45 of the IV Geneva Convention Relating to the Protection of Civilians in Times of War provides that *'in no circumstances shall a protected personbe transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.* This provision has been interpreted to espouse the principle of non refoulement.

Rafael Nieto has submitted that principles espoused in Common Article III to the Geneva Conventions have now gained the status of Jus Cogens and because of that, where a refugee or a prisoner of war is returned to the territory where there is high of risk of torture to his life, this would tantamount to the breach of those non derogable norms.[105]

I wish to note that when Uganda was acceding to the 1951 Convention it made a declaration that Articles 8 and 9 would only operate as recommendations.[106] Moreover, we have just seen that at least they are some of the provisions that try to link the 1951

[101] Stephanne Jaquemet (n.) page.653

[102] Nurias Arenas, "Combatants and armed elements as Refugees. The interplay between International Humanitarian Law and International Refugee Law" (2005) Available at: https://www.researchgate.net/publication/330281193 Combatants and Armed Elements as Refugees The Interactionbetween International humanitarian Law and International Refugee Law. [accessed 8 April 2020]

[103] See: Article 33 of the 1951 Refugee Convention.

[104] See: Article 53 and 64 of the Vienna Convention on the Law of Treaties 1969. Entered into force on 27th of January 1980.

[105] Rafael Nieto Navia (n.99) Page. 25

[106] Op cit at (n.88)

Refugee Convention to IHL. Indeed the declarations made by Uganda specifically to those provisions explains why we have no provisions similar to those provisions within the Refugees Act.
Having earlier noted that the Refugees Act does not confirm to IHRL for not coming out with precision on the principle of non refoulement, similarly I can't hesitate to state the same with regards to the relationship the Refugees Act and IHL.

Conclusion:
It is my humble submission that the Refugees Act of 2006 is indeed a relatively good law but it is clobbered in its area of operation by majorly the declarations and reservations made by Uganda while acceding to the 1951 Refugee Convention together with its Protocol. This because it does not work in isolation of other international instruments for which it acknowledged being subjected to under section 28 of the Act. Indeed time has passed since 1976 when those reservations were made and in addition the law has evolved. The government of Uganda needs to rethink of withdrawing those reservations and amend the Extradition Act as well as some of the provisions of the Refugees Act particularly concerning the administration if it intends to bring the Refugees Act in line with IRL, IHRL and IHL.

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