

**Protection politics:
Preventing illegal extraditions, *refoulement* and cross-border
persecution in East Africa**

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THE *RIGHTS IN EXILE SERIES* BRINGS TOGETHER PUBLICATIONS THAT
FOCUS ON KEY ISSUES OF REFUGEE POLICY AND REFUGEE RIGHTS.

ABOUT THE INTERNATIONAL REFUGEE RIGHTS INITIATIVE

The International Refugee Rights Initiative (IRRI) was founded in 2004 to inform and improve responses to the cycles of violence and displacement that are at the heart of large-scale human rights violations. Over the last 13 years, we have developed a holistic approach to the protection of human rights before, during, and in the aftermath of displacement, by:

- identifying the violations that cause displacement and exile,
- protecting the rights of those who are displaced, and
- ensuring the solutions to their displacement are durable, rights respecting, safe and timely.

We work to ensure the voices of the displaced and conflict affected communities are not only heard but heeded at the international level through our evidence based advocacy that is built on solid field based research and analysis.

We are registered as a non-profit organisation in the US, the UK, and Uganda.

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Background

Exiled political movements and armed groups have long played, and continue to play, a central role in shaping the trajectories of African states and wars. Governments, rebels, and opposition groups know well that conflicts do not simply stop at international borders, but rather, are often shaped by the experiences and opportunities of exile. And just as formal frontiers do not necessarily stop the flow of arms and ideas or cut networks of alliances and patronage, they also do not eliminate the risk of persecution or harm to those who cross them in search of protection.

Governments of countries that host foreign opposition figures, political activists or rebels inevitably face complex political and legal challenges, which become even more complicated when they share a border with the countries of origin of these individuals. Host countries often face pressure to curb the political freedoms of exiled politicians and activists, and even to extradite them. They may also consider doing so out of their own national security concerns, when the presence of such individuals is perceived as increasing the risk of a spill-over of violence

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from across the border. Moreover, if foreigners are using the territory of their host country to organise and launch armed activities against another state, the host government has the legal obligation to stop them from doing so.

At the same time, human rights and humanitarian obligations limit the measures host countries are allowed to pursue in this context. The principle of *non-refoulement* prohibits the removal of any person to a territory in which s/he would face persecution or torture. It is part of

international customary law and is enshrined in a number of international and regional conventions. This principle protects all individuals, regardless of whether or not they have been granted refugee status. It also applies when an extradition is sought by the country of origin of an individual: if the extradited person would face persecution or torture upon being returned to his or her country, then the extradition would be illegal.

Nonetheless, deportations, disappearances and extraditions of foreign nationals continue to occur, in violation of international law. Following recent incidents of extraditions and *refoulement* in East Africa, this paper seeks to clarify the key legal obligations of countries hosting foreign political opponents and opposition figures and to urge governments to respect these obligations. It starts with examples of recent cases of illegal extraditions and cross-border persecution that all took place in East Africa, continues with a discussion of the legal principles that are of relevance and ends with specific recommendations.

Cross-border persecution and *refoulement* in East Africa

On 2 November 2016, Kenyan authorities arrested James Gatdet Dak, the spokesperson of the South Sudanese opposition movement the Sudan People's Liberation Movement-in-Opposition (SPLM-IO) and a recognised refugee in Kenya, and deported him to Juba. UNHCR's attempts to

stop his deportation were unsuccessful.¹ It was not until August 2017 that Dak appeared before a court in Juba, reportedly facing criminal charges that include treason, communicating “false information prejudicial to South Sudan” and insulting the president.² Conviction in some of these charges can lead to death penalty.

Less than three months after Dak’s deportation, two other SPLM-IO figures disappeared in Nairobi. On 23 January 2017, Dong Samuel Luak, reportedly serving as the SPLM-IO’s deputy chairman for justice and human rights affairs and also a recognised refugee in Kenya, was abducted while on his way to board a bus.³ The following day, Aggrey Idri Ezibon, the chairman of the SPLM-IO’s humanitarian affairs committee, also disappeared. He was last seen in Kilimani neighbourhood in Nairobi.⁴

...by the time the ruling was issued both Idri and Samuel had already been transferred to South Sudan, where they were subsequently detained by the South Sudanese authorities.

Within days, the families of Samuel and Idri, supported by civil society organisations, filed a *habeas corpus* petition before the High Court of Kenya in Nairobi. The Court ordered that the two men should not be deported from Kenya,⁵ but according to different reports, by the time the ruling was issued both Idri and Samuel had already been transferred to South Sudan, where they were subsequently detained by the South Sudanese authorities.⁶ The South Sudanese government denied being involved in the abductions.⁷ The UN Working Group on Enforced or

Involuntary Disappearances issued a statement calling “on the governments of Kenya and South Sudan to reveal the fate of two South Sudanese men,” and to “guarantee the safety and protection of the men and afford protection to witnesses who can help establish their whereabouts.”⁸ More than a year later, their fate remains unknown.

¹ UNHCR, “News comment by UNHCR’s Spokesperson, Cécile Pouilly, on the return of Mr James Gatdet Dak to South Sudan,” 04 November 2016, available at: <http://www.unhcr.org/uk/news/press/2016/11/581ca3924/news-comment-unhcrs-spokesperson-cecile-pouilly-return-mr-james-gatdet.html> (accessed 12 November 2017).

² Radio Tamazuj, “Riek Machar’s ex-spokesman Gatdet Dak appears in court,” 23 August 2017, available at: <https://radiotamazuj.org/en/news/article/riek-machar-s-ex-spokesman-gatdet-dak-appears-in-court> (accessed 02 December 2017); Radio Tamazuj, “Presidency says Kiir’s amnesty didn’t include James Gatdet,” 28 August 2017, available at: <https://radiotamazuj.org/en/news/article/presidency-says-kiir-s-amnesty-didn-t-include-james-gatdet> (accessed 02 December 2017).

³ Office of the High Commissioner for Human Rights, “Kenya and South Sudan must reveal fate and whereabouts of two abducted South Sudanese – UN expert group,” 17 February 2017, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21193&LangID=E> (accessed 14 November 2017), (OHCHR 2017).

⁴ Ibid.

⁵ Daily Nation, “High Court halts deportation of two South Sudanese from Kenya,” 27 January 2017 available at: <http://www.nation.co.ke/news/Court-halts-deportation-of-Sudanese-dissidents-/1056-3789424-ndj2xj/> (accessed 02 December 2017).

⁶ Human Rights Watch, “Three Months, Still No Word on Disappeared South Sudanese Men,” 23 April 2017, available at: <https://www.hrw.org/news/2017/04/23/three-months-still-no-word-disappeared-south-sudanese-men> (accessed 02 December 2017); Horn of Africa Civil Society Forum, *The Watch: A review of conditions for civil society in the Horn of Africa*, p. 35-39, available at: <http://www.kacesudan.org/wp-content/uploads/2017/10/Watch-June-Final-2-1.pdf> (accessed 02 December 2017).

⁷ Voice of America, “South Sudan Government Denies Involvement in Disappearance of 2 Men,” 17 February 2017, available at: <https://www.voanews.com/a/south-sudan-government-denies-involvement-in-disappearance-of-two-men/3729420.html> (accessed 14 November 2017).

⁸ OHCHR 2017.

Following the abductions of Dak, Samuel and Idri, other exiled South Sudanese opposition officials reportedly went into hiding.⁹ The events “led the opposition to perceive the region as having sided with SPLM/A in Government,” the UN Panel of Experts on South Sudan observed.¹⁰

In August 2017, the SPLM-IO deputy spokesperson Lam Paul Gabriel was briefly abducted by unknown armed civilians in Uganda. He was released with the assistance of the Ugandan police, and stated that his abductors told him to stop speaking to the media. The South Sudanese government denied any involvement in the incident, and the Ugandan police said it is investigating it.¹¹ In late December 2017, the SPLM-IO Kapoeta State Governor Marko Lochapio Lokidor was abducted from Kakuma Refugee Camp in northern Kenya and was reportedly transferred to the South Sudanese authorities. According to several sources, the abduction and transfer was carried out with the knowledge and involvement of the Kenyan authorities.¹² UNHCR said it was investigating the allegations.¹³

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The political crisis and violence in Burundi has also led to cases of informal extraditions recently. On Saturday 21 October 2017 four leaders of the Popular Forces of Burundi (Forces Populaires du Burundi, FPB) were reportedly arrested in Ngara, north-eastern Tanzania. According to the FPB, the next day all four were “irregularly extradited” to Burundi.¹⁴ Those arrested include Major General Jeremie Ntiranyibagira, the group’s leader, and Lt. Col. Edouard Nshimirimana, his second-in-command.¹⁵ Neither the Tanzanian nor the Burundian authorities have acknowledged the arrests or deportations took place and the whereabouts of the four individuals is still unclear.

Whilst these incidences of South Sudanese and Burundians being illegally returned to their home countries are relatively recent, Rwandan refugees in Uganda have long been the target of harassment by the authorities of their home country. This has also been a source of tensions between Kigali and Kampala. In October 2013, Joel Mutabazi, a Rwandan refugee in Uganda, was abducted and handed over to the Rwandan authorities. The Ugandan government acknowledged

⁹ Alan Boswell, “Say hi to Mathiang Anyoor!”, 16 November 2016, available at: <https://medium.com/@alanboswell/say-hi-to-mathiang-anyoor-e994fcb63518> (accessed 11 November 2017).

¹⁰ Letter dated 13 April 2017 from the UN Panel of Experts on South Sudan established pursuant to Security Council resolution 2206 (2015) addressed to the President of the Security Council - Final report of the Panel of Experts on South Sudan, S/2017/326, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2017/326 (accessed 11 November 2017).

¹¹ Jason Patinkin, “Armed group in Uganda briefly abduct South Sudanese rebel, he says,” *Reuters*, 19 August 2017, available at: <https://www.reuters.com/article/us-southsudan-uganda/armed-group-in-uganda-briefly-abduct-south-sudanese-rebel-he-says-idUSKCN1AZ0K2> (accessed 02 December 2017).

¹² Sudan Tribune, “South Sudan rebel appointed governor abducted in Kenya,” 31 December 2017, available at: <https://www.sudantribune.com/spip.php?article64385>; SPLM-IO US Mission, “Kidnapping of SPLM/A (IO) Kapoeta State Governor, Marko Lochapio Lokidor, by the Kenyan Authorities,” 03 December 2017, available at: <https://twitter.com/TaoOfGarang/status/947464679001075712> (both accessed 02 January 2018).

¹³ Reuters, “U.S., Britain and Norway warn South Sudan parties over ceasefire violations, 3 January 2018,” available at: <https://uk.reuters.com/article/uk-southsudan-unrest/u-s-britain-and-norway-warn-south-sudan-parties-over-ceasefire-violations-idUKKBN1ER0L4?rpc=401&> (accessed 3 January 2018).

¹⁴ Forces Populaires du Burundi on Twitter (@FPBurundi), 22 October 2017, available at: <https://twitter.com/FPBurundi/status/922209542213177344> (accessed 11 November 2017).

¹⁵ Daily Nation, “Tanzanian forces arrest Burundi rebels in Nairobi, extradite them,” 23 October 2017, available at: <http://www.nation.co.ke/news/africa/Burundi-rebel-leaders--extradited-from-Tanzania-/1066-4152134-xu1fsz/index.html> (accessed 02 December 2017).

the transfer but said it was an “error”.¹⁶ Seven Ugandan police officers, and one Rwandan and one Congolese individuals are currently on trial in Uganda for Mutabazi’s transfer.¹⁷ Nonetheless, Rwandan refugees continue to complain of kidnap threats, disappearances and harassment,¹⁸ while Kigali continues to accuse Kampala of hosting wanted opposition leaders.¹⁹

In some of the cases, such as the removal of Gatdet Dak from Kenya to South Sudan, the cooperation between the country of asylum and the authorities of the country of origin were acknowledged.

Meanwhile in Kenya, Ethiopian refugees have experienced similar abuse. Human Rights Watch has documented cases of disappearances and harassment of Ethiopian opposition activists, including recognised refugees. These were allegedly carried out by both Kenyan and Ethiopian officials, and include several cases of extraditions to Ethiopia, where individuals were subsequently detained and physically abused.²⁰

The cases described here, from Kenya, Uganda and Tanzania, are far from identical. In some of them, such as the removal of Gatdet Dak from Kenya to South Sudan, the cooperation between the country of asylum and the authorities of the country of origin were acknowledged. In other cases, such cooperation has either been kept in secret, denied, or was carried out in an informal manner. In all cases, however, it resulted in violations of some of the most fundamental principles of international human rights and refugee law.

The principle of *non-refoulement*

The principle of *non-refoulement*, enshrined in Article 33(1) of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention), prohibits the expulsion of a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²¹ A *non-refoulement* provision is also included in the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention), Article II(3) of which prohibits the “rejection at the frontier, return or expulsion,” of

¹⁶ UNHCR, “UNHCR deeply concerned about hand-over of Rwandan refugee by Ugandan authorities,” 5 November 2014, available at: <http://www.unhcr.org/news/press/2013/11/527908899/unhcr-deeply-concerned-hand-over-rwandan-refugee-ugandan-authorities.html> (accessed 02 December 2017).

¹⁷ The EastAfrican, “Top Ugandan police officers charged with kidnap of Kagame’s guard,” 27 October 2017, available at: <http://www.theeastafrican.co.ke/news/Uganda-police-espionage-Rwanda-mutabazi/2558-4158658-ykot8c/index.html> (accessed 23 January 2018).

¹⁸ Dickens H. Okello, “Rwandan Refugees in Uganda to Petition Parliament,” *ChimpReports*, 28 November 2017, available at: <http://chimpreports.com/rwandan-refugees-in-uganda-to-petition-parliament/> (accessed 02 December 2017).

¹⁹ The EastAfrican, “Tension builds up between Uganda, Rwanda over citizens’ arrests,” 23 December 2017, available at: <http://www.theeastafrican.co.ke/news/Tension-builds-up-between-Uganda-Rwanda-over-arrests/2558-4239860-qkra0qz/index.html>.

²⁰ Human Rights Watch, “Human Rights Watch Letter to Inspector General of Police of Kenya,” 17 May 2017, available at: <https://www.hrw.org/news/2017/09/20/human-rights-watch-letter-inspector-general-police-kenya> (accessed 03 December 2017).

²¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), available at: <http://www.unhcr.org/3b66c2aa10.pdf> (accessed 29 January 2018). Ratified by Uganda in 1976, Kenya in 1966, and Tanzania, in 1964. All three states are also parties to the Convention’s 1967 Protocol. See UNHCR, *State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (as of April 2015)*, available at: <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (accessed 22 January 2018).

any person, when this “would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.”²²

The principle of *non-refoulement* is also enshrined in a number of international human rights instruments. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) provides that “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²³ Article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006) similarly prohibits the expulsion, return (*refoulement*), surrendering or extradition of a person to a state in which “there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”²⁴

Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which provides that “no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment,” has also been interpreted by the UN Human Rights Committee as containing a prohibition of *refoulement*.²⁵

National refugee legislation in Kenya, Uganda and Tanzania – the three countries from which individuals were forcibly returned in the examples mentioned above – includes similar prohibitions of *refoulement*.²⁶ All of these states have also reaffirmed their collective commitment

²² The 1969 OAU Convention states that the threat to the person being removed has to be caused by those reasons for flight that are stipulated in the Convention’s definition of the term “Refugee”. The OAU Convention provides a wider definition to the term “refugee” than the 1951 Convention. While the 1951 Convention defines a refugee as someone who is at risk of persecution at his country of nationality “for reasons of race, religion, nationality, membership of a particular social group or political opinion” (Article 1(A)(2)), the OAU Convention provides that the term “refugee” also applies “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” (Article I(2)). Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974), available at: <http://www.unhcr.org/uk/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html> (accessed 29 January 2018).

²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (accessed 29 January 2019). Uganda and Kenya ratified the Convention. Tanzania has not.

²⁴ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), available at: <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx> (accessed 29 January 2018). Uganda, Kenya and Tanzania signed the Convention in 2007-2008, but none has ratified it.

²⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 28 January 2018); UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 12, available at: <http://www.refworld.org/docid/478b26ae2.html> (accessed 11 November 2017).

²⁶ The Kenya Refugee Act of 2006 (Article 18) and Uganda Refugee Act of 2006 (Article 42) both include *non-refoulement* provisions that reflect the prohibitions stipulated in the OAU Convention. Tanzania’s Refugees Act of 1998 (Article 28(4)) prohibits the deportation of an asylum seekers or a refugee if “such a person will be tried or punished for an offence of a political character after arrival in the territory from which he came or is likely to be the subject of physical attack in such territory.” See Uganda: The Refugee Act 2006, available at: <http://www.refworld.org/docid/4b7baba52.html> (accessed 29 January 2018); Kenya: The Refugees Act, 2006, available at: <http://www.refworld.org/docid/467654c52.html> (accessed 29 January 2018); Tanzania: Refugees Act, 1998, available at: <http://www.refworld.org/docid/3ae6b50bf.html> (accessed 29 January 2018).

to comply with their obligations under both the 1951 and 1969 Conventions in the Dar-es-Salaam Declaration of the International Conference on the Great Lakes Region (ICGLR).²⁷

There is a general consensus, however, that the prohibition of *refoulement* to a territory in which one will face persecution (as defined in the 1951 Convention) or torture or cruel, inhumane or degrading treatment, constitutes a principle of customary international law.²⁸ As such, it is binding on all states and regardless of the human rights conventions they are parties to or their national legislation.

Moreover, while the 1969 OAU Convention uses the term “person” and the 1951 Convention the term “refugee”, the principle of *non-refoulement* protects not only recognised refugees from removal, but any individual who will face persecution or torture at his country of origin, irrespective of whether or not s/he has been formally recognised as a refugee. One’s formal refugee status, however, does indicate more clearly that one is at risk of harm at home in case of removal.

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Following the deportations of Mutabazi from Uganda and Dak from Kenya, UNHCR issued official statements describing these forced removals as a violation of the principle of *non-refoulement*.²⁹ No such statements were made by the UN with regard to the other cases of deportations described above, most of which have never been officially confirmed or acknowledged by the authorities in either the host country or country of origin. Nonetheless, if confirmed, they all appear to have similarly violated this principle.

Exceptions to *non-refoulement*

The 1969 OAU Convention does not include any exceptions to the principle of *non-refoulement*. This means that it cannot be violated under any circumstances. Article II(4) of the Convention does provide, however, that when a state “finds difficulty in continuing to grant asylum to refugees,” it can “appeal directly to other Member States and through the OAU,” which “shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.”³⁰

Under the 1951 Convention, *non-refoulement* is not an absolute principle. Article 33(2) provides that it does not protect “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country, or who, having been convicted by a final judgment of a particularly

²⁷ ICGLR, *Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region*, 2004, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/041120_DarEsSalaamDeclaration.pdf (accessed 22 January 2018).

²⁸ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Oxford: Oxford University Press, 2011, p. 345-354, (Goodwin-Gill and McAdam 2011).

²⁹ UNHCR, “UNHCR deeply concerned about hand-over of Rwandan refugee by Ugandan authorities,” 5 November 2014, available at: <http://www.unhcr.org/news/press/2013/11/527908899/unhcr-deeply-concerned-hand-over-rwandan-refugee-ugandan-authorities.html> (accessed 02 December 2017); UNHCR, “News comment by UNHCR’s Spokesperson, Cécile Pouilly, on the return of Mr James Gatdet Dak to South Sudan,” 04 November 2016, available at: <http://www.unhcr.org/uk/news/press/2016/11/581ca3924/news-comment-unhcrs-spokesperson-cecile-pouilly-return-mr-james-gatdet.html> (accessed 12 November 2017).

³⁰ This role will theoretically be played today by the African Union (AU), the successor of the OAU.

serious crime, constitutes a danger to the community of that country.”³¹ However, the broadened scope of the *non-refoulement* principle under international human rights law limits the implications of the exception clause in the 1951 Convention. Even if a refugee is found guilty of a “particularly serious crime” or poses a danger to national security, his removal will still be illegal if it will expose him to torture or cruel, inhumane or degrading treatment. The prohibition of torture and cruel, inhuman or degrading treatment is an absolute one, and so is the prohibition of *refoulement* to such abuse.

Non-refoulement and extradition

Given the absolute nature of the principle of *non-refoulement*, it also protects individuals from extradition which may lead to persecution, torture or ill-treatment.³² When an extradition is sought, there must be a formal legal basis for it. It cannot be carried out in an informal and arbitrary manner or based on personal communications or agreements.³³ Procedural safeguards and guarantees must be in place to ensure compliance with the principle of *non-refoulement* and other applicable legal obligations.

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“Diplomatic assurances” given by the requesting country that the individual in question will be treated in accordance with international law do not relieve a state from its *non-refoulement* obligations when these assurances are either unreliable, or are unsuitable to effectively eliminate the danger to this individual.³⁴ Whether or not assurances are reliable or suitable has to be determined in light of the facts of each individual case and the human rights record of the state requesting the extradition and giving the assurances.

In the case of extradition, the requested state must also assess whether the transfer of an individual will expose him or her to a violation of the right to a fair trial, “in terms of the treatment a fugitive is likely to receive upon surrender as well as with regard to the quality of a judgment already handed down.”³⁵ The right to a fair trial is enshrined in Article 14 of the ICCPR as well as in Article 7 of the African Charter on Human and Peoples’ Rights (the African Charter), and includes, among other things, the right to be defended and the right to an appeal.³⁶

Freedom of expression in country of asylum

The OAU Convention, like the 1951 Convention, states that refugees must respect the laws of their country of asylum. However, the OAU Convention also provides that refugees shall “abstain from

³¹ Goodwin-Gill and McAdam 2011, p. 243-244.

³² UNHCR, *Note on Problems of Extradition Affecting Refugees*, 27 August 1980, EC/SCP/14, available at: <http://www.refworld.org/docid/3ae68ccdc.html> (accessed 11 November 2017); UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, available at: <http://www.refworld.org/docid/481ec7d92.html> (accessed 11 November 2017).

³³ UNHCR, *The Interface Between Extradition and Asylum*, November 2003, PPLA/2003/05, p. 56-74, 87-103, available at: <http://www.refworld.org/docid/3fe846da4.html> (accessed 12 November 2017), (UNHCR 2003a).

³⁴ UNHCR, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, available at: <http://www.refworld.org/docid/44dc81164.html> (accessed 11 November 2017).

³⁵ UNHCR 2003a, p. 54.

³⁶ OAU, African Charter on Human and Peoples’ Rights (“Banjul Charter”) (adopted 27 June 1981, entered into force 21 October 1986), available at: <http://www.refworld.org/docid/3ae6b3630.html> (accessed 29 January 2018).

any subversive activities against any Member State of the OAU” (Article III(1)) and requires all states to “prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio” (Article III(2)).

The OAU Convention does not provide a definition for the terms “subversive” or “attacking”. Good faith interpretation of these terms would be in line with international human rights law, and particularly with the ICCPR and the African Charter. Both instruments apply to all individuals, citizens and non-citizens alike, and include provisions guaranteeing their freedom of expression.³⁷ Therefore, states cannot legitimately suppress all criticism or propaganda made by individuals, including foreigners, within their territories.³⁸

The ICCPR allows for restrictions on individuals’ freedom of expression only when such restrictions are necessary for the “protection of national security or of public order (*ordre public*), or of public health or morals,” and for the “respect of the rights and reputations of others” (Article 19(3)). It also prohibits “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (Article 20). When restrictions are imposed for one of these grounds, they must be provided by law and “conform to the strict tests of necessity and proportionality.”³⁹ Restrictions on freedom of expression may not be

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imposed to suppress peaceful political activities or advocacy efforts when these do not genuinely pose any threat and only because they promote views and ideas that are critical or not in line with political actors.

While the distinction between legitimate expressions and forbidden ones can sometimes be vague and debatable, it is clear that the direct involvement of refugees in violent activities aimed at other states is prohibited. Host countries have the duty to maintain the humanitarian

and civilian character of asylum, and to prevent refugees from carrying out armed activities against other countries.⁴⁰ This obligation stems from the 1969 OAU Convention as well as various other international instruments.⁴¹

³⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html> (accessed 22 November 2017); Office of the High Commissioner for Human Rights (OHCHR), *The Rights of Non-Citizens*, 2006, HR/PUB/06/11, available at: <http://www.refworld.org/docid/46ceabb22.html> (accessed 22 November 2017).

³⁸ UNHCR, *Political Rights of Refugees*, November 2003, PPLA/2003/04, available at: <http://www.refworld.org/docid/3fe820794.html> (accessed 21 November 2017), (UNHCR 2003b). The Uganda Refugee Act of 2006 in Article 35 (d) states that refugees may not “engage in any political activities within Uganda, whether at local or national level.” This clause should similarly be interpreted in light of Uganda’s obligations under international human rights law and its own constitution.

³⁹ UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, available at: <http://www.refworld.org/docid/4ed34b562.html> (accessed 23 January 2018).

⁴⁰ UN High Commissioner for Refugees (UNHCR), *Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum*, September 2006, available at: <http://www.refworld.org/docid/452b9bca2.html> (accessed 2 December 2017).

⁴¹ See also UNHCR 2003b, p. 17

Foreigners directly involved in armed activities cannot be considered refugees as long as they have not “genuinely and permanently renounced military activities”.⁴² They can be prosecuted, for instance in cases of illegal possession of arms or involvement in forced recruitment, but as discussed above, they still cannot be deported or extradited as a punishment for their actions in violation of the principle of *non-refoulement*, regardless of the level of political pressure that is applied by the government of their country of origin.

The same is true for persons who are excluded from international protection, or whose refugee status is withdrawn because they engaged in actions that fall within the scope of Article 1F of the 1951 Convention or Article I(5) of the 1969 Convention:

“An excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments.”⁴³

Countries of asylum often play an important role as mediators in the violent conflicts the refugees they host are fleeing. When they repress refugees, they ultimately... hinder the possibility of a meaningful, inclusive dialogue to bring the violence to an end.

Conclusion

Across East Africa, the protection of politically active exiles is repeatedly compromised for political reasons and in violation of international law, as host governments fail to prevent, and in some cases even actively facilitate, the abductions and extraditions of foreigners who are eligible for international protection.

The principle of *non-refoulement* prohibits the expulsion of any person – regardless of his or her legal status – to a territory in which this person will be exposed to persecution, torture or cruel, inhumane or degrading treatment. It applies even when a formal extradition request is made by the individual’s country of origin, and procedural guarantees should be in place to ensure it is not violated. Moreover, while human rights law limits the freedom of expression of all individuals in certain, limited, cases, deportation cannot be carried out simply as a punishment for the expression of unpopular political opinions by foreigners.

Guaranteeing the political rights of exiles, however, is not only a legal obligation, but also politically conducive. Countries of asylum often play an important role as mediators in the violent conflicts the refugees they host are fleeing. When they repress refugees, they ultimately create an environment in which there are no neutral mediators, and therefore hinder the possibility of a meaningful, inclusive dialogue to bring the violence to an end. After all, the ability of refugees to be politically active, publically advocate for change in their country of origin and share their views with the public and relevant stakeholders can contribute to eventually making it possible for them to return home one day.

⁴² UN High Commissioner for Refugees (UNHCR), *Conclusion on the civilian and humanitarian character of asylum No. 94 (LIII) - 2002*, 8 October 2002, available at: <http://www.refworld.org/docid/3dafdd7c4.html> (accessed 4 January 2018).

⁴³ UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <http://www.refworld.org/docid/3f5857684.html> (accessed 22 January 2018).

Recommendations

To governments of host countries

- Do not remove individuals to territories in which they are at risk of persecution or torture, regardless as to whether or not they have been formally recognised as refugees.
- Investigate cases of disappearances, abductions and harassments of refugees, publish the findings and hold accountable those responsible.
- Ensure that extradition procedures are in place, are transparent, and are followed by all relevant authorities. Such procedures must include safeguards to guarantee compliance with the principle of *non-refoulement* and other applicable human rights instruments. Extradition cases should normally be brought before a court of law.
- Notify and consult UNHCR when extradition requests are made, particularly when these requests concern asylum seekers or refugees. Allow UNHCR to monitor extradition proceedings, if and when these take place.

To UNHCR

- Work with host governments to enhance the protection of refugees from persecution by operatives of their countries of origin and to ensure cases of abuse and harassment are properly investigated and dealt with appropriately.
- Request to be informed and allowed to monitor any transfer procedure involving a refugee or an asylum seeker.
- Work with governments to ensure extradition procedures contain the relevant safeguards to guarantee the rights of populations of concern, and that these safeguards are properly implemented.