

LEGAL ASPECTS OF ASYLUM IN SUB-SAHARAN AFRICA:  
A DEADLOCK OR A CONCRETE HOPE FOR A BETTER  
FUTURE?

*By Cristiano D'Orsi\**

I. INTRODUCTION

This article discusses an essential aspect of the legal conditions of refugees in the African continent's sub-Saharan area: asylum. Asylum is considered the "traditional" solution for people, both individuals and groups, obliged to flee from their own countries.<sup>1</sup> This article analyzes

---

\* Cristiano D'Orsi is a Ph.D. candidate in International Relations (International Law) at the Graduate Institute of International and Development Studies in Geneva (Switzerland); Degree in International Relations at the Università degli Studi di Perugia (Italy); Certificate in International Relations at the Italian Society for International Organization in Rome (Italy); DEA in International Relations (International Law) at the Graduate Institute of International Studies in Geneva (Switzerland); external lecturer in migration and refugee law at the International Institute of Humanitarian Law in Sanremo (Italy); 2006: Certificate in refugee studies at the International Institute of Human Rights in Strasbourg (France); 2007: European Fellow at the Refugee Studies Centre in Oxford (England); 2007-2008: Gallatin Fellow at the University of Virginia School of Law (USA); 2009: DAAD Fellow at the Max Planck Institute for International and Comparative Studies in Heidelberg (Germany); 2010: Fellow at the Research Centre of the Academy of International Law in The Hague (The Netherlands). Cristiano D'Orsi would like to thank Professor David Martin at University of Virginia School of Law for his constant support and useful suggestions, and Ms. Nathalie Shonka for the very accurate work of editing done. And he would like to dedicate this work to his parents, Bruno and Elisa, who always supported his choices. This note was accepted for publication in 2008. The author can be contacted at [Cristiano.Dorsi@graduateinstitute.ch](mailto:Cristiano.Dorsi@graduateinstitute.ch)

<sup>1</sup> MOHAMMED BEDJAOUI, *L'ASILE EN AFRIQUE* 26-27 (1979) (giving a detailed historical excursus to show the long-standing tradition of asylum in sub-Saharan Africa). The author affirms: "Pour le continent africain, la tradition d'hospitalité est devenue légendaire [...] Dans l'Afrique traditionnelle, le respect de la personne humaine et l'aide désintéressée à celui qui souffre ont toujours guidé les peuples et les hommes dans leurs relations." *Id.* at 26. He continues:

Cependant, le sentiment humanitaire semble être la véritable racine des traditions d'hospitalité. En effet, l'une des caractéristiques les plus remarquables des politiques appliquées par les gouvernements africains, en matière d'asile, c'est l'accueil inconditionnel réservé aux réfugiés authentiques,

how the institution of asylum, and specifically the concept of "refugee," is legally perceived and applied in Africa.

Part II of this article summarizes the history of the refugee problem in Africa, while Part III explains the relevant law governing refugee situations. Parts IV and V focus on the notion of *non-refoulement*, a cornerstone of the legal protection of refugees throughout the world, and on its particular relevance to African refugees. The principle of *non-refoulement* seems to have become a peremptory norm in the realm of international law<sup>2</sup> despite the fact that the doctrine is far from uniform.<sup>3</sup> Part VI deals with a specific peculiarity of asylum in the African continent: situations where there have been a mass-influx of refugees, considered an essential aspect of the broader concept of "African refugee,"<sup>4</sup> which give rise to the category of so-called *prima facie* refugees.<sup>5</sup>

---

quels que soient les risques que cela pourrait comporter pour eux-mêmes du point de vue de la sécurité et qu'il ne puisse être le nombre des intéressés.

Id. at 27.

<sup>2</sup> Jean Allain, *The Jus Cogens Nature of Non-refoulement*, 13 INT'L J. REFUGEE L. 533-58 (2001); see also Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 89 (Erika Feller et al. eds., 2003). According to Lauterpacht and Bethlehem: "*Non-refoulement* is a concept which prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion." *Id.* The 1969 Vienna Convention on the Law of the Treaties defines a peremptory norm: "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter 1969 Vienna Convention].

<sup>3</sup> Edwin Odhiambo Abuya, *Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective*, 19 INT'L J. REFUGEE L. 51, 83 (2007). Abuya affirms: "[T]he claim that by the 1980s the principle of *non-refoulement* had attained customary international law status is questionable, as it is not supported by any evidence of 'widespread authoritative' state practice." *Id.*

<sup>4</sup> Many authors deal with the "expanded definition" of the African refugee, one of whom is N.S. Okoguble. Nlerum S. Okoguble, *The Legal Dimension of Refugee Problem in Africa*, 10 E. AFR. J. PEACE & HUM. RTS. 176 (2004). "This expanded definition has turned out to be beneficial to Africa since the traditional definition of refugees would have excluded quite a large number of persons who seek refuge in other countries." *Id.* at 183. See also Rainer Hofmann, *Refugee Law in the African Context*, 52 HEIDELBERG J. INT'L L. 318, 323 (1992). Hofmann specifies that this expanded definition is due to:

Additionally, Parts VII, VIII, X, and XI critique the solutions a refugee can utilize to end his or her precarious existence. Only one durable solution allows individuals to remain in the first country of asylum: local integration. However, alternative durable solutions exist, such as voluntary repatriation or resettlement in a third country where the refugee should be granted asylum. Analyzing some examples of forced repatriation, sometimes masked as “voluntary,” shows that African countries prefer the former solution, often with the agreement of the United Nations High Commissioner for Refugees (“UNHCR”). It is important to note that the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”) is the only legally binding instrument that explicitly defines “voluntary repatriation.”<sup>6</sup> Additionally, African host

---

Art. 1 (2) 1969 OAU Convention break[ing] new ground in international refugee law by providing for an additional category of refugees: all those persons who are forced to leave their country of origin in order to escape violence, regardless of whether they are in fact personally in danger of political persecution, are considered as refugees under the 1969 OAU Convention.

*Id.*

<sup>5</sup> See IVOR C. JACKSON, *THE REFUGEE CONCEPT IN GROUP SITUATIONS* 448-65 (1999). See also *infra* note 127 (giving Jackson’s approach to this concept).

<sup>6</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, done Sept. 6-10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention]. The OAU Convention stipulates:

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.

*Id.* art. V. See *infra* pp. 28-30.

states are bearing an increasing burden of asylum. The burden is especially onerous because local integration, the only durable solution derived from granting asylum in the first host country, is a solution that African governments presently disfavor.<sup>7</sup>

Furthermore, Part IX examines African jurisprudence on refugees and deals with the prohibition of subversive activities, which has a legal basis in Article III of the OAU Convention. Presently, African jurisprudence on the issue of asylum-seekers is fragmentary and lacks a consistent theory despite the fact that the 1951 Convention Relating to the Status of Refugees<sup>8</sup> and the OAU Convention remain the unquestionable points of reference for both national and regional African courts.<sup>9</sup>

Finally, Part XII analyzes African states' practices in applying treaties, laws, and regulations concerning refugee questions. It also confirms that legal theory respecting refugees is far from stabilized and has done little to assure their legal well-being.

## II. THE TRADITION OF ASYLUM IN SUB-SAHARAN AFRICA: A RECENT OVERVIEW

The emergence of the modern refugee phenomenon in Africa may be linked, for various reasons, to what Louise W. Holborn defined as the "[s]truggle for and attainment of independence by most African

---

<sup>7</sup> Margaret Legum, *Problems of Asylum for Southern African Refugees*, in REFUGEE PROBLEMS IN AFRICA 54, 57 (Sven Hamrell ed., 1967). Legum attempts to show how integration is difficult to carry out: "Thus, despite their own preference, governments are tending to confine refugees fairly strictly to certain defined areas." *Id.*

<sup>8</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Geneva Convention]. Significantly, no sub-Saharan African country participated in drafting the 1951 Geneva Convention. *Id.* Furthermore, although the 1951 Geneva Convention does not explicitly address asylum, Mr. Colmar, the French delegate at the drafting of the Convention, stated that "[i]n his opinion, the right of asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it." ALEX TAKKENBERG & CHRISTOPHER C. TAHBAZ, 3 THE COLLECTED TRAVAUX PRÉPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES 319 (2d ed. 1989).

<sup>9</sup> For example, as the 1951 Geneva Convention and the OAU Convention are authorities on refugee law, the African Court of Human Rights will reference these documents when dealing with this issue.

nations.”<sup>10</sup> Changes in the African political scene following decolonization meant that the increases in the number of refugees occurred in the context of newly independent states and changing relations within the international system. These changes raise important legal questions.<sup>11</sup>

Throughout the 1980s and 1990s, African states became less committed to asylum.<sup>12</sup> Although African states practiced an open asylum policy during the 1960s and 1970s,<sup>13</sup> this was not a result of the “traditional hospitality”<sup>14</sup> attributed to these countries. Rather, the open asylum policy was mandated by concerns including domestic politics, national security and international relations.<sup>15</sup> In this sense,

---

<sup>10</sup> LOUISE W. HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME—THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972*, at 825 (1975).

<sup>11</sup> James H. S. Milner, *The Politics of Asylum in Africa: The Cases of Kenya, Tanzania and Guinea* 359 (2006) (unpublished Ph.D. thesis, Univ. of Oxford) (on file with International Development Centre, Queen Elizabeth House).

<sup>12</sup> Bonaventure Rutinwa, *The End of Asylum? The Changing Nature of Refugee Policies in Africa* 1 (UNHCR, *New Issues in Refugee Research*, Working Paper No. 5, 1999).

<sup>13</sup> Aderanti Adepoju, *The Dimension of the Refugee Problem in Africa*, 81 *AFR. AFF.* 22 (1982). Adepoju points out, “[i]n the 1960s and early 1970s, the majority of African refugees originated mainly from three territories under Portuguese rule, namely, Angola, Guinea-Bissau and Mozambique. These refugees were living mostly in three neighbouring countries sympathetic to the liberation cause, namely Zaire, Senegal and Tanzania.” *Id.*

<sup>14</sup> John Hatch, *Historical Background of the African Refugee Problem, in REFUGEES SOUTH OF THE SAHARA: AN AFRICAN DILEMMA* 1, 16 (Hugh C. Brooks & Yassin El-Ayouty eds., 1970). Hatch notes: “There is a tradition and practice of hospitality in the continent, so that an African is always an African.” *Id.* *But see* Legum, *supra* note 7, at 57 (“The African states are becoming as wary as nations elsewhere about giving permanent resident rights to large numbers of refugees, of whose background they can know very little.”). Yet, the UNHCR itself points out:

Hospitality towards the traveller, the exile, is characteristic of African societies, a deeply rooted tradition which has allowed vast numbers of refugees in Africa to rebuild their lives among their former neighbours. Ideal as this solution may appear from a distance, experience has shown that it can hide patterns of severe hardship to both the host and the refugee populations. Refugees who may be integrated with relative ease in areas where cultivable land is abundant are liable to find themselves condemned to the bottom of the social ladder in regions where resources are already stretched thin.

Adepoju, *supra* note 13, at 26.

<sup>15</sup> Sanda Kimbimbi, *La Protection des Réfugiés en Afrique*, 79, *ÉTUDES INTERNATIONALES* 87, 88 (2001) (“La persistance du problème et l’impact de la

the changing response of African states to refugees could be a result not of a new approach to this category of individuals, but rather of the changing political context in which refugee movements have occurred.<sup>16</sup>

In the 1960s and 1970s, many refugees of newborn African countries lived in neighbouring countries sympathetic to the liberation movements in the refugees' home country. In these cases, it seems that asylum was given as both a gesture of African solidarity and a means of highlighting the deficiencies of the colonial regime.<sup>17</sup> Another group of refugees during this period was a result of tensions that existed before the colonial period but culminated after independence.<sup>18</sup> In effect, the new African governments perceived refugees as a threat to national security because the refugees could be the source of interstate tensions.<sup>19</sup> This was particularly true in the case of refugees from Sudan and Rwanda. Throughout the 1960s and early 1970s, Sudan believed that refugee populations in neighbouring countries were the sources of insurgent groups. In response, the Khartoum armed forces entered border areas in Uganda, seized refugees, and returned them to Sudan, causing a tense relationship between Sudan and its neighbours.<sup>20</sup> After a change in the Ethiopian government in 1974, Sudan became the harbor of tens of thousands of refugees.<sup>21</sup> This dispersed influx occurred over "distant and sometimes inaccessible areas," and "involved very large numbers of people, from a plethora of political groupings."<sup>22</sup> Many established themselves in Khartoum and triggered tensions with the government in Addis-Ababa.<sup>23</sup>

During this time, the majority of refugees in Africa were integrated into national economies through the "zonal development" approach.

---

présence des réfugiés sur la sécurité, l'environnement et l'équilibre socio-économique des pays hôtes sont avancés pour justifier cette remise en cause.").

<sup>16</sup> Milner, *supra* note 11, at 31.

<sup>17</sup> Yassin El-Ayouty, *Referendum and Displacement of Population in French Somaliland, 1967: Political Factors Creating Refugee Situations in Africa*, in REFUGEES SOUTH OF THE SAHARA REFUGEES: AN AFRICAN DILEMMA 133, 139 (Hugh C. Brooks & Yassin El-Ayouty eds., 1970). This was what occurred in Djibouti, which was one of the states that was "looking anew into the formula of the automatic choice of independence in the light of their national interests." *Id.*

<sup>18</sup> See GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* 114 (2001).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 115.

<sup>21</sup> AHMAD KARADAWI, *REFUGEE POLICY IN SUDAN, 1967-1984*, at 67 (1999).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 65-70.

Zonal development was deemed the best method of consolidating the condition of refugee settlements<sup>24</sup> and was supported by the UNHCR and other agencies.<sup>25</sup> The open response of African countries was justified in early works on post-independent asylum policy as the “traditional hospitality” of African states during this period.<sup>26</sup> Bonaventure Rutinwa, senior lecturer at the University of Dar Es Salaam and former consultant to the UNHCR, pointed out that the signing of the OAU Convention marked the formalization of an “open door policy” by the African countries.<sup>27</sup> He added that the commitment of the Convention to asylum was a hallmark of what he defined as a “golden age” for African refugees.<sup>28</sup>

However, the history of the OAU Convention shows that political concerns played a more significant role in the drafting of this document than the notion of “traditional hospitality.” Jeff Crisp, senior policy research officer for the UNHCR, affirmed that it is important “[t]o recognize the extent to which the principle and practice of asylum was underpinned by other considerations.”<sup>29</sup> James Milner, co-director of the PRS Project which advises U.N. agencies, citing the case of Tanzania, stressed that a dual imperative for providing asylum existed in the 1960s and 1970s:

Asylum was granted to refugees fleeing wars of national liberation as part of the ideology of Pan-Africanism and as a means of highlighting the failures of colonial and minority-ruled territories. Likewise, providing asylum to refugees

---

<sup>24</sup> Apollo Kironde, *An African Evaluation of the Problem*, in REFUGEES SOUTH OF THE SAHARA: AN AFRICAN DILEMMA 105, 110 (Hugh C. Brooks & Yassin El-Ayouty eds., 1970).

<sup>25</sup> MARK CUTTS ET AL., UNITED NATIONS HIGH COMM’R FOR REFUGEES, THE STATE OF THE WORLD’S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION 37 (Mark Cutts et al. eds. 2000) [hereinafter STATE OF THE WORLD’S REFUGEES].

<sup>26</sup> YÉFIME ZARJEVSKI, A FUTURE PRESERVED: INTERNATIONAL ASSISTANCE TO REFUGEES 102 (1988). Zarjevski states:

Everywhere the fate of refugees is determined by the attitude of the country of reception. In Africa, this attitude has always been influenced by a simple human feeling of brotherly sympathy, and by unshakeable optimism. No persuasion was needed in Africa to make governments grant asylum to refugees who sought it. *Refoulement* at the frontier is the exception rather than the rule, and represents a rare breach of traditional hospitality.

*Id.*

<sup>27</sup> Rutinwa, *supra* note 12, at 4.

<sup>28</sup> *Id.* at 4, 8.

<sup>29</sup> Jeff Crisp, *Africa’s Refugees: Patterns, Problems, and Policy Challenges* 5 (UNHCR, *New Issues in Refugee Research*, Working Paper No. 28, 2000).

through the zonal development approach was seen as a means of attracting international assistance to under-developed areas of newly independent states.<sup>30</sup>

In the 1980s, the situation seemed to change radically as refugees were no longer accommodated in settlements, but rather put into refugee camps.<sup>31</sup> The refugee camps were promoted by host states who viewed them as the most convenient way to limit the impact of refugees on the local community.<sup>32</sup> This shift clearly indicated a change in the asylum policies of African states.<sup>33</sup> The security issue, particularly the presence of armed elements within the refugee populations, seemed the most important, especially considering the events that occurred in Southern Africa in the late 1970s involving South Africa and Namibia.<sup>34</sup>

Interestingly, President J. Nyerere of Tanzania, in his statement at the 1979 Arusha Pan-African Conference on Refugees, declared, "the refugees of Africa are primarily an African problem . . . . But I do not believe that dealing with the problem of 3.5 million people, and giving them a chance to rebuild their dignity and their lives is an impossible task for 48 nations and their 350 million inhabitants."<sup>35</sup> Additionally, M. Williams Shope caustically affirmed and concluded the following: "We would like to restate our conviction that the causes of refugee problems in Africa are political and economic. Life in the African con-

---

<sup>30</sup> Milner, *supra* note 11, at 39. "Tanzania was the first African state which found itself host to relatively large numbers of refugees . . . . Provisions made for them have varied. At one time, they were supported in camps by the Tanzanian government; at others, concerted attempts were made to settle them agriculturally among the local people." *Id.* See also Legum, *supra* note 7, at 59 "Latterly, as the burden increased, the Tanzanian government has insisted that the liberation movements should make themselves responsible for refugees; and they have been largely confined to two areas some distance from the capital Dar-el-Salaam." *Id.*

<sup>31</sup> LOESCHER, *supra* note 18, at 226.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Elly-Elikunda Mtango, *Military and Armed Attacks on Refugee Camps, in REFUGEES AND INTERNATIONAL RELATIONS 87-121* (Gil Loescher & Laila Monahan eds., Oxford Univ. Press 1989) (providing a description of the events that occurred in southern Africa in the late 1970s involving South Africa and Namibia). The author affirms that political considerations prevailed over humanitarian concern in the 1983 "Draft Declaration" promoted by UNHCR "on the prohibition of military and armed attacks against refugee camps and settlements." *Id.* at 98.

<sup>35</sup> AN ANALYSING ACCOUNT OF THE CONFERENCE ON THE AFRICAN REFUGEE PROBLEM, ARUSHA, MAY 1979, at 15 (L-G Eriksson et al. eds., Scandinavian Institute of African Studies 1981).

continent is very complex and multiform. Stormy and sometimes dramatic events shake the domestic life in individual African country [sic].<sup>36</sup>

The refugee problem started becoming unbearable for African countries in the early 1990s. In the 1990 Khartoum Declaration, African countries showed their concern, noting the “donor fatigue syndrome coupled with declining political will on the part of some of the traditional donors.”<sup>37</sup> These factors added to the fear that Western states could reduce their commitment in Africa after the conclusion of the Cold War and changed the vision of the emergency of refugees. This troublesome vision was confirmed by various events that occurred in Africa throughout the 1990s. During this time, the proliferation of conflicts across the continent caused Africa’s refugee population to reach 6.7 million in 1994, according to statistics provided by the UNHCR.<sup>38</sup> Despite the scale of the crisis, Western countries were reluctant to become involved in these emergencies because their interests were limited.<sup>39</sup> The geopolitical and economic interests of industrialized countries have generally been low in Africa, resulting in armed conflicts and accompanying refugee crises that persist for years.<sup>40</sup> Additionally, many states across Africa were considerably alarmed by the potential consequences of hosting mass influxes of refugees and took steps to exclude asylum-seekers from their territories.<sup>41</sup>

---

<sup>36</sup> Mark W. Shope, *Causes of Refugee Problem in Africa* 29 (paper submitted in preparation for Pan-American Refugee Conference, Arusha, Jan. 8–Feb. 2, 1979).

<sup>37</sup> Org. African Unity [OAU], *The Khartoum Declaration on Africa’s Refugee Crisis*, OAU Doc BR/COM/XV/55.90, ¶ 3 (Sept. 24, 1990), available at <http://www.umn.edu/humanrts/africa/KHARTO.htm>.

<sup>38</sup> STATE OF THE WORLD’S REFUGEES, *supra* note 25, at 310.

<sup>39</sup> LOESCHER, *supra* note 18, at 13.

<sup>40</sup> Jeff Crisp, *No Solution in Sight: The Problem of Protracted Refugee Situations in Africa*, in *DISPLACEMENT RISKS IN AFRICA* 17, 19 (Itaru Ohta & Yntiso D. Gebre eds., 2005).

<sup>41</sup> See *id.* at 18–19. See also The United Nations Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), art. 3, ¶¶ 2–3 (Dec. 14, 1967), available at [http://www.unhcr.ch/html/menu3/b/o\\_asylum.htm](http://www.unhcr.ch/html/menu3/b/o_asylum.htm) [hereinafter Declaration on Territorial Asylum]. The Declaration on Territorial Asylum clearly affirms that exception to rejection or expulsion of an individual can be made “[o]nly for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.” *Id.* at art. 3, ¶ 2. Furthermore, “[s]hould a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the persons concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.” *Id.*

The catastrophic events of this period, mainly those that occurred in the Great Lakes Region,<sup>42</sup> brought the institution of asylum in the African continent to a crisis. While some authors noted a dramatic increase in instances of *refoulement* and rejection at the frontier, others pointed to a significant decline in the standard of protection of refugees by almost all African countries and noted that repatriation was the only solution adopted by most governments.<sup>43</sup>

The massive increase in the number of refugees caused many to find themselves in emergencies throughout the entire decade. Because the host countries' economies did not improve during the same period, integration became almost impossible, and camps became refugees' permanent residence.<sup>44</sup> Problems included not only the protracted nature of these situations and declining international support, but additionally, many financial donors declared that they were no longer prepared to assist refugees.<sup>45</sup>

Other authors have cited a separate reason for the rise in restrictive asylum policies set by African countries: changes in the nature of refugee movements and populations.<sup>46</sup> The most recent generation of African asylum-seekers were no longer fleeing wars of national liberation and decolonization, causes that had rallied all African populations against a common enemy, and thus could no longer count on the solidarity previously offered to them.<sup>47</sup> Furthermore, refugees have recently been perceived as a security concern for host countries, and restrictive policies regarding refugees have been justified on these grounds.<sup>48</sup>

Finally, Crisp noted that democratization has given rise to a system of more restrictive asylum policies on the African continent.<sup>49</sup> The

---

<sup>42</sup> Milner, *supra* note 11, at 51. Secretary General of the OAU, Salim Ahmed Salim stated, "The time has come for all of us to work towards enhancing mutual understanding and restoring confidence." *Id.*

<sup>43</sup> Rutinwa, *supra* note 12, at 9, 14-15.

<sup>44</sup> Arafat Jamal, *Camps and Freedoms: Long-term Refugee Situations in Africa*, 16 FORCED MIGRATION REV. 4, 4 (2003). Jamal states: "Protracted refugee situations are neither natural nor inevitable consequences of involuntary population flows; they are the result of political actions, both in the country of origin . . . and in the country of asylum." *Id.*

<sup>45</sup> Crisp, *supra* note 29, at 6.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Rutinwa, *supra* note 12, at 16-17.

<sup>49</sup> Crisp, *supra* note 29, at 8. The author affirms:

Indeed, there is growing evidence of a linkage between the process of democratization on one hand and the decline in refugee protection standards

opening of the political process throughout Africa has led to increasing phenomena of xenophobia that has been fuelled by the effects of the austerity programs imposed by the International Monetary Fund.<sup>50</sup> As governments have been obliged to cut free services for their citizens, it has become difficult for people to accept the same services that their governments or other agencies freely provide to refugees.<sup>51</sup> This disparity aroused discontent in the local populations.<sup>52</sup> A last, but no less striking, feature of refugees in this continent is the fact that offers of asylum are often reciprocal: countries that generate thousands of refugees also give protection to refugees from countries offering asylum to their nationals.<sup>53</sup>

### III. THE OAU CONVENTION AS THE MAIN REGIONAL SOURCE OF REFUGEE LAW IN AFRICA: INTEGRATION OR REAL IMPLEMENTATION OF THE UNIVERSAL REGIME?

Originally considered a temporary problem, the refugee question came to dominate relationships between states in Africa. A combination of political and socio-economic realities produced both the tensions and the suppleness that are evident in the OAU Convention. Specifically, the tensions derive from the socio-economic aspects related to burden sharing,<sup>54</sup> the political issues surrounding the prohibi-

---

on the other. Prior to the 1990s, authoritarian governments and one party state in Africa were relatively free to offer asylum to large refugee populations when they considered such a policy to be consistent with their own interests. But with the end of the cold war and the introduction of pluralistic systems of government in many parts of the continent, the refugee question has assumed a new degree of political importance. As in the industrialized states, both governments and opposition parties are prone to encourage nationalistic and xenophobic sentiments, and to blame their country's ills on the presence of refugees and other foreigners. In countries where large numbers of people are living below the poverty line and where income differentials are wide (South Africa provides a good example) such messages can have a potent appeal, irrespective of their veracity.

*Id.*

<sup>50</sup> Rutinwa, *supra* note 12, at 1-2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Aderanti Adepoju, *Refugees in Africa: Problems and Prospects* (Mar. 31, 1984) (unpublished paper, on file with author).

<sup>54</sup> The enormous sacrifices of the African states in hosting refugee populations were an affirmation of the basic premise of the political realities and humanitarian burden sharing philosophy underlying the 1969 Convention. See Bahame Tom Mukirya Nyanduga, *Refugee Protection Under the 1969 OAU Convention Governing*

tion of “subversive activities,” and the doctrine of non-intervention. In contrast, the flexibility of the OAU Convention originates from the adopted definition of the term “refugee.” The analysis of both the tensions and the flexibilities reveals that the drafting of this Convention was strongly influenced by the perceptions of nationhood and sovereignty that were dominant in Africa at the time.<sup>55</sup> Thus, it is unsurprising that the Convention is not strongly associated with a human rights perception of the refugee problem.<sup>56</sup>

In the early 1960s, the emergence of new refugee problems in Africa was considered the main reason for the UNHCR, Sadruddin Aga Khan,<sup>57</sup> to initiate suppression of the dateline in the definition of “refugees” as provided in Article 1 of the 1951 Convention Relating to the Status of Refugees (“1951 Convention”), which eventually led to the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”)<sup>58</sup> abolishing the dateline.<sup>59</sup> The ratification of the 1967 Protocol caused members of the Organization of African Unity (“OAU”) to abandon their plan to create a wholly independent African convention. Instead, the countries chose to establish another legal instrument dealing with specific African aspects of the refugee problem. This instrument was complementary to the 1951 Convention,<sup>60</sup> which has been

*Specific Aspects of Refugee Problems in Africa*, 47 GERMAN Y.B. INT’L L. 85, 96 (2004).

<sup>55</sup> J. Oloka-Onyango, *The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa*, 24 DENV. J. INT’L L. & POL’Y 349, 374-75 (1996).

<sup>56</sup> *Id.*

<sup>57</sup> Dr. Aga Khan was the longest serving High Commissioner, serving from 1965 to 1977. Prince Sadruddin Aga Khan, Britannica Online Encyclopedia, <http://www.britannica.com/EBchecked/topic/915026/Prince-Sadruddin-Aga-Khan> (last visited Nov. 3, 2008).

<sup>58</sup> Protocol Relating to the Status of Refugees, Nov. 18, 1966, G.A. Res. 1186 (XLI), available at [http://www.unhcr.ch/html/menu3/b/o\\_p\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_p_ref.htm).

<sup>59</sup> *Id.* art. I, ¶¶ 1-2. The Protocol stipulates:

For the purpose of the present Protocol, the term ‘refugee’ shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words ‘As a result of events occurring before 1 January 1951 . . .’ and the words ‘. . . as a result of such events’, in article 1 A (2) were omitted.

*Id.* art. 1, ¶ 2.

<sup>60</sup> OAU Convention, *supra* note 6, art. 8, ¶ 2. The OAU Convention Preamble states:

9) Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep

considered too Eurocentric,<sup>61</sup> as well as the 1967 Protocol.<sup>62</sup> Additionally, concerns for finding a solution to the mass-influx of refugees in the continent and for limiting the risks of destabilization of the states, which were still weak at that time, have been considered “profound reasons” that inspired the drafting of the OAU Convention.<sup>63</sup> It is important to note that the 1967 Protocol has a dual nature. For countries that are parties to the 1951 Convention, it is a supplementary instrument. For states that are not parties to the 1951 Convention, it is an independent instrument by which they undertake its obligations irrespective of the dateline.<sup>64</sup>

The Universal Declaration of Human Rights (“Universal Declaration”) does not deal with the admission of refugees or the question of asylum; rather, it deals principally with the status of persons granted asylum.<sup>65</sup> In contrast, the OAU Convention regulates the question of asylum in Article II, stressing that in the African context the conces-

concern of States for refugees and their desire to establish common standards for their treatment. 10) Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees and meanwhile to apply their provisions to refugees in Africa.

*Id.* pmbi., ¶ 9-10.

[The Assembly of Heads of State and government meeting] [r]equests Member States of the Organization of African Unity, if they have not already done so, to ratify the United Nations Convention relating to the Status of Refugees and to apply meanwhile the provisions of the said Convention to refugees in Africa.

OAU, Resolution No. 26, ¶ 7, AHG/Res.26 (II) (1965).

<sup>61</sup> RENU M. ANAND, *AFRICAN REFUGEES: AN OVERVIEW* 16 (1993).

<sup>62</sup> Paul Weis, *The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa*, 3 *REVUE DES DROITS DE L'HOMME* 449, 453 (1970).

<sup>63</sup> Kimbimbi, *supra* note 15, at 87.

<sup>64</sup> Weis, *supra* note 62, at 454. As of December 1, 2006, Cape Verde in sub-Saharan Africa is the only country part of the 1967 Protocol not also part of the 1951 Convention. *THE 1951 REFUGEE CONVENTION QUESTIONS & ANSWERS* 16-17 (UNHCR ed. 2007), available at <http://www.unhcr.org/basics/BASICS/3c0f495f4.pdf>. Conversely, as of December 1, 2006, Madagascar is the only country in sub-Saharan Africa that is part of the 1951 Convention not also part of the 1967 Protocol. *Id.* As of March 1, 2006, Eritrea remains the only country in sub-Saharan Africa that is not a member of either the 1951 Convention or of the 1967 Protocol. *Id.*

<sup>65</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

sion of asylum is "a peaceful and humanitarian act."<sup>66</sup> This last expression has decisively tempered tension with respect to problems associated with African refugees.<sup>67</sup>

Both the Geneva Convention and the OAU Convention should be read individually, in light of their own particular provisions. In case of any possible conflict, Article 30 of the 1969 Vienna Convention on the Law of the Treaties appears relevant. This Article deals with the application of successive treaties relating to the same subject matter.<sup>68</sup> The OAU Convention can be considered a codification of the law of prior treaties. Therefore, its emphasis on its complementary character seems to ensure that its wording is not divergent from the 1951 Convention.<sup>69</sup>

Finally, it is worth noting that implementing both the Universal Declaration and the OAU Convention requires legislative and administrative measures to ensure that the municipal law of the contracting

---

<sup>66</sup> OAU Convention, *supra* note 6, art. II, ¶ 2. See also Elisabeth Zoller, *Bilan de Recherches de la Section de Langue Française*, in *LE DROIT D'ASYLUM/THE RIGHT OF ASYLUM* 23 (Martinus Nijhoff 1989). Nevertheless, Zoller contends: "Il n'existe pas en droit international des règles impératives qui obligerait l'Etat à octroyer l'asile. C'est en ce sens que l'asile humanitaire n'existe pas, il n'y a d'asile que politique parce que toujours discrétionnaire." *Id.* Zoller continues: "Bilan de recherches de la section de langue française du Centre d'Études et de Recherche de l'Académie." *Id.*

<sup>67</sup> Ahmed M. Rifaat, *Refugees and the Right of Asylum: An African Perspective*, 40 *REVUE EGYPTIENNE DE DROIT INTERNATIONAL* 71, 105 (1984).

<sup>68</sup> 1969 Vienna Convention, *supra* note 2, art. XXX. Article XXX stipulates:

- 1) Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
- 2) When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
- 3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
- 4) When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
- 5) Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

*Id.*

<sup>69</sup> Weis, *supra* note 62, at 463.

states would be in accordance with the letter and spirit of the two instruments. However, doubts exist regarding the actual enforcement of these latest treaties.

#### IV. THE PIVOTAL ISSUE OF REFUGEE LAW: ASYLUM

Throughout the legal history of Africa, establishing the right of asylum for most refugees has not posed the most urgent question for authorities in charge of drafting conventions, treaties, and laws.<sup>70</sup> The first paragraph of Article II of the OAU Convention includes the principle of granting asylum by stating: “[m]ember States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.”<sup>71</sup> The doctrine recommends asylum, but does not require it.<sup>72</sup> It has been stressed that although the OAU Convention is considered a great step forward in the legal protection of refugees, it does not provide individuals with a right of asylum.<sup>73</sup> To the contrary, according to the dominant doctrine, asylum is the result of kindness and is not legally required. There is agreement, however, that the doctrine gives individuals the benefit of a temporary stay in the country of refuge.<sup>74</sup>

Although granting asylum generally has been considered a right of the country,<sup>75</sup> respected scholars have regarded asylum more as a right

<sup>70</sup> Peter Nobel, *Refugee, Law, and Development in Africa*, 3 MICH. Y.B. INT’L LEGAL STUD. 255, 265 (1982).

<sup>71</sup> OAU Convention, *supra* note 6, art. II, ¶ 1.

<sup>72</sup> Weis, *supra* note 62, at 457. Regarding asylum and state sovereignty, it is worth noting that “[t]he possibility of acknowledging with respect to the asylum-seeker, that another country is considered more appropriate to provide protection.” Morten Kjaerum, *The Concept of Country of First Asylum*, 4 INT’L J. REFUGEE L. 514, 514 (1992).

<sup>73</sup> Rifaat, *supra* note 67. See also Kimbimbi, *supra* note 15, at 88. The author uses the adverb “implicitment” to stress that the OAU Convention recognizes that the right to grant asylum remains a prerogative of the state. *Id.*

<sup>74</sup> Rainer Hofmann, *Refugee Law in Africa*, 39 L. & ST. 79, 85 (1989); Bedjaoui, *supra* note 1, at 28. Bedjaoui contends: “[Le droit d’asile est] un droit pour l’Etat d’accorder l’asile et non un droit de l’individu à prétendre au bénéfice de celui-ci.” *Id.*

<sup>75</sup> TAKKENBERG & TAHBAZ, *supra* note 8, at 346. Mr. Rochefort, French delegate for the draft of the 1951 Convention, declared:

The right of asylum rested on moral and humanitarian considerations which were freely recognized by receiving countries, but it had certain limitations. A country could not contract an unconditional obligation towards a person

of the individual in Africa. Milner affirmed that several authors share this opinion.<sup>76</sup> In this sense, Committee A of the 1979 Arusha Conference recognized that “international level asylum is still a right of the state, [but] some progress had been made in the 1969 OAU Refugee Convention in the direction of strengthening the position of the individual in relation to asylum.”<sup>77</sup> A minority of scholars have even affirmed that the right of asylum in the OAU Convention is a legal duty that is binding on states.<sup>78</sup>

To show the coherence of the intentions of the drafters of the OAU Convention, the wording of Article II paragraph 1 of the OAU Convention has been retrieved by Article II, paragraph 4, of the Final Text of the AALCO’s (Asian-African Legal Consultative Organization) 1966 Bangkok Principles on Status and Treatment of Refugees (“Bangkok Principles”), adopted in 2001, which stipulates: “States shall, bearing in mind provisions of Article X, use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality.”<sup>79</sup>

However, the fact that the reception of asylum-seekers is subject to national legislation can seriously restrain what shelter is available to individuals asking for refuge. The OAU Convention, in Article II, paragraphs 2, 3, and 4, closely follows the preamble of The United Nations Declaration on Territorial Asylum (“Declaration on Territorial

---

over whom it was difficult to exercise any control, and into the ranks of whom undesirable elements might well infiltrate.

*Id.*

<sup>76</sup> Milner, *supra* note 11, at 36 n.130. Milner refers to Bonaventure Rutinwa’s general views on the issue of refugees in sub-Saharan Africa. *Id.* See also TAKKENBERG & TAHBAZ, *supra* note 8, at 318. Moreover, Giraldo-Jaramillo, Colombian delegate at the draft of the 1951 Convention, doubted that asylum was “a duty incumbent upon states.” *Id.* Giraldo-Jaramillo explained that, “[i]n his view, territorial asylum could not be regarded as a duty incumbent on states.” *Id.*

<sup>77</sup> Conference on the Situation of Refugees in Africa, Arusha, Tanzania, May 7-17, 1979, U.N. Document REF/AR/CONF/RPT./1.

<sup>78</sup> BAIWONG MAHAMAT, ANALYSE COMPARATIVE DE LA PROTECTION JURIDIQUE ACTUELLE DES REFUGIES EN AFRIQUE ET EN EUROPE 16 (N’Djamena 1998).

<sup>79</sup> Asian-African Legal Consultative Organization [AALCO], *Final Text of the AALCO’s 1966 Bangkok Principles on Status and Treatment of Refugees* art. 2 ¶ 1 (adopted June 24, 2001), available at <http://www.unhcr.org/refworld/docid/3de5f2d52.html> [hereinafter *Bangkok Principles*]. A provision of this kind is not present in the original version of the 1966 Bangkok Principles concerning Treatment of Refugees.

Asylum”).<sup>80</sup> While the Declaration is not legally binding, the same provisions become binding for the contracting parties through their incorporation in the OAU Convention. This is crucial for the principle of *non-refoulement*, whose embodiment in the regional instrument is considered a very important step forward in the development of the human rights of asylum-seekers and in the strengthening of the law of asylum.<sup>81</sup>

Article II, paragraph 3 of the OAU Convention prohibits *refoulement* in terms similar to Article 33 of the Geneva Convention, although the regional instrument does not provide for the limitation contained in paragraph 2 of the universal instrument.<sup>82</sup> On the contrary,

---

<sup>80</sup> See Paul Weis, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT’L L. 93, 117, 148 (1969). Weis affirms:

The Declaration [on Territorial Asylum] constitutes an elaboration of Article 14 of the Universal Declaration. This Article, in its final form, recognizes the right to seek and to enjoy asylum, but not the right to be granted asylum. It is based on the concept of asylum as a right of the state to grant it, rather than as a right of the individual to be granted asylum.

*Id.* However, later in the same article Weis states: “While the so-called right of asylum is thus in present international law a right of states to grant asylum, there is a growing tendency to take account of the interest of the individual seeking asylum.” *Id.* See also Paul Weis, *The Present State of International Law on Territorial Asylum*, 31 *Annuaire Suisse de Droit Int’l* 86, 86 (1975) (“Article II of the (African Union) Convention, which is modelled closely on the text of the Declaration on Territorial Asylum as it stood prior to certain changes brought about by a Working Party of the 6<sup>th</sup> Committee of the UN General Assembly.”). The Declaration on Territorial Asylum stipulates: “Recognizing that the grant of asylum by a State to persons entitled to invoke article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State.” Declaration on Territorial Asylum, *supra* note 41, pmbl., ¶ 2. Furthermore, “[n]o person referred to in Article I, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.” *Id.* art. 3, ¶ 2. It additionally states that “[w]here a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.” *Id.* art. 2, ¶ 2.

<sup>81</sup> Weis, *supra* note 62, at 457. Hofmann goes further, adding that “in Art. II, paragraph 3, the principle of *non-refoulement* in its wide sense was anchored for the first time in international law.” Hofmann, *supra* note 74, at 84.

<sup>82</sup> 1951 Geneva Convention, *supra* note 8, art. 33. Article 33 of the 1951 Geneva Convention stipulates:

1) No Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2) The benefit of the

the OAU Convention explicitly excludes rejection at the border from the definition of *refoulement*.<sup>83</sup> An ongoing debate among scholars arose as to whether asylum has been contended as a veritable "right" in the African continent.<sup>84</sup>

Member states that find it difficult to continue to grant asylum to a refugee are required by paragraph 4 to "[a]ppeal directly to other member States and through the OAU, and such other member States shall in the spirit of African solidarity and international cooperation take appropriate measures to reduce the burden of the member state granting asylum."<sup>85</sup>

Paragraph 5 of Article II encourages resettlement in other member states, as well as temporary asylum in the country, when a member state does not grant a refugee the right to reside in a country of asy-

---

present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Id.*

<sup>83</sup> TAKKENBERG & TAHBAZ, *supra* note 8, at 345. However, Zutter, the Switzerland delegate, stated during the meeting of the "Travaux préparatoires" at the 1951 Convention: "The term '*refoulement*,' . . . had a vague[] meaning; it could not, however be applied to a refugee who had not yet entered the territory of a country. The word 'return,' used in the English text, gave that idea exactly." *Id.* But see Lauterpacht & Bethlehem, *supra* note 2, at 114. Lauterpacht and Bethlehem observe that the 1951 Convention implicitly provides for the non-rejection at the frontier: "Rejection at the frontier, as with other forms of pre-admission *refoulement*, would be incompatible with the terms of Article 33 (1)." *Id.* Lauterpacht and Bethlehem specify that "*refoulement* is prohibited to the frontiers of any territory in which the person concerned will be at risk-regardless of whether those territories are the country of origin or the person concerned." *Id.* at 122.

<sup>84</sup> George Okoth-Obbo, *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, 20 REFUGEE SURV. Q. 79, 88-89 (2001).

<sup>85</sup> OAU Convention, *supra* note 6, art. II, ¶ 4. The Delegate of Panama in the Special Committee on Refugees and Displaced Persons stated: "I think that the problem of refugees does not concern two countries, the country of origin and the country of refuge, but that it involves the responsibility of all countries." Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT'L L. 327, 343 (1949). The Special Committee on Refugees and Displaced Persons was established by resolution number 5 (I) of the Economic and Social Council of the United Nations, February 16, 1946, entitled "Commission on Human Rights and Sub commission on the status of women." *Id.* The doctrine of veritable contractual obligation considers the provisions of OAU Convention Article II. S. Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 149, 320 (1976).

lum.<sup>86</sup> This paragraph is particularly interesting because of its use of the qualifier “may” concerning the temporary residence in any country of asylum in which the applicant first presented herself or himself pending arrangements for her or his resettlement. It shows that asylum is not an absolute duty for the guest country, but rather derives from the principle of *non-refoulement*. This principle suggests that an asylum-seeker should at least be momentarily admitted if the accordance of a non-right-of-entry would oblige the individual to return to a country where she or he could be persecuted.<sup>87</sup>

Far from weakening the principle of *non-refoulement*, temporary refuge has been considered a means to facilitate the observance of the principle.<sup>88</sup> Since *non-refoulement* is applicable to expulsion or return, as well as to rejection at the frontiers, temporary refuge should be considered to provide a form of protection characterized by the general principle. This interpretation is consistent with the situation provided by both Article 31 of the 1951 Convention and by Article II, paragraph 3, of the OAU Convention.<sup>89</sup>

The real question arises from the fact that the principle of temporary refuge in African countries has often been disregarded. In the sunset years of the last century and at the dawn of the current one, individuals seeking asylum in Kenya have been urged by the UNHCR to

---

<sup>86</sup> See OAU Convention, *supra* note 6, art. II, ¶ 5. “Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.” *Id.*

<sup>87</sup> Weis, *supra* note 62, at 458.

<sup>88</sup> Contra Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary “Refuge” and Local Responses to Force Migrations*, 35 VA. J. INT’L L. 13, 19 (1994). “The current popularity of temporary protection cannot be explained as a belated recognition of the excessive narrowness of the Refugee Convention, but instead constitutes one more device to constrict access to asylum.” See also *The Republic v. Abdul Rahman and Others (Somalians)*, Criminal Case G 26 of 2005 (Malawi: Resident Magistrate Court Lilongwe May 9, 2005), available at <http://www.unhcr.org/refworld/docid/4289d1664.html>. “Illegal entry of any person for purposes of seeking asylum does not disqualify the applicant to become a refugee.” *Id.*

<sup>89</sup> See G.J.L. Coles, *Temporary Refuge and the Large Scale Influx of Refugees*, 8 AUSTL. Y.B. INT’L L. 189, 199, n.29 (1978-80) (“Article 31 of the 1951 Convention expressly deals with the Refugees unlawfully in the country of refuge.”). See also TAKKENBERG & TAHBAZ, *supra* note 8, at 324 (Baron van Boetzelaer, representing The Netherlands at the drafting of the 1951 Convention, saying he “feared that Article 26 [now Article 31] might be interpreted as debarring states from expelling refugees who had illegally entered its territory”).

go back to Uganda or Tanzania, through which they may have already passed. Ugandan officials have refused to consider the claims of Rwandan refugees previously present in Tanzania, even as the government based in Dodoma threatened the refugees with forced repatriation to the territory controlled by Kigali.<sup>90</sup>

Article II, paragraph 6 contains another principle introduced to international refugee law by the OAU Convention, arising out of the OAU's concern with subversion.<sup>91</sup> The principle enunciated in this paragraph had constantly been advocated by the OAU and has become a legal obligation on state parties.<sup>92</sup> It was introduced to address concerns regarding the danger of subversive activities by refugees against their country of origin.<sup>93</sup>

The provisions on asylum in the OAU Convention combine classical refugee concerns with priorities drawn from both the politics of international relations and state security. The legal effect of the OAU Convention with respect to asylum should not be overemphasized, as its greater value rests on the purpose of its provisions to merge and depoliticize the grant of asylum, particularly in the context of international relations and state security policies.<sup>94</sup>

G. Goodwin-Gill, professor of public international law at Oxford University, reaffirms the main concept linked to asylum in sub-Saharan Africa, stating:

Despite the encouraging tone of the OAU Convention, neither this instrument nor any other permits the conclusion that states have accepted an international obligation to grant asylum to refugees, in the sense of the admission to residence and lasting protection against persecution and/or the exercise of jurisdiction by another state.<sup>95</sup>

---

<sup>90</sup> See J.C. HATHAWAY, *THE RIGHTS OF THE REFUGEE UNDER INTERNATIONAL LAW* 294 (2005). The author does not specify exactly when these events occurred.

<sup>91</sup> OAU Convention, *supra* note 6, art. II, ¶ 6.

<sup>92</sup> Weis, *supra* note 62, at 458.

<sup>93</sup> *Id.* See also Thomas Hovet, Jr., *Boundary Disputes and Tensions as a Cause of Refugees*, in *REFUGEES SOUTH OF THE SAHARA: AN AFRICAN DILEMMA* 21, 28 (Hugh C. Brooks & Yassin El-Ayouty eds., Negro Univ. Press 1970). "Refugees . . . have been used as bases for subversion of what were considered to be neo-colonial regimes in the more 'reactionary' African states. To the African states who were the subject of this sort of pressure, the refugees, in essence, became a source of tension." *Id.*

<sup>94</sup> Okoth-Obbo, *supra* note 84, at 88-90.

<sup>95</sup> G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 178 (1986).

Years later, however, the same author noted: "Nonetheless, state practice is replete with examples of asylum given; the humanitarian practice exists, but the sense of obligation is missing."<sup>96</sup>

V. *NON-REFOULEMENT* IN SUB-SAHARAN AFRICA: HAS A NEW MEANING OF THE CONCEPT ESTABLISHED ITSELF?

The most urgent need of refugees is to secure entry into a territory that will protect them from the risk of persecution. This concern should be reconciled to the fact that sovereign governments claim all the territories of the world and often prevent or restrict access to non-citizens.

It has been maintained that, in the traditional doctrine of international law, every sovereign state had the power to expel unwanted aliens, even if doctrine simultaneously noted that political refugees have often constituted an exception. In the first decades of the twentieth century, courts gave the impression that they considered that genuine political refugees should not be deported to the persecuting country,<sup>97</sup> even if it is difficult to separate the political nature of the reason that induces them to ask for asylum from the private one.<sup>98</sup>

Political refugees, just one of the categories of African refugees, show the tension involved in granting asylum. For instance, granting asylum to a political lawbreaker may be considered a violation of territorial sovereignty. Insofar as it serves as a barrier to legal proceedings,

<sup>96</sup> G. GOODWIN-GILL & J. MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 369 (2007).

<sup>97</sup> Morgenstern, *supra* note 85, at 347.

<sup>98</sup> JEAN TURPIN, *NOUVEAUX ASPECTS JURIDIQUES DE L'ASILE POLITIQUE- LE LITIGE HUNGARO-YUGOSLAVE DEVANT LA SOCIETE DES NATIONS* 51 (Maisonneuve 1937). Talking about political crimes, Turpin highlights that rarely: "[l]e délit commis soit exclusivement politique, c'est-à-dire qu'il ne porte atteinte qu'à un intérêt politique, le plus souvent l'intérêt politique et l'intérêt privé seront lésés en même temps." *Id.* Thus, this statement raises the question of how difficult it sometimes is to distinguish political reasons from private reasons in the application for asylum made by the claimant. He concludes:

Il faudrait arriver à concilier la nécessité de l'asile et la nécessité de la répression, c'est un problème difficile si l'on considère que l'Etat de refuge est toujours mal placé pour apprécier la criminalité de tels actes, les insurgés se prétendant toujours en état de légitime défense. Pour accorder l'extradition, il faudrait que l'Etat porte un jugement sur le régime politique de l'Etat requérant, or, l'intervention ne doit pas dégénérer en un acte d'immixtion dans le domaine de la compétence discrétionnaire des gouvernants.

*Id.* at 55.

asylum may appear as a distrust of national justice and as an intrusion into the domestic affairs of a state. Nonetheless, when it is accepted by all states, each playing the role of the state of refuge and the role of territorial state, asylum loses all such negative aspects and turns into a general and impersonal rule of conduct.<sup>99</sup>

Such rules are supported in Africa by the fact that states can refer to a quasi burden-sharing pillar of their continent's protection of refugees, which the OAU Convention mentions in Article II, paragraph 3.<sup>100</sup> Additionally, many sub-Saharan African countries, such as Lesotho, provide for the principle of *non-refoulement* in their respective national legislation.<sup>101</sup> On this point, doctrine seems to adopt a uniform approach. According to states' past practices, authors generally would affirm that these states comply with the letter of both the regional instrument and national legislation, including the prohibition on rejection at the border.<sup>102</sup> This occurs despite the fact that national legislatures sometimes use the concepts of *non-refoulement* and expulsion interchangeably.

The OAU Convention does not consider this latter concept in its provisions. On the contrary, Article V of the Bangkok Principles stipulates in paragraph 4:

The expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose be-

---

<sup>99</sup> Asylum (Colom. v. Peru), 1950 I.C.J. 395 (Nov. 20), available at <http://www.unhcr.org/refworld/docid/3ae6b6f8c.html>.

<sup>100</sup> ASHA HANS & ASTRI SUHRKE, *Responsibility Sharing, in RECONCEIVING INTERNATIONAL REFUGEE LAW* 90 (J.C. Hathaway ed., 1997). The concept of burden sharing was formally introduced during the Conference on the Refugee Situation in Africa which took place May 7-17, 1979 in Arusha. *Id.*

<sup>101</sup> Hovet, *supra* note 93, at 22. Historically, however, "[w]hile most states will allow entry of political refugees, Lesotho will return to South Africa any person seeking refuge whom South Africa charges with a violation of law, including violation of what in other societies might be called political crimes." *Id.* "In the case of Botswana and Lesotho, these states have agreed to requests from South Africa for the return of refugees who are charged with crimes that most states would consider as political crimes." *Id.* at 27.

<sup>102</sup> Robert Plender, *The Present State of Research Carried out by the English-Speaking Section of the Centre for Studies and Research in LE DROIT D'ASILE [THE RIGHT OF ASYLUM]* 92 (1989).

fore the competent authority or a person or persons specially designated by the competent authority.<sup>103</sup>

The government of Sudan wanted to express its view that, in this paragraph, the expression “competent authority” should mean the relevant national bodies and not serve as a general reference to courts or judicial bodies. Sudanese authorities intervened to make the expulsion of aliens easier.<sup>104</sup>

The principle of *non-refoulement* prescribes that no refugee should be forced to return to any country where she or he is likely to face persecution. *Refoulement* is to be distinguished from expulsion or deportation, which are more formal processes whereby a lawfully resident foreigner may be asked to leave a state, or may be removed against his or her will.<sup>105</sup> Analyzing the practice, Africa’s governments should comply with the international legal instruments more than they currently do. One way they may do so is by introducing provisions in their respective national legislations that more clearly show their will to ban practices of *refoulement*. Nigeria, for example, has legally protected asylum-seekers from both rejection at the frontier and expulsion, apart from situations where it is apparent that the applicant should be excluded from the grant of asylum under relevant provisions of the international conventions.<sup>106</sup> In Ghana, both practice and juris-

---

<sup>103</sup> *Bangkok Principles*, *supra* note 79, art. V, ¶ 4. See also 1951 Geneva Convention, *supra* note 8, art. 32, ¶ 2 for the striking similarities between Article V, paragraph 4 of the Bangkok Principles and Article 32, paragraph 2 of the 1951 Geneva Convention.

<sup>104</sup> United Nations High Comm’r for Refugees [UNHCR], *Collection of International Instruments and Others Legal Texts Concerning Refugees and Other of Concern to UNHCR*, Geneva, Switz., vol. 3, 1189, (June 2007), available at <http://www.unhcr.org/publ/PUBL/455c733b2.pdf>.

<sup>105</sup> G. GOODWIN-GILL, *supra* note 96, at 117.

<sup>106</sup> B.O. Iluyomade & A. Popoola, *The Legal Position of Aliens in Nigerian Law*, in 1 THE LEGAL POSITION OF ALIENS IN NATIONAL AND INTERNATIONAL LAW 978 (Jochen Abr. Frowein & Torsten Stein eds., 1987). See also A Commentary to Federal High Court of Abuja, *Egbuna v. Taylor*, FHC/ABJ/ M/216/2004; *Anyaele v. Taylor*, FHC/ABJ/M/217/2004. Although more about cessation of refugee status than *refoulement*, the action of the Federal High Court of Abuja revoking asylum to former Liberian dictator C. Taylor is remarkable. The Court based its judgement on the 1949 Geneva Convention, by which Nigeria is

obliged to either persecute or hand over any person suspected of having committed grave breaches of the Conventions. This was the most decisive principle upon which the Court could compel the handing over of Taylor to the Special Court in Sierra Leone. In this case, the principle of universal jurisdiction will apply. It would, however, be up to the Court to take the ini-

prudence show an historical acceptance of the principle of *non-refoulement* by the competent authorities.<sup>107</sup> In contrast, Kenya did not incorporate the *non-refoulement* principle into its legislative framework.<sup>108</sup> According to one scholar, who disavows the doctrine of *non-refoulement* as a peremptory norm of international law, Kenya is not obliged to adhere to *non-refoulement* because the country is unable to meet its refugee obligations due to financial reasons.<sup>109</sup>

The principle of *non-refoulement*, as conceived in Article 33 of the 1951 Geneva Convention, raises questions as to its personal scope and its relation to the issues of admission and non-rejection at the frontier.<sup>110</sup> Through the decades, commentators' views on the scope of Article 33 have changed.<sup>111</sup> Anyone presenting himself at a frontier

tative as the Geneva Conventions are not listed among the Conventions contained in the Schedules to the Nigerian Refugees Act.

*Id.*

<sup>107</sup> G.K. Ofori-Amaah, *The Legal Position of Aliens in National and International Law in Ghana*, in 1 THE LEGAL POSITION OF ALIENS IN NATIONAL AND INTERNATIONAL LAW 525 (Jochen A. Frowein & Torsten Stein eds., 1987). The author cites the 1968 Government of Sierra Leone v. Jumu case, where the Ghanaian Court affirmed the principle that courts "were not bound, in the absence of clear and cogent evidence to the country, to surrender fugitives for political reprisal and persecution." *Id.*

<sup>108</sup> Abuya, *supra* note 3, at 81.

<sup>109</sup> *Id.* But see The Refugee Act, (2006) Cap. 13 § 18 (Kenya). Denying this view, Article 18 of the 2006 Kenyan Refugee Act clearly affirms:

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country . . . .

This article is being written during the crisis of Kenyan institutions followed by the general election of December 27, 2007. Furthermore, during this time the situation in Kenya is still far from being stabilized, and the parties are still in the negotiating process. Abuya, *supra* note 3, at 81.

<sup>110</sup> Paul Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 30 BRIT. Y.B. INT'L L. 482 (1953). The Swiss delegate at the Conference for the establishment of the 1951 Convention considered that the word "return" (*refouler*) should apply solely to refugees who had already entered the country but were not yet residents. *Id.* According to this interpretation, states were not obliged to allow large groups of persons claiming refugee status to cross their frontiers. *Id.*

<sup>111</sup> *Id.* at 483.

[*Non-refoulement*] leads the way to the adoption of the principle that a state shall not refuse admission to a refugee, i.e. that it shall grant him at least temporary asylum-pending his settlement in a country willing to grant him residence- if non-admission is tantamount to surrender to the country of persecution.

post is already within state jurisdiction. For this reason, African states sometimes devise fictions to keep the alien's legal status as non-admitted.

Benefits of Article 33 of the 1951 Convention ought not to be predicated upon formal recognition of refugee status that might be impractical in the absence of effective procedures or in the case of mass-influx. Furthermore, the Executive Committee of the United Nations High Commissioner for Refugees ("Executive Committee") stated in one of its conclusions:<sup>112</sup>

---

*Id.*

<sup>112</sup> G.A. Res. 428 (V), ¶ 8(c), U.N. Doc. A/RES/428 (Dec. 14, 1950) [hereinafter UNHCR Statute]. In accordance with paragraph 4 of UNHCR's Statute, the Economic and Social Council established the Executive Committee of the High Commissioner's Program in 1958. Economic and Social Council [ECOSOC], Res. 672 (XXV), U.N. Doc. E/RES/672 (XXV) (Apr. 30, 1958). In resolution 1166 (XII), the General Assembly

[r]equests the Economic and Social Council to establish an Executive Committee of the High Commissioner's Programme to consist of representatives of from twenty to twenty-five States Members of the United Nations or members of any of the specialized agencies, to be elected by the Council on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem.

International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees, G.A. Res. 1166 (XII), UNHRC, 3d Comm., A/RES/1166, ¶ 5 (Jan. 1, 1970), available at <http://www.unhcr.org/excom/EXCOM/3ae69efa0.html> Although established by the Economic and Social Council, which elects its members, the Executive Committee functions as a subsidiary organ of the General Assembly. *Id.* Its documentation is issued in a General Assembly series and its annual report is submitted directly to the General Assembly where it is considered in the Third Committee. *Id.* The Executive Committee does not substitute for the policy-making functions of the General Assembly or Economic and Social Council; rather, it has its own slate of executive and advisory functions. UNHCR, G.A. Res. 428, arts. IV, V. The General Assembly set out the following terms of reference:

(a) To give directives to the High Commissioner for the liquidation of the United Nations Refugee Fund; (b) To advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office; (c) To advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help solve specific refugee problems remaining unsolved after 31 December 1958 or arising after that date; (d) To authorize the High Commissioner to make appeals for funds to enable him to solve the refugee problems referred to in sub-paragraph (c) above; (e) To approve projects for assistance to refugees coming within the scope of sub-paragraph (c) above; (f) To give directives to the High Commissioner for the use of the emergency fund to be established under the terms of paragraph 7 below.

The Executive Committee . . . [r]eaffirms the fundamental importance of the observance of the principle of non-refoulement—both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.<sup>113</sup>

As far as Africa's legal instruments, the principle of *non-refoulement* is embodied in Article II, paragraph 3 of the OAU Convention, which states: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or to remain in a territory where his life, physical integrity or liberty would be threatened . . ." <sup>114</sup> Article 12, paragraph 3 of the 1981 African Charter on Human and Peoples' Rights focuses on asylum as well, and states, "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions."<sup>115</sup>

This principle must be assessed by reference to other formally non-binding declarations and resolutions. The Universal Declaration, in

*Id.* Reaffirming the terms of reference laid down by the General Assembly, the Economic and Social Council

[d]ecides further that the Executive Committee of the High Commissioner's Programme, being entrusted with the terms of reference set forth in General Assembly resolution 1166 (XII), shall: (a) Determine the general policies under which the High Commissioner shall plan, develop and administer the programmes and projects required to help solve the problems referred to in resolution 1166 (XII); (b) Review at least annually the use of funds made available to the High Commissioner and the programmes and projects being proposed or carried out by his Office; (c) Have authority to make changes in, and give final approval to the use of funds and the programmes and projects referred to in sub-paragraphs (a) and (b) of the present paragraph. (Economic and Social Council, resolution No. 672 (XXV)). The Executive Committee holds one annual session. This takes place in Geneva during the first half October each year. Its duration is of one week. The Executive Committee's Rules of Procedure are contained in document A/AC/96/187/Rev.6.

Economic and Social Council Consideration of Resolution 1166 (XII), E/Res/672 XXV (Nov. 26, 1957), <http://www.acnur.org/biblioteca/pdf/6080.pdf>.

<sup>113</sup> UNHCR Executive Comm., *Non-refoulement*, Conclusion, No. 6 (XXVIII) (Oct. 12, 1977), available at <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html>.

<sup>114</sup> OAU Convention, *supra* note 6, art. II, ¶ 3.

<sup>115</sup> African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3, art. 12, ¶ 3 (Oct. 21, 1986).

Article 14, paragraph 1, provides: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."<sup>116</sup> The Declaration on Territorial Asylum recommends in Article 3, paragraph 1, that states would be guided by the principle that no one entitled to seek asylum "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution."<sup>117</sup>

A similar definition has been adopted in the Bangkok Principles which goes further with regard to the *refoulement* of an asylum-seeker. Article III, paragraph 1 states:

No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.<sup>118</sup>

The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person's presence is a danger to the national security or public order of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.<sup>119</sup>

It is clear that Article 33 of the 1951 Geneva Convention gave the inspiration to the formulation of this Article. Both the Declaration on Territorial Asylum and the Bangkok Principles provides that an exception may be made to the basic principle. As the Bangkok Principles affirm: "In cases where a state decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provi-

---

<sup>116</sup> Universal Declaration, *supra* note 65, art. 14, ¶ 1. See also OAU, Constitutive Act of the African Union art. III, ¶ e (July 11, 2000). One of the objectives of the African Union is "[t]o encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights." *Id.*

<sup>117</sup> Declaration on Territorial Asylum, *supra* note 41.

<sup>118</sup> *Bangkok Principles*, *supra* note 79, art. III, ¶ 1. Lauterpacht and Bethlehem note that "there are likely to be few instances of persecution that cannot be addressed by reference to one or more of the criteria enumerated (in Article 33 of the 1951 Convention that are here drawn on)." Lauterpacht & Bethlehem, *supra* note 2, at 127. Nonetheless, they hold that the principle of *non-refoulement* remains applicable. *Id.*

<sup>119</sup> *Bangkok Principles*, *supra* note 79, art. III, ¶ 1.

sional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country."<sup>120</sup>

In the African system, the principle of *non-refoulement* can be considered a real pillar. As previously mentioned, the OAU Convention establishes it without exception. This principle is not restricted to victims of persecution, but is extended to individuals who become refugees due to social and civil turmoil, natural catastrophes, and famine.<sup>121</sup> In addition, it applies at the border, within the territory of the country concerned, and to all individuals, whether recognized as refugees or not.<sup>122</sup> According to a minority doctrine, this principle would mean that there is no space even for expulsion and would obligate contracting states to grant at least a temporary asylum, if not a permanent one, to people fleeing persecution.<sup>123</sup> This concept now seems to include both non-rejection and non-return.<sup>124</sup>

Over the years, state practice, individually and within international organizations, has contributed to a progressive development of the law. Some factual elements may be necessary before states apply the principle of *non-refoulement*, particularly concerning human rights violations in the country of origin.<sup>125</sup> State practice in cases of mass-influx offers some support for the view that *non-refoulement* applies both to the individual refugee who has a well-founded fear of persecu-

---

<sup>120</sup> *Id.* art. III, ¶ 2.

<sup>121</sup> Iluyomade & Popoola, *supra* note 106, at 972-73. For instance, in Nigeria famine and other natural disasters are recognized as a reason for the flight of the refugees. *Id.* See also KÉBE MBAYE, *LES DROITS DE L'HOMME EN AFRIQUE* 288 (Pedone 2d. ed. 2002) (stating that natural disasters and social insecurity are reasons to seek temporary asylum); Adepaju, *supra* note 53, at 2.

<sup>122</sup> See OAU Convention, *supra* note 6, art. I.

<sup>123</sup> R.C. CHHANGANI, *AFRICAN REFUGEE LAW: PROBLEMS AND PROSPECTS* 10-12 (1992).

<sup>124</sup> G. GOODWIN-GILL, *supra* note 96, at 123-24. *But see* Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (ruling that the President's executive order that all illegal aliens intercepted on the high seas should be repatriated was not limited by the Immigration and Nationality Act of 1952 or Article 33 of the United Nations Convention Relating to the Status of Refugees).

<sup>125</sup> Lauterpacht & Bethlehem, *supra* note 2, at 151. In effect, "[t]he content of the principle of *non-refoulement* in a human rights context is relatively easily identified as the principle is in large measure an implied derivation from the commonly formulated prohibition of torture or cruel, inhuman or degrading treatment or punishment." *Id.*

tion and to the large groups of persons who do not enjoy the protection of the government of their country of origin.<sup>126</sup>

Unfortunately, many historical cases exist in sub-Saharan Africa that illustrate the serious consequences of a failure to recognize the need of refugees to be able to enter another state. Contrary to some affirmations, *refoulement* in Africa is very common. In 1999, Guinea sent back hundreds of refugees fleeing conflict in Sierra Leone, and, in 2001, Namibian authorities implemented dusk-to-dawn curfews, with soldiers under orders to shoot violators along a 450 kilometer bank of the Kavango River.<sup>127</sup> The latter episode prevented Angolan refugees escaping violence in Cuando Cuban Province from seeking asylum because government and National Union for the Total Independence of Angola ("UNITA") patrols could be safely avoided only at night.<sup>128</sup> In the mid-1990s, both Tanzania and Zaire sometimes closed their borders to masses attempting to flee the conflict in Rwanda.<sup>129</sup>

---

<sup>126</sup> *Id.* at 121. JACKSON, *supra* note 5, at 457-58. About this subject, Jackson contends:

[T]he identification of the categories of persons who form part of a large-scale influx situation is largely descriptive [Executive Committee, Conclusion No. 22 (XXXII), 'Protection of asylum-seekers in situations of large-scale influx', 1981] and without decisive legal consequences. The only case in which such legal consequence would arise would be if a large-scale influx is determined at the outset to be clearly outside the scope of 1950/51 refugee definition, e.g. if it consists of persons who flee only in order to escape those consequences of a conflict, or similar situation, which affect the population as a whole.

*Id.* CHALOKA BEYANI, HUMAN RIGHTS STANDARDS AND THE FREE MOVEMENT OF PEOPLE WITHIN STATES 123 (2000). Beyani adds: "[A] sudden influx of a large number of refugees in State territory outside the normal process of immigration is a public order matter and restrictions which are applied in the context of designating places of residence in these circumstances have a legitimate objective." *Id.* Lauterpacht & Bethlehem, *supra* note 2, at 119:

The words of Article 33(1) give no reason to exclude the application of the principle [of *non-refoulement*] to situations of mass-influx. On the contrary, read in the light of the humanitarian object of the treaty and the fundamental character of the principle, the principle must apply unless its application is clearly excluded.

*Id.*

<sup>127</sup> HATHAWAY, *supra* note 90, at 280.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 281. Tanzania's Foreign Minister told the Parliament in this occasion: "[e]nough is enough. Let us tell the refugees that the time has come for them to return home, and no more should come." *Id.* (citation omitted). Furthermore, as some 50,000 refugees attempted to flee ethnic clashes either in Rwanda or in Burundi, the Government of Arusha officially closed its border with Burundi on March 31, 1995.

Waves of mass-influxes of refugees in the African continent can be considered a part of two distinct generations.<sup>130</sup> The “first generation,” roughly 1960 to 1990, was characterized by victims of internal conflicts—Burundi, Rwanda, and Sudan—and the conflict for self-determination of countries still under colonial domination and racial oppression.<sup>131</sup> This wave was less significant in number than the second generation and occurred in a stable political and economic context of the host country.<sup>132</sup>

On the other hand, mass-influx of the “second generation,” from the 1990s to the present, seems to be due mainly to regional civil wars, which have occurred in the Great Lake region, in the basin of the Mano river (including Liberia, Sierra Leone and Guinea), and in the Horn of Africa (including Ethiopia, Eritrea and Somalia).<sup>133</sup> This arrival of refugees is often added to an influx of internally displaced persons, sometimes occurring in the same host countries for the refugees, such as in the Democratic Republic of Congo, Ivory Coast and Uganda.<sup>134</sup> Moreover, the arrivals are more significant in number than the “first generation” and have created a major increase in humanitarian assistance.<sup>135</sup>

---

*Id.* At that time the Tanzanian Prime Minister told Parliament “[t]he gravity of the situation, especially for those coming from Burundi and Rwanda, has made it inevitable for Tanzania to take appropriate security measures by closing her border with Burundi and Rwanda.” *Id.* (citation omitted). About Zaire, on August 19, 1994, Deputy Prime Minister Malumba Mbangula declared that no more refugees would be allowed to cross from Rwanda into Zaire. Before this announcement, some 120 refugees per minute had been crossing into Zaire at the frontier post in Bukavu. *Id.* (quoting *Le Zaire Ferme ses Frontière aux Réfugiés*, LE MONDE Aug. 22, 1994, at 4).

<sup>130</sup> MUTOY MUBIALA, *LE MISE EN OEUVRE DU DROIT DES REFUGIES ET DES PERSONNES DEPLACES EN AFRIQUE: PROBLEMATIQUE ET PERSPECTIVES* 30-31 (2006).

<sup>131</sup> *Id.*

<sup>132</sup> Joe Oloka-Onyango, *Human Rights, The OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva*, 3 INT’L J. REFUGEE L. 458 (1991). The “economic” refugees form a category of individuals now considered to deserve protection in Africa. In addition, some author urges that “[t]he intransigence of refugee law on this matter is clearly not justifiable in all cases and at all times, especially when the social and economic ramifications of political measures become all the more apparent.” *Id.*

<sup>133</sup> MUBIALA, *supra* note 130, at 30-31.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Van Heuven Goedhart, UNHCR High Commissioner during the drafting of the 1951 Convention affirmed:

there were two main categories of refugee. First, there were refugees who, after leaving one country of persecution, arrived in another country where they might possibly remain unmolested for a certain period, but would then

To thwart the entry of these refugees, the states sometimes erect blunt barriers that serve as border closures. This was the case of South Africa during the apartheid era when the government of Pretoria erected a 3,000-volt electrified razor wire fence to prevent the entry of Mozambican refugees.<sup>136</sup> Refugees who succeed in crossing an asylum state's border may still face ejection by officials, which can be a matter of formal policy and may be massive in scope. For instance, in July 1999, without court review, Zambia ordered the deportation of all nationals, including refugees, of the Democratic Republic of Congo because Zambia's national budget could not cover their assistance.<sup>137</sup>

Sometimes non-states' agents carry out ejection with toleration of national authorities, as in Kenya in the mid-1990s.<sup>138</sup> Furthermore, Sierra Leonean and Liberian refugees fled Guinea in 2000 during a wave of xenophobic violence that was unleashed after the President of Guinea encouraged citizens to form militia groups with the purpose of forcing refugees to be repatriated.<sup>139</sup>

Refugees may also be subject to removal when access to a procedure to verify their status is refused. Namibia has already classified Angolan refugees as "illegal immigrants" subject to exclusion of refugee status, just as Zimbabwe has done with Rwandans.<sup>140</sup> In 2006, the Tanzanian government decided to expel some 5,000 Rwandan refu-

---

again be in danger of persecution . . . . Secondly, there were refugees who fled from a country of persecution direct to a country of asylum; they might not, however, be granted the right to settle there, even though the country in question was a Contracting State.

TAKKENBERG & TAHBAZ, *supra* note 8, at 322-23.

<sup>136</sup> HATHAWAY, *supra* note 90, at 282.

<sup>137</sup> *Id.* at 284. *But see*, JRS: Briefings, *Zambia: Repatriation Leads to Decline in Food Production*, JESUIT REFUGEE SERVICE, Sept. 28, 2006, <http://www.jrs.net/news/index.php?lang=en&sid=1295> (highlighting the importance of refugees for Zambian economy).

<sup>138</sup> HATHAWAY, *supra* note 90, at 284 (quoting F. del Mundo, *The Future of Asylum in Africa*, 96 REFUGEES 7 (1994)):

For example, immediately after Kenyan President Moi decreed that Ugandan and other refugees would have to leave his country, police and members of the youth wing of the ruling Kenya African National Union (KANU) began seizing refugees from their homes, bars and lodges . . . . Despite urgent appeals to the [UNHCR], refugees [were] being persecuted by the security forces and at least one thousand [were] deported across the Ugandan border.

*Id.* (citation omitted).

<sup>139</sup> Douglas Farah, *For Refugees, Hazardous Haven in Guinea; As Fighting Spills into Camps, Aid Becomes Unreliable*, WASH. POST, Nov. 6, 2000, at A 24.

<sup>140</sup> HATHAWAY, *supra* note 90, at 285.

gees, classified as “illegal immigrants,” even though many of them had already been naturalized.<sup>141</sup> To stress the caution shown by the African governments towards refugees, several African countries have made declarations concerning the enforcement of Article 34 of the 1951 Geneva Convention.<sup>142</sup> For instance, the Republic of Malawi declared that its government “is not bound to grant to refugees any more favourable naturalization facilities than are granted, in accordance with the relevant laws and regulations, to aliens generally.”<sup>143</sup> The Mozambique authorities have made this kind of declaration as well.<sup>144</sup> In contrast, Botswana and the Kingdom of Swaziland made a similar reservation on this Article, with the latter stating that its government “is not in a position to assume the obligations of Article 34 of the said Convention, and must expressly reserve the right not to apply the provisions therein.”<sup>145</sup> It is important to note that the granting of asylum and naturalization are two mutually exclusive concepts, as it is impossible to grant asylum to one’s national. In this case, naturalization may be considered a durable solution for the asylum-seekers.<sup>146</sup>

Refugees can also face *refoulement* because of the practical weakness in the operation of domestic asylum systems, such as in South Africa where the South African Human Rights Commission established that

[M]ost officers [at the Lindela Repatriation Centre] were not trained to make decision about asylum . . . and referred all those cases to a few overloaded senior immigration officers.

<sup>141</sup> Adepoju, *supra* note 53, at 11. Interview by the author with Miss Claudine Umuhire, former member of the Eligibility Commission for refugee status of the government of Rwanda, Kigali-Geneva, 15 September 2006. *Id.* Miss Umuhire is currently living in the United States. *Id.* Also, in 1980 Tanzania naturalized about 36,000 Rwandese refugees who had been living there for several years. *Id.*

<sup>142</sup> 1951 Geneva Conventions, *supra* note 8, art. 34. Article 34 of the 1951 Geneva Convention stipulates that “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” *Id.*

<sup>143</sup> UNHCR, DECLARATIONS AND RESERVATIONS TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, 14 (2006), <http://www.unhcr.org/protection/PROTECTION/3d9abe177.pdf>.

<sup>144</sup> *Id.* at 16. “The Government of Mozambique does not consider itself bound to grant to refugees facilities greater than those granted to other categories of aliens in general, with respect to naturalization laws.” *Id.*

<sup>145</sup> *Id.* at 4. HATHAWAY, *supra* note 90, at 464. In Swaziland, local government decided to deny refugees any means of support, then arrested them when they protested their situation. *Id.* This can be considered an act of *refoulement*. *Id.*

<sup>146</sup> NIRAJ NATHWANI, RETHINKING REFUGEE LAW 141-42 (2003).

People at Lindela who claimed they were asylum-seekers were not given the opportunity to apply for asylum as was the policy. The Commission heard that immigration officers at Lindela had repeatedly asked for training.<sup>147</sup>

Furthermore, “[i]nitiatives to promote voluntary repatriation are sometimes used as a pretext to engage in the disguised withdrawal of protection from refugees.”<sup>148</sup> In August 2002, Rwandan authorities allowed members of a Congolese rebel group, which they supported, to meet with refugees from the Democratic Republic of Congo to encourage their return home.<sup>149</sup> They even indicated to the refugees that camp services and the offer of transportation home would soon be withdrawn for those who chose not to repatriate.<sup>150</sup> This aroused the concern of former UNHCR’s High Commissioner Ruud Lubbers, who declared: “In Rwanda, I remain concerned about the imposed return of Congolese refugees, and I have taken this up with the Rwandan government.”<sup>151</sup>

Hundreds of Burundian refugees declared they were voluntarily repatriating from Tanzania, when in reality they were leaving because of reductions in their food rations, coupled with the denial of their right to earn a living through economic activity.<sup>152</sup> Additionally, almost 1,000 Sudanese refugees returned home in 2000 because they were starving in Ugandan camps.<sup>153</sup>

<sup>147</sup> HATHAWAY, *supra* note 90, at 287 n.50.

<sup>148</sup> *Id.* at 287.

<sup>149</sup> *Id.* at 288.

<sup>150</sup> *Id.*

<sup>151</sup> Ruud Lubbers, U.N. High Comm’r for Refugees, Opening Statement at the 53d Session of the Executive Comm. of the High Comm’r’s Program, (Sept. 30, 2002), <http://www.unhcr.org/admin/ADMIN/3d9872754.html>.

<sup>152</sup> MARC SOMMERS, *FEAR IN BONGOLAND: BURUNDI REFUGEES IN URBAN TANZANIA* 192 (2001). By late 1991, UNHCR, Tanzanian and Burundi officials produced a repatriation blueprint for Burundi refugees in Tanzania. *Id.* There were three options contained in this repatriation blueprint that Burundi refugees could choose: voluntarily return to Burundi, elect Tanzanian citizenship, or maintain their refugee status in Tanzania settlements. In 1992, Tanzanian Home Affairs Minister Mrema explained:

Tanzania did not want to entertain the idea of Burundi refugees becoming freedom fighters, especially when the situation in their country of origin that made them run away had changed in their favour . . . . [W]e are encouraging [the refugees] to go back to avoid forming another Burundi in Tanzania. . . . We certainly cannot continue harbouring refugees indefinitely as this would create a political problem for us.

*Id.* (citation omitted).

<sup>153</sup> HATHAWAY, *supra* note 90, at 288-89.

All of these actions are patently contrary to the principle of *non-refoulement* affirmed in the OAU Convention. This principle makes clear that a bona fide refugee may claim the right not to be pushed back to the country where he or she expects to suffer persecution.<sup>154</sup> The notion that bona fide refugees should not be sent to a country where their life or freedom would be threatened for political, religious or racial reasons is now widely recognized.<sup>155</sup> The principle applies equally to those who have authorized residence in the territory and to illegal entrants.<sup>156</sup> However, "it seems difficult to reconcile such a rule with the doctrine of the unlimited right of states to regulate the admission of aliens."<sup>157</sup>

To this purpose, one doctrine asserts a rule of international law that qualifies states' rights such that states should not refuse the admission of a bona fide refugee where such a refusal would expose the refugee to persecution in his or her country of origin.<sup>158</sup> However, this does not entail that the admitting country should permit the continued residence of the refugee.<sup>159</sup> On the contrary, the same doctrine affirms that the admitting state may expel the refugee to another country.<sup>160</sup> If this happens and no foreign country can or wants to receive the alien, the country of first-asylum cannot send the refugee back if there is still a concrete possibility that he or she risks persecution in his or her country of origin.<sup>161</sup>

It is taken for granted that while certain general principles have been laid down for the protection of bona fide refugees, the application of these principles does not guarantee the individual a right to demand asylum in the country of potential refuge.<sup>162</sup> The enjoyment of asylum is dependent upon the discretion of the country of refuge, which implies that this country and this country alone can terminate asylum at

---

<sup>154</sup> Paul Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193, 198 (1954).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 199.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Abdollah Bahramy, *Introduction to ABDOLLAH BAHRAMY, LE DROIT D'ASILE* 8 (1938). However, Bahramy maintained that international law is concerned with the protection of refugees and considered this as evidence that international law is directly concerned with the individual. *Id.*

will.<sup>163</sup> This fact is important to highlight the imperfections of the present situation in Africa where the power to grant or deny asylum is determined by individual states without any degree of certainty or uniformity.<sup>164</sup> In Africa, unfortunately, there is the same lack of uniformity in the application of the principle of *non-refoulement*. Additionally, there is a lack of uniformity among states and lack of compliance of any single state with both its international and internal legal commitments.

#### VI. MASS-INFLUX SITUATIONS, BURDEN SHARING AND THEIR LEGAL IMPLICATIONS

Mass-influx flows have been a fairly typical occurrence throughout Africa's history. The OAU Convention is meant to promote the *prima facie* recognition of groups of refugees.<sup>165</sup> Group determination is particularly important because it is more economical than an individualized status determination procedure, which is a significant benefit to developing countries.<sup>166</sup> Whether an individual's status has been determined individually or by group on *prima facie* grounds has no effect on the rights that accompany refugee status.<sup>167</sup>

*Prima facie* recognition consists of a procedural mechanism for recognizing refugee status based on evidence that the situation in the country of origin supports the assumption that individuals of the group qualify for refugee status under the applicable refugee criteria.<sup>168</sup> Refugee status granted on a *prima facie* basis, considered "customary,"<sup>169</sup> does not require confirmation at a later stage, even if individual eligibility becomes feasible. In the African context, the extended

---

<sup>163</sup> *Id.* at 10: "[Notre travail] pourra aider . . . à écarter à l'avenir dans les affaires intérieures des autres Etats, sous prétexte de l'exercice d'une coutume ou d'un usage international qui n'a jamais été admis à titre de droit ou de privilege par les auteurs consciencieux." *Id.*

<sup>164</sup> MANUEL R. GARCÍA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* 154-55 (1956).

<sup>165</sup> GUGLIELMO VERDIRAME & BARARA HARRELL-BOND, *RIGHTS IN EXILE: JANUS-FACED HUMANITARIANISM* 57 (2005).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *See id.*

<sup>169</sup> W. Lemma, *Ethiopian Refugee Law and the Place of Women in It*, in *LEGAL STATUS OF REFUGEE AND INTERNALLY DISPLACED WOMEN IN AFRICA* 195 (C. Mulei, et al. eds., 1996).

refugee definition in the OAU Convention is usually applied on a group basis.<sup>170</sup>

In some countries, *prima facie* recognition has been done through official government statements declaring that all persons of a particular nationality are to be automatically granted refugee status by virtue of the conditions in their countries of origin.<sup>171</sup> In many situations, “*prima facie* recognition of refugees usually amounts to little more than registration upon arrival. This may be carried out by border police or immigration officials, although [non-governmental organizations (NGOs)] are often delegated this task.”<sup>172</sup> However, the involvement of NGOs in the registration of refugees is related more to humanitarian assistance than to the appropriate recognition of their refugee status and accompanying rights.<sup>173</sup> It is quite infrequent that such refugees receive any document indicating their status. The only means of identification they receive is a ration card that indicates the quantity of items (both food and non-food) that can be provided for them.<sup>174</sup> A ration card is considered more of an “act of charity than as a means of upholding their rights.”<sup>175</sup>

The situation of urban refugees was slightly better in the recent past. Although it was not easy for the Office of the High Commissioner to provide every refugee in the country with a certificate of identification, the UNHCR’s local agency tried to develop a system that would ensure that at least the status of refugees who came to the capital would be recognized.<sup>176</sup> “The regularisation of the status of refugees in Khartoum called for the issuing of Identification Cards.”<sup>177</sup> Officials from the UNHCR based the requirement on both Article 27 of the Geneva Convention and Article 13 of the 1974 Sudanese Asylum Act.<sup>178</sup> In order to clarify who in the town should receive these

<sup>170</sup> Agnès Callamard, *Malawian Refugee Policy, International Politics and the One-Party Regime*, 47 J. INT’L. AFF. 525, 531-32 (1994).

<sup>171</sup> VERDIRAME & HARRELL-BOND, *supra* note 165, at 57.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> KARADAWI, *supra* note 21, at 107.

<sup>177</sup> *Id.*

<sup>178</sup> 1951 Geneva Convention, *supra* note 8, art. 27. Article 27 of the 1951 Convention stipulates that: “The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.” *Id.* Article 13 of the Sudanese Asylum Act stipulates:

1) The Commissioner for Refugees shall, with the assistance of his assistants, issue an identity card to every refugee on his registration or at a sub-

cards, the Commissioner defined broad categories of refugees whose stay in the town should be considered lawful. This classification was comprised of seven categories, including professional refugees with high qualifications and skills, skilled workers engaged in gainful employment; and students who had the opportunity to attend or were attending secondary and post-secondary schools.<sup>179</sup>

A registration program should include the basic requirement that it is “field driven and based on the situation on the ground.”<sup>180</sup> Planning should account for the “possibility of increasing or decreasing registration activity depending on the situation.”<sup>181</sup> Furthermore, “[t]here must be sufficient input of supplies and materials required for registration. Basic materials should be deployed with the initial emergency team and other needs, as identified, provided on request. If necessary supplies are not available registration cannot be undertaken.”<sup>182</sup> Finally, “[r]efugee acquiescence, if not total cooperation, is a prerequisite. A refugee committee, accepted by the community, and known to aid workers, is important.”<sup>183</sup>

On the other hand, there are situations when registration of refugees may not be desirable because it may impede implementing quick solutions. If protection is not a particular concern,

and there is no need for refugees to be formally identified, recognized or collected together for their safety, then the following situations may argue against registration: refugees from “traditional” tribal fighting (i.e. over grazing lands) which may soon be resolved by elders’ negotiations; victims of drought or other natural calamities who have crossed international borders and thus are being presented as “refugees”; cross-border nomadic groups (even if there is currently conflict in one part of their traditional “territory”); [and finally] refugees who are be-

---

sequent time. The card shall bear the consecutive number found in the register of refugees. 2) The card shall be issued for the period during which the refugee is granted permission to stay in the Sudan, and shall be renewed on the renewal of such period.

Regulation of Asylum Act 1974, art. 13 (Sudan) *available at* [www.unhcr.org/refworld/docid/3ae6b50710.html](http://www.unhcr.org/refworld/docid/3ae6b50710.html).

<sup>179</sup> KARADAWI & WOODWARD, *supra* note 21, at 107.

<sup>180</sup> UNHCR, REGISTRATION GUIDELINES, pt. 2, ¶ 6.1 (1997).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* ¶ 6.1.

<sup>183</sup> *Id.* ¶ 6.1.

ing assisted by closely related groups in the country of asylum.<sup>184</sup>

In these types of situations,

[A]ssistance may be given on a short-term, community basis, thus avoiding registration and establishment of camps and perhaps services that will be expensive and difficult to dismantle even after the conflict or other problems subside. There may also be situations where general information such as population numbers and general information on the refugee group may suffice while registration of vulnerable individuals may be needed in order to provide the necessary special attention.<sup>185</sup>

Protection of the rights of refugees becomes particularly acute in situations of mass-influx, when, mainly because of reluctance to grant group recognition, their status can remain undetermined for a long period of time.<sup>186</sup> The UNHCR's Executive Committee Conclusion No. 22 deals with the topic of the mass-influx situations. Among other things, it provides:

- The asylum seekers forming part of these large-scale influxes include persons who are refugees within the meaning of the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees or who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country.<sup>187</sup>
- It is . . . imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment pending arrangements for a durable solution, and to establish effective arrangements

---

<sup>184</sup> *Id.* ¶ 2.1.

<sup>185</sup> *Id.* ¶ 2.2.

<sup>186</sup> VERDIRAME & HARRELL-BOND, *supra* note 165, at 70-71.

<sup>187</sup> UNHCR Executive Comm., *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, Conclusion No. 22 (XXXII) (1981), <http://www.unhcr.org/excom/EXCOM/3ae68c6e10.html> [hereinafter UNHCR Protections]. See OAU Convention, *supra* note 6, art. 1, ¶ 2.

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

*Id.*

in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers.<sup>188</sup>

- In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable [*it could be unwilling*] to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection . . . [Refugees] should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.<sup>189</sup>

- *In all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed.*<sup>190</sup>

- It is . . . essential that asylum seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with some minimum basic human standards, such as:<sup>191</sup>

- a) they should not be penalized or exposed to any unfavorable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order;<sup>192</sup>

- b) they should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights;<sup>193</sup>

- c) they should receive all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities; in this respect the international community should conform with the principles of international solidarity and burden-sharing;<sup>194</sup>

---

<sup>188</sup> UNHCR Protection, *supra* note 187, art. 1, ¶ 3.

<sup>189</sup> *Id.* art. II A, ¶ 1 (emphasis added).

<sup>190</sup> *Id.* art. II (emphasis added).

<sup>191</sup> *Id.* art. II B, ¶ 2.

<sup>192</sup> *Id.* art. II B, ¶ 2(a).

<sup>193</sup> *Id.* art. II B, ¶ 2(b).

<sup>194</sup> *Id.* art. II B, ¶ 2(c).

d) they should be treated as persons whose tragic plight requires special understanding and sympathy. They should not be subjected to cruel, inhuman and degrading treatment;<sup>195</sup>

e) there should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity;<sup>196</sup>

....

n) they should be granted all the necessary facilities to enable them to obtain a satisfactory durable solution;<sup>197</sup>

....

p) *all steps should be taken to facilitate voluntary repatriation.*<sup>198</sup>

- Asylum seekers shall be entitled to contact the Office of UNHCR. UNHCR shall be given access to asylum seekers. UNHCR shall also be given the possibility of exercising its function of international protection and shall be allowed to supervise the well-being of persons entering reception or other refugee centres.<sup>199</sup>
- A mass influx may place unduly heavy burdens on certain countries . . . . States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx situations.<sup>200</sup>
- Such action should be taken bilaterally or multilaterally at the regional or at the universal levels and in co-operation with UNHCR, as appropriate. Primary consideration should be given to the possibility of finding suitable solutions within the regional context.<sup>201</sup>
- In a spirit of international solidarity, Governments should also seek to ensure that the causes leading to large-scale influxes of asylum-seekers are as far as possible removed and, where such influxes have occurred, that conditions favourable to voluntary repatriation are established.<sup>202</sup>

<sup>195</sup> *Id.* art. II B, ¶ 2(d).

<sup>196</sup> *Id.* art. II B, ¶ 2(e).

<sup>197</sup> *Id.* art. II B, ¶ 2(n).

<sup>198</sup> *Id.* art. II B, ¶ 2(p) (emphasis added).

<sup>199</sup> *Id.* art. III, ¶ 1.

<sup>200</sup> *Id.* art. IV, ¶ 1.

<sup>201</sup> *Id.* art. IV, ¶ 2.

<sup>202</sup> *Id.* art. IV, ¶ 6.

Executive Committee Conclusion No. 100 clarifies:

a) The [Executive Committee] noted that mass-influx is a phenomenon that has not been defined, but that, for the purposes of this Conclusion, mass influx situations may, *inter alia*, have some or all of the following characteristics: i) considerable numbers of people arriving over an international border; ii) a rapid rate of arrival; iii) inadequate absorption or response capacity in host States, particularly during the emergency; iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.<sup>203</sup>

Paragraph b) continues:

[The Executive Committee] [r]ecognizes the differing capacities of States to contribute to resolving mass influx situations; *commends* the significant contributions made by countries of first asylum, particularly those in the developing world and those faced with protracted refugee situations; and *stresses* the value of action by States, UNHCR and other actors to share the burden and responsibility of countries of first asylum and to strengthen capacities for the protection of refugees in such host countries.<sup>204</sup>

State practice has occasionally granted a more generous treatment than what the Executive Committee and the Standing Committee have recommended. For instance, asylum-seekers have at times been allowed to seek employment, which can make them net contributors to host countries' economies and minimize their dependence on material assistance.<sup>205</sup>

Controversies over the recognition of refugee status in the case of mass-influx are very common. In 1984, both the Sudanese government and UNHCR refused to recognize as refugees Tigrayans and Eritreans arriving in eastern Sudan.<sup>206</sup> The UNHCR justified its position on two grounds. First, ignoring the OAU Convention's broader definition of "refugee," the UNHCR implemented its own statute which defines a refugee according to an individual's "well-founded fear of persecution."<sup>207</sup> In this instance, fear of individual persecution could not be

---

<sup>203</sup> UNHCR, Executive Comm., *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, ¶ (a), Conclusion No. 100 (LV) (2004), <http://www.unhcr.org/excom/EXCOM/41751fd82.html>.

<sup>204</sup> *Id.* ¶ b.

<sup>205</sup> VERDIRAME & HARRELL-BOND, *supra* note 165, at 72.

<sup>206</sup> KARADAWI, *supra* note 21, at 224.

<sup>207</sup> *Id.* See also UNHCR, *supra* note 104, art. 1, ¶ 6(b).

proved, thus the UNHCR did not consider itself directly responsible for these individuals.<sup>208</sup> Second, UNHCR considered that its role in providing assistance depended on a government request. Since the Sudanese government made no request, it determined it did not need to unilaterally intervene.<sup>209</sup> However, this situation changed at the end of 1984 when the Sudanese government, under international pressure, was obliged to declare that “[t]he famine situations in both Chad and Ethiopia are compounded by political factors and in both cases the people fleeing to Sudan are considered as refugees under the OAU and UN Conventions.”<sup>210</sup>

J.-P. L. Fonteyne explains, “The phenomenon of mass-influx of refugees . . . has been the cause of a far-reaching reconsideration of the essential parameters of an effective international refugee policy.”<sup>211</sup> Furthermore, burden-sharing is among the policies that have been reconsidered, although, in the international instruments in which it can be discerned,<sup>212</sup> the burden-sharing provision is essentially hortative and no effort is mounted to enforce the norm against the numerous states in Africa that ignore it. In spite of this, it should be stressed how much the “success of a proportional burden-sharing system depends on the . . . powerful states’ ability to use this advantage more skillfully and forcefully to induce broader participation in the system as refugee flows increase.”<sup>213</sup> It should also be noted that the vagueness and lack of detail regarding the standards of burden-shifting are detrimental to a strict application of the doctrine in the African context.<sup>214</sup>

---

<sup>208</sup> KARADAWI, *supra* note 21, at 224.

<sup>209</sup> *Id.* at 224.

<sup>210</sup> *Id.* at 225.

<sup>211</sup> J.-P. L. Fonteyne, *Burden-sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees*, 8 AUSTL. Y.B. INT’L L. 162, 187 (1978-80).

<sup>212</sup> OAU Convention, *supra* note 6, art. 2, ¶ 4.

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.

*Id.*

<sup>213</sup> Peter H. Schuck, *Refugee Burden-sharing: A Modest Proposal*, 22 YALE J. INT’L L. 272, 276 (1997).

<sup>214</sup> *Id.*

VII. WHEN ASYLUM IS GRANTED, LOCAL INTEGRATION AS A  
TRADITIONAL SOLUTION IS NO LONGER "FASHIONABLE"

Local integration has normally been conceived as the first valid alternative to voluntary repatriation and has traditionally been considered the best durable solution for refugees. Local integration has always represented a guiding principle for refugee programs in developing countries. According to the 1951 Convention, restoring refugees to dignity and ensuring the provision regarding human rights includes an approach that would lead to their integration in the host country.<sup>215</sup> In effect, this instrument employs the concept of assimilation which implies the reduction of differences between asylum-seekers and the host society as well as permanence within it.<sup>216</sup> However, some authors highlight the importance of both the preservation of individual identity<sup>217</sup> and the possibility of promoting independence pending voluntary repatriation, under which integration in the host society could be only temporary.<sup>218</sup>

Tom Kuhlman made the definition of "integration" more explicit, outlining indices that can be employed to gauge refugee integration into a host community. For a successful integration, he identified, among others, the following characteristics:

[I]f the social-cultural change they undergo permits them to maintain an identity of their own and to adjust psychologically to their new situation; . . . if friction between host populations and refugees is not worse than within the host population itself; and if the refugees do not encounter more discrimination than exists between groups settled in precedence within the host society.<sup>219</sup>

<sup>215</sup> U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Dec. 14, 1950, *Convention Relating to the Status of Refugees*, G.A. Res. 429 art. 34, G.A. Res. 429 (July 28, 1951). "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees." *Id.* (emphasis added).

<sup>216</sup> Barbara Harrell-Bond, *Are Refugee Camps Good for Children?* (UNHCR, Working Paper No. 29, 2000).

<sup>217</sup> Sarah Dryden-Peterson & Lucy Hovil, *Local Integration as a Durable Solution: Refugees, Host Populations and Education in Uganda* (UNHCR Evaluation and Policy Unit, Working Paper No. 93, 2003).

<sup>218</sup> Jeff Crisp, *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa* (UNHCR Evaluation and Policy Unit, Working Paper No. 75, 2003).

<sup>219</sup> Tom Kuhlman, *The Economic Integration of Refugees in Developing Countries: A Research Model*, 4 J. REFUGEE STUDIES 1, 7 (1991).

Organized settlements have been workable mainly for rural refugees. These settlements are designed to ultimately promote refugees' self-sufficiency and to enable them to meet their own basic needs. Aderante Adepoju, former member of the UNHCR's External Research Advisory Committee and President of the Union for African Population Studies, distinguished a variety of settlements that have been set up in sub-Saharan Africa in the last few decades. These include relief camps, assisted spontaneous settlements, unassisted spontaneous settlements,<sup>220</sup> and organized rural settlements and quasi-urbanized settlements. He noted that while organized camps are convenient for the delivery and distribution of emergency assistance and offer protection to refugees, they also reinforce the refugees' sense of dependence.<sup>221</sup>

One of the most common types of settlements in Africa was the "spontaneous" settlement.<sup>222</sup> This term has been used to "describe the pattern of settlement whereby refugees reach rural areas in the host country and manage to re-establish survival strategies."<sup>223</sup> This kind of settlement was very common in Sudan in the mid-1970s and became dominant despite the "governmental policy of transferring and resettling refugees away from the border."<sup>224</sup>

In 1967 to 1968, government policy was to "transfer new arrivals from the borders, and, where voluntary repatriation was not forthcoming, to assist them to settle through economically viable projects, financed by UNHCR."<sup>225</sup> However, "[b]etween 1975 and 1979, the rate of assistance [provided by the UNHCR] fell short of the needs of the continuing influx."<sup>226</sup> The resulting inability to cope with new massive influxes, mostly from Eritrea, at that time federated into Ethiopia, played a large role in forcing the refugees to seek ways to start a new life on their own.<sup>227</sup> These refugees settled in different regions of Sudan, predominantly in the Blue Nile province.<sup>228</sup>

---

<sup>220</sup> See Tom Kuhlman, *Organized Versus Spontaneous Settlement of Refugees in Africa*, in *AFRICAN REFUGEES: DEVELOPMENT AID AND REPATRIATION* 121 (Howard Adelman and John Sorenson eds., 1994). Kuhlman explains: "most refugees in Africa are spontaneously settled." *Id.* at 124.

<sup>221</sup> Adepoju, *supra* note 53, at 8-9.

<sup>222</sup> KARADAWI & WOODWARD, *supra* note 21, at 73.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 74.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 75.

The difficulty experienced by refugees' point of entry in countries was a decisive factor contributing to the proliferation of spontaneous settlements in Sudan during this period, and elsewhere in the continent in later years.<sup>229</sup> A considerable number of refugees had to leave border areas both because of lack of hospitality on the part of the local population and because their social backgrounds or skills were not suitable for rural life.<sup>230</sup> "Some refugees found it hard to remain at the first point of entry, but were also unwilling to accept the blanket solution of moving to agriculture-based rural refugee settlements."<sup>231</sup>

Prior to 1991, the *laissez-faire* policy in Kenya permitted refugees to live throughout the entire country.<sup>232</sup> As early as 1986, Sudanese seeking refuge in Uganda settled mostly among the Ugandan returnees.<sup>233</sup> However, when another wave of southern Sudanese arrived, they were told to settle across the Nile.<sup>234</sup> Many refugees entered Uganda from Sudan by simply walking across the border, such as the individuals coming from Congo.<sup>235</sup> On many occasions, the generally positive reception of refugees was due to the fact that "familial relationships extend across borders and . . . people on both sides of a border have alternated the role of refugees with that of hosts."<sup>236</sup> In northern Kenya, ties between the Oromo from Ethiopia and the Borana have facilitated refugee self-settlement.<sup>237</sup> The settlement of Rwandese in southern Uganda has also been facilitated by the existence of cross-border kinship.<sup>238</sup> In the last decades, the role played by kinship ties has been transformed and self-settlement in rural areas is now accepted more for the commercial value of an expanding population; in Uganda self-settled refugees pay local taxes because a tax receipt provides more protection than a ration card.<sup>239</sup>

Urban refugees pose another great challenge to asylum countries in Africa. This category of refugees includes educated and skilled adults

---

<sup>229</sup> *Id.* at 76.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> VERDIRAME & HARRELL-BOND, *supra* note 165, at 70.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 71.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

who compete for very limited opportunities in towns.<sup>240</sup> In Kenya and Uganda, there were districts where particular nationalities concentrated and had been residents for many years.<sup>241</sup> However, these districts were often poor areas and the population of refugees there included "those waiting for their asylum-determination interview, and those recognised as refugees who had been 'instructed' to go to camps and had refused to do so, as well as those whose application for asylum had been rejected."<sup>242</sup>

In Sudan, the phenomenon of urban refugees reached vast proportions by 1979.<sup>243</sup> Before this time urban refugees in Sudan were a relatively small group of educated refugees that had often left their countries of origin with the plan to continue their education beyond what they could in their own countries.<sup>244</sup> These refugees were often considered as individuals rather than part of a larger, homogeneous group.<sup>245</sup> In 1979, the Arusha Pan-African Conference on Refugees confirmed this idea, even though evidence of what occurred in eastern Sudan suggested the movement of urban refugees during this period did not fit the above pattern.<sup>246</sup> In fact, those who moved to urban areas did not necessarily move as individuals, and they were not necessarily people from urban backgrounds.<sup>247</sup>

Two main stages in the flight of urban refugees could then be identified in this country. The first was the "movement from the home area to a point of safety in Sudan" which provided the condition for eligibility of refugee status.<sup>248</sup> The second stage is considered the "movement from the point of entry to the Sudanese urban area" and can be

---

<sup>240</sup> Sudan and Djibouti in the 1980s constituted a typical example of this kind of situation. Adepoju, *supra* note 53, at 9. In 1980, 49% of the urban refugees in Djibouti lived in the capital. *Id.* Sudan was estimated to have in the 80s the largest population of urban refugees in Africa (around the 50%) but in 1981, just the 5-10% of those living in the capital was gainfully employed. In Kenya, these figures raised to the 19%. *Id.*

<sup>241</sup> VERDIRAME & HARRELL-BOND, *supra* note 165, at 71.

<sup>242</sup> *Id.*

<sup>243</sup> KARADAWI & WOODWARD, *supra* note 21, at 76.

<sup>244</sup> *Id.* at 76-77.

<sup>245</sup> *Id.* at 77.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 107. Karadawi noted that more attempts were made by Sudanese authorities to restrict the refugee presence in Khartoum. *Id.* "After the end of the OAU Conference in July (1978), the decision to evict the refugees from the town should have died a natural death." *Id.*

<sup>248</sup> *Id.* at 77.

classified more as a rural to urban migration, rather than as a refugee flight in the classical meaning.<sup>249</sup>

VIII. WHEN ASYLUM IS REJECTED: RESETTLEMENT IN A THIRD COUNTRY AND THE OBSERVATION THAT NO SUB-SAHARAN AFRICAN COUNTRY PLAYS THIS ROLE EFFECTIVELY

Resettlement in new homelands has been historically conceived as the least desirable solution for African refugees and has suffered from legal and institutional failures in the involvement of various actors, including the UNHCR, resettlement countries, and referral agencies.<sup>250</sup> Resettlement is available only to a small number of refugees, and only a few countries in the world, the most significant being Australia, Canada and the United States, have resettlement quotas.<sup>251</sup> In spite of the increase in quotas for African refugees throughout the 1990s, the total number is always in the tens of thousands out of the millions of refugees.

The UNHCR often reminds refugees that there is no right to be resettled; even if, for many refugees, resettlement represents the best route of survival in countries such as Kenya and Uganda, where the other two durable solutions do not seem to be practicable in recent years. Furthermore, serious problems can sometimes arise from refugee leaders identifying cases that deserve resettlement where they rely on privileged relations they have with authorities who determine resettlement. In sub-Saharan Africa,

[r]esettlement is a "lottery ticket." Disproportionate number[s] of those working for the agencies seem to receive it. This is because they have greater access to UNHCR. "Accessibility" is the key factor in resettlement. The other problem is that we rely too much on the elders who, in some cases are part of the system, or they are the problem! We do not have a rigid referral system, but we still rely too much on certain "referors."<sup>252</sup>

<sup>249</sup> *Id.* See also Ahmad Karadawi, *Constraints on Assistance to Refugees: Some Observation from the Sudan*, 11 WORLD DEV. 537, 537-47 (1983) (providing a broader analysis of the topic of the urban refugees in Sudan).

<sup>250</sup> Adepoju, *supra* note 53, at 6.

<sup>251</sup> Joanne van Selm, *Refugee Protection in Europe and the U.S. After 9/11*, in PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES AND HUMAN RIGHTS 237, 256 (Niklaus Steiner, Mark Gibney & Gil Loescher eds., 2003).

<sup>252</sup> VERDIRAME & HARRELL-BOND, *supra* note 165, at 284 (quoting an interview with a protection officer in the Dabaab camp in Kenya.).

The UNHCR's practice of identifying individuals or groups who have to be resettled also creates problems, although resettlement countries often support this practice.<sup>253</sup> The practice also demands that certain categories of refugees are referred to the UNHCR for resettlement.<sup>254</sup>

In 2000, Sudanese minors and Rwandan refugees of mixed parentage (Hutu and Tutsi) were given precedence in Kenya over other groups by the United States, which was a candidate country for resettling the refugees.<sup>255</sup> In the same year in Uganda, the UNHCR identified Congolese and Rwandan Hutus as the main group in need of resettlement.<sup>256</sup> A particular case concerned Somalis of Bantu ethnicity.<sup>257</sup> The UNHCR first considered resettling this group in Mozambique or Tanzania because of its cultural affinity.<sup>258</sup> This resettlement plan eventually failed because the national authorities of these two countries did not receive enough reassurances regarding the economic aspects of the resettlement.<sup>259</sup> Moreover, Mozambique was still facing the return of its nationals.<sup>260</sup>

To explain why certain groups were favored over others, the UNHCR gave examples of social categories considered "privileged" and explained that "[r]ape victims were resettled much less because of the rape, than because of the reaction that they were subjected to by the community. The same applies to mixed marriages. If people do not get harassed or persecuted, there is less need for resettlement."<sup>261</sup> However, the UNHCR has also received criticism for denying access to resettlement programs to particular categories of individuals who seemed to satisfy the criteria for resettlement, such as the Congolese students who had survived the Lumbubashi massacre in the early 1990s and then lived in camps for a long period.<sup>262</sup> Furthermore, many refugees who suffered for security reasons were excluded from the process of resettlement because they did not live in camps.<sup>263</sup>

---

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.* at 285 (citation omitted).

262 *Id.* at 286.

263 *Id.* The authors talk about the case of some UNHCR officials that in 2000-2001 were arrested and put on trial in Kenya. *Id.* at 287. They were accused of cor-

IX. PROHIBITION OF CERTAIN ACTIVITIES: ARTICLE III AND THE  
CONCEPT OF "SUBVERSION"

It is possible to link Article 2, paragraph 6, of the OAU Convention with Article 3, which is the most categorical expression in the OAU Convention on the question of subversion.<sup>264</sup> This provision prohibits refugee involvement in subversive activities.<sup>265</sup> The OAU Convention's inclusion of this Article is understandable because African countries were at that time preoccupied with sustaining the fragile state system they had received as a legacy. The Article shows the organization's preoccupation with the preservation of territorial integrity and existing political structures of member countries.<sup>266</sup>

The qualification and character of subversive activities had already been developed in the early twentieth century. At that time, scholars invoked a well-defined status for refugees that, paired with a technical organization that is now mostly under the UNHCR's field of activities, would have allowed a reduction in the likelihood of subversive political activities against governments responsible for their flight.<sup>267</sup> Referring particularly to the African legal background, such a prohibition is not original to the OAU Convention. Article III, paragraph V, of the 1963 OAU Charter stipulated: "The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles . . . [u]nreserved condemnation, in all its forms, of political assassination as well as of subversive activities

---

ruption, having taken bribes to favor the resettlement of certain individuals over others. *Id.*

<sup>264</sup> Nyanduga, *supra* note 54, at 95. It seems that the rationale behind the prohibition contained in article II is to express political solidarity between African states and the prohibition has been perceived as a safeguard against possible external interference in what was seen as internal affairs. *Id.* See also BEYANI, *supra* note 126, at 120.

<sup>265</sup> OAU Convention, *supra* note 6, art. 3.

<sup>266</sup> Okoguble, *supra* note 4, at 184, 184 n.30. The author also stresses the link between this the provisions of this article and paragraphs 4 and 5 of the preamble of the convention. *Id.*

<sup>267</sup> Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT'L L. 680, 703 (1938). "The political complications often connected with aiding refugees would be practically eliminated also, particularly if the local offices concerned with refugees were qualified to decide which people fell within the accepted definition of 'refugee.'" *Id.* In practice, this latter affirmation has still not found any positive, definitive answer, seventy years after it was made. This occurs despite the existence of a general convention and, for the African continent, of a regional convention providing for an "extended" definition of a "refugee." *Id.*

on the part of neighbouring States or any other States.”<sup>268</sup> This provision has been incorporated into Article 4 of the Constitutive Act of the African Union, which requires “[r]espect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.”<sup>269</sup>

The prohibition of subversion against other member states of the OAU, a duty incumbent on the refugee,<sup>270</sup> was also affirmed in the Declaration on the Problem of Subversion adopted by the Heads of State and Government at Accra in 1965.<sup>271</sup> The Resolution on the Problem of Refugees in Africa states the following:

---

<sup>268</sup> OAU Charter, art. III, May 25, 1963, 47 U.N.T.S. 45.

<sup>269</sup> OAU, *Constitutive Act of the African Union*, art. 4, ¶ O, July 11, 2000.

<sup>270</sup> R.C. Mahalu, *The Legal Regime for Refugees in Eastern African States*, 37 ARCHIV DES VOLKERRECHTS 34 (1988).

<sup>271</sup> OAU, *Declaration on the Problem of Subversion*, AHG/Res. 27(II), 2d Sess. (Oct. 21-25 1965).

The Assembly of Heads of State and government meeting in its Second Ordinary Session in Accra, Ghana, from 21 to 25 October 1965,  
Desirous of consolidating the fraternal links that unite us,  
SOLEMNLY UNDERTAKES:

1. Not to tolerate, in conformity with Article 3, paragraph 5, of the Charter, any subversion originating in our countries against another member state of the Organization of African Unity;
2. Not to tolerate the use of our territories for any subversive activity directed from outside Africa against any Member State of the Organization of African Unity;
3. To oppose collectively and firmly by every means at our disposal every form of subversion conceived, organised [sic] or financed by foreign powers against Africa, the OAU or its Member States individually;
4. (a) To resort to bilateral or multilateral consultation to settle all differences between two or more Member States of the Organization of African Unity;  
(b) To refrain from conducting any press or radio campaign against any member states of the Organization of African Unity, and to resort instead to the procedure laid down in the Charter and the Protocol of Mediation, Conciliation and Arbitration of the Organization of African Unity.
5. (a) Not to create dissension within or among Member States by fomenting or aggravating racial, religious, linguistic, ethnic or other differences;  
(b) To combat all forms of activity of this kind;
6. To observe strictly the principles of international law with regard to all political refugees who are nationals of any member states of the Organization of African Unity;
7. To endeavour to promote, through bilateral and multilateral consultations, the return of refugees to their countries of origin with the consent of both the refugees concerned and their governments;

2. Recalls that Member States have pledged themselves to prevent refugees living on their territories from carrying out by any means whatsoever any acts harmful to the interests of other states Members of the Organization of African Unity;
3. Requests all Member States never to allow the refugee question to become a source of dispute amongst them.<sup>272</sup>

This latter resolution is expressly referred to in the Preamble to the OAU Convention.<sup>273</sup>

The first paragraph of Article 3 of the OAU Convention is analogous to Article 2 of the Universal Declaration, which requires conformity with laws, regulations, and measures for the maintenance of public order. However, the OAU Convention makes the significant addition of a new principle, which requires a refugee to “abstain from any subversive activities against any member State of the OAU.”<sup>274</sup> The second paragraph of Article 3 compels a positive obligation on the contracting countries to prohibit such activities.<sup>275</sup> In the past, the term “subversive” gave rise to different interpretations. The clause that prohibits activities that may credibly raise concerns between member states of the OAU has been called “rather vague” in its phrasing.<sup>276</sup> In addition, it should be noted that the ban on seditious activities concerns only acts against member states of the African organization, not activities in relation to non-member states.

This has also raised the question of the vicarious liability of states for acts of private persons within their jurisdiction. It seems that countries have a duty to prevent individuals under their jurisdiction from committing harmful acts against other states. This is true even though what constitutes an “injurious” act is highly controversial. Experts in

- 
8. To continue to guarantee the safety of political refugees from non independent African territories, and to support them in their struggle to liberate their countries.

*Id.* Beyani notes that Article 8 of this Declaration calls for the guarantee of the safety of political refugees and support for them in the struggle to liberate their countries but omits political refugees from already independent African countries. BEYANI, *supra* note 126, at 122.

<sup>272</sup> Declaration on the Problem of Refugees in Africa, AHG/Res. 26(II), 2d Sess. (Oct.21, 1965).

<sup>273</sup> OAU Convention, *supra* note 6, pmbl.

<sup>274</sup> *Id.* art. 3, ¶ 1.

<sup>275</sup> *Id.* art. 3, ¶ 2: “Signatory States undertake 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.” See also Bedjaoui, *supra* note 1, at 68.

<sup>276</sup> Weis, *supra* note 62, at 459 See also BEYANI, *supra* note 126, at 120.

the field seem to agree that at least the use of force by private persons directed against another state must qualify as an injurious act.<sup>277</sup> Refugees may be more inclined to engage in activities against their country of origin, but from a legal perspective, there is no difference in the legal responsibility of a state for the activities of asylum-seekers in its country than for the activities of other private persons under its control.<sup>278</sup>

Article III does not suggest any set of sanctions against a regime for breach of this duty, which must be admitted as a shortcoming.<sup>279</sup> However, one scholar has interpreted the wording of Article III's prohibition as too strict and thus contrary to Article 19 of the Universal Declaration.<sup>280</sup> Finally, it has been noted that Article III deals more with "subversive activities" than "subversive refugees." This seems to mean that asylum will not be refused to a "subversive refugee" who appears to deserve protection, with the caveat that the refugee can be monitored so that he or she does not again undertake activities considered "subversive" by the country of asylum.<sup>281</sup>

The provision means that, in practice, refugee camps are normally situated at some distance from the border in compliance with Article II, paragraph 6 of the Convention. In some areas, such as the Horn of Africa, however, states actively support "subversive activities" of refugees against their country of origin. Strictly speaking, these activities should lead to the cessation of refugee status.<sup>282</sup> Both passive and active support for the countries of refuge are not only contrary to Article III, but they are contrary to the more general principle that refugee settlements have a strictly humanitarian and civilian character. It is essential for host states to do all within their capacity to ensure maintenance of this character, as the Executive Committee confirmed.<sup>283</sup>

<sup>277</sup> See Weis, *supra* note 154, at 146.

<sup>278</sup> Weis, *supra* note 62, at 460.

<sup>279</sup> Okoth-Obbo, *supra* note 84, at 134.

<sup>280</sup> Nobel, *supra* note 70, at 267. Universal Declaration, *supra* note 65. "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.* art. 19.

<sup>281</sup> Michel Ndoh, *Les Réfugiés Africains: Statut Juridique et Réflexions Politiques*, 20 GENEVE-AFRIQUE 9, 25 (1982).

<sup>282</sup> W.J.E.M. van Hövell tot Westerflier, *Africa and Refugees: The OAU Refugee Convention in Theory and Practice*, 7 NETH. Q. HUM. RTS. 172, 182 (1989).

<sup>283</sup> UNHCR, Executive Comm., *Military or Armed Attacks on Refugee Camps and Settlements*, ¶ 4(a), Conclusion No. 48 (XXXVIII) (1987).

Refugees in camps and settlements have, together with the basic rights they enjoy, duties deriving from the refuge and protection granted or afforded to

Finally, attention should be given to the need to protect states, which led to the omission in the OAU Convention of a provision equivalent to Article 26 of the 1951 Convention. That Article accords to lawfully-present refugees the option to move freely in the country of asylum.<sup>284</sup>

#### X. VOLUNTARY REPATRIATION: A VIABLE PANACEA AGAINST ALL LEGAL PROBLEMS?

The OAU Convention has given the strongest guidance regarding voluntary repatriation, dedicating an entire paragraph to the standards that should be applied.<sup>285</sup> In Article V, paragraph 1, it establishes the important principle of voluntary repatriation, which has acquired broad international application, and highlights the essentially voluntary aspect of repatriation.<sup>286</sup> This Article requires collaboration between the country of origin and the host country during repatriation and prohibits the punishment of refugees who return to their country. The Article of the OAU Convention begins with this statement: "The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will."<sup>287</sup>

The explicit stipulation in a legally-binding instrument that repatriation must be a voluntary act represents a valuable corroboration of the principle of *non-refoulement*. Voluntary repatriation is now considered a custom, but its inclusion in the OAU Convention was an early attempt to codify the concept in a legally-binding treaty.<sup>288</sup> In effect, the right to return to one's country of origin is a basic human

---

them by the country of refuge. In particular, they have duties to conform to the laws and regulations of the State of refuge including lawful measures taken for the maintenance of public order and to abstain from any activity likely to detract from the exclusively civilian and humanitarian character of the camps and settlements.

*Id.*

<sup>284</sup> Plender, *supra* note 102, at 79. 1951 Geneva Convention, *supra* note 8, art. 26. Article 26 of the Geneva Convention stipulates: "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances." *Id.*

<sup>285</sup> Saul Takahashi, *The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection*, 9 INT'L J. REFUGEE L. 593, 599 (1997).

<sup>286</sup> OAU Convention, *supra* note 6, art. 5, ¶ 1.

<sup>287</sup> *Id.*

<sup>288</sup> René Degni-Segui, *L'Action Institutions Africaines en Matière de Réfugiés*, in COLLOQUE DE CAEN: DROIT D'ASILE ET DES RÉFUGIÉS 231, 233 (1997).

right that has been confirmed in other international instruments, which are not strictly related to the legal protection of refugees.<sup>289</sup>

The OAU Convention explains in detail the duties of both the country of asylum and the country of origin regarding registration. These stipulations are intended to guarantee that states of asylum, international organizations, and NGOs will support the voluntary repatriation of refugees. Additionally, the country of origin will not impose any sanctions nor discriminate in any way against refugees who voluntarily return home.<sup>290</sup> The Convention seems to envisage only organized repatriation, meaning repatriations that require formal written agreements. However, spontaneous repatriation must now be taken into account because it factors into the daily practice of African refugees.<sup>291</sup>

Within the OAU, decision-making organizations' developments regarding voluntary repatriation have been narrow, with the exception of the 1975 Resolution of the Council of Ministers of the OAU. This document touched upon a number of legal and practical matters not otherwise covered in the Convention itself. These include modalities for the implementation of repatriation, the right to return in the case of mixed marriages, and the facilitation of refugees' aptitude to return home with their property and savings.<sup>292</sup> This resolution was conceived with the intent to elaborate and develop the involvement of the liberation movements that had been recognized by the OAU at the time.<sup>293</sup>

Nevertheless, the African treaty does not clarify how this provision relates to the cessation clauses. On the one hand, the reference to the duty to respect the voluntary character of repatriation in all cases could be read to limit the right of countries to return even an individual who

---

<sup>289</sup> See Universal Declaration, *supra* note 65, art. 13, ¶ 2; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 12, ¶ 4 (Dec. 16, 1966). But see OAU, *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3, art. 12, ¶ 2 (Oct. 21, 1986) (allowing for restriction "provided for by law for the protection of national security, law and order, public health or morality.").

<sup>290</sup> Weis, *supra* note 62, 460-61.

<sup>291</sup> Okoth-Obbo, *supra* note 84, at 123-26. See Westerflieger, *supra* note 282, at 184 (giving an example of a huge, spontaneous repatriation – the one that took place in Guinea after the death of President S. Touré).

<sup>292</sup> Resolution on Voluntary Repatriation of African Refugees, OAU Res.399, ¶ 3(a), OAU Doc. CM/Res.399 (XXIV) (Feb. 13, 1975). Member states are called to "[a]ccept and abide scrupulously by the international agreements and the OAU Convention on Refugees, particularly as regards the voluntary nature of repatriation." *Id.*

<sup>293</sup> Okoth-Obbo, *supra* note 84, at 123.

is no longer a refugee by virtue of the cessation of her or his status. On the other hand, the final clause clearly says only an individual who is a refugee—thus excluding former refugees from invoking voluntarism.<sup>294</sup>

Voluntary repatriation is undoubtedly the preferred solution to solve the crisis of refugees that afflict many countries in the African continent. It is considered an ideal solution when there is stability between the countries of origin and asylum.<sup>295</sup> This solution has a positive effect on economic and political conditions of the entire region and leads to a decline in demands for financial assistance from the international community.<sup>296</sup>

One of the major ambiguities concerning voluntary repatriation is that it does not have confirmation in any conventions or other binding legal instruments, apart from the exception created in the OAU Convention.<sup>297</sup> At the present time, the concept of voluntary repatriation seems to denote more an institutional policy than a group of norms accepted by states and other actors of the international community. The UNHCR has assumed direct responsibility to encourage both simple dialogue and negotiations between the country of origin and country of asylum, often contributing to assist repatriates in resettling in their own country.<sup>298</sup> Furthermore, doctrine affirms that the practica-

---

<sup>294</sup> James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 OHIO ST. J. ON DISP. RESOL. 175, 178, n. 10 (2005).

<sup>295</sup> KARADAWI & WOODWARD, *supra* note 21, at 203.

<sup>296</sup> *Id.*

<sup>297</sup> It is worth noting the 1979 Arusha Conference on the Situation on Refugees in Africa called upon all African governments to take into consideration official proclamations of amnesty to their nationals in exile in order to boost their voluntary repatriation. In this circumstance, the Conference invited the OAU “[t]o make a declaration to the effect that granting of amnesty should be held sacrosanct and inviolate.” The international conference on the situation of refugees in Africa, Arusha, Tanz., May 7-17, 1979, *Recommendations from the Pan-African Conference on the Situation on Refugees in Africa*, ¶ 8, available at <http://www.unhcr.org/refworld/docid/3ae6b37214.html>. This Conference,

[c]alls upon all African Governments to consider making official public declarations of amnesty to their respective nationals currently in exile, so as to encourage their voluntary repatriation. Guarantees for safe return and machinery to supervise such guarantees to be considered and worked out both by the countries of origin and the countries of asylum in co-operation with the OAU, the refugee-serving agencies and the refugees concerned or their representatives.

*Id.* ¶ 7.

<sup>298</sup> Over the years, the progress made by UNHCR in the African continent has been outstanding: the coordination of the repatriation of some 200,000 Sudanese from Ethiopia in 1972-73, 250,000 Zimbabweans repatriated in 1980-81, and

bility of voluntary repatriation depends on the specific character of the conflict.<sup>299</sup>

Crisp lists the following reasons why the “repatriation rather than integration” approach assumes dominance in Africa:

- because earlier efforts to promote local settlement and self-reliance in Africa’s rural refugee settlements had achieved very limited results;
- because refugees were increasingly regarded as an economic and environmental burden on the countries which hosted them;
- because African countries with large refugee populations felt that the burden they had accepted was not being adequately shared by the world’s more prosperous states;
- because many refugee-hosting countries in Africa had declining economies, growing populations and were themselves affected by conflict and instability;
- because refugees came to be regarded (especially after the Great Lakes crisis) as a threat to local, national and even regional security, especially in situations where they were mixed with armed and criminal elements;
- because the post-cold war democratization process in some African states meant that politicians had an interest in mobilizing electoral support on the basis of xenophobic and anti-refugee sentiments.<sup>300</sup>

---

250,000 Chadian repatriated from Cameroon and Central African Republic in 1982. Adepoju, *supra* note 13, at 27. As Adepoju notes, at that time Cameroon was still trying to relieve her refugees’ caseload after a large number of refugees voluntarily repatriated themselves to Guinea-Bissau. *Id.* See Rainer Hofmann, *Voluntary Repatriation and UNHCR*, 44 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT, 326, 329-32 (1984). Furthermore, the Tripartite Commission launched in the framework of repatriations of the Ethiopians from Djibouti in 1982-1983. UNHCR pushed back all the critics that maintained that Ethiopian refugees were forced to sign a declaration in which they agreed to be repatriated. In a way, it seems ineffective that there was such a high percentage of volunteers for repatriation among the strictly Ethiopian political exiles in Djibouti. *Id.* On the other hand, it should be highlighted that after the cessation of hostilities in refugees’ home country and the promulgation of the amnesty proclamation by the Government in Addis-Ababa, Djiboutian authorities had the right to consider refugees no longer as refugees because the circumstances giving rise to their refugee status had ceased to exist. 1951 Geneva Convention, *supra* note 8, art. 1 ¶ C(5); OAU Convention, art. 1 (4)(e).

<sup>299</sup> KARADAWI & WOODWARD, *supra* note 21, at 203.

<sup>300</sup> Crisp, *supra* note 218, at 3-4.

Forced repatriation constitutes a very serious breach of international law and no refugee can be expected to return to her or his country as long as the circumstances explaining her or his flight still prevail. In this sense, a substantial change in the interior conditions within the country of origin is an essential prerequisite, both for legal and for practical reasons, for any repatriation program to succeed. Any effort taken by the UNHCR to cause such changes would contravene its mandate. It should be up to the international community, on behalf of the United Nations, to attempt to achieve such a change. Large-scale repatriation has occurred in Africa where "the intervention of the UNHCR and refugee aid organisations was only significant as a *complement* to the political changes in the country of origin."<sup>301</sup>

Some refugees, however, choose not to go home even when conditions in their country of origin appear to have stabilized. For example, at the end of the 1990s a sizeable number of Liberian refugees preferred to remain in countries of asylum, such as Ghana and Guinea, rather than return home where the situations seemed to have been stabilized.<sup>302</sup> According to Crisp, the choice to remain in the country of asylum is dictated by multiple factors:

- because "residual caseload" refugees have a continuing and legitimate fear of persecution in their own country, or because they come from minority groups which are at risk of other forms of harassment and discrimination;
- because the degree of destruction in the refugees' place of origin is so great that the people concerned do not feel that they will be able to survive at home;
- because the circumstances which originally forced people to become refugees were so traumatic that they cannot return to their country of origin, even if they would not be at risk if they were to repatriate;
- because they lack the capital required to make the journey home and to make ends meet during the initial process of reintegration;

---

<sup>301</sup> KARADAWI & WOODWARD, *supra* note 21, at 203 (emphasis added). To this purpose, Karadawi mentions the return of southern Sudanese refugees in 1972-1973, and also the return of Ansars fighters in Sudan during 1977 and 1980 (due to the reconciliation between the Khartoum central government and the Sudanese National Front). *Id.* Furthermore, the return in Chad of the Hussein Hebre supporters (when he returned to power in 1982-1983) and the return in Uganda of the opponents of Sidi Amin, once that he was overthrown in 1979. *Id.*

<sup>302</sup> Crisp, *supra* note 218, at 4-5.

- because the “residual caseload” refugees are too old, too young or too sick to embark upon what will inevitably be a very arduous repatriation and reintegration process;
- because the refugees have close ethnic, linguistic, social or economic links with the local population and the country of asylum;
- because refugees who remain in a country of asylum may enjoy better access to education, health services and resettlement opportunities than those who return to their country of origin; and,
- because certain refugees groups may choose to remain in exile and to pursue their political objectives from the country which has granted them asylum.<sup>303</sup>

Once changes favorable to repatriation have taken place, a program of voluntary repatriation should be set up even if its success relies upon several factors, including the clearly expressed wish of the country of origin as to which refugees return. A typical example is a concession of amnesty, which should be accompanied by an express desire of the refugee himself.<sup>304</sup> It is always possible that amnesties would be violated and returnees would have to experience flight into exile once again. That is why, at least until 1980, the UNHCR encouraged a policy of settlements in the country of asylum rather than favoring voluntary repatriation.<sup>305</sup> In 1980, there was an important shift in UNHCR policy, and voluntary repatriation became a major priority in the continent, especially in the Horn of Africa.<sup>306</sup> This shift was considered strange because it occurred at a time in which there was no

---

<sup>303</sup> *Id.* at 4-5. Adepoju gives an example of refugees' close links with the local population and the country of asylum:

Refugees living close to borders which to them arbitrarily divide ethnically homogeneous groups, as in the case with the Uganda/Tanzania border where people sometimes literally have to cross border in order to visit their relations. This situation also has been observed in Somalia, where the colonialists' boundary arbitrarily divided the Somali nomads into both Somalia and Ethiopia.

Adepoju, *supra* note 13, at 28.

<sup>304</sup> Adepoju, *supra* note 53, at 12. Adepoju, talking about amnesties in Zaire (1978-1979) and Guinea (1971) points out: “However, amnesties themselves are not sufficient; countries of origin should create conditions conducive to the reception of returnees and ensure their integration in the country.” *Id.* See P.J. Van Krieken, *Repatriation of Refugees under International Law*, 1 NETH. Y.B. INT'L L., 113 (1982) for an example of what happened in Zaire in 1976.

<sup>305</sup> KARADAWI & WOODWARD, *supra* note 21, at 204.

<sup>306</sup> *Id.*

significant change in the circumstances that had generated the flight of refugees.<sup>307</sup> To justify this shift, the UNHCR issued a new interpretation of the refugee phenomenon under which the previous attempts to provide assistance to asylum-seekers in the host countries had not resulted in durable solutions.<sup>308</sup> Additionally, at this time “refugee programmes were dependent on financial assistance from international donors,” and asylum-seekers had become a heavy burden for these donors.<sup>309</sup>

The refugee can be persuaded to repatriate by the stipulation of a formal procedure in a tripartite agreement between the country of refuge, the country of origin and the UNHCR. The role played by the UNHCR should be the one of supervising the return and, when possible, the first phase of reinstallation. It has been suggested that the UNHCR should have the right to challenge the agreement before competent international bodies, such as the United Nations Secretary-General (rather than the General Assembly) if, after a careful analysis of the situation of the country of origin, conditions remain unfavourable to the reinstallation of the refugees.<sup>310</sup>

Focus should be drawn to whether these kinds of activities by the UNHCR have a legal basis, considering that Article V of the OAU Convention, which deals with voluntary repatriation, does not expressly mention the UNHCR. The UNHCR clearly need not participate nor attempt to influence massive repatriation of refugees because political sensitivities may caution against it. In the case of the massive repatriation of Ethiopians from Sudan in the mid-eighties, repatriation was carried out by the Tigrayan People’s Liberation Front.<sup>311</sup> In some states, refugees were expelled simply as a matter of government policy. In the early 1980s, Uganda, under Milton Obote, displaced a large number of Banyarwanda, including some 40,000 people who claimed Ugandan citizenship and 31,000 people registered with the UNHCR as refugees. Uganda forced most of them to seek refuge in Rwanda.<sup>312</sup> The youth wing of the ruling Uganda People’s Congress enforced the

---

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Hofmann, *supra* note 298, at 334.

<sup>311</sup> Okoth-Obbo, *supra* note 84, at 128.

<sup>312</sup> Louise Pirouet, *Refugees in and from Uganda in the Post-Colonial Period*, in *UGANDA NOW: BETWEEN DECAY AND DEVELOPMENT* 239, 243, 245 (Holger Bernt Hansen & Michael Twaddle eds., 1988).

displacement, but only at the instigation of the Ugandan government.<sup>313</sup>

On the contrary, at the universal level it seems that UNHCR involvement relies upon the provision of Article 8, subsection (c) of the agency's statute, which affirms: "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by . . . (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities."<sup>314</sup> This interpretation could be criticized, given that, as provided in Article 9, an explicit mandate by the General Assembly should be indispensable even if the Article uses the conditional "may."<sup>315</sup> On the other hand, it has been emphasized that the conclusion of any agreement providing for an extensive decision-making function of the UNHCR hinges upon the unequivocal consent of the country of origin. In principle, no government should fear that the agency's supervision would turn into an intervention in internal affairs, given the UNHCR's strictly humanitarian approach to refugee crisis and the fact that its intervention should occur only in those exceptional cases where the provisions of a repatriation agreement would not be observed.<sup>316</sup>

Voluntary repatriation has received increased attention from the international community since the beginning of the 1980s, even though the OAU had already invoked it several times.<sup>317</sup> To legally support its

<sup>313</sup> Rutinwa, *supra* note 12, at 6.

<sup>314</sup> UNHCR Statute, *supra* note 113, ¶ 8(c).

<sup>315</sup> Paragraph 9 of the UNHCR Statute stipulates that "[t]he High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal." *Id.* ¶ 9 (emphasis added).

<sup>316</sup> Hofmann, *supra* note 298, at 334-35.

<sup>317</sup> Adepoju, *supra* note 13, at 33 (quoting ADDIS ABABA, AFRICA AND ITS REFUGEES (AFRICA REFUGEE DAY) 53 (1975)). In pursuance of the ideal solution to the refugee flow in the African continent, the OAU had urged countries of origin of refugees:

to bring to an end those situations which led the refugees to leave their country; to assure refugees that they will be favourably received in their country of origin and can resume a normal and useful life there without fear of persecution or punishment . . . to help refugees who . . . wish to return to their home and to facilitate their resettlement and resumption of normal and peaceful life in their country of origin; to grant a general amnesty to those refugees whose fear of persecution on political grounds needs to be allayed and to assure them that they will be welcomed and genuinely reintegrated in their own environment, with full restoration of their rights and privileges.

*Id.*

new role, and contrary to all the indications of the fact that refugee movements were caused directly or indirectly by political conflict, the UNHCR started affirming that most African refugees were individuals who did not fall within the classic definition provided by the UNHCR statute.<sup>318</sup> This interpretation indicated an inclination to deny that the international community had some responsibility towards African refugees. This occurred despite the fact that since 1957, the UNHCR had provided assistance without applying the 1951 definition of "refugee" to the dynamic African situation.

In denying the majority of African refugees their legal status and thereby material assistance, the UN agency declared that the movement of most of the refugees from their country of origin had been instigated by assistance programmes in the countries of asylum giving people an incentive to leave their homes.<sup>319</sup> Moreover, the concentration of assistance in the country of refuge discouraged repatriation.<sup>320</sup> Subsequently, any attempt to encourage voluntary repatriation necessarily involved limiting the material assistance provided to refugees in the host countries.<sup>321</sup>

---

<sup>318</sup> According to the definition provided Paragraph 6 subsections "A" and "B" in the UNHCR Statute:

The competence of the High Commissioner shall extend to:

A. (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

(ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.

....

B. Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

UNHCR Statute, *supra* note 113, ¶ (6)(A)(i)-(ii), (B).

<sup>319</sup> KARADAWI & WOODWARD, *supra* note 21, at 205.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

Since the 1980s, the UNHCR has been called upon by the Secretary-General to carry out different functions in connection with large-scale repatriation operations that had resulted in an expansion of the original terms of its mandate, particularly concerning the provisions of assistance to countries of origin to ease the re-integration of returning refugees.<sup>322</sup> The extension of UNHCR liabilities is evident in the 1994 UN General Assembly resolution which

[r]eiterates that voluntary repatriation, when it is feasible, is the ideal solution to refugee problems, calls upon countries of origin, countries of asylum, the Office of the High Commissioner and the international community as a whole to do everything possible to enable refugees to exercise freely their right to return home in safety and dignity, ensuring that international protection continues to be extended until that time, and assisting, where needed, the return and reintegration of repatriating refugees, and further calls upon the High Commissioner, in cooperation with States concerned, to promote, facilitate and coordinate the voluntary repatriation of refugees, including the monitoring of their safety and well-being on return.<sup>323</sup>

To stress the importance of voluntary repatriation, the General Assembly has also specified that

[C]alls upon the Office of the High Commissioner, the international community and other concerned entities to intensify their support to African Governments through capacity-building activities, including training of relevant officers, disseminating information about refugee instruments and principles providing financial, technical and advisory services to accelerate the enactment or amendment and implementation of legislation relating to refugees, strengthening emergency response and enhancing capacities for coordination of humanitarian activities;

---

<sup>322</sup> F. Schnyder in 1965 affirms:

Il convient de signaler aussi que, pour compléter le rôle du HCR à cet égard, les programmes d'assistance autorisent celui-ci à favoriser dans certains cas le rapatriement librement consenti des réfugiés en finançant leur transport du pays d'asile au pays d'origine. En outre, il existe des accords conclus avec certains gouvernements, qui prévoient la participation du HCR aux efforts tendant à encourager le rapatriement librement consenti des réfugiés.

F. Schnyder, *Les aspects juridiques actuels du problème des réfugiés*, in 1 RECUEIL DES COURS 114, 411 (A. W. Sijthoff 1965).

<sup>323</sup> G.A. Res. 49/169, ¶ 9, U.N. Doc. A/RES/49/169 (Dec. 23, 1994).

*Reaffirms* the right of return and the principle of voluntary repatriation . . . .

*Also reaffirms* that voluntary repatriation should not necessarily be conditioned on accomplishment of political solutions in the country of origin . . . .

*Expresses grave concern* at the increasing number of internally displaced persons in Africa, calls upon States to take concrete action to pre-empt internal displacement and meet the protection and assistance needs of internally displaced persons. . . .<sup>324</sup>

Over the last few decades, the UN clearly adopted a role in which it actively created conditions encouraging the return of refugees. However, this practice is still taking place in a “legal vacuum,”<sup>325</sup> considering that resolutions adopted by the General Assembly following the 1950 Statute only formulate guidelines of these responsibilities without specifying their content. The Executive Committee has tried to elaborate basic standards relative to the legal issue of voluntary repatriation<sup>326</sup> by examining this topic in detail since 1980, when it emphasized the voluntary nature of repatriation as an essential prerequisite for dealing with refugees’ crisis. Thus the Executive Committee:

- (a) Recognized that voluntary repatriation constitutes generally, and in particular when a country accedes to independence, the most appropriate solution for refugee problems;
- (b) Stressed that the essentially voluntary character of repatriation should always be respected;
- (c) Recognized the desirability of appropriate arrangements to establish the voluntary character of repatriation, both as regards the repatriation of individual refugees and in the case of large-scale repatriation movements, and for UNHCR, whenever necessary, to be associated with such arrangements;
- (d) Considered that when refugees express the wish to repatriate, both the government of their country of origin and the government of their country of asylum should, within the framework of their national legislation and, whenever neces-

<sup>324</sup> G.A. Res. 61/139, ¶¶ 18-20, 26, U.N. Doc. A/RES/61/139 (Dec. 19, 2006).

<sup>325</sup> Vincent Chetail, *Voluntary Repatriation in Public International Law: Concepts and Contents*, 23 REFUGEE SURV. Q. 1, 12 (2004).

<sup>326</sup> See Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT’L J. REFUGEE L. 285, 303-07 (1989). Executive Committee conclusions cannot be in any case considered as binding, belonging more to that category of provisions sometimes called “soft law.” *Id.*

sary, in co-operation with UNHCR take all requisite steps to assist them to do so;

(e) Recognized the importance of refugees being provided with the necessary information regarding conditions in their country of origin in order to facilitate their decision to repatriate; recognized further that visits by individual refugees or refugee representatives to their country of origin to inform themselves of the situation there—without such visits automatically involving loss of refugee status—could also be of assistance in this regard.<sup>327</sup>

The same conclusion identifies two complementary principles in a position to implement the repatriation operation. The Executive Committee:

(f) Called upon governments of countries of origin to provide formal guarantees for the safety of returning refugees and stressed the importance of such guarantees being fully respected and of returning refugees not being penalized for having left their country of origin for reasons giving rise to refugee situations;

(i) Called upon the governments concerned to provide repatriating refugees with the necessary travel documents, visas, entry permits and transportation facilities and, if refugees have lost their nationality, to arrange for such nationality to be restored in accordance with national legislation.<sup>328</sup>

Surprisingly, a change in circumstances prevailing in the country of origin is not mentioned explicitly. This section merely employs an indirect reference to the “formal guarantees for the safety of returning refugees” as a condition of the repatriation program itself, rather than a precondition for repatriation.<sup>329</sup> The subjective element of voluntary repatriation overshadowed the objective element of the situation in the country of origin. These elements are complementary in identifying the legal precondition of voluntary repatriation. Voluntariness cannot be the only criterion because the doctrine also requires considering the changed circumstances in the country of origin. However, the question remains: how meaningful is the “voluntariness” element when Rwanda

---

<sup>327</sup> UNHCR, Executive Comm., Voluntary Repatriation, ¶¶ (a)-(e), Conclusion No. 18 (XXXI) (1980), <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=41b041534&query=executive%20committee%20conclusion%2018>.

<sup>328</sup> *Id.* ¶¶ (f), (i).

<sup>329</sup> *Id.* ¶ (f).

and Uganda withhold food, water, and other essential goods from refugees in order to induce them to repatriate “voluntarily”?<sup>330</sup>

The above-mentioned ambiguity also remains in the following conclusion adopted on the same issue in 1985. At that time, the Executive Committee repeated the voluntary character of repatriation as the central principle and stated:

- a) The basic rights of persons to return voluntarily to the country of origin is reaffirmed and it is urged that international co-operation be aimed at achieving this solution and should be further developed;
- b) The repatriation of refugees should only take place at their freely expressed wish; the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected.<sup>331</sup>

Differing from the previous conclusion, the Executive Committee explicitly mentions the situation of the country of origin that caused the refugee to want to escape. However, the key aspect of voluntary repatriation, in connection with the prevention of refugee flow and the responsibilities of countries towards their nationals, is formulated in vague terms. This conclusion affirms:

- c) The aspect of causes is critical to the issue of solution and international efforts should also be directed to the removal of the causes of refugee movements. Further attention should be given to the causes and prevention of such movements, including the co-ordination of efforts currently being pursued by the international community and in particular within the United Nations. An essential condition for the prevention of refugee flows is sufficient political will by the States directly concerned to address the causes, which are at the origin of refugee movements;
- d) The responsibilities of States towards their nationals and the obligations of other States to promote voluntary repatriation must be upheld by the international community. International action in favour of voluntary repatriation, whether at the universal or regional level, should receive the full support and co-operation of all States directly concerned. Promotion of volun-

---

<sup>330</sup> HATHAWAY, *supra* note 90, at 318.

<sup>331</sup> UNHCR, Executive Comm., *Voluntary Repatriation*, ¶¶ (a), (b), Conclusion No. 40 (XXXVI) (1985) <http://www.unhcr.org/excom/EXCOM/3ae68c9518.html>.

tary repatriation as a solution to refugee problems similarly requires the political will of States directly concerned to create conditions conducive to this solution. This is the primary responsibility of States.<sup>332</sup>

The Executive Committee attempted to clarify the guidelines in the UNHCR's Handbook in 1996. This document provides a theoretical framework by defining the crucial components of voluntary repatriation and stressing the interaction between its voluntary nature and the change of circumstances in the country of origin. At first, the Handbook confirms how the "principle of voluntariness must be viewed in relation to both: conditions in the country of origin (calling for an informed decision); and the situation in the country of asylum (permitting a free choice)"<sup>333</sup> and is the "cornerstone of international protection with respect to the return of refugees."<sup>334</sup> The Handbook continues in defining the concept of voluntariness in broad and negative terms:

Voluntariness means not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning, for example by dissemination of wrong information or false promises of continued assistance. In certain situations economic interests in the country of asylum may lead to interest groups trying to prevent refugees from repatriating.<sup>335</sup>

<sup>332</sup> *Id.* ¶¶ (c), (d).

<sup>333</sup> UNHCR, *Handbook on Voluntary Repatriation: International Protection*, ¶ 2.3 (1996), available at <http://www.unhcr.org/publ/PUBL/3bfe68d32.pdf> [hereinafter Handbook].

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* It is worth noting that paragraph 4.1 provides three examples where the essential precondition of voluntariness is not considered as satisfied. These are:

- 1) host country authorities deprive refugees of any real freedom of choice through outright coercion or measures such as, for example, reducing essential services, relocating refugees to hostile areas, encouraging anti-refugee sentiment on the part of the local population.
- 2) factions among the refugee population or exiled political organizations influence the refugees' choice either directly by physically pressuring them to return, or indirectly by activities such as disinformation campaigns about the risk of remaining in the country of asylum or dangers related to returning home.
- 3) certain interest groups in the host country actively discourage voluntary repatriation by disseminating false information including incorrect promises of assistance, economic opportunities or improvement of the legal status.

*Id.* ¶ 4.1.

In substance, the two basic components of voluntary repatriation are reaffirmed throughout the entire Handbook. The improvement of the conditions of the country of origin is considered, on the same level as voluntariness, as one “essential precondition” before the UNHCR will promote voluntary repatriation.<sup>336</sup> The case of repatriation of Mozambicans from Malawi in the 1990s is illustrative of the tendency to limit the duration of voluntary repatriation. When a voluntary repatriation movement concludes, those who still reside in the host country cannot rely on remaining for a prolonged time until the application of the cessation clauses terminates their status as refugees.<sup>337</sup>

Furthermore, the Handbook clarifies in paragraph 3.1:

Promotion of repatriation can take place when a careful assessment of the situation shows that the conditions of “safety and dignity” can be met: in other words, when it appears that objectively, it is safe for most refugees to return and that such returns have good prospects of being durable.<sup>338</sup>

It also explains the difference between promotion and facilitation of repatriation, describing how in the latter case respect for the refugees’ will to return requires passive involvement of UNHCR if there is no change of circumstances in the country of origin.<sup>339</sup>

---

<sup>336</sup> *Id.* ¶ 3.1.

These are some of the essential preconditions to be met for UNHCR to promote voluntary repatriation movements:

- 1) There must be an overall, general improvement in the situation in the country of origin so that return in safety and with dignity becomes possible for the large majority of refugees.
  - 2) All parties must be committed to fully respect its voluntary character.
  - 3) The country of origin must have provided a formal guarantee, or adequate assurances for the safety of repatriating refugees, as appropriate.
  - 4) UNHCR must have free and unhindered access to refugees and returnees.
- The basic terms and conditions of return must be incorporated in a formal repatriation agreement between UNHCR and the authorities concerned.

*Id.*

<sup>337</sup> MARJOLEINE ZIECK, *UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS* 441 (1997).

<sup>338</sup> *Handbook, supra* note 333, ¶ 3.1.

<sup>339</sup> *Id.*

Respecting the refugees’ right to return to their country at any time, UNHCR may facilitate **voluntary repatriation** when refugees indicate a strong desire to return voluntarily and/or have begun to do so on their own initiative, even where UNHCR does not consider that, objectively, it is safe for most refugees to return. This term should be used only when UNHCR is satisfied that refugees’ wish to return is indeed voluntary and not driven by coercion . . . .

The Handbook also attempts to explain the expression, “return in safety and dignity,” which is considered an essential precondition for the issue in question.<sup>340</sup> To “return in safety” is easy to define and the Handbook gives specific examples of changes in the country of origin after which return is possible.<sup>341</sup> To “return with dignity” is a more

---

While the condition of fundamental change of circumstances in the country of origin will usually not be met in such situations, UNHCR may consider facilitating return in order to have a positive impact on the safety of refugees/returnees as well as to render assistance which the refugees may require in order to return. Such assistance may have to be given in the absence of formal guarantees or assurances by the country of origin for the safety of repatriating refugees, and without any agreement or understanding having been concluded as to the basic terms and conditions of return. In designing and carrying out its protection and assistance functions, UNHCR, however, has to make it clear to the authorities and, most importantly, to the refugees, that UNHCR support for such repatriations is based on respect for the refugees’ decision to repatriate and cannot be interpreted as an indication of adequate security.

*Id.*

<sup>340</sup> *Id.* ¶ 2.4

Return in safety: Return which takes place under conditions of legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites), and material security (access to land or means of livelihood).

Return with dignity: The concept of dignity is less self-evident than that of safety. The dictionary definition of “dignity” contains elements of “serious, composed, worthy of honour and respect.” In practice, elements must include that refugees are not manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.

Among the elements of “safety and dignity” to be considered are:

- the refugees’ physical safety at all stages during and after their return including en route, at reception points and at the destination,
- the need for family unity,
- attention to the needs of vulnerable groups,
- the waiver or, if not possible, reduction to a minimum of border crossing formalities,
- permission for refugees to bring their movable possessions when returning,
- respect for school and planting seasons in the timing of such movements, and
- freedom of movement. *Id.*

<sup>341</sup> *Id.*

difficult concept to explain.<sup>342</sup> However, these two concepts tend to obscure the legal contents of voluntary repatriation. The evolution of the concept of “return in safety and dignity” has stressed the role of the subjective element to the detriment of the objective one, as is evident in the UNHCR’s 2002 “Background Note” on voluntary repatriation. That document mentions the voluntary nature of repatriation in elusive terms and considers safety in the country of origin as the most important condition.<sup>343</sup> It should be stressed that the concept of “safety,” as applied to the OAU Convention, rests on the assumption that the condition for return in safety already exists. Therefore, the provisions focus mainly on the legal organization and on conditions for the return itself.<sup>344</sup>

Over the years, there has been a reversal in what are considered the core criteria for the voluntary repatriation by the UNHCR. For decades, the main element of repatriation was the character of voluntariness, which today has been replaced by criteria concerning the situation in the country of origin. This proves that the subject is not always well-defined and is sometimes influenced more strongly by political considerations than by strictly legal ones.<sup>345</sup>

#### XI. “VOLUNTARY” REPATRIATION IN SUB-SAHARAN AFRICA: AN ANALYSIS OF SOME EMBLEMATIC EXAMPLES

There are cases in Africa in which asylum countries give arbitrary deadlines to refugees to require them to repatriate “voluntarily,” rely-

<sup>342</sup> *Id.*

<sup>343</sup> UNHCR, Global Consultation in International Protection, *Voluntary Repatriation*, ¶¶ 14-15, U.N. Doc. EC/GC/02/5 (Apr. 25, 2002).

14) The search for solutions has generally required UNHCR to promote measures, with governments and with other international bodies, to establish conditions that would permit refugees to make a free and informed choice and to return safely and with dignity to their homes. Creating the most conducive actual conditions for return remains, however, fundamentally a political process, going well beyond the role and capacity of UNHCR, and involving actors with different and not necessarily converging interests.

15) From UNHCR’s perspective, the core of voluntary repatriation is return in and to conditions of physical, legal and material safety, with full restoration of national protection the end product. These core components of “return in safety and with dignity,” and UNHCR’s role in relation to each, are discussed below.

*Id.*

<sup>344</sup> Okoth-Obbo, *supra* note 84, at 126.

<sup>345</sup> Chetail, *supra* note 325, at 18.

ing sometimes on agreements between the UNHCR and the countries of origin. This was the position of Tanzania towards Rwandan refugees in 1996. Rwandan repatriation from Tanzania, in December 1996, can hardly be described as "voluntary." This forced repatriation represented a broader international trend toward a more restrictive refugee policy and declining protection standards.<sup>346</sup> Under a different framework, the UNHCR launched the "organized voluntary repatriation" of roughly 500,000 Angolan refugees from Zambia, Namibia, and the Democratic Republic of Congo.<sup>347</sup> In that case, the UNHCR determined that conditions for repatriation were acceptable, although some refugees opposed the initiative because they recalled the terrible attempt in 1994 to promote their repatriation based on a cease-fire among the fighting factions.<sup>348</sup>

In many situations concerning refugee protection, decisions have been affected by political considerations. As Agnès Callamard discussed, refugee policies are governed more often than not by politics and ideology, rather than ethics.<sup>349</sup>

In the mid-1990s, Tanzanian authorities feared that the new Rwandan government in power could clear out refugee camps in western Tanzania that sheltered potentially dangerous adversaries of the new Kigali government. Tanzania was concerned about this situation. Its concern was based on a similar incident, in 1972, when the Burundian army bombed a number of villages in western Tanzania in retaliation for attacks on Burundian territory by rebel groups operating in Tanzania. These concerns pushed Tanzanian authorities to promote a "vol-

---

<sup>346</sup> Beth Elise Whitaker, *Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania*, in PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES, AND HUMAN RIGHTS 141, 142 (Niklaus Steiner et al. eds., 2003). See ANN VIBEKE EGGI, MASS REFUGEE INFLUX AND THE LIMITS OF PUBLIC INTERNATIONAL LAW 247 (2002). For example:

The Tanzanian Government had decided that national security concerns had highest priority and that these concerns would prevail. Although it did agree to individual screening of those who did not return as of this date, this option was not in any systematic way made known to refugees. In addition, the whole set-up of this mass return certainly did not suggest that it would be feasible for a refugee to receive special treatment and an evaluation of the merits of his or her claim. Correspondingly, no formal mechanism was provided or established for identifying individuals who risked persecution if they were to be sent back.

*Id.*

<sup>347</sup> HATHAWAY, *supra* note 90, at 936.

<sup>348</sup> *Id.* at 936-37.

<sup>349</sup> See Callamard, *supra* note 170, at 555-56.

untary” repatriation of the Rwandan refugees by claiming that the security situation in Rwanda had improved. Rwandan asylum-seekers could no longer legitimately allege refugee status because instability in public order in Kigali had ended. Such instability of the political situation was the basis upon which Rwandans had entered Tanzania in 1994. However, when the refugees re-entered their own country, the situation could not be considered completely stabilized, but at least Tanzania authorities could avoid a potential bombing of their territory.<sup>350</sup>

According to the expanded definition of the 1969 OAU Convention, refugee status was extended to all persons fleeing, among other situations, “events seriously disturbing public order.”<sup>351</sup> Under this definition, governments offer protection *en masse* to people fleeing civil war and violence without requiring them to be individually screened.<sup>352</sup> However, when the conditions that led to the granting of refugee status no longer exist, the cessation clause for fundamental changes in circumstances can apply. Although the standards for applying this principle are high, cessation occurred when the standard was met in fifteen cases between 1975 and 1996.<sup>353</sup>

The final element of repatriation is the declining availability of funds to support these kinds of operations. In Tanzania, the decline of funding levels was important to the Dar-el-Salaam government’s claim of the necessity of “burden sharing,” relying upon Article II, paragraph 4 of the OAU Convention. Repatriation of the Rwandans was finally encouraged by a memorandum signed by UNHCR and the Tanzanian government that required all Rwandan refugees to leave the country by the end of 1996. Although this agreement was signed under assurances from Tanzanian authorities that force would not be used, the government of Tanzania violated the memorandum, refused to keep its promises, and employed force to compel the Rwandese to leave Tanza-

<sup>350</sup> Whitaker, *supra* note 346, at 141-54.

<sup>351</sup> See OAU Convention, *supra* note 6, art. I, ¶ 2.

<sup>352</sup> See JACKSON, *supra* note 5, chs. 11-13. This kind of practice is particularly appreciated by Jackson. *Id.* In 1937, Turpin had already written:

[P]armi les réfugiés peuvent se trouver des délinquants de droit commun, il est impossible à l’Etat de refuge, alors que les individus qui demandent asile arrivent en foule, d’exercer un droit de contrôle et de rechercher si tous ont droit à l’asile. L’Etat leur accorde un asile provisoire, quitte plus tard, après contrôle, à extradier les criminels de droit commun et à faire bénéficier les réfugiés politiques de l’asile définitif.

Turpin, *supra* note 99, at 50.

<sup>353</sup> Whitaker, *supra* note 346, at 148.

nia.<sup>354</sup> In the example given, Tanzanian authorities did not force all Rwandans back to their own country. In a sense, the Tanzanian government shifted back to the traditional definition of “asylum” provided by the 1951 UN Convention by determining the status of refugee based on an individual fear of persecution and not on a group basis.

Some scholars hold that the doctrinal definition of “refugee” provided by the OAU Convention permits, without any reasonable doubt, the admission of asylum-seekers to host countries on a prima facie group basis.<sup>355</sup> In the example provided, Rwandan refugees had initially been admitted to Tanzania based on the expanded definition given by the OAU Convention. The change of policy can be explained by the fact that the Tanzanian officials intended to limit the number of people eligible for protection. Tanzania clearly perceived such refugees as potential threats to good relations with refugee-generating neighbors and, consequently, as a diplomatic source of embarrassment.<sup>356</sup> The peculiarity of this case was that refugees who could claim a legitimate fear of persecution upon return to Rwanda were those who had participated in the 1994 genocide. As Rutinwa affirmed, “Tanzania has skewed the logic of refugee protection. They only protect the killers. If you haven’t killed anyone, then you are sent home.”<sup>357</sup>

The presence of criminals applying for the status of refugees has posed a classical question of how to distinguish them from other asylum-seekers. This problem is also manifested in urban areas such as

---

<sup>354</sup> *Id.* at 149-50. Article 3 of the 1995 Tripartite Agreement between UNHCR, Tanzania and Rwanda expressly instructs that:

The Government of the United Republic of Tanzania undertakes to guarantee the voluntary character of the repatriation of Rwandan refugees and will take, in consultation with the United Nations, all measures necessary to uphold this fundamental principle of international protection. To this end, it will take all measures necessary to ensure that refugees are in full knowledge of facts . . . .

Tripartite Agreement on the Voluntary Repatriation of the Rwandese from Tanzania, U.N. High Comm’r for Refugees [UNHCR]-Rwanda-Tanz., Apr. 12 1995, <http://www.unhcr.org/refworld/docid/3ee712db4.html>. “The Government of the United Republic of Tanzania shall grant to the United Nations High Commissioner for Refugees free and unhindered access to its territory and refugees to allow the implementation of the repatriation operation.” *Id.* art. IV.

<sup>355</sup> LAWYER’S COMM. FOR HUMAN RIGHTS, *AFRICAN EXODUS: REFUGEE CRISIS, HUMAN RIGHTS AND THE 1969 OAU CONVENTION* 29 (1997).

<sup>356</sup> Monica Kathina Juma & Peter Mwangi Kagwanja, *Securing Refuge from Terror: Refugee Protection in East Africa After September 11*, in *PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES, AND HUMAN RIGHTS* 225, 228 (Niklaus Steiner et al. eds., 2003).

<sup>357</sup> Whitaker, *supra* note 346, at 152.

Arusha in Nairobi, where it was very difficult to distinguish between Somali or Rwandese fighters and bona fide refugees. Therefore, the tendency has been to collectively refuse to criminalize refugees and to instead deem them within the national security system.<sup>358</sup>

The decision to repatriate Rwandan refugees in the mid-1990s could be seen as a strategy of conflict prevention in the area. In that case, as the former UNHCR, S. Ogata, explained, conflict prevention was more important than refugee protection. This argument reflects the perspective that violations of refugee protections, such as *non-refoulement*, can at times be justified as a strategy of conflict prevention. Ogata stated:

When refugee outflows and prolonged stay in asylum countries risk spreading conflict to neighbouring states, policies aimed at early repatriation can be considered as serving prevention. . . . [This is] what motivated . . . UNHCR's policy of encouraging repatriation from Zaire and Tanzania to Rwanda, even though human rights concerns in Rwanda never disappeared.<sup>359</sup>

The literature does not agree on why Tanzania adopted the policy of closing its borders. Tanzania maintained that it was done simply because of the lack of assistance from the international community during the arrival of Rwandese asylum-seekers after the 1994 genocide.<sup>360</sup> Remaining in the same geographical area, the latter solution of "global repatriation" sought in the "Plan d'action" of Bujumbura for the Great Lakes Region failed as the conditions for a return in security were not reached in either of the two countries concerned; namely, Rwanda and Burundi.<sup>361</sup>

The Tanzanian government also showed a lack of adequate provisions for protecting refugees in the case of the Burundians in 1997 and 1998.<sup>362</sup> At that time, Tanzanian authorities embarked on a "round-up" of all Burundian nationals living in western Tanzania, although it did not target Burundi refugees in other areas of Tanzania.<sup>363</sup> In spite of its determination after the outbreak of war in Burundi in late 1993 that all Burundian citizens in Tanzania had *prima facie* status as refugees, Tanzanian authorities changed their minds and placed nearly 100,000

---

<sup>358</sup> Juma & Kagwanja, *supra* note 356, at 231-32, 235.

<sup>359</sup> Whitaker, *supra* note 346, at 153 (citation omitted).

<sup>360</sup> Juma & Kagwanja, *supra* note 356, at 226.

<sup>361</sup> MUBIALA, *supra* note 130, at 49.

<sup>362</sup> SOMMERS, *supra* note 152, at 203.

<sup>363</sup> *Id.*

Burundians in refugee camps near the Burundi border awaiting repatriation as soon as possible.<sup>364</sup>

## XII. BETWEEN QUAY AND SHIP: FINAL CONSIDERATIONS ON ASYLUM IN SUB-SAHARAN AFRICA

Many African countries have taken and are still taking steps that reveal their inconsistent approach to the obligations that they have assumed under international law.<sup>365</sup> Furthermore, African international treaty law provides a sufficient answer to fluxes of refugees although it seems to lack a provision forbidding they take into consideration the causes of the entry of refugees.<sup>366</sup> Regarding internal legal systems, it should be noted that existing laws and proposed refugee bills throughout Africa do not take into consideration the complex new realities posed by new circumstances, such as the war against terrorism.<sup>367</sup>

Until this decade, it can hardly be affirmed that refugee matters in the continent are conducted in conformity with international and regional norms. The OAU Convention nonetheless remains an important pillar for the asylum regime. In recent years, Africa's approach to the refugee problem has changed from a traditional open-door policy to a retreat from commitment to the institution of asylum. The traditional generosity of the African countries to refugees has been misleading because it gives the impression that refugees in these countries enjoy freedom and fundamental human rights.<sup>368</sup> The principal factors that have influenced Africa's new policy can be identified in the extent of the refugee problem and its impact on host countries, the inadequate capacity of host countries to face this flow, and the absence of equitable burden-sharing.<sup>369</sup>

On the contrary, where internal measures have been adopted, they have revealed their ineptitude to respond to the refugee crisis, particularly to mass-influx situations that will likely require the establishment

<sup>364</sup> *Id.* (citation omitted).

<sup>365</sup> Zachary Lomo, *The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work*, 18 BERKELEY J. INT'L L. 268, 279 (2000).

<sup>366</sup> W. Czaplinski & P. Sturma, *La Responsabilité des États pour les flux de Réfugiés Provoqués par eux*, 40 ANNUAIRE FRANÇAIS DE DROIT INT'L, 159 (1994).

<sup>367</sup> Juma & Kagwanja, *supra* note 356, at 234.

<sup>368</sup> ZACHARY LOMO, *Refugees in East Africa: Developing an Integrated Approach*, in EAST AFRICA AND THE HORN: CONFRONTING CHALLENGES TO GOOD GOVERNANCE 37, 40-41 (Dorina A. Dekoe ed., 2006).

<sup>369</sup> Rutinwa, *supra* note 12, at 25.

of special procedures for classification and protection. This large gap also occurs because African countries seem to generally lack a jurisprudential approach to refugee issues.<sup>370</sup> Moreover, practice has showed difficulties for the concerned states to implement a system that limited national capacities can adequately employ.

Recourse to durable solutions, particularly voluntary repatriation, has given few tangible results compared to expectations. This is due largely to the persistence of problems that created the outflow of refugees from the countries of origin, such as armed conflicts and massive violations of human rights.

It seems too easy to affirm that the real solution to the plight of refugees in this continent is the elimination of the forces that generate this category of individuals. Both the UNHCR and the OAU have admitted this point and have tried to promote democratic governance, respect for human rights, and enforcement of the African mechanism for the prevention, management, and peaceful settlement of the conflicts that afflict the entire continent. Even if they can bring us directly to the target, the easiest paths are the most difficult to take. In effect,

[A]ccess to asylum procedures was occasionally problematic during the reporting period. Sometimes screening or admissibility procedures effectively barred applicants from access to a substantive determination of their claim, including where a prima facie case appeared to exist. In some countries, reduced or lack of access to legal aid or to appropriate interpreters prevented or undermined effective presentation of cases. UNHCR and its partners worked with relevant counterparts to establish, reactivate and/or strengthen national eligibility procedures and improve decision-making.<sup>371</sup>

In conclusion, "the question is of right and therefore hospitality means the right of a foreigner not to be treated with hostility by mere reason of his arrival on foreign soil."<sup>372</sup> We often forget this basic notion that has been affirmed for centuries.

---

<sup>370</sup> Ekuru Aukot, *Refugee Protection in Africa: A Developing Country's Dilemmas Towards Effective Protection*, 9 E. AFR. J. PEACE & HUM. RTS., 253-54 (2003). Having been born in Kenya, Aukot advocated for the Kenyan Refugee Bill that was approved in Kenya in December 2006. *Id.*

<sup>371</sup> UNHCR, Executive Comm., *Note on International Protection*, ¶ 17, U.N. Doc. A/AC.96/1008 (July 4, 2005).

<sup>372</sup> EMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL (1796), reprinted in 7 PEACE CLASSICS 33 (Helen O'Brien trans. 1939).