

# Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?

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## I. Introduction

This article analyzes some specific aspects of the present refugee law regime in Sub-Saharan Africa in order to assess how the institution of asylum, considered the “traditional” solution for both individuals and groups of people who are obliged to flee from their own countries,<sup>1</sup> is legally perceived and applied in this continent.

This paper first focuses on the notion of *non-refoulement*, a cornerstone of the legal protection of refugees throughout the world that is of particular relevance to African refugees. This principle seems to have now assumed the role of a peremptory norm of international law<sup>2</sup> although the doctrine is far from uniform.<sup>3</sup> This paper also focuses on a specific peculiarity of asylum in Africa: situations where there has been a mass-influx of asylum-seekers, considered an essential as-

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<sup>1</sup> M. Bedjaoui created a detailed historical excursus to show the long-standing tradition of asylum in Sub-Saharan Africa. M. Bedjaoui, *L'Asile en Afrique*, Nairobi: All Africa Conference of Churches (1979), 26-27.

<sup>2</sup> J. Allain, *The jus cogens Nature of Non-refoulement*, 13 *International Journal of Refugee Law* (2001), 533-558. See also E. Lauterpacht/D. Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in: E. Feller/V. Türk/F. Nicholson (ed.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge (UK)/New York/Geneva 2003, 89.

<sup>3</sup> E. Odhiambo Abuya affirms: “However, the 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.” See E. Odhiambo Abuya, *Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective*, 19 *International Journal of Refugee Law* (2007), 83.

pect of the broader concept of “African refugee”,<sup>4</sup> and which gives rise to the category of the so-called *prima facie* refugees.<sup>5</sup> Additionally, this article analyzes the durable solution most sought-after by national and international institutions for an asylum-seeker: voluntary repatriation.<sup>6</sup> The analysis of some examples of repatriation, sometimes masked as “voluntary”, shows the preference of the African countries towards this durable solution, which often is pursued with the agreement of the United Nations High Commissioner for Refugees (UNHCR) but sometimes without it. We note that the 1969 “OAU Convention Governing the Specific Aspects of Refugees Problems in Africa”<sup>7</sup> is the only legally binding instrument that explicitly defines “voluntary repatriation”, providing for in Article V.<sup>8</sup>

## II. Non-refoulement: Is a New Meaning of the Concept Making its Way in Sub-Saharan Africa?

The most urgent need of refugees is to secure entry into a territory that will protect them from the risk of persecution. This concern must be reconciled with 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, there was no doubt that every sovereign state had the power to expel unwanted aliens, even though doctrine simultaneously noted that political refugees often were constituted an exception. In the first decades of the twentieth century already, courts had indicated that genuine political refugees should not be deported to the persecuting country,<sup>9</sup> despite the fact that historically it has been, and today it often re-

<sup>4</sup> Many authors deal with the “expanded definition” of the African refugee. Among them N. S. Okogbule, *The Legal Dimension of Refugee Problem in Africa*, 10 *East African Journal of Peace and Human Rights* (2004), 183; R. Hofmann, *Refugee Law in the African Context*, 52 *ZaöRV* (1992), 323.

<sup>5</sup> For a first approach to the concept I. C. Jackson, *The Refugee Concept in Group Situations*, The Hague/London/Boston 1999, 448-465. Also *infra* this article.

<sup>6</sup> For instance, the 1975 resolution on voluntary repatriation represented the first, strong attempt of the council of the OAU to impart directives to countries members of the organization urging them to particularly abide by the “voluntary nature of repatriation”, a formula that appears for the first time in the language of an organ of the OAU. See Council of Ministers, *Resolution on Voluntary Repatriation of African Refugees*, Resolution No. CM/Res. 399 (XXIV), 13-21 February 1975, particularly paragraph 3, letters a), c); paragraph 9. See also Council of Ministers, *Resolution on Refugees*, Resolution No. CM/Res. 489 (XXVII), 24 June-3 July 1976, paragraph 10; Council of Ministers, *Resolution on the Situation of Refugees in Africa and on Perspective Solutions to Their Problems in the 1980's*, Resolution No. CM/Res. 727 (XXXIII) Rev. 1, 6-20 July 1979, paragraph 3.

<sup>7</sup> Hereinafter “1969 OAU Convention”. We keep in this article the former denomination even if, since 2000, we should more correctly talk of an “AU Convention”.

<sup>8</sup> For an analysis of this concept, see *infra*, later this article.

<sup>9</sup> F. Morgenstern, *The Right of Asylum*, 26 *British Yearbook of International Law* (1949), 347.

mains, difficult to separate the political nature of the reason that induces individuals to ask for asylum from private ones.<sup>10</sup>

In Africa, the rule of not rejecting aliens seeking asylum is supported by the fact that states could refer to a sort of burden-sharing pillar of their continent's protection of refugees, which the 1969 OAU Convention mentions in Article II, paragraph 3.<sup>11</sup> Many Sub-Saharan African countries – including Benin, Lesotho,<sup>12</sup> Senegal and Swaziland – also provide for the principle of *non-refoulement* in their respective national legislations. On this point, doctrine seems to adopt a uniform approach now. According to states' past practice, scholars affirm that these states have complied with the letter of the regional instrument and the national legislation, including the prohibition on rejection at the border.<sup>13</sup> This occurs although national legislations sometimes use the concepts of *non-refoulement* and *expulsion* interchangeably. 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 distinguishable 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 her or his will.<sup>14</sup>

The 1969 OAU Convention does not consider this expulsion in its provisions, but Article V of the 2001 Final text of the revised AALCO 1966 Bangkok principles on status and treatment of refugees mentions it in paragraph 4.<sup>15</sup> The government of Sudan wanted to express its view that, in this paragraph, the term “compe-

<sup>10</sup> Talking about political crimes J. 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.” J. Turpin, *Nouveaux Aspects Juridiques de l'Asile Politique: Le Litige Hungaro-Yougoslave devant la Société des Nations*, Paris 1937, 51.

<sup>11</sup> The concept of burden-sharing was formally introduced in Africa by the 1979 Meeting held in Arusha during the Conference on the Refugee Situation in Africa. See A. Hans/A. Suhrke, *Responsibility Sharing*, in: J. C. Hathaway (ed.), *Reconceiving International Refugee Law*, The Hague/Boston/London 1997, 90.

<sup>12</sup> But, in its history: “While 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.” T. Jr. Hovet, *Boundary Disputes and Tensions as a Cause of Refugees*, in: H. C. Brooks/Y. El-Ayouty (ed.), *Refugees South of the Sahara: An African Dilemma*, Westport 1970, 22. The same author, at page 27: “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.”

<sup>13</sup> R. Pender, *The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research*, in: Hague Academy of International Law, *Le Droit d'Asile/The Right of Asylum*, Dordrecht/Boston/London 1989, 92.

<sup>14</sup> G. Goodwin-Gill/J. McAdam, *The Refugee in International Law*, Oxford, 3<sup>rd</sup> ed., 2007, 117.

<sup>15</sup> Final text of the revised AALCO 1966 Bangkok principles on status and treatment of refugees, AALCO's 40<sup>th</sup> session, New Delhi, 24 June 2001, in: UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Others of Concern to UNHCR*, Geneva, vol. 3, 2007, 1184. The similarity of the phrasing of this article with Article 32, paragraph 2 of the 1951 Geneva Convention where *expulsion* is crystallized is evident.

tent authority” means the relevant national bodies and does not serve as a general reference to courts or judicial bodies. Sudanese authorities intervened in this clear manner to make the expulsion of aliens from their country easier.<sup>16</sup>

Analyzing the practice, this paper contends that the African continent’s governments should comply more with international legal instruments than they currently do or than they have done in the past. They may comply with the international instruments by introducing provisions in their respective national legislations that more clearly show their will to ban practices of *refoulement*. For example, Nigeria has created clear legal protection for 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>17</sup> In Ghana, practice and jurisprudence show a historical acceptance of the principle of *non-refoulement* by the competent authorities.<sup>18</sup> On the contrary, according to one scholar, Kenya is not obliged to adhere to *non-refoulement* because the country is unable to meet its refugee obligations due to financial reasons, despite the fact that recent Kenyan legislation on refugees provides the opposite implication.<sup>19</sup>

The principle of *non-refoulement*, as conceived in Article 33 of the 1951 Convention relating to the Status of Refugees,<sup>20</sup> raises questions as to its personal scope and its relation to the issues of admission and non-rejection at the frontier.<sup>21</sup> Through the decades, commentators’ views on the scope of Article 33 have

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<sup>16</sup> UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Others of Concern to UNHCR*, Geneva, vol. 3, 2007, 1101.

<sup>17</sup> B. O. Iluyomade/A. Popoola, *The Legal Position of Aliens in Nigerian Law*, in: J. A. Frowein/T. Stein (ed.), *Die Rechtsstellung von Ausländern nach staatlichem Recht und Völkerrecht/The Legal Position of Aliens in National and International Law/Le Régime Juridique des Étrangers en Droit National et International*, Berlin/Heidelberg/New York/London/Paris/Tokyo 1987, 978.

<sup>18</sup> G. K. Ofoosu-Amaah, *The Legal Position of Aliens in National and International Law in Ghana*, in: Frowein/Stein (ed.), *op. cit.* note 17, 525. 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 contrary, to surrender fugitives for political reprisal and persecution.”

<sup>19</sup> Odhiambo Abuya, *op. cit.* note 3, 81. 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 to subjected 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 where [...]”

<sup>20</sup> Hereinafter: 1951 Geneva Convention.

<sup>21</sup> We just point out that 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 resident there yet. According to this interpretation, states were not obliged to allow large groups of persons claiming refugee status to cross their frontiers. P. Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 30 *British Yearbook of International Law* (1953), 482.

changed.<sup>22</sup> Now, anyone presenting himself at a frontier post is already considered within state jurisdiction. For this reason, African states sometimes devise fictions to keep the alien's legal status as non-admitted.

The status of the principle discussed here must be assessed by reference to other formally non-binding declarations and resolutions. The Universal Declaration of Human Rights Article 14, paragraph 1 reads: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."<sup>23</sup> The 1967 Declaration on Territorial Asylum, recommends at Article 3, paragraph 1, that states would be guided by the principle that no one who is entitled to seek asylum "[s]hall 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". A similar definition has been adopted by the 2001 revised AALCO 1966 Bangkok principles, although this latter definition goes further in restricting the reasons that justify the *refoulement* of an asylum seeker.<sup>24</sup>

In the African system, the principle of *non-refoulement* can be considered a pillar. The 1969 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, as well as natural catastrophes and famine.<sup>25</sup> This principle applies both starting at the border and within the territory of the country concerned, and concerns all individuals, recognized or not as refugees, pending the determination of their status. According to a minority doctrine, this principle in the African system would mean there is no place even for expulsion and would oblige contracting states to grant at least a temporary asylum to people fleeing persecutions.<sup>26</sup>

Over the years, state practice, individually and within international organizations, has contributed to the progressive development of the law. Some factual

<sup>22</sup> Ibid., 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."

<sup>23</sup> We remind here that 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." Constitutive Act of the African Union. Lomé, 11 July 2000, Article 3, letter e).

<sup>24</sup> Final text of the revised AALCO 1966 Bangkok principles on status and treatment of refugees, op. cit. note 15, 1183, Article III, paragraph 3 of the Principles.

<sup>25</sup> For instance, in Nigeria famine and other natural disasters are recognized as a reason for the flight of the refugees. See *Ilu yomade/Popoola*, op. cit. note 17, 972-973. Natural disasters are included as reasons to flee also in K. Mbaye, *Les Droits de l'Homme en Afrique*, Paris, 2<sup>nd</sup> ed., 2002, 288, where the author includes in the list of reasons to ask for asylum, at least temporary, in Africa economic and social insecurity as well. The same opinion was expressed almost twenty years before by A. Adesoji, in: *Refugees in Africa: Problems and Prospects*, Paper Presented at the Symposium Assistance to Refugees: Alternative Viewpoints, Oxford, 27-31 March 1984, 2.

<sup>26</sup> R. C. Chhangani, *African Refugee Law: Problems and Prospects*, Maiduguri - Nigeria, 1992, 10-12.

elements may be necessary to know before states apply the principle of non-refoulement: for example, human rights violations in the country of origin.<sup>27</sup> State practice in cases of mass-influx offers additional support for the view that non-refoulement applies both to the individual refugee who has a well-founded fear of persecution and, in limited, well-defined situations, to the frequently-large groups of persons who do not enjoy the protection of the government of their country of origin.<sup>28</sup>

Unfortunately, many historical examples in Sub-Saharan Africa illustrate the serious consequences of failing to recognize the need of refugees to be able to enter another state. Contrary to a common conception, refoulement in Africa is very common: hundreds of refugees fleeing conflict in Sierra Leone were sent back by Guinea in 1999; Namibian authorities implemented a dusk-to-dawn curfew, with soldiers under orders to shoot violators all along a 450-km bank of the Kavango River in 2001. This last example prevented Angolan refugees escaping violence in Cuban Province from seeking asylum because government and UNITA patrols could be avoided safely only at night.<sup>29</sup> In the mid-1990s, both Tanzania and Zaire at times closed their borders to masses attempting to flee the conflict in Rwanda.<sup>30</sup>

To thwart the entry of refugees, states may sometimes erect direct barriers that serve as border closures. This was the case in 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>31</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 truly massive in scope. In July 1999, without court review, Zambia ordered the deportation of all nationals, including refugees,

<sup>27</sup> Lauterpacht/Bethlehem, *op. cit.* note 2, 151.

<sup>28</sup> *Ibid.*, 121. See also Jackson, *op. cit.* note 5, 457-458; C. Beyani, *Human Rights Standards and the Free Movement of People within States*, Oxford 2000, 123.

<sup>29</sup> These examples are cited in J. C. Hathaway, *The Rights of Refugees under International Law*, Cambridge 2005, 280.

<sup>30</sup> See: Border closure triggers debate, *Guardian*, July 19, 1995. Besides, 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. At that time the Tanzanian Prime Minister told Parliament that: "[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." Cited in Hathaway, *op. cit.* note 29, 281. About Zaire, on August 19, 1994, Deputy Prime Minister Malumba Mbanguila 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. See: Le départ des soldats français du Rwanda. Le Zaire ferme ses frontières aux réfugiés, *Le Monde*, August 22, 1994: "La frontière est fermée dans le sens Rwanda-Zaire, et reste ouverte dans l'autre sens afin de permettre aux réfugiés de regagner leur pays."

<sup>31</sup> C. Nettleton, *Across the Fence of Fire*, 78 *Refugees* (1990), 27-28.

of the Democratic Republic of the Congo because Zambia's national budget could not cover their assistance.<sup>32</sup>

Sometimes, non-states agents carry out ejection with toleration of national authorities, as in Kenya in the mid 1990s.<sup>33</sup> Sierra Leonean and Liberian refugees fled Guinea-Conakry in 2000 during a wave of xenophobic violence that was unleashed after the president of Guinea-Conakry encouraged citizens to form militia groups for the purpose of forcing refugees to be repatriated.<sup>34</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, as Zimbabwe has done with Rwandans.<sup>35</sup> In 2006, the Tanzanian government decided to expel some 5,000 Rwandan refugees, classified as "illegal immigrants", even though many among them had already been naturalized.<sup>36</sup> To point out the caution showed by the African governments towards refugees, several African countries have made declarations concerning the enforcement of Article 34, which concerns naturalization in the 1951 Geneva Convention.<sup>37</sup> The granting of asylum and naturalization are two reciprocally exclusive concepts because it is impossible to grant asylum to one's national. For this reason, naturalization may be considered an alternative, durable solution for the asylum-seekers.<sup>38</sup> Furthermore, refugees can face refoulement

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<sup>32</sup> Cited in Hathaway, *op. cit.* note 29, 284. However, to highlight the importance of refugees for the Zambian economy, see news: Zambia: repatriation leads to decline in food production: "The repatriation of Angolan refugees is creating food shortages in and around the Zambian camps they have lived in for decades", 201 Jesuit Refugee Service Dispatches (28 September 2006).

<sup>33</sup> F. Del Mundo, *The Future of Asylum in Africa*, 96 *Refugees* (1994), 7: "There is resentment, for example, in Kenya, at the security problems the presence of Somali refugees has brought. Last year, Kenyan security forces pushed back over 1,000 refugees from a border camp, something unheard before in Africa."

<sup>34</sup> D. Farah, *For Refugees, Hazardous Haven in Guinea*, *Washington Post* 24 (6 November 2000).

<sup>35</sup> Cited in Hathaway, *op. cit.* note 29, 285.

<sup>36</sup> Interview with Miss Claudine Umuhire, formerly member of the Eligibility Commission for refugee status of the government of Rwanda, Kigali-Geneva: 15 September 2006. We would like to remind here that in 1980 Tanzania naturalized about 36,000 Rwandese refugees who had been living there for several years. Adepou, *op. cit.* note 25, 11.

<sup>37</sup> For Malawi: "The Government of the Republic of Malawi 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." The Mozambique authorities have made this kind of declaration, as well. In contrast, Botswana and the Kingdom of Swaziland made a similar reservation on this article, the terms of the Kingdom of Swaziland's stating that: "Similarly, the Government of the Kingdom of Swaziland 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." For the declarations: UNHCR, *Declarations and Reservations to the 1951 Convention Relating to the Status of Refugees – as of 1<sup>st</sup> March 2006*, Geneva, 2006, 14.

<sup>38</sup> N. Nathwani, *Rethinking Refugee Law*, The Hague/London/New York 2003, 141-142.

because of the practical weakness in the operation of the domestic asylum system, such as in South Africa in 2000.<sup>39</sup>

Initiatives to promote voluntary repatriation are sometimes used as a pretext to engage in a disguised withdrawal of the protection of refugees. In August 2002, Rwandan authorities allowed members of a Congolese rebel group, which they supported, to meet with refugees from the Democratic Republic of the Congo in order to promote their return home. They even threatened refugees that camp services and the offer of transportation home would soon be withdrawn for those who choose not to repatriate.

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 denial of the right to earn a living through economic activity.<sup>40</sup> Almost 1,000 Sudanese refugees returned home in 2000 because they were starving in Ugandan camps.<sup>41</sup>

All these actions are patently contrary to the principle of non-refoulement affirmed in the 1969 OAU Convention. This principle makes it clear that a *bona fide* refugee may claim the right not to be pushed back to the country where she or he expects to suffer persecution.<sup>42</sup> The principle that *bona fide* refugees should not be returned or expelled to a country where their life or freedom would be threatened for political, religious or racial reasons is now widely recognized. The principle applies equally to individuals whose residence in the territory has been authorized and to illegal entrants. It appears justified to deduce it from a duty of countries to desist from action that may lead to the return of a refugee to a country

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<sup>39</sup> In this occasion 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. 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.” See: 2000, South African Human Rights Commission’s statement, cited in H a t h a w a y, op. cit. note 29, 287.

<sup>40</sup> By late 1991, UNHCR, Tanzanian and Burundi officials produced a repatriation blueprint for Burundi refugees in Tanzania. 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 A. M r e m a explained that: “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.” He added “we are encouraging [the refugees] to go back to avoid forming another Burundi in Tanzania” and continued: “We certainly cannot continue harbouring refugees indefinitely as this would create a political problem for us.” Quotations in M. S o m m e r s, *Fear in Bongoland: Burundi Refugees in Urban Tanzania*, New York/Oxford 2001, 102.

<sup>41</sup> Cited in H a t h a w a y, op. cit. note 29, 288-289.

<sup>42</sup> In the African continent, the distinction between *bona fide* refugee and “bogus” refugee is always difficult to make. An anonym wrote: “It must always be borne in mind that even among those who qualify as bona fide refugees maybe found bogus ones; for if a man is capable of expressing himself fluently both orally as well as documentally, such a man can cook out stories and can easily qualify as a bona fide refugee.” See: A n o n y m o u s, *Giving Assistance to Refugees*, Paper Submitted in Preparation for the Pan-African Refugee Conference, Arusha, January 8-February 2, 1979, 9.



where she or he may become the victim of persecution. However, it seems difficult to reconcile such a rule with the doctrine of the unlimited right of states to regulate the admission of aliens. In effect, the enjoyment of asylum is rigorously dependent upon the discretion of the country of refuge, which implies that this country and this country alone, in the exercise of its competence, can terminate that asylum at will.<sup>43</sup> This affirmation is important to stress the imperfections of the present situation in Africa where the power to grant or deny asylum is determined by individual states without any real degree of certainty or uniformity.<sup>44</sup> And in Africa there is the same lack of uniformity in the application of the principle of non-refoulement: lack of uniformity among states and lack of compliance of any single state with both its international and domestic legal commitments.

### III. The Implications of Mass-Influx Situations in Sub-Saharan Africa

Mass-influx flows have been a fairly typical occurrence throughout Africa's history. The 1969 OAU Convention is meant to promote the *prima facie* recognition of groups of refugees. Group determination is particularly important because it is far more economic than an individualized status determination procedure, which is a significant benefit to developing countries. Whether an individual's status has been determined individually or under group determination on *prima facie* grounds has no effect on the rights that accompany refugee status.<sup>45</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. Refugee status granted on a *prima facie* basis, considered as "customary",<sup>46</sup> does not require "confirmation" at a later stage, although individual eligibility becomes feasible. In the African context, the "extended" refugee definition in the 1969 OAU Convention is usually considered to apply on a group basis.<sup>47</sup>

In several countries, *prima facie* recognition has been done through official government statements declaring that all persons of a particular nationality are to be

<sup>43</sup> A. Bahramy, *Le Droit d'Asile*, Paris 1938, 8.

<sup>44</sup> M. R. Garcia-Mora, *International Law and Asylum as a Human Right*, Washington D.C. 1956, 154-155.

<sup>45</sup> G. Verdirame/B. Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, New York/Oxford 2005, 57.

<sup>46</sup> W. Lemma, *Ethiopian Refugee Law and the Place of Women in it*, in: C. Mulei/L. Dirasse/M. Garling (ed.), *Legal Status of Refugee and Internally Displaced Women in Africa*, Nairobi 1996, 195.

<sup>47</sup> UNHCR, *Note on refugee status granted on prima facie basis*, 2005, 2. For some other application of this principle apart from the example given in this paragraph see also Mozambican refugees in Malawi in the early 1990s cited in A. Callamard, *Malawian Refugee Policy, International Politics, and the One Party System*, 47 *Journal of International Affairs* (1994), 531-532.

automatically granted refugee status by virtue of the conditions in their countries of origin.<sup>48</sup> In many situations, *prima facie* recognition results in a simple registration upon arrival. This may be carried out by border police or immigration officials, although humanitarian organizations are often delegated the task. NGO involvement in the registration of refugees, however, is more related to humanitarian assistance than to the appropriate recognition of their refugee status and accompanying rights. It is quite frequent that refugees in this category receive no documents certifying their status. The only means of identification they receive is a "ration card" that indicates the quantity of items that can be provided for them but is considered more an act of charity than as a means to uphold their rights.<sup>49</sup>

The situation of urban refugees was slightly better in the recent past. Although it was difficult for the UNHCR to provide every refugee in the town with a certificate of identification, the UNHCR's local agency attempted to develop a system that would ensure that at least the status of refugees who came to the capital would be recognized. For instance, the regularization of the status of refugees in Khartoum called for the issuing of "identification cards." Officials from the UNHCR based this requirement on Article 27 of the 1951 Geneva Convention and Article 13 of the 1974 Sudanese Asylum Act.<sup>50</sup> In order to clarify who in the town should receive these cards, the delegates of the UNHCR in the country defined broad categories of refugees whose stay in the town should be considered as lawful. This classification was comprised of seven categories, including students who had the opportunity to attend secondary and post-secondary schools.<sup>51</sup>

On the other hand, there are situations when registration of groups of refugees may not be desirable because it may impede implementing a quicker solution. If protection is not a particular concern, and there is no need for refugees to be formally identified, recognized or collected together for safety, then the following situations may argue against registration: refugees from "traditional" tribal fighting that may be soon resolved by elders' negotiations; victims of drought or other natural calamities who have crossed international borders as "refugees"; and finally refugees who are being assisted by closely-related groups in the country of asylum. There are current examples in Africa of all these situations. In such scenarios, assistance may be given on a short-term, community basis, thus avoiding registration

<sup>48</sup> For example in Tanzania, where official statements to recognize *prima facie* refugees have been issued in the past, this was normally done publishing them in the official gazette. Combined with the obligation not to reject potential refugees at the frontier, such statements would oblige border police to grant access to certain categories of persons and would reduce some of the difficulties faced by the refugees.

<sup>49</sup> Verdirame/Harrell-Bond, *op. cit.* note 45, 57.

<sup>50</sup> Article 13 of the Sudanese Asylum Act reads: "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 subsequent 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."

<sup>51</sup> A. Karadawi, *Refugee Policy in Sudan: 1967-1984*, New York/Oxford 1999, 107.

and establishment of camps and services that would be expensive and difficult to dismantle after the conflict or other problems subside.<sup>52</sup>

In any case, 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>53</sup> The Executive Committee of the UNHCR<sup>54</sup> Conclusion No. 22 deals with the topic of the mass-influx situations, among other things, and provides that:

“I. General

1. The refugee problem has become particularly acute due to the increasing number of large-scale influx situations in different areas of the world and especially in developing countries. 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.

2. Asylum seekers forming part of such large-scale influx situations are often confronted with difficulties in finding durable solutions by way of voluntary repatriation, local settlement or resettlement in a third country. ...

II. Measures of protection

A. Admission and non-refoulement

2. In all cases the fundamental principle of non-refoulement including non-rejection at the frontier-must be scrupulously observed. ...

B. Treatment of asylum seekers who have been temporarily admitted to country pending arrangements for a durable solution

2. It is therefore essential that asylum seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards:

(a) they should not be penalized or exposed to any unfavourable 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; ...

(p) all steps should be taken to facilitate voluntary repatriation. ...

IV. International solidarity, burden-sharing and duties of States

(6) 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

<sup>52</sup> UNHCR, Registration Guidelines, Geneva, 1997, 3, 6.

<sup>53</sup> Verdirame/Harrell-Bond, op. cit. note 45, 72.

<sup>54</sup> Hereinafter: ExCom. ExCom conclusions cannot be in any case considered as binding, belonging more to that category of provisions sometimes called “soft law”. About the legal content of the “conclusions” elaborated by the ExCom, see: J. Szucki, The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme, 1 International Journal of Refugee Law (1989), 285-318.

and, where such influxes have occurred, that conditions favourable to voluntary repatriation are established.”<sup>55</sup>

ExCom Conclusion No. 100 clarifies:

“b) The ExCom 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>56</sup>

In Africa, state practice has occasionally granted a more generous treatment than ExCom has recommended. For instance, asylum-seekers have at times been allowed to seek employment, which can transform them into net contributors to the hosts' economy and minimize their dependence on material assistance.<sup>57</sup>

Controversies regarding the recognition of refugee status in the case of mass-influx are very common. In 1984, the Sudanese government and the UNHCR refused to recognize as refugees Tigrayans and Eritreans arriving in Eastern Sudan. UNHCR justified its position on two grounds. First, ignoring the 1969 OAU Convention's broader definition of “refugee”, the UNHCR invoked just its own Statute, which defines a refugee according to B) as “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 wellfounded fear of persecution ...”.<sup>58</sup> As fear of individual persecution could not be proved in the case of the 1984 influxes, UNHCR did not consider itself directly responsible for these individuals. Secondly, UNHCR maintained that its role in providing assistance depended on a government request. As the Khartoum government did not make a request, UNHCR would not intervene unilaterally. 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>59</sup>

<sup>55</sup> ExCom, Conclusion No. 22 (XXXII), Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981).

<sup>56</sup> ExCom, Conclusion No. 100 (LV), International Cooperation and Burden and Responsibility Sharing in Mass-Influx Situations (2004).

<sup>57</sup> Verdirame/Harrell-Bond, *op. cit.* note 45, 72.

<sup>58</sup> Paragraph 6, letter B) of the 1950 UNHCR Statute.

<sup>59</sup> Quoted in Karadawi, *op. cit.* note 51, 225

Finally, it is true that the phenomenon of mass-influx of refugees has induced a far-reaching reconsideration of the essential parameters of an effective African refugee policy.<sup>60</sup>

#### IV. A Panacea for All Problems? Voluntary Repatriation in the African Context

Article V, paragraph 1 of the 1969 OAU Convention establishes the important principle of repatriation, which has acquired broad international application, and highlights the essentially voluntary aspect of it. Article V requires collaboration between the country of origin and the host country during repatriation and prohibits the punishment of the refugee who returns to her or his own country.

The explicit stipulation in a legally binding instrument that repatriation might be a voluntary act represents a valuable corroboration of the principle of non-refoulement. Voluntary repatriation is now generally considered a custom, but its inclusion in the 1969 OAU Convention was an early attempt to codify the concept in a legally-binding treaty.<sup>61</sup>

The 1969 OAU Convention explains in detail the duties of both the country of asylum and the country of origin regarding registration. These provisions 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>62</sup> The Convention seems to envisage only organized repatriation, meaning repatriations that require formal written agreements. Spontaneous repatriation, however, must now be taken into account because it is a factor in the daily practice of African refugees.<sup>63</sup>

The 1969 OAU Convention, however, does not make clear how the provision on voluntary repatriation relates to the cessation clauses of the status of refugees. On the one hand, 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

<sup>60</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 *Australian Yearbook of International Law* (1978-1980), 187.

<sup>61</sup> R. Degni-Segui, *L'Action des Institutions Africaines en Matière de Réfugiés*, in: *Société française pour le droit international, Colloque de Caen: Droit d'Asile et des Réfugiés*, Paris 1997, 233.

<sup>62</sup> P. Weis, *The Convention of the Organisation of the African Unity Governing the Specific Aspects of Refugee Problems in Africa*, 3 *Revue des droits de l'homme* (1970), 460-461.

<sup>63</sup> G. 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 Law Quarterly* (2001), 123-126. An example of huge, spontaneous repatriation was the one that took place in Guinea after the death of President S. Touré, mentioned in: W. J. E. M. Van Hovell tot Westerfliet, *African and Refugees: The OAU Refugee Convention in Theory and Practice*, 7 *Netherlands Quarterly of Human Rights* (1989), 184.

individual who is no longer a refugee by virtue of the cessation of her or his status. On the other hand, the clauses in Articles V clearly read that only an individual who "is" a refugee can receive the benefit of such provisions.<sup>64</sup>

Within the African legal system, 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 OAU Convention itself. These included 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>65</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 in the repatriation of their nationals.<sup>66</sup>

Voluntary repatriation is the preferred solution to solve durably the crisis of refugees that afflict many countries in Africa. It is considered an ideal solution when there is stability between the countries of origin and asylum.<sup>67</sup> This solution has a positive effect on economic and political conditions of the entire region concerned and leads to a decline in demands for financial assistance from the international community.

One of the major ambiguities concerning voluntary repatriation is that it is not confirmed by any conventions or other binding legal instruments, apart from the exception created in the 1969 OAU Convention.<sup>68</sup> Currently, 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. UNHCR has often assumed direct responsibility to encourage 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>69</sup> Furthermore, schol-

<sup>64</sup> J. C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 *Ohio State Journal on Dispute Resolution* (2005), note 10, 178.

<sup>65</sup> African Union, *Voluntary repatriation of African refugees*, 13-21 February 1975, Council of Ministers, Resolution CM/Res.399 (XXIV), letter a). We stress here that resolutions in the framework of the OAU institutional system were not considered as binding for the member states of the organization.

<sup>66</sup> Okoth-Obbo, *op. cit.* note 63, 123.

<sup>67</sup> Karadawi, *op. cit.* note 51, 203.

<sup>68</sup> It is worth to note as 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. UN Doc. A/AC.96/INF.158.

<sup>69</sup> Over the years, the work of this kind made by the UNHCR in the African continent has been outstanding. It suffices to cite the coordination of the repatriation of some 200,000 Sudanese from Ethiopia in 1972/1973 as far as the 250,000 Zimbabweans repatriated in 1980/1981 or the 250,000 Chadian repatriated from Cameroon and Central African Republic in 1982, because of the temporary cessation of hostilities in N'Djamena. As A. Adepoju notes, Cameroon at that time was still trying to relieve of her caseload of refugees after a large number of refugees voluntarily repatriated themselves to Guinea-Bissau. A. Adepoju, *The Dimension of the Refugee Problem in Africa*, 81 *African*

ars add that the practicability of voluntary repatriation heavily depends on the specific character of the conflict generating the refugees.<sup>70</sup>

J. Crisp lists a series of reasons why the “repatriation rather than integration” approach assumes dominance in the African continent:

- “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>71</sup>

In contrast, 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 that gave rise to her or his flight still prevail. In this sense, a substantial change in the internal conditions within the country of origin constitutes an essential prerequisite, for legal and for practical reasons, for any repatriation programme to succeed. Any effort of the UNHCR to try to cause such change 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 many times in Africa, where the intervention of the UNHCR and other aid organizations was only important as a complement to political changes in the country of origin.<sup>72</sup> Some refugees, however, choose not to go home even when conditions in their country of origin appear to have stabilized: at the end of the 1990s a sizeable number of Liberian refugees preferred to remain in their country of asylum, such as Ghana and Guinea, rather than

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Affairs, (1982), 27. Furthermore, we cite 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 effectively very hard that there were a high percentage of volunteers for repatriation among the strictly Ethiopian political exiles in Djibouti. 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 such because, as for Art. 1 C (5) of the 1951 Convention and for Art. I (4), lit. e) of the 1969 OAU Convention, the circumstances in connection with which they had been recognized as refugees had ceased to exist. For this example, R. Hofmann, *Voluntary Repatriation and UNHCR*, 44 *ZaöRV* (1984), 329-332.

<sup>70</sup> Karadawi, *op. cit.* note 51, 203.

<sup>71</sup> J. Crisp, *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa*, in: UNHCR, *New Issues in Refugee Research: Working Paper No. 75* (2003), 19-20.

<sup>72</sup> To this purpose, Karadawi mentions the return of southern Sudanese refugees in 1972-1973; similarly in Sudan, the return of Ansar fighters in 1977 and 1980 (due to the reconciliation between the Khartoum central government and the Sudanese National Front). Furthermore, the return in Chad of the supporters of Hussein Habre (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. Karadawi, *op. cit.* note 51, 203.

to return home. The choice to remain in the country of asylum is dictated by several factors:

- "because 'residual caseloads' 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 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 the refugees have close ethnic, linguistic, social or economic links with the local population and the country of asylum;<sup>73</sup>
- because certain refugee groups may choose to remain in exile and to pursue their political objectives from the country which has granted them asylum."<sup>74</sup>

Once change favorable to repatriation has taken place, a programme of voluntary repatriation could be set up, although its success relies upon several factors, including the clearly expressed wish of the country of origin that refugees return. A typical example of expressing this wish is a concession of amnesty, which should be accompanied by an explicit desire of the refugee himself.<sup>75</sup> It is always possible that amnesties would be violated and returnees would have to flee into exile once again. That is why, at least until 1980, the UNHCR encouraged in Africa a policy of settlements in the country of asylum rather than favoring voluntary repatriation. In 1980, there was an important shift in the UNHCR policy and voluntary repatriation became a major priority in the continent, especially the Horn of Africa. This shift was considered strange because it occurred at a time in which there was no significant change in the circumstances that had generated the flight of refugees. 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. Finally, refugee programmes were dependent on financial assistance from international donors and asylum-seekers had become a heavy burden for these donors.<sup>76</sup>

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<sup>73</sup> A. Adepoju gives an example of this kind of situation: "Refugees living close to borders which to them arbitrarily divide ethnically homogeneous groups, as in the case of the Uganda/Tanzania border where people sometimes literally have to cross border in order to visit their relatives. This situation also has been observed in Somalia, where the colonialists' boundary arbitrarily divided the Somali nomads into both Somalia and Ethiopia." Adepoju, *The Dimension of the Refugee Problem in Africa*, op. cit. note 69, 28.

<sup>74</sup> Crisp, op. cit. note 71, 21.

<sup>75</sup> See what occurred in Ethiopia in the early 1980s: *supra*, note 70 or other examples like Uganda (1964) and Zaire (1967), the latter cited in P. J. Van Krieken, *Repatriation of Refugees under International Law*, 1 *Netherlands Yearbook of International Law* (1982), 113. 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." Adepoju, op. cit. note 25, 12.

<sup>76</sup> Karadawi, op. cit. note 51, 204.



The refugee also 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, not expressly mentioned in Article V of the 1969 OAU Convention, should be 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 Secretary-General of the United Nations, if, after a careful analysis of the situation of the country of origin, conditions remain unfavorable to the reinstallation of the refugees.<sup>77</sup>

The UNHCR clearly needs neither to participate nor to attempt to influence massive repatriations of refugees because political sensitivities may speak against it. In the case of the massive repatriation of Ethiopians from Sudan in the mid-1980s, repatriation was carried out by the Tigrayan People's Liberation Front.<sup>78</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 Tutsis, 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>79</sup> The youth wing of the ruling Uganda People's Congress enforced the displacement, but only at the instigation and with the blessing of the Ugandan Government at all levels.<sup>80</sup>

At the universal level, it seems that the UNHCR competence to be involved relies upon a provision of Article 8, subsection c) of its Statute. The interpretation given by Article 8 could be criticized, given that, as provided in Article 9 of the Statute, an explicit mandate by the UN General Assembly should be indispensable even if the article uses a conditional "may". 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, any government should not fear that the UNHCR's supervision would turn into an intervention into internal affairs, given its 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 were not observed.<sup>81</sup>

As this paper has discussed, voluntary repatriation has received increasing attention from the international community since the beginning of the 1980s, although

<sup>77</sup> Hofmann, *op. cit.* note 69, 334.

<sup>78</sup> Okoth-Obbo, *op. cit.* note 63, 128.

<sup>79</sup> L. Pirouet, *Refugees in and from Uganda in the Post-Colonial Period*, in: H. R. Hansen/M. Twaddle (ed.), *Uganda Now: Between Decay and Development*, London 1988, 243.

<sup>80</sup> B. Rutinwa, *The End of Asylum? The Changing Nature of Refugee Policies in Africa*, in: UNHCR, *New Issues in Refugee Research*, Working Paper No. 5 (1999), 5-6.

<sup>81</sup> Hofmann, *op. cit.* note 69, 334-335.

the OAU had already previously invoked it several times.<sup>82</sup> To legally support its new role, and contrary to all the indications that refugee movements were caused directly or indirectly by political conflicts, the UNHCR started affirming that most African refugees were, in fact, individuals who did not fall within the “classic” definition provided by the UNHCR Statute.<sup>83</sup> This interpretation indicated an inclination to deny that the international community had some responsibility towards African refugees. This occurred despite the fact that the UNHCR had provided assistance since 1957 without applying the 1951 definition of “refugee” to the dynamic African situation. Moreover, in denying the majority of African refugees their legal status and thereby material assistance, UNHCR declared that the movement of most of them from their country of origin had been instigated by assistance programmes in the countries of asylum, which gave people an incentive to leave their homes. At that point, the concentration of assistance in the country of refuge discouraged repatriation as well. Subsequently, any attempt to encourage voluntary repatriation necessarily would have involved limiting the material assistance provided to refugees in the host countries.<sup>84</sup>

Since the 1980s, the UNHCR had been called upon by the UN 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 in order to ease the re-integration of returning refugees.<sup>85</sup> The extension of UNHCR liabilities is evident in a 1994 UN General Assembly resolution<sup>86</sup> and to stress the importance of voluntary repatriation, the UN General Assembly has recently introduced a clarification, arguing that:

“The Assembly would further call upon the High Commissioner and others to intensify their support to African Governments through capacity-building activities. It would also reaffirm the right of return and the principle of voluntary repatriation, as well as *the fact that voluntary repatriation should not necessarily be conditioned on accomplishing*

<sup>82</sup> In pursuance of the ideal solution to the refugee flow in the African continent, the OAU had urged countries of origin of refugees to encourage refugees to return home. For the measures recommended to such governments: OAU, Africa and its Refugees (Africa Refugee Day), Addis Ababa, 1975, 53; quoted in Adepoju, *The Dimension of the Refugee Problem in Africa*, op. cit. note 69, 33.

<sup>83</sup> According to the definition provided in the 1950 Statute, see Art. 6, paragraphs A) and B).

<sup>84</sup> Karadawi, op. cit. note 51, 204-205.

<sup>85</sup> F. Schnyder, *Les Aspects Juridiques Actuels du Problème des Réfugiés*, 114 (I) *Recueil des Cours de l'Académie de La Haye* (1965), 411.

<sup>86</sup> UNGA's resolution, Office of the United Nations High Commissioner for Refugees, 23 December 1994, A/RES/49/169. Paragraph 9 reads: “[UNGA] Reiterates 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.”

*political solutions in the country of origin* (emphasis added). It would express grave concern at the increasing number of internally displaced persons in Africa and call upon States to take concrete action to pre-empt internal displacement and meet the protection and assistance needs of internally displaced persons.”<sup>87</sup>

Over the last few decades, the UNHCR has 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>88</sup> considering that resolutions adopted by the UN General Assembly following the 1950 Statute only formulate guidelines of these responsibilities without specifying their content. The ExCom has tried to elaborate basic standards relative to the legal issue of voluntary repatriation 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.<sup>89</sup> At the same time, ExCom identified the two following complementary conditions to make repatriation operations better:

“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>90</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” (paragraph f), as a condition of the repatriation programme itself, rather than a precondition for repatriation. The subjective element of a voluntary repatriation shadowed the objective element of the situation in the country of origin. The two clauses quoted are complementary and together identify the legal preconditions of voluntary repatriation. Voluntariness cannot constitute the only criterion because the doctrine also requires considering the changed circumstances in the country of origin. But a general question remains: how meaningful is the “voluntariness” element when Rwanda and Uganda withhold food, water and other essential goods from refugees in order to induce them to repatriate “voluntarily”?<sup>91</sup> And is it always possible to detect the element of “voluntariness”?

The above-mentioned ambiguity also remains substantially in the following conclusion adopted on the same issue in 1985. At that time, ExCom repeated the

<sup>87</sup> UNGA’s resolution, Assistance to Refugees, Returnees and Displaced Persons in Africa, 19 December 2006, A/RES/61/139.

<sup>88</sup> V. Chetail, Voluntary Repatriation in Public International Law: Concepts and Contents, 23 Refugee Survey Quarterly (2004), 12.

<sup>89</sup> ExCom Conclusion No. 18 (XXXI), Voluntary Repatriation, 1980, letters a) through e).

<sup>90</sup> Ibid.

<sup>91</sup> Situation described in H a t h a w a y, op. cit. note 29, 318.

voluntary character of repatriation as the central principle.<sup>92</sup> Contrary to the previous conclusion, ExCom now explicitly mentions the conditions of the country of origin that caused the refugee to escape. The key aspect of voluntary repatriation in connection with the prevention of refugee flow and the responsibilities of countries towards their nationals, however, is formulated in vague terms.<sup>93</sup>

ExCom attempted to clarify these 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. The Handbook at first confirms the importance of the principle of voluntariness and later continues by defining the concept of voluntariness in terms that can be considered broad and negative.<sup>94</sup>

The improvement of conditions in the country of origin is considered, on the same level as voluntariness, an "essential precondition"<sup>95</sup> before the UNHCR will promote voluntary repatriation. Moreover, the Handbook also explains the difference between promotion and facilitation of repatriation, describing how in the latter case, respect for the refugee's will requires passive involvement of the UNHCR if there is no change of circumstances in the country of origin.<sup>96</sup>

The Handbook also attempts to explain the expression, "return in safety and dignity", which is considered an essential precondition for the issue in question. 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. In contrast, to "return with dignity" is a more difficult concept to elucidate.<sup>97</sup> The evolution of the concept of "return in safety and dignity" has stressed the role of the objective element to the detriment of the subjective one, as is evident in the 2002 UNHCR's "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>98</sup>

It should be finally stressed that the concept of "safety" applied to the 1969 OAU Convention rests on the assumption that the conditions for return in safety already exist. Therefore, the provisions in the African instrument focus mainly on the legal organization and on conditions for the return itself.<sup>99</sup>

<sup>92</sup> ExCom Conclusion No. 40 (XXXVI), Voluntary Repatriation, 1985 letters a) through b).

<sup>93</sup> Ibid., letters c) through d).

<sup>94</sup> UNHCR, Handbook on Voluntary Repatriation: International Protection, Geneva, 1996, paragraph 2.3. It is worth to note that paragraph 4.1 provides for three examples where the essential precondition of voluntariness is not considered as satisfied.

<sup>95</sup> Ibid., paragraph 3.1.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid., paragraph 2.4.

<sup>98</sup> UNHCR, Global Consultation in International Protection, Voluntary Repatriation, Document No. EC/GC/02/5, 25 April 2002, paragraphs 14 through 15.

<sup>99</sup> O k o t h - O b b o, op. cit. note 63, 126.

## V. Some Emblematic Examples of “Voluntary” Repatriation in Sub-Saharan Africa: Who is to Blame?

There are cases in Africa in which asylum countries give arbitrary deadlines to refugees to require them to repatriate “voluntarily”, relying sometimes on agreements between the UNHCR and the countries of origin. This was the position of Tanzania towards Rwandan refugees in December 1996. Rwandan repatriation from Tanzania cannot be described as “voluntary”. This forced repatriation represented a broader international trend towards a more restrictive refugee policy and declining protection standards.<sup>100</sup> 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 recently appointed government in Kigali. Tanzania was concerned about this situation. Its concern was based on the consideration that on a similar occasion, in 1972, 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 “voluntary” 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.

When the conditions that led to the granting of refugee status no longer exist, the cessation clause for fundamental changes in circumstances can apply. As the requirements for applying this clause are high, standards were met in Africa in just fifteen cases between 1975 and 1996.<sup>101</sup>

Another important element in repatriation is the declining availability of funds to support these kinds of operations. In the example of Tanzania, the decline in funding levels was important to the Dodoma government’s claim of the necessity of “burden sharing”, relying upon Article II, paragraph 4 of the 1969 OAU Convention. Repatriation of the Rwandese was also finally encouraged by a memorandum of understanding signed by the UNHCR and the Tanzanian government that required all Rwandan refugees to leave the country. Although this agreement was

<sup>100</sup> B. E. Whitaker, *Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania*, in: N. Steiner/M. Gibney/G. Loescher (ed.), *Problems of Protection: The UNHCR, Refugees, and Human Rights*, New York/London 2003, 142. For this example, see also: “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 his 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”, quoted in A. V. Eggle, *Mass Refugee Influx and the Limits of Public International Law*, The Hague/London/New York 2001, 247.

<sup>101</sup> Whitaker, *op. cit.* note 100, 148.

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 the country.<sup>102</sup> In a sense, the Tanzanian government shifted back to the traditional definition of asylum provided by the 1951 Geneva Convention, considering that they could confer the status of a refugee based on an individual fear of persecution and not, like the previous practice in similar situations had shown, on a group basis.

In effect, some scholars hold that the same doctrinal definition of "refugee" provided by the 1969 OAU Convention permits the admission of asylum seekers to host countries on a *prima facie* group basis.<sup>103</sup> In our example, Rwandan refugees had initially been admitted to Tanzania based on the "expanded" definition given by the 1969 OAU Convention. The change of Tanzania's policy can be explained also by the fact that Tanzania clearly perceived such refugees as a potential threat to good relations with refugee-generating neighbors and, consequently, as a diplomatic source of embarrassment.<sup>104</sup> Thus, the decision to repatriate Rwandan refugees could be perceived as a strategy of conflict prevention in the area. In similar cases, as the former UNHCR once explained, conflict prevention was more important than refugee protection. This argument reflects the perspective that violations of refugee protection can at times be justified as a strategy of conflict prevention.<sup>105</sup> In this specific case, the presence of criminals applying for the status of refugees has also posed a classical question of how to distinguish them from other asylum-seekers. This problem is also manifest in urban areas such as Arusha and Nairobi, where it is 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>106</sup>

The Tanzanian government also showed a lack of adequate provisions for protecting refugees in the case of the Burundians in 1997-1998. At that time, Tanzanian authorities embarked on a "round-up" of all Burundian nationals living in

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<sup>102</sup> Ibid., 149-150. Article 3 of the 1995 Tripartite Agreement between UNHCR, Tanzania and Rwanda expressly stipulates 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 High Commissioner for Refugees, 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 [...]." And Article 4: "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."

<sup>103</sup> Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, New York 1995, 29.

<sup>104</sup> M. K. Juma/P. M. Kagwanja, *Securing Refuge from Terror: Refugee Protection in East Africa after September 11*, in: N. Steiner/N. Gibney/G. Loescher (ed.), *Problems of Protection: The UNHCR, Refugees, and Human Rights*, New York/London 2003, 228.

<sup>105</sup> Whitaker, *op. cit.* note 100, 153.

<sup>106</sup> Juma/Kagwanja, *op. cit.* note 104, 231-232, 235.

western Tanzania, although it did not target Burundi refugees in other areas. In spite of its prior 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 mind and placed nearly 100,000 Burundians in refugee camps near the Burundi border awaiting repatriation as soon as possible.<sup>107</sup>

Under a different framework, the UNHCR in 2003 launched the “organized voluntary repatriation” of roughly 500,000 Angolan refugees from Zambia, Namibia, and the Democratic Republic of the Congo. In that case, the UNHCR judged 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>108</sup>

## VI. Final Considerations on the Legal Refugee Issues in Sub-Saharan Africa

Many African countries have taken and are still taking steps that reveal their inconsistent approach to the obligations that these same countries have assumed under international law.<sup>109</sup> This paper undertook this analysis aware that scholars often contend that African international treaty law provides a sufficient answer to fluxes of refugees although it seems to lack a provision forbidding that they take into consideration the causes of the entry of refugees.<sup>110</sup> Regarding domestic legal systems, it should be noticed that existing laws and proposed refugee bills throughout Africa do not take into consideration the complex realities posed by new circumstances, such as the war against terrorism.<sup>111</sup>

Until this decade, it could hardly be affirmed that refugee matters in the continent are conducted in conformity with international and regional norms. The 1969 OAU Convention nonetheless remains an important pillar to regulate the refugee law regime in Sub-Saharan Africa.

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 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>112</sup> Furthermore, the traditional “generosity” of African countries

<sup>107</sup> Sommers, op. cit. note 40, 203.

<sup>108</sup> Cited in Hathaway, op. cit. note 29, 936-937.

<sup>109</sup> Z. Lomo, The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work, 18 Berkeley Journal of International Law (2000), 279.

<sup>110</sup> W. Czaplinski/P. Sturma, La Responsabilité des États pour les Flux de Réfugiés Provoqués par eux, 40 Annuaire français de droit international (1994), 159.

<sup>111</sup> Juma/Kagwanja, op. cit. note 104, 234.

<sup>112</sup> Rutinwa, op. cit. note 80, 25.

to refugees often has been misleading because it gives the impression that refugees in these countries enjoy freedom and fundamental human rights.<sup>113</sup>

Where domestic measures have been adopted, they often have revealed their inaptitude to respond to the refugee crisis, in particular to mass-influx situations that probably will require the establishment of special procedures for either the determination or the protection of the asylum seekers. Another factor showing the gap between the current needs of refugees and what has been effectively done for them is the common shortage in the continent of an articulated and consistent jurisprudential approach to refugee issues.<sup>114</sup> Moreover, practice has shown 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 Africa consists of the elimination of the forces that generate this category of individuals. The UNHCR and the present African Union have admitted this point and for years have tried to promote democratic governance, respect for human rights, and the enforcement of the African mechanism for the prevention, management and peaceful settlement of conflicts<sup>115</sup> as an effective and incisive instrument to fight against the plight of refugees, which afflicts the entire continent. Even though they can bring us directly to the target, the easiest paths are nevertheless sometimes the most difficult to take. Still:

“Access 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>116</sup>

<sup>113</sup> Z. L o m o , Refugees in East Africa: Developing and Integrated Approach, in: D. A. Bekoe (ed.), *East Africa and the Horn: Confronting Challenger to Good Governance*, Boulder/London 2006, 41.

<sup>114</sup> E. A u k o t , Refugee Protection in Africa: A Developing Country's Dilemma Towards Effective Protection, 9 *East African Journal of Peace and Human Rights* (2003), 253-254. The author, a Kenyan born, complained the fact of this country's lack of an internal legislation for refugees. Finally, the Kenyan Refugee Bill has been approved in the late December 2006.

<sup>115</sup> OAU, Assembly of Heads of State and Government, Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, Declaration No. AHG/DECL.3 (XXIX), 28-30 June 1993.

<sup>116</sup> ExCom, Note on International Protection, Geneva: UNHCR, 3-7 October 2005, Document No. A/AC.96/1008, paragraph 18, 5.



We hope that better times for refugees in Africa will be forthcoming through a realistic commitment by competent authorities, although we are aware of the fact that: “Wisdom is like a baobab tree; no individual can embrace it.”<sup>117</sup>

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<sup>117</sup> English translation for the Akan and Ewe (Benin, Ghana and Togo) proverb: “Nunya, adidoe, asi metunee o.”

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