# Refugee Law in the African Context

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## *I. Introduction*

The deplorable situation of refugees throughout the world, especially in cases of large-scale movements, remains an unsolved problem. This is particularly true as regards Africa: According to the latest figures[2], the African continent alone has some 6,000,000 refugees which is approximately one third of the overall number of refugees in the world. It is evident that the remarkable and very considerable efforts made by international organizations and voluntary relief organizations, although they have indeed contributed to achieve the primary goal of international refugee law which, based upon purely humanitarian considerations, is to offer protection and assistance to persons having left their countries of origin under different forms of coercion, have so far not resulted in a significant reduction as regards the number of refugees in Africa: While in 1964 an estimated 400,000 refugees were to be found in Africa and in

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[2] Cf. UNHCR, UN Doc. A/AC.96/774 (Part I) of 29 August 1991; according to this information the most important countries of refuge in Africa are Burundi (270,000; Rwanda), Ivory Coast (280,000; Liberia), Djibouti (100,000; Somalia, Ethiopia), Ethiopia (1,200,000; Somalia, Sudan), Guinea (450,000; Liberia, Sierra Leone), Malawi (950,000; Mozambique), Sierra Leone (125,000; Liberia), Somalia (600,000; Ethiopia), Sudan (800,000; Ethiopia), Uganda (145,000; Rwanda, Sudan), Tanzania (270,000; Burundi, Mozambique, Rwanda, Zaire), Zaire (420,000; Angola, Sudan, Burundi, Rwanda, Uganda), Zambia (140,000; Angola, Mozambique, Zaire) and Zimbabwe (180,000; Mozambique). The countries in brackets are the most important countries of origin of the refugees; it is important to note that these statistics only include such persons as are "of concern to UNHCR" – the actual numbers of refugees are probably much higher.

1967 the numbers had already increased to 750,000[3], the increase was continuous throughout the 1970s and by the end of the decade, particularly as a result of the wars in the Horn of Africa, the numbers again rose drastically and had "stabilized" at 4,000,000 refugees by the beginning of the 1980s[4]. Hopes for a significant reduction of these numbers as a result of the termination of the "Cold War" by the end of the last decade proved, most regrettably, to have been premature: It is to be noted that recent outbreaks of civil war in West Africa (in particular in Liberia) and in Somalia have indeed resulted again in massive trans-frontier movements of refugees causing the actual numbers of refugees to rise to the above-mentioned figures. These statistics not only fail to reveal the unspeakable human suffering of the refugees, but also the very considerable economic strain which the African countries receiving refugees are confronted with, especially since these very countries are themselves often among the so-called least developed countries. Early on, therefore, it was clear that it would be necessary to develop an independent legal framework to deal with this "flood" of African refugees; this recognition resulted in the drafting of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[5].

## *II. The Fundamental Causes of the African Refugee Problem*

Before outlining the most important provisions of the OAU Convention, which constitutes the most significant regional supplement of positive international refugee law, a brief presentation of the major root causes of the African refugee problem seems to be appropriate. Conforming with the underlying principles of the evolving new perception of international refugee law[6], which is no longer restricted to the elimination or alleviation of the direct consequences of a given refugee situation, but

[3] Cf. S. Hamrell, Refugee Problems in Africa (1967), 14 et seq.

[4] See R. Hofmann, Flüchtlingsrecht in Afrika, Archiv des Völkerrechts 26 (1988), 1 et seq.

[5] UNTS No. 14691; this Convention has been reproduced, *inter alia*, in International Legal Materials 8 (1969), 1288 et seq.

[6] Cf. e.g. A. Grahl-Madsen, International Refugee Law Today and Tomorrow, Archiv des Völkerrechts 20 (1982), 411 et seq.; E. Jahn, Refugees, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 8 (1985), 452 et seq., and D. Kennedy, International Refugee Protection, Human Rights Quarterly 8 (1986), 1 et seq.

rather aims at comprehensively preventing new movements of refugees[7] and seeks to eliminate already existing refugee situations by means of extensive repatriation programmes[8], it is of fundamental importance to define the root causes of all movements of refugees.

The following four factors are usually considered as the major causes of large-scale refugee movements; it should be stressed, however, that the individual decision to leave one's country under such coercion results mostly from a combination of these causes: Serious and systematic violations of fundamental human rights, in particular the persecution of persons on grounds of their race, religion, nationality, membership of a particular social group or their political opinion[9]; civil wars or events seriously disturbing public order in either part or the whole of the country of origin; external aggression, occupation or foreign domination in either part or the whole of the country of origin; and, finally, natural and ecological disasters such as drought and famine, the effects of which are often magnified by inadequate economic policies of the governments in place[10].

The post-colonial period of Africa provides striking examples of all these root causes of refugee movements, which are often aggravated by the still precarious economic and political situation of many African states[11]. It is a well-known fact that many of the present boundaries in Africa were drawn in a most arbitrary fashion by the former colonial powers, in particular without taking into consideration the then existing ethnic units or economic relations; this resulted in irredentist or secessionist movements or activities by minorities aiming at greater autonomy within a state. Internal hostilities developing into situations of civil strife,

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[7] See e.g. L. Lee, The UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, American Journal of International Law 78 (1984), 480 et seq.

[8] See e.g. G. Goodwin-Gill, The Refugee in International Law (1983), 219 et seq.; R. Hofmann, Voluntary Repatriation and UNHCR, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 44 (1984), 328 et seq., and P. van Krieken, Repatriation of Refugees Under International Law, Netherlands Yearbook of International Law 13 (1982), 93 et seq.

[9] This corresponds with the traditional definition of a refugee, as codified in Art. 1 A (2) 1951 Geneva Refugee Convention; see also A. Grahl-Madsen, The Status of Refugees in International Law, Vol. 1 (1966), 173 et seq., and Goodwin-Gill, ibid., 20 et seq.

[10] It must be emphasized, however, that this group of people, who are often referred to as "famine refugees", are in general not considered as refugees in the legal sense.

[11] For the following see Hofmann (note 4), 3 et seq., with further references.

usually aggravated by outside interference, have often given raise to large-scale refugee movements. The significance of wars of national liberation which characterized the African refugee situation in the 1960s and 1970s has been reduced upon the acquisition of independence by the former Portuguese colonies, Zimbabwe and, more recently, Namibia; while the number of refugees from South Africa has always been relatively small, South Africa's destabilization policies in Angola and Mozambique were always a major reason for refugee movements in Southern Africa – it remains to be seen, however, whether the apparent change of South African policies will result in the stabilization of the internal situation of her neighbouring countries which eventually would allow for large-scale repatriation programmes. In addition to these political factors, much of the migratory activity in Africa is based upon economic distress. This applied in particular to the Sahel zone at the beginning of the 1980s when, due to drought and famine, large numbers of herdsmen were forced to leave their grazing lands in search for sheer survival. Even though these people received considerable material support from international relief organizations, they were usually not considered as refugees in the legal sense of the word. In contrast to this group, the people who came from the rural regions of Ethiopia since the mid-1980s and sought asylum in Sudan under particularly severe conditions were treated mainly as refugees since this movement coincided with a programme of rural resettlement implemented by the then Ethiopian government with a view to weaken the guerilla forces fighting the central government.

### *III. Contents and Practice of African Refugee Law*

International refugee law in Africa is characterized by the coexistence of two international treaties: The universally applicable 1951 Geneva Convention Relating to the Status of Refugees (GCR)[12] and the 1967

[12] UNTS Vol. 189, 151 et seq.; as to the contents of this Convention see e.g. A. Grahl-Madsen, The Status of Refugees in International Law (1966/1972); Goodwin-Gill (note 8); Prince Sadruddin Aga Khan, Legal Problems Relating to Refugees, Recueil des Cours 1976 I, 287 et seq.; G. Melander, The Protection of Refugees (1974); N. Robinson, Convention Relating to the Status of Refugees (1953), and P. Weis, The International Protection of Refugees, American Journal of International Law 48 (1954), 193 et seq.; on January 1, 1992 this Convention was in force for the following African states: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Djibouti, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Equatorial Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Rwanda,

Protocol thereto[13], on the one hand, and the 1969 OAU Convention Governing the Specific Aspects of Refugee Law in Africa[14], on the other hand. The Geneva Refugee Convention constitutes, at least in part, a codification of international refugee law containing, on the one hand, the "traditional" definition of the term "refugee"[15], and, on the other hand, a large number of provisions concerning the conditions under which asylum, once granted, is to be carried out. It does not, however, make any statement as to a right to asylum[16] under international law or to procedures granting refugee status since this falls within the exclusive domain of the given national legal system[17]. Since the 1951 Geneva Refugee Convention was conceived primarily to solve the European refugee problem after World War II as results from the chronological and geographical limitation in Art. 1 GCR, its applicability had to be expanded which was

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Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia and Zimbabwe.

[13] UNTS Vol. 606, 267 et seq.; see only P. Weis, The 1967 Protocol Relating to the Status of Refugees and Some Questions on the Law of Treaties, British Year Book of International Law 42 (1967), 39 et seq. On January 1, 1991 this Protocol was in force for all the African states parties to the 1951 Geneva Refugee Convention and, in addition, for Cape Verde.

[14] On this Convention see e.g. S.A. Aiboni, Protection of Refugees in Africa (1978); I.B.Y. Diallo, Les réfugiés en Afrique (1974); M. Rwelamira, The 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa, International Journal of Refugee Law 1 (1989), 557 et seq., and P. Weis, The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Human Rights Law Journal 3 (1970), 449 et seq. On January 1, 1992 this Convention was in force for the following African states: Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Equatorial Guinea, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia and Zimbabwe.

[15] Art. 1 A (2) GCR reads: "For the purposes of the present Convention, the term 'refugee' shall apply to 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, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...".

[16] Cf. Goodwin-Gill (note 8), 101 et seq.

[17] For an overview of such national systems see R. Hofmann, Asylum and Refugee Law, in: J.A. Frowein/T. Stein (eds.), The Legal Position of Aliens in National and International Law (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.94) (1987), 2045 et seq.; this overview is based upon the information provided by reports on more than 30 countries which was made available for a Conference convened by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg in September 1985.

in fact achieved by the above-mentioned 1967 Protocol. Thus, the 1951 Geneva Refugee Convention can be applied to the large-scale movements of African refugees.

### 1. The Most Important Provisions of the 1969 OAU Convention

Although the 1969 OAU Convention[18] is only conceived as a regional supplement to the universally applicable 1951 Geneva Refugee Convention, a comparison of the two instruments reveals that the 1969 OAU Convention goes a good deal further in some aspects; this applies in particular to the "refugee definition", the unambiguous recognition of the principle of *non-refoulement* in its wide sense, and the strong emphasis upon the necessarily voluntary character of any repatriation of refugees.

a) While Art. I (1) 1969 OAU Convention restates the traditional refugee definition as laid down in Art. 1 A (2) GCR, Art. I (2) 1969 OAU Convention breaks new ground in international refugee law by providing for an additional category of refugees[19]: 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. This expanded definition which clearly matches the developments within the UN, is applied by UNHCR in its activities in Africa[20]. It must be emphasized, however, that efforts to have this expanded definition applied outside Africa have not been very successful[21]. Considering the actual refugee situa-

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[18] For a presentation of its drafting history see Aiboni (note 14), 66 et seq., and Hofmann (note 4), 7 et seq.

[19] Art. I (2) reads: "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".

[20] It is important to note, however, that also according to this definition not all displaced persons in Africa are recognized as refugees; excluded are e.g. "externally or internally up-rooted persons", people who, e.g., are forced to move to another country because of natural disasters or are fleeing within their own country due to situations of civil strife.

[21] See Hofmann (note 17), 2052. It is to be noted, however, that the broad refugee definition contained in Section III of the Cartagena Declaration on Refugees of 22 November 1984, although a non-binding instrument, seems to have acquired the status of a customary legal norm generally applied in the Central American context; see E. Arboleda, Refugee Definition in Africa and Latin America: The Lesson of Pragmatism, International Journal of Refugee Law 3 (1991), 185 et seq.

tion in Africa, which is characterized by the fact that movements of refugees mostly occur as a result of internal armed conflicts and that, therefore, the persons concerned do not fall under the traditional refugee definition, the expanded definition is certainly the only reasonable and appropriate one in the African context[22].

b) Art. II 1969 OAU Convention deals with the legal problems connected with the granting of asylum. While the 1951 Geneva Refugee Convention only regulates the concrete measures which are to be applied once refugee status has been granted, Art. II (1) 1969 OAU Convention strengthens the institution of asylum by proclaiming that "Member States of the OAU shall use their best endeavours consistent with their respective legislation to receive refugees". It must be stressed, however, that this wording does not entail a subjective right in favour of refugees to be granted asylum[23]. Such an act remains the right of the state, the exercise of which is defined as a peaceful and humanitarian act according to Art. II (2) 1969 OAU Convention and may not be regarded as an unfriendly act by any state. Thus, the Member States of the 1969 OAU Convention have not accepted an obligation under international law to grant asylum to refugees[24].

For this reason, the provisions of Art. II (2–5) 1969 OAU Convention which in general correspond with the UN Declaration on Territorial Asylum of 14 December 1967[25], are of particular significance. In Art. II (3) 1969 OAU Convention[26] the principle of *non-refoulement* in its wide sense was explicitly guaranteed for the first time in international law; thus, the Member States of the 1969 OAU Convention accepted an international obligation not to subject anybody to measures that would force such a person to remain in a country where his/her life, physical integrity or liberty would be threatened. Although this provision does not provide

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[22] See also Goodwin-Gill (note 8), 13.

[23] See only Weis (note 14), 457.

[24] See also Goodwin-Gill (note 8), 107.

[25] Cf. A. Grahl-Madsen, Territorial Asylum (1980) and P. Weis, The United Nations Declaration on Territorial Asylum, Canadian Yearbook of International Law 6 (1969), 92 et seq.

[26] Art. II (3) 1969 OAU Convention reads: "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 to or to remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2".

for a right to asylum, it is to be construed as providing for a right to temporary refuge[27].

Thus, this provision goes much further than Art. 33 (1) GCR which, according to prevailing opinion, only guarantees the principle of *non-refoulement* in its narrow sense, i.e. it is applied only to persons who are already within the territory of the country of refuge[28]. For the African continent, therefore, the applicability of the principle of *non-refoulement* in its wide sense is based upon treaty law, whereas according to an increasingly shared opinion[29], it is otherwise "only" based upon customary law.

The 1969 OAU Convention underlines moreover the duty of refugees to abide by the laws of the country of asylum and to refrain from subversive activities against any Member State of the OAU[30].

c) Considering the extensive psychological, political and socio-economic problems caused by the permanent residence of refugees in many countries of asylum, the voluntary repatriation of refugees, whenever feasible, appears as a very important possibility of solving refugee situations[31]. Therefore, the promotion of pertinent programmes has been declared to be one of the principal objectives of UNHCR. It is therefore surprising that the fundamental principles relating to voluntary repatriation do not figure to any great extent in international instruments. The one exception is Art. V 1969 OAU Convention which in fact provides for all the important legal aspects of voluntary repatriation[32].

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[27] Cf. G.J.L. Coles, Temporary Refuge and the Large Scale Influx of Refugees, Australian Yearbook of International Law 8 (1978/80), 189 et seq.

[28] See Goodwin-Gill (note 8), 69 et seq.

[29] Ibid., 74 et seq.

[30] In this context see also S. Corliss, Asylum State Responsibility for the Hostile Acts of Foreign Exiles, International Journal of Refugee Law 2 (1990), 181 et seq.

[31] See Goodwin-Gill (note 8), 223 et seq.

[32] Art. V 1969 OAU Convention reads: "(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

The success of such repatriation programmes obviously depends upon the previous elimination of the major root causes underlying a specific flow of refugees. In the case of gross and persistent violations of human rights being the main reason for flight, the promulgation of an unconditional amnesty by the state of origin applying to all refugees appears as the most important legal precondition[33]. Since the spontaneous return of refugees is often hindered by serious problems of transportation, regular repatriation programmes based upon a Tripartite Agreement concluded between the country of origin, the country of asylum and UNHCR offer a good possibility[34]. In order to facilitate the conclusion of such trilateral agreements, UNHCR should be entitled not only to mediate with the governments immediately involved, but also to contact non-recognized entities, such as parties of a civil war, without such action being considered as formal recognition of such entities as subjects of international law. It is suggested, moreover, that the willingness of refugees to return would be further enhanced if such an agreement were to provide for UNHCR to supervise the actual return of such refugees and the first phase of their reinstallation in their country of origin. The necessary confidence in the stability of political change in their country of origin would surely be strengthened and their fear of renewed persecution reduced considerably if they could address their possible complaints to officers of UNHCR entitled to mediate with the local authorities and, if necessary, to take such issues to the competent international fora.

Another important factor to be borne in mind when discussing the chances of repatriation programmes is the economic situation of the country of origin. This leads to development as the key for solving existing and averting new refugee situations. The implementation of the right

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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 decided 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, voluntary agencies and international and intergovernmental organizations, to facilitate their return".

[33] See in this context, e.g., the Declaration of the Arusha Conference on the Situation of Refugees in Africa of May 1979, UN Doc. A/AC.96/INF.158, 14, and M. Kingsley-Nyinah, The Need for an International Presence: The Return of Refugees and Immunity from Prosecution for Political Offences in South Africa, International Journal of Refugee Law 3 (1991), 301 et seq.

[34] For details see Hofmann (note 8), 334 et seq.

to development[35] perceived in a way as to include not only demands for a new international economic order and genuine political cooperation, but also to consist of an obligation incumbent upon all states to respect most scrupulously all human rights of all their nationals including their right to participate in the political process of decision-making in a democratic way[36], will surely contribute to the achievement of this goal. In this context, the ongoing process of a return to democratic rule throughout Africa is of utmost importance.

In addition to special repatriation agreements, the wish of a refugee to return to the country of origin can be based upon the right to return proclaimed in Art. 13 (2) of the 1948 Universal Declaration of Human Rights which has since been incorporated into all major human rights instruments[37]. It is still debatable, however, whether this right is already to be considered as a part of general international law, apart from the treaty context. In general, the duty of a state to readmit its citizens is considered as an obligation bearing upon inter-state relations and as a necessary corollary of any state's right to expel foreign nationals from its territory, even if this right, particularly as regards refugees with a view to the generally applicable principle of *non-refoulement*, may be subject to certain restrictions. Considering the growing tendency to recognize the right to return as a human right forming part of general international law and the increasing number of states parties to international conventions safeguarding this right, it is justified to assert that any refugee who is willing to return to the country of origin has an internationally protected right to do so[38].

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[35] Cf. the fundamental study by K. M'Baye, Le droit au développement comme un droit de l'homme, Revue des Droits de l'Homme 5 (1972), 505 et seq.; see also Resolution of the General Assembly of the UN of 4 December 1986, UN Doc. GA Res. 41/128.

[36] See Art. 13 African Charter of Human and Peoples' Rights of 1981; cf. E.R. Mbaya, La Charte Africaine en tant que mécanisme de protection des droits de l'homme, in: R. Bernhardt/K.A. Jolowicz (eds.), International Enforcement of Human Rights (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.93) (1987), 77 et seq., and U.O. Umozurike, The African Charter of Human and Peoples' Rights, American Journal of International Law 77 (1983), 902 et seq.

[37] See e.g. Art. 12 (2) UN Covenant of Civil and Political Rights of 1966 and Art. 12 (2) African Charter of Human and Peoples' Rights of 1981.

[38] On the right to return see B. Frelick, The Right of Return, International Journal of Refugee Law 2 (1990), 442 et seq.

## 2. The Practice of African States as Regards Refugees

As most important African contributions to the development of international refugee law are to be emphasized the extension of the refugee definition, the recognition of the principle of *non-refoulement* in its wide sense, and the emphasis upon the necessity of the voluntary character of any repatriation of refugees. This is also reflected in the relevant practice of the African states concerned; it is to be noted, however, that a comprehensive survey of state practice in this field has not yet been made available because of the problems in obtaining the pertinent legal materials and factual statistics[39].

As to the refugee definition and recognition procedures it must be kept in mind that not all African states have enacted statutes regulating the legal situation of refugees; therefore, the refugee definition of Art. I 1969 OAU Convention is of utmost importance since most states seem to apply this definition in their domestic legal order. In this context, it is of interest to note that many African states have provided for the possibility to recognize persons as refugees not only on an individual basis, but also as members of a particular group of persons. Such group recognition seems indeed the most practical solution considering the nature of African refugee situations (large-scale movements of refugees) and the existing administrative structures in many countries. As regards the principle of *non-refoulement*, it should be stressed that most African states seem to comply with their pertinent obligation under international law stemming from Art. II 1969 OAU Convention. Finally, attention should be drawn to the preparedness of African states to cooperate in trilateral repatriation programmes of refugees which have taken place in practically all regions of Africa; among the most recent ones should be mentioned the successful large-scale repatriation of Namibian refugees during 1989 and 1990[40].

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[39] See, however, Hofmann (note 4), 16 et seq.; as to studies of the law and practice of particular states see, e.g., R. Hofmann, Das neue Flüchtlingsgesetz von Simbabwe, Jahrbuch für Afrikanisches Recht 5 (1984), 67 et seq.; G.K.A. Ofosu-Amah, The Legal Position of Aliens in Ghana, in: Frowein/Stein (note 17), 501 et seq. (522 et seq.); B.O. Iluyomade/A. Popoola, The Legal Position of Aliens in Nigeria, in: Frowein/Stein (note 17), 919 et seq. (969 et seq.), and T. Maluwa, The Concept of Asylum and the Protection of Refugees in Botswana: Some legal and political aspects, International Journal of Refugee Law 2 (1990), 587 et seq.

[40] See UNHCR, Report on the Implementation by UNHCR of the Oslo Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED), UN Doc. A/AC.96/741 of 15 December 1989.

## *IV. Perspectives for the Future*

To sum up, one may conclude that Africa made a contribution to international refugee law in three significant areas which are essential for the solution of the pressing refugee problem on the African continent, but which are also extremely important for the development of refugee law in other parts of the world: (1) The extension of the traditional refugee definition to include also persons who, as the result of civil wars or other armed conflicts in their home country, are forced to leave without being politically persecuted in the traditional legal sense; (2) the unambiguous recognition of the principle of *non-refoulement* in its wide sense from which it follows that no state may subject any person to measures which would force such person to return to or to stay in a country where his/her life, physical integrity or liberty would be threatened; and (3) the emphasis on the absolutely voluntary character of any repatriation programme for refugees.

It is obvious that these improvements of the applicable law, however positive they are, have not solved the horrific refugee problem in Africa. It seems justified to state that the refugee situation in Africa has rather deteriorated throughout the 1980s, for which reason the rather sombre statement that this decade could be described as a "tragic decade for refugees in Africa"[41] seems to be true. The alleviation and solution of the African refugee problem is, however, not only necessary for strictly humanitarian reasons; it is imperative in order to stabilize the precarious socio-economic situation in most of the countries of asylum which, notwithstanding their sincere commitment to deal with this problem and the considerable, albeit recently dwindling, support on the part of the international community, simply can no longer afford to spend a very considerable amount of financial means and human resources in order to overcome the problems connected with a massive refugee situation without there being a fair prospect of achieving a truly satisfactory permanent solution.

It is, therefore, all the more important that the efforts to eradicate the root causes of the refugee problem on the African continent be not only continued, but intensified with all means available. The efforts which had been initiated in this respect at the United Nations by the Canadian Gov-

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[41] See No. 10 of The Khartoum Declaration on Africa's Refugee Crisis, adopted by the OAU 17th Extraordinary Session of 15 on Refugees, Khartoum, 22–24 September 1990, OAU Doc. BR/COM/XV/55.90, reprinted in International Journal of Refugee Law 3 (1991), 153 et seq.

ernment[42] and the Government of the Federal Republic of Germany[43] can only be seen as a first step in this direction; today, the world community must, in the present author's opinion, at last seriously address the question if and to what extent refugees and countries of asylum are entitled to compensatory claims against refugee-generating countries[44]. Another legal possibility deserving further consideration is to be seen in the question if and to what extent the existing and in particular the evolving rules of state responsibility might be applied to deal with refugee-generating policies[45]. Such policies must be regarded as factors resulting not only in a significant disturbance of international relations between

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[42] See D. Martin, Large-scale Migrations of Asylum Seekers, American Journal of International Law 76 (1982), 598 et seq.

[43] This initiative resulted in the establishment of a 25 member Group of Experts on International Co-operation to Avert New Flows of Refugees whose Conclusions and Recommendations (UN Doc. A/41/342 of 13 May 1986) were approved by the General Assembly of the UN in Resolution 36/48 of 3 December 1986.

[44] See L. Lee, The Right to Compensation: Refugees and Countries of Asylum, American Journal of International Law 80 (1986), 532 et seq. It should be mentioned in this context that this question is extensively dealt with by the International Committee on the Legal Status of Refugees of the International Law Association which discussed at its meetings in Warsaw (1988) and Broadbench/Queensland (1990) its pertinent "Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum"; for details see The International Law Association, Report of the 63rd Conference Warsaw 1988 (1988), 675 et seq., and *idem*, Report of the 64th Conference Broadbench 1990 (1991), 331 et seq.

[45] For the following see R. Hofmann, Refugee-Generating Policies and the Law of State Responsibility, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 45 (1985), 694 et seq.; of particular importance in this context is Art. 19 of the Draft of the International Law Commission on State Responsibility (Yearbook of the International Law Commission 1980, Vol. 2 [Part 2], 30 et seq.) which reads: "(1) An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached. (2) An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime. (3) Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from: (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid; (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas. (4) Any internationally wrongful act which

neighbouring countries and within the international community as a whole, but also, quite often, in a serious deterioration of the already unbalanced socio-economic structures of the vast majority of potential countries of first asylum. Such refugee-generating policies might be considered as internationally wrongful acts which, in particular circumstances, might even amount to international crimes. Therefore, it would seem justified to state that, in general, states directly affected by such policies are entitled under international law to require the termination of such policies and to claim compensation for the financial damage incurred. Such claims against the country of origin held responsible under international law might be enforced by resorting to peaceful reprisals. If refugee-generating policies would fall under the category of international crimes, a reaction by all the members of the international community involving peaceful and proportional reprisals of an economic nature might be considered as legitimate under international law provided such reaction is based upon a prior decision or recommendation by the competent UN bodies authorizing such measures.

In this context, a recent event in African history might prove to be the starting point for a most important development as regards international law and, in particular, international refugee law: The intervention, on 24 August 1990, of the ECOMOG peacekeeping forces in Liberia in order to bring the civil war to an end, was also justified as a means to stop the daily increasing refugee movement into neighbouring states. Although this is not the proper place to elaborate on the political and, even less so, on the military aspects of this operation, it should be emphasized that such action, in the absence of pertinent activities by UN or OAU bodies, constitutes a new dimension of international response to refugee-generating situations which entail the risk of seriously disrupting the peaceful order in a given sub-region. It is obvious that the legality under international law of such actions might be questioned, as possibly being a breach of the prohibition of the use of force as enshrined in Art. 2 (4) of the UN Charter from which the hitherto prevailing opinion deduced the illegality under international law of any humanitarian intervention not based upon a specific decision by the UN Security Council[46]. It should be stressed, however, that the international community did not condemn the inter-

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is not an international crime in accordance with paragraph 2 constitutes an international delict".

[46] See only U. Beyerlin, Humanitarian Intervention, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 3 (1982), 211 et seq.

vention of the ECOMOG forces and that the above-mentioned 1990 Khartoum Declaration on Africa's Refugee Crisis contains a statement which, however qualified, could be seen as an approval of that action and possible justification for further similar activities; the pertinent section (9) of the 1990 Khartoum Declaration reads as follows:

> "At the continental level, the African Heads of State and Government have resolved to enter into continuous dialogue on the question of root causes of refugees, within the framework of the relevant resolution adopted by the Summit in this regard. They have resolved to translate into action their collective and individual commitment to the defence and promotion of human and peoples' rights and to the peaceful settlement of internal and inter-State conflicts; and to continue respecting the principle of non-interference in the internal affairs of other States in accordance with the provisions of the Charter of the Organization of African Unity and that of the United Nations, without necessarily remaining indifferent to internal situations that may lead to influxes of refugees on the Continent"[47].

It goes without saying that such actions, if taken prematurely or in an ill-considered way, constitute a serious risk to peace and security in a given region; it is, on the other hand, equally obvious that such actions are, under specific circumstances, a realistic, if not the only possible, way to stop an internal conflict from turning into a conflict with international consequences endangering peace and security in a whole region of the world. The UN Security Council Resolution 688 (1991) of 5 April 1991[48] may be seen as further evidence of the growing acceptance, by the interna-

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[47] Quoted from International Journal of Refugee Law 3 (1991), 156.

[48] See International Legal Materials 30 (1991), 858 et seq. In the considerations justifying this Resolution, the Security Council states, *inter alia* : "Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security in the region ..." and "(1) Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; (2) Demands that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected; (3) Insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations; (4) Requests the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities ...".

tional community, of outside intervention in order to protect the lives and physical integrity of the civilian population in general and refugees in particular. Such intervention may indeed serve as a means to prevent a given refugee situation from developing, due to massive flows of refugees across international borders, into a scenario endangering peace and security in a given region of the world. It would surely be premature to deduce from these recent events the existence of a new rule of customary international law allowing for intervention – even armed intervention – into a country from which massive refugee movements into neighbouring states are most likely to occur or are already under way; what is needed, however, are further discussions of the question under what conditions such actions are to be considered, under international law, as a justified response to situations threatening peace and security in a given region of the world.