

**THIRTY YEARS ON: A LEGAL REVIEW OF THE  
1969 OAU REFUGEE CONVENTION GOVERNING THE SPECIFIC  
ASPECTS OF REFUGEE PROBLEMS IN AFRICA**

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## **PART 1: INTRODUCTION**

1. If it could, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>1</sup> would probably consider itself entitled to the same feeling of accomplishment that many in the human world have derived simply from having arrived at this last year of the Twentieth Century. The Convention has, after all, also in the process clocked its thirtieth year since adoption<sup>2</sup> and the twenty-fifth of entering into force<sup>3</sup>.

2. This is, however, a moment when the challenges and uncertainties which the next millennium holds in store must temper even the most veritable of attainments. The Convention must in any case be able to establish concretely the achievements it has made possible. To review it in light of this conjuncture therefore calls for a dual task. In the first instance, such strengths as the Convention has demonstrated thus far should be shown and underlined. This is essential in aggregating the viability of the legal tools with which it turns to face the future. On the other hand, any weaknesses or shortcomings that may have come to light should of course also receive equal, if indeed not more critical, attention. Thereby, the reforms necessary to reinforce and retool the Convention's overall framework can be envisaged.

3. The Convention is not familiar with being subjected to robust interrogation on its milestone anniversaries. Warm and engaging commemorations are more usual. Typical is the unqualified reaffirmation of

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<sup>1</sup>Hereafter referred to as the "OAU Convention" or "the Convention", unless otherwise indicated.

<sup>2</sup>The Convention was adopted in Addis Ababa, Ethiopia, on 10 September 1969 upon signature by 41 OAU Heads of State and Government.

<sup>3</sup>It entered into force on 20 June 1974. By its Resolution CM/Res.398 (XXIV), *Resolution on Africa Refugee Day*, the OAU Council of Ministers meeting in Addis Ababa, Ethiopia, in its Twenty Fourth Ordinary Session from 13 to 21 February 1975, decided that this day would henceforth be "observed by Member States as 'Africa Refugee Day'". The idea of an "Africa Refugee Day" was however not a new one in itself. It had been mandated three years previously in a different context in CM/Res. 266 (XIX) *Resolution on the Bureau for the Placement and Education of African Refugees*, Nineteenth Ordinary Session of the Council of Ministers, Rabat, Morocco, 5 to 12 June 1972 which "invite[d] OAU Member States to organize once a year a 'Refugee Day' to raise funds with a view to increasing the means available to the Bureau for the assistance of refugees."

confidence received in its twentieth year of operation, and the twenty-fifth since adoption, from the OAU Heads of State and Government, according to whom the Convention had:

“ensured the survival of the very institution of asylum itself and its humanitarian character where the [nature] of refugee flows has sometimes threatened the very fabric of brotherhood and peaceful co-existence between States...It continues to provide a solid cornerstone for refugee policy and State practice in the reception of, grant of asylum to and treatment of asylum-seekers and refugees as well as for the implementation of voluntary repatriation. We also take pride in the fact that the Convention has provided positive inspiration for legal developments elsewhere, such as the Cartagena Declaration on Refugees in Latin America. We call on all those Member States which have not acceded to it to do so without further delay and re-dedicate ourselves to a more effective implementation of the Convention<sup>4</sup>.”

4. An even more resounding acclamation would later be heard from a commemorative symposium that was for all practical purposes a full-fledged conference of the OAU member states<sup>5</sup>. The symposium, reaffirmed:

“its belief in the continuing validity of the 1969 OAU Convention as the cornerstone of refugee protection and solutions in Africa. In this regard, and in order to implement the Convention more effectively, it is recommended that States:

- (i) Which have not already done so should ratify the Convention.
- (ii) Should uphold the principles of the Convention on the humanitarian nature of asylum, prohibit activities inconsistent with refugee status, safeguard refugees against refoulement or expulsion, actively promote voluntary repatriation, respect the principle of voluntariness in repatriation and practice burden-sharing and solidarity among States.

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<sup>4</sup> *Tunis Declaration on the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, Thirtieth Ordinary Session of the OAU Assembly of Heads of State and Government, 13 to 15 June 1994, Tunis, Tunisia. The text of the declaration is reprinted in Vol. 13, Nos. 2&3, *Refugee Survey Quarterly*, 167 (Summer/Autumn 1994). Cf. M.R. Rwelamira who concluded his review of the Convention on the occasion of its twentieth anniversary with the view that “The OAU Convention is not without its shortcomings; indeed, it urgently needs a check-up”: “Two Decades of the Convention Governing the Specific Aspects of the Refugee Problems in Africa”, Vol. 1 No. 4, *International Journal of Refugee Law*, 557 at p. 561 (1989).

<sup>5</sup> Publication of the Symposium and its proceedings is the subject of the “Special Issue”, 1995, *International Journal of Refugee Law*. It is reviewed in George Okoth-Obbo, “The OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa: A Review Article”, *Ibid*, p. 274. In the author’s view, whereas the Symposium had been intended as a forum for a free and frank discussion on an equal footing between all participants, governmental or non-governmental, for a number of reasons, it had “almost before it started, effectively turned into a full-fledged conference of states”. See p. 275.

- (iii) Should enact the necessary legislation so as to give effect nationally to the Convention and its principles.
- (iv) With the support of the OAU, UNHCR and other relevant organizations, provide training to Government officials on the 1969 OAU Convention and refugee protection in general, as well as promote those principles among the refugee and national populations as a whole.
- (v) Should courageously resist temptations to whittle down, through national laws, policies or practices, the obligations and standards contained in the Convention<sup>6</sup>.”

For the latest of its anniversaries, the Convention has continued to sustain the generosity of its critiques even where, as in the statement issued by the OAU Secretary-General and the United Nations High Commissioner for Refugees, attention is focussed on the pre-occupations in the African refugee reality today. In their eyes, the Convention is favourably counterpoised to a situation otherwise bemoaned “with profound concern” because:

“...thirty years after the adoption of the OAU Convention, the Continent is still afflicted by the plight of over four million refugees on the continent and several times that number of displaced people inside their countries caused by socio-economic and political factors including, in particular, conflicts, political violence and instability. This situation is unhealthy and unacceptable. Such a large number of refugees and internally displaced persons poses a heavy burden on OAU Member States already saddled with tremendous security, social and economic hardships. We are concerned with evident compassion fatigue within and outside the continent which is undermining the very principle which guided the founding fathers in framing the OAU Refugee Convention<sup>7</sup>.”

5. This review in essence examines whether all this applause and encomia are merited, and, if so, to what extent and in what manner. The inquiry is confined primarily to the legal aspects and issues concerning the Convention. Three of the centre-pieces of its legal architecture, or “pillars”, as Ram C. Chhangani calls them<sup>8</sup>, are examined in their own

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<sup>6</sup> “Recommendation Five” of *The Addis Ababa Document on Refugees and Forced Population Displacements in Africa*, adopted by the *OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa*, 8-10 September 1994, Addis Ababa, Ethiopia, published by UNHCR, Geneva, 1995, p 5. Also reproduced in Special Issue, *IJRL*, op cit., note 4 at p. 303.

<sup>7</sup> *Joint Statement by Dr. Ahmed Salim Salim, Secretary-General of the OAU and Mrs. Sadako Ogata, United Nations High Commissioner for Refugees on the Occasion of the 30th Anniversary of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, Addis Ababa and Geneva, 10 September 1999.

<sup>8</sup> Ram C. Chhangani, “African Refugee Law: Problems and Prospects” – Inaugural Lecture – University of Maiduguri Press, 1992, at p 8.

right, respectively, in Parts 3, 4 and 5 of the paper. They are the “expanded definition” of a refugee, the voluntary repatriation principles and the prohibition of subversive activities. Others are included in the “omnibus” review of the Convention which follows this introduction. There, the Convention’s provisions on asylum, burden-sharing and the linkage established between its regime and the system made up of 1951 United Nations Convention Relating to the Status of Refugees<sup>9</sup> and the Office of the United Nations High Commissioner for Refugees are reviewed. Some brief reflections on the question of internally displaced persons are contained in Part 6. The paper is concluded in Part 7.

## **PART 2: OVERVIEW OF THE 1969 OAU REFUGEE CONVENTION**

### **2.1 Summary of the state of asylum and refugee protection in Africa today**

6. In most of Africa, the picture of a deep-seated crisis in the Continent’s asylum policies, practices and even laws is overpowering. The erosion of the much-vaunted African hospitality towards refugees, the waning of which was the subject of a warning already several years ago<sup>10</sup>, is now indisputable<sup>11</sup>. The containment of refugees has leapt ahead of their protection as the main priority of states in many a country. As if to underline this trend, Africa has been the arena for some of the most biting failures in the protection of refugees of recent times.

7. Those who might have thought that, with the demise of the apartheid regime in South Africa, deadly cross-border campaigns in which refugees are deliberately targeted had come to an end, were to receive a shattering wake-up call from the harrowing events which unfolded in the refugee crisis in eastern Zaire<sup>12</sup>. States have also taken the lead in compromising the protection of refugees in ways that could not have been

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<sup>9</sup> Hereafter referred to as “the 1951 Convention”, unless otherwise indicated.

<sup>10</sup> See Gaim Kibraeb, *Reflections on the African Refugee Problem: A Critical Analysis of Some Basic Assumptions*, Research Report No 67, Uppsala, 1983.

<sup>11</sup> See Ray Wilkinson, “Thirty Years Later: The OAU Refugee Convention Was a Model of Generosity But Times have Changed”, Vol. 2, No. 115, *Refugees*, 4 (1999) at p. 8 (Special issue on the 30th Anniversary of the OAU Refugee Convention):

“The problem is no longer considered transitory but virtually intractable and every aspect of the ‘African refugee crisis’ has changed dramatically. The main source of refugees is no longer wars of independence but more often brutal civil and guerilla conflicts. ‘Humanitarian’ refugee situations have become politicized and militarized beyond recognition. Refugees are not welcome as guests these days and states are increasingly following the lead of other regions in closing their doors.”

<sup>12</sup> See UNHCR, *The State of the World’s Refugees: - A Humanitarian Agenda*, OUP, New York, pp. 20-23.

imagined even only a few years ago. In just a single incident of refolement, the Kenyan authorities would force 1,300 Somali refugees back into their country at gunpoint<sup>13</sup>.

8. Before long, Tanzania, for years the bastion and pride of African refugee policy and practice, would do even worse. In an action to be imitated later by the Zairean Government, it closed its borders in the face of Burundian refugees fleeing danger in their country<sup>14</sup>. In yet another measure, Rwandese refugees were frog-marched willy-nilly back to their country in an exercise euphemistically referred to as “redirected repatriation<sup>15</sup>.” And its own incident of refolement would end much worse for the 126 would-be Burundian refugees who were summarily executed upon being forcibly returned to their country<sup>16</sup>.

9. Even in those cases where admission itself is not officially refused, the treatment of asylum-seekers and refugees varies considerably. The reluctance or refusal to grant refugee status has resulted in large backlogs of asylum applications awaiting adjudication, many for years. The abusive arrest and detention of refugees and asylum-seekers or general harassment by agents of the state is widespread. Even the so-called “civil society”, often looked to as a domestic bedrock of refugee protection, is starting to bring to bear influences which are pre-occupying. The worst of these are xenophobia and the hatred and intolerance of foreigners.

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<sup>13</sup> In July 1993, the Kenyan provincial authorities in its North Eastern Province, together with military personnel, marched some 1,300 Somalis at gunpoint across the border into Somalia from the Mandera area into which the refugees were entering. At the time, the Government was deeply pre-occupied with the security situation in this area, a place in which bandits have been a perennial problem. UNHCR was also then mounting a “Cross Border Operation” into Somalia, which helped reinforce a government interest to see Somalis streaming into Kenya for asylum and material assistance being dealt with by the international community *inside* Somalia itself. UNHCR protested what it considered to have been refolement.

<sup>14</sup> On 31 December 1995, as refugees were entering its territory, the Government of Tanzania closed its borders with Rwanda and Burundi, its Minister for Foreign Affairs later explaining, “we are saying enough is enough. Let refugees go home and no more should come”. See Bonaventure Rutinwa, “The Tanzanian Government’s Response to the Rwandan Emergency”, Vol. 9, No. 3, *Journal of Refugee Studies*, 291 (September 1996).

<sup>15</sup> On 12 December 1996, camp leaders in the Ngara areas of Tanzania, reacting to a statement issued jointly by the Government and UNHCR for the refugees to meet a deadline to repatriate, began to move refugees from the border areas further inland into Tanzania in order to maintain their control over the exiled population. In response, the Tanzanian army forced the refugees to turn around and “redirected” them towards Rwanda. Hundreds of thousands of refugees were taken over the border during the next few days. Those who managed to flee into the surrounding countryside were rounded up and tracked back to Rwanda under military escort. In all, an estimated 483,000 refugees were returned from Tanzania. See, *The State of the World’s Refugees*, op cit., note 12 at p. 20.

<sup>16</sup> This refers to an incident early in 1997 when a group of Burundese nationals, en-route from their country to the camps in Tanzania, was stopped and forcibly returned to Burundi by Tanzanian security personnel.

Strange as it might first seem, asylum-seekers, refugees and immigrants from “sister” African countries are bearing the brunt of the worst of this newest and most pernicious asperity to asylum and refugee protection across Africa. Previously, a refugee or asylum-seeker being victimized by the agents of the state in the country of asylum could lean upon the local community with the expectation of support and solidarity. Today, that same person may find even more to fear from that very community than from the agents of the state! It is a situation of treble jeopardy for the refugees and asylum-seekers.

10. To be fair, the reality is of course more mixed and variable than this dark catalogue portrays, as a number of countries still strive to meet their obligations towards refugees. Policies and legislation which reflect positive and progressive trends can be seen. On the other hand, many countries still retain on their statute books laws carried over from the days when the explicit objective of Government policy was the control and containment of refugees, not the furtherance of their rights. And even in those countries where official policies and laws are positive and forward looking, it is not unusual to find that administrative and bureaucratic practices are of an opposite nature, in some instances practically re-writing the law by their effect.

11. A summary as fundamentally bleak as this must surely point to a failure by the OAU Convention in having any positive influences on the state of refugee protection and asylum in Africa thus far. The implementation record of the Convention is not, as such, the focus of this paper<sup>17</sup>. Rather, we review its jurisprudence in light of the features and challenges arising out of the refugee reality on the Continent. This discussion follows.

## **2.2 Innovations and positive contributions of the Convention**

### **2.2.1 Research problems and constraints**

12. In order to establish a proper basis for our inquiry, we sought, in the first instance, to explore the origins and legislative history of the Convention. This effort would highlight a frustrating dearth of publicly available original records on the Convention, a remarkable contrast with the facility of similar research into the 1951 Convention. The researcher in this latter case will find at his or her disposal comprehensive travaux préparatoires for that instrument. They include reports, resolutions, working documents and summary

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<sup>17</sup> See, for one of the best examinations the state of refugee policies and emerging paradigms in Africa today, Bonaventure Rutinwa, “The End of Asylum? The Changing Nature of Refugee Policies in Africa”, UNHCR Working Papers (May 1999). See also UNHCR, “Issues and Challenges in International Protection in Africa,” Special Issue, *International Journal of Refugee Law*, 55 (1995) and Lawyer’s Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, New York, July 1995.

records covering the genesis of the 1951 Convention from early developments up to and including the Conference of Plenipotentiaries. For good measure, they are set out systematically and in chronological order<sup>18</sup>.

13. The similar situation for the OAU Convention does not compare at all, most notably because no systematic travaux préparatoires were ever published<sup>19</sup>. Searching in other sources for original documents invariably produces results that do not match the effort. Yet, what original documents can be retrieved serve to illustrate the pitfalls of researching the OAU Convention primarily from secondary sources of information. This is clearly one of the most serious handicaps faced by the present writer<sup>20</sup>.

14. As hinted above, the problem is particularly acute in the case of the history and genesis of the Convention. The extent to which this aspect of the research has come to depend upon and be influenced by the pioneer works published shortly after its adoption should be even a matter for concern. Two articles which appeared the year after the adoption of the Convention, by Paul Weiss<sup>21</sup> and Ousmane Goundiam respectively<sup>22</sup>, are particularly to be noted. The latter was Director of UNHCR's Legal Division at the time and had himself participated in some stages of the Convention's evolution. Both facts have evidently done nothing to harm the authority with which his piece came to be viewed.

15. Several subsequent studies have fully relied upon key formulations in these papers without further research into the picture which primary sources themselves might portray, even if this would be merely for purposes of verification. Evidently, as mentioned earlier, those materials are not easy to come by. In any case, the result is that the authors' views and statements covering the motives behind the Convention and its key features have over the years become the established mantra for the analysis on many a similar question<sup>23</sup>.

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<sup>18</sup> See A. Takkenberg and C.C. Tahbaz, *The Collected Preparatoires of the 1951 Convention Relating to the Status of Refugees*, Dutch Refugee Council, Amsterdam, 1990 (in three volumes).

<sup>19</sup> In a recently published book, Ivor Jackson has provided one of the most detailed accounts ever of the legislative history of the OAU Convention based on source materials. Even he, however, is moved to remark, with a hint of frustration:

"The summary of the various discussions within the competent organs of the OAU- which could perhaps throw light on the question of definition-are not available." See Ivor Jackson, *The Refugee Concept in Group Situations*, Martinus Nijhoff Publishers, The Hague/London/Boston, 1999 at p. 191.

<sup>20</sup> See note 19 above. This problem as far as the OAU Convention is concerned echoes similar difficulties afflicting research in African refugee questions in general. See, S.A Khasiani, "Refugee Research in Africa: Problems and Possibilities", Vol. 28 (3) *International Migration*, IOM, Geneva, 1990, p. 369.

<sup>21</sup> Paul Weiss, "The Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa", III-3, *Human Rights Journal*, 449 (1970).

<sup>22</sup> Ousmane Goundiam, "African Refugee Convention", March/April *Migration News*, 3.

<sup>23</sup> See, for instance, S.A Aiboni, *The Protection of Refugees in Africa*, Institute of African Studies, Uppsala, 1978.



16. The dangers which lurk behind studying the Convention in this manner, that is, primarily through the eyes and interpretations of others, are easy to spot. They include attributing to the Convention purposes and intentions it never pretended to have. It is in this fashion that the impression of an abiding dissatisfaction with the scope of application of the 1951 Convention has taken root as the motive behind the elaboration of the 1969 OAU Convention. Here is a typical example how, without citing primary sources, the origins of the Convention are asserted:

“In Africa, the need for a more inclusive definition was noted from the inception of the 1951 Convention...Its definition lacked any provision for protection and assistance to people fleeing armed conflicts and/or people becoming refugees as a result of internal disturbance during the processes of decolonisation, democratization and the creation of new states. The definition of a refugee in Africa was augmented to include those conditions for protection and assistance in the [OAU Convention]<sup>24</sup>.”

Other writers seek to go much farther, even including so-called environmental refugees among the pre-occupations of the drafters of the Convention. So, for instance, Gino J. Naldi claims that

“[the 1951 Convention definition] was intended primarily for the protection of the individual refugee and was dependent on fear of persecution individual in nature. It was not deemed applicable to mass exoduses but the OAU considered that such a narrow definition failed to take account of the particular difficulties facing Africa, such as wars of national liberation *and environmental catastrophes such as drought and famine which had given rise to flight en masse and displaced whole populations*<sup>25</sup>.”

If all this be correct, yet thirty years later both the legal and institutional facets of the international refugee regime still comprise the quintessential bedrock for refugee protection in Africa, then the Convention represents a signal failure in meeting a key Continental objective. In fact, as will become clearer as the paper moves along<sup>26</sup>, it arose out of somewhat

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<sup>24</sup> Jennifer Hyndman and Bo Victor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya”, Vol. 10, Nos. 1&2 *International Journal of Refugee Law*, 21 at pp. 34-35 (1998). See also Lawyer’s Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, New York, July 1995, at p. 29:

“The adoption of the OAU Convention was prompted more by a concern with large flows of refugees whose exodus was related to Africa’s colonial occupation and wars of national liberation than by concern about persecution on an individual basis. This led to the formulation of a definition of refugee that reflected the special character of the African refugee phenomenon”

<sup>25</sup> Gino J. Naldi, *The Organization of African Unity: An Analysis of its Role*, Second Edition, Mansell, London and New York, 1999, at p 79 (emphasis added).

<sup>26</sup> See discussion in Part 3.1 *infra*.

more particular and specific concerns. Its progress therefore should likewise be measured against a similarly more precisely calibrated backdrop.

17. Taking this optic, that is, of a legal instrument whose purposes were ultimately essentially limited, the Convention was clearly a landmark event for refugee law and policy when it entered the scene in 1969<sup>27</sup>. Its revolutionary character lay principally in the new and specific concepts it brought into play and which are examined in detail later. Other aspects of the Convention that, without necessarily being revolutionary, still had a revolutionising effect, are examined in the part of the paper that follows now.

### 2.2.2 The Convention's provisions on asylum

18. The Convention's provisions on asylum, contained in Article II, are considered by many scholars as among its most important contributions to refugee jurisprudence in general<sup>28</sup>. They combine classical refugee preoccupations with priorities evidently drawn from the politics of international relations and state security. On the legal side, the Member States "shall use their best endeavours, consistent with their respective legislation, to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality<sup>29</sup>." In what is perhaps its most crucial provision in terms of classical refugee law, the Convention states that:

"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 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<sup>30</sup>."

19. This is the Convention's provision on non-refoulement. Its prohibition of forcible return goes much farther than the comparable provision in the 1951 Convention. The latter makes an exception in the prohibition of refoulement for "the security of the country" arising out of the refugee having been "convicted by a final judgement of a particularly serious crime<sup>31</sup>." The OAU Convention expressly prohibits, and thereby includes within the scope of its non-refoulement principle, rejection at

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<sup>27</sup> Cf. Rwelamira, *op cit.* note 4 at p.558:

"When it was first adopted, it signified an important advance, opening up avenues hitherto unknown or only cautiously accepted by existing conventions. Unlike its precursors, it ventured into areas considered political and beyond the scope of legal regulation. In that sense, its adoption was a milestone in the protection of African refugees"

<sup>28</sup> Joe Oloka Onyango, "Plugging the Holes: Refugees, OAU Policy and the Practices of Member States", USC Issue Brief, Washington DC, October 1986.

<sup>29</sup> Article II (1).

<sup>30</sup> Article II (3).

<sup>31</sup> Article 33 of the 1951 Convention.

the border. Pointing to this aspect, some scholars have contended that asylum has been established as a right in Africa<sup>32</sup>. Others disagree. These scholars point to various conditions and qualifications reflected in the asylum Article and the Convention's other provisions and argue that the privilege of a State to admit persons onto its territory according to its discretion remains intact<sup>33</sup>. There is even concern that the pivotal role assigned to domestic law in the Convention's asylum provision means that a State, by establishing stringent conditions through such devices, can in effect defeat the intention of the Convention.

20. Perhaps mindful of this uncertainty, the drafters of the African Charter on Human and Peoples Rights<sup>34</sup> seem to have sought to put the matter beyond dispute. The Charter contains by far more forthright and complete provisions on what is specifically referred to as the right to '*seek and obtain asylum in other countries*'<sup>35</sup>. Interestingly, charter itself also uses the qualification "in accordance with the laws of those countries and international conventions," thus potentially reproducing here too the debate as to what exactly is the quantum and quality of the rights and obligations established. Even so, it clearly adds to, and thereby strengthens, the legal infrastructure of the asylum regime in Africa.

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<sup>32</sup> Oloka Onyango, op cit. note 28, says, at p.7:

"paragraphs 2,3,4 and 5 of Article II are modeled closely on the "United Nations Declaration on Territorial Asylum" and their inclusion in the OAU Convention makes them binding upon those States party to it"

<sup>33</sup> See discussion in Rose M. D'Sa, "The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity", 1984-Vol-XXXI, Issue 3, *Netherlands International Law Review* p.378, and also Rainer Hoffman, "Refugee Law in Africa, Vol. 39, Law and State, 79 at p.85: "This means that there is no fundamental right to be granted asylum, but rather asylum is the 'result of a favour', the right of specific persons at least to a temporary stay in the country of refuge".

<sup>34</sup> The African Charter was adopted on 27 June 1981. See OAU.Doc. CAB/LEG/67/3.5. For two sharply contrasting analyses of this instrument, see Richard Gittman, "The African Charter on Human and Peoples Rights", Vol. 22, No.4, *Virginia Journal of International Law*, 667 and Makau was Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", Vol. 35, No. 2, *Virginia Journal of International Law*, 339 (1995).

<sup>35</sup> Emphasis added. The full text of the provision, Article 12, is as follows:

<sup>1</sup> Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

<sup>2</sup> Every individual shall have the right to leave any country including his own and to return to his country. This right shall only be subject to restrictions provided for by the law for the protection of national security, law and order, public health and morality.

<sup>3</sup> Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

<sup>4</sup> A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

<sup>5</sup> The mass expulsion of non-nationals shall be prohibited. Mass expulsions shall be that which is aimed at national, racial, ethnic, or religious groups.

21. Having been said, it must be stated that, the legal effect of the Convention in respect to asylum should not be overstated. When African foreigners, and particularly refugees, encounter major rights-related problems in other African countries, it is more usually political and international relations forces, not legal ones, which are at play. Legal imperatives, important as they might be, have not been nearly as decisive and problematic. The asylum provisions of the Convention and the Charter are of course important in view of the increasing ascendancy throughout Africa of legalism as the basis for mediating rights and obligations. However, the true value of, particularly the Convention's provisions, was not primarily in their greater *legal amplitude* as compared with the 1951 Convention. That value rested, above all, in the purpose of the provisions to *depoliticise* and *cohere* the grant of asylum in particular, and the refugee question more generally, in the context of international relations and state security politics.

22. It is important to explain this point further. It is known that the refugee question in Africa has tended to be heavily influenced by sensitive political and security questions, if this is not an understatement! Reading the history and provisions of the Convention from this point of view, it is clear that its motivators and drafters were determined to bring to refugee politics, practice and jurisprudence a *veritably humanitarianised construct, predictability, transparency and coherence*. In other words, the motive forces of the Convention were essentially political, and then particularly security-driven, even if the animation was to be caste and organized in legal terms.

23. Provisions geared to these objectives are to be found everywhere in the Convention, yet they form a notionally consistent cluster. They include, most famously, the stipulation prohibiting subversive activities, to which we turn later. Among those addressing asylum is the statement that "the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State." The exhortation that "for reasons of security, countries shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin" is based on the same rationale. The provisions in the preamble which speak about a "humanitarian approach", "eliminating friction among Member states" the primacy of "the spirit" of the OAU Charter in solving refugee problems, are all part of the architecture of predictability, depoliticization, humanitarianization and coherence that the Convention was striving to construct.

24. Yet, viewing the provisions from the vantage point of the happenings in the Great Lakes refugee crisis, one might be moved to wonder about their effectiveness. As said already, the *implementation* of the relevant provisions of the Convention, which would of course be the principal question in this consideration, is outside the scope of this paper. However, the point to be stressed on the legal aspects is that to hedge against the subversion of the refugee regime itself by forces and motives such as those that took hold in the eastern former Zaïre was the very purpose towards which the depoliti-

cising and humanitarianising provisions of the Convention were geared. By these stratagems, the refugee problem would, hopefully, be situated with transparency in the configurations of international relations and security.

25. These intentions and aspects of the Convention are strongly supported for reasons which will become even clearer later on. Indeed, the lesson from the Great Lakes refugee crisis is that they should be further elaborated upon and expanded even further. In this connection, one would hope that the necessary reforms could be engineered in such a way as to shift somewhat from the essentially negative variables which the drafters of the Convention had the task to transcribe into legal terms, to more positive and balanced themes. In the atmosphere in which it was devised, the Convention had to ensure that relations between Member States would *not be soured*. That states would be *prevented* from taking umbrage from the grant of asylum. That refugees would be *prohibited* from engaging in subversive activities.

26. While, of course, this approach admittedly reflected the pre-occupations and even necessities of the time, developments of today need to envisage more positive constructs as well, and to elaborate a new and reinforcing paradigm structure of principles accordingly. Could one imagine, for instance, that the jurisprudence of the Convention could be re-built to *allow and encourage a positive* form of political behaviour in a refugee setting? Should not a framework centring on *solutions*, and therefore expressing with equal emphasis the priorities of the relevant stake-holders the context in which all these concepts should be harmonized? Refugees are, after all, phenomenon the essence of which is politics. Politics rest in both the factors that forced them to flee, as in the conditions by which return to their home countries will be possible. What is destructive in a refugee setting is not necessarily politics per se, but the employment of such politics for perfidious purposes. Could permitting what is called positive and responsible politics, assuming it could be properly conceptualised and structured, not even enhance the prospects for a solution? More of this later.

### 2.2.3 Regional solidarity, co-operation and burden-sharing

27. Considering the central role that the principle and practice of burden-sharing has to play in the protection of refugees, it is somewhat surprising to see that the basis for it in 1951 Convention consists in only a fleeting reference in a preambular paragraph<sup>36</sup>. In the set-up of the 1969 Convention, this is a central theme, sub-article (4) of Article II stipulating that:

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<sup>36</sup> This is the fourth preambular which says that

“Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which United Nations has recognized the international scope and nature cannot therefore be solved without international co-operation”.

On the international level, there has been further elaboration of the concept, especially in the Executive Committee of the High Commissioner's Programme. Among

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

The principles expounded in this provision have been widely lauded. Yet, in looking at the distribution of refugees among African countries, what Hathaway considers as solely the function of a geographical accident<sup>37</sup>, wonder the effectiveness of the provisions. For instance, at the height of Africa’s refugee crisis, 90% of the total refugee burden was carried by only 18 countries and 70% by just 12. Somalia and the Sudan at one time hosted 25% of all Africa’s refugees<sup>38</sup>. Yet, even numbers by themselves alone do not provide a full picture of the burdens and constraints. The social and community pressures of hosting refugees are just as forbidding. It has to be considered, for example, that some asylum countries have found that up to 70% of those partaking of their public and community services can be made up of refugees<sup>39</sup>. Added to the poverty which afflicts many African countries, the difficulties of structural adjustments, the crippling effects of international debt and poor balance of payment and trade, a refugee situation could, for sure, come to threaten the very social and economic viability of a hosting state<sup>40</sup>.

28. Under these circumstances, it is easy to understand the concern that “despite the progressive ‘appeals’ rule, there has been no corresponding success in implementing it and turning burden-sharing into reality<sup>41</sup>.” Yet, the broad strokes of even a valid criticism should neither wash away nor diminish the instrumental role which the kind of co-operation and support envisaged in the OAU’s burden-sharing rule has actually played in sus-

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others, the content of the notion and its implications in the various spheres of refugee protection and assistance has been highlighted. See, for instance, EXCOM Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx (32nd Session, 1981) and No. 52, (XXXIX) International Solidarity and Refugee Protection, operative paragraph 3 of which says, “the principle of international solidarity has a fundamental role to play in encouraging a humanitarian approach to the grant of asylum and in the effective implementation of international protection generally”.

<sup>37</sup> See J. Hathaway and A. Neve, “Making International Refugee Law Relevant Again: A Proposal for a Collectivized and Solutions-Oriented Protection System”, 1997, *Harvard Human Rights Journal*, 115. See also discussion infra to which footnote ...relates.

<sup>38</sup> Sergio Ricca, “Refugees in Africa: Legal and Administrative Aspects”, No. 121, *The Courier*, 74 (May-June 1990).

<sup>39</sup> Ibid.

<sup>40</sup> For a fuller treatment of the social and economic constraints and their implications for asylum, see Gaim Kibraeb, “The System of Asylum in African Economies under Pressure”, *Uppsala Studies in Economic History*, 33, Uppsala 1991.

<sup>41</sup> Peter Noble, “Refugees, Law and Development in Africa”, 1982, *Michigan Yearbook of International Legal Studies*, 255, at p 270.

taining a system of protection in Africa. It will be recalled that, in the face of destabilization, intimidation, armed attacks and sabotage perpetrated by the apartheid regime, a number of the Frontline States in effect became unable to provide safe and secure asylum for the South African refugees arriving on their territories. However, it was possible to provide protection for these refugees principally because several countries throughout Africa agreed to receive them, even if they had not arrived directly in the latter's territory.

29. In view, however, of the relatively poor implementation the basis of the criticism seen above, there has long been general consensus along the lines of the call by Peter Noble that "legal and administrative machineries for burden-sharing must be constructed and implemented"<sup>42</sup>. This paper supports this recommendation fully. Yet, along with any initiatives which might be taken in line with it, others arising from the considerations below will also be necessary.

30. First of all, important as it is for the African countries to reinforce co-operation among themselves, the scope for producing solutions in this context should not be exaggerated. Efforts have indeed been attempted before to resettle African refugees in other African countries and to place them for education and employment. As a matter of fact, the Bureau for Placement, Education and Resettlement (BPEAR)<sup>43</sup> was created within the OAU Secretariat precisely for these purposes and the initiatives themselves were mandated under the aegis of the concept of burden-sharing<sup>44</sup>. Especially with respect to education, the Bureau was to record some notable successes in placing refugees in other African countries.

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<sup>42</sup> Peter Noble, *op cit.* note 41 at p 280. The Arusha Conference had called already for the "strengthening and development of institutional arrangements for burden-sharing...within the framework of African solidarity and international co-operation defined" in the OAU Convention. This is, in fact, the stance of the African countries themselves. Throughout the years, resolutions of the OAU Council of Ministers have featured a paragraph along the lines of the following, in which the Council, "calls upon those Member States with few refugees or with no refugees at all to render material and technical assistance to countries of asylum and to consider accepting some refugees in their countries in the spirit of burden-sharing as enshrined in the Arusha Conference Recommendations of 1979". See CM/Res. 939, (XL) *Resolution on the Meeting of the OAU Secretariat and Voluntary Agencies on African Refugees*, Fortieth Ordinary Session, Addis Ababa, 27 February to 5 March 1984.

<sup>43</sup> For a discussion of this body, its evolution and activities, see Joe Oloka Onyango, "The Place and Role of the OAU Bureau for Refugees in the African Refugee Crisis", Vol. 6, No. 1, *International Journal of Refugee Law*, 34 (1994).

<sup>44</sup> For instance, following the consideration of the report on the work of the Bureau in 1972, the Council of Ministers which met in its Nineteenth Ordinary Session in Rabat, Morocco from 5 to 12 June 1972, issued a resolution, CM/Res.266 (XIX), *Resolution on the Bureau for the Placement and Education of African Refugees*, in which it expressed its "grave concern" over "the growth of refugees in Africa and the complexity of the economic, social and human problems posed by these refugees" and called upon "Member States to make provision for employment, scholarships and vocational training opportunities for African refugees".

31. On the whole, however, the results were limited and essentially unremarkable. Moreover, with even education placement itself, the beneficiaries of which were mainly refugees from territories not yet independent or free, the several international scholarship schemes available at the time clearly were the more decisive factors. In any case, we do not find today programmes enabling the relocation of refugees from one African country to another with the purpose to relieve the burden of a sister Member State. The fact that movements in any case take place in a subterranean fashion is instead quite the object of concern!

Secondly, by far the more meaningful solidarity for which robust and effective “machineries” are required, is of the international type. This solidarity is called for in three inter-related contexts. The first, noted long time ago by Gaim Kibraeb<sup>45</sup>, consists in measures of co-operation and assistance which, while conceived within and delivered in a refugee context, are designed to enhance the overall social and economic conditions for refugees and nationals alike. The ICARA<sup>46</sup> process and the concept of refugee aid and development represented significant, result-producing initiatives in this connection. The fact that they have since petered out and the international refugee assistance system is in the position now of being able to provide primarily only the so-called life saving and sustaining measures, has to be deplored as one of the most regressive steps that the international refugee system could have taken in this last decade.

32. The second aspect also continues from the previous one and refers to the material, technical and financial assistance which should be made available to the asylum countries directly within the refugee context. Here, the purpose is to reinforce the capacity and ability of Governments to protect and assist refugees. The consistent diminution in this type of co-operation and assistance is today being trenchantly decried by African Countries, many pointing to the likely negative consequences for the sustainability of refugee-friendly policies and practices<sup>47</sup>.

<sup>45</sup> Op cit. note 40

<sup>46</sup> The acronym stands for the International Conference on Assistance to Refugees in Africa. Two of these conferences were held, under the auspices of the United Nations, UNHCR and OAU in the early 80s. Their objective was to attract donor interest for major refugee-affected asylum countries in the context of what came to be known as refugee aid and development.

<sup>47</sup> This is a reference to the debate that erupted from the middle of 1997 when African leaders, observing developments in Kosovo, complained that the assistance being provided to African refugees by the international community was grossly inadequate by comparison. President Chiluba of Zambia became a leading critique, accusing the United Nations of “gross discrimination against African refugees in the allocation of aid [which was] discrimination of the worst kind.” The High Commissioner for Refugees would be moved to acknowledge in a briefing to the Security Council on 26 July 1999 that “Kosovo has been the focus of unprecedented political attention and material support by the international community, by western countries in particular”. The US Secretary of State would concede the disparity, explaining that “the reason Europe has been getting a higher priority than Africa is that the US has allies in Europe to share the risks and costs of responding to crises”. See “Albright Acknowledges US Neglect of Africa in Major Policy Speech”, *The Star*, Thursday 15 July 1999.



33. There are legal issues involved in this as well. First, whereas there are relatively clear and well-understood standards for legal protection, it is not evident what are the principles and obligations applicable in the case of material assistance. If some indeed exist, they clearly are not being applied evenly, as the disparity in what African refugees are receiving and, more importantly, not receiving is stark as compared with refugee situations elsewhere<sup>48</sup>. The OAU Convention did not elaborate or codify standards and obligations relating to material assistance. Therefore, the project for its further development should include an objective on this question.

34. The other level of international solidarity has a more direct objective tied intimately to the state of international protection both within and outside Africa. A “vibrant” state of asylum and refugee protection should be a value shared globally. The regional and global levels are but two sides of the same coin. It is chimerical to imagine that developments within one region which diminish this system will not migrate to and have similar consequences in another, Africa included<sup>49</sup>. The warning has been sounded before that:

“... in this relationship between African refugee law, policy and practice on the one hand, and global trends on the other lies the most serious likelihood of a further lowering of the thresholds of refugee protection in Africa. As has often been remarked, with the end of the Cold War, the political and ideological value attaching to refugees has waned. The attachment to upholding refugees’ rights which may have previously characterized the approach to asylum is in fierce competition with tendencies towards the most restrictive and minimalist legal regimes, policies and practices ... It is difficult to expect that these trends will not be observed in Africa, where the underlying social and economic constraints are even more compelling. Indeed, the tendency to emulate these trends is said by some already to be in evidence<sup>50</sup>.”

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<sup>48</sup> In the above-mentioned debate, much attention was to focus on, for instance, the per capita amounts being spent on refugees in Africa as compared, again, with Kosovars, the theme of racism figuring as an explanation by some. UNHCR’s Assistant High Commissioner, Jessen-Petersen, during a tour of African countries in which this question kept cropping up, was to say: “I don’t think I would use the word racism, but there are equally worrying trends occurring. Africa is definitely falling down the world’s agenda, which shows a very narrow view of the world”.

“UNHCR slams shrinking support”, *Reuters News Service*, 17 September 1999.

<sup>49</sup> According to “Recommendation Ten” of the *Addis Ababa Document*, op cit., note 6. “The refugee crisis cannot be addressed effectively through rigid and regionalized approaches. The Symposium recommends that this problem be addressed in a global and comprehensive manner, as it will ultimately affect every region of the world. Likewise, countries should strive for effective co-operation and mutual assistance on refugee, displacement and migratory issues, the same way they collaborate on security and environmental matters”.

<sup>50</sup> UNHCR, “Issues and Challenges in International Protection in Africa”, Special Issue, *International Journal of Refugee Law*, 55, at pp. 69-70.

Therefore, international solidarity specifically geared to buoying and nourishing a genuinely refugee-protection oriented system should be fashioned. Or, to put it in the words of the *Addis Ababa Document*:

“The Symposium appeals for genuine international solidarity and burden-sharing to be brought back to the centre of the refugee problem, the international system of protection and of solutions for refugees. In particular, a truly international system embracing global standards and principles on prevention, refugee protection, assistance and solutions should be reinvigorated. The steady slide towards restrictive, deterrent laws, policies and practices at a global level must be halted and reversed<sup>51</sup>.”

African states themselves should heed a warning. As mentioned already, the motive to roll back the frontiers of protection is palpable already in Africa. Some countries get to rationalize these tendencies on the ground that, after all, the international and regional systems of burden-sharing are themselves withdrawing further back from the frontiers of responsibility. The position of this paper is that the descent to a lower standard is not what African countries should either aspire to or wish to be judged by. Models for the reconstruction of the refugee regime, such as the “reformulation” enterprise<sup>52</sup> spearheaded by Professor James Hathaway also promise a plausibility which in the end is bound to prove impossible to sustain. Seeking to underpin, bolster and reinforce the current system, rather than belief in a radical breach with its essence as the way to a solution, clearly is the challenge to be confronted. Assuredly, it is the only correct way to go.

### **2.2.4 The influences of the Convention on domestic refugee law**

35. As the OAU Convention was being elaborated, a number of the newly independent states were themselves promulgating domestic legislation for the management of refugee matters. The distinguishing feature

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<sup>51</sup> “Recommendation Eleven”, *Addis Ababa Document*, op cit., note 6.

<sup>52</sup> The reformulation project, a huge, ponderous and in many respects contradictory enterprise, is too complicated to discuss in the scope of the present paper. In any case, it has been critiqued ably and convincingly by others. See, for instance, Astri Suhrke, “Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action”, Vol.11, No.4, *JRS*, 396 and Bonaventure Rutinwa, “International Refugee Policy for the 21st Century: Which Way Forward?”, Paper presented at the University of Witwatersrand Seminar Series on the Challenge of Forced Migration in Southern Africa (The Graduate School for the Humanities and Social Sciences) 23 September 1999. Professor Hathaway’s ideas nevertheless seem to be finding some fertile ground in Africa. Acting in the capacity of a consultant, he was to influence the South African Government’s policy paper (Green Paper) for, inter alia, the elaboration of the country’s new refugee legislation to the extent that the notion of a “collectivized and solutions-oriented protection policy” is the centre-piece of the whole project. See Republic of South Africa, *The Draft Paper on International Migration*, General Notice 849 of 1997, Government Gazette No. 18033, 30 May 1997.

of these legislation was the pre-occupation with the 'control' of refugees, an objective often expressly indicated in the title and purposes of the enactments<sup>53</sup>.

36. For over ten years after the Convention was adopted in 1969, the development of domestic legislation, with few notable exceptions, for instance the Sudanese Regulation of Asylum Act of 1974, remained slow and essentially static. The Convention therefore did not itself directly inspire the passage of legislation to reflect its principles. The event that was to trigger a change was the Pan-African Conference on Refugees of 1979, one of whose products was a model for drafting refugee legislation. This model reflected key elements of the OAU Convention, most notably the definition, the grant of asylum and the prohibition of *refoulement*.

37. On the basis of this model, UNHCR spearheaded energetic and widespread initiatives across the continent for the promulgation of new legislation and the reform of existing ones. The enactment in 1983 of brand new legislation in, respectively, Zimbabwe and Lesotho became landmark events which were both to anchor and propel the growth of a new generation of refugee legislation. As in the case of the Zimbabwe enactment, the 1969 OAU Convention definition of a refugee and other key provisions were to be expressly incorporated in all the others to follow, including in Malawi, Nigeria, Ghana, Liberia and so on. The rights of refugees were elaborated far more extensively than before, with the OAU Convention's absolute prohibition of *refoulement*, rather than the qualified formulation of the 1951 Convention, now featuring more frequently.

38. Three observations may be made on the relationship between the OAU Convention and domestic legislation. First of all, the model legislation itself never ventured into dramatically new or radical legal terrain, setting itself primarily within the limits of the OAU Convention and the 1951 Convention. The opportunity, therefore, of using, through the model, domestic legislation to leap even further ahead in the development of refugee law was not done a possible service, especially when regard is paid to the fact that the model indeed came to be used widely. Secondly, since, as highlighted below, law-development in the context of the OAU essentially became stagnant, domestic legislation and law has itself over the last two decades become the main vehicle for refugee law progress within the continent. Now that the Convention is looking to re-engineer itself, it has a lot to learn from those enactments, especially the ones which have themselves introduced some novelties. Finally, the experience with even the best legislation in Africa underlines that it is not from legislative enactment alone, but, above all, the reality of *implementation* of those instruments that the true state of refugee jurisprudence in Africa is to be elicited. Here,

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<sup>53</sup> See, for instance, the Botswana Refugee (Recognition and Control) Act of 1967, the Zambia Refugee Control Act of 1970 and the Swaziland Refugees Control Order of 1978.

regrettably, the picture does not match to the same degree the progressive steps indicated by the legislation themselves. This dynamic between law-development and implementation in practice needs to be constantly borne in mind, including its recognition as a key feature of the problematic of the OAU Convention in the future. For, as UNHCR has said:

“While the elaboration of legal standards is an important function in devising the framework for refugee protection, the optimal realization of these standards lies in essentially non-legal considerations of an institutional, resource-based, logistic and material nature. In other words, the elaboration of the appropriate legal regime for refugee protection must be underpinned by the consolidation of technical know-how and resources, logistic and other infrastructures and other material resources<sup>54</sup>.”

## 2.3 Missed opportunities

### 2.3.1 Introduction

39. Thus far, we have looked at the novelties of the Convention for which, nevertheless, progressive reform is now necessary. There was, however, also a myriad of other problems for which legal solutions were called for already at the time the OAU Convention was being elaborated. The Convention needed to devise those solutions. Of course, by making a direct link with the 1951 Convention and describing itself as the “regional complement” to the latter<sup>55</sup>, its full scope of application must be considered as also including that of the 1951 Convention.

Even so, the fact that a number of questions for which legal regulation was required in the African context were not covered within the 1951 Convention itself points to the deficiency in even this relationship. Therefore, the task which faced the Convention was not only to devise the

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<sup>54</sup> UNHCR, *op cit.* note 50, at p 63.

<sup>55</sup> The Convention’s cluster of provisions which construct this relationship with the international refugee system include, first, preambular paragraph 7 which affirms that “the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967 constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment”

Then there is preambular paragraph 10 which recalls previous requests for Member States to accede to the 1951 Convention and its 1967 Protocol and meanwhile to apply their provisions to refugees in Africa. This call is repeated in the Convention. Article VIII(2) then states that

“The present Convention shall be the effective regional complement in Africa of the 1951 UN Convention on the Status of Refugees”

Finally, in the context of the reiteration in preambular paragraph 11 that “the efficiency of the measures recommended by the present Convention to solve the problem of refugees in Africa necessitates close and continuous collaboration between OAU and UNHCR, Articles VII and VIII mandate co-operation between Member States with both the OAU and UNHCR.

legal means *technically* to bridge Africa to the international refugee system, but also to remedy the gaps in the latter system as far as Africa was concerned.

40. In fact, the preparation of the Convention at one point did contain the ambition to elaborate a quite comprehensive instrument. This objective was, however, dropped *inter alia* because of the concern “to ensure full harmony with the principles of the 1951 Convention and to avoid any possible conflict between regional obligations and those resulting from the world-wide legal instrument<sup>56</sup>.” There may have been good reasons for this strategy at the time. Nevertheless, when, therefore, the Convention finally saw the day of light without any provisions addressing a number of urgent, Africa-specific questions, it was, according to the view taken in this paper, an event of missed opportunities. In fact, the need to hold, less than ten years after the Convention was adopted, a major continental meeting, the Pan-African Arusha Conference<sup>57</sup>, in effect to bridge and develop the scope of application of refugee law in Africa, itself testifies to the fact that the Convention had been unable to capture all the “specific aspects of refugee problems in Africa<sup>58</sup>.” We look at some of these questions below.

### 2.3.2 Standards for attributing refugee Status

41. One of the most important, foundational questions in the African context then was, and remains today, the problem of managing and attributing refugee status. A more detailed examination of the issue follows later in the discussion of the expanded definition of a refugee, so only a brief summary of the problem will suffice here. It inheres particularly in the massive fashion in which persons spill into exile from their countries of origin. Most of the literature on the OAU Convention is dominated by the impression that it provides the facility for dealing more manageably with refugee status in these kind of situations. Nothing could be farther from the truth. In relation to an elaborate or even only *essential* set of *standards* pursuant

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<sup>56</sup> Ivor Jackson, *op cit.*, note 19 at p.182.

<sup>57</sup> The Pan African Conference on Refugees took place in Arusha, Tanzania, in May 1979. It was jointly organized by the UNHCR, the OAU and the United Nations Economic Commission for Africa (UNECA). The Conference was attended at ministerial level by 38 OAU Member States, representatives of liberation movements recognized by the OAU and several international organizations and non-governmental organizations involved in refugee work. It produced “Recommendations of the Pan-African Conference on the Situation of Refugees in Africa, 7-17 May 1979. “These recommendations were “fully endorsed” by the Council of Ministers meeting in its Thirty-Third Ordinary Session in Monrovia, Liberia from 6 to 20 July 1979, *Resolution on the Situation of Refugees in Africa and on Prospective Solutions for their Problems in the 1980s*, and also later “supported” by the United Nations General Assembly in G.A. Res. 34/61 of 29 November 1979.

<sup>58</sup> For an analysis of the recommendations of the Conference, see L.Eriksson, G. Melander and P. Nobel (eds.), *An Analyzing Account on the African Refugee Problem, Arusha, May 1979*, 1981. See also Rose M. D’sa, *op cit.* Note 33.

to which the *process* of refugee status determination could be devised and status determination operations better structured, organized and delivered in *mass influx* or so-called *group situations*, the OAU Convention is entirely silent. As, indeed, is international refugee law in general.

### 2.3.3 The safety of refugees and security of affected countries

42. Security problems in many a refugee setting have in recent years been the source of threats to the very survival of the institution of asylum in Africa. Not only the safety of refugees, but also the security and stability of States themselves, have been seriously jeopardized as a result, above all, of the politicization and militarization of refugee camps and settings<sup>59</sup>. By themselves, these problems are not new and were already apparent, in one form or another, when the motive for the Convention arose. After all, the Rhodesian and South African regimes were perpetrating military attacks upon both refugees and asylum states themselves throughout the Southern African region.

43. Moreover, the evident concern in many resolutions of both the Summit OAU and the Council of Ministers with the question of subversion shows that politicization and possibly even militarization even with respect to post-independence refugees was already a reality. The fact that many of the pioneer asylum countries promulgated domestic legislation essentially to *protect themselves and their state interests* from the effects of the presence of refugees on their territories, also points to the problems then<sup>60</sup>.

44. Does the Convention really address these questions at all? Some would respond by pointing to its prohibition of subversive activities. And, indeed, those provisions have an importance all of their own in relation to this problem. Yet, as shall become apparent from the more detailed discussion of those provisions presently<sup>61</sup>, they have real limitations. The High Commissioner for Refugees has warned<sup>62</sup> that it is in the question of

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<sup>59</sup> See P)art 5 *infra*.

<sup>60</sup> See for a discussion of these aspects of African refugee legislation, George Okoth-Obbo, "Bridging the Legal Gap", *Refugees*, 8 (1994).

<sup>61</sup> See Part 5 *infra*.

<sup>62</sup> In her *Closing Remarks of the United Nations High Commissioner at the Forty Eighth Session of the Executive Committee of the High Commissioner's Programme*, Geneva, 17 October 1997, the High Commissioner said:

"I am concerned that if we do not attempt to resolve the apparent contradictions between humanitarian principles and State interests, countless innocent persons will suffer. I therefore wish to propose to States and to regional organizations, and primarily the Organization of African Unity, a two-way effort: my Office is ready to discuss with governments measures which must be adopted to facilitate the respect for humanitarian principles and which take into account their concerns. I hope that States will put forward proposals in this respect, but, more importantly, that they will reconfirm their commitment to these principles"

Reacting to this proposal, the Secretary-General of the OAU (as reported by *Agence Presse*) would, for his part, say:

security that the severest tensions exist today between the political interests of states and their obligations to refugees. It is clear, then, that this is also the matter for which explicitly deliberative and elaborate legal developments are urgently required within the framework of the OAU Convention. The scope of this paper does not allow for an extended discussion of the legal measures called for but some brief reflections are offered.

45. When security problems become so intractable, almost always another legal and operational regime apart from the refugee one is implicated for purposes of the *comprehensive* response required<sup>63</sup>. The legal and institutional apparatus relating to armed conflicts, regional security or international security will more usually be the ones implicated. For purposes of the reforms being discussed here, it is therefore necessary to juxtapose these legal, institutional and operational regimes and to develop the reinforcing synergy and links between them at all levels. One is moved to the thought that had this kind of configuration been available and operational in the Great Lakes, things might have worked in favour of a more comprehensive response and a less catastrophic end to the crisis.

46. Secondly, as the international community has faced novel, unique and complex emergencies, so have imaginative frameworks, devices and measures been elaborated even if initially only in a desultory and *ad hoc* fashion. For all the pre-occupations associated with it, the refugee crisis in the Great Lakes region produced a wide array of such novelties, including the notions of “separation” and “security packages”, to which resort could be had in refugee settings. These should be examined and the relevant elements extrapolated for purposes of developing regionally applicable standards.

### **2.3.4 A framework for the coherent and predictable management of refugee affairs**

47. The management of refugee affairs in a way that is coherent and predictable is linked to the issue just considered. It should have been evident already when the Convention was being formulated, that the enormity and complexities of managing thousands of people displaced onto the territory of another country precipitously would require more than just the *ad hoc* imagination of UNHCR and local officials. This question has continued to be the source of widespread and protracted problems.

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“I believe that while UNHCR should be able to implement its international mandate to protect and assist refugees and displaced persons with the full co-operation of countries concerned, the legitimate political and security concerns of both countries of origin and those of asylum deserved proper consideration”

<sup>63</sup> See the discussion of this question, with particular reference to the responsibility of states, in Dennis McNamara, “The Future of Protection and the Responsibility of the State”, Vol. 10, Nos. 1&2 *International Journal of Refugee Law*, 230 (January/April 1998). Also by the same author, “Everyone Found Wanting”, No. 110, *Refugees* magazine (UNHCR).

48. If it may be said that Governments have the overall responsibility to ensure proper management of refugees, camps and settlements on their territories, this is not always reflected in the structures that are actually established. In some countries, camps and settlements are designated as UNHCR facilities and for all practical purposes run as such without a notable involvement of the Government. On the other extreme, the role of the Government can be over-stated. Given the strict regime under which these “facilities” are then run, they can become, for all practical purposes, concentration camps to go into which even UNHCR has to obtain permission! In other cases, the camps or settlements are fully integrated as part of the local social milieu and are able to thrive as viable communities open to locals and refugees alike. The administration of these facilities also varies considerably, in some places law enforcement personnel, and in others ordinary civil servants, are doing the job. In one situation, governments may provide security, law and order. In others, UNHCR will be called upon to provide, or any way pay for, these services as “part of its responsibility”.

49. These were questions that required systematic legal regulation and elaboration of broad, yet detailed, standards. However, the Convention did not address itself with the matter. It is true that domestic regulations have been elaborated on the subject in many countries, in some cases in quite exacting detail. Indeed, the process of creating international standards might itself gain a lot from examining the experience at the national level<sup>64</sup>, along, of course, with those Conclusions of the

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<sup>64</sup> As an example, in the course of 1997, the UNHCR Regional Liaison Office in Addis Ababa (RLO) received from the Government of Ethiopia for its comments a working text for a national refugee legislation. RLO’s response was comprised in a two-part document entitled *Project on the Promulgation of a Refugee and Returnee Legislation for Ethiopia* forwarded to the Government in April 1998. Part II of this project was a comprehensive re-draft by the RLO of the Government’s draft text and contained a provision on the “management of reception centres, camps and settlements” which read as follows:

“The [Government] shall:

<sup>1</sup> Appoint an officer or officers who shall be responsible for the overall management and administration of such reception centres, refugee settlements or camps as may be established pursuant to [the article providing for the designation of places or areas as reception centres, camps and settlements].

<sup>2</sup> Authorize and make arrangements for law and order and security of the reception centres, camps or settlements for the security and safety of all the asylum-seekers or refugees in them, including the deployment, as necessary, of government police or security personnel.

<sup>3</sup> The officers appointed by [the Government] shall be responsible in particular to ensure or oversee:

(a) The management and administration of the reception centres, refugee camps and settlements in an orderly and efficient manner.

(b) That the essential services to maintain the health and general welfare of asylum-seekers or recognized refugees are properly delivered and maintained in the reception centres, refugee camps or settlements by the organizations involved in the implementation and delivery thereof.



Executive Committee which have touched on related aspects<sup>65</sup>. The point being made here, however, is that for a matter of such signal importance to the protection of refugees throughout the continent as this, the international sphere should be the most appropriate forum for the development of the broad standards. In the case of Africa, that refers to the context of the OAU Convention.

### **2.3.5 The quality of life of the refugees**

50. At the time of elaborating the Convention, a central pre-occupation in the refugee reality in Africa was the quality of life for refugees, or, rather, their dismal state. This was to remain an increasingly preoccupying problem and today the Continent is locked in a bitter row with the international community on the issue<sup>66</sup>. In fact, one of the drafts in the evolution of the Convention had quite elaborate provisions on, among others, wage-earning employment, self-employment and the liberal professions. However, these were among the provisions which were dropped as a result of the “the concern to ensure full harmony with the principles of the 1951 Convention<sup>67</sup>.”

51. The elaboration of standards of treatment for refugees, including, particularly, social and community rights, was important then but is even more compelling today. The question of food for refugees, in other words its appropriateness, quality and quantity requires one of the most particular and urgent attentions in this respect. The sometimes callous, often just ignorant, but thoroughly ghastly manner in which African refugees can be treated by the international humanitarian system is best (worst) illustrated in the food sector. Late, culturally inappropriate, sometimes degraded, refugees have to accept what is offered, in the quantities

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(c) That the asylum-seekers or the refugees as the case may be are registered and the relevant up to date and accurate data and records kept on them.

(d) That the necessary documents as may be prescribed, including identity documents, are issued to all asylum-seekers and recognized refugees in the reception centres or refugee camps or settlements.

(e) The residence of asylum-seekers in reception centres and refugees in camps or settlements in a safe secure manner.

(f) That the civilian and humanitarian character of the reception centres settlements or camps is maintained at all times and that no activities are permitted which may compromise or prejudice such status.

(g) That the asylum-seekers or recognized refugees shall be issued with the necessary permits and documents to facilitate their absence from the camps and movement to other locations within Ethiopia in a proper and lawful manner.

(e) That the participation of asylum-seekers and recognized refugees in the management of their personal and community affairs shall be assured and facilitated.

<sup>65</sup> See, for instance, Conclusion No. 72 (XLIV), *Personal Security of Refugees* (44th Session of the Executive Committee -1993).

<sup>66</sup> See notes 47 and 48 *supra*.

<sup>67</sup> Ivor Jackson, *op cit.*, note 19 p. 182.

and ways in which it is provided. Fundamental and far-reaching changes are required on this matter, which only the facility and force of law can bring about.

There are a number of other questions, some touching more directly on legal protection as such. For instance, today, refugees increasingly find themselves in sensitive situations such as the involvement in regular or irregular military organizations in the asylum context. Where such involvement is forced, the applicable standards are clear. Yet, we find that many refugees are voluntarily submitting themselves to military activities part of an intricate web of national and even regional politics. Even though an individual refugee may voluntarily choose by him/herself to join the service of one or another military body, the consequences at a political and protection level may fall more broadly on and affect the larger refugee population as a whole. Moreover, the consequences on state and regional security in particular, and the effect in turn of these on refugee policy and protection can be biting. This is therefore a question that could not be addressed on the basis alone of the voluntary choice of the individual refugee and requires much broader consideration.

52. Secondly, in the context of solutions, the concept of local integration needs to be revisited. Above all, the phenomenon of refugees who several years and generations later still remain refugees (some still receiving relief assistance), requires a new and more imaginative construct, at the centre of which an easier route to naturalization should be established. Still on the question of solutions, access by refugees to education, health care delivery, and land for occupation and use should also receive special attention. All these and several other related matters had been considered in detail by the *Conference on Legal, Economic and Social Aspects of African Refugee Problems of 1967*<sup>68</sup> which in effect provided the last major working forum for the Convention before it moved towards completion. The conference outlined in detail the general lines of the standards that might be elaborated within the African context with the idea that these should be considered in the elaboration of the Convention. Regrettably, they were unsuccessful in gaining a foothold. Later efforts, most notably the Arusha Conference, have also produced useful road maps. Yet, for all the priority and preoccupations that the issue generates at a political and rhetorical level, similar concern at a legal level remains invisible.

53. In connection especially with this last point, the increasing recourse by Governments to encampment of refugees as the policy of choice above all else simply serves to imbed the refugees deeper into dependency upon relief assistance. Standards which should enable the greatest degree of freedom possible and the choice of settlements over camps while at the same time meeting the pre-occupations of

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<sup>68</sup> See note 77 *infra*.

Governments would be most helpful. Needless to say, in any reform/review of the standards of treatment for refugees in general, the phenomenal developments which have taken place in the field of gender/refugee women and children/adolescents protection would also have to be given special reflection within the OAU refugee frame.

### **2.3.6 The conundrum of law reform stagnation in the context of the OAU Convention**

54. The fact that some of these questions were not tackled within the Convention resulted from, as said before, the choice made in the end to rely mainly upon the 1951 Convention standards. If this strategic choice was the correct one in 1969, it has to be wondered why, in the thirty years since, there has been no significant development of the legal scope and principles of the OAU Convention. A comparison with the soft law which has developed around the 1951 Convention and its principles, for instance in the Executive Committee of the High Commissioner's Programme, shows how remarkable is the difference. Why has there been no similar progress around the OAU Convention, so that we are in a situation today whereby domestic law is really the only theatre figuring significant refugee law developments in Africa?

55. We offer that there are three main factors, one ideological, the other cultural and the last institutional. The ideological factor concerns the idealised and even romanticized way in which the Convention has been viewed so far. Conceived in the womb of the anti-colonial, anti-imperialist zest of the immediate post-independence period, the Convention has managed to generate an aura of home-grown, African, authenticity which few others of the continent's instruments have been able to match. Here, at last was Africa's own regulatory framework, for its refugees, conceived and brought to life by Africans themselves. It was, moreover, also being hailed globally as the example to be followed elsewhere<sup>69</sup>.

56. Not even the African Charter on Human and Peoples' Rights or the African Charter on the Rights and Welfare of the Child, both of which actually have more telling African catalogues, can compare. Hallowed in the ideological aplomb of a sacred African symbol, the Convention has essentially been sheltered from the kind of rigorous inquiry which, for

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<sup>69</sup> Thus, the OAU/UNHCR Symposium recommended that:

"The regions of the world in which international or regional legal systems for refugee protection do not exist, or where the applicable regimes are under review, should consider the relevance of the 1969 OAU Convention. In this regard, the Symposium highlights the Convention's broad definition of a refugee, its provisions on the non-rejection of refugees at borders and the prohibition of refoulement of refugees, and the respect of the voluntariness of refugee repatriation".

See "Recommendation Six" of the *Addis Ababa Document*", op cit. note at p.6 See also discussion in Part 3.2 *infra*.

instance, the 1951 Convention has had to endure not only from scholars, but of course as well from Governments themselves. Reviewing the academic literature on the OAU Convention, it is striking to note how charitably it is treated, which has in fact helped its weaknesses to escape heuristic detection. It is little surprising then that there would be no reform-oriented groundswell around the Convention, even if this has been episodically pointed to<sup>70</sup>.

57. What is called the cultural aspect refers to the reality that for refugees, as indeed for several other matters otherwise regulated by law, the main theatre in most of Africa for the day to day mediation of rights and obligations is not that of law and judicature<sup>71</sup>. In the particular case of refugees, politics and resource considerations have had, and continue to have, a far more telling effect. In fact, it is striking to note the limited extent to which the OAU Convention has actually and concretely provided the anchor for refugee dialogue and action in Africa. Its most celebrated feature, the expanded definition, needs to be put in context in this connection. The point is that in general terms, certainly in the mass influx situations with which the Convention is usually associated, neither the Governments nor the international community are really ever exercised by the question of the refugee status of the group. It is not even that the *prima facie* method of deciding on refugee status is what is used for reasons of practicality. The question is usually merely assumed or even simply passed over in silence. This was to contribute, in no small measure, to the disaster in the Great Lakes region. Yet, in many other places around the Continent, it is common to find the presence and mix within a refugee setting of politically active elements, armed entities, their fighting and administrative cadres, etc.

58. Even day to day practical actions in favour of refugee protection highlight the secondary place of law and judicature. Not every where in Africa is judicial contention the daily-tool-in trade of the trench wars to secure admission for asylum-seekers, grant of refugee status, ensuring treatment in accordance with established standards and finding solutions for refugees. For sure, on the occasion of a critical protection incident,

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<sup>70</sup> For instance M.R. Rwelamira, *op cit.*, note 4.

<sup>71</sup> I make this observation without, for present purposes, seeking to explain what lies at the bottom of the phenomenon. It is evidently a complex subject. Some answers, such as the following offered by Peter Noble in making a similar observation, however appear to be reached all too easily:

“In many newly freed African states there has been a certain skepticism against written law and legalism. This is not difficult to understand on a continent where written law has been synonymous with colonial laws which were conceived and drafted in the various European legislative traditions foreign to African customs, and imposed on Africans as part of a system of control and exploitation. Juxtaposed to the principle of legalism is African pragmatism, a preference for solving each problem as it occurs...often referring to the customary law in an imprecise manner”. *Op cit.*, note 41 at pp. 265-266.

such as refolement, refugee actors might be found dusting up their legal texts and recalling legal provisions and principles. However, few protection personnel are compelled to appear in court on a day to day basis, if ever at all, to litigate or oversee matters relating to refugee rights or treatment. Nor are representations made to the authorities in the course of protection dialogue based mainly on legal precedents derived from the OAU Convention, the 1951 Convention, the 1967 Protocol or indeed even local refugee legislation. True to say, it is not unusual, even if surprising, that some might not even be familiar with the exacting details of these instruments!

59. Even, where, as in the Great Lakes refugee crisis, the intractability of the problems created an imperative need for a regulatory framework, a separate one established specifically for the purpose, not the OAU Convention structure, was the answer<sup>72</sup>. Similarly, irrespective of the applause that the Convention has received for its provisions on voluntary repatriation<sup>73</sup>, there have been no major, organized return movements during its life-time for which only those provisions sufficed as the basis for an operation. Agreements with concerned countries have always had to be elaborated. The most acute refugee problems in Africa have therefore had the effect of exercising and putting to the test *not* Africa's jurisprudence and particularly the OAU Convention framework, but, principally, the political economy of the underlying factors.

60. With regard to the institutional factors, scholars who have investigated the OAU's respective organs charged with an operational, monitoring, supervisory or law-making function over the OAU Convention all seem to be confronted by a picture of limited effectiveness<sup>74</sup>. Those bodies are the OAU Secretariat itself, particularly the Bureau for Refugees which is part of the Political Department, the OAU Commission of Twenty on Refugees, the Council of Ministers and of course the Summit of Heads of State itself.

61. Reviewing their work, an overwhelming impression of robust leadership and activity with regard especially to the law-making and law-developing aspect of their functions on the Convention does not emerge. The fact that, for instance, there has been no thoroughgoing study and reflection under the auspices of any of these bodies on the implementation

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<sup>72</sup> The "Bujumbura Plan of Action" elaborated for the refugee crisis in the Great Lakes region, is the most striking example of centring a refugee response outside of the OAU framework. See, for the text of this plan of action and other relevant documents, OAU/UNHCR, *Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region*, 15-17 February 1995, Bujumbura, Burundi (monograph published and archived by UNHCR and OAU).

<sup>73</sup> See discussion in Part 4 *infra*.

<sup>74</sup> For a study of these bodies and institutions, see Joe Oloka Onyango, *op cit.*, note 43; Gino J. Nadi, *op cit.*, note 25; and Lawyer's Committee for Human Rights, *op cit.*, note 17. See also Anthony Ayok Chol, "The Legal Dimensions of the Refugee Problem in Africa", 14, *Migration*, 5 at pp. 10-14 (1992).

and effectiveness of the Convention in its thirty years so far is emblematic of the problem. These institutions and organs have also not been seen to spearhead a systematic, organized effort for the promulgation or reform of domestic refugee law to give expression to the principles of the Convention. Indeed, a researcher was led to the conclusion, with respect to one of them, that:

“It is also clear that the Bureau has abandoned the attempt to persuade Member States to incorporate the provisions of the 1969 Convention into their domestic law or to amend their immigration and refugee legislation so that they are brought into conformity with the Convention<sup>75</sup>”.

62. There have, to be sure, been initiatives involving the OAU which have yielded important law-developing results for refugee jurisprudence in Africa in general. These include the Arusha Conference mentioned already, the SARRED Conference<sup>76</sup>, the Bujumbura Plan of Action and the Addis Ababa Symposium. Moreover, the relevant recommendations have invariably always been endorsed by the highest decision-making organs of the OAU. Yet, three points should be highlighted. The first is that leaving aside these particular initiatives, it is not possible to find many resolutions between both the Council and the Summit which represent a significant refugee law-making or jurisprudence-developing function. Secondly, this state of inactivity has prevailed even when the Continent was experiencing some of its most acute and critical refugee crises in which the application of the Convention would have been directly implicated. Thirdly, initiatives which have served the purpose of refugee law-development have come to originate primarily from outside the OAU, and, principally, from UNHCR. These have, of course, been mounted in the context of the synergy and collaboration between the two organizations envisaged by the Convention itself. Even so, within the OAU set-up itself, the fact is that the OAU Convention has basically stood still most of these years as far as its progressive development and enhancement would be concerned. Thus, for all the good that has come out of the co-operative construct led by collaborating organizations, an approach that is not firmly rooted in the OAU itself surely cannot be the best way to develop the Convention and its jurisprudence from the point of view of the Africa-specific priorities.

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<sup>75</sup> Joe Oloka-Onyango, *op cit.*, note 43 at p 49.

<sup>76</sup> The International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED) was convened under the joint auspices of the UN/OAU/UNHCR and took place in Oslo, Norway from 22 to 24 August 1988. Its principal product was the *Oslo Resolution, Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa*. The document covered a wide range of issues from root causes, principles for humanitarian assistance, protection, internally displaced persons to public information and dissemination.

63. The OAU, as the parent and oversight body of the 1969 Convention, evidently owes a duty to change this state of affairs. While it is appreciated that the organization indeed faces challenges and constraints of various types, it should be possible to reconfigure its resources to bring about a focussed attention on the Convention. As it looks to the new millennium, there is no doubt that the Convention will need to be retooled and reinvigorated in a number of respects. These efforts will prove able to produce the results required for Africa's refugee law and jurisprudence only if the vigorous leadership and stewardship of the OAU is also at the same time established.

### **PART 3: THE 1969 OAU CONVENTION'S "EXPANDED" DEFINITION OF A REFUGEE**

#### **3.1 The origins of the expanded definition**

64. Without a doubt, the OAU Convention's so-called "expanded definition" of a refugee is its most celebrated feature. The provision, part of Article 1 whose first sub-article corresponds to the definition of a refugee contained in the 1951 Convention, has now generated a reputation which borders on the mythical. It states that:

"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."

What is it about this definition that is "expanded"? Wherein lies its radical aspect as compared with the state of the law at the time when the Convention was initially adopted? What is the positive, practical effect of the definition today?

65. For sure, in elaborating the expanded definition, the one contained in the 1951 Convention provided the contrast. It is also true that this definition was the subject of dissatisfaction in relation to specific preoccupations in the African refugee reality. The thesis that has taken root today as to the motives for the definition has it that it came out of a fundamental irrelevance of the 1951 Convention in relation to Africa's refugee realities. This is a gross overstatement and misrepresentation of the true position<sup>77</sup>.

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<sup>77</sup> Information for the discussion in this part of the paper on the origins and development of the expanded definition is derived mainly from UNECA/UNHCR/OAU/Dag Hammarskjöld Foundation, *Final Report on the Legal, Economic and Social Aspects of African Refugee Problems 9-18 October 1967*, December 1968, especially paras 75 to 89 and Ivor Jackson, *op cit.*, note 19 at pp. 177-199.

66. The Convention was developed under the sway essentially of two rather particular questions. The first of these was the problem of subversive activities and the other the date line contained in Article 1 A (2) of the 1951 Convention. The latter meant that whatever was the legal scope of application of the 1951 Convention, it did not apply to the new refugee situations which had arisen in Africa.

67. With the adoption of the 1967 Protocol Relating to the Status of Refugees, the problem of the date line would be solved. Indeed, the removal now of a key preoccupation seemed to take some wind out of the focus in the drafting process of the Convention. Concerned up to this time with the fact that the 1951 Convention was legally barred from applying in Africa, the Commission had thus far been elaborating a stand-alone instrument that was complete and comprehensive in every respect. However, for this purpose, its working drafts had essentially reproduced, practically verbatim, the 1951 Convention definition and indeed most of its other provisions.

68. At the end of 1966, when it was clear that the Protocol was on its way to adoption, a shift would take place. First of all, as the 1951 Convention was now due to apply fully in Africa, the priority to prepare a Convention which was substantively complete so as to be able to stand alone changed. Instead, the OAU was now expressing its *appreciation* to UNHCR for its “efforts to ensure the United Nations Convention’s universality and adaptation to the present realities of the refugee problems in Africa<sup>78</sup>.” The original instructions to elaborate a Convention “covering all aspects of the problem of refugees” (which thus far was being prepared under a title more or less identical to that of the 1951 Convention – Draft Convention on the Status of Refugees in Africa), would also now change. The drafting committee thus received instructions to prepare an instrument to “govern *specifically African aspects* of the refugees [and which] should come *to be the effective regional complement* of the 1951 United Nations Universal (sic) Convention on the Status of Refugees<sup>79</sup>.” And after the Protocol was formally adopted, both the Summit and the Council thereafter issued calls to “Member States which have not yet done so to accede to the 1951 United Nations Convention relating to the Status of Refugees and the 1967 Protocol and to apply their provisions to

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<sup>78</sup> CM/Res.88 (VII), *Resolution on the Adoption of a Draft Convention on the Status of Refugees in Africa*, Council of Ministers Seventh Ordinary Session, Addis Ababa, 31 October to 4 November 1966.

<sup>79</sup> *Ibid*, emphasis added. See also CM/Res. 104 (IX) *Resolution on the Problem of Refugees in Africa*, Ninth Ordinary Session, Kinshasha, Congo, 4 to 10 September 1967, which “instructed the OAU Commission to adopt an instrument governing the specific aspects of the problem of refugees, and that the adoption of that instrument by Member States be recommended”.



Africa<sup>80</sup>. Of course, when finally adopted itself, the 1969 OAU Convention essentially maintained this position vis-à-vis those instruments<sup>81</sup>.

69. The question of subversion itself was rather narrowly defined and the two separate aspects under consideration came to influence the Convention in different ways. One aspect concerned subversion by refugees from independent African countries and the other the position to be taken with regard to refugees from territories still under colonial rule or domination by the white minority regimes in the Southern African region. In the latter case, the issue was whether the freedom fighters among them could also be considered as refugees

70. As to the question concerning subversion by refugees from independent African countries, the “specific” solutions erected in the Convention were comprised not in the provision covering the definition, but in those considered later below prohibiting subversive activities<sup>82</sup>. The debate concerning refugees from territories still under colonial or minority rule is what produced the expanded definition. It centred on the distinction which should be made in attributing refugee status between “ordinary refugees fleeing their country of origin for fear of persecution” and “freedom fighters”. A number of countries, especially from among the so-called Front Line States, were of the view that freedom fighters should not be treated under refugee obligations, and that the states should not be obliged to grant them refugee status. The weight of opinion however ultimately favoured the position that:

“It was the duty of every African country in a spirit of solidarity to assist freedom fighters who were fighting for the liberation of the African continent from colonial rule...[Freedom fighters] had no duty to abstain from subversive activities against countries under colonial rule and white minority domination. African solidarity and the principles of the OAU as expressed in its Charter, clearly states that in seeking freedom for the African Continent, it was legitimate to assist liberation movements<sup>83</sup>.”

The expanded definition was drafted accordingly. Contrary to the current discourse on this point, it did not grow as such out of dissatisfaction with what is seen as the personalized and individualized nature of the 1951 definition. It is also not possible to establish the general dissatisfaction so widely claimed today concerning that definition’s inability to accommo-

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<sup>80</sup> See for instance CM/Res.149, Resolution on the Problem of Refugees in Africa, Eleventh Ordinary Session of the Council of Ministers meeting in Algiers, Algeria, 4 to 12 September 1968.

<sup>81</sup> See discussion in Part 3.1 *infra*.

<sup>82</sup> See discussion under Part 5 *infra*.

<sup>83</sup> *Final Report*, op cit., note 77, paragraphs 83-84.

date persons forced to seek safety elsewhere in large groups, or for reasons such as general violence war and conflict, what is typically expressed in statements such as:

“The traditional definition of refugee [was expanded] to include persons who, as a result of civil wars or other armed conflicts in their home country are forced to leave without being politically persecuted in the traditional sense<sup>84</sup>.”

Put simply, these statements are not supported by the historical record. As we have seen, the definition was expanded to deal specifically with the situation of refugees from territories still under colonial or minority racist rule. And, in the context of that concern, the predominant issue was not the civil war character of freedom fighters nor the question of numbers.

### **3.2 The value and positive effects of the expanded definition**

71. Notwithstanding the foregoing paragraphs, it is precisely in light of the perspectives being contended there that not only the roots, but, even more so, the value of the expanded definition has come to be widely viewed. Those are also the features which are cited as the Convention’s most novel and forward-looking contributions to refugee jurisprudence. Because it focuses on the objective circumstances which have compelled flight; because the fear of danger is not linked to the individual’s personal subjective reaction to the adversity he perceives; because the definition includes within its scope even accidental situations not necessarily based on deliberate State action; and because the source of danger need not be the actions of a State or its agents; the wideness of the definition is thereby clearly established.

72. For the time being, the question whether these situations are, as such, not covered in the 1951 Convention definition shall be left aside. In that context, it is clear that, *legally* speaking, these qualities of the expanded definition constitute a pillar of immeasurable magnitude not only for refugees in Africa, but, it will also be argued, even elsewhere. Thus far, the preponderant part of Africa’s refugees has resulted mainly from massive abuses of human rights, civil strife and conflicts and war. If, indeed, the 1951 Convention does not provide and could not have provided the legal device for considering as refugees these masses seeking safety in other countries, then it is of course only the 1969 Convention that has made it possible for them to be protected and treated in line with international refugee standards. What then, an indispensable rock for protection the Convention and its definition have been for a Continent whose refugee numbers once topped 8 million! Already many years ago, Rainer Hoffman said:

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<sup>84</sup> Hofman, op cit., note 33 at p. 90. See also Rose D’sa op cit., note 33 “It is submitted that Article I (2) is drafted more widely in order to expressly include in the OAU definition of a refugee people who are displaced as a result of warfare or other civil order”.

“Considering the actual refugee situation in Africa which is characterized by the fact that migration of refugees mostly occurs as a result of internal conflicts and, therefore, the persons concerned do not fall within the traditional definition of refugees, the expanded definition is certainly the only reasonable and appropriate one<sup>85</sup>.”

Given the views concerning the inapplicability of the 1951 Convention, these arguments remain just as compelling today. And, as far as can be foreseen, the need for the Convention in this context will continue to demonstrate itself in the future. A few years ago, Robert Kaplan was warning that deep-seated anarchy whereby

“Borders crumble, wars are fought over scarce resources especially water and war itself becomes continuous with crime as armed bands of stateless marauders clash with the private security forces of the elite [and] nations crumble under the tidal wave of refugees from environmental and social disasters<sup>86</sup>.”

is what awaited Africa “in the first decade of the Twentieth Century”. If he is correct, masses of refugees will surely result from this apocalyptic and dysfunctional state of affairs. The Convention and its definition are therefore set to remain even more pivotal and crucial than before, if Africa’s refugees of the future are to have access to protection under refugee obligations.

73. Looked at this way, the continuing need for the expanded definition is demonstrable even for those regions where only the 1951 Convention applies. The point simply is that the continuing narrowing of the scope of application of that Convention’s refugee definition has the result, if not indeed the intention, of denying protection to people who so evidently require safety for their lives away from home. The narrow interpretation of the 1951 Convention definition is thus not an idle or abstract intellectual exercise. It represents a *diminution*, not expansion, of the practice of human rights protection in a refugee context, the consequences of which can be grim for those denied. It is a backward step, in scholarship as in the practice of States, first, from the shared human rights values around which all mankind should rally and, second, from the direction in which refugee law should instead be moving. The fact that the expanded definition represents an *opposite* trend is what comprises its true value for refugee jurisprudence at a global level. Isabelle Gunning could thus not be on a more correct theme when she makes a spirited argument for

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<sup>85</sup> Rainer Hoffman, *op cit.*, note 33 at p.83.

<sup>86</sup> Robert D. Kaplan, “*The Coming of Anarchy*”, *The Atlantic Monthly*, February 1994. The editorial of *West Africa* magazine 18-24 July 1994, would rebuke this dark and pessimistic portrayal as “a locus classicus of ‘Afro-pessimism’” and dismiss it as “unserious and [based on a] totally unempirical approach”. See page 1254.

“...the international use of [the] expanded definition because ...the African definition is more reflective of the dominant circumstances currently causing individuals to flee. Moreover, the African definition is more representative of the goals of the multicultural character of an international society as envisioned by the United Nations Charter<sup>87</sup>.”

74. In discussions concerning the role and functions of the refugee regime, the superior and more telling importance of “prevention”, “fostering a human rights culture”, “conflict resolution” and so forth is asserted<sup>88</sup>. Be that as it may, it can be foreseen that strife and gross, massive abuses of human rights are bound to remain the reality not only in Africa, but, as recent events have shown, even on the doorsteps of those regions which claim the highest degree of political stability. This is the reason not only why an expanded definition of a refugee, but as well a structure of protection based primarily on asylum, shall continue to be necessary<sup>89</sup>.

When the influence of the OAU Convention migrates to other regions, as in the case of the Cartagena Declaration on Refugees of Central America of 1984, it does more than just provide a precedent for legal draftsmanship. The Cartagena Declaration not only took its inspiration for a refugee definition from that of the OAU Convention, it also itself expanded that definition farther<sup>90</sup>. As the effect of the 1969 OAU Convention is thus increasingly multiplied municipally in Africa and abroad in other regions, the idea is both nourished and reinforced that the approach it represents is the best way to

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<sup>87</sup> Isabelle R. Gunning, “Expanding the International Definition of Refugee: A Multiculture View”, Vol. 13 No.1, *Fordam International Law Journal*, 35, at p.37 (1989-1990). See also “Recommendation Six” of the Addis Ababa Document op cit. note 6.

<sup>88</sup> Under this approach, Gervase Coles, “Approaching the Refugee Problem Today” in Gil Loescher and Laila Monahan (eds.), *Refugees and International Relations*, Oxford University Press, New York, 1989, 373, criticizes the system built on the 1951 Convention as “old” and “limited”, for which “new necessities” are required, above all “to free so much traditional Western thinking about the refugee problem of its “exile” bias” (p. 387). Cf. Note 89 infra.

<sup>89</sup> Elsewhere, I have argued that because “the ability to seek and obtain the physical and material safety of another authority, and particularly another State is often the only real option available to populations caught in the ethnic, political and other upheavals taking place in Africa”,

“...refugee law must [therefore] necessarily be “exilic”. It must emphasize the obligations of an asylum state and the international community as it is the *failure* of any effective protection in the country of origin that kicks it into gear. It must emphasize protection and security from forcible return to danger. In view of [the factors highlighted at the beginning of this note] these are not the weaknesses, but the very strengths of refugee law, the system of international protection and the mandate of UNHCR.”

See George Okoth-Obbo, “Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law” in Vera Gowland-Debbas, *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1996, 7 at pp. 9 and 11

deal with refugees. One would thus hope that a principle of customary international law can develop out of this cross-border legal and philosophical mobility of the Convention's definition. And that it is this trend, however nascent and inchoate, that is implied by the one-time Co-ordinator for Refugee Affairs of the United States when explaining the persuasive effect of the expanded definition in his country's refugee policies:

"This broader definition is important given the need to provide immediate assistance and to continue to provide care and maintenance for an extended period of time. Our own law facilitates this definition, allowing international assistance funds from the United States to flow flexibly. Our Migration and Refugee Assistance Act of 1962 provides the authority for assistance in place, as opposed to resettlement, without defining refugees specifically but allowing, for instance, contributions to the UNHCR for assistance to refugees under his mandate of persons on behalf of whom he exercises his good offices and for meeting the unexpected urgent refugee and migration needs<sup>91</sup>."

### 3.3 The need to review the expanded definition

75. Having said all this, if the expanded definition was wide and radical in 1969 in relation to the 1951 Convention definition, today it is in a mixed position. On the one hand, the specific revolutionary situations for which the expressions "external aggression", "occupation" and "foreign

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<sup>90</sup> The Cartagena Declaration on Refugees was adopted following a meeting in Cartagena, Colombia, from 19 to 22 November 1984, of experts and representatives from ten Central American countries: Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela. According to its definition, a refugee includes

"persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

For a good analysis of both the Declaration and its comparative aspects with the OAU Convention, see Eduardo Arboleda, "The Refugee Definition in Africa and Latin America: The Lessons of Pragmatism", Vol. 3, No. 2, *International Journal of Refugee Law*, 185 (1991) and also by the same author, "The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention – A Comparative Perspective", Special Issue, *International Journal of Refugee Law*, 87 (1995). See also Hector G. Espiell, Sonia Picado and Leo V. Lanza, "Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America", Vol. 2, No.1 *International Journal of Refugee Law*, 83. See also arguments in favour of a liberal interpretation of the 1951 Convention in Walter Kalin, "Refugees and Civil Wars: Only a Matter of Interpretation?", Vol. 3, No. 3, *International Journal of Refugee Law*, 435 (1991).

<sup>91</sup> Jonathan Moore, "Refugees and Foreign Policy: Immediate Needs and Durable Solutions, Department of State Bulletin, July 1987, p. 70, cited in Ivor Jackson, op cit. note 19 at p. 193.

domination” were coined no longer prevail, with independence having come to the former Portuguese colonies, Zimbabwe and Namibia, and the end of apartheid in South Africa. Those components of the expanded definition could thus be said to be irrelevant today. On the other hand, they could also be viewed as vessels still possessed of the capacity for the legal transcription of Africa’s refugee realities of today.

76. This can, however, be expected to be attended by some controversy. It would be interesting, for example, to see how the refugee problems arising out of the situation in Democratic Republic of Congo would fare if their interpretation in light of those concepts were to become a real arbitral issue. If, as has also been claimed, the “objective” nature of the OAU definition was intended also to depoliticise refugee decision-making<sup>92</sup>, there can be no doubt that nothing would be more politicized than trying to construe the presence in the DRC of various foreign countries in terms of the notions of “aggression” and “occupation”.

77. For reasons of this type, the expanded definition itself has now arrived at the need for a review. Two main questions can be underlined in this connection. First, it should be upgraded to more properly reflect the actual situations which today cause people to flee as refugees in Africa. Here, the Convention would have much to learn from the Cartagena Declaration which, in talking about generalized violence, internal aggression and massive violations of human rights, more fulsomely describes the refugee-producing circumstances in Africa today than does the expanded definition.

78. Secondly, the causal element in the descriptive paradigm of the definition should receive more emphasis than it does presently. Here, again, the approach of the Cartagena Declaration in predicating its descriptive paradigm on the *threat to life, safety or freedom* of those fleeing, is instructive. For its part, the OAU expanded definition is predicated mainly on the compulsion *to leave the place of habitual residence in order to seek refuge*. Ironically, in so doing, it reintroduces the problematic question of motive for flight which it is otherwise credited with having disabused from the refugee definition! In any case, it does not concentrate enough on the aspect of danger to safety, the threat to lives and jeopardy to the human rights of those fleeing, which is and should be the essence of refugee protection whether under the 1951 or 1969 OAU regime.

### 3.4. The bad

79. The preceding section considered the positive and practical effects of the jurisprudence that has congealed around the Convention’s

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<sup>92</sup> Ivor Jackson, *op cit.* note 19 at p 192, “It is also understood from UNHCR officials who were closely associated with the preparatory work for the OAU Refugee Convention that the notion of ‘persecution’ may well have encountered objections in view of its possible political implications”.

definition. In the present section, it is intended to highlight two negative developments for refugee jurisprudence and practice which have resulted from misconstruing the nature and scope of the expanded definition.

### 3.4.1 Misconstruing the expanded definition

80. The first of these goes back to the question concerning the scope of application of the 1951 Convention definition. This was already a subject of contention even before the adoption of the 1969 OAU Convention. However, with its adoption, the more its definition was now pointed to as the unique example of positive law enabling the consideration of victims of war and civil strife as refugees – the so-called “group refugees” – the more it became possible to validate and reinforce the argument that the 1951 Convention did not apply to those categories. Sadly, this *theoretical* interpretation of the 1951 Convention definition in relation to the OAU one, and not the *demonstrated record* of the international community in thus far considering “group refugees” under the legal purview of the 1951 Convention, would also now become the centre-piece of that debate.

81. In a comprehensive review of that record, including the legislative history of the 1951 Convention itself and the practice of the international community, Ivor Jackson has sought to defend the argument that:

“The fact that the 1950/51<sup>93</sup> definitions are “individual” in character does not mean that they are not applicable in group situations and that the fact that they can be so applied was already so recognized in the travaux préparatoires....This needs to be clearly stated since it is nowadays sometimes claimed that the 1950/51 definitions have little relevance to many of today’s refugee problems, precisely because these problems are not of an “individual” but of a “group” character<sup>94</sup>.”

His survey brings him to the conclusion that.

“Very broad criteria have traditionally been adopted when applying the 1950/51 definitions in group situations. The practice is highly relevant for the perception of what is a single comprehensive refugee concept and of its inherent potentiality for application in a wide variety of situations, in which different solutions need to be envisaged....Such solutions should however be sought within the single and comprehensive refugee concept. In view of the danger of the fragmentation and perceived erosion, they

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<sup>93</sup> The reference is to, first, the 1951 Convention definition of a refugee and, secondly, the essentially similar definition contained in the Statute of the Office of the United Nations High Commissioner for Refugees of 1950.

<sup>94</sup> Ivor Jackson, *op cit.*, note 19 at.2.

should not in any way, lead to a redefinition of this concept which has proved to be of major significance in the humanitarian field<sup>95</sup>.”

82. The crux of the matter is that the contraction of the legal scope of application of the 1951 definition concretely means that the doors of safety are slammed in the face of those fleeing palpable and veritable danger to their lives, safety and human rights in general. The denial to them of such protection, and their return to the places they have fled, could result in tragic consequences. It is difficult, in legal terms, to understand why an arbitrary legal classification or interpretation should have preponderance over such clear human rights imperatives. Moreover, even for those already admitted into asylum under some framework of legal tolerance, this same arbitrary legal classification should not be the rationale for their effective imprisonment in a legal limbo, creating uncertainty, despondency and despair. To lean upon and draw from the OAU Convention the theoretical energy for rationalizing these measures is an abuse and misuse of the intentions and purposes from which it arose.

### **3.4.2 The prima facie / group refugee status confusion**

83. The second question also concerns the misconstruction of what actually inheres within the scope of the OAU Convention definition itself. Almost all the quotations cited thus far in this paper in connection with that definition equate it to “group refugees<sup>96</sup>.” The ability to consider entire groups as refugees is also highlighted as one of the features that set that definition apart from the one contained in the 1951 Convention. Because practical considerations often compel the grant of refugee status to groups on the so-called prima facie basis, the latter is also now characterized as one of the unique devices contained within the OAU definition. And, still within the frame of that definition, both concepts, that is, refugee status granted to groups and the prima facie device, are also seen as one and the same thing.

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<sup>95</sup> Ivor Jackson, *op cit.*, note 19 p. 473. With respect to the implications of the analysis in relation to the OAU Convention definition, the author’s conclusion follows the line of argument that:

“There can be no question that the broader refugee concept can have important technical advantages in large-scale influx situations....Resort to the “border” concept however, should not be taken to imply that persons who flee their countries because of foreign aggression, civil war, international strife or general disregard for human rights are not a priori covered by the traditional refugee concept such an assertion would be both factually and legally wrong”.

See Ivor Jackson, “The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection”, Vol. 3 No. 3, *International Journal of Refugee Law*, 403 at p.411 (1991).

<sup>96</sup> See, for instance, *Lawyers for Human Rights*, *op cit.*, note 24.



84. It is in the historical origins of the *prima facie* concept and the circumstances of its use in that context that its equation to group refugee status resides. However, it is argued in this paper this simulation is incorrect and that the OAU Convention in fact deals with neither of the two. Furthermore, the real deficit in refugee law in general, but also in both the 1951 and the OAU Conventions, is that legal standards for both the substance and procedures of the two concepts are quite paltry, and, in terms of positive international law, non-existent. For Africa in particular, this is a crucial question. Legal developments are urgently required.

85. The *prima facie* concept refers to the *provisional* consideration of a person or persons as refugees without the requirement to complete refugee status determination formalities to establish definitively the qualification or not of each individual. Its essential purpose is not directed to the question of refugee status as such. It is, rather, a means to enable urgent measures to be taken under circumstances where the protracted attention which conclusive refugee status determination would otherwise require cannot be afforded. As explained by UNHCR, it is a facility which is particularly useful in cases where it is necessary to provide life-saving measures on an emergency basis:

“While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to provide assistance is extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to the so-called group determination of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee<sup>97</sup>.”

Several factors are lumped together here in such a way that the incorrect simulation as one and the same thing of a legal question (refugee status), a methodology for decision-making (*prima facie*), numeric factors (groups) and the imperative to save lives, is practically impossible to avoid. It is necessary to explain therefore that the *prima facie* concept essentially consists in a *device* for *preliminary* decision-making on what is the *separate* question of refugee status. In particular, it enables an urgent decision to be made in favour of dealing with claimants for protection and assistance under refuge obligations without this being decisive of the question of their refugee status as such. The paragraph cited above implies that numbers are part of the triggering mechanism for *prima facie* refugee status determination. The situation referred to in the paragraph is of course one

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<sup>97</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Re-edited version) Geneva, 1992, paragraph 44, at p.13.

of the most typical examples in which the prima facie methodology will be used. Here, a rapid, mass influx whereby human rights protection and life-saving assistance under a refugee framework are urgently called for is in progress. Be that as it may, the approach can also be used for individual claimants for protection as refugees.

86. Refugee status granted on a prima facie basis remains presumptive although this presumption continues to be enjoyed until there is a specific decision to the contrary. On the other hand, whereas groups can, and are, granted prima facie status, group status as such refers to a legal classification and not to a procedure. The two are not equal to nor legally coterminous with each other. Not only can groups accrue refugee status by other means, status accrued on a group basis can be legally conclusive. The refugee legislation of Zimbabwe is one of the best illustrations of this point<sup>98</sup>.

87. The confusion being cleared here has helped obscure a critical shortcoming in the legal breadth and depth of the OAU Convention, the 1951 Convention and refugee law in general in the context of mass or group flows as far as refugee status determination is concerned. Because of the historical and practical use of the prima facie concept in these type of situations, it has come to be considered as the *quintessential* mechanism for dealing with refugee status in situations of mass influx. Similarly, there is a likewise enduring impression that the OAU Convention definition provides the legal means for, indeed that it is, such a mechanism. The truth is that both these statements are incorrect. The prima facie concept, as we have underlined, is only a device used for a particular set of problems which asylum-seekers can present. Beyond this, it says nothing else about the question of how to *conclusively* determine the status of those claimants. The OAU Convention does not provide for this. Nor does the 1951 Convention. Nor refugee law in general. None of these provide in a systematic and coherent way the standards, operational definitions or mechanisms enabling conclusive determination of refugee status, both inclusion and exclusion, in mass influx cases.

88. It is true of course that refugee status determinations based on the OAU definition could arguably be easier to arrive at in a mass influx or group situation than the comparable case under 1951 Convention. However, and the point cannot be underlined enough, the OAU Convention is itself neither the source nor the authority for either “prima facie” or “group determination” of refugee status. Actually, nowhere in its definition of a refugee or the provisions on asylum are either concepts mentioned in the Convention.

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<sup>98</sup> The Zimbabwe Refugee Act of 1983 provides in 5.3 (2) that :  
 “subject to the provisions of subsection (3), if the Ministers considers that any class of persons are refugees as defined [in the Act] he may declare such persons *to be* refugees” (emphasis added).

89. It has taken the tragedies of the Great Lakes refugee crisis to bring this point home, or at least it is hoped that the lessons have been registered. Because this was an emergency in which numbers were so large and the imperative to save lives so acute, the *prima facie* mechanism was unavoidably reached for. The use of this device thus made it possible for the life-saving measures to go ahead. In reality, the task of *essentially* and *conclusively* determining refugee status as such had not been engaged and still remained outstanding, as indeed it is in every case, individual or group, where this approach is employed. This was not done, and, in the meantime, a situation took root whereby a motley mix of criminals and a defeated political and administrative entity could re-organize and reconstitute themselves in a refugee setting. They would then take hostage innocent refugees, UNHCR itself and the international humanitarian system for purposes of violent political competition with the authorities in the country of origin.

It has been argued that conditions for carrying out any kind of status determination procedure did not exist in that crisis. Indeed, the operational difficulties and challenges of this crisis are impossible to diminish. However, the legal aspect of this question, which is what is pursued here, is different from the empirical constraint. First, and to repeat: Had refugee status as such been rigorously and conclusively dealt with? No. Could the *prima facie* mechanism provide the means to do so? For two reasons, again, no.

90. First of all, while, clearly, there were refugee elements in the exodus, and an urgent imperative to save lives existed, the use of the *prima facie* methodology to enable this latter function *did not* conclusively decide the matter. Secondly, as well as the presence of genuine refugees in the exodus, there was also *clear* evidence that not *all* the group was made up of refugees, in fact it included persons who were excludable. Formulating the question in this manner points up the legal dilemma and gaps in the system. The *prima facie* concept could, at least, provisionally, provide the means to enable the international community to urgently protect and assist under refugee obligations the decisive part of the exodus that was definitely made up of genuine refugees. Yet, what legal standards or devices existed to exclude with the same facility those criminal and other elements who, clearly, should not have been protected and assisted under refugee obligations? None.

91. The deficiency was thus not only a practical one. Refugee law itself, as it stood then and remains today, does not provide a fulsome set of legal notions, standards, and definitions setting up the legal infrastructure for conclusive refugee status determination, one way or the other, in group/influx situations. The *prima facie* approach is a device which enables the performance of certain emergency tasks. It attributes a provisional status but is itself not a conclusive process of refugee status determination. It does not really speak as such to the question of definitive refugee status. Persons assisted under a *prima facie* framework still await

the conclusive determination of their refugee status no less than an asylum-seeker awaiting adjudication before a tribunal. However, the predictability which exists in the latter case in terms of procedures, methodologies and legal standards does not exist at all in international refugee law for purposes of the conclusive determination of refugee status for groups. This includes both the OAU and the 1951 Conventions.

92. At a minimum, Africa can expect to continue to be faced with mass influxes. At worst, more of the mixed and intractable flows such as that which unfolded out of the genocide in Rwanda could occur. The OAU Convention remains as unequipped now as it was at the time of its adoption in providing the legal framework for refugee status determination in these kind of situations. Where an influx points to criminality and therefore exclusion, the problem can be viewed even more clearly and acutely. This question needs to be addressed urgently. Measures which were elaborated for the dealing in practical terms with these problems in the Great Lakes crisis, such as the now well-known concept of separation, may provide some useful guide for the ground work and concepts necessary in developing the legal standards required. For Africa's purposes, the context for these developments should, once again, be that of the OAU Convention.

#### **PART 4: VOLUNTARY REPATRIATION**

93. The OAU Convention is credited with having been the first international instrument to codify in treaty terms the principles on the voluntary repatriation of refugees. The relevant provisions are contained in Article V which states that:

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 the country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland as a result of such assurance or their own initiative shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and inter-governmental organizations to facilitate their return.

94. The provision clusters together an amazing array of issues. As with the provisions on asylum and the prohibition of subversion, the complexion of those on repatriation hints at the pre-occupation with friendly relations and especially political and security predictability among the States concerned by the refugee caseload in question. The article also evinces the accent which both the Summit of Heads of State and the Council of Ministers had been placing on voluntary repatriation as the best solution for Africa's refugee problems<sup>99</sup>.

95. The provisions of the Convention have since been developed considerably in part within the OAU context and otherwise in other fora whose effects are however registered as well in Africa. Within the OAU decision-making structures itself, developments are limited, the single most notable exception being a 1975 resolution on repatriation<sup>100</sup>. This little-remarked document is, however, important in that it touches upon a number of legal and practical matters not otherwise covered in the Convention itself but which have significant importance in the context of repatriation. Among these are modalities for the implementation of repatriation, the facilitation of refugees' ability to return home with their property and savings and the right of return in the case of mixed marriages. The resolution was clearly intended to elaborate and enhance the involvement of the liberation movements recognized at the time by the OAU in the "repatriation of their compatriots". It may, however, have some demonstration value with regard to the question raised further below concerning the role in repatriation operations today of so-called non-State Entities (NSEs).

96. It is out of the Executive Committee of UNHCR that the most decisive and important enhancements of voluntary repatriation policy and soft law have emanated<sup>101</sup>. These developments themselves have in no small part been inspired by those which have taken place in Africa. Equally important, are the "memoranda of understanding" UNHCR invariably concludes with the concerned countries for its organized repatriation operations.

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<sup>99</sup> One of the functions of the OAU Commission on Refugees when initially established was to "help the countries of origin and the host countries to devise ways and means for the return of the refugees to the country of origin in complete security". See CM/Res. Resolution on the Problem of Refugees in Africa, op cit. note 79.

<sup>100</sup> CM/Res. 399 (XXIV), *Resolution on Voluntary Repatriation of African Refugees*, Twenty Fourth Ordinary Session in Addis Ababa, Ethiopia, from 13 to 21 February 1975.

<sup>101</sup> Most notably Conclusion No. 18 (XXXI), *Voluntary Repatriation*, (31st Session, 1980) and Conclusion No. 40 (XXXVI), *Voluntary Repatriation*, (36th Session, 1985).

97. These agreements have instrumental in the affirmation of principles now essentially regarded as peremptory in the repatriation context. Among these, is the question of amnesties or assurances for the return of refugees in safety, UNHCR's right of access to returnees to monitor the consequences of return, modalities for collaboration in organizing and implementing repatriation and the facilitation of cross-border formalities.

98. The legal novelties and innovations reflected in some of these agreements have been quite far-reaching. The most notable in this respect have been the respective agreements for the repatriation of Namibian refugees in 1989 and 1990, South African refugees between 1991 and 1993 and Mozambican refugees between 1992 and 1994. It is a matter to be regretted that these and other such precedents have thus far not been systematically collected and likewise made publicly available for research, or analyzed for their law-making and enhancing effects in the repatriation field. This, clearly, is a project to be commended for consideration by both UNHCR and the OAU.

99. Agreements concluded as the basis for the cessation of civil conflicts or political settlements, for instance in Mozambique, Liberia and Rwanda have also contributed to the evolutionary process. Some of these have also gone quite far in the breadth and depth of issues they have disposed of and therefore also have considerable precedent-setting and law-developing potential for repatriation practice and law. One of the more notable ones in this respect remains the protocol for the repatriation of Rwandese refugees elaborated as part of the Arusha peace process<sup>102</sup> but which was overtaken by events before coming into operation. The recommendation proposed earlier should include the systematic collection and study of these agreements as well.

100. For sure, the provisions of the OAU Convention and indeed of repatriation law in general have and continue to face major challenges in Africa. Whether or not refugees have repatriated voluntarily is a question which has dogged many of the major movements that have taken place in Africa during the lifetime of the Convention so far. The point concerns direct compulsion as well as situations where more diffuse social, political and economic pressures are at play. Problems of security for returning refugees have also been central in some of the repatriations<sup>103</sup>. Many of these situations, however, involve difficulties in the implementation of

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<sup>102</sup> *Protocol Agreement Between the Government of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons*, Done at Arusha, Tanzania, on 9 June 1993.

<sup>103</sup> For readings on these questions in the context of Africa, see Fred Cuny and Barry Stein "Prospects for and Promotion of Spontaneous Repatriation" in Gil Loescher, op cit., note 88, p.293; Jeff Crisp, "Voluntary Repatriation Programmes for African Refugees: A critical Examination", Vol. 1, No. 2, *Refugee Issues* (1985) and, by the same author, "Refugee Repatriation: New Pressures and Problems", Vol. 14, No. 5, *Migration World*. (1985).

standards that are themselves well established. The rest of this section of the paper thus wishes to concentrate on the cases where even the standards themselves are uncertain.

101. One of these arises out of the fact that the Convention clearly envisages mainly organized repatriations, that is, when refugees “return under the terms of a plan worked out well in advance and has the support of both the home and asylum governments as well as that of UNHCR and the refugees themselves<sup>104</sup>.” Such plans will normally include formal written agreements of the type discussed earlier. Yet, as UNHCR and others have pointed out:

“The great majority of refugees who return to their home do so on their own initiative, rather than by agreeing to join a formal repatriation plan devised under international auspices after a ‘fundamental change of the circumstances’ had made possible a return ‘in safety and dignity’<sup>105</sup>.”

The example is given that, of the estimated 2.4 million refugees who repatriated in 1992, around 1.7 million did so spontaneously<sup>106</sup>. Moreover, even within the womb of organized repatriations, the general tendency is that most refugees will still repatriate by themselves. On this basis, some scholars seem to go so far as practically to repudiate the relevance of any formula for a structured repatriation regime, for instance the argument by Barry Stein and Fred Cuny that

“The refugees are the main actors in the contemporary practice of voluntary repatriation. They are the main decision-makers and participate in determining the modalities of movement and the condition of reception. Refugee-induced repatriation is a self-regulating process on the refugees’ own terms. The refugees apply their own criteria to their situation in exile and to conditions in their homeland and will return home if it is safe and better by their standards<sup>107</sup>.”

101. This view at one and the same time over-states and understates the dynamics of what can be quite a complex process. It is not in all cases that refugees “vote with their feet” as a result of considered and delibera-

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<sup>104</sup> See UNHCR, *The State of the World's Refugees: The Challenge of Protection*, Penguin Books, Middlesex, 1993, p. 106.

<sup>105</sup> *Ibid.*, p. 107.

<sup>106</sup> *Ibid.* Writing in 1992, Fred C. Cuny, Barry N. Stein and Pat Reed (eds.) *Repatriation During Conflict in Africa and Asia*, Centre for the Study of Societies in Crisis, Texas, 1992, would say that

“Since 1957, almost 7 million refugees have returned home. Although the figures and totals are suspect, they reveal a pattern: of the millions of returnees, over ninety per cent returned in an organized or irregular fashion, without significant assistance”.

<sup>107</sup> Barry Stein and Fred C. Cuny, “Repatriation in a Civil War/Conflict Situation”, paper presented at the Round Table Consultation on Voluntary Repatriation and UNHCR, Geneva, Switzerland, 2 to 3 June 1992, p. 3.

tive decision-making. Spontaneous repatriation is often the consequence of diffuse push and pull factors and under-currents which themselves might not be so obvious. In any case, as far as international protection aspects are concerned, the question is really rather how refugees who repatriate spontaneously are to be guaranteed the rights and protections which repatriation law otherwise secures. For instance, how is the responsibility of the Government in the home country to ensure the conditions for safe return to be actualized and ensured in these cases? How is return to monitored where, for instance, UNHCR, any other organization or even the Government itself do not have presence in the areas of return?

102. The other point is that, within the set-up of the provisions of the Convention, refugees are configured principally as *subjects* of a repatriation framework being established for them by State and international actors but in the construction of which they themselves play no major part. We, however, see today many politically-charged and protracted situations where it is apparent that the return of refugees will require more than just the actions of States alone in making “adequate arrangements for the safe return of those who request repatriation.” A role must be provided for ‘ordinary refugees’ to be the architects of their own destiny not just in terms of the technical aspects of the repatriation, but above all in reference to the political issues.

103. The thinking being explored here, and which has provided the framework for some of the repatriations in Latin America, owes a lot to a recent study by J-F Durieux on Burundese refugees in the Kigoma region of Tanzania in which he demonstrates that “refugee meetings centred around ‘peace’ issues” should “not be considered as prohibited activities”. In the particular case examined in the study, there was now both a challenge and a need to organize “a veritable dialogue on peace among the refugees with structural links to both the internal and external peace processes<sup>108</sup>.” Difficult and sensitive as these questions and proposals are, they clearly are among those which must be considered in enhancing the repatriation framework of the Convention in the context of current and indeed future realities.

104. The provisions of the 1969 OAU Convention also rest on the assumption that the conditions for return in safety would exist already, therefore they focus primarily on the legal organization and conditions for the return itself. Yet, what are the optimal conditions for the promotion of repatriation, and even how to determine their existence, is one of the most central and intractable questions confronted in cases where repatriation is to be encouraged. In a biting criticism of the approach set out in UNHCR’s handbook on voluntary repatriation, Saul Takayahashi has argued in

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<sup>108</sup> Jean François Durieux, “Preserving the Civilian Character of Refugee Camps: Lessons from the Kigoma Refugee Programme in Tanzania” unpublished monograph, UNHCR, Geneva, 1999.



favour of a standard in which repatriation itself is only a secondary consequence of an “objective and impartial assessment based on human rights assessment and an authoritative decision that conditions are safe<sup>109</sup>.” According to him,

“for voluntary repatriation to be promoted, there must be a change of circumstances in the country of origin at such a level as would justify the application of the cessation clause<sup>110</sup>.”

Especially in view of the attraction which is being shown today for so-called induced returns<sup>111</sup>, it is indeed essential that any further elaboration of the Convention's standards should take account of this human rights perspective and ensure that there is no dropping below the protection thresholds established by the elements of volition and safety. At the same time, the processual questions which Takayahashi otherwise does not deal with would also have to be addressed: Who will make the assessments? How? By what criteria? How are impartiality, independence and objectivity to be guaranteed?

105. The essential critique in the paper under reference concerns refugees who are forced home against their will or to conditions where danger might still lurk. The former is usually not the question on which *conceptual* difficulties will abound. Or, to put it differently, instances where force is used to effect return amount to refoulement, are usually evident as such and UNHCR should be able to react to them in those terms. Moreover, if other considerations force refugees to return to their country, as when Ethiopian refugees were displaced back home from Somalia by the civil wars, or the “redirection” of Rwandese refugees by the Tanzanian authorities, UNHCR involvement in those cases, if decided upon at all, would also not be on the pretence that the movements have been voluntary.

106. It is the “grey area” cases, i.e. whether conditions are optimal, which are more usually the cause of the greatest difficulty. In these instances, repatriation is being, and in some cases *has to be*, promoted not because there has been a fundamental change, but because *opportunities* exist advantage of which must be taken to engineer a solution under accepted standards. The repatriations in which UNHCR is obliged to become involved following an overall political settlement bear mention. In these instances, it is clear that, at the material time, the conditions of total and irreversible safety implied in Takayahashi's argument do not

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<sup>109</sup> Saul Takahashi, “The UNHCR Handbook on Voluntary Repatriation”, Vol. 9, No. 4, *International Journal of Refugee Law*, 593 (1997)

<sup>110</sup> *Ibid.*, at p. 602.

<sup>111</sup> See, for a good discussion of the “meaning” of the words and concepts used in refugee repatriation, B. S. Chimni, “The meaning of Words and the Role of UNHCR in Voluntary Repatriation”, Vol. 5, No. 3, *International Journal of Refugee Law*, 442 (1993).

exist. Instead, the repatriation itself is conceived and planned as part of the process of creating those conditions, the so-called reconciliation cases<sup>112</sup>. This was the case in the repatriations to Namibia, South Africa and Mozambique. Obviously, in structuring the legal and operational framework of the repatriation, UNHCR would insist on, above all, the established protection standards. However, it could not be possible to promote repatriation in such cases if it should take place “only after” safety has been verified sufficient for the cessation of refugee status.

107. The last issue arises out of those situations where repatriation will not be possible without provision being allowed for the participation of what are referred to as non-State entities, that is, organizations locked in conflict and extra-constitutional competition for power with the official Government. Some of the largest repatriations on the Continent have even been essentially implemented by these entities, but with UNHCR not able to participate in or influence them because of political sensitivities. Thus, in the massive repatriation of Ethiopians from the Sudan carried out between 1985 and 1987 by one such entity, the Tigrayan People’s Liberation Front, political considerations would force UNHCR not to participate and “instead to focus on its protection role in the country of asylum<sup>113</sup>.”

108. Of course, where the parties themselves have come to the negotiation table and arrive at a comprehensive framework for a settlement, the environment might also be created for the predictable participation of the NSE in the process and for all the relationships implied. However, there remain situations where generally applicable humanitarian principles and standards allowing for some form of engagement with the NSE in general terms is what is required. When the UNHCR Executive Committee’s Conclusion No 40 on voluntary repatriation was being negotiated, the inclusion of a proposal to this effect was defeated. There is, of course, awareness that this is eminently quite a sensitive political matter. However, there will be a lot to be gained in the African context by generating some forward movement on this question in terms of general humanitarian principles and standards. The receptable for these efforts again should be the OAU Convention.

## **PART 5: THE PROHIBITION OF SUBVERSIVE ACTIVITIES**

109. Even before the OAU was established in 1963, the newly independent African States were already being exercised by the question of subversion. The pre-occupation was, on the one hand, with the more classical, international relations version of the problem, that is,

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<sup>112</sup> See UNHCR, *The State of the World’s Refugees: In search of Solutions*, OUP, New York, 1995, pp. 106-107

<sup>113</sup> See Barbara Hendrie, “The Tigrayan Refugee Repatriation: Sudan to Ethiopia 1985-87” in Fred Cuny et al, *op cit.* note 106 at p 15. See also discussion of this problem by B. S Chimni, *op cit.* note 111.

“The overthrow of the legal, political and social order of the state which another state attempts or achieves by propagating its ideology amongst the political forces of the state which is the target of this undertaking. It converts those forces to its ideology by supporting them in their efforts to capture power<sup>114</sup>

On the other hand, activities evidently already being carried out by refugees and exiles were also attracting the concern of States within the frame of the problem. Little surprise then that when established, the cornerstone principles of the OAU would include “non-interference in the internal affairs of States”, “respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence” and “unreserved condemnation of...subversive activities on the part of neighbouring states or any other states<sup>115</sup>.” Both aspects of the problem would also be among the very first with which the OAU’s highest political and executive organ, the Summit of Heads of State and Government, would seize itself. In only its second ordinary session, the Summit produced, first, a declaration dealing with the problem of subversion in the context of regional and international relations<sup>116</sup> and then another focussing more particularly on the problem in the context of asylum and activities by refugees<sup>117</sup>. The parts of the declaration which have a general or direct bearing to refugees deserve to be set out in full:

3. To oppose collectively and firmly by every means at our disposal every form of subversion conceived, organized or financed by foreign powers against Africa, OAU or its Member States individually.
- 4 (b) To refrain from conducting any press or radio campaigns against any member States of the Organization of African Unity and to resort instead to the procedure laid down in the Charter and Protocol on Mediation, Conciliation and Arbitration of the Organization of Africa Unity.
6. To observe strictly the principles of international law with regard to all political refugees who are nationals of any Member States of the Organization of African Unity.
7. To endeavour to promote through bilateral and multilateral consultations, the return of refugees to their countries of origin with the consent of both the refugees concerned and their governments.

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<sup>114</sup> Cited in Etienne-R Mbaya, “Political Asylum in the Charter of the OAU: Pretensions and Reality”, Vol. 35, *Law and State*, 63 at pp. 74-75.

<sup>115</sup> Article III sub-articles (2), (3) and (5) of the Charter of the Organization of African Unity, 25 May 1963.

<sup>116</sup> Assembly of Heads of State and Government, *Declaration on the Problem of Subversion*, AHG/Res.27 (II), Second Ordinary Session, Accra, Ghana, 21 and 25 October 1965.

<sup>117</sup> *Resolution on the Problem of Refugees in Africa*, AHG/Res. 26 (II).

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

110. The resolution on refugees recalled the pledge by Member States “to prevent refugees living on their territories from carrying out by any means whatsoever any acts harmful to the interest of other States Members of the Organization of African Unity” and requested “all Member States never to allow the refugee question to become the source of dispute among them.” By the time of this meeting of the Summit, the Council of Ministers had the previous year established a commission on refugees which was later to be instructed to “draw up a draft Convention covering all aspects of the problem of refugees in Africa<sup>118</sup>.” Those instructions, however, did not as such spell out any specific matters which should be covered in the drafting of the Convention. A particular one was now to be indicated by the Summit, which instructed the Commission “to re-examine the draft OAU Convention on the status of refugees having regard to the views expressed by the Assembly at its present session,” that is, the question of subversion<sup>119</sup>.

111. The obligation to deter subversive activities in a refugee context in independent African countries would thereafter continue to be reiterated in several resolutions of the OAU along the lines of the above language<sup>120</sup>. There could therefore again be no surprise to find that when the OAU Convention was adopted in 1969, it figured in its provisions on what had after all been one of the organization’s most serious pre-occupations in the refugee context. As it stands now in Article III of the Convention, the prohibition of subversive activities is couched as follows:

- “1. Every refugee has duties to the country in which he finds himself which require in particular that he conforms with its law and regulations as well as with measures for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press or by radio.”

The prohibition of subversive activities does not stand alone in the Convention. Several other provisions including a number in the preamble buttress it directly and indirectly. One of these speaks of the “need for the

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<sup>118</sup> CM/Res. 36 (III), *Resolution on the Problem of Refugees in Africa*, Third Ordinary Session meeting in Cairo from 13 to 17 July 194, paragraph 6.

<sup>119</sup> Op cit. note 117.

<sup>120</sup> For instance, at its Ninth Ordinary Session in Kinshasa, the Council of Ministers was “anxious that the refugee problem should not be a friction between States”. See CM/Res 104 (IX) *Resolution on the Problem of Refugees in Africa*.

essentially humanitarian approach towards solving refugee problems". In another, the Heads of State and Government express their *anxiety* "to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside". There is also the determination that "such subversive activities should be discouraged". The exclusion clause contained in Article I (5) (c) for committing "acts contrary to the purposes and principles of the Organization of African Unity" also has a bearing to the matter. So also is the stipulation in Article I (6) according to which "for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin".

112. Speaking generally, the prohibition of subversive activities and the obligations reflected here are in fact not unique to Africa and conform to the general principles of international law, for instance as set out in the Declaration on General Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations<sup>121</sup>. Indeed, two years before the adoption of the Convention, the Declaration on Territorial Asylum adopted by the United Nations General Assembly had stipulated that

"States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations<sup>122</sup>."

However, the matter is by no means all that straightforward. After all, international law also reflects the position that

"Not every action considered hostile by a state of origin injures its sovereign interests. Exile political organizations, for example, are essentially a manifestation of the exercise of basic human rights. International law grants an asylum state substantial discretion to limit the political freedoms allowed to foreign nationals, but permitting their exercise gives the state of origin no legitimate cause for complaint<sup>123</sup>."

113. Therefore, even among those who otherwise accept the rationale of the prohibitions, some have questioned the expression "any other activity likely to cause tension between Member States" as being too wide<sup>124</sup>. Others have contended that the prohibition of activities through the press and the radio might infringe freedoms protected under the Universal Declaration of Human Rights<sup>125</sup>. In fact, the Convention's prohibition of sub-

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<sup>121</sup> G.A.Res.2625, 25 UN.GAOR Supp (No. 28)121 (UN Doc A/8028 (1970).

<sup>122</sup> UNGA res.2312 (XXII) Art 4.

<sup>123</sup> Steven Corliss, "Asylum State Responsibility for the Hostile Acts of Foreign Exiles", Vol. 2, No. 2 *International Journal of Refugee Law*, 181 (1990).

<sup>124</sup> See Rainer Hofman, *op cit.*, note 33 at p. 85.

<sup>125</sup> See for instance Peter Noble *op cit.*, note 41 at p. 267.

versive activities has attracted far more vicious and rounded criticism than this. One of the most brutal has come from Etienne-R Mbaya who, following an ideologically-loaded analysis of the relevant provisions concludes:

“When we realize that for the OAU Convention a subversive activity consists of any action which ‘is such as to cause tension between the member states and particularly through the use of armed force, the press and broadcasts’, we can more fully appreciate the extent of the danger such cases threaten a subversive refugee who is guilty or remaining interested in his country’s political problems. To accept such a situation without reacting to it is tantamount to ensuring that the African refugee is considered as a subhuman species<sup>126</sup>.”

The one-time Head of the OAU’s Bureau for Refugees has articulated essentially the same sentiment:

“By implication, while refugees are allowed to stay in exile until the circumstances that drove them out their country change, they are not allowed by work or deed to help bring about the desired political change. Put more simply, the refugees’ stay in a member state that offered them asylum is contingent upon their passivity and silence, even though the motive behind their flight might have been the search for freedom of expression as well as the right to development<sup>127</sup>.”

114. Many of the discussions around these provisions concentrate on what, exactly, is comprised in the prohibitions, the imprecision in language and so forth. The study by the Lawyer’s Committee for Human Rights referred to earlier goes much further and in more detail than most in this regard, and is more forthright in its condemnation of the prohibition for, according to the Committee, violating freedoms protected in human rights law and particularly the International Covenant on Civil and Political Rights<sup>128</sup>. At the same time, the study concentrates on the consequences of the prohibition, as well as the inconsistent behaviour of states in discouraging their obligations under this provisions, the Committee’s point being that:

“...what is most striking is the double standard operated by Governments everywhere. Whether or not a host government restricts the political activities of refugees depends almost entirely on its own alignments and preferences<sup>129</sup>.”

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<sup>126</sup> Etienne-R Mbaya, op cit. note 114, at pp. 76-77.

<sup>127</sup> Chris J. Bakwesega, “Forced Migration in Africa and the OAU Convention” in Howard Adelman and John Sorenson, *African Refugees: Development Aid and Repatriation*, Westview/York Lanes Press, 1994, 3 at p.11.

<sup>128</sup> Op cit., note 24, at pp. 92 to 96.

<sup>129</sup> Ibid, at p. 94.

115. With due respect, some of these criticisms simultaneously overstate their case while at the same time diminishing the seriousness of the devastation that can be visited upon an entire refugee situation once politicization and militarisation are allowed to take root. Evidently, the situation which unfolded in the eastern Zaïre camps is an extreme example. However, for precisely that reason, it provides an unparalleled lesson as to what this is all about. Moreover, it should also be obvious that the pre-occupations are not over the natural, relatively benign oracular interest in the affairs of their country of origin that refugees would find impossible to disabuse themselves of. "Political activities" of this type go on in exile all the time, the intention not necessarily being the disruption of the international relations or security priorities of the countries concerned. Although, of course, states will indeed often object, situations where rhetorical reasons are at the root of the dissatisfaction will normally be easy to detect.

116. We earlier suggested, and the point may now be reinforced, paradigm reforms to construct a threshold of, for lack of a better word, "permissible political behaviour" by refugees. The idea is that such activities would be acknowledged by all concerned as comprising a legitimate, proper and even beneficial exercise of their democratic freedoms by refugees. Accordingly, they would not be considered as inviting objections in the context of subversion. Moreover, their value in the drive towards the solution of the refugee problem itself could also then be explored. Obviously, this would still remain a potentially sensitive and controversial matter. Therefore, in the interest of the greatest degree of predictability possible, and here the concerns by the Lawyer's Committee are well placed, the so-called permissible activities would have to be defined in the clearest manner possible.

117. Activities which truly pose genuine threats to the security of states are, it is argued, relatively easy to spot, indeed the key players in their perpetration usually themselves vouchsafe the intent precisely to disrupt the status quo. They are of both a political and military nature but can also take other forms, including the diplomatic. In relation to such activities taking place in a refugee context, the position of this paper is forthright and unambiguous. They cannot and should not be allowed to take place under any circumstances. To do otherwise is the surest route to shutting down, ultimately, the humanitarian asylum and refugee protection regime. Irrespective of how just the extra-constitutional political and military resistance activities might be, they cannot and should not be permissible in a refugee context, that is, either in the physical refugee milieu as such, or through the use of refugee status and the protections it provides.

118. Focussing therefore on the protection interests of the refugees, and not only the priorities of States (which is the principal rationale of the prohibition as it stands now), we have little hesitation in supporting the maintenance of the prohibition of what are referred to presently as subversive activities. We, however, argue that some refinements are necessary if the refugee-centred purposes just mentioned are also to be realized. Four main points are highlighted in this connection.

119. First of all, in order to make the matter as clear as possible, the law and jurisprudence on this subject should include a clearer and more ample definition of the activities considered as prohibited in this context. Secondly, another concept should be employed as the basis for reconstructing the prohibition than the notion of "subversion". If it is considered to be important and necessary to highlight the question of State security, a much broader set of concerns in this area can still be addressed by taking recourse instead to the notion of perfidy. The concept is well known and understood in international law, and is the subject of rules and principles which can avail even better in meeting the concerns of States. The point is that whereas thirty years ago it was necessary to anchor African refugee law in the context of security and international relations, the time has come now for the opposite maneuver, namely to anchor the political and security elements more firmly in law. The principle of perfidy provides the means to do this even better as far as state security priorities are concerned.

120. Thirdly, given that the provisions of the 1969 OAU Convention would have sought to have deterrent effect on subversive activities, the fact that they did not spell out a sanctions regime for the breach of Article III must be pointed to as shortcoming. This, too, is a question to be addressed in the law reform being urged in this paper. However, in saying this, two other important aspects of the *scheme* of the Convention's provisions on subversive activities can be examined further. First of all, where the activities of refugees or foreigners rise to the level where they represent a real, genuine threat to the security of another state, for instance because these persons are waging war, there will usually be a significant involvement of another state either in facilitating the exiles or even using them directly as instruments. In this context, it is the actions or omissions of the instrumentalising state which should be the pivotal focus of the concern by the affected state and therefore of the regulatory regime. And no matter that refugees may be the instruments of the activities, in essence this would not be a refugee crisis, but one of regional and international peace and security.

121. This means that it is regional and international organs and instruments relating to international relations and particularly regional peace and security, and not primarily those dealing with refugees, which should be at the centre of that crisis. The fact that, in the Great Lakes crisis, refugee humanitarian policy, institutions and instruments were forced to be the *only* response to what was an acute and unremitting crisis of regional security (although occurring in a refugee context) must be one of the core reasons for the grim events which came to unfold. The consequence of all this is that the reforms necessary to deal more roundly with the problem of subversion in a refugee theatre do not consist in only the reform and expansion of refugee law, its institutions and instruments. Of equal, if not more importance, a linkage has to be made with the machinery of international peace and security, and its primacy underlined, for those situations, such as in the Great Lakes, where a refugee setting becomes the captive of forces themselves not of a refugee nature.



122. The fourth point flows from the previous one. In law and policy, persons who engage in the kind of activities being discussed here cannot and should not be dealt with at all under refugee obligations and facilities. In other words, any person or persons minded to pursue extra-constitutional competition for power with the Government of his or her country of origin should not be admitted into the status and facilities of refuge to start with. This is not a question of the justness or not of the cause which they may pursue. It is a point of law and policy and one upon which, this paper echoes, must be insisted upon. The point being made here thus links directly with the one argued already about the necessity to complexify the refugee status procedures, particularly those which will ensure that persons bent on political resistance, including the prospect of military activities, are not submitted into the refugee regime.

123. Nothing said here implies that activities for purposes of resistance and, in that context, the opportunity for States to transact foreign policy and international relations through supporting resistance groups, are criminalised in absolute terms. On the other hand, whatever activities may be permissible should absolutely not be so permitted within the legal and physical infrastructure and framework of the humanitarian institution of refugee asylum. The opposite of this point means that any activities that are permitted, whether as a matter of law or of the foreign policy choices of the hosting country, would have to take place in a different legal and international relations construct. This is also the answer to those who argue on behalf of the right of exiles to pursue resistance against the government which after all is the one that forced them into exile.

124. This new model would thus enable the question of refugee security and safety not directly or implicitly linked or related to resistance and extra-constitutional political competition between exiles and the country of origin to receive the focus that they have so far been denied for being subsumed under the language of subversion. Whereas resistance (subversion) will now be in a separate, non-refugee framework in respect of which the institutions and instruments of international relations and security will be at the centre, safety and security in a refugee context will be located in municipal law and the domestic instruments for law and order and penal enforcement. This separation, we argue will ensure that the personal safety and security of refugees will be better understood and addressed.

## **PART 6: THE QUESTION OF INTERNALLY DISPLACED PERSONS**

125. The question of internally displaced persons (IDPs) is obviously too large and complex to allow a fulsome discussion within the scope of this paper. The particular point of interest here is much more narrowly focussed on the criticism that has been leveled at the OAU Convention for not providing for IDPs within its scope of application. The criticism usually rests on interposing an essential similarity between refugees and internally displaced persons in relation to the factors of displacement, the needs for legal

protection and material assistance and the imperative ultimately to find a solution. Furthermore, these factors are then assigned by far the greater importance so that the “mere fact” that these “de facto refugees” have not crossed an international border ceases to be a veritable factor in stemming the criticism. Oloka-Onyango, one among the critiques thus says:

“African refugee law has nothing to say about this situation, the closest phrase being in Article 1 of the OAU Convention, namely ‘...events seriously disturbing public order...’ However, because such persons are not forced to ‘seek refuge in another place outside (their) country of origin’ they do not qualify for the OAU Convention description of the term “refugee” despite the fact that the UNHCR has (through its good offices’ mandate) endeavoured to assist in any way possible. A necessity exists to provide a protection mechanism enshrined in law, to assist such internally displaced refugees in any way possible, even while clearly recognizing the political problems thereby entailed<sup>130</sup>.”

126. With the work that has been carried out under the auspices of the Special Representative of the Secretary-General on Internally Displaced Persons, considerable predictability has now been brought to at least the legal standards covering the plight of IDPs. Even so, it is submitted that the tendency to proximate IDPs to refugees comes more out of an ethical reaction to an institutional problem, than any inherent conceptual or situational similarity the two may share. As is known, within the international humanitarian machinery, no single agency has been entrusted on a standing basis with the mandate specifically for IDPs. Against the background of the acute suffering to which IDPs get exposed, the very real and concrete problem of an agency to urgently provide for them has been a key factor in driving the legal and institutional arrangements that need to be established. This imperative continues even today, as witnessed in the recent debates in the Security Council on the plight of Angolan IDPs.

127. However, for purposes of elaborating Africa’s structured and standing regulatory framework, the standpoint of this paper is that the two matters should in principle be kept separate. At least, the presumed approximation between the two should not be established a priori as the

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<sup>130</sup> Joe Oloka Onyango, “Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty years after Geneva”, Vol. 3, No. 3. *International Journal of Refugee Law*, 453 at p 457. Bakwesega, op cit., note 127 also says at p.8:

“This definition implies that ‘refugeeism’ has a geography; people are recognized as refugees *only after* they have crossed national borders. Yet, civil war, domestic tension or natural disasters have caused thousands of people to flee their homes to other areas within their national borders. Although still within their countries of origin, they are nonetheless in *refugee-like situations* and, therefore, deserve the minimum standards of treatment prescribed in the 1969 OAU Convention” (all emphasis original).

starting point of the process but, rather, should be one of the issues to be *investigated and conclusions arrived at scientifically and meritoriously*. While, without a doubt, there are shared features and characteristics, there is also perhaps too easy a tendency to assume that the discourse is about essentially one and the same thing. In reality, in conceptual, regulatory and operational terms, in order to engineer the necessary solutions, the two might be found to lend themselves to fundamentally different regimes and applications. Therefore, there is no support found in this paper for the proposition that IDPs implicitly figure as a key challenge facing the OAU Convention in the next millennium and that, therefore the legal reforms envisaged for the Convention in that context must necessarily include IDPs.

## **PART 7: CONCLUSION**

128. We have sought to prod the specific effects of the 1969 OAU Convention in its thirty years so far within the prism of refugee jurisprudence. The survey shows that the Convention indeed brought about novel concepts the effects of which have been registered both in Africa and elsewhere. On the legal level, the most important of these, respectively, are the influences on domestic refugee law and the migration of the expanded definition to other regions. Yet, it is also seen that the Convention primarily was a legal vessel designed to secure priorities which were eminently political and not mainly legal. At the time the Convention was being designed, the destabilizing effects of the politicization of the asylum and refugee regime were evident already and threatening its coherence. Thus, granted that the Convention engineered novel concepts in the legal sphere, its most important and enduring contribution was in the stability, coherence and predictability it invested upon the refugee regime in Africa at the political level.

129. The analysis shows that in the period since its adoption, something in the nature of stagnation has come to characterize the legal aspects of the Convention, including in that a strong record of states taking recourse to the instrument is difficult to demonstrate. Yet, even in this period, it has continued to be an important pillar and anchor for the asylum regime in that it came to exercise what can be referred to as a rhetorical, subliminal impact, again mainly at the political level. The point being asserted is that by just being there, as Africa's own home-grown regional instrument, it was able to restrain the strong under-currents which even today continue to work against the sustainability of positive asylum policies and practices in Africa as a whole. This is the point which has been put elsewhere as follows:

“Not surprisingly, there has been strong impetus in some African countries to emulate [the restrictive approach being pursued in other regions]. Instances in which borders were closed in the face of refugees fleeing real danger have already been witnessed.

Mistreatment of refugees and asylum-seekers as deliberate State policy has also taken place. On the whole however, the negative creep has been relatively contained. The moral effect of the Convention in Africa itself has a lot to do with the restraint. The fact that the Convention is so highly regarded particularly among its African stakeholders has definitely encouraged political adherence to its principles. Indeed, had there been no OAU Convention in Africa when the more restrictive tendencies emerged the whole system of asylum and refugee protection would by now have collapsed<sup>131</sup>.”

130. The future facing the Convention is one in which no respite is seen in the refugee problem, yet refugees will be facing an environment far more unfriendly than before. The features of that problematic are also far more complex, including security problems. Moreover, if the paper has portrayed the impression that the theatre for refugee action in Africa has thus far consisted essentially of politics and policy, it is just as clear that Africa as a whole is increasingly moving towards laws, legality and indeed even judicature as the mediator of relations, interests, rights and obligations. The forecast then is that refugee action will in the future more and more have to rely on its legal instruments.

131. The Convention is part of this architecture, nay, it is its central piece at the continental level. Whereas, thirty years ago, even as a legal instrument it was mainly part of the brick work of the political framework of the refugee regime, today it is in a reversed position where the greatest value sought from it is legal. Looking at the Convention in a setting of strident legalism, the inquiry has shown the need for it to move more decidedly in the direction of reform. For the truth is that, for all its strengths, at thirty now, it also shows where it is patchy and dry. Its shortcomings at birth have combined with new requirements arising out of the changed and changing nature of the refugee problem in Africa and globally for a picture of an instrument that needs to be reconstructed. Similarly, we see also the necessity to re-invigorate the institutional apparatus for the oversight, monitoring and renewal of the Convention and the paper has lanced a challenge to the OAU accordingly.

132. Change creates uncertainty and produces the impetus to cling to the known certainties, no matter the shortfalls which that may represent. Yet, for the sake of Africa's refugees, it is necessary that the repair work and renovation which the Convention requires should start at least to be conceptualized. This paper will have achieved its purpose if it at least contributes to the thinking which must start accordingly.

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<sup>131</sup> George Okoth-Obbo, “Thirty years of the OAU Refugee Convention: Achievements, Prospects and Challenges” in UNHCR Regional Directorate for Southern Africa, *Southern African Refugee File-Special Edition on the 30th Anniversary of the OAU Refugee Convention*, July-September 1999, p.3 at pp. 3-4.