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ASYLUM AND VOLUNTARY
REPATRIATION APPLIED TO THE SUB-
SAHARAN AFRICAN LEGAL CONTEXT:
ARE THEY TWO VIABLE SOLUTIONS FOR
REFUGEES?,"

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AFRICAN LEGAL CONTEXT: ARE THEY TWO VIABLE SOLUTIONS FOR
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General Introduction

This article deals with two aspects bound to the legal conditions of refugees in the African continent, namely asylum and voluntary repatriation. The first is considered like the “traditional” solution for people, either individuals or groups, obliged to flee from their own countries.¹ On the contrary, the second is the solution traditionally invoked as the preferable one either by States or by institutions, like the United Nations High Commissioner for Refugees², to put an end to the precarious condition of refugees. In this work, we will also examine the principle of *non-refoulement*, cornerstone of the legal protection of refugees in general, and in Africa in particular, principle that seems now to have even assumed the role of peremptory norm of the international law.³

Analysing some practice as well, we will see how the question of the refugees in the African continent is, at least under a legal point of view, still far to be stabilized towards a spread well-being of this particular category of individuals.

An African Notion of Asylum

Generally speaking, “asylum” is a term used to designate the protection that a State grants to a foreign citizen against his own government.⁴ On the matter of asylum, the international legal order

¹ M. Bedjaoui did a detailed historical *excursus* to show how the tradition of asylum is old in Sub-Saharan Africa. *See*: Bedjaoui, M., *L'Asile en Afrique*, Nairobi: All Africa Conference of Churches, 1979, pp. 26-27.

² Hereinafter: UNHCR.

³ *See* for instance: Allain, J., “The *jus cogens* nature of *non-refoulement*”, in: *International Journal of Refugee Law*, vol. 13, 2001, pp. 533-558.

⁴ Garcia-Mora, M.R., *International Law and Asylum as a Human Right*, Washington D.C.: Public Affairs Press, 1956, p. 1. But *see*, for the traditional category of the political refugee, the definition accepted by the Institute of International Law at the Brussels Conference in 1936: « [L]e terme réfugié désigne tout individu qui, en raison d'événements politiques survenus sur le territoire de l'Etat dont il était ressortissant, a quitté volontairement ou non ce territoire ou en demeure éloigné, qui n'a acquis aucune nationalité nouvelle et ne jouit pas de la protection diplomatique d'aucun autre

requires on the States primarily the obligation to stick on to two principles: to grant asylum when it is evident that human rights have been explicitly violated and to reject application for asylum when the criminality of the applicant is patent and no threat of persecution is visible.⁵

By his origin, asylum has turned into a factor of peace and moderation to the scope of shunning violence, giving reprieve, entailing wisdom and moderation in view of the potential danger of the return of an exiled refugee. However, at the same time, asylum has been regarded as an element of instability because it can increase the risks involved in revolutions.⁶ Thus, in principle asylum cannot be opposed to the operation of justice. An exception to this rule can take place if, in the guise of justice, arbitrary action is replaced for the rule of law. This would be the case if the administration of justice were corrupted by measures prompted by political aims.⁷

Referring to the specific object of our piece of work, that concerns the African legal framework, we note that at the time when the 1969 “OAU Convention governing the specific aspects of refugee problems in Africa”⁸ was conceived and adopted the major cause for refugees was the problem related to colonial occupation. On the contrary, as years went by, civil wars and ethnic conflicts in many member States became a major cause of refugee outflow and this has had a reflex on the way to consider the concept of “asylum” in the African continent. The poor state of African countries’ economies and the increasing number of refugees in that continent necessitated that the implementation of the protection mandate deriving from the AU Convention were predicated on the principles of African solidarity and international cooperation. The need for external financing remained a major challenge to refugee protection in Africa, which suffered because of major shifts in international political and economic trends.

Etat ». Quoted in: Holborn, L.W., “The Legal Status of Political Refugees, 1920-1938”, in: *American Journal of International Law*, vol. 32, 1938, p. 680, note 1.

⁵ At this point, we highlight how courts of law have the reliability to reconcile two principles that underlie the whole matter of asylum and the extradition of common criminals. The first principle is the interest of the States in the suppression and punishment of crimes. The other is their interest in the protection of human rights. In making this determination, the State is acting as an agent of the international community and that is therefore essential that practical considerations act in harmony with the interest of the world society, if coupled with the highest sentiment of humanity. Only in presence of these conditions, asylum and extradition can be rationally applied. On this subject, *see*: Garcia-Mora, R.M., *op. cit.* note 4, p. 69. Mr. Caicedo Castilla, judge *ad hoc* in the Asylum Case (1950) in his dissenting opinion pointed out that: “In defending a political refugee, Colombia defends a *fundamental human right*...” (Emphasis added). *See*: International Court of Justice, Asylum Case (Colombia/Peru), Judgement of November 20, 1950, in: *Reports of judgements, advisory opinions and orders*, Leyden: A.W. Sijthoff’s Publishing Company, 1950, dissenting opinion, p. 381.

⁶ Judge Badawi Pasha argued that: “[T]he practice of asylum as a usage of revolutions remains a juridical phenomenon which can be regulated, interpreted and applied, just as the usages of war.” Dissenting opinion, in: ICJ, Asylum Case (1950), *op. cit.* note 5, p. 313.

⁷ Judgement, in: ICJ, Asylum Case (1950), *op. cit.* note 5, p. 284.

⁸ Hereinafter: “1969 Convention”, “African Convention”, “AU (African Union) Convention” or “regional Convention.”

Furthermore, the enormous sacrifices done by African States in hosting refugee populations because of the various conflicts were an affirmation of the basic premise of the political realities and humanitarian burden sharing philosophy underlying the 1969 Convention.⁹

By way of summary, we could accept in general terms for “asylum” applied to the African context also the following definition given by the Institute of International Law at its 1950 session:

“Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.”¹⁰

The AU Convention: Is Asylum Really Protected?

Introduction

In the early 60s, the emergency of new refugee problems in Africa was considered the main reason for the United Nations High Commissioner for Refugees, Sadruddin Aga Khan¹¹, to take the initiative for the suppression of the dateline in the definition of “refugees” as provided in Article 1 of the 1951 “Convention Relating to the Status of Refugees”.¹² Thereby, this led to the conclusion of the 1967 “Protocol Relating to the Status of Refugees”¹³ which abolished the dateline.¹⁴ It was the ratification of the Protocol, which led the members of the Organization of African Unity¹⁵ to abandon the intention of elaborating an independent African convention in favour of the establishment of a legal instrument dealing with specific African aspects of the refugee problem, which would be “complementary”¹⁶ either to the 1951 Convention or to the 1967 Protocol.¹⁷

⁹ Mukirya Nyanduga, B.T., “Refugee Protection under the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa”, in: *German Yearbook of International Law*, vol. 47, 2004, p. 96.

¹⁰ Quoted in Krenz, F.E., “The Refugee as a Subject of International Law”, in: *The International and Comparative Law Quarterly*, vol. 15, 1966, p. 91. Moreover, we have to highlight that in Article 18 of the 1911 Bolivarian Agreement, is expressly specified that: “Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law.” Quoted in: Judgement, ICJ, Asylum Case (1950), *op. cit.* note 5, p. 274.

¹¹ He was High Commissioner from 1965 to 1977, being until now the Commissioner in charge for the longest period.

¹² Hereinafter: “1951 Convention”, “universal Convention” or “Geneva Convention.”

¹³ Hereinafter: “1967 Protocol” or “Protocol.”

¹⁴ Article 1, paragraph 2 of the Protocol clearly stipulates: “For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words “As a result of events occurring before 1 January 1951 and...” and the words “...as a result of such events”, in article 1 A (2) were omitted.

¹⁵ Hereafter: “African Union.”

¹⁶ *See*: Article 8, paragraph 2 of the AU Convention. It recalls the 1951 Convention but not the 1967 Protocol that, on the contrary is mentioned in the Preamble of the African Convention: “2- The present Convention shall be the effective regional *complement* (emphasis added) in Africa of the 1951 United Nations Convention on the Status of Refugees.” The Preamble affirms in paragraphs 9 and 10: “9- Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their

We want here just to draw the attention on the fact that the 1967 Protocol is of a dual nature. In fact, for countries parties to the 1951 Convention it is a supplementary instrument and for States which are not parties to the convention it constitutes an independent instrument by which they undertake the obligations contained in the convention with regard to refugees as there defined, but irrespective of the dateline.¹⁸

The universal Convention does not deal with the admission of refugees and the question of asylum but principally with the status of persons granted asylum. On the contrary, the AU Convention regulates also the question of asylum, in its Article II, stressing the concept that in the African context the concession of the asylum is, according the wording of paragraph 2: “a peaceful and humanitarian act”. This last expression has been deemed as decisive for tempering tension in respect of the problems associated with African refugees.¹⁹

Both the Geneva Convention and the AU Convention should to be read individually, in the light of their own particular provisions. According to the doctrine, in case of any possible conflict, Article 30 of the 1969 Vienna Convention on the Law of the Treaties, which deals with the application of successive treaties relating to the same subject matter,²⁰ would appear relevant, since the 1969 Convention can be considered as a codification of the law of the treaties. The emphasis in

treatment. 10- Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa”. In effect, the aforementioned 1965 Resolution No. 26, AHG/Res.26 (II), at its paragraph 7 argues: “[The Assembly of Heads of State and government meeting] Requests Member States of the Organization of African Unity, if they have not already done so, to ratify the United Nations Convention relating to the Status of Refugees and to apply meanwhile the provisions of the said Convention to refugees in Africa.”

¹⁷Weis, P., “The Convention of the Organisation of the African Unity governing the specific aspects of refugee problems in Africa”, in: *Revue des Droits de l'homme*, vol. 3, 1970, p. 453.

¹⁸ Weis, P., *ibid.*, p. 454. As for 1st of December 2006, in Sub-Saharan Africa just Cape Verde is part of the 1967 Protocol without being part of the 1951 Convention. On the contrary, at the same date Madagascar is the only country in Sub-Saharan Africa that is part of the 1951 Convention without being part of the 1967 Protocol. As for 1st of March 2006, Eritrea still remains the only country in Sub-Saharan Africa that is not part neither of the 1951 Convention nor of the 1967 Protocol yet. Source: UNHCR.

¹⁹ Rifaat, A.M., “Refugees and the right of asylum: an African perspective”, in: *Revue Egyptienne de droit international*, vol. 40, 1984, p. 105.

²⁰ Article 30 of the 1969 Vienna Convention, entitled “Application of successive treaties relating to the same subject matter” stipulates that: “1- Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. 2- When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3- When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4- When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5- Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.”

the regional convention on its complementary character seems visibly entail that its wording is not divergent with the 1951 Convention.²¹

Finally, for the purpose of our work, it is worth to be noted that the implementation of both the universal and the regional conventions always need legislative or administrative measures to ensure that the municipal law of the contracting States would be in accordance with the letter and the spirit of the two instruments. On the existence and the real enforcement of these latest ones, as we will see later in this work, we are still doubtful.

Article II of the AU Convention: Asylum

In the legal history of Africa, establishing the right of asylum for the most part of refugees has not posed the most urgent question to solve by the authorities in charge of elaborating conventions, treaties and laws.²²

Although the 1969 Convention is considered a great step forward in the legal protection of refugees, it does not provide for any right of asylum to the individual.²³

The first paragraph of Article II includes the principle of the granting of asylum although its wording:

“Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality”

it has been considered by the doctrine mostly recommendatory rather than mandatory,²⁴ stressing on the fact that there is no fundamental right of individuals to be granted asylum, but rather that asylum is the result of a kindness, individuals having at least the right to a temporary stay in the country of refuge.²⁵ Nevertheless, some scholars, belonging to a minority group, have

²¹ Weis, P., “OAU Convention”, *op. cit.* note 17, p. 463.

²² Nobel, P., “Refugee, law, and development in Africa”, in: *Michigan Yearbook of International Legal Studies*, vol. 3, 1982, p. 265.

²³ Rifaat, A.M., *op. cit.* note 19, p. 105.

²⁴ Weis, P., “OAU Convention”, *op. cit.* note 17, p. 457. However in the field of asylum is also worth to note that something else is left of State sovereignty, that is: “[t]he possibility of acknowledging with respect to the asylum-seeker, that another country is considered more appropriate to provide protection.” See: Kjaerum, M., “The concept of country of first asylum”, in: *International Journal of Refugee Law*, vol. 4, 1992, p. 514.

²⁵ Hofmann, R., “Refugee Law in Africa”, in: *Law and State*, vol. 39, 1989, p. 85. M. Bedjaoui shares this opinion. See: Bedjaoui, M., *op. cit.* note 1, p. 28. The author in fact argues: « [Le droit d’asile est] un droit pour l’Etat d’accorder l’asile et non un droit de l’individu à prétendre au bénéfice de celui-ci ».

objected to this perspective, arguing that the right of asylum in the African Convention is a legal duty binding States.²⁶

To show the coherence throughout the years in the intentions of the drafters of the 1969 Convention, the wording of the above-mentioned paragraph has been retrieved by paragraph 4, of the Article II of the 2001 Final text of the revised Asian-African Legal Consultative Organization²⁷ 1966 Bangkok principles on status and treatment of refugees. This paragraph in fact stipulates:

“States shall, bearing in mind provisions of Article X, use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality.”²⁸

Furthermore, the fact that the reception of asylum-seekers is made subject to national legislation can constitute a serious restraint to shelter individuals asking for refuge.

Paragraphs 2, 3 and 4 of the Article II of the AU Convention follow closely the United States Declaration on Territorial Asylum recalled in the preamble of the Convention.²⁹ Nevertheless, while the Declaration is not legally binding, the same provisions become binding for the contracting parties by their incorporation in the African Convention. This is crucial above all for the principle of *non-refoulement*³⁰ whose embodiment in the regional instrument has been

²⁶ Mahamat, B., *Analyse comparative de la protection juridique actuelle des réfugiés en Afrique et en Europe*, Heidelberg/N'djamena: Institut Max Planck de droit comparé et de droit international public, Imprimerie du Tchad, 1998, p. 16.

²⁷ Hereinafter: AALCO.

²⁸ A provision of this kind is not present in the original version of the 1966 Bangkok Principles concerning Treatment of Refugees.

²⁹ About the 1967 Declaration, P. Weis argues as “[t]he Declaration [on Territorial Asylum] constitutes an elaboration of Article 14 of the Universal Declaration. This Article, in its final form, recognizes the right to seek and to enjoy asylum, but not the right to be granted asylum. It is based on the concept of asylum as a right of the State to grant it, rather than as a right of the individual to be granted asylum.” However, later in the same article he argues: “While the so-called right of asylum is thus in present international law a right of States to grant asylum, there is a growing tendency to take account of the interest of the individual seeking asylum.” See: Weis, P., “The United Nations Declaration on Territorial Asylum”, in: *Canadian Yearbook of International Law*, vol. 7, 1969, pp. 117 and 148. And in another article the same author states: “Article II of the (African Union) Convention, which is modelled closely on the text of the Declaration on Territorial Asylum as it stood prior to certain changes brought about by a Working Party of the 6th Committee of the UN General Assembly [...]” See: Weis, P., “The present state of international law on territorial asylum”, in: *Annuaire Suisse de droit international*, vol. 31, 1975, p. 86. In detail, paragraph 2 of the Preamble of Declaration contends: “Recognizing that the grant of asylum by a State to persons entitled to invoke article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State”; Article 3, paragraph 1 of the Declaration argues: “No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution”; Article 2, paragraph 2 of the Declaration contends: “Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.”

³⁰ For an analysis of this principle, see *infra*, the proper paragraph on *non-refoulement*.

considered a very important step forward in the development of the human rights of asylum-seekers and in the improvement of the law of asylum.³¹

Therefore, Article II paragraph 3 of the 1969 Convention prohibits *refoulement* in similar terms to Article 33 of the Geneva Convention although the regional instrument does not provide for the limitation contained in paragraph 2 of the universal instrument,³² but, on the contrary, the AU Convention explicitly excludes rejection at the border. Also on this aspect a debate among scholars arose, on the fact that asylum has been contended as a veritable right in the African continent.³³

Paragraph 4 pushes on a member State, which finds difficult to continue to grant the asylum to a refugee to

“Appeal directly to other member States and through the OAU, and such other member States shall in the spirit of African solidarity and international cooperation take appropriate measures to reduce the burden of the member State granting asylum.”³⁴

Paragraph 5 of Article II encourages resettlement in other member States, as well as temporary asylum in the country, when a member States does not grant a refugee the right to reside in a country of asylum. This paragraph has been considered particular interesting because of the employment of the verb “may”, used concerning the temporary residence in any country of asylum in which the applicant first presented himself, pending arrangements for his resettlement. It shows how this is not an absolute duty but it derives from the principle of *non-refoulement* that an asylum-seeker should at least be momentarily admitted if, in the case of non right of entry accorded, he would be obliged to return in the country where he could be persecuted.³⁵

³¹ Weis, P., “OAU Convention”, *op. cit.* note 17, p. 457. R. Hofmann goes further adding that “in Art. II, paragraph 3, the principle of *non-refoulement* in its wide sense was anchored for the first time in international law.” See: Hofmann, R., “Refugee law”, *op. cit.* note 25, p. 84.

³² Article 33 of the 1951 Geneva Convention stipulates: “1- No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2- The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

³³ See for instance, Okoth-Obbo, G., “Thirty years on: a legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugees Problems in Africa”, in: *Refugee Survey Quarterly*, vol. 20, 2001, pp. 88-89.

³⁴ It is worth to note what the Delegate of Panama in the Special Committee on Refugees and Displaced Persons put forward: “I think that the problem of refugees does not concern two countries- the country of origin and the country of refuge, but that it involves the responsibility of all countries.” Quoted in: Morgenstern, F., “The right of asylum”, in: *British Yearbook of International Law*, vol. 26, 1949, p. 343. The Special Committee on Refugee and Displaced Persons was established by a resolution of the Economic and Social Council of the United Nations, the 16th of February 1946 entitled “Commission on Human Rights and Sub commission on the status of women”, Resolution No. 5 (I). This provision of the 1969 Convention has been considered by the doctrine as a veritable contractual obligation. See: Aga Khan, S., “Legal problems relating to refugees and displaced persons”, in: *Collected Courses of The Hague Academy of International Law*, vol. 149 (I), 1976, p. 320.

³⁵ Weis, P., “OAU Convention”, *op. cit.* note 17, p. 458.

Far from weakening the principle of *non-refoulement*, temporary refugee has been judged by the doctrine as a mean to facilitate the observance of the latter principle. In effect, since the principle of *non-refoulement* is applicable to expulsion or return as well as to rejection at the frontiers, temporary refuge should be considered as providing a form of protection characterized by the general principle. This interpretation is consistent with the situation provided by either Article 31 of the 1951 Convention or by Article II, paragraph 3 of the AU Convention.³⁶

However, the real question arises from the fact that often this principle in the African countries has been disregarded. For example, individuals seeking asylum in Kenya have been told by UNHCR to go back to Uganda or Tanzania through which they may already passed. Ugandan officials have refused to consider the claims of Rwandan refugees previously present in Tanzania, even as the Government of Arusha was threatening the refugees with forced repatriation to the territory controlled by Kigali.³⁷

Article II paragraph 6 is yet another principle introduced into international refugee law by 1969 Convention, arising out of the African Union³⁸ concern with subversion. The principle enunciated in this paragraph had constantly been advocated by the AU thus become a legal obligation on States parties. It is dictated by the concern to diminish the danger of subversive activities by refugees against their country of origin.³⁹

Finally, we have to stress how the provisions on asylum in the African Convention combine classical refugee concerns with priorities drawn from either the politics of international relations or the State security. This even if the legal effect of the Convention in respect to asylum is considered not be overemphasized and their greater value seems to rest in the purpose of the provisions to join together and depoliticise the grant of asylum in particular in the context of international relations and State security policies.⁴⁰ Finally, quoting G. Goodwin-Gill:

“Despite the encouraging tone of the OAU Convention, neither this instrument nor any other permits the conclusion that States have accepted an international obligation to grant asylum to refugees, in the sense of the admission to residence and lasting protection against persecution and/or the exercise of jurisdiction by another State.”⁴¹

³⁶ Coles, G.J.L., “Temporary refuge and the large scale influx of refugees”, in: *Australian Yearbook of International Law*, vol. 8, 1978-1980, p. 199.

³⁷ Hathaway, J.C., *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, 2005, p. 294. These episodes refer to the end of the 90s of the 20th century and to the beginning of the 21st century.

³⁸ Hereinafter: “African Union” or “AU.”

³⁹ Weis, P., “OAU Convention”, *op. cit.* note 17, p. 458.

⁴⁰ Okoth-Obbo, G., *op. cit.* note 33, pp. 88-90.

⁴¹ Goodwin-Gill, G., *The Refugee in International Law, second edition*, Oxford: Clarendon Press, 1996, p. 178.

Article III of the AU Convention: Prohibition of subversive activities

It is possible to link paragraph 6 of Article II with Article III that is the most categorical expression used the 1969 Convention on the subversion issue.⁴² In fact, it prohibits a refugee's involvement in subversive activities. Regarding the subversive activities, we remind that their qualification and character were already taken into consideration in the early twentieth century's doctrine. At that time, scholars invoked a well-defined status for refugees that, paired with a technical organization, now mostly under UNHCR's field of activities, would have allowed reducing the possibility of subversive political activities against governments reliable for their flight.⁴³

Furthermore, in the African legal panorama, such a prohibition is not an originality of the 1969 Convention. In fact, already Article III, paragraph V, of the 1963 Organization of African Unity's Charter stipulated:

“The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles: 5. Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States.”

This provision has been retrieved in the Constitutive Act of the African Union, which stipulates at Article 4, letter O:

“The Union shall function in accordance with the following principles: (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.”

The prohibition of subversion against other Member States of the AU, a real duty incumbent on the refugee,⁴⁴ was also affirmed in a “Declaration on the problem of subversion” adopted by the Heads of State and government of the organization at its second plenary session at Accra in 1965.⁴⁵

⁴² Mukirya Nyanduga, B.T., *op. cit.* note 9, p. 95. It seems that the rationale behind the prohibition contained in this article is to express political solidarity between African States and the prohibition has been perceived as a safeguard against possible external interference in what was seen as internal affairs. *See*: Beyani, C., *Human Rights Standards and the Free Movement of People within States*, Oxford: Oxford University Press, 2000, p. 120.

⁴³ Holborn, L.W., “Legal status”, *op. cit.* note 4, p. 703. She continued at the same page: “The political complications often connected with aiding refugees would be practically eliminated also, particularly if the local offices concerned with refugees were qualified to decide which people fell within the accepted definition of “refugee”.” In our opinion, this latter affirmation in practice unfortunately has not found any positive, definitive answer yet, not even after seventy years that it was made. This occurs despite the existence of a general convention and, for the African continent, of a regional convention providing for an “extended” definition of a “refugee.”

⁴⁴ Mahalu, C.R., “The Legal Regime for Refugees in Eastern African States”, in: *Archiv des Volkerrechts*, vol. 26, 1988, p. 37.

Furthermore, the “Resolution on the problem of the refugees in Africa” adopted by the same conference unequivocally recalls and requests, in its paragraphs 2 and 3 that:

“2- [t]hat Member States have pledged themselves to prevent refugees living on their territories from carrying out by any means whatsoever any acts harmful to the interests of other states Members of the Organization of African Unity”,

And that:

“3- Requests all Member States never to allow the refugee question to become a source of dispute amongst them.”⁴⁶

This latter resolution is expressly referred to in the Preamble to the African Convention.⁴⁷

The first paragraph of Article 3 of the regional Convention is analogous to Article 2 of the universal Convention, which requires conformity with laws, regulations and measures for the maintenance of public order. Nevertheless, the 1969 Convention makes a significant addition of a new principle, which requires a refugee “to abstain from any subversive activities against any member State of the OAU.”

The second paragraph of Article 3 compels a positive obligation on the contracting countries to prohibit such activities.⁴⁸

⁴⁵ Declaration on the problem of subversion, 21-25 October 1965, Assembly of Heads of State and government, Resolution AHG/Res.27 (II): “The Assembly of Heads of State and government meeting in its Second Ordinary Session in Accra, Ghana, from 21 to 25 October 1965, Desirous of consolidating the fraternal links that unite us, solemnly undertake: 1- not to tolerate, in conformity with Article 3, paragraph 5, of the Charter, any subversion originating in our countries against another Member State of the Organization of African Unity; 2- Not to tolerate the use of our territories for any subversive activity directed from outside Africa against any Member State of the Organization of African Unity; 3- To oppose collectively and firmly by every means at our disposal every form of subversion conceived, organized or financed by foreign powers against Africa, OAU or its Member States individually; 4- (a) To resort to bilateral or multilateral consultation to settle all differences between two or more Member States of the Organization of African Unity; b) To refrain from conducting any press or radio campaign against any Member States of the Organization of African Unity, and to resort instead to the procedure laid down in the Charter and the Protocol of Mediation, Conciliation and Arbitration of the Organization of African Unity. 5- (a) Not to create dissension within or among Member States by fomenting or aggravating racial, religious, linguistic, ethnic or other differences; b) To combat all forms of activity of this kind; 6- To observe strictly the principles of international law with regard to all political refugees who are nationals of any Member States of the Organization of African Unity; 7- To endeavour to promote, through bilateral and multilateral consultations, the return of refugees to their countries of origin with the consent of both the refugees concerned and their governments; 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.” C. Beyani notes how Article 8 of this Declaration calls for the guarantee of the safety of political refugees and support for them in the struggle to liberate their countries but omits political refugees from already independent African countries. *See*: Beyani, C., *op. cit.* note 42, p. 122.

⁴⁶ The problem of refugees in Africa, 21-25 October 1965, Assembly of Heads of State and government, Resolution AHG/Res.26 (II).

⁴⁷ *See*: paragraph 10 of the Preamble of the UA Convention.

⁴⁸ Article III, paragraph 2 of the African Convention words as follows: “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

The term “subversive” gave rise in the past to different interpretations and the clause that prohibits any activity credible to bring about concern between the AU member States has been judged as “rather vague” in its phrasing.⁴⁹

In addition, it should be noted that the ban of seditious activities adverts only acts against member States of the AU, and not to activities in relation to non-member States. This article has also raised the question of the vicarious liability of States for acts of private persons within their jurisdiction. Therefore, it seems that countries have a duty to prevent to individuals under their jurisdiction from committing harmful acts against other States. Nevertheless, what acts are to be considered “injurious” is highly controversial even if doctrine seems agree on the fact that at least the use of force by private persons directed against another State has to be qualified in such terms.⁵⁰

Refugees can be more inclined to engage in opposing activities against their country of origin, but under a legal point of view, there is no difference in the legal responsibility of a State for the activities of asylum-seekers in its country and for the activities of other private persons under its control.⁵¹

Nevertheless, it has been noted how this article does not provide for any sanction regime for its breach and it must be pointed as a shortcoming.⁵² On the other hand, some other scholar has interpreted the wording of the prohibition contained in the Article 3 as too strict and thus contrary to Article 19 of the Universal Declaration of Human Rights.⁵³ Finally, it was also noted like this article deals more about the “subversive activity” than the “subversive refugee” in himself. This means that it seems that asylum will not be refused to a “subversive refugee” that appears to deserve protection with the only precaution that he can be watched in the way that he does not undertake again activities considered as “subversive” by the country of asylum.⁵⁴

We call attention to that the need to protect States has also led to the omission in the African Convention of an equivalent of Article 26 of the 1951 Convention, which accord to refugees the possibility to move freely in the country of asylum.⁵⁵

cause tension between Member States, and in particular by use of arms, through the press, or by radio.” See, among others: Bedjaoui, M., *op.cit.* note 1, p. 68.

⁴⁹ Weis, P., “OAU Convention”, *op. cit.* note 17, p. 459. In effect: “Indication of its meaning can be glimpsed from the way in which it is used in other instruments adopted by the OAU.” See: Beyani, C., *op. cit.* note 42, p. 120.

⁵⁰ See for instance, Weis, P., “Territorial Asylum”, *op. cit.* note 29, p. 146 where, as an example, he mentions “Terrorist activities such as attempts on the life of diplomatic envoys and of political opponents as part of revolutionary action against another State are also included.”

⁵¹ Weis, P., “OAU Convention”, *op. cit.* note 17, p. 460.

⁵² Okoth-Obbo, G., *op. cit.* note 33, p. 134.

⁵³ See: Nobel, P., *op. cit.* note 22, p. 267. Article 19 of the Universal Declaration of Human Rights affirms: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

⁵⁴ Ndoh, M., « Les réfugiés africains: statut juridique et réflexions politiques », in : *Genève-Afrique*, vol. 20, 1982, p. 25.

⁵⁵ Plender, R., “The present state of research carried out by the English-speaking section of the Centre for Studies and Research”, in: Hague Academy of International Law, *Le droit d'asile/The Right of Asylum*, Dordrecht/Boston/London: Martinus Nijhoff, 1989, p. 79. Article 26 of the Geneva Convention argues: “Each Contracting State shall accord to

Article V of the AU Convention: Voluntary repatriation

Article V, paragraph 1 establishes the important principle of voluntary repatriation, which has acquired broad international application, and highlights the essentially voluntary aspect of repatriation. This article requires collaboration between the country of origin and the host country during repatriation and prohibits the punishment of refugees who return to their countries. The article of the Convention begins with the statement that:

“The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.”

The explicit stipulation in a legally binding instrument that repatriation might be a voluntary act represents a valuable corroboration of the principle of *non-refoulement*. Voluntary repatriation is now perceived by the doctrine like a custom and its presence in the African Convention represents the first attempt to codify this provision.⁵⁶

The AU Convention then explains in detail the duties of both the country of asylum and the country of origin regarding registration. These stipulations are intended to guarantee that States of asylum, international organizations as well as NGOs will support the voluntary repatriation of refugees. Furthermore, the country of origin will not impose any sanctions nor discriminate in any way refugees who voluntarily return home⁵⁷ even if the Convention seems to envisage only organized repatriation, it means repatriations that require formal written agreements. However, spontaneous repatriation has now to be taken more and more into account in the daily practice of the African refugees.⁵⁸

Within the African Union decision making organization developments of voluntary repatriation are narrow with the exception of the 1975 Resolution of the Council of Ministers of the AU. This document touched upon a number of legal and practical matters not otherwise covered in the convention itself. Among these, we can include modalities for the implementation of repatriation, the right to return in the case of mixed marriages and the facilitation of refugees' aptitude to return home with their property and savings.⁵⁹ This resolution had been considered with

refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”

⁵⁶ Degni-Segui, R., « L'action des institutions africaines en matière de réfugiés », in : Société française pour le droit international, *Colloque de Caen : droit d'asile et des réfugiés*, Paris: Éditions A. Pedone, 1997, p. 233.

⁵⁷ Weis, P., “OAU Convention”, *op. cit.* note 17, pp. 460-461.

⁵⁸ Okoth-Obbo, G., *op. cit.* note 33, pp. 123-126.

⁵⁹ African Union, *Voluntary repatriation of African refugees*, 13-21 February 1975, Council of Ministers, Resolution CM/Res.399 (XXIV) where letter a) states: “[Member States] Accept and abide scrupulously by the international agreements and the OAU Convention on Refugees, particularly as regards the voluntary nature of repatriation.”

the intent to elaborate and develop the involvement of the liberation movements recognized at the time by the African Union in the repatriation of their nationals.⁶⁰

Article VI of the AU Convention: Travel documents

Although the Geneva Convention deals with the question of travel documents, the regional Convention equally contains provisions on this subject. In details, this latter includes an obligation to give to refugees legally staying in the territories of member States the travel documents provided for in the United Nations Convention. This together with the limitation which, similarly, appears in the universal instrument: “unless compelling reasons of national security or public order otherwise require”, but with the additional limitation that this obligation is subject to the aforementioned Article III. Giving the clear interest of refugees to be enabled to travel, this further limitation should not lead to boundaries in the deliverance of travel documents unless that they are dictated by serious indications that the refugee’s travel would be prejudicial to national security as well as to public order.

According to paragraph 2 of this article, a country of first asylum may be dispensed from delivering documents with a return clause where an African country of second asylum accepts a refugee from a country of first asylum. This stipulation may only be applied with the agreement of the both issuing country and the country of destination. Furthermore, it provides that this latter country accept the refugee for permanent settlement. In its turn, the country of resettlement would be expected to deliver a travel document with return clause to the refugee. In this way, the provision should not prove any prejudicial to the travel of the refugee.⁶¹

An African Meaning of *Non-Refoulement*?

The most urgent need of refugees is to secure entry into a territory in which they are protected from the risk of being persecuted. This concern should be reconciled to the fact that governments claim all the territories of the world, often preventing or restricting access to non-citizens.

In the traditional doctrine of the international law, it was maintained that there was no doubt that every sovereign State had the power to expel unwanted aliens even if at the same time doctrine

⁶⁰ Okoth-Obbo, G., *op. cit.* note 33, p. 123.

⁶¹ Weis, P., “OAU Convention”, *op. cit.* note 17, pp. 461-462.

notes that political refugees have often constituted an exception. In effect, already in the first decades of the twentieth century, courts had given the impression that they considered that genuine political refugees should not be deported to the persecuting country⁶² even if it is always difficult to separate the political nature of the reason that induces to ask for asylum from the private one.⁶³

Nevertheless, regarded as an isolated phenomenon, the asylum of a political lawbreaker may attain the aspect of a violation of the territorial sovereignty. Moreover, as far as it is a barrier to legal proceedings, it may appear as a distrust of the national justice and as an intrusion in the domestic affairs of a State. Nonetheless, when it is accepted by all the States, both playing either the role of the State of refuge and territorial State, it loses all such aspects and turns into a general and impersonal rule of conduct.⁶⁴

A first attempt to alleviate the position about “*refoulement*” (sometimes it has been also associated to “reconduction”)⁶⁵ was made in the 1933 Geneva Convention relating to the international status of refugees. There, parties agreed not to exercise the power of expulsion or “*refoulement*” in respect of refugees who have been authorized to reside in their territory regularly “unless the said measures are dictated by reasons of national security or public order.”⁶⁶ Furthermore, parties also agreed on “in any case not to refuse entry to refugees at the frontiers of their countries of origin.”⁶⁷ However, the most important difficulty arose where a refugee who is subjected to an expulsion order cannot obtain the necessary visas to enable him to enter another State. He may incur in penalties for failing to comply with an expulsion order that is materially impossible for him to carry out. Clandestine and illegal crossing of frontiers has been promoted and

⁶² Morgenstern, F., *op. cit.* note 34, p. 347.

⁶³ Talking about political crimes J. Turpin highlights how rarely: « [l]e délit commis soit exclusivement politique, c'est-à-dire qu'il ne porte atteinte qu'à un intérêt politique, le plus souvent l'intérêt politique et l'intérêt privé seront lésés en même temps ». See: Turpin, J., *Nouveaux aspects juridiques de l'asile politique- le litige Hungaro-Yugoslave devant la Société des Nations*, Paris: G.P. Maisonneuve, p. 51. Thus, this statement rises the question on how difficult is sometimes to distinguish political reasons from private reasons in the application for asylum made by the claimant. On this subject Turpin at p. 52, quotes the Article 16 of a draft adopted by the International Law Institute in 1880 that stipulated: « En tout cas, l'extradition pour crime ayant à la fois le caractère de crime politique et de crime de droit commun, ne devra être accordée que si l'Etat requérant donne l'assurance que l'extradé ne sera pas jugé par des tribunaux d'exception ». But, as he concludes at p. 55: « Il faudrait arriver à concilier la nécessité de l'asile et la nécessité de la répression, c'est un problème difficile si l'on considère que l'Etat de refuge est toujours mal placé pour apprécier la criminalité de tels actes, les insurgés se prétendant toujours en état de légitime défense. Pour accorder l'extradition, il faudrait que l'Etat porte un jugement sur le régime politique de l'Etat requérant, or, l'intervention ne doit pas dégénérer en un acte d'immixtion dans le domaine de la compétence discrétionnaire des gouvernants ».

⁶⁴ Dissenting opinion by Judge Badawi Pasha, in: ICJ, *Asylum Case* (1950), *op. cit.* note 5, p. 312.

⁶⁵ Jennings, R.Y., “Some international law aspects of the refugee questions”, in: *British Yearbook of International Law*, vol. 20, 1939, p. 105.

⁶⁶ Article 3, paragraph 1 of the 1933 Geneva Convention.

⁶⁷ Article 3, paragraph 2 of the 1933 Geneva Convention. At this regard, we note that this paragraph was not accepted by the United Kingdom. About the position of the United Kingdom on this Convention, see, among others, Beck, R.J., “Britain and the 1933 Refugee Convention: national or State sovereignty?” in: *International Journal of Refugee Law*, vol. 11, 1999, pp. 597-624.

even ordered by States. The 1933 Convention tried to bind this practice reserving to apply such “internal measures, as they may deem necessary.”⁶⁸

However, these early provisions, although legally they could not apply to the African continent, nonetheless they did not often find any fertile breeding ground in Africa. This occurs notwithstanding the fact that they could refer to a sort of burden sharing, pillar of the African protection of refugees that also the AU Convention mentions, although not explicitly, in its Article II, paragraph 3.⁶⁹ Moreover, this occurs in spite of the fact that many African countries (among others: Benin, Lesotho, Senegal and Swaziland) provide for the principle of *non-refoulement* in their respective national legislation and it seems that from their past State practice may be figured out that application at the border was also included.⁷⁰

It is worth to note also that already in 1936, it was drawn a possible restriction of the power of expulsion which has not appeared yet in any convention but which was advised by judge M. Hansson and it consists in the fact that refugees should be given a hearing before an expulsion order is made against them.⁷¹ This advice has now become a provision present in several legislations, but not in the African continent.

African Convention does not deal with expulsion. On the contrary, Article V of the Final text of the revised AALCO 1966 Bangkok principles on status and treatment of refugees stipulates in its paragraph 4:

“The expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority.”⁷²

On this latter paragraph the Government of Sudan wanted to express the view according to which the wording “competent authority” should mean the relevant national bodies and not as a

⁶⁸ Jennings, R.Y., *op.cit.* note 65, p. 105. *See*: Article 3, paragraph 3 of the 1933 Geneva Convention. Furthermore: « [L]’expulsion ne doit pas aboutir à une extradition déguisée. Un réfugié ne peut pas être livré, par la voie détournée de l’expulsion, aux autorités du pays d’où il s’est échappé, sans que les conditions posées en matière d’extradition aient été dument observées ». *See*: Reale, E., “Le droit d’asile”, in: *Recueil des Cours de l’Académie de La Haye*, vol. 63 (I), 1938, p. 560. As A. Grahl-Madsen pointed out: “Extradition and asylum are two different institutions, but they are related in the sense that refusal of extradition may amount to asylum and extradition means the denial of asylum.” Quoted in: Plender, R., *op.cit.* note 55, note 174, p. 108.

⁶⁹ The concept of burden sharing was formally introduced by the 1979 Meeting held in Arusha during the Conference on the Refugee Situation in Africa, conference held from the 7 to the 17 May. *See*: Hans, A.; Suhrke, A., “Responsibility sharing”, in: Hathaway J.C. (edited by), *Reconceiving International Refugee Law*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1997, p. 90.

⁷⁰ Plender, R., *op. cit.* note 55, p. 92.

⁷¹ The opinion of Judge Hansson is evident in his report to the 1936 League Committee on International Assistance to Refugees. *See*: Special Report, doc. No. A.27.1936.XII.

⁷² It is evident the similarity of the phrasing of this article with paragraph 2 of Article 32 of the 1951 Geneva Convention.

simple reference to courts or judicial bodies. This intervention has been done in a clear view to make expulsion easier.⁷³

The principle of *non-refoulement* prescribes that no refugee should be forced to return to any country where he is likely to face persecution. *Refoulement* is to be distinguished from expulsion or deportation that could be considered as a process that is more formal whereby a lawfully resident foreigner may be asked to leave a State, or be removed against his will.⁷⁴

Moreover, in our opinion in Africa governments should act more strongly in accordance with the principle of *non-refoulement*. As in Nigeria, where asylum seekers are protected against rejection at the frontier and expulsion, a part when it is apparent that the applicant should be excluded from the advantage of the asylum according to the relevant provisions of the international conventions.⁷⁵ Another example is Ghana where both practice and jurisprudence show an historical acceptance of the principle of *non-refoulement* by the competent authorities.⁷⁶

As for Article 33 of the 1951 Geneva Convention, in which it is consecrated, the principle of *non-refoulement* raises questions as to its personal scope and relation to the issues of admission and non-rejection at the frontier.⁷⁷ Through the decades, the views of commentators on the scope of Article 33 have changed.⁷⁸ In fact, anyone presenting himself at a frontier post will already be within State jurisdiction. For this reason, States have devised fictions to keep the alien legally non-admitted. Particular important is to check the principle “no duty to admit” that raises several questions and particularly whether States are obliged to protect refugees to the point of not adopting measures which will have consequences in their persecution or exposure to danger. In fact, State practice gives little weight to the issue of admission, but more to the necessity for *non-refoulement* through time.

⁷³ UNHCR, *Collection of international instruments and other legal texts concerning refugees and others of concern to UNHCR*, Geneva: UNHCR, November 2006, vol. 3, p. 1101.

⁷⁴ Goodwin-Gill, G., *op. cit.* note 41, p. 117.

⁷⁵ Iluyomade, B.O.; Popoola, A., “The legal position of aliens in Nigerian law”, in: Frowein, J.A.; Stein, T. (Hrsg.), *Die Rechtsstellung von Ausländern nach staatlichem Recht und Völkerrecht/The Legal Positions of Aliens in National and International Law/Le régime juridique des étrangers en droit national et international*, Berlin/Heidelberg/New York/London/Paris/Tokyo: Springer Verlag, 1987, p. 978.

⁷⁶ Ofosu-Amaah, G.K., “The legal position of aliens in national and international law in Ghana”, in: Frowein, J.A.; Stein, T. (Hrsg.), *Die Rechtsstellung von Ausländern nach staatlichem Recht und Völkerrecht/The Legal Positions of Aliens in National and International Law/Le régime juridique des étrangers en droit national et international*, Berlin/Heidelberg/New York/London/Paris/Tokyo: Springer Verlag, 1987, p. 525. The author cites the 1968 *Government of Sierra Leone v. Jumu* case, where the Ghanaian Court affirmed the principle that Courts “were not bound, in the absence of clear and cogent evidence to the contrary, to surrender fugitives for political reprisal and persecution.”

⁷⁷ We just point out that the Swiss delegate at the Conference for the establishment of the 1951 Convention considered that the word “return” (*refouler*) should apply solely to refugees who had already entered the country but were not resident there yet. According to this interpretation, States were not obliged to allow large groups of persons claiming refugee status to cross their frontiers. See: Weis, P., “Legal aspects of the Convention of 25 July 1951 relating to the status of refugees”, in: *British Yearbook of International Law*, vol. 30, 1953, p. 482.

⁷⁸ *Ibid.*, p. 483: “[*Non-refoulement*] leads the way to the adoption of the principle that a State shall not refuse admission to a refugee, i.e. that it shall grant him at least temporary asylum-pending his settlement in a country willing to grant him residence- if non-admission is tantamount to surrender to the country of persecution.”

Benefit of Article 33 of the 1951 Convention ought not to be predicated upon formal recognition of refugee status that might be impractical in the absence of effective procedures or in the case of mass-influx. Besides, as it is affirmed in one of its resolutions, the Executive Committee⁷⁹ of UNHCR:

“*Reaffirms* the fundamental importance of the observance of the principle of *non-refoulement* both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.”⁸⁰

About Africa’s legal instruments, it has to be highlight that the principle of *non-refoulement* is embodied in the 1969 Convention, specifically in its Article II, paragraph 3⁸¹:

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or to remain in a territory where his life, physical integrity or liberty would be threatened [...]”

In addition, Article 12, paragraph 3 of the 1981 African Charter of Human and Peoples’ Rights focuses on asylum:

“Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.”

All this without forgetting that the Universal Declaration of Human Rights that at the Article 14, paragraph 1, claims:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”⁸²

The standing of the principle that we are discussing in this section must be assessed by reference to other formally non-binding declarations and resolutions. The 1967 Declaration on

⁷⁹ Hereinafter: “Executive Committee” or “ExCom”.

⁸⁰ ExCom, Conclusion No. 6 (XXVIII), “*Non-refoulement*”, 1977.

⁸¹ Mahalu, R.C., *op. cit.* note 44, p. 34.

⁸² We remind here that one of the objectives of the African Union is “[t]o encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights”. *See*: Constitutive Act of the African Union. Lomé, 11 July 2000, Article 3, letter e).

territorial asylum, for instance, recommends at Article 3, paragraph 1, that States be guided by the principle that no one entitled to seek asylum:

“Shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.”

A similar definition was adopted by Principles concerning Treatment of Refugees, approved in Bangkok in 1966 by the Asian-African Legal Consultative Committee, even if it goes more in detail regarding the causes that can admit the *refoulement* of an asylum seeker. In effect, it underlines that Article III, paragraph 3 of the Principles stipulates:⁸³

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

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

It is here clear how Article 33 of the 1951 Geneva Convention gave rise to the formulation of this article. Furthermore, both the Articles III provide that an exception may be made to the basic principle affirming that:

“In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.”⁸⁴

If we compare this definition with the one provided by the Declaration on Territorial Asylum that, at the paragraphs 2 and 3 states as follows:

⁸³ See Final text of the revised AALCO 1966 Bangkok principles on status and treatment of refugees, AALCO’s 40th session, New Delhi, 24 June 2001, in: Collection of international instruments and other legal texts concerning refugees and others of concern to UNHCR, vol. 3, p. 1094. About the AALCO, it is worth to note that, born in 1956, just in 1963 saw the first Sub-Saharan African country (Ghana) join it, after that already ten Asian countries were part of the Committee, being not African countries among the seven original members. Actually, among the original members figured also the UAR, entity formed by Syria and Egypt.

⁸⁴ Report of the Eighth Session of the Asian-African Legal Consultative Committee by Mustafa Kamil Yasseen, Observer for the Commission, Bangkok, 8-17 August 1966, in: Yearbook of the International Law Commission, 1967, vol. II, p. 332.

“2- Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass-influx of persons. 3- Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.”⁸⁵

We can easily observe that they do not differ in a substantive way.

About the African system, as we mentioned above, the principle of *non-refoulement* can be considered, at least formally, a real pillar, the 1969 Convention stating it without exceptions.

Viewed in the African legal context this principle is not restricted to victims of persecution but it is extended to individuals who become refugees due to the circumstances of social and civil turmoil, as well as of natural catastrophe and famine.⁸⁶ Moreover, it applies starting both at the border and within the territory of the country concerned, applying to all persons, recognized or not as refugees, pending the determination of their status. This principle entails in the African system that there is no space to expulsion, putting obligation on contracting States to grant at least temporary asylum, if they cannot grant permanent asylum, to people fleeing persecutions.⁸⁷

Over the years States practice, individually and within international organization, has contributed to further progressive development of the law. They have recognized that *non-refoulement* applies to the moment at which claimants present themselves for entry. Some elements based on fact may be necessary before the principle is applied (for instance, human rights violations in the country of origin). Yet the concepts now include both non-rejection and non-return.⁸⁸

In addition, State practice in cases of mass-influx offers some support for the view that *non-refoulement* applies both to the individual refugee with a well-founded fear of persecution, and to the frequently large groups of persons who do not in fact enjoy the protection of the government of their country of origin in certain quite well-defined situations.⁸⁹

⁸⁵ UNGA, “Declaration on territorial asylum”, 14 December 1967, resolution No. 2312 (XXII).

⁸⁶ For instance, in Nigeria famine and other natural disasters are recognized as a reason for the flight of the refugees. See: Iluyomade, B.O.; Popoola, A., *op. cit.* note 75, pp. 972-973. Natural disasters are included as reasons to flee also in: Mbaye, K., *Les droits de l’homme en Afrique* (2ème edition), Paris: Editions Pedone, 2002, p. 288 where it includes in the list of reasons to ask for asylum, at least temporary, in Africa economic and social insecurity as well.

⁸⁷ Chhangani, R.C., *African Refugee Law: Problems and Prospects*, Maiduguri- Nigeria: University of Maiduguri Press, 1992, pp. 10-12.

⁸⁸ Goodwin-Gill G., *op. cit.* note 41, pp. 123-124.

⁸⁹ *Ibid.*, p. 121. About this subject, I. Jackson argues: “[T]he identification of the categories of persons who form part of a large-scale influx situation is largely descriptive [in: ExCom, Conclusion No. 22 (XXXII), “Protection of asylum-seekers in situations of large-scale influx”, 1981] and without decisive legal consequences. The only case in which such legal consequence would arise would be if a large-scale influx is determined at the outset to be clearly outside the scope of 1950/51 refugee definition, e.g. if it consists of persons who flee only in order to escape those consequences of a conflict, or similar situation, which affect the population as a whole.” See: Jackson, I.C., *The Refugee Concept in Group Situations*, The Hague/London/Boston: Martinus Nijhoff Publishers, 1999, pp. 457-458. And C. Beyani adds: “[A] sudden influx of a large number of refugees in State territory outside the normal process of immigration is a public order matter and restrictions which are applied in the context of designating places of residence in these circumstances have a legitimate objective.” See: Beyani, C., *op. cit.* note 42, p. 123.

Instead, there are many historical, even recent, cases in Sub-Saharan Africa, which illustrate the grave consequences of a failure to recognize the need of refugees, above all when they arrive in group, to be able to enter another State.⁹⁰ Both Tanzania and Zaire at times closed their borders to masses attempting to flee the conflict in Rwanda.⁹¹

As an author argues, waves of mass-influx of refugees in the African continent can be considered as being part of two distinct generations. The “first generation” (roughly from 1960 to 1990) seemed to be characterized by three aspects: it regarded both victims of internal conflicts (Burundi, Rwanda, and Sudan) and in the conflict for the self-determination of the countries still under colonial domination and racial oppression. Furthermore, it was less important in number than the present one and it occurred in a stable political and economic context of the host country.⁹² On the contrary, mass-influx of the “second generation”, from the 90s to present, seem to be due just to civil wars, mostly regional, which have occurred in the Great Lake region, in the basin of the Mano river (Liberia, Sierra Leone, Guinea) and in the Horn of Africa (Ethiopia, Eritrea and Somalia). This influx of refugees is often added to an influx of internal displaced persons, sometimes occurring in the same host countries for the refugees (like in Democratic Republic of Congo, Ivory Coast or Uganda). Moreover, the influx is more important in number if compared to the one of the “first generation”, raising an “explosion” of the humanitarian assistance.⁹³

⁹⁰ *Refoulement* in the African continent is very common. For instance, hundreds of refugees fleeing conflict in Sierra Leone were sent back by Guinea in 1999. We assisted also at the dusk-to-dawn curfew, with soldiers being ordered to shoot violators- by Namibian authorities all along a 450 Km bank of the Kavango River in 2001. This prevented Angolan refugees escaping violence in Cuando Cuban Province in seeking asylum, since governments and UNITA patrols could be safely avoided only at night. These examples are cited in Hathaway, J.C., “The Rights of Refugees”, *op. cit.* note 37, p. 280.

⁹¹ Tanzania’s Foreign Minister told the Parliament in this occasion: “[e]nough is enough. Let us tell the refugees that the time has come for them to return home, and no more should come.” *See*: “Border closure triggers debate”, *Guardian*, July 19, 1995. Besides, as some 50,000 refugees attempted to flee ethnic clashes either in Rwanda or in Burundi, the Government of Arusha officially closed its border with Burundi on March 31, 1995. At that time the Tanzanian Prime Minister told Parliament that: “[t]he gravity of the situation, especially for those coming from Burundi and Rwanda, has made it inevitable for Tanzania to take appropriate security measures by closing her border with Burundi and Rwanda.” Cited in: Hathaway, J.C., “The Rights of Refugees”, *op. cit.* note 37, p. 281. About Zaire, on August 19, 1994, Deputy Prime Minister Malumba Mbangula declared that no more refugees would be allowed to cross from Rwanda into Zaire. Before this announcement, some 120 refugees per minute had been crossing into Zaire at the frontier post in Bukavu. *See*: « Le départ des soldats français du Rwanda. Le Zaire ferme ses frontières aux réfugiés », *Le Monde*, August 22, 1994: « La frontière est fermée dans le sens Rwanda-Zaire, et reste ouverte dans l’autre sens afin de permettre aux réfugiés de regagner leur pays ».

⁹² The “economic” refugee is a category that is considered more and more to deserve protection in Africa. In addition, some author urges that “[t]he intransigence of refugee law on this matter is clearly not justifiable in all cases and at all times, especially when the social and economic ramifications of political measures become all the more apparent.” *See*: Oloka-Onyango, J., “Human rights, the OAU Convention and the refugee crisis”, in: *International Journal of Refugee Law*, vol. 3, 1991, p. 458.

⁹³ Mubiala, M., « La mise en oeuvre du droit des réfugiés et des personnes déplacées en Afrique: problématiques et perspectives », Louvain-la-Neuve : Academia Bruylant, 2006, pp. 30-31.

To thwart refugees to enter the State blunt barriers can serve as same goal as border closures. It was the case of South Africa during the *apartheid* era when the Government of Pretoria erected a 3,000 volt electrified razor wire fence to prevent the entry of Mozambican refugees.⁹⁴

Even refugees who succeed in crossing an asylum State's border may still face ejection by officials and at times, the ejection can be both a matter of formal policy, and truly massive in scope. For instance, in July 1999, Zambia ordered the deportation without court review of all nationals, including refugees, of the Democratic Republic of Congo, because national budget could not cover their assistance.⁹⁵

Sometimes, non-States agents with toleration of national authorities carry out ejection, as it happened in Kenya in the mid 90s.⁹⁶ In the same way, Sierra Leonean and Liberian refugees fled Guinea in 2000 after a wave of xenophobic violence was unleashed when the President of this latter country encouraged citizens to form militia groups with a view to forcing refugees to be repatriated.⁹⁷

Moreover, refugees may be sometimes subject to removal when the access to a procedure to verify their status is refused. For example, Namibia has already classified Angolan refugees as "illegal immigrants" subject to exclusion of their status, as Zimbabwe have done with Rwandans.⁹⁸ This, without forgetting the decision of the Tanzanian Government to expel in 2006 some 5,000 Rwandan refugees, classified as "illegal immigrants", even if among them there were many who had already been naturalized.⁹⁹ Nevertheless, we have to remind how several African countries have done some declarations concerning the enforcement of Article 34¹⁰⁰, the one concerning naturalization in 1951 Geneva Convention. In effect, for Malawi:

⁹⁴ See: Nettleton, C., "Across the Fence of Fire", in: *Refugees*, 78, 1990, pp. 27-28, where he argues that official statistics report that ninety-four refugees had been killed trying to get through the fence.

⁹⁵ Cited in: Hathaway, J.C., "The Rights of Refugees", *op. cit.* note 37, p. 284. On the contrary, *Zambia: repatriation leads to decline in food production*: "The repatriation of Angolan refugees is creating food shortages in and around the Zambian camps they have lived in for decades", in: *Jesuit Refugee Service Dispatches* No. 201, September 28, 2006.

⁹⁶ Del Mundo, F., "The Future of Asylum in Africa", in: *Refugees*, No. 96, 1994, p. 7: "There is resentment, for example, in Kenya, at the security problems the presence of Somali refugees has brought. Last year, Kenyan security forces pushed back over 1,000 refugees from a border camp, something unheard before in Africa."

⁹⁷ Farah, D., "For refugees, hazardous haven in Guinea", in: *Washington Post*, 6 November 2000, p. 24.

⁹⁸ Cited in: Hathaway, J.C., "The Rights of Refugees", *op. cit.* note 37, p. 285.

⁹⁹ Personal interview by the author with Miss Claudine Umuhire, member of the Eligibility Commission for refugee status of the Government of Rwanda, Kigali-Geneva, 8 September 2006. The author has also recently followed for a while the case of Mr. Kuloka Diomi, a Congolese activist in human rights who found refuge in Togo. The problem resided in the fact that in Lomé as well Mr. Diomi continued his campaign of denouncing violation of human rights. In this case he took as a target the Togolese authorities (See the 44 page paper: "La Situation des Droits de l'Homme au Togo- janvier 2003, avril 2004" that he contributed to write and in which is denounced the violation of the human rights in that country). His problem was born by the fact that Mr. Diomi, fearing a persecution in Togo, had fled to Ivory Coast and there asked for asylum. However, in the month of March 2007, he is still formally a refugee in Togo and he engaged a dispute with UNHCR in Ivory Coast to be protected by the agency considering that he could not prove, until now to the Ivorian authorities in which his fear of persecution would exactly consist.

¹⁰⁰ Article 34 of the 1951 Geneva Convention stipulates that "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

“The Government of the Republic of Malawi is not bound to grant to refugees any more favourable naturalization facilities than are granted, in accordance with the relevant laws and regulations, to aliens generally.”¹⁰¹

This kind of Declaration has been done by the Mozambique as well.¹⁰² On the contrary, Botswana made a reservation on this article as well as the Kingdom of Swaziland by which:

“Similarly, the Government of the Kingdom of Swaziland is not in a position to assume the obligations of article 34 of the said Convention, and must expressly reserve the right not to apply the provisions therein.”¹⁰³

The granting of asylum and naturalization are two concepts deemed as reciprocally exclusive because it is impossible to grant asylum to one’s national. Thus, naturalization may be considered a durable solution.¹⁰⁴

Moreover, refugees may face *refoulement* because of the practical weakness in the operation of domestic asylum system, as in South Africa where the South African Human Rights Commission established that:

“[m]ost officers [at the Lindela Repatriation Centre] were not trained to make decision about asylum [...] and referred all those cases to a few overloaded senior immigration officers. People at Lindela who claimed they were asylum-seekers were not given the opportunity to apply for asylum, as was the policy. The Commission heard that immigration officers at Lindela had repeatedly asked for training.”¹⁰⁵

Initiatives to promote voluntary repatriation are sometimes used as the pretext to engage in the disguised withdrawal protection from refugees. In August 2002, Rwandan authorities not only allowed members of a Congolese rebel group backed by them to meet with refugees from Democratic Republic of Congo in order to promote their return home. They even advised the refugees that both camp services and the offer of transportation home would have soon been

¹⁰¹ UNHCR, *Declarations and reservations to the 1951 Convention relating to the status of refugees*- as of 1st March 2006-, Geneva: UNHCR, p. 14.

¹⁰² *Ibid.* p. 16: “The Government of Mozambique does not consider itself bound to grant to refugees facilities greater than those granted to other categories of aliens in general, with respect to naturalization laws.”

¹⁰³ *Ibid.* p. 39. In Swaziland, local government decided to deny refugees any means of support, then to arrest them when they protested their situation. Cannot it be considered an act of *refoulement*? Cited in Hathaway, J.C., “The rights of refugees”, *op. cit.* note 37, p. 464.

¹⁰⁴ Nathwani, N., *Rethinking Refugee Law*, The Hague/London/New York: Martinus Nijhoff Publishers, 2003, pp. 141-142.

¹⁰⁵ 2000 South African Human Rights Commission’s statement, cited in: Hathaway, J.C., “The Rights of Refugees”, *op. cit.* note 37, p. 287.

withdrawn from those who did not choose to repatriate arousing the concern of former UNHCR's High Commissioner Ruud Lubbers who declared:

“In Rwanda, I remain concerned about the imposed return of Congolese refugees, and I have taken this up with the Rwandan government.”¹⁰⁶

Hundreds of Burundian refugees reported to be voluntarily repatriating from Tanzania were leaving because of reductions in their food rations, coupled with denial of the right to earn a living through economic activity as well as almost 1,000 Sudanese refugees returned home in 2000 because they were starving in Ugandan camps.¹⁰⁷

These actions are contrary to a principle affirmed in the AU Convention and that has a precedent in the 1933 Geneva Refugee Convention. It provided at its Article 3 that:

“Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsion or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.”¹⁰⁸

In addition, the Provisional Arrangement Concerning the status of Refugees coming from Germany and signed at Geneva on July 4, 1936, read as follows in Article 4, paragraph 2:

“Without prejudice to the measures which may be taken within the country, refugees who have been authorized to reside in a country may not be subjected by the authorities of that country to measures of expulsion or be sent back across the frontier unless such measures are dictated by reasons of national security or public order.”¹⁰⁹

Finally, the United Nations General Assembly approved the resolution on February 12, 1946, which claims:

“No refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts including adequate information from the government of their countries

¹⁰⁶ Opening Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the Fifty-third Session of the Executive Committee of the High Commissioner's Programme, Geneva, 30 September 2002. File on Refworld, 2006 Edition.

¹⁰⁷ Cited in: Hathaway J.C., “The Rights of Refugees”, *op. cit.* note 37, pp. 288-289.

¹⁰⁸ Article 3, paragraph 1 of the 1933 Convention. As we emphasize above, comparing it to 1951 Geneva Convention, the 1969 AU Convention does not provide with no limitation of admission in its wording.

¹⁰⁹ Quoted in: United Nations, Department of Social Affairs, *A Study of Statelessness*, Lake Success, 1949, p. 95.

of origin, expressed valid objections to returning to their countries of origin and who do not come within the provisions of paragraph d) below, shall be compelled to return to their country of origin.”¹¹⁰

In this way, it could be clear that *bona fide* refugees may require the right not to be deported to the country where they are expected to suffer persecution. In effect, it seems that the principle that *bona fide* refugees should not be returned or expelled to a country where their life or freedom would be threatened for political, religious or racial reasons, is now definitely widely recognized and it applies equally to persons whose residence in the territory has been authorized, and to illegal entrants. It appears justified to deduce it from a duty of countries to desist from action, which may lead to the return of a refugee to a country where he may become the victim of persecution. However, it seems difficult to reconcile such a rule with the doctrine of the unlimited right of States to regulate the admission of aliens. Yet, a part of the doctrine asserts the presence of a rule of international law that qualifies this right in the sense that States should not refuse the admission to a *bona fide* refugee where such a refusal would expose him to a persecution jeopardizing his life or freedom primarily at the frontiers of his country of origin. This does not entail that the admitting country should permit the continued residence of the refugee once admitted. On the contrary, the same doctrine affirms that the admitting State may expel him to another country.¹¹¹

It is taken for granted that while certain general principles have been laid down for the protection of *bona fide* refugees, the application of these principles does not guarantee the individual a right to demand asylum in the country of potential refuge.¹¹²

The enjoyment of asylum is rigorously dependent upon the discretion of the country of refuge, which implies that this country alone, in the exercise of its competence, can conclude that asylum at will.¹¹³ The occurrence of this fact is so important to bring to mind the imperfections of the present position where the power to grant or deny asylum, also in the African continent, is deferred by individual States without any degree of either certainty or uniformity.¹¹⁴

An author highlights the fact that the international doctrine of asylum is based on two notions. The first consists in the fact that granting or denying asylum results from the application of rules of international law, particularly those dealing with the jurisdiction of the State and the fact

¹¹⁰ United Nations General Assembly, Question of refugees, 12 February 1946, No. 8 (I), paragraph c), ii).

¹¹¹ Weis, P., “The International Protection of Refugees”, in: *American Journal of International Law*, vol. 48, 1954, pp. 198-199.

¹¹² Nevertheless, for instance, C. Rousseau argues that international law is concerned with the protection of refugees, and he considers this as evidence that international law is directly concerned with the individual. See, among others : Rousseau, C., *Droit International Public, Tome II (Les sujets de Droit)*, Paris, Sirey, 1974, pp. 770-772.

¹¹³ Bahramy, A., *Le droit d’asile*, Paris: Rousseau et C. Editeurs, 1938, p. 8. The same author adds at p. 10: « [Notre travail] pourra aider [...] à écarter à l’avenir dans les affaires intérieures des autres Etats, sous prétexte de l’exercice d’une coutume ou d’un usage international qui n’a jamais été admis à titre de droit ou de privilege par les auteurs consciencieux ».

¹¹⁴ Garcia-Mora, M.R., *op. cit.* note 4, pp. 154-155.

that in application of such rules, nations are expected to conform to the demands and requirements of the individual within the world society.¹¹⁵ If necessary this would once more confirm that, the right of asylum can also be perceived as an essence of the system set up by the Charter of the United Nations.¹¹⁶ This, even if, as some doctrine has emphasized, a State that agrees to grant asylum to refugees by an international convention, there is considerable doubt that it will always act accordingly, especially if it considers the application of a convention as detrimental to his own interests. Moreover, in this case, it has been argued that it is up to the individuals to press their rights on the international stage.¹¹⁷ Nevertheless, we hard see how in the African continent individuals that often are completely ignorant about even their basic rights (as the right of life, for instance) could act alone affirming some rights that they do not even know to have. With the help of some international organizations and ONGs that are often tackle in their effort of helping entire populations in need?

Voluntary Repatriation, Legal Instruments and the Role of UNHCR: an Analysis

One of the major ambiguities concerning the concept of voluntary repatriation resides in the fact that, although it has been enshrined for decades, it does not have any confirmation in any conventions or other binding legal instruments, a part the exception of the African Convention.¹¹⁸ In effect, the concept in question, at present time, seems to denote more an institutional policy than norms accepted by States and other actors of the international community. UNHCR has often assumed direct responsibility to encourage either simple dialogue or negotiations between the country of origin and country of asylum contributing also to assist repatriates in resettling in their own country.¹¹⁹

¹¹⁵ *Ibid.*, p. 161.

¹¹⁶ Lauterpacht, H., *International Law and Human Rights*, London: Stevens, 1950, p. 244. Yet, in this specific case, H. Lauterpacht refers both the right to petition and to asylum.

¹¹⁷ Morgenstern, F., *op. cit.* note 34, p. 353.

¹¹⁸ It is worth to note as the Arusha “Conference on the Situation on Refugees in Africa”, held in 1979, called upon all African governments to take into consideration official proclamations of amnesty to their nationals in exile in order to boost their voluntary repatriation. In this circumstance, the Conference invited the AU: “[t]o make a declaration to the effect that granting of amnesty should be held sacrosanct and inviolate.” In this recommendation, the Conference also called upon all African Governments: “To consider making official public declarations of amnesty to their respective nationals currently in exile, so as to encourage their voluntary repatriation. Guarantees for safe return and machinery to supervise such guarantees to be considered and worked out both by the countries of origin and the countries of asylum in co-operation with the OAU, the refugee-serving agencies and the refugees concerned or their representatives.” *See*: UN Doc. A/AC.96/INF.158.

¹¹⁹ Over the years, the work of this kind made by UNHCR in the African continent has been outstanding. It suffices to cite the coordination of the repatriation of some 200,000 Sudanese from Ethiopia in 1972/1973 as far as the 250,000 Zimbabweans repatriated in 1980/1981 or the 250,000 Chadian repatriated from Cameroon and Central African Republic in 1982, because of the temporary cessation of hostilities in N’Djamena. Moreover, we have to cite the Tripartite Commission launched in the framework of repatriations of the Ethiopians from Djibouti in 1982/1983.

Forced repatriation constitutes a very serious breach of international law and no refugee can be expected to return to his country as long as the circumstances explaining his flight still prevail. Yet, a substantial change in the interior conditions within the country of origin is an essential prerequisite, both for legal and for practical reasons, for any repatriation programme to succeed. Clearly, any effort done by UNHCR to try to cause such changes would contravene its mandate. It should be up to the international community, on behalf of the United Nations, to attempt to achieve such changeover, always in the respect of the country's sovereignty. Once changes taking place, the programme of voluntary repatriation could be set up even if its success relied upon several factors, including the clearly expressed wish of the country of origin that the refugees can return. A typical example is given by a concession of an amnesty, which, of course, should be accompanied by the express will of the refugee himself.¹²⁰

The refugee can be convinced in his choice by the stipulation of a formal procedure agreed upon in a Tripartite Agreement between the country of refuge with the country of origin and UNHCR. The role played by UNHCR should be the one of supervise the return and, very important when it can be done, the first phase of the reinstallation. It has even supposed that UNHCR should have the right to denounce the agreement before competent international organs, such as the Secretary-General of the United Nations rather than its General Assembly if, after a careful analysis of the situation of the country of origin, conditions remains not favourable to the reinstallation of the refugees.¹²¹

Nevertheless, we have to focus our attention on the fact if this kind of activities by UNHCR can have a legal basis. Generally, in the African context is Article V of the AU Convention that it serves for this purpose although UNHCR is not expressly mentioned. Furthermore, UNHCR clearly have to neither participate nor influence the massive repatriation of refugees because of political sensitivities. This was the case of the massive repatriation of Ethiopians from Sudan in the mid-eighties repatriation that was carried out by the Tigrayan People's Liberation Front.¹²² In some States, refugees were expelled simply as a matter of government policy. For example, in the early 1980s, Uganda under Milton Obote displaced a large number of Banyarwanda, including some

UNHCR pushed back all the critics that maintained that Ethiopian refugees were forced to sign a declaration in which they agreed to be repatriated. In a way, it seems effectively very hard that there were a high percentage of volunteers for repatriation among the strictly Ethiopian political exiles in Djibouti. On the other hand it should be highlighted that after the cessation of hostilities in refugees' home country and the promulgation of the amnesty proclamation by the Government in Addis-Ababa, Djiboutian authorities had the right to consider refugees no longer as such because, as for Art. 1 C (5) of the 1951 Convention and for Art I (4), *lit. e*) of the 1969 OAU Convention, the circumstances in connection with which they had been recognized as refugees had ceased to exist. For this example, *see*: Hofmann, R., "Voluntary repatriation and UNHCR", in: *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 44, 1984, pp. 329-332.

¹²⁰ *See* for instance, what happened in Ethiopia in the early '80s: *supra* note 119 or other examples as Uganda (1964) and Zaire (1967), the latter cited in: Van Krieken, P.J., "Repatriation of Refugees under International Law", in: *Netherlands Yearbook of International Law*, vol. 1, 1982, p. 113.

¹²¹ Hofmann, R., "Voluntary repatriation", *op.cit.* note 119, p. 334.

¹²² Okoth-Obbo, G., *op. cit.* note 33, p. 128.

40,000 people who claimed Ugandan citizenship and 31,000 people registered with UNHCR as refugees, forcing most of them to seek refuge in Rwanda.¹²³ The displacement was actually enforced by the youth wing of the ruling Uganda People's Congress (UPC), but at the instigation and with the blessing of the Ugandan Government at all levels.¹²⁴

On the contrary, at the universal level seems that UNHCR competence relies upon the provision of Article 8, letter c) of the agency's Statute that affirms:

"The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities."

Yet, this interpretation could be criticized, giving that, as provided for in Article 9 of the Statute; an explicit mandate by the General Assembly should be indispensable, even if the article in question uses the conditional "may".¹²⁵ On the other hand, it has been emphasized that the conclusion of any agreement providing for an extensive decision-making function of UNHCR hinges upon the unequivocal consent of the country of origin. In principle, any government should not fear that the agency's supervision would turn into an intervention into internal affairs, given that the strictly UNHCR's humanitarian approach to refugee crisis. Nevertheless, it has been stressed how UNHCR's intervention should occur only in those exceptional cases where the provisions of a repatriation agreement would not to be observed.¹²⁶

Voluntary repatriation has been receiving increasing attention from the international community since the beginning of the 1980s. From this period, UNHCR has been called upon by the Secretary General to carry out different functions in connection with large-scale repatriation operations that have resulted in an expansion of the original terms of its mandate, particularly concerning the provisions of assistance to countries of origin to ease the re-integration of returning refugees.¹²⁷ The extension of UNHCR liabilities¹²⁷ is evident in the 1994 UN General Assembly resolution:

¹²³ Pirouet, L., "Refugees in and from Uganda in the post-colonial period", in: Hansen, H.R.; Twaddle, M. (edited by), *Uganda Now: Between Decay and Development*, London: James Currey, 1988, p. 243.

¹²⁴ Rutinwa, B., "The end of asylum? The changing nature of refugee policies in Africa", in: UNHCR, *New Issues in Refugee Research*, Working Paper n° 5, 1999, pp. 5-6.

¹²⁵ Article 9 of the UNHCR Statute stipulates that: "The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly *may* (emphasis added) determine, within the limits of the resources placed at his disposal."

¹²⁶ Hofmann, R., "Voluntary repatriation", *op.cit.* note 119, pp. 334-335.

¹²⁷ F. Schnyder in 1965 stated: « Il convient de souligner aussi que, pour compléter le rôle du HCR à cet égard, les programmes d'assistance autorisent celui-ci à favoriser dans certains cas le rapatriement librement consenti des réfugiés en finançant leur transport du pays d'asile au pays d'origine. En outre, il existe des accords conclus avec certains gouvernements, qui prévoient la participation du HCR aux efforts tendant à encourager le rapatriement librement consenti des réfugiés ». *See*: Schnyder, F., "Les aspects juridiques actuels du problème des réfugiés", in: *Recueil des Cours de l'Académie de La Haye*, vol. 114 (I), 1965, p. 411.

“Reiterates that voluntary repatriation, when it is feasible, is the ideal solution to refugee problems, calls upon countries of origin, countries of asylum, the Office of the High Commissioner and the international community as a whole to do everything possible to enable refugees to exercise freely their right to return home in safety and dignity, ensuring that international protection continues to be extended until that time, and assisting, where needed, the return and reintegration of repatriating refugees, and further calls upon the High Commissioner, in cooperation with States concerned, to promote, facilitate and coordinate the voluntary repatriation of refugees, including the monitoring of their safety and well-being on return.”¹²⁸

To stress the importance of voluntary repatriation, the General Assembly has also introduced a clarification, specifying that:

“The Assembly would further call upon the High Commissioner and others to intensify their support to African Governments through capacity-building activities. It would also reaffirm the right of return and the principle of voluntary repatriation, as well as *the fact that voluntary repatriation should not necessarily be conditioned on accomplishing political solutions in the country of origin (emphasis added)*. It would express grave concern at the increasing number of internally displaced persons in Africa and call upon States to take concrete action to pre-empt internal displacement and meet the protection and assistance needs of internally displaced persons.”¹²⁹

Hence, over the last decades the role of the UN agency moved to an active creation of conditions encouraging to the return of refugees. However, we have to emphasize that this practice is still taking place in what part of the doctrine has called “legal *vacuum*”¹³⁰ considering that resolutions provided by the General Assembly adopted following the 1950 Statute only formulate guidelines of these responsibilities without specifying their content. The ExCom have tried to elaborate basic standards relative to the legal issue of voluntary repatriation¹³¹ examining this topic in detail since 1980 when it put the accent on the voluntary nature of repatriation as an essential prerequisite for dealing with refugees’ crisis. Thus the ExCom:

¹²⁸ UNGA’s resolution, “Office of the United Nations High Commissioner for Refugees”, 23 December 1994, No. A/RES/49/169, paragraph 9.

¹²⁹ UNGA’s resolution, “Assistance to refugees, returnees and displaced persons in Africa”, 19 December 2006, No. A/RES/61/139.

¹³⁰ Chetail, V., “Voluntary repatriation in public international law: concepts and contents”, in: *Refugee Survey Quarterly*, vol. 23, 2004, p. 12.

¹³¹ ExCom conclusions cannot be in any case considered as binding, belonging more to that category of provisions sometimes called “*soft law*”. On the question about the legal content of the Conclusions elaborated by the ExCom, see: Sztucki, J., “The conclusions on the international protection of refugees adopted by the Executive Committee of the UNHCR programme”, in: *International Journal of Refugees Law*, vol. 1, 1989, pp. 285-318.

“(a) Recognized that voluntary repatriation constitutes generally, and in particular when a country accedes to independence, the most appropriate solution for refugee problems; (b) Stressed that the essentially voluntary character of repatriation should always be respected; (c) Recognized the desirability of appropriate arrangements to establish the voluntary character of repatriation, both as regards the repatriation of individual refugees and in the case of large-scale repatriation movements, and for UNHCR, whenever necessary, to be associated with such arrangements; (d) Considered that when refugees express the wish to repatriate, both the government of their country of origin and the government of their country of asylum should, within the framework of their national legislation and, whenever necessary, in co-operation with UNHCR take all requisite steps to assist them to do so; (e) Recognized the importance of refugees being provided with the necessary information regarding conditions in their country of origin in order to facilitate their decision to repatriate; recognized further that visits by individual refugees or refugee representatives to their country of origin to inform themselves of the situation there—without such visits automatically involving loss of refugee status—could also be of assistance in this regard.”¹³²

Furthermore, the same conclusion identifies two complementary principles in a position to implement the repatriation operation. In effect, the ExCom:

“(f) Called upon governments of countries of origin to provide formal guarantees for the safety of returning refugees and stressed the importance of such guarantees being fully respected and of returning refugees not being penalized for having left their country of origin for reasons giving rise to refugee situations; (i) Called upon the governments concerned to provide repatriating refugees with the necessary travel documents, visas, entry permits and transportation facilities and, if refugees have lost their nationality, to arrange for such nationality to be restored in accordance with national legislation.”¹³³

Unexpectedly, the change of circumstances prevailing in the country of origin is not mentioned explicitly. This examined Conclusion does just an indirect reference to the “formal guarantees for the safety of returning refugees (paragraph f)), as a condition of repatriation programme itself, rather than a precondition for repatriation. Thus, will seems to suffice and an indispensable precondition. The subjective element of voluntary repatriation put in the shade the objective one that is the situation of the country of origin. Nevertheless, both elements are complementary in identifying the legal precondition of voluntary repatriation. Voluntariness alone cannot be the exclusive criterion, without considering also the change circumstances in the country of origin. But how much can the element of voluntariness count when Rwanda or Uganda withhold

¹³² ExCom Conclusion No. 18 (XXXI), “Voluntary repatriation”, 1980.

¹³³ *Ibid.*

food, water and other essential goods from refugees in order to induce them to repatriate “voluntarily”?¹³⁴

The above-mentioned ambiguity substantially remains also in the following Conclusion adopted on the same issue, in 1985. There the ExCom repeats the voluntary character of repatriation as the central principle. In effect:

“a) The basic rights of persons to return voluntarily to the country of origin is reaffirmed and it is urged that international co-operation be aimed at achieving this solution and should be further developed; b) The repatriation of refugees should only take place at their freely expressed wish; the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected.”¹³⁵

Nevertheless, differing from the previous Conclusion, the ExCom explicitly mentions the situation of the country of origin that caused the refugee escape. However, the key aspect of the voluntary repatriation is formulated with a vague wording, in connection with the prevention of the refugee flow and the liabilities of the countries towards their nationals. The Conclusion affirms:

“c) The aspect of causes is critical to the issue of solution and international efforts should also be directed to the removal of the causes of refugee movements. Further attention should be given to the causes and prevention of such movements, including the co-ordination of efforts currently being pursued by the international community and in particular within the United Nations. An essential condition for the prevention of refugee flows is sufficient political will by the States directly concerned to address the causes, which are at the origin of refugee movements; d) The responsibilities of States towards their nationals and the obligations of other States to promote voluntary repatriation must be upheld by the international community. International action in favour of voluntary repatriation, whether at the universal or regional level, should receive the full support and co-operation of all States directly concerned. Promotion of voluntary repatriation as a solution to refugee problems similarly requires the political will of States directly concerned to create conditions conducive to this solution. This is the primary responsibility of States.”¹³⁶

An attempt to make clearer the guidelines set forth by the ExCom was made in the 1996 UNHCR’s *Handbook*. This piece of work provides a more theoretical framework in defining the crucial components of voluntary repatriation and in stressing the interaction between its voluntary nature and the change of circumstances in the country of origin.

At first, the *Handbook* confirms how the principle of voluntariness:

¹³⁴ Hathaway, J.C., “The Rights of Refugees”, *op. cit.* note 37, p. 318.

¹³⁵ ExCom Conclusion No. 40 (XXXVI), “Voluntary repatriation”, 1985.

¹³⁶ *Ibid.*

“[v]iewed in relation to both: conditions in the country of origin (calling for an informed decision); and the situation in the country of asylum (permitting a free choice) [...] is the cornerstone of international protection with respect to the return of refugees.”

The *Handbook* continues in defining the concept of voluntariness in terms that can be deemed as broad and negative:

“Voluntariness means not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning, for example by dissemination of wrong information or false promises of continued assistance. In certain situations economic interests in the country of asylum may lead to interest groups trying to prevent refugees from repatriating.”¹³⁷

In substance, the two basic components of voluntary repatriation are reaffirmed all along the *Handbook*. In effect, the improvement of the conditions of the country of origin is considered, on the same level of the voluntariness, as one “*essential precondition*”¹³⁸ to promote voluntary repatriation by UNHCR. Yet, the case of repatriation of Mozambicans from Malawi at the half of 90s is illustrative for the tendency to limit the time duration of voluntariness. In fact, when a voluntary repatriation movement has been concluded, those who still reside in the host country cannot hinge on prolonged stay until the time application of the cessation clauses of their status of refugees terminates.¹³⁹

The *Handbook* in its paragraph 3.1 clarifies:

¹³⁷ UNHCR, *Handbook on voluntary repatriation: international protection*, Geneva: UNHCR, 1996, paragraph 2.3, p. 9. It is worth to note that paragraph 4.1 at p. 30 supplies three examples where the essential precondition of voluntariness is not considered as satisfied. These are: 1) host country authorities deprive refugees of any real freedom of choice through outright coercion or measures such as, for example, reducing essential services, relocating refugees to hostile areas, encouraging anti-refugee sentiment on the part of the local population; 2) factions among the refugee population or exiled political organizations influence the refugees’ choice either directly by physically pressuring them to return, or indirectly by activities such as disinformation campaigns about the risk of remaining in the country of asylum or dangers related to returning home; 3) certain interest groups in the host country actively discourage voluntary repatriation by disseminating false information including incorrect promises of assistance, economic opportunities or improvement of the legal status.

¹³⁸ *Ibid.*, paragraph 3.1: “These are some of the essential preconditions to be met for UNHCR to promote voluntary repatriation movements: 1) There must be an overall, general improvement in the situation in the country of origin so that return in safety and with dignity becomes possible for the large majority of refugees. 2) All parties must be committed to fully respect its voluntary character. 3) The country of origin must have provided a formal guarantee, or adequate assurances for the safety of repatriating refugees, as appropriate. 4) UNHCR must have free and unhindered access to refugees and returnees. The basic terms and conditions of return must be incorporated in a formal repatriation agreement between UNHCR and the authorities concerned.”

¹³⁹ Zieck, M., *UNHCR and Voluntary Repatriation of Refugees*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1997, p. 441.

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

It also gives an explanation on the difference between promotion and facilitation of the repatriation, explaining that in the latter case respect for the refugee’s will requires a passive involvement of UNHCR as there is no changes of circumstances in the country of origin.¹⁴⁰

Furthermore, the *Handbook* tries to explain the expression of “return in safety and dignity” considered as an essential precondition for the issue in question. While the “return in safety” is easy to define, giving some specific examples of changes in the country of origin after which the return becomes possible, the expression “return with dignity” is more difficult to grasp.¹⁴¹ However, these two concepts tend to hide the legal contents of voluntary repatriation. It means that the evolution of the concept of return in safety and dignity stresses the role of the objective element to the detriment of the subjective one, as we can perceive without difficulty in the 2002 UNHCR’s Background Note on voluntary repatriation. There voluntary nature of repatriation is mentioned with an elusive wording and the safety in the country of origin is considered as the most important condition.¹⁴²

¹⁴⁰ *Ibid.*, paragraph 3.1: “Respecting the refugees’ right to return to their country at any time, UNHCR may facilitate voluntary repatriation when refugees indicate a strong desire to return voluntarily and/or have begun to do so on their own initiative, even where UNHCR does not consider that, objectively, it is safe for most refugees to return. This term should be used only when UNHCR is satisfied that refugees’ wish to return is indeed voluntary and not driven by coercion [...]. While the condition of fundamental change of circumstances in the country of origin will usually not be met in such situations, UNHCR may consider facilitating return in order to have a positive impact on the safety of refugees/returnees as well as to render assistance, which the refugees may require in order to return. Such assistance may have to be given in the absence of formal guarantees or assurances by the country of origin for the safety of repatriating refugees, and without any agreement or understanding having been concluded as to the basic terms and conditions of return. In designing and carrying out its protection and assistance functions, UNHCR, however, has to make it clear to the authorities and, most importantly, to the refugees, that UNHCR support for such repatriations is based on respect for the refugees’ decision to repatriate and cannot be interpreted as an indication of adequate security.”

¹⁴¹ *Ibid.*, paragraph 2.4: “Return in safety: Return which takes place under conditions of legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites), and material security (access to land or means of livelihood). Return with dignity: The concept of dignity is less self-evident than that of safety. The dictionary definition of “dignity” contains elements of “serious, composed, worthy of honour and respect.” In practice, elements must include that refugees are not manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights. Among the elements of “safety and dignity” to be considered are: – the refugees’ physical safety at all stages during and after their return including en route, at reception points and at the destination, – the need for family unity, – attention to the needs of vulnerable groups, – the waiver or, if not possible, reduction to a minimum of border crossing formalities, – permission for refugees to bring their movable possessions when returning, – respect for school and planting seasons in the timing of such movements, and – freedom of movement.”

¹⁴² UNHCR, Global Consultation in international protection, “voluntary repatriation”, No. EC/GC/02/5, 25 April 2002, Paragraphs 14 and 15: “14- The search for solutions has generally required UNHCR to promote measures, with governments and with other international bodies, to establish conditions that would permit refugees to make a free and informed choice and to return safely and with dignity to their homes. Creating the most conducive actual conditions for return remains, however, fundamentally a political process, going well beyond the role and capacity of UNHCR, and involving actors with different and not necessarily converging interests. 15- From UNHCR’s perspective, the core of voluntary repatriation is return in and to conditions of physical, legal and material safety, with full restoration of

About the concept of “safety” applied to the 1969 Convention it is to be stressed how its provisions rest on the assumption that the condition for returns in safety would exist already, thus they focus mainly on the legal organization and conditions for the return itself.¹⁴³

Over the years, we can assist in a turn over of positions in the core criteria for the voluntary repatriation considered as essential by the UNHCR with the situation in the country of origin that seems overcome the character of voluntariness, considered for the decades the main element of the repatriation. This proves how the subject is very “slick” influenced sometimes by political considerations that have the upper hand over strictly legal ones.¹⁴⁴

“Voluntary” Repatriation in Sub-Saharan Africa: the Example of Tanzania

There were cases in Africa in which asylum countries gave arbitrary deadlines to refugees, relying sometimes on agreements UNHCR and their countries of origin, to require refugees to repatriate “voluntarily”. This was, for example, the case of Tanzania towards Rwandan refugees in the late 1996. Nevertheless, the Rwandan repatriation from Tanzania, in December 1996 can hardly be described as “voluntary”. Actually, this forced repatriation represented a broader international trend toward a more restrictive refugee policy and declining protection standards.¹⁴⁵ Different was the framework in which UNHCR launched the “organized voluntary repatriation” of roughly 500,000 Angolan refugees from Zambia, Namibia, and the Democratic Republic of Congo. In this case UNHCR esteemed that conditions to repatriation were acceptable even if some refugees were opposed to the initiative, remembering the terrible attempt to promote their repatriation based upon a cease-fire among the fighting factions, in 1994.¹⁴⁶

In lots of situations concerning refugee protection decisions have been affected by political considerations. Quoting Agnès Callamard, refugee policies are:

national protection the end product. These core components of “return in safety and with dignity”, and UNHCR’s role in relation to each, are discussed below.”

¹⁴³ Okoth-Obbo, G., *op. cit.* note 33, p. 126.

¹⁴⁴ Chetail, V., *op. cit.* note 130, p. 18.

¹⁴⁵ Whitaker, B.E., “Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania”, in: Steiner, N.; Gibney, M.; Loescher, G., *Problems of Protection: The UNHCR, Refugees, and Human Rights*, New York/London: Routledge, 2003, p. 142. For this example, *see also*: “The Tanzanian Government had decided that national security concerns had highest priority and that these concerns would prevail. Although it did agree to individual screening of those who did not return as of his date, this option was not in any systematic way made known to refugees. In addition, the whole set-up of this mass return certainly did not suggest that it would be feasible for a refugee to receive special treatment and an evaluation of the merits of his or her claim. Correspondingly, no formal mechanism was provided or established for identifying individuals who risked persecution if they were to be sent back”, quoted in: Egli, A.V., *Mass Refugee Influx and the Limits of Public International Law*, The Hague/London/New York: Martinus Nijhoff Publishers, 2001, p. 247.

¹⁴⁶ Cited in: Hathaway, J.C., “The rights of refugees”, *op. cit.* note 37, pp. 936-937.

“[g]overned more often than not by politics and ideology, rather than ethics.”¹⁴⁷

Of course, at that time Tanzanian authorities feared that the new Rwandan Government in power could clear out the refugee camps in Western Tanzania that sheltered potentially dangerous adversary of the new Kigali’s Government. Tanzania was concerned about this situation. This based on the consideration that already in 1972 the Burundian army bombed some villages in Western Tanzania. The bombing was in retaliation of some attacks on Burundian territory by rebel groups that operated in Tanzania. We have to highlight that a decisive factor behind the repatriation operation was the adoption by Tanzanian authorities of the view that the security situation within Rwanda had improved. Based on this argument, Rwandan asylum seekers no longer could claim legitimately refugee status because the instability to public order in Kigali had ended. The instability of the political situation represented the basis upon which Rwandans entered Tanzania in 1994.

According to the expanded definition of the 1969 AU Convention, refugee status was extended to all persons fleeing, among others: “events seriously disturbing public order.”¹⁴⁸ Under this definition, governments offer protection *en masse* to people fleeing civil war and violence without requiring them to be individually screened.¹⁴⁹ Nevertheless, when the situation that leads to the granting of refugees status no longer exists, cessation clause for fundamental circumstances changes can entry into force even if the standards to apply this principle are high and were only met in fifteen cases between 1975 and 1996.¹⁵⁰

A last but not least element in the repatriation could be easily perceived in the declining availability of funds to support this kind of operation. In the example of Tanzania, this declining of funding levels entailed the Arusha Government’s claim on the necessity of the “burden sharing”, in this relying upon Article II, paragraph 4 of the 1969 Convention.¹⁵¹ Repatriation of the Rwandans was finally encouraged by the memorandum of understanding that UNHCR signed with the Tanzanian government requiring all Rwandan refugees to leave the country by the end of the year

¹⁴⁷ Callamard, A., “Malawian refugee policy, international politics, and the one party regime”, in: *Journal of International Affairs*, vol. 47, 1994, p. 555.

¹⁴⁸ Article I, paragraph 2 of the AU Convention.

¹⁴⁹ This kind of practice is particularly appreciated by I. Jackson. See throughout all this work and particularly Chapters XI, XII and XIII. See: Jackson, I., *op. cit.* note 89. In 1937 J. Turpin already wrote: « [P]armi les réfugiés peuvent se trouver des délinquants de droit commun, il est impossible à l’Etat de refuge, alors que les individus qui demandent asile arrivent en foule, d’exercer un droit de contrôle et de rechercher si tous ont droit à l’asile. L’Etat leur accorde un asile provisoire, quitte plus tard, après contrôle, à extraditer les criminels de droit commun et à faire bénéficier les réfugiés politiques de l’asile définitif ». See: Turpin, J., *op. cit.* note 63, pp. 49-50

¹⁵⁰ Whitaker, B.E., “Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania”, in: Steiner, N.; Gibney, M.; Loescher, G., *op. cit.* note 145, p. 148.

¹⁵¹ Article II, paragraph 4 of the 1969 Convention stipulates: “Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.”

1996 under assurances from Tanzanian authorities that force would not be used even if the government of Tanzania did not keep promises, violating the memorandum.¹⁵²

Nevertheless, we have to stress how Tanzanian authorities did not force all the Rwandans back to their own country. In a sense, Arusha's government shifted back to the traditional definition of asylum provided by the 1951 UN Convention considering that they could concede the status of refugee based on an individual fear of persecution and not, like the practice in similar situation showed, on a group-basis.¹⁵³ It is worth to be noted that it has been argued that, although doctrine does not concord with the following affirmation, the definition of refugee provided by the AU Convention permits the admission of asylum seekers to host countries on a *prima facie* group basis.¹⁵⁴

In our example, Rwandans refugees had initially been admitted to Tanzania based on the "expanded" definition given by the AU Convention. The change of policy can easily be explained by the fact that the intentions of Arusha was of limiting the number of people eligible for protection.

Tanzania clearly perceived such refugees as potential threats to good relations with refugee-generating neighbours and, consequently, as a diplomatic source of embarrassment.¹⁵⁵

The peculiarity of this case was that refugees who could claim a legitimate fear of persecution upon return to Rwanda were those who had participated in the 1994 genocide. In fact, as B. Rutinwa argued:

"Tanzania has skewed the logic of refugee protection. The only protect are the killers. If you haven't killed anyone, then you are sent home."¹⁵⁶

¹⁵² Whitaker, B.E., "Changing priorities in refugee protection: the Rwandan repatriation from Tanzania", in: Steiner, N.; Gibney, M.; Loescher, G., *op. cit.* note 145, pp. 149-150. Article 3 of the 1995 Tripartite Agreement between UNHCR, Tanzania and Rwanda expressly instructs that: "The Government of the United Republic of Tanzania undertakes to guarantee the voluntary character of the repatriation of Rwandan refugees and will take, in consultation with the High Commissioner for Refugees, all measures necessary to uphold this fundamental principle of international protection. To this end, it will take all measures necessary to ensure that refugees are in full knowledge of facts [...]" And Article 4: "The Government of the United Republic of Tanzania shall grant to the United Nations High Commissioner for Refugees free and unhindered access to its territory and refugees to allow the implementation of the repatriation operation."

¹⁵³ This is what is also called the *prima facie* recognition. *Prima facie recognition* is a procedural mechanism for recognizing refugee status based on evidence that the situation in the country of origin supports the assumption that individuals of the group qualify for refugee status under the applicable refugee criteria. Refugee status granted on a *prima facie* basis does not require "confirmation" at a later stage, even if individual eligibility becomes feasible. In the African context, the "extended" refugee definition in the OAU Convention is usually applied on a group situation. *See*: UNHCR, *Note on Refugee Status Granted on Prima Facie Basis*, 2005, p. 2. The African practice on this matter is vast. *See*, among others: Mozambican refugees in Malawi in the early 90s cited in Callamard, A., *op. cit.* note 147, pp. 531-532.

¹⁵⁴ Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, New York, Lawyers Committee for Human Rights Editions, 1995, p. 29.

¹⁵⁵ Juma, M.K.; Kagwanja, P.M., "Securing Refuge from Terror: Refugee Protection in East Africa after September 11", in: Steiner, N.; Gibney, N.; Loescher, G., in: *op. cit.* note 145, p. 228.

¹⁵⁶ Quoted in: Whitaker, B.E., "Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania", in: Steiner, N.; Gibney, M.; Loescher, G., in: *op. cit.* note 145, pp. 151-152.

The presence of criminal elements applying for the status of refugees has always posed the classical problem to find a way to distinguish them and the other asylum seekers. This problem is manifest also in urban areas where in Arusha as in Nairobi, was very difficult the distinction between Somali or Rwandese fighters and *bona fide* refugees. Consequently, the tendency has been to collectively criminalize refugees and deem them within the national security system.¹⁵⁷

The decision to repatriate the Rwandan refugees in the half of 90s could be seen in a sense as a strategy of conflict prevention in the area. In itself, this is a very important priority, along with refugee protection. In this particular case, as former UNHCR High Commissioner explained, conflict prevention was more important than refugee protection. This argument reflects the perspective that violations of refugee protections such as *non-refoulement* can at times be justified as a strategy of conflict prevention. In fact, S. Ogata stated:

“When refugee outflows and prolonged stay in asylum countries risk spreading conflict to neighbouring States, policies aimed at early repatriation can be considered as serving prevention. [This is] what motivated [...] UNHCR’s policy of encouraging repatriation from Zaire and Tanzania to Rwanda, even though human rights concerns in Rwanda never disappeared.”¹⁵⁸

Nevertheless, literature does not agree on the reason why Tanzania adopted this policy of closing its borders, come maintaining that it was done simply because of lack of assistance from international community facing the influx of Rwandese after the 1994 genocide.¹⁵⁹

Remaining in the same area, we also note as the solution of “global repatriation” sought in the “Plan d’action” of Bujumbura for the Great Lakes region failed, conditions for a return in security not being reached in none of the two countries concerned, namely Rwanda and Burundi.¹⁶⁰

General Conclusion

Many African countries have taken and still are taking measures that reveal their inconsistency face to the obligations that the same countries have assumed under international

¹⁵⁷ Juma, M.K.; Kagwanja, P.M., “Securing Refuge from Terror: Refugee Protection in East Africa after September 11”, in: Steiner, N.; Gibney, M.; Loescher, G., in: *op. cit.* note 145, pp. 231-232 and 235.

¹⁵⁸ Whitaker, B.E., “Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania”, in: Steiner, N.; Gibney, M.; Loescher, G., *op. cit.* note 145, p. 153.

¹⁵⁹ Juma, M.K.; Kagwanja, P.M., “Securing Refuge from Terror: Refugee Protection in East Africa after September 11”, in: Steiner, N.; Gibney, M.; Loescher, G., *op. cit.* note 145, p. 226.

¹⁶⁰ Mubiala, M., *op. cit.* note 93, p. 49.

law.¹⁶¹ Nevertheless, we undertook this analysis also aware of the fact that the doctrine often argues that African international treaty law gives a sufficient answer to the flux of refugees. Even if a provision, forbidding the provocation of the flux seems to lack.¹⁶² Moreover, about internal legal systems, we are also aware of the fact that existing laws and proposed refugee bills in all over the African continent do not take into consideration the complex new realities posed, for instance, by the war against terrorism.¹⁶³

We have (unfortunately) to stress how often until now refugee matters in the continent could not have been run in conformity both international and regional norms, with the 1969 Convention that nonetheless still remain an important pillar for the asylum regime.

In recent years, Africa's approach to the refugee problem has changed from a traditional "open door" policy to a retreat from commitment to the institution of asylum.

Actually, the traditional "generosity" of African countries to refugees has been often misleading because it gives the impression, but just the impression that refugees in these countries enjoy freedom and fundamental human rights.¹⁶⁴

The principal factors that have influenced Africa's new policy are the extent of the refugee problem and its impact on host countries, the inadequate capacity of host countries to face this flow as well as the absence of an equitable burden sharing.¹⁶⁵

On the contrary, where internal measures have been adopted, they have revealed their inaptitude to respond at the refugee crisis, particularly referring to mass-influx situation that probably will require the setting up of special procedures for either their determination or their protection. This big lacuna occurs also because generally countries of this continent seem to lack a jurisprudential approach to refugee issues.¹⁶⁶ Moreover, practice have showed how difficult is for the States concerned to put in place a treatment that limited national capacities can face adequately.

Besides, recourse to durable solutions, particularly voluntary repatriation, has not given any tangible result yet mostly because of the persistence of the problems that created the afflux of refugees in the countries of origin, such as armed conflicts and massive violation of the human rights.

¹⁶¹ Lomo, Z., "The struggle for protection of the rights of refugees and IDPs in Africa: making the existing international legal regime work", in: *Berkeley Journal of International Law*, vol. 18, 2000, p. 279.

¹⁶² Czaplinski, W. ; Sturma, P., « La responsabilité des États pour les flux de réfugiés provoqués par eux », in : *Annuaire français de droit international*, vol. 40, 1994,

¹⁶³ Juma, M.K.; Kagwanja, P.M., "Securing Refuge from Terror: Refugee Protection in East Africa after September 11", in: Steiner, N.; Gibney, M.; Loescher, G., *op. cit.* note 145, p. 234.

¹⁶⁴ Lomo, Z., "Refugees in East Africa: developing and integrated approach", in: Bekoe, D.A. (edited by), *East Africa and The Horn- Confronting Challenger to Good Governance*, Boulder/London: Lynne Rienner Publishers, 2006, p. 41.

¹⁶⁵ Rutinwa, B., *op. cit.* note 124, p. 25.

¹⁶⁶ Aukot, E., "Refugee protection in Africa: a developing country's dilemmas towards effective protection", in: *East African Journal of Peace and Human Rights*, vol. 9, 2003, pp. 253-254. The author, a Kenyan born, complained with the fact that this country lack of an internal legislation of refugees. Finally, the Kenyan Refugee Bill should be approved and entry into force by the end of the spring 2007.

It seems too easy to argue that the real solution of the plight of refugees in this continent is in the elimination of the causes that generate this category of individuals. And either UNHCR or the African Union have understood it, trying to promote democratic governance, respect of human rights and the enforcement of the African mechanism for the prevention, management and peaceful settlement of the conflicts as an effective and incisive instrument to fight against this plight that afflicts all the continent.

Nevertheless, often the easiest paths, even if they can bring us directly to the target, are the most difficult to take.

In fact, still:

“Access to asylum procedures was occasionally problematic during the reporting period. Sometimes screening or admissibility procedures effectively barred applicants from access to a substantive determination of their claim, including where a *prima facie* case appeared to exist. In some countries, reduced or lack of access to legal aid or to appropriate interpreters prevented or undermined effective presentation of cases. UNHCR and its partners worked with relevant counterparts to establish reactivate and/or strengthen national eligibility procedures and improve decision-making.”¹⁶⁷

I allow concluding this analysis soliciting competent authorities to reflect on the fact:

“[T]he question is of right and therefore hospitality means the right of a foreigner not to be treated with hostility by mere reason of his arrival on foreign soil.”¹⁶⁸

We often forget it even if it has been affirming for centuries.

¹⁶⁷ ExCom, *Note on International Protection*, 3-7 October 2005, Doc. No. A/AC.96/1008, paragraph 18, p. 5.

¹⁶⁸ Kant, E., “Perpetual Peace (1796)”, in: *Peace Classics*, vol. 7, London: Peace Book Company, 1939, p. 33