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**THE AU CONVENTION ON REFUGEES  
AND THE CONCEPT OF ASYLUM**

**Cristiano d'Orsi\***

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I. THE FIGURES ILLUSTRATING THE PRESENT REFUGEE SITUATION IN SUB-SAHARAN AFRICA

At the end of 2010, within the regions of responsibility of the UNHCR Bureau for Africa (Central Africa-Great Lakes, East and Horn of Africa, Southern Africa and Western Africa) the number of refugees and people in a refugee-like situation amounted to 2,184,000 compared to 2,074,800 of the beginning of the same year.<sup>1</sup> This increase was evidently due to the escalation of violence in several countries, notably in Central African Republic (“CAR”), Democratic Republic of Congo (“DRC”) and Somalia, and to the conflict that broke out in Cote d’Ivoire, which caused the outflow of 21,000 potential asylum-seekers to DRC, 18,100 to Liberia and 4,000 to Uganda.<sup>2</sup>

In the same period, many forcibly displaced people in Sub-Saharan Africa (“SSA”) fled their native countries for neighbouring countries. For instance, in that period, Kenya had an influx 402,900 refugees, mainly from Somalia while Chad saw an influx of 347,900 refugees, mainly from CAR and Sudan. The ten major source countries in 2010 included Somalia, with 770,200 individuals, the DRC, with 476,700 refugees, Sudan, with 387,200 persons and Eritrea, with 222,500 nationals having obtained asylum elsewhere.<sup>3</sup>

This article analyzes several specific aspects of the current refugee legal regime in SSA in order to assess how the institution of asylum, considered the traditional solution for both individuals and groups who are obliged to flee their countries of citizenship,<sup>4</sup> is legally perceived and applied. The analysis will focus on the 1969 African Union Convention Governing the

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<sup>1</sup> UNHCR, UNHCR Statistical Yearbook 2010 65 (2011).

<sup>2</sup> *Id.* (explaining that the category of people in a refugee-like situation is “[d]escriptive in nature and includes groups of persons who are outside their country or territory of origin and who face protection risks similar to those of refugees, but for whom refugee status has, for practical or other reasons, not been ascertained.”).

<sup>3</sup> UNHCR, *UNHCR Global Trends 2010* 12-15 (2011) (“The number of Sudanese refugees has decreased for five consecutive years following the return of hundreds of thousands of refugees from neighbouring countries to South Sudan. However, in 2010 the numbers of Sudanese refugees increased by some 19,000 people compared to 2009, mainly due to the volatile situation in Darfur and Southern Sudan.”).

<sup>4</sup> See generally MOHAMED BEDJAOU, *L’ASILE EN AFRIQUE* 26-27 (1979) (creating a detailed, historical *excursus* to show the longstanding tradition of asylum in Sub-Saharan Africa).

Specific Aspects of Refugee Problems in Africa,<sup>5</sup> the pillar for refugee protection in SSA and “considered the most generous and flexible international agreement on refugee protection.”<sup>6</sup>

Excluded from this analysis are North African countries and Maghreb countries, for a couple of reasons. First, historically and anthropologically, the inhabitants of Morocco, Algeria, Tunisia, Libya, and Egypt perceive themselves to be more Arab than African, as they are ethnically and culturally closer to the Islamic peoples of the Near and Middle East than to the African peoples of SSA.<sup>7</sup> Second, in general, few Africans apply for asylum in Maghreb countries, a recent exception being the Sudanese and Eritrean refugees entering Egypt,<sup>8</sup> where at the end of 2010, Egypt hosted on its territory 6,172 Somali and 10,035 Sudanese refugees.<sup>9</sup> Conversely, citizens of Maghreb countries rarely apply for asylum in SSA countries, preferring to seek refuge in countries outside of Africa.<sup>10</sup> Nevertheless, 2011 data is not yet available, but it may not follow this trend given the popular revolutions in Egypt, Libya and Tunisia.

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<sup>5</sup> African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, *adopted* Sept. 10, 1969, 8 I.L.M. 1288 (entered into force June 20, 1974) [hereinafter “1969 AU Convention”].

<sup>6</sup> Interview by Fatoumata Lejeune-Kaba with George Okoth-Obbo, Afr. Bureau Dir., United Nations High Comm’r for Refugees (Sept. 9, 2009), *available at* <http://unhcr.org/4aa7b80c6.html>.

<sup>7</sup> Philip K. Hitti, *History of Arabs: From the Earliest Times to the Present* 160-68 (10th ed. 2002).

<sup>8</sup> *See Egypt: Stop Deporting Eritrean Asylum Seekers*, HUMAN RIGHTS WATCH (Jan. 8, 2009), <http://www.hrw.org/en/news/2009/01/08/egypt-stop-deporting-eritrean-asylum-seekers> (“Egypt has forcibly returned home more than 45 Eritrean migrants on several flights in the past two weeks without first providing the UN High Commissioner for Refugees (UNHCR) the required opportunity to interview them. ‘Eritreans are fleeing a repressive government with a terrible human rights record and need protection, not further abuse,’ said Joe Stork, deputy director of Human Rights Watch’s Middle East and North Africa division. ‘Instead of forcing them onto flights, Egypt should give UNHCR immediate access to identify Eritrean migrants with refugee claims.’”).

<sup>9</sup> UNHCR, *Statistical Yearbook 2010*, Geneva: UNHCR, October 2011, Table 5, at 80-81.

<sup>10</sup> *See, e.g., Frequently Requested Statistics*, UNHCR, <http://www.unhcr.org/pages/4a0174156.html> (last visited Sept. 3, 2009) (revealing that, in 2008, only one Moroccan citizen applied for asylum in Sub-Saharan Africa (in Mauritania), sixteen Algerians (1 in Angola, two in Benin, one in Botswana, one in Cameroon, one in Liberia, one in Mali, nine in Senegal), two from Tunisia (both in Mauritania), one from Libya (in Nigeria), and one Egyptian (out of 4,775 Egyptian asylum seekers over the world) applied for asylum in South Africa).

The African Convention, adopted in 1969 by the former Organization of the African Unity,<sup>11</sup> entered into force on June 20, 1974,<sup>12</sup> constitutes a legal reference for states, international and regional organizations, as well as NGOs and humanitarian operators working in SSA. To date, forty-five countries in SSA have ratified the Convention.<sup>13</sup> The exceptions are Djibouti (which signed in 2005),<sup>14</sup> Eritrea,<sup>15</sup> Madagascar (which

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<sup>11</sup> Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. W. INT'L L.J. 69, 71-72 (2002) (“[O]n July 11, 2000, the OAU adopted the Constitutive Act of the African Union (‘AU Act’) to replace the OAU Charter. The AU Act, which established the African Union (AU), was ratified with asthmatic breathlessness and entered into force on May 26, 2001, less than one year after its adoption. . . . The OAU was formally dissolved on July 9, 2002, during the last (38th) ordinary session of the OAU Assembly in Durban, South Africa. The AU was formally launched during the same period, holding its first session between July 9 and July 10, 2002, also in Durban, South Africa. With the launching of the AU, the OAU ceased to be an umbrella international organization for collective Africa.”).

<sup>12</sup> 1969 AU Convention *supra* note 5.

<sup>13</sup> List of Countries Which Have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, AFRICA-UNION.ORG (Nov. 11, 2009), <http://www.africa-union.org/root/au/documents/treaties/text/refugee%20Problems%20in%20Africa.doc>.

<sup>14</sup> See UNHCR, *2012 Regional Operations Profile – Djibouti* (2012), available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483836> (“UNHCR and the Government of Djibouti are working to ensure that Somali refugees, most of whom are recognized on a *prima facie* basis, are duly registered. Non-Somali (mostly Eritrean and Ethiopian) asylum-seekers will be given access to refugee status determination (RSD) procedures with the reactivation of the National Commission for Eligibility. UNHCR will work closely with the authorities to revive the Commission. UNHCR will continue registering Somali refugees at the Loyada border, where there is a reception centre. A total of 400 people from Ethiopia and Eritrea will be considered for RSD. To keep an effective cooperation with national authorities, regular training and capacity-building workshops need to be carried out for law-enforcement officials and border guards.”).

<sup>15</sup> AMNESTY INT’L, ANNUAL REPORT 2009: THE STATE OF THE WORLD’S HUMAN RIGHTS 140 (2009) (“Egypt, Sudan, Germany, Sweden and the UK forcibly returned Eritrean refugees and asylum-seekers from November 2007 onwards. These forced returns disregarded the fate of earlier returnees who had been arbitrarily detained and tortured, and ignored UNHCR guidelines which strongly recommend against any forced returns to Eritrea because of Eritrea’s poor human rights record.”) [hereinafter THE STATE OF THE WORLD’S HUMAN RIGHTS]; see also UNHCR, *2012 Regional Operations Profile - East and Horn of Africa. Eritrea* (2012), available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4838e6> (“People of concern to UNHCR in Eritrea are mainly Somali, Sudanese and Ethiopian asylum-seekers and refugees. The Government of Eritrea recognizes Somali and Sudanese refugees on a *prima facie* basis, while Ethiopians are recognized by UNHCR in Eritrea under its mandate. The Somali and Sudanese refugees are camp-based and reside

signed in 1969), Mauritius,<sup>16</sup> Namibia (which signed in 2009),<sup>17</sup> San Tomé and Príncipe, and Somalia (which signed in 1969).<sup>18</sup>

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in Emkulu and Elit camps, respectively. Most Ethiopian refugees reside in the capital, Asmara. It is not foreseen that return will be possible for the Somali or the Ethiopian refugees. In the case of the Sudanese, however, a return could be envisaged. Since local integration is not an option, resettlement remains the main durable solution. To date, a total of 165 Somali, Ethiopian and Sudanese refugees have been resettled in third countries. The main operational objectives and priorities of UNHCR Eritrea in 2012 and 2013 will continue to focus on providing international protection and seeking durable solutions for Somali, Sudanese and Ethiopian asylum-seekers and refugees, as well as providing care and maintenance to camp-based Somali and Sudanese refugees and urban-based Ethiopian refugees.”).

<sup>16</sup> See UNHCR, *2012 Regional Operations Profile - Southern Africa. Madagascar* (2012) available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485626&submit=GO> (“A small number of refugees and asylum-seekers in the Indian Ocean island States of Comoros, Madagascar, Mauritius and the Seychelles will receive assistance from UNDP under a Memorandum of Understanding with UNHCR. The well-being of persons of concern will be assessed through regular UNHCR monitoring visits. In Madagascar, UNHCR is working with the Government to identify and develop a strategy that will address the emerging issue of statelessness.”).

<sup>17</sup> The case of Namibia is unique because it has addressed the refugee situation through the promulgation of domestic law. See *The Refugees (Recognition and Control) Act* (1999) (Namib.); see also John Baloro, *The Law and Pattern of the Repatriation of Namibian and South African Refugees: Possible Lessons for a Programme of Repatriation of Mozambican Refugees*, 28 COMP. & INT'L L.J. S. AFR. 113 (1995) (discussing the situation of refugees in Namibia). Namibia also engaged in several agreements with the United Nations High Commissioner for Refugees. See *Agreement on the Establishment of a Commission for the Promotion of Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of Namibia, and the United Nations High Commissioner for Refugees*, Angl.-Namib.-UNHCR, June 14, 1995, available at <http://www.unhcr.org/refworld/docid/3edef5c24.html>; *Agreement on the Establishment of a Tripartite Commission for the Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of Namibia and the United Nations High Commissioner for Refugees*, Angl.-Namib.-UNHCR, Nov. 8, 2002, available at <http://www.unhcr.org/refworld/docid/447d8dca4.html>. See generally UNHCR, *2012 Regional Operations Profile - Southern Africa. Namibia* (2012) available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48588a7b&submit=GO> (“Namibia hosts some 8,700 refugees and asylum-seekers, mainly from Angola and the DRC. More than 7,400 live in Osire refugee settlement. UNHCR will continue to advocate for local integration as the most appropriate solution for the Angolan refugees who have been in the country for nearly 20 years, as well as voluntary repatriation. RSD, health and education services for the refugees have been integrated into the work of government line ministries. UNHCR will provide technical support and assistance to ensure that protection and assistance meet international standards.”).

<sup>18</sup> UNHCR, *UNHCR's Position on the Return of Rejected Asylum-Seekers to Somalia 2* (2004) (“Throughout [Somalia], human rights violations remain

## II. THE CORE QUESTION: THE IMPORTANCE OF ASYLUM AND THE PROBLEMS OF RECOGNITION

Asylum is important because it represents an institution through which human personality and values can be protected. At the same time, it has often broad implications in international relations and can disturb interstate relations.<sup>19</sup> Asylum is the protection given by the state to an individual or to a group of individuals “by letting him enter the territory the state and allowing him to stay within it.”<sup>20</sup>

The right to seek and enjoy freedom from persecution does not find expression in the two main, universally-binding instruments applicable to SSA: the 1951 Geneva Convention Relating to the Status of Refugees<sup>21</sup> and its 1967 New York Protocol. Nor is the right to asylum mentioned in the 1950 United

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endemic. These include murder, looting and destruction of property, use of child soldiers, kidnapping, discrimination of minorities, torture, unlawful arrest and detention, and denial of due process by local authorities. In 2003, a local human rights organization, the Isma'il Jimale Human Rights Centre, documented 530 civilian deaths in armed conflicts between July 2002 and June 2003. . . . In July 2003, the targeting of young girls for rape and killing was prominent in clan disputes in Baidoa, and kidnappings in Mogadishu reached such alarming proportions that the public took to the streets to protest. Gender-based violence is prevalent, including rape, female genital mutilation and domestic violence. The cultural attitudes of traditional elders and law enforcement officials routinely result in restrictions on women's access to justice, denial of their right to due process and their inhumane treatment in detention. The prolonged absence of a central government complicates efforts to address the human rights violations.”); THE STATE OF THE WORLD'S HUMAN RIGHTS, *supra* note 15, at 294 (“The interlinked human rights and humanitarian crises continued to worsen in 2008. Thousands more civilians were killed, bringing the total number of civilians killed as a result of armed conflict since January 2007 to more than 16,000. Transitional Federal Government (TFG) and Ethiopian armed forces fought against opposition clan-based groups and militias, most prominently al-Shabab (‘youth’) militias which emerged out of the former Islamic Courts Union (ICU). More than 1.2 million civilians were internally displaced in southern and central Somalia. At the end of the year an estimated 3.25 million people were dependent on emergency food aid, which was often disrupted due to widespread insecurity and impacted by insufficient contributions from donor governments. Humanitarian aid workers and local human rights defenders were increasingly targeted in threats and killings.”).

<sup>19</sup> M.G. Kaladrahan Nayar, *The Rights of Asylum in International Law: Its Status and Prospects*, 17 ST. LOUIS U. L. J. 17, 18 (1972).

<sup>20</sup> E.W. Vierdag, *“Asylum” and “Refugee” in International Law*, 24 NETHERLANDS INT'L L. REV. 287, 287 (1977).

<sup>21</sup> Geneva Convention Relating to the Status of Refugees, *adopted July 28, 1951*, 189 U.N.T.S. 150 [hereinafter 1951 Geneva Convention].

Nations High Commissioner for Refugees (“UNHCR”) Statute. The final act of the conference that adopted the 1951 Convention, however, recommended that “[g]overnments continue to receive refugees in their territories and . . . act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.”<sup>22</sup>

At the time of the drafting of the 1948 Universal Declaration of Human Rights (“UDHR”), in which the right to seek and enjoy asylum was first introduced in a universal, non-binding instrument, it was proposed that individuals also enjoyed a right to be granted asylum.<sup>23</sup> At the initiative of the British delegation, however, states concurred that individuals could only enjoy a right to seek asylum from persecution. This so-called right of asylum ended up consisting of “the [mere] competence of every state to allow a persecuted alien to enter, remain on its territory . . . and thereby to grant asylum to him.”<sup>24</sup> In the twentieth century, no state practice supports an international legal recognition of an individual’s right to be granted asylum.<sup>25</sup>

The term “asylum” has generally been interpreted as a protection tied to assimilation in a new society, touching more deeply upon the issue of state sovereignty.<sup>26</sup> If understood in

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<sup>22</sup> United Nations Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A/CONF.2/108/Rev.1 (July 25, 1951), in *THE COLLECTED TRAVAUX PRÉPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES* 692, 696 (Alex Takkenberg & Christopher C. Tahbaz, eds., 1989).

<sup>23</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 14, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution; (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”).

<sup>24</sup> Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* 273 (1997) (quoting Lassa Oppenheim, *International Law: A Treatise* 678 (Hersch Lauterpacht ed., 1967)).

<sup>25</sup> Felice Morgenstern, *The Right of Asylum*, 26 *BRIT. Y.B. INT'L L.* 327, 352 (1949) (expressing, as of 1949, that “[i]t would . . . appear that the practice of states has not created a right of individuals to asylum, except, perhaps, in the matter of non-extradition of political offenders.”); *see also* Frank E. Krenz, *The Refugee as a Subject of International Law*, 15 *INT'L & COMP. L.Q.* 90, 115 (1966) (“[T]he realisation of an individual right to asylum is still to await some kind of formal recognition.”).

<sup>26</sup> KOURULA, *supra* note 24, at 273-74.



this way, an ulterior motive exists for states not to recognize an individual's emerging right to be granted asylum.<sup>27</sup>

In addition, the issue of an existing right of individuals to be granted asylum, if they apply for it, was also discussed by the International Law Commission ("ILC") at its first session in 1949 in connection with a draft declaration on the rights and duties of states. At this time, a proposal was submitted to include an additional article related to the right of asylum. The draft article read:

Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecutions for offences which the State according asylum deems to have a political character. The State of which the refugee is a national has the duty to respect the asylum accorded and may not consider it an unfriendly act.<sup>28</sup>

During the debates on this proposal, the first sentence was amended by omission of the words: "which the state according asylum deems to have." The second sentence was rejected. Finally, it was decided not to include an article on asylum in the draft declaration even though one of the members of the committee in charge of writing the document pointed out:

The right of asylum was one of the noblest creations of customary international law. It would be inconceivable not to include it in a general declaration on the rights and duties of States, and the proposed additional article should therefore be included in the declaration which the Commission was preparing.<sup>29</sup>

This latter affirmation is important because it mentions the customary nature of the right of asylum.<sup>30</sup> In effect, while a state is not compelled to grant asylum, an individual admitted

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<sup>27</sup> *Id.*

<sup>28</sup> *Summary Records and Documents of the First Session Including the Report to the Commission to the General Assembly*, [1957] 1 Y.B. Int'l L. Comm'n 3, 125, U.N. Doc. A/CN.4/SER.A/1949 (1956). Twenty years later, the latter sentence was absorbed into the 1969 AU Convention which stipulates that "asylum . . . shall not be regarded as an unfriendly act by any Member State." 1969 AU Convention, *supra* note 5, art 2.

<sup>29</sup> *Id.* at 126 (noting a statement of J.M. Yepes).

<sup>30</sup> Paul Kuruk, *Refugeeism, A Dilemma in International Human Rights: Problems in the Legal Protection of Refugees in West Africa*, 1 TEMP. INT'L & COMP. L.J. 179, 192-93 (1987) [hereinafter Kuruk, *Refugeeism*] ("Customary law is viewed as a crucial factor for the protection of African refugees. It is believed that under this mode of protection refugees are received by their kinsmen who facilitate their integration into the new society.").

to the territory of a state in which he seeks refuge should be entitled to enjoy it.<sup>31</sup>

According to general doctrine, asylum consists of several elements. The granting of asylum is the equivalent of (i) admitting an individual to the territory of a State; (ii) allowing her/him to remain in that territory; (iii) refusing to expel or extradite her/him; and (iv) avoiding prosecution, punishment, or other restriction on the individual's liberty under Articles 31, 32 and 33 of the 1951 Geneva Convention, which together articulate the very important principle of *non-refoulement*.<sup>32</sup>

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<sup>31</sup> Int'l Law Comm'n, *supra* note 28. Based on this author's analysis, Mr. J.M. Yepes intended the expression "right of asylum" to include a right to enjoy asylum.

<sup>32</sup> 1951 Geneva Convention, *supra* note 21, art. 33 ("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."). See generally Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533 (2001); Rene Bruin & Kees Wouters, *Terrorism and Non-Derogability of Non-Refoulement*, 15 INT'L J. REFUGEE L. 5 (2003); Phil C.W. Chan, *The Protection of Refugees and Internally Displaced Persons: Non-Refoulement Under Customary International Law?*, 10 INT'L J. HUM. RTS. 231 (2006); Vincent Chetail, *Le principe de Non-Refoulement et le statut de réfugié en droit international*, in LA CONVENTION DE GENÈVE DU 28 JUILLET 1951 RELATIVE AU STATUT DES RÉFUGIÉS 50 ANS APRÈS: BILAN ET PERSPECTIVES 3 (Vincent Chetail ed., 2001); Nils Coleman, *Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law*, 5 EUR. J. MIGRATION & L. 23 (2003); Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 Int'l J. Refugee L. 373 (2008); Jean-Francois Durieux & Jane McAdam, *Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16 INT'L J. REFUGEE L. 4 (2004); Florentino P. Feliciano, *The Principle of Non-Refoulement: A Note on International Legal Protection of Refugees and Displaced Persons*, 57 PHIL. L.J. 598 (1982); Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897 (1986); Patricia Hyndman, *Asylum and Non-Refoulement—Are These Obligations Owed to Refugees Under International Law?*, 57 PHIL. L.J. 43 (1982); Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87 (Erika Feller et al. eds., 2003); Reinhard Marx, *Non-Refoulement, Access to Procedures, and Responsibilities for Determining Refugee Claims*, 7 INT'L J. REFUGEE L. 383 (1995); Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71

The Convention covers several aspects of the concept of asylum.<sup>33</sup> While none of its articles alone give refugees the right to enter another country, read together, they provide for some real protection; “[f]or, although an administrative act of ordering the expulsion of a refugee may not offend against article 32, an actual expulsion may be forbidden under article 33 if it will result in the return of the refugee to a country where he or she fears persecution.”<sup>34</sup> Consequently, the right to enjoy asylum cannot be considered an “empty phrase,”<sup>35</sup> but must be considered an expression of custom based on the history of relations among states that found an implicit codification in SSA in 1951 through the universal Convention.<sup>36</sup>

In 1967, the United Nations General Assembly (“UNGA”) elaborated on the Declaration on Territorial Asylum,<sup>37</sup> keeping Article 14 of the UDHR in mind. Article 14, in its final form, recognized the right to seek and enjoy asylum, but not the right to be granted asylum.<sup>38</sup> Article 14 was based on the concept of

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WASH. U. L. Q. 833 (1993); Jari Pirjola, *Shadows in Paradise: Exploring Non-Refoulement as an Open Concept*, 20 INT’L J. REFUGEE L. 639 (2008); Robert C. Sexton, *Political Refugees, Non-Refoulement and State Practice: A Comparative Study*, 18 VAND. J. TRANSNAT’L L. 731 (1985); David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999).

<sup>33</sup> Alice Edwards, *Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum*, 17 INT’L J. REFUGEE L. 293, 302-03 (2005).

<sup>34</sup> Patricia Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 AUSTL. L.J. 148, 153 (1986) [hereinafter Hyndman, *Refugees Under International Law*].

<sup>35</sup> Richard Plender & Nuala Mole, *Beyond the Geneva Convention: Constructing a de facto Right of Asylum From International Human Rights Instruments*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 81, 82 (Frances Nicholson & Patrick Twomey eds., 1999).

<sup>36</sup> Paul Kuruk, however, noted that the lack of an enforcement mechanism in the 1951 Convention to provide guarantees of asylum “. . . is a serious omission. As a human rights instrument, the 1951 Convention should not only define the content of human rights concepts but also should clarify the government conduct mandated by those rights, thereby stimulating internal and external pressures for reform.” Paul Kuruk, *Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees*, 35 STAN. J. INT’L L. 313, 330 (1999) [hereinafter Kuruk, *Asylum and the Non-Refoulement of Refugees*].

<sup>37</sup> Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), U.N. Doc. A/RES/2312(XXII) (Dec. 14, 1967).

<sup>38</sup> See Universal Declaration of Human Rights, *supra* note 23, art. 14.

asylum as a right of the state *to grant* asylum, rather than as right of the individual *to be granted* asylum. In this respect, P. Kuruk states:

The international reluctance to recognize the enforceable right of asylum is based on the fear that such recognition would run counter to the principle of territorial sovereignty. Less significantly, individuals would be viewed merely as objects, not subjects, of international law. Besides, governments are afraid to underwrite a right of asylum, especially when they are unable to predict the volume, demography, and frequency of asylum-seekers. The potentially disruptive effects of large scale refugee flows remain a major concern. Compounding these issues are the difficulties asylum countries face in providing satisfactory solutions to refugee crises.<sup>39</sup>

This position has been stressed many times in SSA, where states prefer to sanction efforts to contain refugee flows from their countries of origin over the granting of asylum. This preference was exemplified by the decision of states in the Great Lakes region after the refugee crisis following the Rwandese genocide called for safe zones in Burundi and Rwanda within which civilian populations could be protected and to which refugees already outside those countries could be repatriated. In fact, however, the legality of these safe areas was questioned.<sup>40</sup> The concept of safe areas implies that repatriates have no choice of residence or movement from the safe areas to other parts of the country, a violation of their freedom of movement<sup>41</sup> affirmed in Article 26 of the 1951 Geneva Conven-

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<sup>39</sup> Kuruk, *Asylum and the Non-Refoulement of Refugees*, *supra* note 36, at 321.

<sup>40</sup> Bonaventure Rutinwa, *Beyond Durable Solutions: An Appraisal of the New Proposals for Prevention and Solution of Refugee Crisis in the Great Lakes Region*, 9 J. REFUGEE STUD. 312, 313-15 (1996).

<sup>41</sup> *Id.* (musing on the difficulty of movement for refugees in Africa); see also Zachery Lomo, *The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work*, 18 BERKELEY J. INT'L L. 268, 281 (2000) ("In practice, however, considerable obstacles to travel, even in emergencies, exist for African refugees. For example, our research in both Kenya and Uganda has demonstrated that refugees must navigate a hierarchy of power before they can finally get a 'movement permit' that authorizes them to leave the settlement or camp. In Uganda, in order to 'legally' leave the settlement, a refugee must first get a letter from the chairman of the Refugee Welfare Committee, allowing her to visit the Ugandan camp commandant, where she must get another letter that permits her to travel to a specific destination for a limited period of time. The offices

tion.<sup>42</sup>

In SSA, the stereotype of African hospitality has contributed to the misconception, recognized by contemporary scholars,<sup>43</sup> that in past decades refugees were generally welcomed by their brethren across borders<sup>44</sup> and provided with the necessary means to earn a living.<sup>45</sup> Official sources have been more diplomatic concerning this issue, only partially admitting the real situation.<sup>46</sup>

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of the camp commandants are not always nearby, nor are these officials always available when a refugee has reached their offices. Moreover, such permission is not always forthcoming because both gatekeepers have wide powers of discretion.”)

<sup>42</sup> 1951 Geneva Convention, *supra* note 21, art. 26 (“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”).

<sup>43</sup> See GAIM KIBREAB, *AFRICAN REFUGEES: REFLECTIONS ON THE AFRICAN REFUGEE PROBLEM* 68-69, 80 (1985) (providing examples of disturbing trends developed in Africa in the 1980s); Kuruk, *Asylum and the Non-Refoulement of Refugees*, *supra* note 36, at 336 (sharing a similar analysis: “the capacity of traditional hospitality to protect the continuing waves of African refugees is doubtful, as illustrated by the treatment of the Liberian refugees.”).

<sup>44</sup> See Kuruk, *Refugeeism*, *supra* note 30, at 197 (noting the example of the “[E]wes from Ghana and Fangs from Equatorial Guinea that were able to integrate easily among their brethren in Senegal, Togo and Cameroon, respectively.”).

<sup>45</sup> See Bonaventure Rutinwa, *The End of Asylum? The Changing Nature of Refugee Policies in Africa* 4 (Oxford Univ. Refugees Study Program, Working Paper No. 5, 1999) (describing the attitude adopted by many African states between the early 1960s and 1990 as an “open door policy” towards asylum-seekers). More precisely, Rutinwa argues: “The evolution of refugee policy in Africa may be divided into two periods. The first is the period between early 1960s and the mid- to late 1980s. The second is the period between the late 1980s to today. The period between the early 1960s and 1990 may be described as the ‘golden age’ of asylum in Africa. The attitude adopted by many states during this period has been described as an ‘open door policy.’” *Id.* at 4.

<sup>46</sup> See ORG. OF AFRICAN UNITY, *ADDIS ABABA DOCUMENT ON REFUGEES AND FORCED POPULATION DISPLACEMENTS IN AFRICA* ¶ 12 (1994) (“[T]hroughout the continent, countries are generous towards refugees and many practice liberal asylum policies.”). But the following paragraph notes: “[n]evertheless, the institution of asylum and the system of refugee protection are under tremendous stress in Africa. The large number of refugees seeking asylum in countries already themselves experiencing tremendous social and economic hardships, has brought into question the very capacity of nations to come with refugees. In a number of countries, the basic principles of refugee protection are not being upheld. Refugees have been arrested and detained without charge. Others have been resumed against their will to places where their lives may be in danger. Yet others have been restricted to refugee camps or to remote, inaccessible locations where they are sometimes exposed to ban-

One could argue that traditional African hospitality in admitting aliens is evidence that, within SSA at least, asylum-seekers could have been guaranteed the right to be granted asylum.<sup>47</sup> Article 2 of the 1969 AU Convention, however, which crystallized the concept of asylum by codifying historical practice in a legal instrument,<sup>48</sup> points out that the granting of asylum in SSA should be considered more of a “humanitarian act”<sup>49</sup> and less of an act undertaken by local authorities to comply with a legally recognized right.

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ditry, rape and other forms of criminality. Many have not been able to enjoy social, economic and civil rights.” *Id.* ¶ 13.

<sup>47</sup> Kuruk, *Refugeeism*, *supra* note 30, at 198 (“In ascertaining customary law, it would be wrong to refer to past practices as evidence of the existing customary law; the only appropriate approach is to look at present practices. It is contended that although the so-called traditional African hospitality used to be strong in the past, socio-economic factors have rendered it *practically non-existent* in modern-day Africa. There is no longer a spirit of hospitality which continues to be influential in the protection of refugees at customary law.”) (emphasis added).

<sup>48</sup> See 1969 African Convention, *supra* note 5, art. 2 (“(1) 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. 2) The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State. 3) No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2. 4) Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum. 5) Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph. 6) For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.”).

<sup>49</sup> Nlerum S. Okogbule, *The Legal Dimensions of the Refugee Problem in Africa*, 10 E. AFR. J. PEACE & HUM. RTS. 183 (2004) (affirming that by the provision of Article 2(1), the country concerned would be required to exercise this “peaceful and humanitarian act”—the concession of the asylum—exclusively in consideration of the African tradition); see also W.J.E.M. Van Hövell tot Westerfliet, *Africa and Refugees: The OAU Refugee Convention in Theory and Practice*, 7 NETH. Q. HUM. RTS. 172, 176 (1989) (“Article II, paragraph 2 states that the grant of asylum is a peaceful and humanitarian act. This approach is further reflected in Article V, which describes five important principles regarding voluntary repatriation.”).

In addition, it has been clearly affirmed that the wording of Article 2(1) of the 1969 African Convention is advisory rather than compulsory.<sup>50</sup> In other words, the reception of refugees is subject to national legislation, which constitutes a severe limitation on the effective enjoyment of the right of asylum.<sup>51</sup>

Possibly, it has been determined that the right to be granted asylum is a moral and not a legal right.<sup>52</sup> As previously noted, however, the asylum principle adopted in the 1969 African Convention corresponds to the principle embodied in the 1967 UNGA Declaration on Territorial Asylum, without significant changes.<sup>53</sup>

African regional organizations have confirmed many times that the principle of granting asylum is not mandatory. When these organizations speak about asylum, they define it as an institution more than a right.<sup>54</sup> One commentator correctly and pragmatically argues that an “open-door” policy adopted by states in a general state of poverty cannot alleviate the plight of refugees, adding that:

The influx of a large number of refugees in the world's poorest nations brings with it a variety of difficulties and places great strains on the country's inadequate national resources and this naturally erodes the hospitality demonstrated at the time of arrival. Consequently, unless there is an active intervention on the part of the international refugee assisting organizations, the plight of the refugees will continue unabated.<sup>55</sup>

Nevertheless, Article 2 of the AU Convention constitutes one of the most important innovations introduced by a regional

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<sup>50</sup> Paul Weis, *The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa*, 3 HUM. RTS. J. 457, 457 (1970).

<sup>51</sup> *Id.*; see also Rainer Hofmann, *Refugee Law in Africa*, 39 L. & ST. 84, 84 (1989).

<sup>52</sup> Kuruk, *Refugeeism*, *supra* note 30, at 218.

<sup>53</sup> Bahame Tom Mukira-Nyanduga, *Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 94 GER. Y.B. INT'L L. 94, 94 (2004).

<sup>54</sup> See Org. of African Unity, *supra* note 46, at ¶ 14(iii). In 1979, the Arusha Conference on the African refugee noted that, although some progress had been made in the direction of strengthening the position of the individual in relation of asylum, “asylum is still a right of the State.” Int'l Conference on the Situation of Refugees in Afr., *Recommendations from the Pan-African Conference on the Situation of Refugees in Africa, Arusha (Tanzania)*, 17 May, 1979, ¶ 1(1).

<sup>55</sup> KIBREAB, *supra* note 43, at 69.

instrument with respect to refugee status. Through providing for the "right to grant asylum," it appears that the AU Convention has advanced the notion of an individual right to be granted asylum beyond that which the 1951 Geneva Convention provides.<sup>56</sup> In the international legal history of Africa, however, there have not been any initiatives to provide for a right to be granted asylum since the failed United Nations Conference on Territorial Asylum held in Geneva in 1977. This Conference was considered to be unsuccessful by eminent scholar, A. Grahl-Madsen.<sup>57</sup> Nonetheless, this is the same eminent scholar who, in 1980, eleven years after the adoption of the 1969 AU Convention wrote: "[a] right of asylum . . . may flow from international conventions, but so far there are only rudimental provisions to this effect."<sup>58</sup> In so much as the term "international" has been conventionally interpreted to incorporate the meaning of the term "regional," A. Grahl-Madsen may have intended "international" to mean "intercontinental."

For instance, the term "asylum" has been used to characterize South African student refugees in bordering countries who were assisted by UNHCR during approximately the same period in which A. Grahl-Madsen wrote his comment.<sup>59</sup> The use of the word "asylum," might be an attempt to emphasize that these individuals were in reality refugees rather than students. When contrasted with other situations in SSA, the use of the term "asylum" may reflect a greater sensitivity to the political nature of their plight.<sup>60</sup>

In general, however, UN resolutions relating to Africa deal

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<sup>56</sup> Ahmed Rifaat, *Refugees and the Right of Asylum: An African Perspective*, 40 REVUE EGYPTIENNE DE DROIT INT'L 71, 104-06 (1984).

<sup>57</sup> ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM 66 (1980) ("[I]t is important to stress that refugee law in general, and the right of asylum in particular, are problems of global scope, which ought to be solved at the global level.").

<sup>58</sup> *Id.* at 2.

<sup>59</sup> G.A. Res. 32/119, ¶ 2, U.N. Doc. A/RES/32/119 (Dec. 16, 1977) ("[UNGA] notes with appreciation the generous contributions of Governments of Botswana, Lesotho and Swaziland in providing *asylum* and making available educational facilities for student refugees.") (emphasis added). On the contrary, in both earlier and later situations, such as the ones involving Somalia, Sudan, and Djibouti, the term "asylum" was omitted. See G.A. Res. 2958 (XXVII), U.N. Doc. A/RES/2958 (Dec. 12, 1972); G.A. Res. 35/180, U.N. Doc. A/RES/35/180 (Dec. 15, 1972); G.A. Res. 35/181, U.N. Doc. A/RES/35/181 (Dec. 15, 1980); G.A. Res. 35/182, U.N. Doc. A/RES/35/182 (Dec. 15, 1980).

<sup>60</sup> David Kennedy, *International Refugee Protection*, 8 HUM. RTS. Q. 32, 32 (1986).



only marginally with asylum in the framework of protection of refugees, usually because they are more assistance-oriented<sup>61</sup> than theoretical. UN resolutions often simply restrict themselves to confirming the humanitarian characterization of asylum, as the Executive Committee of UNHCR (“ExCom”) frequently does,<sup>62</sup> admitting the presence of asylum as an

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<sup>61</sup> See G.A. Res. 45/181, ¶ 4, U.N. Doc. A/RES/45/181 (Dec. 4, 1986); G.A. Res. 41/123, U.N. Doc. A/RES/41/123 (Dec. 4, 1986); G.A. Res. 42/106, ¶ 4-6, U.N. Doc. A/RES/42/106 (Dec. 7, 1987); G.A. Res. 42/107, U.N. Doc. A/RES/42/106 (Dec. 7, 1987).

<sup>62</sup> See United Nations High Comm’r for Refugees, Exec. Comm., *General Conclusion on International Protection*, ¶ c, U.N. Doc. A/43/12/Add.1 (Oct. 10, 1988) (“States must continue to be guided, in their treatment of refugees, by existing international law and humanitarian principles and practice.”); United Nations High Comm’r for Refugees, Exec. Comm., *Safeguarding Asylum*, ¶ e, U.N. Doc. 12A (A/52/12/Add.1) (Oct. 10, 1997) (“[The ExCom] calls upon all concerned parties to respect and comply with the precepts on which the institution of asylum is based, and to implement their obligations in a spirit of true humanitarianism.”). For an exhaustive document on the legal responsibilities of the ExCom, see Jerzi Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT’L J. OF REFUGEES L. 285, 288 (1989) (“The Executive Committee of the UNHCR Programme . . . was formally established by ECOSOC Res. 672(XXV) April 30, 1958, pursuant to the request by the General Assembly to replace (as of January 1, 1959) the so-called UNREF (United Nations Refugee Emergency Fund) Executive Committee. The terms of reference of the new Committee, as formulated in paragraph 5 of General Assembly resolution 1166(XII) (26 November 1957), were as follows: (a) To give directives to the High Commissioner for the liquidation of the United Nations Refugee Fund; (b) To advise the High Commissioner, at his request, in the exercise of his function under the Statute of his Office; (c) To advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help to solve specific refugee problems remaining unsolved after 31 December 1958 or arising after that date; (d) To authorize the High Commissioner to make appeals for funds to enable him to solve the refugee problems referred to in sub-paragraph c) above; (e) To approve projects for assistance to refugees coming within the scope of sub-paragraph (c) above; (f) To give directives to the High Commissioner for the use of the emergency.”). To summarize, although established by ECOSOC, ExCom functions as a subsidiary organ of the General Assembly and its documentation is issued in a General Assembly series. ExCom’s report is submitted directly to the General Assembly for consideration in the Third Committee. UNHCR’s Statute Article 3 directs that the High Commissioner “shall follow policy directives given him by the General Assembly or the Economic and Social Council.” Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (v), U.N. Doc. A/1775 (Dec. 14, 1950). ExCom does not substitute for the policy making functions of the General Assembly or ECOSOC, but it does have its own executive and advisory functions. These include: to advise the High Commissioner in the exercise of his/her functions; to review funds and programmes; to authorize the High Commissioner to make appeals for funds; to approve proposed biennial

institution and adopting the formula regionally codified in Article 2(2) of the 1969 AU Convention without going much further.<sup>63</sup>

Alternatively, recalling Article 14 of the UDHR, the UNGA sometimes provides general guidelines to be followed by states:

[The General Assembly] *reaffirms* that, as set out in article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees or asylum-seekers contrary to international standards.<sup>64</sup>

In contrast, ExCom has tried to be more generous in dealing with asylum by providing a framework for protecting and assisting persons in need of international protection, while ensuring that proper long-term solutions can be achieved.<sup>65</sup> ExCom urges governments to follow “liberal . . . practices” in granting asylum to refugees who enter their territory and calls upon governments to cooperate with the Office of the High Commissioner in the performance of its task—particularly with respect to asylum.<sup>66</sup> In 1997, ExCom reaffirmed “[t]hat the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights, is among the most basic mechanisms for the international protection of refugees.”<sup>67</sup>

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budget targets.” *ExComm Mandate and Statute*, UNHCR, <http://www.unhcr.org/pages/49c3646c86.html> (last visited Oct. 7, 2011).

<sup>63</sup> See G.A. Res. 62/125, ¶ 16, U.N. Doc. A/RES/62/125 (Dec. 18, 2007); G.A. Res. 61/139, ¶ 14, U.N. Doc. A/RES/61/139 (Dec. 19, 2006); G.A. Res. 60/128, ¶ 13, U.N. Doc. A/RES/60/128 (Dec. 13, 2005).

<sup>64</sup> G.A. Res. 54/146, ¶ 6, U.N. Doc. A/RES/54/146 (Dec. 17, 1999).

<sup>65</sup> United Nations High Comm’r for Refugees, Exec. Comm., *General Conclusion on International Protection*, ¶ n, U.N. Doc. A/53/12/Add.1 (Oct. 9, 1998) [hereinafter *General Conclusion on International Protection*].

<sup>66</sup> United Nations High Comm’r for Refugees, Exec. Comm., *Note on Asylum*, ¶ 2, U.N. Doc. EC/SCP/4 (Aug. 24, 1977).

<sup>67</sup> See United Nations High Comm’r for Refugees, Exec. Comm., *Safeguarding Asylum*, ¶ b, U.N. Doc. A/52/12/Add.1 (Oct. 17, 1997) [hereinafter *Safeguarding Asylum*]. Compare *General Conclusion on International Protection*, *supra* note 66, ¶ f (“[The ExCom] notes that the 50th anniversary of the Universal Declaration of Human Rights is being commemorated this year and reaffirms that the institution of asylum, which derives directly from the right to seek and enjoy asylum from persecution set out in Article 14 of the Declaration, is among the most basic mechanisms for the protection of refu-

Aware that there is no universally recognized, legally binding instrument promoting the enforcement of asylum, however, in 1977, ExCom stopped requesting the High Commissioner “to draw the attention”<sup>68</sup> of governments to the different international instruments existing in this field. At the regional level, the 2001 final text of the Asian-African Legal Consultative Organization’s (“AALCO”) 1966 Bangkok Principles on Status and Treatment of Refugees indirectly strengthened this concept, affirming that “a State has the sovereign right to grant or to refuse asylum in its territory to a refugee.”<sup>69</sup> Under this framework, the African Charter on Human and Peoples’ Rights (Banjul Charter) provides that an individual has the right “to seek and obtain asylum” elsewhere if persecuted, although it does not provide an obligation of states to receive refugees.<sup>70</sup> Additionally, the obtaining of asylum is qualified by the not well established clause “when persecuted.”<sup>71</sup> Nevertheless, concession of asylum can be analyzed under the purview of the 1951 Geneva Convention and the 1969 African Convention.

Under this framework, however, questions concerning “western-oriented” forms of persecution, not always considered such in SSA, still remain unresolved.<sup>72</sup> A typical example of

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gees.”), with United Nations High Comm’r for Refugees, Exec. Comm., *General Conclusion on International Protection*, ¶ c, U.N. Doc. A/46/12/Add.1 (Oct. 11, 1991) (“[The ExCom] emphasizes the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection . . .”), and United Nations High Comm’r for Refugees, Exec. Comm., *General Conclusion on International Protection*, ¶ f, U.N. Doc. A/47/12/Add.1 (Oct. 9, 1992) (“[The ExCom] reaffirms the primary importance of the principles of *non-refoulement* and asylum as basic to refugee protection[.]”). *But see Safeguarding Asylum*, ¶ c (noticing the “[g]rowing complexity of refugee crises poses serious and novel challenges to the institution of asylum.”).

<sup>68</sup> See *Safeguarding Asylum*, *supra* note 67, ¶ b.

<sup>69</sup> Asian-African Legal Consultative Org., *Bangkok Principles on the Status and Treatment of Refugees*, art. 2(2), (Dec. 31, 1966). It is worth noting that this statement has been accepted without any reservations by African governments.

<sup>70</sup> African Charter on Human and Peoples’ Rights, art. 12.3, Jun. 27, 1981, 1520 U.N.T.S. 26363 (“Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.”).

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

<sup>72</sup> Jamil Ddamulira Mujuzi, *Rights of Refugees and Internally Displaced Persons in Africa*, in *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS* 177, 185 (Maniuli Ssenyonjo ed. 2012).

this involves the persecution of homosexuals, still practiced in several countries in SSA. For example, in Uganda, where recently a bill was introduced in its Parliament outlawing the promotion of homosexuality,<sup>73</sup> an asylum-seeker would likely not be able to apply for asylum there if such a bill were to become law and asylum was sought to avoid persecution for being a homosexual. Given the language of this legislation, homosexuals are unlikely to be considered part of a specific “social group” protected in principle by section 4a of the 2006 Ugandan Refugees Act. And, as article 12.3 of the Banjul Charter explains, an individual can have asylum granted only “[i]n accordance with laws of those [African] countries.”

In addition, ExCom, which obviously welcomed the development of legislation on asylum as well as the establishment of processes for status determination and admission of refugees in a number of African countries,<sup>74</sup> has, in accordance with several principles, provided common criteria to identify the country responsible for examining an asylum request. In developing the “general policies under which the High Commissioner shall plan, develop and administer the programmes,”<sup>75</sup> however, ExCom has created very broad guidelines for the identification of such a country without going beyond its mandate.

Among others terms, ExCom has stressed that it is fair for a state to try to call upon another state to grant asylum to an

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<sup>73</sup> A Bill for an Act Entitled the Anti Homosexuality Act, 2009, Bill Supp. No. 13, CII Uganda Gazette No. 47 (Sept. 25, 2009) (“The objectives of the Bill are to: a) provide for marriage in Uganda as that contracted only between a man and a woman; b) prohibit and penalize homosexual behavior and related practices in Uganda as they constitute a threat to the traditional family; c) prohibit ratification of any international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act; d) prohibit the licensing of organizations which promote homosexuality.”). See also Press Release, Amnesty International, Uganda: Anti-homosexuality bill ‘a grave assault on human rights,’ (Feb. 7, 2012), available at <http://www.amnesty.org/en/for-media/press-releases/uganda-anti-homosexuality-bill-grave-assault-human-rights-2012-02-07>. As of May 2012, Liberia is also in the process of adopting an anti-homosexual bill. See E. J. Nathaniel Daygbor, *Liberia: House Decides Anti-Gay Bill 28 Feb.*, ALLAFRICA (Feb. 27, 2012), <http://allafrica.com/stories/201202271012.html>.

<sup>74</sup> See United Nations High Comm’r for Refugees, Exec. Comm., *General Conclusion on International Protection*, U.N. Doc. A/AC.96/1003 (Oct. 8, 2004).

<sup>75</sup> United Nations Econ. & Social Council, Exec. Comm., *Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, ¶ 2(a), U.N. Doc. E/RES/672 (Apr. 30, 1958).

individual if the second state has a closer connection to the individual than the original state in which the individual asked for asylum.<sup>76</sup> Furthermore, ExCom has highlighted several other important principles such as: “[w]hile asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, *should* not lead to an asylum request being excluded from consideration.”<sup>77</sup>

The verb “should” used in the above sentence is conditional. However, African domestic legislation on refugees generally contains no norms that penalize an asylum-seeker if she or he does not comply with the formal requirements requested by the law.<sup>78</sup> In the judgement of *Malawi v. Rahman*, the Lilongwe Magistrate Court recognized the special situation of the “failed-state” of Somalia<sup>79</sup> and consequently justified the illegal entry

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<sup>76</sup> United Nations High Comm’r for Refugees, Exec. Comm., *Refugees Without an Asylum Country*, ¶ h(iv), U.N. Doc. A/34/12/Add.1 (Oct. 16, 1979).

<sup>77</sup> *Id.* at ¶ i(i).

<sup>78</sup> See DIÁRIO DA REPÚBLICA [C. CIV] art. 5(3) (Act No. 8/1990) (Angl.) (“A refugee who is unlawfully present in the country shall not be punished for the act of unlawful entry or presence provided that he presents himself to the authorities and justifies his situation.”); The Refugees Act, art. 9, ¶ 1 (Act No. 9/1998) (Tanz.) (“Any person entering or who is within Tanzania, whether lawfully or otherwise and who wishes to remain in Tanzania as a refugee within the meaning of section 4 shall immediately and not later than seven days after entry, unless he can show reasonable cause for delay, present himself or report to the nearest authorized officer, village Executive Officer, or a justice of peace and apply for recognition as a refugee.”). Note that nothing is said in the case of the asylum-seeker who presents himself after seven days and without showing a reasonable cause for her/his delay. *But see* JOURNAL OFFICIEL [C. CIV] art. 29, ¶ 2 (Act No. 021/2002) (Dem. Rep. Congo) (“[P]eut être interpellé par les services compétents qui le déféreront devant la Commission Nationale pour les Réfugiés.”). Note that the formula used here is not strict with reference to an asylum-seeker.

<sup>79</sup> See Tara Magner, *Does a Failed State Country of Origin Result in a Failure of International Protection? A Review of Policies Toward Asylum-Seekers in Leading Asylum Nations*, 15 GEO. IMMGR. L.J. 703, 704 (2001) (“A failed state is distinguishable from a nation destabilized by civil strife or guerrilla warfare. Failed states are a phenomenon that is ‘deeper . . . than mere rebellion, coup, or riot. [State collapse] refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new.’ The World Bank identifies three pathologies of state collapse: 1) ‘States that have lost (or failed to establish) legitimacy in the eyes of most of the population . . . and are therefore unable to exercise . . . authority[.]’ 2) ‘[s]tates that have been run into the ground by leaders and officials who are corrupt, negligent, incompetent, or all three[.]’ 3) ‘[s]tates that have fragmented into civil war, and in which no party is capable of re-establishing central authority.’ In sum, the

and residence of several Somali asylum-seekers. The court confirmed:

Illegal entry of any person for the purpose of seeking asylum does not disqualify the applicant from becoming a refugee. However, any person who illegally enters Malawi as an asylum-seeker is supposed to present himself within 20 hours of his entry before a competent officer but should not be detained, imprisoned, declared prohibited immigrant or otherwise penalised by reason only of his illegal entry or presence in Malawi until the committee makes a decision on his application.<sup>80</sup>

Following a similar procedure, a South African High Court, in *Tafira v. Ngozwane*, highlighted that the rights contained in the 1998 National Refugee Act needed to be applied to an asylum-seeker, irrespective of whether she or he entered South Africa legally or strictly conformed to the formal requirements for submitting her or his application for refugee status.<sup>81</sup>

Regardless of these official statements, several African governments are occasionally reluctant to reinforce the protection of crucial rights, such as the right to seek and enjoy asylum. As a result, the goal of refugee law is significantly hampered. Several studies show the quantity of gross violations of human rights, for example, perpetrated on a daily basis in the refugee camps and other settlements where asylum-seekers wait for a response to their asylum requests.<sup>82</sup>

In various circumstances, ExCom has expressed its regret for the restrictive asylum practices in Africa. These expressions of regret began in the early 1980s, when countries patently closed their borders to asylum-seekers.<sup>83</sup> The attitude of

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state has experienced a 'fundamental loss of institutional capability.' State failure does not necessarily signify the absence of a government's intention to offer protection to its population; it more accurately signifies the point at which the government is unable to accomplish any goal, no matter what the good intentions of its nominal leaders may be."

<sup>80</sup> Republic v. Rahman (2005) Criminal Case G 26 (Malawi).

<sup>81</sup> *Tafira v. Ngozwane* 2006 (1) SA 136 (HC) (S. Afr.); Refugee Act 130 of 1998 § 21(4)(a) (S. Afr.) ("Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic.")

<sup>82</sup> Odd E. Olsen & Kristin S. Scharffscher, *Rape in Refugee Camps as Organizational Failures*, 8 INT'L J. HUM. RTS. 377, 377-97 (2004).

<sup>83</sup> See United Nations High Comm'r for Refugees, Exec. Comm. *General Conclusion on International Protection*, ¶ d, U.N. Doc. A/33/12/Add.1 (Oct. 17, 1978) ("[The ExCom] [r]ecalled the Conclusions adopted at the twenty-eighth session regarding asylum and expressed concern that refugees still encoun-

several African states was contrary to ExCom statements supporting the right of an alien to seek and enjoy asylum, which has been confirmed several times throughout the 1990s and 2000s.<sup>84</sup>

Kenyan authorities denied asylum to twenty-three Somalis in November 2007.<sup>85</sup> Additionally, Kenyan authorities denied asylum to Somalis earlier in 2007,<sup>86</sup> and later in 2009.<sup>87</sup> Such an attitude was quite paradoxical considering that, since its independence in 1963, Kenya has been one of the few African states committed to finding a regional solution for the hundreds of thousands of refugees dispersed over the African continent.<sup>88</sup> Somali asylum-seekers were clearly considered a

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tered difficulties in obtaining permanent or even temporary asylum in certain areas . . .”); United Nations High Comm’r for Refugees, Exec. Comm. *General Conclusion on International Protection*, ¶ d, U.N. Doc. A/37/12/Add.1 (Oct. 20, 1982); United Nations High Comm’r for Refugees, Exec. Comm., *General Conclusion on International Protection*, ¶ e, U.N. Doc. A/38/12/Add.1 (Oct. 20, 1983); United Nations High Comm’r for Refugees, Exec. Comm. *General Conclusion on International Protection*, ¶ d, U.N. Doc. A/39/12/Add.1 (Oct. 18, 1984).

<sup>84</sup> See United Nations High Comm’r for Refugees, Exec. Comm., *Note on International Solidarity and Refugee Protection*, ¶ 5, U.N. Doc. EC/SCP/50 (Oct. 10, 1988) (“[ExCom] [i]nvited all States to continue actively to support the protection functions of the High Commissioner through all appropriate means, both bilateral and multilateral, as well as to abide by their own humanitarian responsibilities towards refugees, including, particularly, to safeguard the right to seek and enjoy asylum from persecution...”); United Nations High Comm’r for Refugees, Exec. Comm., *Internally Displaced Persons*, ¶ 1, U.N. Doc. A/49/12/Add.1 (Oct. 7, 1994); *General Conclusion on International Protection*, *supra* note 62, ¶ f; United Nations High Comm’r for Refugees, Exec. Comm., *Conclusion on the Civilian and Humanitarian Character of Asylum*, ¶ c(i), U.N. Doc. A/57/12/Add.1 (Oct. 8, 2002); United Nations High Comm’r for Refugees, Exec. Comm., *Conclusion on Protection Safeguards in Interception Measures*, ¶ a(iii), U.N. Doc. A/58/12/Add.1 (Oct. 10, 2003).

<sup>85</sup> *Kenya: Unlawful deportation of Somali asylum seekers*, RELIEFWEB (Nov. 30, 2007), <http://reliefweb.int/node/252118> (“According to the Consortium, the deported Somalis were denied the right to seek asylum and access to humanitarian organisations or the UN refugee agency (UNHCR). They have been returned to Mogadishu where their safety is uncertain.”).

<sup>86</sup> Amnesty Int’l, *Kenya: Denied Refugee: The effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees 3* (2007).

<sup>87</sup> *Kenya: Refoulement of Somali asylum seekers* UNHCR, (Apr. 3, 2009), <http://www.unhcr.org/49d5d9c16.html> (“UNHCR wishes to express its concern about the increasing trend by the Kenyan authorities to forcibly return Somali asylum seekers to their country.”)

<sup>88</sup> Edwin Odhiambo-Abuya, *Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective*, 19 INT’L J. REFUGEE L. 51,

“danger to the security of Kenya,” and thus excluded from refugee status pursuant to the 2011 Kenyan Refugee Act.<sup>89</sup> The question of what constitutes a “danger to the security” of the country leads to the never-ending debate of whether the host country is acting arbitrarily in granting asylum to applicants. In Kenya, which follows previous examples of national SSA legislation based on concerns over “national security,”<sup>90</sup> a refugee and his/her family can be expelled from the country, although asylum has already formally been accorded.<sup>91</sup>

In the last few years, Ugandan authorities have also shared the attitude of their Kenyan counterparts.<sup>92</sup> Rwandan

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54 (2007).

<sup>89</sup> The Refugee Act, (2011) § 15 (Kenya) (“1) No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where *a*) the person may be subject to persecution on account of race, sex, religion, nationality, membership of a particular social group or political opinion; or *b*) the person’s life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country. 2) *The benefit of the provision of this section may not be available to a refugee or an asylum seeker where there are reasonable grounds for regarding such a refugee or asylum seeker as a danger to the security of Kenya.*”) (emphasis added).

<sup>90</sup> See, e.g., The Refugee Act, § 28(a)(ii) (1998) (Tanz.) (discussing “deportation” instead of expulsion); Loi No. 2000-019 portant statut des réfugiés au Togo, art. 27 (2000) (Togo); The Refugee Proclamation, art. 10.2 (2004) (Eth.); The Refugees Act, art. 40 (2006) (Uganda); The Sierra Leone Refugees Protection Act, § 16.1 (2007).

<sup>91</sup> The Refugee Act, (2011) § 17 (Kenya) (“Subject to section 16 and subsection (2) of this section, where the Cabinet Secretary considers the revocation of the refugee status of any person and the expulsion from Kenya of that person to be necessary on grounds of national security and public order, the Cabinet Secretary may, after consultation with the Cabinet Secretary responsible for matters relating to internal security, order the revocation of the refugee status and proceed to expel such a person or member of his family from Kenya.”).

<sup>92</sup> Samuel B. Tindifa, *Refugees and Human Rights in Uganda: A Critical Assessment of the Law, Policy and Practice*, 5 E. AFR. J. OF PEACE & HUM. RTS. 53, 59 (1998) (“[I]ntegrating refugees into local communities has never been considered by the Ugandan authorities as a viable option. . . . This perception of the refugee question has led the Uganda Government to adopt measures aimed at tight control, segregation, ‘pacification’ and the depoliticization of refugees. . . . This practice marginalizes refugees.”); James Katalikawe, *Helping Refugees to Help Themselves: Uganda’s Response to the Refugee Crisis in the Great Lake Region*, 8 E. AFR. J. OF PEACE AND HUM. RTS. 211, 212-13 (2002) (“Kenya and Tanzania are violating the rights of refugees seeking asylum in the two countries. . . . Xenophobia and anti-refugee sentiment among



asylum-seekers, for instance, were denied the right to seek asylum in 2005.<sup>93</sup> In addition, in 2001, Congolese individuals of Rwandan origin were denied the right to seek asylum in Rwanda because they were considered Congolese (despite having been chased from Congo because of their Rwandan heritage).<sup>94</sup> Zimbabwean asylum-seekers “historically” go through many problems in order to obtain asylum in South Africa,<sup>95</sup> a country that as of 2012 continues in its *refoulement* of genuine refugees.<sup>96</sup>

To highlight the difficulty of enjoying a presumptive right to asylum in practice, S.M. Tindifa called attention to the situation in Uganda:

Many of th[e] rights [provided in the 1951 Geneva and 1969 AU Conventions] are violated [in Uganda] [including] the following:

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East Africans have notably hardened. . . . Conditions for refugees are said to be significantly better in Uganda. But . . . their treatment may worsen as Uganda negotiates with Kenya and Tanzania to standardize the refugee policies of all three nations.”).

<sup>93</sup> *Uganda: rejection of Rwandan refugees*, JESUIT REFUGEE SERVICES (Jul. 15, 2005), [http://www.jrs.net/news\\_detail?TN=NEWS-20100603110716](http://www.jrs.net/news_detail?TN=NEWS-20100603110716) (“According to a statement on 3 July from the Uganda Office of the Prime Minister (OPM), 90% of Rwandan refugees have been rejected and will soon be asked to leave the country. This follows an influx of between 1,300-1,500 refugees from Rwanda into Uganda in April and May 2005, most of whom were confined to living in the Nakivale settlement in Western Uganda without a decent place to stay, or food to eat. The Ugandan government alleges that by confining refugees to this one site, it would prevent double registration.”).

<sup>94</sup> *JRS Dispatches No. 86: Congolese Refugees Rejected by Congo and Rwanda*, RELIEFWEB (Feb. 3, 2001), <http://reliefweb.int/node/75687> (“JRS Grands Lacs reports that 146 Congolese people of Rwandan ethnic origin arrived in Kiziba camp, western Rwanda, after they were sent out of Congo and later rejected as Rwandans in Kigali. In June last year, some 800 Congolese people of Rwandan ethnic origin living in Kinshasa were placed in a camp for security reasons. In September, the government allegedly sent 146 of them to Rwanda. The people arrived in Kigali, where they were told they are not Rwandan and rejected.”).

<sup>95</sup> *See Zimbabweans face uphill struggle in search for asylum in South Africa*, UNHCR (July 11, 2008), <http://www.unhcr.org/48776e934.html>

<sup>96</sup> *See HUMAN RIGHTS WATCH, WORLD REPORT 2012: SOUTH AFRICA* (2012), available at <http://www.hrw.org/world-report-2012/world-report-2012-south-africa> (“Some South African officials indicated that the country was considering moving refugee reception offices to its borders with Mozambique and Zimbabwe and detaining all asylum seekers while their cases were being considered. Local civil society voiced concerns this would bring chaos and possibly a humanitarian crisis to the South Africa-Zimbabwe border area in particular and lead to a sharp deterioration of already poor decision-making, which would likely lead to increased *refoulement* of genuine refugees.”).

the right to life; the right to equal treatment, education and naturalization; freedom of expression, association and worship; freedom of movement; the right to gainful employment; the right against *refoulement*.<sup>97</sup>

It should be noted, however, that according to UNHCR, the situation in Uganda is slowly improving in favor of more concrete protection for refugees,<sup>98</sup> although the concerns caused by the aforementioned national law discriminating against homosexuals remain.

Since the right to seek and enjoy asylum is often constrained in Africa, it is not surprising that there is little evidence on the continent of its existence. And unfortunately, African shortcomings can be easily demonstrated through numerous inexplicable examples such as South Africa's refusal to grant asylum to the fifty Ethiopians in 2000.<sup>99</sup> South Africa continues to this day to turn away asylum-seekers,<sup>100</sup> as evidenced by the increasing *refoulement* of homosexuals occurring in recent years.<sup>101</sup>

Not surprisingly, ExCom has finally stressed that the credibility of the institution of asylum can be seriously affected when states promptly return those improperly found to lack a

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<sup>97</sup> Tindifa, *supra* note 92, at 60.

<sup>98</sup> See Vanessa Akello, *Uganda's progressive Refugee Act becomes operational*, UNHCR (June 22, 2009), <http://www.unhcr.org/4a3f9e076.html> ("Asylum seekers have been accorded a very good law, which embodies some of the best regional tenets on refugee law," said Stefano Severe, UNHCR's representative in Uganda. The legislation clearly enumerates the rights of refugees, as well as their obligations in Uganda. It defines who is a refugee and it is gender sensitive. The law outlines the process to be used in determining refugee status. It also sets forth how a refugee situation can cease, once durable solutions have been found. The freedoms enshrined in the law include the right to work, freedom of movement and the right to live in settlements rather than in refugee camps. Prime Minister Nsibambi noted that refugees 'are given opportunity to fend for themselves by growing crops, attain food security and avail themselves of other human basic needs.' The Ugandan leader stressed that the Refugee Act 2006 'epitomizes Uganda's unwavering liberal policy towards refugees who seek protection here until they feel it is safe for them to return to their countries of origin.'").

<sup>99</sup> JESUIT REFUGEE SERV., SOUTHERN AFRICA ANNUAL REPORT 43 (2000).

<sup>100</sup> See AFRICA: Horn migrants heading south "pushed backwards." IRIN AFRICA (Aug. 2, 2011), <http://www.irinnews.org/Report/93403/AFRICA-Horn-migrants-heading-south-pushed-backwards>.

<sup>101</sup> See Paul Canning, *Is South Africa increasingly refusing gay asylum seekers?*, CARE2 (Nov. 6, 2011, 6:00 PM), <http://www.care2.com/causes/is-south-africa-increasingly-refusing-gay-asylum-seekers.html>.

necessity for such inter-state protection.<sup>102</sup> As the African situation demonstrates, however, the problem starts before individuals found not to deserve protection are repatriated. Rather, the problem lies within the concept of asylum itself: it derives from a lack of unanimously recognized standards allowing all aliens to effectively seek asylum.

Given the foregoing, there might be an alternative solution by granting asylum as a right though domestic African law. In several African constitutions,<sup>103</sup> the right of granting asylum could become, in the near future, local customary law<sup>104</sup> within SSA. Some African officials, in particular former President of Botswana, Q.K.J. Masire, have indicated support for local custom by arguing that the granting of asylum should be a “moral duty.”<sup>105</sup>

There is no reasonable basis for expecting the emergence of a local African custom on the right of granting asylum, however. Custom is composed of a subjective element (*opinio juris sive necessitatis*) and an objective element (state practice). If we agree that the *opinio juris* of granting asylum in Africa, like

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<sup>102</sup> United Nations High Comm’r for Refugees, Exec. Comm., *Conclusion on the Return of Persons Found Not to be in Need of International Protection*, ¶ b, U.N. Doc. A/58/12/Add.1 (Oct. 10, 2003).

<sup>103</sup> See CONSTITUTION DE LA RÉPUBLIQUE DU RWANDA Jun. 4, 2003, art. 25 (Rwanda) (“Le droit d’asile est reconnu dans les conditions définies par la loi. L’extradition des étrangers n’est autorisée que dans les limites prévues par la loi ou les conventions internationales auxquelles le Rwanda est partie. Toutefois, aucun Rwandais ne peut être extrudé.”); see also CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO Feb. 18, 2006, art. 33 (Dem. Rep. Congo); CONSTITUTION DE LA RÉPUBLIQUE DU BURUNDI Feb. 22, 2005, art. 23 (Burundi); CONSTITUTION DE LA RÉPUBLIQUE DE CÔTE D’IVOIRE Aug. 1, 2000, art. 12 (Côte d’Ivoire); CONSTITUTION DU BURKINA FASO Jun. 11, 1991, art. 9 (Burk. Faso); LA CONSTITUTION DU MALI Mar. 26, 1991, art. 12 (Mali) (“Nul ne peut être contraint à l’exil. Toute personne persécutée en raison de ses convictions politiques ou religieuses, de son appartenance ethnique, peut bénéficier du droit d’asile en République du Mali.”).

<sup>104</sup> Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 125 (Malcolm D. Evans ed., 2006) (“[A]longside general customary law there exists rule of *special or local customary law*, which are applicable only within a defined group of States; and it is in principle possible for a State which does not accept a rule which is in the process becoming standard international practice to make clear its opposition to it, in which case it will be exempted from the rule when it does become a rule of law, having the status of what is generally called a *persistent objector*.”) (emphasis added).

<sup>105</sup> Tiyanjana Maluwa, *The Concept of Asylum and the Protection of Refugees in Botswana: Some Legal and Political Aspects*, 2 INT’L J. REFUGEE L. 587, 594 (1990).

elsewhere in the world, does not exist,<sup>106</sup> then we must be very sceptical of the existence of a customary right of granting asylum simply based on the actions of state agents.<sup>107</sup>

State practice is comprised of general and consistent elements. But while “[a] practice can be general even if it is not universally followed[,] there is no precise formula to indicate how widespread a practice must be . . . [because practice is analyzed with respect to the level of] acceptance among the states particularly involved in the relevant activity.”<sup>108</sup> It is the term “consistent” that has left scholars with more than some doubt as to the application of a custom of granting asylum in Africa. On this basis, in spite of the efforts by national legislators to introduce the right of granting asylum as a constitutional principle, the practice is still too inconsistent to consider the granting of asylum a veritable local custom in SSA.

### III. IS THE CONCEPT OF TEMPORARY PROTECTION AN “EMPTY BOX” IN AFRICA?

Because the requirements of full asylum are sometimes too demanding for states to comply with, a new concept has recently started to creep into the asylum conversation; “temporary protection.”<sup>109</sup> Temporary protection prohibits a state from forcibly repatriating foreign nationals who find themselves within its territory.<sup>110</sup> It has broadened from an assurance given to individuals fleeing violence and instability caused by armed conflict within their state of citizenship to include individuals fleeing from other situations like natural disasters, which are

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<sup>106</sup> I personally find it difficult to understand how some scholars find that the granting of asylum is not effected in contemplation of a legal obligation.

<sup>107</sup> BARRY E. CARTER ET AL., INTERNATIONAL LAW 124 (5th ed. 2007) (“For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation; . . . a practice that is generally followed but which states feel legally free to disregard does not contribute to customary international law.”).

<sup>108</sup> *Id.*

<sup>109</sup> Kennedy, *supra* note 60, at 65 (“The debate about what has been termed ‘temporary refuge’ frankly acknowledges what it sees as an inevitable disjuncture between the international legal exhortations of international institutions and the practice of national politics.”).

<sup>110</sup> See United Nations High Comm’r for Refugees, Dept. of Int’l Protection, *Legal Protection Policy Research Series: Protection Mechanism Outside of the 1951 Convention (“Complimentary Protection”)*, U.N. Doc. PPLA/2005/2 (June 2005) (by Ruma Mandal) [hereinafter *Complimentary Protection*].

common in SSA.<sup>111</sup>

In Article 2(5) of the final draft of the 1969 AU Convention, African legislators provided that where an asylum-seeker has not received the right of residence in any state of asylum, he may be granted at least temporary residence in the country of asylum in which he first presented himself, pending arrangements for his possible resettlement elsewhere.<sup>112</sup> The verb “may,” however, indicates that this provision is not a binding obligation, but a derivation of the principle of *non-refoulement*, which states that an asylum-seeker must be provisionally admitted if, in the case of the denial of the right of entry, he is obliged to remain in or to return to a country where he has a “well-founded fear of being persecuted.”<sup>113</sup> Where asylum-seekers should physically live during their stay in the host country is still debated, even if the prevailing practice is to use “detention centers.”<sup>114</sup>

The norm of temporary protection, considered customary,<sup>115</sup> was created “at the intersection of refugee law, humani-

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<sup>111</sup> See Richard Black, *Environmental Refugees: Myth or Reality?* 1-2 (Univ. of Sussex, Working Paper No. 34, 2001) (noting that human movement and natural disasters have led to the development of “three sub-categories of environmental refugee, namely temporary displacement due to temporary environmental stress; permanent displacement due to permanent environmental change; and temporary or permanent displacement due to progressive degradation of the resource base.”). For instance, floods have recently struck Burundi, Ethiopia, Kenya, and Mozambique. See *Burundi: Floods displace thousands north of Bujumbura*, REF WORLD (Apr. 14, 2009), <http://www.unhcr.org/refworld/docid/49e6ef2cc.html>; *Thousands more displaced as floods spread*, REF WORLD (Aug. 27, 2009), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=48b7acaf1c&skip=0&query=floods>; *Floods displace thousands in northeast*, REF WORLD (Oct. 16, 2008), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=48fd88ab9&skip=0&query=floods>; *Amenesty International Report 2004 – Mozambique*, REF WORLD, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=40b5a1fcc&skip=0&query=floods&querysi=Mozambique&searchin=title&display=10&sort=relevance> (last visited Oct. 7, 2011).

<sup>112</sup> See 1969 AU Convention, *supra* note 5, art. 2(5).

<sup>113</sup> Weis, *supra* note 51, at 458 (paraphrasing Article 1(1) of the 1969 AU Convention).

<sup>114</sup> Kuruk, *Asylum and the Non-Refoulement of Refugees*, *supra* note 36, at 339.

<sup>115</sup> Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA J. INT'L L. 551, 553 (1986).

tarian law, and human rights law.”<sup>116</sup> It has particular importance on the African continent because, although it does not contain anything intrinsically that prevents its application to individuals, it is usually “used to describe a short-term emergency response to a significant influx of asylum seekers,”<sup>117</sup> a phenomenon which has been sadly prevalent in SSA.<sup>118</sup>

It is not by chance that the expanded definition of “refugee” provided in the 1969 AU Convention,<sup>119</sup> which seems to support the implementation of a norm regarding explicit temporary protection,<sup>120</sup> has been considered a fundamental basis

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<sup>116</sup> JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 42 (2007).

<sup>117</sup> *Complimentary Protection*, *supra* note 110, at 3. Joan Fitzpatrick doubts, however, the formalization of temporary protection because though “it might fill an important legal lacuna,” it “might appear to support questionable interpretations of existing treaty obligations.” Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT’L L. 279, 296 (2000).

<sup>118</sup> Fitzpatrick, *supra* note 117, at 282. In the last decade, generally following civil or international wars, mass-influxes of asylum-seekers have occurred on the continent in countries such as Sudan, Ethiopia, Eritrea, Somalia, Rwanda, Burundi, Democratic Republic of Congo, and Angola. *See, e.g.*, U.N. Secretary-General, *Report of the Secretary-General on Assistance to Refugees, Returnees, and Displaced Persons in Africa, delivered to the General Assembly*, U.N. Doc. A/54/414 (Sept. 29, 1999).

<sup>119</sup> The expanded definition of the African Convention refers to Article 1(2) of the African Convention, which enlarges the definition provided in the 1951 Geneva Convention by stating: “The term refugee shall *also* apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” 1969 AU Convention, *supra* note 5, art. 1(2) (emphasis added); *see also* Fitzpatrick, *supra* note 117, at 293 (observing that “the definition of refugee [under the AU Convention] . . . was expanded to embrace war victims and other groups, without any suggestion that the quality or durability of their protection should be diminished as compared to that enjoyed by persons meeting the definition in the 1951 Convention.”); Kuruk, *Asylum and the Non-Refoulement of Refugees*, *supra* note 36, at 324-25 (noting the “definition calls for an objective inquiry into the conditions prevailing in the refugee’s country of origin, it is better suited for mass movements of refugees than the subjective test in the 1951 Convention, because it would permit the granting of refugee status to groups of refugees without necessarily subjecting each person to individual screening.”).

<sup>120</sup> Kay Hailbronner, *Nonrefoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S* 135 (David A. Martin, ed., 1986). A.M. Rifaat is clearer on this issue, contending that “[s]ignatory states [of the 1969 AU Convention] were also urged to grant temporary asylum to refugees even

for transitory protection outside the African continent. UNHCR has even opined that “an OAU refugee Convention writ large” is the most attractive option to international codification of complementary protection, with the concept of temporary protection serving as its foundation.<sup>121</sup> In addition, temporary residence is unequivocally referred to in Article 2(5) of the AU Convention,<sup>122</sup> providing that the refugee does not have the right to be a resident in any other state of asylum. Temporary residence, thus, seems to have left more room for denial than if the phrase “has not resided in” had been chosen.<sup>123</sup>

On the other hand, the AU Convention has already served as a legal basis for a number of states in SSA to provide temporary protection to nationals of neighbouring countries who have fled violence or civil strife, even if exceptions apply. For example, in the past Ghana and Nigeria typically did not grant an individual the right to rely on the extended definition of refugee provided in the 1969 AU Convention.<sup>124</sup> But now, Ghana is one of the few examples in SSA of a country that is taking concrete steps to comply with its international legal obligations in terms of refugee protection.<sup>125</sup> Moreover, Nigeria currently is hosting Liberian and Sierra Leonean refugees pursuant to the 1969 AU Convention,<sup>126</sup> and the national procedures it uses for

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when they feel that they cannot grant them permanent asylum.” Rifaat, *supra* note 56, at 106 (relying on Article 2(5) of the AU Convention); *see also* 1969 AU Convention, *supra* note 5, art. 1.

<sup>121</sup> MCADAM, *supra* note 116, at 47.

<sup>122</sup> 1969 AU Convention, *supra* note 5, art. 2(5) (“[W]here a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement.”).

<sup>123</sup> W.J.E.M. Van Hövell tot Westerflinter, *supra* note 49, at 176.

<sup>124</sup> Hailbronner, *supra* note 120, at 135.

<sup>125</sup> UNHCR, *Submission by the United Nations High Commissioner for Refugees (UNHCR) for the Office of the High Commissioner for Human Rights’ Compilation Report - Universal Periodic Review: Ghana 1*, (2012), available at <http://www.unhcr.org/refworld/docid/4f7867ff2.html>.

<sup>126</sup> Multipartite Agreement for the Local Integration of Liberian and Sierra Leonean Refugees in Nigeria between the Government of the Republic of Liberia, the Government of the Republic of Sierra Leone, the Government of the Federal Republic of Nigeria, the Economic Community of West African States (ECOWAS), and the Office of The United Nations High Commissioner for Refugees (UNHCR), Jun. 2007, available at <http://www.unhcr.org/49e479ca22.pdf> (“11) Liberian and Sierra Leonean refugees opting to locally integrate in Nigeria will acknowledge that by accepting passports issued to them by their respective countries of origin they are voluntarily re-availing

the status determination are in large part effected pursuant to the 1969 AU Convention.<sup>127</sup>

Temporary protection is often associated with the effective sharing of responsibilities, and sometimes involves the physical transfer of asylum-seekers and structured schemes for financial assistance for states of refuge. This objective may be resisted by African states seeking to avoid creating a legal commitment to be safe havens and by refugee advocates who fear the commoditization of refugee protection.

It often happens, however, that asylum, initially granted as a temporary measure, can be transformed into a permanent condition, especially when the refugee's stay in the host country lasts decades and it becomes difficult to control all of his movements.<sup>128</sup> A typical example of this situation involves the Angolans who have been provided with temporary protection by DRC officials since Angola's civil conflict in 1975, but have never been repatriated.<sup>129</sup>

Nonetheless, there are a few exceptions to this general rule as evidenced by the Rwandans return to their home in the mid-1990s from Uganda where they were "temporarily" protected since 1959,<sup>130</sup> the Burundians, repatriated from Tanzania dur-

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themselves of the protection of those countries. Their status as refugees will thus cease in accordance with Article 1C (1) of the 1951 Convention and the corresponding provisions of Nigerian law. 12) The loss of refugee status through re-availment does not preclude a new claim to recognition as a refugee, including on a *sur place* basis, should conditions arise justifying such recognition under the 1951 Convention relating to the Status of Refugees or the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.”).

<sup>127</sup> L.H. Gumi & K. Zannah, *Refugee Status Determination Procedure in Nigeria*, IARLJ, [http://www.iarlj.org/general/images/stories/wp\\_papers\\_cape\\_town/refugee\\_status\\_dertmination\\_procedure\\_in\\_nigeria.pdf](http://www.iarlj.org/general/images/stories/wp_papers_cape_town/refugee_status_dertmination_procedure_in_nigeria.pdf) (last visited May 2, 2012).

<sup>128</sup> Okogbule, *supra* note 49, at 188 (“[T]he problem . . . is that the longer a refugee stays in a country of asylum, the more he or she acquires rights and interests which are at variance with the continuing grant of the temporary status of a refugee. For instance, a refugee may get married to a national of the asylum-granting country . . . and yet by law remain a refugee. The question then arises, under those circumstances, when can it be said that his or her refugee status has ended?”).

<sup>129</sup> Cf. UNHCR, *Angola* 296 (2007) (“[T]he year 2006 also saw UNHCR, for the first time, assisting thousands of spontaneously settled Angolans in the Democratic Republic of the Congo (DRC) to return home.”).

<sup>130</sup> Fitzpatrick, *supra* note 117, at 293. It is important to point out that refugees were historically perceived as a temporary problem in Uganda, which considered its territory mainly a transit point for them. See Tindifa,



ing September 2009, where they had been living “temporarily” since 1972,<sup>131</sup> and the 24,000 Mauritians repatriated in March 2012 from Senegal and Mali, where they were “temporarily” protected since late 1980s, early 1990s.<sup>132</sup>

Even in recent years, however, South African authorities have denied temporary protection to asylum-seekers from Zimbabwe.<sup>133</sup> This inconsistency, a recurrent trait regarding the application of refugee law in Africa, is explained in the following statement:

South Africa’s very recent inclination to provide a special temporary residence permit to Zimbabweans (one that will legalize their stay for a short period of time and allow them to work in the interim) will hopefully fill the gap in South Africa’s law . . . . [S]uch a permit would not only promote the legal entry of Zimbabweans into South Africa at a port of entry, but at the same time it will serve a much greater purpose - formulating a policy for socio-economic migrants who are facing a humanitarian crisis which will ensure that refugee protection is not being eroded.<sup>134</sup>

It is important to note that the 1997 South African Draft Green Paper on International Migration contained several recom-

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*supra* note 92, at 56; cf. H.R. Garry, *Applying the “Plumb Line” of Uganda’s Bill of Rights: Human Rights and the Draft Bill of Refugees*, 5 E. AFR. J. PEACE & HUMAN RTS. 64, 71 (1998) (“[R]efugees should not be seen as only requiring temporary protection [in Uganda]. . . . Rather, refugees should be seen as persons entitled to durable and permanent solutions to their problem of protection.”).

<sup>131</sup> Edwin Seleli & Eveline Wolfcarius, *Repatriation of 1972 Burundian Refugees Hits 50,000 Mark*, UNHCR (Sept. 16, 2009), <http://www.unhcr.org/4ab0db636.html>.

<sup>132</sup> *UNHCR completes repatriation of more than 24,000 Mauritians*, UNHCR (Mar. 27, 2012), <http://www.unhcr.org/4f71f54c6.html>.

<sup>133</sup> *JRS Dispatches No. 222: South Africa: No Temporary Shelter for Zimbabweans*, RELIEFWEB (Sept. 14, 2007), [http://reliefweb.int/sites/reliefweb.int/files/reliefweb\\_pdf/node-243580.pdf](http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-243580.pdf) (“[I]nconsistencies have clouded what could be new thinking in the department. Home Affairs Director-General Mavuso Msimang said assisting Zimbabwean asylum seekers was not among his department’s priorities.”).

<sup>134</sup> Tal Hanna Schreier, *A Critical Examination of South Africa’s Application of the Expanded OAU Refugee Definition: Is Adequate Protection Being Offered Within the Meaning of the 1969 OAU Refugee Convention?* 59-60 (Feb. 2008) (unpublished LL.M thesis, University of Cape Town) (citing Fatima Khan, *Patterns and Policies of Migration in South Africa: Changing Patterns and the Need for a Comprehensive Approach* 10-11 (Univ. of Cape Town Law Clinic, Discussion Paper, 2007)), available at [http://srvrhdig001.uct.ac.za:80/R/?func=dbin-jump-full&object\\_id=1298&local\\_base=GEN01](http://srvrhdig001.uct.ac.za:80/R/?func=dbin-jump-full&object_id=1298&local_base=GEN01).

mendations pertaining to a separate and stand-alone piece of refugee legislation in South Africa, which should:

Be based on a model of refugee protection that is rights-based, solution-oriented, with the sharing of the burden across all SADC member states. *The objective of the model is to provide temporary protection to persons whose basic human rights are at risk in their country of origin.*<sup>135</sup>

As a matter of fact, it remains doubtful whether the 1969 AU Convention really does lend support to the supposition that a civil right of temporary protection can be considered regional customary international law. The practice of contracting states in cases of the mass-influx of individuals is far from certain.<sup>136</sup> In addition, critics of temporary protection have argued that if it is to be pragmatic or grounded in the host state's capacity to comply, it corrupts the obligation of *non-refoulement*.<sup>137</sup> These critics argue that if temporary protection were binding, it would threaten the discretionary character of asylum, especially if the international burden of sharing the responsibility for refugees cannot be established with equal normative and practical force.<sup>138</sup> Critics and defenders of temporary protection alike rely upon the proposition that temporary protection is different from both refugee law and asylum. As such, the debate about the validity of the notion of temporary protection ultimately circles back to the endless debate on the right to asylum and *non-refoulement*.<sup>139</sup>

#### IV. FINAL REFLECTIONS ON THE INSTITUTION OF ASYLUM IN AFRICA

The 1994 OAU/UNHCR Symposium observed that the institution of asylum in Africa was under stress:

[Th]e large number of refugees seeking asylum in countries already themselves experiencing tremendous social and economic hardships, has brought into question the very capacity of nations to cope with refugees. In a number of countries, the basic

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<sup>135</sup> *Id.* at 32-33 (emphasis added) (emphasis omitted) (citing DR. WILMOT G. JAMES, GREEN PAPER: INTERNATIONAL MIGRATION (1997), available at <http://www.queensu.ca/samp/Green.pdf>).

<sup>136</sup> Hailbronner, *supra* note 120, at 135.

<sup>137</sup> Kennedy, *supra* note 60, at 67.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

principles of refugee protection are not being upheld. Refugees have been arrested and detained without charge. Others have been resumed [*sic*] against their will to places where their lives may be in danger. Yet others have been restricted to refugee camps or to remote, inaccessible locations where they are sometimes exposed to banditry, rape and other forms of criminality. Many have not been able to enjoy social, economic and civil rights.<sup>140</sup>

Ten years later, the African Parliamentary Conference, held in Cotonou under the auspices of UNHCR and ICRC, reaffirmed the importance of maintaining the civilian and humanitarian character of asylum, as set up in article II of the 1969 AU Convention through, among other aspects:

Encourag[ing] the competent authorities in countries facing mixed movements of refugees and armed elements to adopt programmes for the disarmament of these armed elements and the identification, separation and internment of combatants, seeking technical assistance and additional resources from the international community, where required [and] [e]ncourag[ing] the United Nations and sub-regional organizations to ensure that programs aimed at integrating former armed elements in post-conflict situations are adequately funded, so as to contribute to sustainable peace and security.<sup>141</sup>

The most evident peculiarity in the concepts of both temporary protection and asylum *tout court* in the African continent is the presence of a plain inconsistency between the written norm and its application. Put simply, African legislators and officials produce inconsistent written norms that do not always take into consideration the real situation in the field or, more often, demonstrate their incoherence by not applying *de facto* the international and national provisions contained in legal instruments, thereby unwillingly promoting the “legal emptiness of the norm.”<sup>142</sup> In my opinion, African legislators and officials behave very coherently in the face of this seeming in-

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<sup>140</sup> Org. of African Unity, *supra* note 46, ¶ 13.

<sup>141</sup> African Parliamentary Conference, Cotonou, Benin, June 1-3, 2004, *Refugees In Africa: The Challenges of Protection and Solutions*, available at <http://www.ipu.org/splz-e/cotonou.htm>.

<sup>142</sup> Cf. Michael H. Shapiro, *Lawyers, Judges and Bioethics*, 5 S. CAL. INTERDISC. L.J. 113, 155 (1997) (“One claim may be that defending certain interests and even discussing certain topics reflect moral indifference and cause harm, at least if outrage is not expressed by the discussants. . . . The ‘emptiness’ of law is reflected in its unthinking and offensive detachment.”).

coherence.

The 1969 AU Convention recognizes the special need in Africa for refugee protection within the legal framework. While the 1969 AU Convention has provided a legal framework for better protection of the refugee, its benefits have been eroded away by the conflicts that still devastate several areas in Africa. Although the African Convention advanced the progressive development of international law by codifying major principles of refugee law, international cooperation remains the main principle of the convention and has been the keystone in the protection of refugees on the African continent.<sup>143</sup> Moreover, a serious defect in the 1951 Geneva Convention was its failure to guarantee a right of asylum to the individual, an omission that, in a sense, renders the rights of the refugee provided under international law useless. Finally, both the regional and the universal conventions have been considered quite vague in their terminology.<sup>144</sup>

Since the Second World War, there have been considerable developments in international cooperation, a greater emphasis upon fairness, equity, and humanitarianism in international law, as well as a growing recognition of the concept of the international community as a society of individuals with an obligation to ensure that all of its members are given the right to live in dignity and safety.<sup>145</sup> This latter notion has been affirmed by domestic courts in Africa. In *Minister of Home Affairs v. Watchenuka*, a South African court wrote: “[h]uman dignity has no nationality. It is inherent in all people—citizens and non-citizens alike—simply because they are human.”<sup>146</sup>

Nonetheless, it is true that, today in Africa, states consistently refuse to accept binding obligations to grant aliens any rights to asylum in the form of permanent rights to settle. African states have been resolute in maintaining that the question of whether or not a right of entry should be afforded to an individual or to a group of individuals is something that each country must resolve for itself.<sup>147</sup>

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<sup>143</sup> Mukira-Nyanduga, *supra* note 53, at 104.

<sup>144</sup> Kuruk, *Refugeeism*, *supra* note 30, at 227.

<sup>145</sup> Hyndman, *Refugees Under International Law*, *supra* note 34, at 155.

<sup>146</sup> *Minister of Home Affairs v. Watchenuka* 2003 (1) SA 21 (SCA) at ¶ 25 (S. Afr).

<sup>147</sup> S. PRAKASH SINHA, ASYLUM AND INTERNATIONAL LAW 218 (1971).

