PLUGGING THE GAPS

Refugees, OAU Policy,
and the Practices of Member States in Africa

by

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The U.S. Committee for Refugees (USCR) is pleased to disseminate this paper written by Joe Oloka Onyango, a Ugandan-trained lawyer, and a doctoral student in law and development at Harvard Law School. Mr. Oloka Onyango recently served an internship with USCR.
Little can be said to describe adequately the dire circumstances of refugees on the African continent. A refugee population of more than five million, representing fifty percent of the global total, is vivid testimony to the magnitude of the problem. Coupled with the fact that many of the world's least developed nations are those most adversely affected by the crisis, these statistics alone make a permanent solution akin to the mirage of a wadi to a Bedouin in the Sahara.

In the arena of international law and practice where part of the solution to this problem belongs, gaping loopholes still exist both in the content and in the implementation of the standards established to govern the status and the protection of refugees as a specific class of persons, and of the realization of their individual human rights. Under the umbrella of the Organization of African Unity (the political conglomeration of independent African nations), refugee law in Africa has attained the most progressive degree of expression in the world.

The OAU Convention of 1969, which is the principal legal instrument in Africa directed to refugee issues, represents a pragmatic response to the realities of social, political, and economic turmoil that have pervaded the continent since the flame of emancipation razed through its erstwhile colonies in the decade between the late 1950s and the early 1960s. The Convention not only reflects the magnitude and complexity of the problem, but also the historical circumstances under which the nations of Africa were given parturition. In harmony with the common ideals expressed within the framework of the OAU Charter and the 1969 refugee Con-
vention, member states have on the whole adopted a positive and progressive attitude towards the plight of refugees, even in the face of debilitating domestic economic and related constraints. And yet, the fact that the refugee crisis in Africa continues to worsen raises questions about whether those humanitarian principles are still relevant to Africa today, and about the extent to which member states have adhered to them.

Although the reasons for Africa's refugee crisis extend far beyond any factor that legal provisions alone can completely remedy, it remains critical to address the question of their efficacy. It is one thing for a refugee to be assured that the law caters to her interests. It is quite another if as a practical matter the basic conditions necessary to guarantee her fundamental rights are endangered by the callous disregard of the standards central to the legal instrument.

Legal scholars clearly recognize three levels at which international law finds expression: the universal, the regional, and the municipal or domestic. In implementing these standards, issues that relate to sovereignty, jurisdiction, and enforcement become significant because they give the municipal level priority over the universal or the regional. Thus, without an effective machinery at all levels to ensure that standards embodied in a particular international instrument are implemented, it remains but a paper tiger, a problem most poignantly experienced by human rights activists in the field. The refugee question is no exception. The example of the forcible expulsion and repatriation of nationals and refugees of Rwandese extraction from Uganda between 1982 and 1983 provides telling evidence of the frustrations faced by activists seeking to implement international standards within the juridical confines of a sovereign nation-state that is actively violating them.
Since the legal framework of refugee issues in Africa is far in advance of the international standard, it is primarily to the links between the regional and national levels of implementation that most attention should be paid. The focus of this paper is the policy and practice of the OAU as an institution and of the individual sovereign states that constitute it. In particular, it considers questions relating to the status, protection, and resettlement of refugees in Africa. It reviews the history of the legal and institutional mechanisms in force on the continent and considers their contemporary relevance. It examines instances in which practice has varied markedly from policy, and explores the legal and related implications of such a dichotomy. The paper points to these loopholes in order to establish the theoretical framework for exhaustively exploring the measures needed to implement fully the existing enforcement standards. It also considers ways in which such standards can be improved. Finally, it includes several case studies illustrating the impact of the Convention and linking the theoretical and the practical issues raised.

REFUGEE PROTECTION IN AFRICA: AN HISTORICAL SURVEY

THE LEGAL FRAMEWORK

The refugee problem in Africa is predominantly a phenomenon of the post-colonial epoch, with the exception of a few cases—such as Rwanda, which was torn by civil strife shortly before independence; the North African states of Algeria, Morocco, and Tunisia, in their anti-colonial struggles; and the Portuguese and minority-ruled countries of South Africa. Only four years after the OAU was established in 1963, Africa had a refugee population of nearly half a million people, and was
developing the potential for creating more. Interestingly, most refugees at that time were persons fleeing those countries still under the yoke of colonial domination. This led the OAU to conclude that

"The refugee problem in Africa then is clearly the product of racism and white domination, of colonialism and neo-colonialism, and of the birth-pangs associated with the process of decolonization and the evolution of true and viable nation-states in Africa."

From the outset, the question of creating a machinery for protecting persons dispossessed from their countries of origin was never far down the agenda of member states, individually and collectively. The 1951 United Nations Convention Relating to the Status of Refugees (the major international legal instrument then in force) established January 1, 1951, as the termination date at which the High Commissioner for Refugees would be concerned with refugee matters, and thus by implication excluded the African refugee problem from the ambit of its operation. General African opinion of the instrument was that it was "Western" in character and thus did not apply to the African situation. Furthermore, many of the provisions of the 1951 Convention, for example those dealing with "welfare" (Articles 20-28), were believed to impose an enormous burden upon countries that were grappling with the constraints of under-development.

Regardless of the limitations deemed intrinsic to the instrument, the OAU urged its member states to adhere to them while efforts were underway to establish a legal framework within which problems affecting refugees in Africa could be dealt with comprehensively. A special committee on refugees, consisting of ten member states (that has since been expanded to fifteen) was established at the OAU Council of Ministers session in Lagos in 1964. That July, the idea of a draft convention dealing with the spe-
cific issues raised by Africa's refugee problem was mooted. A year later, at the fourth ordinary session of OAU ministers held at Nairobi, a Committee of Legal Experts was designated to review the legal issues raised and to complete the draft.

The OAU Convention of 1969 In September 1967, a session of the OAU Council of Ministers instructed the adoption of the instrument governing the "Specific Aspects of the Problem of African Refugees" as a complement to the UN Convention. In addition, it recommended accession to the then recently passed UN Protocol to the 1951 Convention (that deleted reference to the January 1 deadline). The final draft was adopted in February 1969 at Addis Ababa, and came into force on June 20, 1974.

Several principles (derived mainly from the Charter of the OAU), lay at the foundation of the 1969 Convention, including:

(i) The principal objectives for which the OAU was established (i.e., the unity and solidarity of all member states);
(ii) The improved well-being of all African peoples, individually and collectively;
(iii) The complete eradication of the vestiges of colonial dominion from the African continent;
(iv) The defense of the principle of sovereignty (i.e., the maintenance of the territorial integrity and independence of each member state);
(v) International cooperation, in accord with the principles enshrined in the United Nations Charter and the Universal Declaration of Human Rights; and
(vi) The peaceful settlement of disputes through mediation, negotiation, conciliation, or arbitration.

As it evolved, the Convention expressed the necessity to maintain a balance between refugee protection and the prevention of subversive activities that might be committed against the home state, given the circumstances in which the refugees were created. In addition, it expressed the underlying commitment that they would never permit the refugee question to create conflict among them.
The Refugee Definition

The most innovative features of the 1969 Convention—ones which gave it a truly African flavor—were enshrined in two articles, one relating to the refugee definition, and another governing the granting of asylum. Article I of the Convention not only incorporated the general definition used in the 1951 UN Convention, but further extended the definition to cover

"...every person who, owing to external aggression, occupation, foreign domination or events seriously disrupting 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."

This provision recognized that within the African situation, it was not only the individual's "...well-founded fear of persecution..." which created refugees, but that their exodus could be the result of factors of a more general nature, intrinsic to circumstances in the country in question. More importantly, the provision recognized persons seeking refuge from the wider ramifications of coups d'état, civil strife, and political unrest. Thus, for example, a person fleeing a state of emergency in her country would not necessarily be put to the onerous burden of strictly proving that she had been the victim of individual persecution.

As a consequence of this extension of the definition, persons who in Europe would be considered as merely de facto refugees,* and thus outside the mandate of the UN Convention of 1951 and consequently of the

* De facto refugees—a classification that emerged within the context of the European refugee situation—are those persons who have been forced to flee their own countries, but are unable to prove an individual well-founded fear of persecution. They are refugees in fact, but are not recognized as such in law.
protection of the High Commissioner for Refugees, were recognized as refugees for the purposes of Article 1. Thus, the category of *de facto* refugees could only be applied to those who fell outside the scope of Article 1—an extremely small percentage of the African refugee population. Furthermore, the Convention made no distinction between persons fleeing from independent African states and those emanating from colonial dominions or those still ruled by a white minority, as was then the case with Rhodesia, the Portuguese colonies, and South Africa. Freedom fighters thus fell within the ambit of its operation.

**Asylum under the Convention** With respect to asylum, the 1969 Convention introduced an important distinction from the provisions of the 1951 UN Convention. Emphasizing that the granting of asylum is "peaceful" and "humanitarian" and should not be considered as an unfriendly act by any member state, Article II provides that member states should use their best endeavors consistent with their respective legislation to

"...receive refugees and to secure settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."

The innovation introduced by this provision is twofold. First, it imposes a mandatory duty upon member states to endeavor to receive and secure settlement for refugees. Secondly, it advances beyond the 1951 Convention, which only deals with the status of persons who have been granted asylum and does not address the question of the actual grant of it. Paragraphs 2, 3, 4, and 5 of Article II are closely modeled on the United Nations "Declaration on Territorial Asylum," and their inclusion in the OAU Convention makes them binding upon those states that are a party to it. The major drawback of the article was that refugee reception and reset-
tlement was made subject to the application of domestic legislation, in
effect, raising the possibility of its nullification by individual states.

**Subversion, Voluntary Repatriation, and Travel** The Convention expressed
member states' concerns with subversive acts that refugees might commit
against the home state. It enshrined the same prohibitions of subversive
activities against other states as had the OAU Charter and a declaration
on the same issue adopted in Accra in 1965. Article III of the Convention
prohibited rendering any assistance to refugees in order to attack any
member state. In accordance with the objective of eradicating the ves-
tiges of colonialism and armed apartheid from the continent, the prohibi-
tion did not extend to dependent countries and nonmembers of the OAU,
specifically those in Southern Africa.

Finally, in agreement with the Committee of Legal Experts that
voluntary repatriation was the best solution to the refugee problem, the
Convention incorporated this principle in Article V. Concomitantly, one
of the most sacred tenets of refugee law—the principle of nonrefoule-
ment—was enshrined in the same article, emphasizing the necessity for a
peaceable and collaborative resolution to the refugee crisis. As guide-
lines for member states with respect to the question of refugee travel,
the OAU Convention adopted provisions similar to those promulgated by the
UN Convention.

**The Legal Ramifications** Thirty-three member states had ratified the
provisions of the Convention by the end of 1985. Significantly fewer have
actually adjusted their national legal systems to reflect the progressive
thrust of the Convention, although this by no means implies that their at-
titudes towards the problem are negative. Nevertheless, with the coming
into force of the Convention in mid-1974, all member states were henceforth bound by its provisions. The application and the realization of international law, however, are ultimately dependent upon the domestic legal machinery and the extent to which it incorporates such principles. In order, therefore, for the Convention to be meaningful for refugees in Africa, more than lip-service adherence had to be paid to the document. It had to be fortified by the individual members of the OAU adopting its provisions. This aspect of the question shall be the subject of a separate analysis.

RECENT DEVELOPMENTS

The African Human Rights Charter Perhaps the single most important development in the arena of refugee law in Africa in recent years has been the passing of the African Charter on Human and People's Rights (The Banjul Charter) in 1981. Representing a growing consciousness among OAU member states of the dire conditions of all African peoples in both dependent and liberated countries, the Banjul Charter significantly advanced the status of regional refugee law on the continent. The first, and perhaps the most important, advancement relates to the granting of asylum. While the 1969 Convention only imposes a duty upon member states to receive refugees, Article 12(3) of the Banjul Charter confers the right to seek and obtain asylum in other countries when persecuted, in accordance with the laws and international conventions. This provision represents a recognition of the reasons that might cause a person to leave her own country. Furthermore, and more importantly, it enshrines the right to asylum in the legal regime of the African continent. A second innovation is introduced by Article 12(4). Under it, an alien whom a state party has legally admitted into its territory may only be expelled from it by a
decision made in accordance with the law. Article 12(5) extends the pro-
hibition of expulsion to masses of non-nationals—a problem that has sub-
jected many refugee populations in Africa to being returned en masse to
countries they have fled against their will on the grounds that they are
illegal aliens. The distinction between the two is not often very ob-
vious, and thus both provisions significantly reinforce the principle of
nonrefoulement and the objective of voluntary repatriation, both of which
are central to refugee law.

The number of OAU member states that have ratified the Banjul Charter
to date has effectively brought the instrument into force. The stage is
thus set for the Commission established under it to be brought into exis-
tence, as well. Given the wide ambit of the Commission's mandate—if it
is actually permitted to implement it—refugees in Africa shall at least
have a forum in which their grievances can be addressed.

**Displaced Persons** The situation of persons displaced as a result of
drought and famine is a recently emerging aspect of the refugee question
which the legal framework of refugee law on the continent does not add-
ress.** In the words of the OAU Bureau for Refugees,

*Can we repatriate people to places where not even a
plant grows? Can they be integrated into societies
which themselves do not have enough to eat? Can we
resettle in other countries, children, men, and women
who have almost no no-how?*

** Included in the category of internally displaced persons are the esti-
mated 3,500,000 people forcibly removed from their homes in urban areas in
South Africa and transferred to the "bantustans" (or homelands), where
they fall under the jurisdiction of "independent" governments. The
problem presented is not only extremely intricate and beyond the scope of
this paper, but is not one that can be resolved under international law.
The ravages of war and acts of recrimination have displaced a considerable number of people within their own countries. Thus, estimates place the number of persons displaced by the war in Angola at 500,000, while in Mozambique, the number is believed to be between 700,000 and 1,800,000. The circumstances of the displaced people of Uganda's "Luwero Triangle" is still an immense problem, despite the cessation of hostilities in the area.

The closest clause in Article 1 that could cover the situation of such persons is "...events seriously disturbing public order...." Whether or not the member states had these categories of persons in mind when the Convention was drafted is debatable. Purely as a matter of interpretation, such language would not encompass the victims of natural disasters; neither would it cover the instance of an individual who has not been forced to "...seek refuge in another place outside his country of origin..." Quite clearly, refugee law in general and the 1969 Convention in particular were not designed with these kinds of crises in mind. These are Africa's de facto refugees--persons who have in substance been forced to flee and necessarily require the same assistance as refugees, but who are not afforded the legal protection refugees receive.

While the plight of those who have been afflicted by these problems has not been ignored by the international community--indeed, the High Commissioner for Refugees is selectively empowered to deal with them--it is still necessary to give them due recognition under the law, and to extend to them the full benefits afforded by its protection. The necessity for such construction of this problem is particularly acute in the arena of refugee law, because apart from the very general human rights instruments, no other facet of the discipline addresses itself to the question.
Refugees in Orbit  Mention must be made of the phenomenon known as "refugees in orbit," and of its significant ramifications for the refugee crisis in Africa. There are several forms in which this phenomenon might exist, the most prevalent being an instance where a refugee is denied asylum in the country to which she first flees. Because of the principle of first asylum, she is subsequently denied refuge in the next country that she turns to for assistance. In this way she finds herself between a rock and a hard place--unable to return home for fear of her life, and unable to secure a permanent place of asylum, for herself. Furthermore, she may expelled as an "illegal alien" because of the circumstances of her entry into the second country.

Unfortunately, refugee law in Africa offers no respite for persons affected in this way, and the number so affected (although by no means as large as in Europe), is growing at an alarming rate--reflecting increasing anarchy in the refugee crisis. Unless legal and institutional mechanisms are implemented to address this problem in a timely fashion, it shall assume particularly unpleasant dimensions.

Economic Migrants and Illegal Aliens  Refugee law does not give cognizance to persons who leave their countries of origin solely on the grounds that the vagaries of economic existence there are unacceptable. In addition, it only affords limited protection to asylum seekers who have entered a country illegally. While the logic underlying these positions might appear sound, they do not adequately take into account the fact that economic discrimination can and has been employed to effect persecution against individuals and groups in a country. Furthermore, the fact that a person is in a country illegally does not necessarily imply that she is not a refugee--indeed, the contrary is often the case.
These problems--by no means anywhere near resolution--are duplicated in refugee situations the world over, the present situation of Latin Americans in the United States, a vivid example. While the Banjul Charter attempts to address this problem, measures are needed to ensure that the fine line between economic migrants, illegal aliens, and refugees is not arbitrarily crossed.

INSTITUTIONAL MECHANISMS

As developments within the OAU legal framework relating to refugees were taking place, efforts were underway to establish institutional machinery to address the problem. How to create such machinery was one of the main questions addressed by the 1967 Conference on the Legal, Economic, and Social Aspects of the Refugee Crisis in Africa. Noting that while the most ideal solution and ultimate objective of regional refugee policy should be the voluntary repatriation of refugees, where such a solution was unattainable, a mechanism for their resettlement should be instituted. Such an alternative solution was deemed essential because only eight percent of the refugee population had been voluntarily repatriated by the time of the conference, and their conditions in camps and elsewhere were worsening.

The Bureau for Refugees The main recommendation on institutional mechanisms that emerged from the 1967 conference was that educational schemes for refugees and disciplines and courses relevant to the African situation be established. Consequently, on March 1, 1968, the Bureau for the Placement and Education of Refugees (BPEAR) was established with the mandate to

(i) Seek educational and economic opportunities for refugees in host countries;
(ii) Act as an information conduit to member states and the international community on the patterns, causes and consequences of refugee movements in Africa;
(iii) Equip refugees with the resources that would assist them in coping with their predicament and upon the eventual voluntary repatriation to their countries of origin;

(iv) Mediate between host countries and refugees with respect to alleged violations of national legislation committed by refugees.

(v) Operate in association with the United Nations High Commissioner for Refugees (UNHCR), voluntary agencies, and member states to ensure the realization of the objectives in the 1969 OAU Convention.

The BPEAR was established primarily as a "clearing house" for implementing resettlement operations in countries that host refugees. It was primarily directed towards assisting qualified refugees through a labor pool to be drawn upon by African governments seeking to fill vacancies in their administrative machineries. Although an independent organization, its operations were to be coordinated and facilitated through the cooperation of the OAU, the UNHCR, the Economic Commission for Africa (ECA), the International Labour Organization (ILO), UNESCO (UN Educational, Scientific, and Cultural Organization), and a number of nongovernmental organizations, each of which was uniquely qualified to assist the Bureau in attaining its objectives. Each member state, in recognition of the principle of African and humanitarian solidarity, was called upon to contribute to the solution of refugee resettlement and placement by accepting a fixed quota of refugees.

Education and training were earmarked as the BPEAR's highest priority, in line with the suggested reappraisal and reorientation of existing programs. Recommendations to this end were considered a necessary solution to the problem of "elite" refugees, as well as for those who sought better education and training.

Through the maintenance of contacts with member states, institutions, societies, and a network of national correspondents, the Bureau set out to establish a system through which individual countries could absorb qualified refugees. The Bureau also operated as a placement
office through which refugees interested in obtaining higher education could be placed, although the extent of this operation was limited by the availability of scholarship funds from the various sources that provided assistance to the OAU, in general, and to the Bureau, in particular.

What impact the activities of the BPEAR (since renamed the OAU Bureau for Refugees, or OAU/BR) have had upon alleviating the plight of refugees in Africa is unclear. The language of the mandate makes it quite clear that OAU/BR operations would necessarily be limited to a very small percentage of the refugee population—namely those categorized as "urban" refugees. Thus, most of the refugee population, and indeed those who are most in need of assistance, fell outside the scope of the Bureau's operations, constituting a significant loophole in the institutional apparatus established by the OAU. The protection and resettlement of rural refugees were apparently left to the operations of the NGOs, the UNHCR, and governmental agencies and programs, where in existence. Its functioning as a clearing house for resettlement is clearly limited by its mandate.

Obviously, the Bureau has played an important role as a forum for disseminating information concerning refugees. It has held and participated in valuable conferences in this regard, and through the system of national correspondents it is able to remain in touch with the formulation of policy in individual states. However, its operations are an inadequate reflection of the magnitude of the problem that the refugee situation presently entails.
MEMBER STATES AND THE REFUGEE QUESTION

IMPLEMENTING OAU POLICY

The dichotomy between policy and practice is illustrated most vividly in the domestic legal regimes and in the actual manner in which they are enforced by individual states. Any international convention establishes the framework of principles to be adhered to and gives the general direction that signatories should progress towards in implementing those principles. It may furthermore enshrine certain explicit stipulations on what shall be done and some concrete prohibitions on what shall not. In reality, however, it has little to say about how it is going to be put into actual practice. At the national level, the translation of policy into practice should be manifested in three general directions:

- through methods and proceedings that ensure the actual enforcement of the rules;
- the appointment of officers and agencies for the administration of the rules, and,
- the dissemination of the rules to both those persons charged with their implementation and those most directly affected by them.

With the refugee question, as indeed with any other branch of international law, the major issue at hand is this: how do states that have not passed any national legislation adhere to an international convention, and how do they know that they are doing so? The same question can be asked of those states that have done so. For the refugee, this question is of even greater pertinence. Denied any knowledge of her duties and obligations, and more importantly, of her rights under the law, she is in a precarious situation, to say the least.

A cursory inspection of the composition of member states that have ratified the 1969 OAU Convention (see map) shows that a number of those
ACCEDEES/RATIFIERS OF INTERNATIONAL LEGAL REFUGEE INSTRUMENTS

INTERNATIONAL LEGAL REFUGEE INSTRUMENTS (KEY)

* 1951 United Nations Refugee Convention
+ 1967 United Nations Protocol
1 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugees in Africa

NUMBER OF ACCEDEES/RATIFIERS

* 42
+ 41
1 33 (up to July 1986)
that are most significantly affected by the refugee crisis, such as Djibouti and Uganda, have not ratified it. Furthermore, of those that have done so, few have actually incorporated the provisions of the Convention into their indigenous legal regimes. No clear pattern emerges in the attitude of those states that have ratified the Convention in comparison with those that have not done so.

The attitude of most states is positive. Burundi has a refugee population of more than 250,000 and an exemplary record in its attempt to grapple with the problems facing such an impoverished country. Yet, for many years before it ratified the OAU Convention in December 1975, it maintained a comprehensive list of the rights of refugees modeled on the provisions of the 1951 UN Convention. Thus, although none of the provisions of international law had actually been enshrined in Burundi's domestic legal system, official guidelines existed to ensure the conformity of practice with principle. Tanzania has not only ratified the 1969 OAU Convention and the Banjul Charter of 1981, but it has traditionally been one of the most hospitable to refugees from all over the continent. Late in 1985, for example, it began the formal settlement of 35,000 refugees from Burundi at Mishamo, in the west of the country, on an agricultural project of nearly 1,000 square miles in size. Unfortunately, in an act that sent severe tremors through the refugee population in the country in 1983, the government of Tanzania returned refugees from Kenya, in spite of a court ruling that they would probably face persecution for "offenses of a political nature," if sent home. Examples of instances where political considerations override humanitarian ones are, sadly, not infrequent.
Comparatively, the states of Francophone Africa have refugee laws that are significantly more advanced than those of their English-speaking counterparts. Likewise, their attitude towards international law is that of generally incorporating provisions into their national legislation without modification or reservation.

The dichotomy between policy and practice referred to manifests itself at two levels. Firstly, it is in the paucity of national laws that incorporate the principles of the OAU Convention. Secondly, and of greater significance, it is the existence of laws and regulations in other areas that have the greatest impact upon the manner in which host states treat refugees. The problem of nonrefoulement and the often fine line between illegal immigrants and refugees, freedom fighters and persecuted persons, all present considerable obstacles to the enforcement of the Convention. Two recent examples serve as illustration. In 1986, Algeria expelled thousands of citizens of Mali on the grounds that they were in fact illegal aliens. However, it is difficult to assert that they were indeed so, and that among their numbers, there were no individuals who had in fact fled Mali in genuine fear of persecution. Without such definitive evidence, such an act would constitute a violation of the Convention to which Algeria is signatory. The government of the land-locked Southern African state of Lesotho has progressively been forced to adopt a more restrictive attitude towards refugees—particularly because the bellicose neighbor which surrounds it believes that those given refuge in such countries are nothing but insurgents.

There is no doubt that the existence of institutional structures specifically delineating the rights of refugees would serve as a buffer against the adverse effects of these laws, and, more importantly,
against arbitrary actions by governments. However, regardless of the nature or content of legal and institutional mechanisms that might be in force, ultimately it is within the context of the social, political, and economic realities of the African continent that the policies and the practices of the states that comprise the OAU must be appreciated. The following is an assessment of the policies of a number of African states and an overview and analysis of the factors that dictate their responses to the refugee situation in their countries.

**SOUTHERN AFRICA**

A number of peculiar conditions significantly affect the refugee situation in this region of the continent. Several countries in the area have only recently attained independence and are still grappling with the quest for national identity. Of the ten countries that can loosely be referred to as "Southern Africa," two (Angola and Mozambique) gained independence in the mid-seventies, one (Zimbabwe) has only been free for six years, and two others (Namibia and South Africa) remain under the yoke of a racist minority regime. Also, the existence of the apartheid government has necessitated the evolution of policies that express the OAU objective of eradicating the vestiges of colonialism and apartheid from the continent, while fully cognizant that they are directed against a belligerent and racist government. The responses of governments in the region to the refugee crisis have thus been determined by the balance between their humanitarian concerns and the dictates of significant political and economic forces.

Of the eight independent countries in the region, six have acceded to the 1951 UN Convention and the 1967 Protocol, two (Zambia and Angola) have ratified the 1969 OAU Convention, and one (Malawi) is a party to
none--exemplifying that country's isolationist policies which set it apart from the general current of change in Africa.

**BOTSWANA** Although Botswana has acceded to both the 1951 UN Convention and the 1967 Protocol, she has not ratified the OAU Convention. As a host country to refugees in the region, Botswana has traditionally maintained a policy of hospitality that predates the attainment of independence in 1966. Refugees from South Africa and Namibia, Angola, Mozambique, and Zimbabwe have continuously sought refuge in the country, not only because of geographic proximity, but also because of its having attained liberation much earlier than any of the refugee-producing countries in the region. Faced with the oppressive policies of white minority regimes that heightened with the movement towards liberation, the post-independence policy of the government has been likewise adjusted. Botswana has thus sought to minimize the political implications of its role as a host country and as a conduit for refugees proceeding on to Zambia and Tanzania. This is particularly because, with the activities of national liberation movements in the area, the then-Rhodesia minority government made no distinction between "terrorists" and refugees, as is still the case with the present regime in Pretoria.

Domestic policy in the country is determined by the Refugees (Recognition and Control) Act of 1967, and the amendment of 1970. Refugee applicants appear before any one of the three "refugee advisory committees" established under the Act to make the initial determination of refugee status. Each case is then submitted to the minister of state for final determination. Cases of refugees who have been formally recognized are subject to bi-annual reviews of their general welfare and status. No right of appeal exists for rejected applicants, although individual cases
may be reconsidered upon the request of the applicant. The branch office of the UNHCR may recommend the re-opening of a case, attend the meetings of the Gaberone Committee, and observe the proceedings of the other two (either at Francistown or Lobatse), as appropriate. Recognized refugees are issued residence permits on instructions of the minister of public services.

In practice, several factors militate against the operation of the legal provisions in existence. Generally, this is fostered by the government's response to a rising xenophobia among its population. More importantly, it is the result of the crackdown by South Africa on states that border it, and of the drought that in recent years has seriously affected crop production and livestock. This has consequently led to instances of the arbitrary return of refugees to their countries of origin, either for leaving the confines of their settlement at Dukwe in the north of the country, for serious and petty crimes, or for "unspecified reasons"—normally pressure from neighbors such as Zimbabwe, who believe that dissident elements are being harbored in the camps. At the level of legal provisions, not only is the domestic regime clearly inadequate to protect refugees, but other areas of the law operate against their livelihood and protection. Under section 7 of the Immigration Act, the authorities are lawfully empowered to deny the entry of any person into the country. While this distinction is ostensibly directed against illegal immigrants, the line between such persons and refugees is a fine one, and indeed the oxymoron used by the government—"illegal immigrant refugee"—is testimony to this fact.

At the level of institutional mechanisms, the refugee advisory committees have at times been known to be inoperative—the determination of eligibility then being vested in the Special Branch Department of the police,
without the involvement of the UNHCR. This has on occasion meant that the
government has acted against refugees without the knowledge of the UNHCR--
a situation that could be obviated if consultations had been maintained.
No steps appear in the offing to amend the law in order to bring it into
closer harmony with the OAU Convention. Nevertheless, despite such in-
stances, the government's attitude towards refugees has on the whole been
positive, and there is no reason to believe that it shall change signifi-
cantly, despite the omnipresent threat that this entails.

LESOTHO  Completely surrounded by South Africa, Lesotho is the only
landlocked nation on the continent bordered on all fronts by a single
country. In many respects, this has been a major determinant of its
responses to the refugee question. Virtually all of Lesotho's refugees
emanate from South Africa, and as the struggle against apartheid inten-
sifies, they will doubtless increase. Lesotho has maintained a progres-
sive refugee policy, and has continuously expressed its intent to abide
by the international instruments to which she is signatory, although these
exclude the OAU Convention. In the face of increased pressure either to
return refugees to South Africa, or to remove them from the country,
Lesotho was forced to move a number of them to other countries of asylum.
The economic blockade early in 1986 and the subsequent coup d'etat were
undoubtedly factors in the evolution of this situation.

Refugee matters in Lesotho are governed by the Aliens (Control) Act
of 1966 and the fourth schedule to the Act. Under it, the inter-minister-
ial National Refugee Commission--comprised of representatives from the
ministries of foreign affairs and the interior, and of the immigration and
aliens department of the police--regulates and screens asylum requests.
The minister of the interior, who chairs the NRC, makes the final deter-
mination on the granting of refugee status upon advice given by the commission. Final appeal is available to the high court that disposes of the application. There is no specific role for the UNHCR representative, although he has helped to secure alternative countries of asylum for refugees under the threat of return to South Africa, or otherwise endangered by the spectre of its reprisal. There are no identification cards issued to refugees, although Convention travel documents are issued to recognized refugees for travel abroad.

The new government in Lesotho, while not overtly manifesting any significant change in attitude towards refugees, nevertheless has exhibited a movement towards policies that are more accommodating to the South African government. This attitude is displayed by the government's declaration that Lesotho's acceptance of refugees is in accordance with a long-standing policy that "...her territory shall not be used as a springboard for attacks on her neighbors." Whether or not such neighbors include South Africa cannot be the subject of much debate, given that it stands alone in this regard. Other declarations in a similar vein suggest that the government shall proceed cautiously in receiving refugees from South Africa.

Most recently, reports of abductions, murders, and widespread intimidation of ANC refugees in the country, believed to be the work of South African security agents (with the tacit assistance of the Lesotho police), reflect on the current precarious situation. Although it is too early to predict, one can safely say that increased pressure on the Pretoria regime will result in significant adverse ramifications for refugees in Lesotho, and a tightening of the hitherto open government policy. It is most likely, therefore, that Lesotho will become even more of a transit country than in the past.
EASTERN AFRICA

The countries of Eastern Africa are host to the largest percentage of refugees on the continent. The Horn of Africa--scene of internecine struggles, inter-state wars, and the most devastating droughts ever to afflict mankind--has been and continues to be the highest refugee-producing area on the continent. For a substantial part of its post-colonial history, Uganda has seen the massive exodus of thousands of its nationals into the states that neighbor it on all borders and beyond. The responses of governments in the region to the crisis have varied from open sympathy with the plight of refugees (for example, Tanzania), to resignation to the fact that refugees will continue to flood their borders regardless of any attempts to stem the influx (as is the attitude of the Somali government).

While the number of refugees from either Kenya or Tanzania is small, and still only confined to the elite of those countries, some of the responses of neighboring governments to their plight have been particularly callous. For example, despite Kenya's usually generous policy toward Ugandan refugees over the years, in 1984 a number of dissidents were abducted from the country, either with the active involvement of the Kenyan authorities, or at the very least with their collusion--a serious breach of the rule prohibiting refoulement. Only in July 1986, the Sudanese government made what appears to be an abrupt about face in policy, announcing that the country could no longer afford to maintain an open door to refugees. This was done despite the fact that the Sudan's "Regulation of Asylum Act" is one of the most developed legal regimes in Africa.

All seven of the countries in the region have acceded to the 1951 UN
Convention and the 1967 Protocol. Four (Sudan, Ethiopia, Tanzania, and Somalia) have ratified the 1969 OAU Convention.

SOMALIA

Official figures recently released by the Somali government place the number of refugees at one in every five people in the country. Other estimates are considerably more conservative, but still recognize that the number is substantial. Somalia has played host to refugees beginning in the mid-1950s, with the exodus of people from Ethiopia after the government's attempt to establish an administration in the Ogaden region of the country. A more serious crisis was engendered with the onslaught of the Sudano-Sahelian drought of the 1970s and the resulting influx of refugees searching for respite from the famine—an experience that was repeated when the "Long-Tail" drought struck the region between 1973 and 1975. Intermittent wars and conflicts have likewise led to massive influxes of people at various times in the past decade.

Throughout the period of these crises, the legal regime in Somalia regarding refugee matters has changed. Somalia has ratified the OAU Convention, and she has acceded to the UN refugee instruments. In July 1979, a presidential decree established a Committee for Refugee Acceptance. The committee's task was to process applications for refugee status. Final appeal could be made to the Justice Committee in the office of the president, in particular from decisions based on Articles 31 (on the imposition of penalties for illegal entry), 32 (on expulsion), and 33 (on refoulement) of the 1951 Convention. In the words of the government, the committee was "...quickly overtaken by events." In May 1981, the government created the National Refugee Commission, charged with the welfare of refugees, which established 37 refugee camps. The NRC was sub-
sequently reconstituted under an Extraordinary Commissioner with ministerial rank, and is the present machinery in force in Somalia that governs refugee matters.

Somalia has had several running battles with donor countries, voluntary agencies, international organizations, and the government of Ethiopia over the manner in which Somalia's refugee crisis has been handled. All sides have leveled accusations, although for quite a time, government officials made it extremely difficult for relief assistance to be channeled to those in need of it. Furthermore, Somalia has always insisted that voluntary repatriation is the most durable solution to the refugee crisis in the region, and has at times pursued this objective with a single-mindedness that has resulted in severe hardships for the refugees, forcibly returned to a hostile environment. By the time common sense prevailed over obduracy, the problem had evolved into an emergency—the effects of which still pervade the refugee community.

Not only have the attitude and the policies of the Somali government resulted in a marked reduction in assistance to the country; they have also meant that, for the refugees, conditions in the camps have been considerably worsened. Somalia's legal regime has remained undeveloped—partly because of the very large numbers of people who are being handled in the camps, and who continue to swamp Somalia's borders regardless of the situation in the country—but also because of the government's failure to establish institutional mechanisms to curtail effectively the worst effects of the crisis. Despite recent attempts, much remains to be done about legislative reform, policy formulation, and institutional restructuring, as well as in the attitude of the government towards refugees and its assessment of the crisis.
Tanzania  Few countries in Africa have addressed the refugee question with as much vigor and dedication as the government of Tanzania. For a long time the only country in Africa wholeheartedly prepared to accept South African refugees, she has consistently maintained an open door to those fleeing from persecution in their countries. Former President Julius Nyerere was often heard to reprimand other African leaders for their failure to respond as magnanimously as they could to the refugee crisis, and for their reluctance to ratify the 1969 OAU Convention, despite its progressive content and in view of the extent of the crisis on the continent.

In Tanzania, refugee matters are mainly governed by the Refugee (Control) Act of 1965. Under it, although there is no definition of the word "refugee," the minister responsible for these matters may issue a declaration that certifies as refugees a designated class of persons under the Act. Thus, although vague in its ambit and a matter for ministerial discretion, the Act at least provides for the recognition of refugee status.

Despite predating the OAU Convention, the provisions of the Act clearly display striking foresight and innovation. Supplemented by Refugee Declaration Orders, the Act vests in the minister responsible for refugee affairs the discretionary power to declare a particular class of aliens in the country ("...persons ordinarily resident outside Tanzania...") as refugees under the Act. Such orders have been passed for Namibians (in 1969), Ugandans (1971), and for people fleeing Burundi (1973). By basing such a determination on events relating to period and geographical area, the Act obviates the need to determine refugee status when influxes involve several thousands. Individual cases are determined through a separate procedure that imposes upon an applicant seeking refugee status the onus of showing that her particular circumstances warrant it.
The Act also contains specific provisions covering nonrefoulement. Discretionary power is vested in the minister or any competent authority the minister appoints, or a court that has convicted a refugee. That authority includes the power to refuse to grant an applicant a permit to remain in Tanzania, and to order her return or deportation. Such power is subject to the provisions of the Act that prohibit the return of refugees in specified instances, although no reasons need be given for the decision reached. Thus asylum, as opposed to the Banjul Charter, is merely a privilege and not a right. In practice, however, the government and the UNHCR usually seek alternative countries of asylum for persons refused it in Tanzania.

Refugees in Tanzania have been accorded significantly cordial treatment, given the country's economic constraints in recent years. However, it appears that their interests can and have been sacrificed in the interests of closer political cordiality with its neighbors. Thus, apart from the incident involving the refugees from Kenya, Tanzanian officials gave their implicit approval to the debacle involving person of Rwandese ethnic origin in Uganda in 1982 and 1983—an exercise that would have involved serious constraints both for those who were in fact and in law nationals of Uganda, and for those who had been given refuge there. Only the timely intervention of the UNHCR saved a bad situation from deteriorating.

**WESTERN AND CENTRAL AFRICA**

Together, the western and the central regions of the continent are of particular importance to Africa's refugee crisis, although the latter is significantly more prominent than the former. Because of the links between the two (geographical and otherwise), they are best treated together. While this region has had its own share of war and conflict, it is
the drought in the Sahel that has had the greatest impact. The drought crisis in Chad has produced the greatest percentage of refugees, and several of the countries in the area have their hands full trying to cope with the problems it created. With nearly 400,000 refugees from several of its neighbors, Zaire has the largest percentage of dispossessed persons. In comparison, Cameroon (with the second largest) has a refugee population of close to 50,000. Of the twenty-two countries in the area, twenty have acceded to the 1951 UN Convention and to the 1967 Protocol, and seventeen have ratified the OAU Convention. The domestic regimes of these countries are, in general, more advanced than those elsewhere on the continent.

**GABON**  A ratifier of the 1969 OAU Convention, Gabon has a significantly well-developed domestic legal regime governing refugee matters. Under a law passed in 1976, the *Delegation Generale aux Refugies* (DGR) was created to oversee questions relating to refugees in the country. The responsibilities of the DGR appear to be quite significant, and it seems to have a relatively free hand in implementing them, as well as the authority to do so. Among these are the following:

- the legal and administrative protection of refugees;
- the implementation of international and regional agreements that have been ratified by Gabon;
- the management of the collection and distribution of financial assistance to refugees;
- oversight of refugee settlement areas and of monitoring problems caused by their presence in the country;
- the issue of necessary documents to enable refugees to enjoy the full benefits that they are entitled to under the law;
- the power of revocation (upon advice of the Supreme Court) of refugee status of any person who no longer fulfills the condition laid down in the international instruments;
- cooperation with the UNHCR and facilitation of the operation of NGOs and similar agencies involved in the country.

The Gabon legislation is important because it represents a bold attempt to address the refugee problem by a country not yet significantly
affected by it. Gabon establishes clear guidelines for officials involved with refugees and provides the institutional framework for recognizing and enforcing their rights. There have been no reports from Gabon concerning serious violations of the rights of refugees, as has been the case with some member states in other areas. Unfortunately, new rumblings about "unregistered aliens," concerns about immigration, and the loss of employment opportunities for nationals do not augur favorably for Gabon's refugee population, small as it is. It is still too early to determine how these developments will affect official practice regarding refugees.

**SENEGAL** Although Senegal has a comparatively small refugee population, it has a significantly well developed domestic legal regime governing refugee matters. It has acceded to both the 1951 UN Convention and the 1967 Protocol, and has also ratified the 1969 OAU Convention. The main legislation governing refugee matters is the 1968 law on the status of refugees, which has been supplemented by decrees passed in 1972, 1975, 1976, and 1978—all made with UNHCR's active support and consultation. With the last of these, provision was made for establishing the National Commission for Refugees under the general secretariat of the president and chaired by a senior civil servant. Senegalese law adheres to the international definition of the term "refugee," thereby delimiting the mechanics of determining refugee status.

Refugees in Senegal are mainly from the neighboring states of Guinea Bissau and Guinea. Efforts have been underway for several years to establish refugees in urban areas where they can find a means of subsistence. A rural refugee center at Mbour has achieved self-reliance in agricultural production, and several urban centers provide basic amenities. Under the law, refugees have the same rights as nationals concerning education, ac-
cess to scholarships, the right to work, and other social rights. No restrictions exist on the refugee's right to travel and in providing the necessary travel documentation.

NORTHERN AFRICA

None of the countries of Northern Africa has a significant refugee population, with the exception of Algeria, which has nearly 170,000 refugees. Morocco, Tunisia, Egypt, and Algeria have all acceded to the 1951 UN Convention and the 1967 Protocol, and have ratified the OAU Convention. Libya has also ratified the OAU Convention, as has Morocco, even though it (Morocco) is no longer a member of the OAU.

Algeria, Morocco, and Tunisia all have domestic legislation based on the 1951 UN Convention. Under them, the main refugee-determination bodies (the Bureau de Pour La Protection Des Refugies Apatrides in Algeria, and the Bureau de Refugies et Apartrides in Morocco) consider applications for refugee status. Appeals are permissible within thirty days of the date of the decision to the Commission De Recours. The UNHCR is allowed to assist applicants in presenting their cases, and, in practice, it may request reconsideration of an application without necessitating recourse to the appeals commission.

In practice, Algeria and Egypt have on the whole been hospitable countries for refuge. The former has absorbed the majority of the refugees fleeing intermittent conflict in the Western Sahara, as well as some of the victims of the drought that has afflicted the Sahel. In carrying out the massive return of thousands of Malian citizens, in early 1986, on the grounds that they were illegal immigrants, Algeria acted in denigration from earlier practice. Also, it could well have been violating its legislation which incorporates the provisions of international refugee law
governing _refoulement_. Perhaps because of the relatively small numbers of refugees in the region and relatively greater economic prosperity, the states of Northern Africa have been able to deal with the problem with greater success, and less external assistance than other areas of the continent. Of course, this is by no means the reflection of a highly developed domestic legal regime.

**TOWARD NEW LEGAL AND INSTITUTIONAL HORIZONS**

Although the preceding survey does not encompass all the domestic legal regimes in Africa that incorporate aspects of international refugee law, (for example, those of countries particularly significant to the question under investigation--Zaire, Sudan, and Ethiopia), it presents an overview of legal developments that have taken place in individual OAU member states in response to the refugee crisis on the African continent. Obviously, several loopholes still manifest themselves even in the most developed of systems, necessitating further reform--at both the regional and the domestic levels. Thus, the question that must be confronted is this: what measures are necessary to make refugee law more pertinent to the needs, the interests, and the rights of refugees in Africa? Some observations on legal and institutional reforms at the regional and the domestic levels follow.

(1) **THE OAU CONVENTION**  Obviously, the prerequisite measure for each OAU member state is the wholesale incorporation of the provisions of the 1969 OAU Convention into their domestic legal regimes. At a minimum, the standards of the Convention should form the parameters to guide policy and practice affecting refugees in individual states. The OAU should
thus not confine itself to advocating for ratification (given the fact that legally, the Convention is binding on all member states), but it must proceed to the active encouragement of conscription of the instrument's provisions into indigenous legal systems. Furthermore, a mechanism must be established within the OAU to monitor adherence to the principles. The logical vehicle for such monitoring is the Human Rights Commission established under the Banjul Charter.

The commission should be utilized as a vehicle to oversee and enforce the protection of the rights of refugees from violation, particularly by the governments of host states. Furthermore, it should act as a forum in which national legislation that significantly contrasts with the letter and the spirit of the OAU refugee Convention can be effectively challenged.

(2) THE REFUGEE DEFINITION While incorporation of the OAU Convention's definition should be a minimum objective, attention should also be paid to the plight of Africa's de facto refugees, who are not covered by it. Such people have not only been uprooted from their traditional homes; they live in genuine fear of persecution by their own governments. Although the political volatility of such a role is not insignificant, the OAU should nevertheless be permitted to monitor progress towards the resolving such problems as and when they arise in individual member states. Legislative reform at the regional level is a convoluted and intricate process. Little would therefore be achieved by seeking to amend Article I of the Convention. Instead, the OAU needs to promulgate concrete guidelines for action to cover instances where people have been displaced within their own countries and a crisis situation has thus evolved. Likewise, efforts should be made to promulgate a system to prevent an upsurge in the
number of refugees in orbit, and to secure permanent settlement for them. Member states should be actively encouraged to view the refugee definition as flexible, and to respond to each crisis and its intricacies as it evolves.

(3) DOMESTIC LEGAL REGIMES Even in those countries that have made attempts to establish indigenous legal systems to govern refugee matters, it is fairly clear that much remains to be done. Ultimately, because the practices of individual states have the greatest impact on refugees in Africa, it is upon the domestic regimes that most efforts for reform should be focused.

First, bodies established to govern refugee matters should be vested with maximum administrative autonomy and quasi-judicial power. Assessments should be based on the provisions within the refugee conventions, in consultation with the OAU/BR, UNHCR, and the relevant government ministry. An automatic right of appeal against decisions of the body should be available to the country's highest judicial authority, with the provision of legal assistance where warranted. In emergencies, individual assessment of cases should be halted, and all those affected by a specific crisis should be recognized as refugees--at least until the conditions that created the influx have been altered substantially. Such bodies can also be used to increase coordination between refugee bodies, immigration offices, and other government sectors that affect the refugees' livelihood.

(4) REORIENTING THE OAU/BR As a resettlement coordination agency, the operations of the OAU/BR are clearly limited. Many times more rural than urban refugees exist in Africa, and greater attention needs to be paid to alleviating their plight. Although ultimately dependent upon the avail-
able resources, a reorientation of the Bureau's objectives is necessary. Even without substantial financial resuscitation, much can still be done to coordinate refugee-status assessment, relief efforts, protection enforcement, voluntary repatriation, etc., by individual states. The Bureau should act as the liaison between host and home governments, refugees, and agencies active in the field, in creating satisfactory programs for all refugees, as well as overseeing their voluntary repatriation.

(5) SHIFTING THE BURDEN An obvious per-capita imbalance exists in the manner in which Africa's refugee burden is distributed. Although in certain respects this flows from the geographical location of particular refugee crises, member states not as harmed by the crisis as others need to be more responsive to the problems of those most afflicted. Countries with greater resources at their disposal and as yet small refugee populations should be encouraged to assist efforts underway in seriously affected areas. At the regional institutional level, ways must be found to ameliorate the adverse effects upon countries hosting large refugee populations.

(6) THE ROLE OF THE UNHCR Although the UNHCR has a different status in each country where it is operational, in practice it is often ignored in the decision-making process, to the detriment of refugees. Together with the OAU/BR, it has an important role in monitoring the implementation of the international refugee instruments. A coordinated appraisal of the problems at hand invariably leads to a better understanding of what solutions are needed. Knee-jerk reactions after the horse has bolted are clearly inappropriate.
IN LIEU OF A CONCLUSION

Ultimately, the implementation of the preceding recommendations is dependent upon the commitment of the various actors in the refugee question to its complete resolution. All too often, we are confident that once legal mechanisms are in place, a significant advance is thereby attained in the protection of the persons to whom it is addressed. Unfortunately, the refugees cannot share in the luxury of such confidence. In the final analysis, the law can be no better than the concrete situation in which it operates, and its efficacy shall necessarily be determined by that situation. As a prerequisite to the eventual resolution of the refugee crisis, the factors that have led to its emergence must be comprehensively dealt with.

Consequently, reforming legal mechanisms must be viewed as only one facet of this struggle—as one path to an end—rather than as an end in and of itself. And, finally, even a seemingly foolproof legal system—with all the gaps plugged—can at best only alleviate, but not resolve, the crisis that pervades the everyday existence of those on the African continent uprooted from the only place that they can call home.
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* These documents were especially used as sources for sections of this paper concerning the history of the OAU.

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