A Report on the African asylum systems

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Introduction:

Asylum in Africa is governed by a regional system defined by the 1969 (OUA) Convention largely inspired the 1951 Convention. Despite the efforts done in the regional level to unify the asylum rules, asylum systems are very varied in the sub-regional and national levels. The North African and Kenyan asylum systems illustrate well this variety and are worth being analysed after introducing the regional asylum system as defined by the OUA Convention.

Chapter 1: Analytical Overview of the 1969 (OAU) Convention

The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa[1] ('1969 Convention') is the regional legal instrument governing refugee protection in Africa. It was adopted on 10 September 1969 at the sixth ordinary session of the Organization of African Unity's ('OAU') Assembly of Heads of State and Government when it was signed by 41 heads of state or government. It entered into force on 20 June 1974 after ratification by one third of OAU member states. It has since been signed or ratified by 50 of the 53 member states of the African Union,[2] the successor organisation to the OAU. The 1969 Convention is a relatively short instrument, containing a preamble and 15 articles. Each substantive article is analysed in turn below.

I-Refugee Definition

The first article provides two refugee definitions: one replicating the 1951 Convention relating to the Status of Refugees[3] ('1951 Convention') definition and a second unique definition. The 1951 Convention defines a refugee as someone with a well founded fear of persecution on the basis of his or her race, religion, nationality, membership of a particular social group or political opinion. The 1969 Convention includes that definition[4]—minus the 1 January 1951 date limit that most states later agreed, by way of a Protocol[5], not to apply—and provides at article I(2), 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.[6]

This unique definition explicitly introduces objective criteria, based on the conditions prevailing in the country of origin, for determining refugee status, and 'requires neither the

1) Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (1969 Convention).
2) Eritrea, Sao Tome & Principe and the Saharawi Arab Democratic Republic have neither signed nor ratified the 1969 Convention. Djibouti, Madagascar, Mauritius, Namibia and Somalia have signed but not ratified the Convention.
3) Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention).
4) 1969 Convention (n 1) art I(1).
5) Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) art 1(2).
6) 1969 Convention (n 1) art I(2).

elements of deliberateness nor discrimination inherent in the 1951 Convention definition'.[7] Both definitions are employed by UNHCR in its operations in Africa.[8]

Article I also includes paragraphs on cessation[9] and exclusion.[10] Each paragraph closely follows the 1951 Convention, with three additions. The additional cessation clauses provide that the 1969 Convention shall cease to apply to any refugee who has 'committed a serious non-political crime outside his country of refuge *after* his admission to that country as a refugee'[11] or has 'seriously infringed' the 1969 Convention's purposes and objectives.[12] A further point of distinction is that the 1969 Convention does not include the clause present in the 1951 Convention mitigating against cessation in respect of a refugee who can 'invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality'.[13] The additional exclusion clause adds 'acts contrary to the purposes and principles of' the OAU as a further ground of exclusion.[14]

II- Asylum in the 1969 Convention

Article II relates to asylum. The 1951 Convention does not establish any right to asylum. The Universal Declaration of Human Rights, by contrast, enshrines the right of individuals to 'seek and enjoy' asylum,[15] but stops short of recognising any right to asylum at international law. The United Nations ('UN') Declaration on Territorial Asylum[16] is similarly circumscribed, representing the result of an abortive international effort to recognise and codify a right to asylum. The grant of asylum thus remains within the exclusive discretion of states; as they have no obligation to grant it, individuals have no right to asylum corresponding to their right to 'seek and enjoy' it.

While the 1969 Convention reflects this international consensus, it nevertheless significantly 'strengthens the institution of asylum'[17] by providing, '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'.[18] This urging of states to grant asylum is 'a further inroad into the traditional international law perspective which has tended to regard asylum as an exclusive right of the sovereign state, and certainly not a right to be enforced by an individual against a state'.[19] The Convention does not stop there; mirroring part of the preamble to the UN Declaration on Territorial Asylum, it characterises the grant of asylum as a 'peaceful and humanitarian act' that 'shall not be regarded as an

[7] Ruma Mandal, 'Protection Mechanisms Outside the 1951 Convention ("Complementary Protection")' (2005) UNHCR Legal and Protection Policy Research Series <http://www.unhcr.org/435df0aa2.pdf> accessed 8 December 2010, 13.
[8] UNHCR, 'Note on International Protection' A/AC96/830 (7 September 1994) [32].
[9] 1969 Convention (n 1) art I(4).
[10] 1969 Convention (n 1) art I(5).
[11] 1969 Convention (n 1) art I(4)(f) (emphasis added).
[12] 1969 Convention (n 1) art I(4)(g).
[13] 1951 Convention (n 3) art 1C(5).
[14] 1969 Convention (n 1) art I(5)(c).
[15] UNGA, 'Res 217A (III)' 10 December 1948 (UDHR) art 14(1).
[16] UNGA, 'Res 2312 (XXII)' 14 December 1967 .
[17] Rainer Hofmann, 'Refugee Law in the African Context' (1992) 52 Heidelberg Journal of International Law 318, 324.
[18] 1969 Convention (n 1) art II(1).

, 170.

unfriendly act by any Member State'.[20] The language encouraging states to grant asylum is, however, only recommendatory, and is expressly limited by the reference to domestic legislation. This explains why the 1969 Convention incrementally advances, but does not enshrine, a right to asylum.

While the 1969 Convention's contribution to the advancement of a right to asylum may be characterised as modest, its role regarding *non-refoulement*—a major aspect of the concept of asylum—is somewhat more significant. The general rule of *non-refoulment* provides that an individual should not be returned to a state where he or she is likely to face persecution, other ill-treatment or torture. This principle is codified in, or has been judicially read into, a number of international refugee[21] and human rights instruments.[22] Some commentators have even elevated the norm to the status of customary international law.[23] In the context of *non-refoulement* under refugee law, the norm, as articulated at article 33(1) of the 1951 Convention, prohibits states from returning a refugee to territory where there is a risk that his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The second prong of article 33, however, permits a national security exception.[24]

The 1969 Convention's *non-refoulement* provision closely follows article 3(1) of the UN Declaration on Territorial Asylum. It provides,

[n]o 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.[25]

This is broader than the 1951 Convention's *non-refoulement* provision in four important respects, however in most cases the 1969 Convention does not expand *non-refoulement* by as much as is often posited.

First, the 1969 Convention does not include a national security exception like the one found in its universal counterpart. In this respect the 1969 Convention indeed expands *non-refoulement*, however it does not render it absolute, as many scholars have suggested.[26] Pursuant to articles I(4)(f) and (g), the application of the 1969 Convention, and hence protection from *refoulement*, ceases if the individual concerned commits a serious non-political crime outside the country of refuge after admission as a refugee or seriously infringes the Convention's purposes and objectives. This, according to D'Sa, implies that the 1969 Convention, like the 1951 Convention, allows expulsion in limited circumstances, 'although

[20] 1969 Convention (n 1) art II(2).
[21] See, for example, 1951 Convention (n 3) art 33; 1969 Convention (n 1) art II(3).
[22] See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.
23 See, for example, Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 140–163; contra: James Hathaway, 'Leveraging Asylum' (2009) 45 Texas International Law Journal 503.
[24] 1951 Convention (n 3) art 33(2).
[25] 1969 Convention (n 1) art II(3).
[26] See, for example, Georges Abi-Saab, 'The Admission and Expulsion of Refugees with Special Reference to Africa' (2000) 8 African Yearbook of International Law 71, 90; Mandal (n 7) 15.

the OAU appears to deal with the latter somewhat indirectly'.[27]

Second, the 1969 Convention's *non-refoulement* provision applies at frontiers, while the 1951 Convention makes no such explicit provision, nor was such a scope of application likely intended at the time of drafting. This has led commentators to view *non-refoulement* under the 1969 Convention as broader than under the 1951 Convention.[28] State practice since 1951 has, however, caught the universal refugee regime up to the standard set by the 1969 Convention. According to Goodwin-Gill and McAdam, '[b]y and large, States in their practice and in their recorded views, have recognized that *non-refoulement* applies to the moment at which asylum seekers present themselves for entry, either within a State or at its border'.[29] At present, therefore, the 1969 Convention's conception of *non-refoulement* is no broader than that of the 1951 Convention as far as applicability at frontiers is concerned.

Third, van Hövell tot Westerflier notes that under the 1969 Convention, *non-refoulement* applies to 'persons', whereas under the 1951 Convention it applies only to 'refugees'.[30] However, even under the 1951 Convention, *non-refoulement* applies equally to asylum seekers, 'at least during an initial period and in appropriate circumstances, for otherwise there would be no effective protection'.[31] Outside such initial period or to the extent that such appropriate circumstances do not prevail, the 1969 Convention may indeed protect a broader class of persons from *refoulement* than does its universal counterpart, but positing that this is the case in a general sense misunderstands the applicability of *non-refoulement* under the 1951 Convention.

The fourth way in which *non-refoulement* is at least textually broader under the 1969 Convention stems from the range of harm *non-refoulement* protects against. Article 33(1) of the 1951 Convention protects refugees from *refoulement* to territories where their 'life or freedom' would be threatened. Article II(3) of the 1969 Convention, by contrast, protects refugees from return to territories where their 'life, physical integrity or liberty' would be threatened. Assuming that freedom and liberty are analogous, the 1969 Convention explicitly protects persons from one additional type of harm: threats to physical integrity. In practice, however, protection from threats to physical integrity are likely implicitly included in protection from threats to life.

Article II also articulates a very early notion of responsibility sharing, providing,

[w]here 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.[32]

Such 'appropriate measures' include regional resettlement, financial support and political

27) Rose D'Sa, 'The African Refugee Problem, Relevant International Conventions and Recent Activities of the Organization of African Unity' (1984) 31 Netherlands International Law Review 378, 388.
[28] See, for example, Abi-Saab (n 26) 89; Nierum S Okogbule, 'The Legal Dimensions of the Refugee Problem in Africa' (2004) 10 East African Journal of Peace and Human Rights 176, 184; UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 57.
[29] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 208.
[30] WJEM van Hövell tot Westerflier, 'Africa and Refugees: the OAU Refugee Convention in Theory and Practice' (1989) 7 Netherlands Quarterly of Human Rights 172, 176.
[31] Goodwin-Gill and McAdam (n 29) 232.
[32] 1969 Convention (n 1) art II(4).

responsibility sharing. Each possible method of responsibility sharing has, however, has been constrained in practice by the limited resources of African states.

Temporary protection is also addressed by article II. It describes a variety of practices. Indeed, Fitzpatrick describes it as 'a magic gift, assuming the desired form of its enthusiasts' policy objectives'.[33] Her description is reflected in the dual meaning attributed to the notion of temporary protection articulated in the 1969 Convention. The concept finds expression at article II(5), which provides, '[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'. This was interpreted by the Centre for Refugee Studies of York University as implying that the nature of the protection granted under the 1969 Convention was of limited duration:

The debate about temporary *versus* permanent refugee protection has no real currency in the South, where protection has almost always been assumed to be temporary, even if it lasted for a long time. Protection has usually been provided by neighbouring countries with the clear understanding that the refugees would eventually return home. In fact, in Africa, temporary protection is not only common practice, it is given prominence in the Organisation of African Unity's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 2(5).[34]

The version of temporary protection actually posited by the 1969 Convention does not, however, imply limited protection. Rutinwa explains that article II(5) 'applies to persons who have been recognised as refugees but for one reason or another have not been granted the right of residence for any duration at all. It is not intended to determine the duration of residence for all refugees who have been recognised and granted asylum'.[35] Furthermore, 'where a person is resettled from one African country to another on account of the first country not being able to continue to provide him or her asylum, the function of resettlement in this case is not to terminate but to continue the refugee status of that person but in a different country'.[36] Put this way, it becomes clear that the 1969 Convention's notion of temporary protection is more akin to responsibility sharing than it is to later versions of temporary protection designed to limit states' obligations towards refugees. Under the 1969 Convention, it is the sojourn in the first country of asylum, not the protection, which is temporary.[37]

While the notion of temporary protection articulated by the 1969 Convention is a humanitarian one, it seems premised on an idea that is fundamentally less so. Article II(5) exists to remedy a situation where a refugee has received asylum but no corresponding right of residence. That a refugee could be recognised as such but could also be lawfully deprived of a right of residence must be queried, as a state's realisation of its obligations under the 1951 Convention, which applies co-extensively with the 1969 Convention, clearly depends on the refugee's presence in the territory of the state of asylum. Indeed, article II(1), in urging states to grant asylum, conceives of such asylum in terms of reception and securing the

[33] Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 American Journal of International Law 279, 280.
[34] The Refugee Research Unit, Centre for Refugee Studies, York University in Bonaventure Rutinwa, 'Prima Facie Status and Refugee Protection' (2002) UNHCR New Issues in Refugee Research Working Paper No 69 <http://www.unhcr.org/3db9636c4.pdf> accessed 8 December 2010, 16.
[35] Rutinwa (n 34) 16.
[36] ibid.
[37] ibid.

'settlement' of refugees.

Finally, article II(6) provides that for reasons of security, host states shall settle refugees 'at a reasonable distance from the frontier of their country of origin'.

III- Prohibition of Subversive Activities

The third article articulates refugees' duty to respect the laws and regulations of the host state, echoing article 2 of the 1951 Convention, and prohibits them from engaging in subversive activities against any OAU member state. Article III is operationalised by the cessation clause described above, which terminates the refugee status of an individual who commits a serious non-political crime after the acquisition of such status.

IV- Non-discrimination

Article IV on non-discrimination in the application of the Convention follows article 3 of the 1951 Convention, however discrimination is prohibited on the additional grounds of nationality, membership of a particular social group or political opinion.[38]

V- Voluntary Repatriation

Article V of the 1969 Convention addresses voluntary repatriation. Its first paragraph articulates the core principle: '[t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will'. This is an important corollary of article II's provisions on asylum, particularly article II(3) on *non-refoulement*. The clauses that follow the core principle are premised on the assumption that the conditions for safe return have been met and detail the duties of countries of asylum and origin and refugee assisting agencies. The sending state, in collaboration with the receiving state, must 'make adequate arrangements for the safe return of refugees who request repatriation',[39] while the country of origin must 'facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations'.[40] The Convention mandates countries of asylum, countries of origin, voluntary agencies and international and inter-governmental organisations to assist refugees with the process of return,[41] providing in particular that states of origin should use the news media and the OAU to invite refugees home and provide assurances regarding the circumstances prevailing there, and host countries should ensure that such information is received.[42] Article V also provides that upon return, refugees must not be penalised for having fled.[43]

The 1969 Convention is the first and remains the only international legal instrument to formally insist on the voluntariness of refugee repatriation, however it is worth noting that the concept appears in UNHCR's statute,[44] the result of a UN General Assembly resolution adopted 19 years prior to the 1969 Convention. Its originality aside, article V(1) is a 'powerful

[38] The 1951 Convention prohibits discrimination on the grounds of race, religion or country of origin (1951 Convention (n 3) art 3).
[39] 1969 Convention (n 1) art V(2).
[40] 1969 Convention (n 1) art V(3).
[41] 1969 Convention (n 1) art V(5).
[42] 1969 Convention (n 1) art V(4).
[43] ibid.
[44] UNGA, 'Res 428 (V)' 14 December 1950 [chap 1, art 1].

statement of principle'[45] which is hailed as representing an early articulation of a principle that went on to represent a cornerstone of the international regime for refugee protection.[46] Unfortunately, it has been misinterpreted to suggest that repatriation is the primary solution for refugees on the continent. Rutinwa explains that in fact, article V is 'much more about elaborating the principles and the modalities of effecting voluntary repatriation than a prescription of it as the only solution'.[47]

VI- Travel Documents

Article VI, like article 28 of the 1951 Convention, mandates contracting states to provide refugees with travel documents. In view of article II(5) on temporary protection, article VI(2) provides, 'where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause'.[48]

VII- Cooperation

Articles VII and VIII relate to state cooperation with the OAU and the office of the United Nations High Commissioner for Refugees ('UNHCR'), respectively. Article VIII(2) provides that the 1969 Convention 'shall be the effective regional complement in Africa' of the 1951 Convention, which means, among other things, that refugees recognised only under article I(2) of the 1969 Convention are entitled to the refugee rights enumerated in the 1951 Convention.

[45] Jean-Francois Durieux and Agnes Hurwitz, 'How Many is Too Many? African and European Legal Responses to Mass Influx of Refugees' (2004) 47 German Yearbook of International Law 105, 130.
[46] Voluntary repatriation is one of the trifecta of 'durable solutions' for refugees; the others are local integration and resettlement.
[47] Rutinwa (n 34) 16.
[48] 1969 Convention (n 1) art VI(2).

Chapter 2: The North African Asylum Systems

North Africa includes countries of Algeria, Egypt, Morocco, Libya and Tunisia, and it is a sub-region that belongs to two regions: Africa and the Arab world. This region has a particular importance for UNHCR where it carried out its first operations carried out outside Europe to face the massive influx of Algerian refugees in Morocco and Tunisia during the Algerian Liberation War (1954-1962). The recent events have confirmed North Africa as a hospitable region toward refugee. Indeed, the civil war in Libya has caused a massive influx of refugee in the Tunisian borders. Thousands of Libyan refugees are currently enthusiastically hosted by the Tunisian families who offer them all the basic needs.

However and from legal prospect, asylum has, obviously, become subject to some restrictions in the region. The situation has been worsened during the last years, when migration flows have increased mainly through the countries of the region to Europe[49]. The fighting against illegal migration has, indeed, sacrificed the refugees' rights guaranteed by the international law's principles binding North African countries. In this context, it is worth studying the North African asylum systems and assessing their compatibility with the Geneva Convention's principles. This study should include different legislations related to asylum adopted by the four North African countries. In this respect, North Africa displays deficient asylum systems with a paradoxical legal framework.

I- A paradoxical legal framework

The paradoxes of the legal framework of the North African asylum systems result from the large adherence to the international instruments that contrasts with the deficiency of the national legislations.

1- Large adherence to the international instruments

1-1- The 1951 Geneva convention and the 1967 Protocol of New York

All North African countries, except Libya, are bounded by the 1951 Convention relating to the Status of Refugees. Egypt was the only North African country to participate in the UN Conference on the status of refugees held in Geneva which adopted this Convention on 28 July 1951. However, although it was a signing country, Egypt had been hesitating for a long time before ratifying the Geneva Convention on 15 May 1984. The other countries were under French (Algeria, Morocco and Tunisia) or British occupations (Libya) when the Convention was adopted in 1951. Contrary to Britain, France had extended the Geneva Convention to the three North African countries that were under its authority at that time. Thus, the Convention has had a legal force in Algeria, Morocco and Tunisia since its entree into force on 22 April 1954.

After their independences, Algeria, Morocco and Tunisia had formally expressed their intention to continue to be bounded by the Geneva Convention without confirming the reservation made by the French government towards article 17[50]. Thus, the three countries are

49) Salvatore Coluccello and Simon Massey, "Out of Africa: The human trade between Libya and Lampedusa", *Trends in Organized Crime*, Vol. 10, No 4, December 2007, pp. 77-90.
50) Maurice Flory, « La succession aux Traités lors de la décolonisation de l'Afrique du Nord », *Annuaire de l'Afrique du Nord*, 1966, pp.11-24. *Cf.* also Karl Zemanek, « State Succession after Decolonization », *Collected Courses of the Hague Academy of International Law*, Vol. 116, No 3, 1965, pp. 213-215.

logically bounded by the Convention without any reservation, although they are sometimes arguing the opposite. As regard Egypt, reservations were made about articles 12(1), 20, 22, 23 and 24[51].

As regard the Protocol relating to the Status of Refugees, signed at New York on 31 January 1967 (the 1967 Protocol of New York), all North African countries, except Libya, are signatory states and have, already, ratified this text. Hence, the scope of the 1951 Geneva Convention provisions has been legally extended to these countries while they were originally confined to the European territories and event occurred before the Second World War. This extension had been made, however, for North African countries even before the adoption of the 1967 Protocol of New York as mentioned previously.

1-2- International humanitarian and human rights instruments

The international humanitarian instruments already have a legal force since the French occupation in Algeria, Morocco and Tunisia[52]. After Independences, these three countries expressed their intention to continue to be bounded by the 1949 Geneva Conventions. Egypt and Libya have acceded to these Conventions, respectively, on 11 November 1952 and 22 May 1956.

Concerning international human rights instruments, all North African countries have, indeed, ratified or acceded to the most important ones that provide a partial protection for refugees. Thus, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1984 Convention against torture are, among other instruments, binding the five North African countries.

1-2- Regional instruments

The North African countries have three main membership circles: African Union (AU), except Morocco which is not member, the League of Arab States (LAS) and the Organisation of Islamic Summit (OIS). However, only AU has a regional legal framework to deal with asylum's issues, while Arab and Islamic countries have failed to reach a common instrument in this respect.

The main African instrument about refugee status is, definitely, the Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa signed at Addis Ababa on 10 September 1969 (the 1969 Addis Ababa Convention) [53]. Aware of the narrowness of the refugee's definition adopted in the 1951 Geneva Convention and its inadequacy to the African context, the African countries have agreed in the 1969 Addis Ababa Convention about a lager definition aiming to provide African people with a suitable regional legal framework for their struggle for liberalisation from European colonisation[54].

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51) See Amor Boubakri, « L'adhésion de la Tunisie aux instruments internationaux relatifs aux réfugiés », *Etudes Internationales* (Tunis), No 105, December 2007, pp. 93-118 ; Khadija Elmadmad, *Asile et réfugiés dans les pays afro-arabes*, Rabat, éd. Eliff, 2002, pp. 102-103.

52) M. Flory, *op. cit.*, pp. 15-17.

53) Emmanuel Opoku Awuku, "Refugee Movements in Africa and the OAU Convention on Refugees", *Journal of African Law*, Vol. 39, No. 1, 1995, pp. 79-86; George Okoth-Obbo, "Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa", *Refugee Survey Quarterly*, Vol. 20, No 1, Jan. 2001, pp. 79-138.

54) It should be mentioned, in this respect, that the refugee's definition adopted in the 1951 Geneva Convention is now questionable in the light of the recent evolvements and challenges faced by the refugees' protection in the

The 1969 Addis Ababa Convention has been ratified by Algeria, Egypt, Libya and Tunisia. These countries have also ratified the African Charter of Human and People's Rights adopted in Nairobi on 22 June 1981. However, none of the North African countries has signed the African Union Convention for Protection and assistance of internally displaced persons in Africa, adopted recently in Kampala on 23 October 2009.

2- Deficient national legislations

A main feature of the North African asylum systems consists in the absence of national legislations on asylum which is spread out on the general legislation.

2-1- The lack of national legislation on asylum

Special asylum legislation has a major importance for the refugee status insofar as it determines the procedural aspects of asylum and refugees' rights and duties. The North African countries have chosen to keep a harmful silence in this respect displaying, by doing so, certain disrespect towards the international standards protecting refugees. Indeed, the adherence both to the 1951 Geneva Convention and the 1969 Addis Ababa Convention supposes that national legislation should be issued in order to insure the implementation of the rules resultant from those instruments and their effectiveness in the national legal system; otherwise, the international commitment to refugee protection becomes questionable and reveals a kind of hypocrisy.

Scholars have argued, indeed, that states bounded by the 1951 Geneva Convention do not have the liberty of refusing to issue a national legislation on asylum. Such legislation is necessary to allow refugees to benefit from the protection provided by this Convention[55]. The absence of such legislation should be considered, therefore, as an illegal break of the principles of this Convention. The imperative international customary rule *pacta sunt servanda* requires, indeed, that states should observe with good will the rules resulting from an international convention[56].

It should be mentioned, however, that some internal legal texts with a limited importance for refugee status exist in Algeria, Egypt and Morocco. The first one is the Moroccan Decree No 2-57-1256 issued on 29 August 1957, determining the way to implement the Geneva Convention. This Decree was amended by Decree of 8 October 1970 and Decree No 2-84-836 issued on 28 December 1984[57]. Algeria has, also, a similar text which is the Decree No 63-274, issued on 25 July 1963 with the same subject as the Moroccan Decree[58]. Besides, Egypt issued the Decree of 15 May 1984 creating the Permanent Commission of Refugees' Affairs.

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world as a result of the emergence of new forms of asylum not covered by this Convention. See: Henri Joël Tagum Fombeno, « Réflexions sur la question des réfugiés en Afrique », *Revue Trimestrielle des Droits de l'Homme*, No 57, Jan. 2004, pp. 245-274.

55) Elmadmad, *op. cit*., pp. 157-159.

56) *Pacta sunt servanda* rule is, expressly, provided in the Vienna Convention on the Law of Treaties adopted on 23 May 1969 (art. 26). Still, this rule remains, fundamentally, a *jus congens* customary rule. See I. I. Lukashuk, "The Principle *Pacta Sunt Servanda* and the nature of obligation under international law", *The American Journal of International Law*, Vol. 83, No. 3 (Jul., 1989), pp. 513-518.

57) *Bulletin officiel*, 6 September 1957, p. 1161 ; 28 April 1971, p. 469; 2 January 1985, p. 47. *Cf.* also K. Elmadmad, *op. cit*., pp. 175-179.

58) *Journal Officiel de la République Algérienne*, No 52, 30 July 1963, p. 763. *Cf.* K. Elmadmad, *ibid*., pp. 165-168.

Still, the importance of these texts remains limited, insofar as they are emanating from Executive branch and they do not have a legislative nature. Therefore, refugees are not secured sufficient protection because executive texts, in general, offer only a low legal security for stakeholders. However, one can say that texts with a limited importance are more than the absence of legal texts that would implement the international refugee rules in the national legal system.

2-2- Asylum in the general legislation

The norms of Asylum system in the North African countries are spread out on different categories of legal texts. The first ones to be mentioned in this respect are Constitutions that provide protection against extradition. Indeed, all North African constitutional texts are unanimous in forbidding extradition of political refugees. Such protection is clearly stated in the 1998 Algerian (art. 69), the 1971 Egyptian (art. 53), and the 1959 Tunisian (art. 17) Constitutions. Unlike the other North African countries, Libya doe not have a written constitution. However, some texts have a constitutional value exist in this country, among them the 1969 Revolutionary Declaration which provided the same protection for political refugees (art. 11)[59].

Besides, the North African asylum norms exist in the laws that determine foreigners' status. Some aspects of asylum regime are, thus, lined up with this status, mainly social and economic rights. Other aspects of asylum regime have even been included in the new legislations intended to fight against illegal migration. Thus, a harmful confusion has been intentionally made about asylum seekers and illegal migrants by, *inter alia*, the Libyan Law No 2 (2004) governing the entrée, stay and departure of foreigners, and the Tunisian Law No 68-7 about foreigners' status as amended by the Law No 2004[60].

II- Unfavourable asylum systems

The analysis of the different elements of the asylum legal framework leads to conclude that North African countries do not offer favourable asylum systems because asylum has been somehow politicised and Refugee Status Determination (RSD) procedures are inadequate. Besides, refugees and asylum seekers do not have sufficient guarantees.

1- The politicisation of asylum

The politicisation of asylum is a phenomenon that limits protection to political refugees, while other categories of refugees are deprived of such protection. This limitation exists in all North African constitutional texts that forbid extradition of political refugees. Such constitutional provisions suggest that refugees are not equal in rights. Yet, international standards do not allow such discrimination and require an equal treatment for refugees. Indeed, Asylum is essentially a humanitarian act whose main characteristics are neutrality and disinterest.

This politicisation has sometimes impacted the RSD procedures that distinguish, in Egypt and Morocco, between political refugees and other categories. Paradoxically, the grant of asylum for the first category is likely to be more volatile and depends on political reasons.

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59) All these texts are available in the UNDP's legal database for the Arab countries: www.undp.org

60) See A. Boubakri, "Protection of Refugees and Asylum Seekers in the Migration Flows", *International Studies* (Tunis), No 94, March 2005, pp. 81-89 (in Arabic).

2- Inadequate RSD procedures

The RSD procedures are at the core of the asylum system, in general, and have a vital importance for asylum seeker since it is an unavoidable way to have access to the needed protection. This is why RSD procedures are usually considered as a key indicator showing how serious the state's commitment to protect refugees is. Consequently, the more adequate the RSD is, the more serious this commitment will be, and *vice versa*.

Unfortunately, the North African RSD procedures do not, altogether, display a real willingness to provide refugees with the protection in accordance with the international standards. Their deficiency reveals that refugees are, somehow, unwelcome and even undesirable in the North African countries since they do not have set up RSD procedures which are an evident consequence of their adherence to the 1951 Geneva Convention.

The North African countries can be divided into groups with regard to RSD procedures. The first group includes countries where RSD procedures are totally inexistent which are Libya and Tunisia. In these two countries asylum seekers have no possibility to present asylum claim to the authorities. However, the Tunisian government has allowed the UNHCR to carry out RSD procedures and examine, therefore, asylum claims according to the Agreement of 16 January 1992. UNHCR uses its own standards to determine the refugee status which figures in the guidelines elaborated for this purpose[61]. Persons recognised as refugees by the UNHCR delegation obtain, therefore, a document from the Tunisian authorities legalising their stay in the country. Asylum seekers who not get the refugee status can only make an internal appeal before the UNHCR delegation.

As far as Libya is concerned, the situation is worse since UNHCR is not formally allowed to carry out RSD procedures. However, UNHCR is present in the country since 1999, and this country registers refugees and asylum seekers and provides them with material assistance despite the absence of a memorandum of understanding with the Libyan government. Still, UNHCR situation is not comfortable at all since it depends on the political situation of the Libyan government. The last period has shown, indeed, this unsettled situation when the Libyan government ordered UNHCR's officials on 8 June 2010 to stop their activities and close all their offices in Tripoli.

The second group is composed of countries that have their own RSD procedures. Indeed, Algeria, Egypt and Morocco have set up a national Committee to assess with asylum claims. These committees belong to the Ministries of Foreign Affairs and they are composed of representatives of the Interior and Justice Ministries and UNHCR is represented as well.

The decisions made by these *ad hoc* Committees are definitive and cannot be reviewed. Thus, refugees are deprived of right to fair trial as required by the international instruments binding the North African countries. Even if appeal could be possible in theory, refugees are not provided with sufficient legal aid to present their appeal.

61) UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, January 1992.

3- Lack of guarantees

The most important guarantees that refugees need are definitely protection against expulsion and extradition. In the international asylum system *non refoulement* is considered as a part of the international customary standards and has the value of a *jus cogens* rule. Every country has, therefore, the imperative duty to respect *non refoulement* principle notwithstanding it is bounded by the 1951 Geneva Convention or not. Hence, the North African countries, as members of the international community, have to insure respect for this fundamental rule of international refugee law.

Furthermore, *non refoulement* has a large scope in international refugee law since it covers situations such as non admission, expulsion and extradition. Thus, states should not, under any case, send asylum seeker or refugee to the country or territories in which he fears persecution[62].

The question which is worth being asked is: How far the North African countries have been respectful of these provisions?

In fact, the answer can be summarised as the following: Like asylum systems, like refugees' guarantees. The North African states have not proved, in reality, any scruple towards the *non refoulement* principle and other fundamental standards aiming to protect refugees and asylum seekers mainly against arbitrary and harmful measures such as non admission, expulsion and extradition.

Sub-Saharan refugees and asylum seekers have become, during the recent years, the main victims of illegal and unfair measures taken by the North African authorities. The cooperation with European states to fight against illegal migration has worsened the situation insofar as North African countries have received a green light to use all means in this respect. Mainly Eritrean and Somali refugees are among the most injured refugees' population in the region. Asylum seekers reported that they have been forcibly returned to their countries where they faced torture and other ill treatments[63].

62) See Jean-François Durieux and Jane Mc Adam, "*Non-refoulement* through time: The case for a derogation clause to the refugee convention in mass influx emergencies", *International Journal of Refugee Law*, Vol. 16, No. 1, 2004, pp. 4-24.

63) Amnesty international, *'Libya of tomorrow' What hope for human rights?*, London, June 2010, pp. 96-97; Human Rights Watch, *Stemming the flow: Abuses against migrants, asylum seekers and refugees*, New York, September 2006; *Sinai perils: Risks to migrants, refugees and asylum seekers in Egypt and Israel*, New York, November 2008.

Chapter 3: Refugee law and protection in Kenya: contextualizing the refugee laws

Having signed the 1951 United Nations Convention Relating to the Status of the Refugees[64] on 8th October 1966; the 1967 Protocol Relating to the Status of Refugees[65] on 13 Dec 1966, and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa[66] on 10th September 1969, Kenya is a party to Principal international conventions that provide for international principles for protection of refugees.

Currently, there are two major refugee camps in the country namely Dadaab(which comprises of three other sub-camps, that is, IFO, Dagahaley and Hagadera)situated in the country's remote north eastern part of the country, near the Kenya/Somalia border; and Kakuma refugee camp which is established on the north western part of the country, bordering Sudan. Both camps are located in hot, arid areas with temperatures often as high as 40° C.[67]

Domestic legal protection of refugees in Kenya has for a long time been considered within the framework of the Immigration Act,[68] the Alien Restriction Act, [69] and since January 2007, the Kenya Refugee Act.[70] The Immigration Act consolidates the laws relating to immigration. It does not distinguish refugees and asylum seekers as a special class of aliens, who normally do not enter in host countries armed with the usual travel documentation required of aliens. All aliens who enter Kenya are required to register their presence in Kenya under section 13(2) C of the Immigration Act, failure to which they face charges of being unlawfully present in Kenya.

The Act describes a class of entry permit for individuals generally fulfilling the definition of the Refugee Convention (though not the definition of a refugee as given in the OAU refugee convention) i.e. a person who is, ***"…owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unwilling to avail himself of the protection of the country of his nationality or who, not having a nationality and being outside the country of his former habitual residence for any particular reason, is unable or, owing to such fear, is unwilling to return to such country, and any wife or child over the age of 13 years of such a person.***" This provision would allow asylum seekers to apply for class M permits from immigration officers at points of entry into Kenya, if proper administrative procedures were in place. However, due to the circumstances under which refugees enter the country, regardless of what the law says, there is no way an asylum seeker may ask for legal permission to enter or remain in Kenya as a refugee through an entry point.

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[64] United Nations Convention Relating to the Status of Refugees, , adopted on 28th July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons; convened under General Assembly Resolution 429 (V) of December 1950; 189 UNTS 150; entry into force: 22 April 1954.

[65] The 1967 Protocol Relating to the Status of Refugees prepared and submitted to the United Nations General Assembly in 1966 and adopted in Resolution 2198(XXI) of 16th December 1966; 606 UNTS 267; entry into force 4 October 1967.

[66] OAU Convention adopted at the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10th September 1969); 1000 UNTS 46; entry into force: 20 June 1974.

[67] Refugee Consortium of Kenya, *Refugee Insights;* Protracted Refugee situations, Issue No. 8 January – June 2005, p. 4.

[68] Cap 172 Laws of Kenya, Revised Edition 1984 (1968).

[69] Cap 173 Laws of Kenya, Revised Edition 1985 (1977).

[70] Act No. 13 of 2007.

The same position obtains for the Aliens Restriction Act which, in section 2, defines an alien as ***"any person who is not a citizen of Kenya."*** It provides that all non-citizens who enter Kenya without a valid entry permit or pass are unlawfully present and subject to arrest, detention and prosecution by immigration officers. As soon as they enter Kenya, asylum seekers and refugees, as aliens, are also subject to the Aliens Restriction Act. The Act sets out precisely to accomplish what its title implies, that is, to restrict the presence and rights of aliens in Kenya.

The Immigration Act and Aliens Restriction Act do not accord refugees their rights as enshrined in the international instruments. As the Kenyan legal status demonstrates, the signing of international conventions and protocols by countries does not guarantee rights to refugees.

The Government of Kenya (through the Department of Refugee Affairs) cooperates with UNHCR in protecting refugees. UNHCR is responsible for refugees based on its statute and in conjunction with the 1951 Convention and 1967 Protocol, which oblige signatory states to assist forcibly displaced migrants who meet specific criteria. Without a policy on refugee protection or the capacity of the Department to protect refugees in Kenya, UNHCR stepped in to assist in its international mandate of protection and provision of humanitarian assistance. UNHCR also carries out Refugee Status Determination (RSD) on behalf of the Government, although the handing over process is now in place.

As of 1991, UNHCR, through its good offices, recognized refugees who could not be processed under conventional or statutory definitions, but who required protection. Noting the Government of Kenya adherence to the international instruments to which it is a party in regard to persons seeking refuge within its borders, UNHCR started applying the idea of preventive protection in Africa that saw the creation of preventive zones and refugee camps. This move was intended to prevent Somali refugees from crossing to Kenya and also encourage those in Kenyan camps to return to Somalia. [71]

Many refugees in Kenya now live in refugee camps (mentioned in the introductory note above). Though camps are arguably a useful and acceptable short-term emergency measure, the ad hoc status of prima facie refugees accorded to refugees in these refugee camps as they await refugee determination status is problematic. In Kenya, the vast majority of displaced Somalis and Sudanese fall into this ad hoc category of refugees. Though this status does entitle them to basic food, shelter, and health and social services in the camps, it precludes the possibility of their generating a more independent livelihood as mobility beyond the borders of the isolated camps is restricted. All prima facie refugees are required by the Kenyan government to live in camps located in arid and semi arid border areas.[72]

Because the vast majority of refugees in Kenya have prima facie status, they are entitled to assistance through the good offices of UNHCR, but they remain, in a practical sense, second-rate refugees. Their containment in camps renders them wholly dependent on international humanitarian assistance. Positive to note is that they are given temporary safety and protection from *refoulement* and that some are able to (unofficially) move to more strategic locations. This unauthorized movement of Somali refugees, in particular, annoys the

[71] Jennifer Hyndman, *Managing Displacements; Refugee and the Politics of Humanitarianism*; p. 23.
[72] Ibid, p. 24.

Government of Kenya (GOK), which then complains to UNHCR. Yet it is also a political statement that the government of Kenya cannot simply contain the refugee problem. Nonetheless, the movement of refugees in the refugee camps is highly restricted, for their safety and state security.[73]

The Refugees Act, enacted in December 2006, takes precedence over the Immigration Act and Aliens Restriction Act on refugee matters and creates an institutional framework including relevant offices; commissioner, department, camp officer; it formalizes administrative processes on how to seek asylum and apply for appeal. The definition of a refugee under the Act is in the context of the 1951 Convention and the 1969 OAU Convention, the Act restores refugee management as a function of government. Refugee recognition in the Immigration Act is now superseded by the refugee status determination process in the Refugee Act. The Act protects refugees from prosecution in respect of unlawful presence in Kenya while undergoing or awaiting the RSD process. Refugee-related documents are issued as provided by the Act.

The Act defines Asylum as the provision of shelter and protection by the government to refugees. Asylum seeker is a person who seeks refugee status in accordance with the Act. The members of a refugee's family include the spouse, dependent children under 18 and extended family members who are dependent on the refugee. Through the Act, the Government takes authority for determining who is and is not a refugee. The Act captures the definitive elements of the term "refugee" from both the 1951 Convention and the 1969 OAU Convention. The definition is used in ascertaining who qualifies for refugee status, protection and assistance.

The Act adopts the definition of a statutory refugee[74] from the 1951 Convention. It provides that a person shall be a statutory refugee for the purposes of the Act if such a person "***owing to a well founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or not having a nationality and being outside the country of his former habitual residence, is unable to , owing to a well founded fear of being persecuted for any of the aforesaid reasons is unwilling to return to it."***

I- Duties of Refugees

In essence, refugees have no preferential treatment before the law of the host country and must respect the laws and regulations as well as measures taken for the maintenance of public order. The 1951 Convention[75] provides that every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order. The 1969 OAU Convention[76]prohibits subversive activities and requires every refugee to conform to the host countries laws and regulations as well as measures taken for public peace. To ensure this, the 1969 OAU Convention, requires states where refugees are residing to prevent them from attacking any state member of the OAU, by any activity likely to cause tension.

[73] Ibid., p.26.
[74] Section 3 (1) of the Kenya Refugees Act No. 13 of 2006
[75] Article 2 of the 1951 Convention
[76] Article 3 of the OAU Convention

The Refugee Act 2006 has expressly captured this obligation under section 16(1) (b). Refugees are also under duty to refrain from engaging in subversive activities such as armed insurrection, against their country of origin. The duty to respect the law is common to nationals as well as to foreigners in general. Under section 25 of the Act, a refugee who falsifies declarations and information or is found in the country after expulsion under section 21 of the Act, commits an offence which attracts a custodial sentence.

II- Rights of Refugees

Pursuant to section 16 of the Refugees Act, Refugees in Kenya are entitled to the rights in international Conventions to which Kenya is a party. Refugee rights set by the Refugee Convention include several critical protections which speak to the most basic aspects of the refugee experience, including the rights to non discrimination,[77] religion,[78] equal treatment to aliens generally,[79] need to escape, to be accepted, and to be sheltered; basic survival and dignity rights, the right of every human being to life, liberty, and security. Intellectual property rights[80] and the right to acquire property,[81] right of association[82] as well as to documentation of their status and access to national courts[83] for the enforcement of their rights are provided. Right to engage in wage earning employment,[84] self employment[85] and to practice liberal profession is also granted.[86] Expansive range of socio-economic rights include housing, [87] public education, [88] public relief, [89] labour legislation and social security.[90] Rights to administrative assistance[91] and freedom of movement[92] are also granted.

Refugees are also to be treated as citizens under labour and tax legislation. The Convention establishes rights of solution, intended to assist refugees to bring their refugee status to an end. Provision is made for the issuance of travel documents[93] and transfer of assets [94] that would be necessary upon resettlement, and also for the alternative of naturalization in the asylum state. The right to non *refoulement*[95] is guaranteed.

Although the Convention spells out substantive refugee rights, it allows any State to make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive. Articles 36-46 are executory and transitory provisions. This means that all substantive rights other than to non-discrimination, freedom of religion, access to the courts, and protection against *refoulement* may be excluded or modified by a state through

[77] Article 3 of the 1951 Convention
[78] Article 4
[79] Article7
[80] Article 14
[81] Article 13
[82] Article 15
[83] Article 16
[84] Article 17
[85] Article 18
[86] Article 19
[87] Article 21
[88] Article 22
[89] Article 23
[90] Article 24
[91] Article 25
[92] Article 26
[93] Article 28
[94] Article 28
[95] Article 33

reservation upon signature, ratification, or accession to the Convention. An evaluation of refugee rights under section 16 of the Refugee Act therefore requires that account be taken of any reservations by the Kenyan government.

Although the Kenya Refugee Act has many progressive aspects of refugee protection in Kenya; including some laudable institutional and administrative measures that help refugees to exercise their rights, there are still many gaps that need to be addressed. There are legal difficulties in applying and exercising refugee rights. In order to grant refugees protection and treatment according to international standards, all other laws relating to refugees would ideally apply to refugees only in as far as they conform to the Constitution and not in flagrant violation of specific law to refugees, the Refugees Act of 2006, together with the rules (*Reception, Registration and Adjudication*) Regulation 2009, that operationalize the Act.