Africa's Refugee Innovations: Pointing the Way Toward a Better Refugee System

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Résumé : Il va sans dire que le régime international de protection des réfugiés est trop restrictif. En effet, dès les deux premières décennies de sa promulgation, il a été revu. Initialement, il faisait référence uniquement aux personnes « persécutées pour des discriminations d'ordre racial, religieux, ou fondées sur la nationalité et l'appartenance à un groupe social particulier ou à une opinion politique. Le refugié, étant à l'extérieur de son pays d'origine et de sa résidence habituelle, est incapable, de bénéficier de la protection de ce pays. Malgré sa réputation, l'Afrique s'est engagée depuis longtemps envers les droits, la politique et la gouvernance de son peuple. Qu'est-ce que le reste du monde peut-il ainsi apprendre de l'exemple africain à l'égard des régimes de protection des réfugiés ? En l'occurrence, énormément. Les innovations de l'Afrique dans la définition des réfugiés et les protections, qui leur sont accordées, constituent l'une de ses plus grandes innovations. Elles sont dignes d'éloges et de réplication.

Abstract : It has long been known that the international refugee regime is too restrictive. In fact, within the first two decades of its promulgation it was revised. Initially including only persons"owing to well-founded fear of being persecuted for reasons of race, religion, 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. Despite its reputation, Africa has a longstanding commitment to the Rights. Politics, and Governance of its people. What then can the rest of the world learn from the African example respecting refugee regimes? As it happens, a great deal.

The Organization for African Unity adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969. Its definition of refugee, whereby refugee status was granted to persons fleeing "events seriously disturbing public order," remains a shining aspect of African Exceptionalism. The Convention Relating to the Status of Refugees governs the international refugee regime. It has long been known that the

international refugee regime fails to cover all persons seeking refuge. In fact, within the first two decades of its promulgation, it was revised. Initially including only persons "owing to well-founded fear of being persecuted for reasons of race, religion, 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 who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."(*Convention and Protocol relating to the Status of Refugees*, 1967) Much was wrong with this, including the initial option of letting states choose to only recognize refugees from Europe. (Paul, 2014: 219)

Africa in particular found this definition altogether too restrictive. Organization for African Unity was not content to leave migrants who were not covered by the Convention Relating to the Status of Refugees and its subsequent Protocol without recourse. Accordingly, it adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969. It included a definition whereby refugee status was granted to persons fleeing "events seriously disturbing public order." (*Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969) Despite its reputation, Africa has a longstanding legal commitment to the rights, politics, and governance of its people. What then can the rest of the world learn from the African example respecting refugee regimes? As it happens, a great deal. Africa's framework for refugee laws serves as a model for the inevitable updating of the international refugee regime.

I. **The International Refugee Regime**

The international refugee regime is too restrictive. The Convention Relating to the Status of Refugees and its subsequent Protocol (hereinafter the "Refugee Convention") serves as the basis for the international refugee regime. (Refugee Convention, 1967) For

the purposes of this article, refugee without qualification shall mean persons seeking refuge. Persons seeking refuge who are covered only by the Refugee Convention shall be termed international refugees. The Refugee Convention's coverage excludes persons not meeting the enumerated categories by which it defines refugees. Those categories are as follows. A migrant must (1) "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion," (2) be "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 (3) be a person without nationality and be outside the country of his "former habitual residence as a result of such events," who is unable or, owing to such fear, is unwilling to return to it. (Refugee Convention, 1967) This definition grants refugee status only to these categories.

There are many subsets of persons thus denied refugee status under the international refugee regime. Thus persons seeking refuge on the basis of generalized violence in war have no claim to refugee status. The Refugee Convention also excludes persons displaced internally for only persons outside of their home country can claim refugee status. There is no global legal framework for internally displaced persons (hereinafter "IDP"). (*Resolution 1997/39 on Internally Displaced Persons*, 1997) This is not to say that the international community is unaware of the problem of IDP. It has simply not been moved to create the same legal framework for IDP's as it has for international refugees.[1] (*Guiding Principles on Internal Displacement*, 1998) These and other shortcomings of the international regime were felt particularly hard on the African continent in the 20th century. The international refugee regime has much to learn about protections for displaced persons of any ilk. Much of that learning should come from Africa.

II. The African Refugee Regime

[1] noting that "it is fair to say that the international community is more inclined than it is prepared, both normatively and institutionally, to respond effectively to the phenomenon of internal displacement."

The African experience with refugee flows has been consistently acute. Mass disorder has at some points been the rule rather than the exception for Africa. Fueled by colonial liberation and its attendant strife, (Nicolosi, 2014: 320) large refugee flows bedeviled the continent during the latter half of the 20th century until the present day. With only the framework of the international regime most of Africa's refugees would not have received the requisite protections. Africa began a process of legal innovation to deal with the problem. This process began with the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter the "African Convention"). Chief among the African Conventions innovations is an expanded definition of refugee.

a. Definition as Innovation

Africa's first, and perhaps most important, innovation is in the definition of refugee itself. Article I(1) of the African Convention replicates the definition used in the Refugee Convention. Article I(2) expands this definition to include "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."(African Convention, 1969) Thus, to borrow Nicolosi's conception, an African refugee (2014: 325) is any person who claims refugee status on the basis of Article I(2) of the African Convention.

In addition to the general expansion to the definition of refugee, the African Refugee Regime also includes the first legally binding international protections for internally displaced persons. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (hereinafter the "Kampala Convention") does not specifically deal with refugees in the sense of the internationally recognized legal category. The Kampala Convention defines internally displaced persons as:

> "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized State border." (Kampala Convention, 2009)

A Kampala refugee is, therefore, any person whose claim to refugee status derives from the Kampala Convention and its definitions. Much like the African refugee, Kampala refugees represent a legal innovation. There are many other innovations. Africa boasts unique treatment of temporary protections, IDP, voluntary repatriation, and non-refoulement.

b. Temporary Protections

Article II(5) of the African Convention provides that "[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." (African Convention, 1969) This temporary protection is a feature of the legal regime of many nations. The unique aspect in Africa is one of linkage. As Nicolosi notes, some assume that this permits states overburdened by refugees or some other factor preventing effective management of refugee flows to off load refugees to states better suited to dealing with them. (Nicolosi, 2014: 329) In this way Africa has, or can be said to be developing, a more effective program of linking temporary protections. This program protects both the limited capacity of overburdened states, and the refugees themselves. The refugees are thus saved from being subjected to the vagaries of overburdened state bureaucracies unable to see to their needs. Linked temporary protection is an innovation worth studying.

c. Internally Displaced Persons

The African Convention, for all its genius, has little to say about one of the largest categories of displaced persons, those

displaced internally. Since it entered into force in 2012, the Kampala Convention has defined the rights and status of IDP. As noted above, it covers those who are fleeing some form of generalized violence, but have yet to cross an international boundary. The Kampala Convention "effectively transforms the operational IDP category into a definite legal status." (Won. 2011: 6) Nowhere else in the world does IDP have a definite legal status. The Kampala Convention "does not create a new special legal status for idps, but rather strives to ensure that the current" needs are addressed.(Nicolosi, 2014: 332)This is an important innovation as Africa boasts more than a quarter of the world's population of IDP. In 2015, the United Nations High Commissioner for Refugees estimated global population of 37,494,172. (*UNHCR worldwide population overview*, 2016)Sub-Saharan Africa has 10,762,882 of them.(*UNHCR worldwide population overview*, 2016)

The Kampala Convention further ensures that IDP may seek legal redress for losses suffered as a result of their displacement. Remarkably, this includes not merely losses suffered through loss of property but also those suffered through mental and physical harms. (Nicolosi, 2014: 334) IDP are not a new concern for Africa's refugee regime. In fact, Article XXIII of the 1990 African Charter on the Rights and Welfare of the Child extended IDP protections to children. (Fontaine, 2006: 70-1) It was not until the Kampala Convention that adult age Africans were accorded similar protection.

d. Voluntary Repatriation

Voluntary repatriation of refugees is seemingly an integral part of refugee management. We would not assume, for example, that a state would be under an obligation to permit asylum requests but then could simply return a refugee seeker to a situation the state has reason to know would place the refugee seeker in harm. This principle is known as non-refoulement of which more will be said later. Suffice it to say that one could be excused assuming that voluntary repatriation must form the core of the international legal agreements which govern refugee management. This assumption

would be excusable, but excepting the African Convention, it would nonetheless be wrong. For nowhere else in the world is voluntary repatriation a codified guarantee.

Article V (1) sets out the standard. It declares "the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will."(African Convention, 1969)Voluntary repatriation can be said to go beyond merely preventing an asylum seeker from being returned to a place of harm. Nicolosi notes that even the risks to the refugee of being ''penalised" for leaving a country are repugnant to the African Convention. (Nicolosi, 2014: 334)This is so "for any of the reasons giving rise to refugee situations." (Nicolosi, 2014: 334) Voluntary repatriation as such constitutes a level of legal protection beyond that which is afforded by any other legal regime.

e. Non-refoulement

The principle of non-refoulement does form a significant core of international law. According to this principle, a person should not be returned to a place where there is a real chance that they would face persecution, torture, or ill-treatment.(Nicolosi, 2014: 327)This principle is enshrined in many other legal documents "including Article 33 of the Geneva Convention; Article 3 of the 1984 Convention against Torture; 33 and Article 7 of the 1966 International Covenant on Civil and Political Rights."(Nicolosi, 2014: 327) It is particularly important in refugee law. Article 33 (1) of the 1951 Refugee Convention, states that:
"No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." (Refugee Convention, 1967)

Yet, here again, Africa provides greater protections. The African refugee regime broadens the scope of non-refoulement respecting refugees in two crucial ways. First, the drafters of the African Convention declined to include an exception for national security. The principle of non-refoulement has the character of a

jus cogens peremptory norm. (Allain, 2001: 539) That is say that non-refoulement is a principle of international law of such import that no derogation from its strictures is permitted. To be sure, this is a proposition that is hotly debated. (Allain, 2001) Whatever one's opinion concerning the jus cogens status of non-refoulement, it is widely agreed that it constitutes a fundamental aspect of international law.(Allain, 2001: 539) Nonetheless, in codified form there is often some language of qualification.Sub part 1 of The Refugee Convention's Article 33 sets out the principle of non-refoulement as applicable to the refugee law. Sub part 2 explains the limitations of the non-refoulement obligation. It reads as follows:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."(Refugee Convention, 1967)

National security is thus a treaty-based safe harbor available to states permitting them derogationfrom refugee law.[2]

The African Convention has no such safe harbor.(Nicolosi, 2014: 326) Nicolosi notes that some combination of the Article III which forbids refugees from engaging in subversive activities and Article I(4)(g) which ends the applicability of the African Convention to any person who "infringes the purposes and objectives of the Convention." (Nicolosi, 2014: 326)

This would have to be viewed differently from the Refugee Convention's Article 33, however, as Article 33 has a more broad

[2] Whether this derogation meets a states international obligations is an open question which is resolved on consideration of whether or not non-refoulement is a jus cogens peremptory norm or not. If it is, derogation is not permissible even where authorized by treaty. If it is not a jus cogens norm, treaty based limitations are perfectly acceptable.

based exception extending to anyone who is a "danger to the security of the country." (Refugee Convention, 1967) Moreover, the understanding of the African Convention as not providing a non-derogation clause is borne out by the African human rights framework generally. This is so in light of neither the Kampala Convention nor the African Charter on Human and People's Rights contain derogation clauses. (Kampala Convention, 2009)(Banjul Charter, 1982) In Africa national security is neither a sufficient nor a necessary condition to permit derogation.

The second way in which Africa broadens the scope of non-refoulement is by applying it even at the frontiers. This is indeed an innovation. Typically,asylum seekers must actually cross into the territory of another nation before they are eligible for any of the benefits of refugee status. This includes triggering the Refugee Convention's non-refoulement principle. In Africa, merely arriving at a frontier is sufficient. One need not cross an international border to trigger non-refoulement obligations. (Nicolosi, 2014: 328)

f. Asylum

According to Article 14 of the Universal Declaration of Human Rights,"Everyone has the right to seek and to enjoy in other countries asylum from persecution." (Universal Declaration of Human Rights, 1948) And yet, a right absent a remedy is a right almost without utility. In Africa, the substantive right has been backed by a judicially imposed procedural remedy. In *OrganisationMondialeContre La Torture and Others v. Rwanda* the African Commission on Human and People's Rights held that Rwanda violated the plaintiff's rights by denying them the ability to "seek refuge." (Organisation v. Rwanda*)* The court thus held that denial of the process to seek refuge was tantamount to denial of the right itself. This is an important decision giving Africans a legal process that makes their legal rights effective.

As has been demonstrated, in African refugee law, even the definition is an innovation. When this is coupled with the truly imaginative and innovative provisions of the African refugee regime, it is clear that Africans are in a league of their own in terms

of refugee protections. The vast majority of people in refugee-like situations are accorded protections, some of them where they would receive similar protections nowhere else. All of this means that refugees in Africa have greater legal protections than they are accorded in any other region of the world. Yet, in Africa, as is the case everywhere else, capacity is key. In the words of Sir Winston Churchill "[c]ourts and magistrates may be set up but they cannot function without sheriffs and constables." (1946) Having clearly marked a path of exceptionalism in refugee law, Africa must now give full effect to this exceptionalism by marrying it with the will and capacity to realize its promise.

III. The African Legal Implementation

Despite its excellent legal framework, Africa fails to give full effect to this framework with on the ground implementation of its legal promises. A pertinent example of this is an exegesis of the case law surrounding this issue. The Institute for Human Rights and Development in Africa has established a case law analyzer. It is a comprehensive compilation of human rights law and case law from Africa's regional tribunals. From this database it is possible to search all of the cases which are tagged with 'refugee rights' and decided on the merits. That this yielded only nine cases shows a glaring disparity between the legal exceptionalism that is promised in the African refugee regime and the ability to hold governments to these promises.

As has been demonstrated, Africa's legal regime has much going for it. In many respects it is the class of the world, often setting forth legal precedents unseen anywhere else. It is not, however, without it troubles. Curiously, Africa's refugee regime is rarely adjudicated in Africa's regional courts. When it is adjudicated, the results are often plagued with needless delay or indicate that the states in question have willfully flouted their responsibilities under the refugee regime. If the life of the law has been experience, to paraphrase Justice Oliver Wendell Holmes,

then the life of the African refugee regime has been an experience in promise unfulfilled. (1881)

CASE ANALYSIS

An analysis of cases under the African refugee regime returns surprising results. These results clearly detail that the regime is failing to give full effect to its promise. This failure is principally manifested in three ways. First, on the whole, cases are simply not adjudicated. Second, what adjudication there is, is accompanied by needless and unnecessary delay. Third, even where courts announce rights, they often fail to give meaningful and effective remedies. In these ways, Africa's legal regime takes the shine off a system of laws designed to exalt the human rights of those most vulnerable Africans, namely refugees.

First, in Africa very few cases percolate to the regional refugee tribunals. As has been stated, the Institute for Human Rights and Development in Africa's database of African regional jurisprudence is the best source for analyzing case law respecting the region. Since 1974 when the African refugee convention went into effect, only 15 cases with the tag 'refugee rights' have been adjudicated throughout the various regional tribunals. When further narrowing the search to those cases with the 'refugee rights' tag and decided on the merits only 9 cases remain. In the 42-year existence of the African refugee regime only 9 cases were adjudicated. Even this number is misleading. A close reading of these cases leave but three where the outcome of the case actually turned on the 'refugee right' in question. Those cases are *OrganisationMondialeContre la Torture, Association Internationale des JuristesDémocrates, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme v. Rwanda*,*Curtis Francis Doebbler v. Sudan,*and *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*. The very best expostulation the world has yet seen of international legal agreements protecting the rights of refugees singularly fails to actually give protections to refugees.

The second failure of the African refugee regime is the needless delay in adjudicating cases actually brought before it. This problem is often compounded by the unfortunate situation of having the government being complained against occasioning the delay. One representative example is the aforementioned *Doebblerv. Sudan.* In *Doebbler*, the complainant asserts that the Sudanese Government and the United Nations High Commissioner for Refugees withdrew refugee status from Ethiopian refugees. The complainant asserts that Sudan's subsequent treatment amounted to violations of international law, including *inter alia* the African Convention.

In adjudicating these claims the African Commission found that there were no violations, or at least no evidence of said violations. Yet, the case was submitted to the Commission in the year 2000. Its final adjudication was not given until 2009. The Government of Sudan routinely missed the Commission's deadlines for responses. (*Doebbler v. Sudan,* 2012) This caused the timing of the Commission's decisions to inexorably slip. It is difficult to avoid the conclusion that the Complainant's case was not harmed by the near decade it took to adjudicate it. Accepting the foregoing, it is equally difficult not to conclude that the Government of Sudan's alleged violations were not compounded by the delay their actual failure to timely respond occasioned. Such is the value of world class legal protections in the face of procedural intransigence.

The third failure of the African refugee regime is to forget the legal maxim *Ubi Jus IbiRemedium,* which roughly equates to for every wrong, a remedy.[3] (Miller and Devins, 1986)The African refugee regime fails to remedy violations with effective and meaningful redress.In *Development v. Guinea*, the African Commission found violations of the African Charter on Human and People's Rights and the African Convention. The Complainant

[3] quoting Blackstone for the proposition that "It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded .... It is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

contended that the widespread sexual violations, looting, expulsions, and other inhuman treatment was meted out to Sierra Leonean refugees after a speech by the President of Guinea urging that the refugees "should be arrested, searched and confined to refugee camps." (*Development v. Guinea,* 2012) The Commission agreed.

It then*recommended* that "a Joint Commission of the Sierra Leonean and the Guinea Governments be established to assess the losses by various victims with a view to compensate the victims." (*Development v. Guinea,* 2012) The Commission, empowered to protect the rights of African's, found gross violations of the legal rights of refugees. Itsremedy was to merely recommend that a commission be set up to assess losses. Neither state is compelled to do so and even if they did so they would not be compelled to redress those loses. Those wronged by Guinea cannot be thought to have been sufficiently remedied by having a proposed commission that would merely discuss their wrongs.

It is now possible to see the extent to which Africa's regional refugee laws are truly exceptional. This exceptionalism begins with the inclusion of a broader definition binding on all signatories of the African Convention. This exceptionalism is extended by including temporary protections and internally displaced persons and by reimagining voluntary repatriation, non-refoulement, and asylum. Despite this exceptional legal framework, Africans suffer refugee harms to the same of greater extent to any other region. This is so because the African refugee regime remains hampered by low levels of regional adjudication, needless procedural delay, and poor remedies. Respecting refugees, the light of Africa's laws far outshines the feeble glow of its realities. Africa is exceptional in its regional refugee laws. It is thoroughly unexceptional in its refugee problems.

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