

# CHAPTER 15

## MOVING THE DEBATE FORWARD: SECURING THE RIGHTS OF REFUGEES UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

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### Abstract

*Refugees and their protection are becoming an out-and-out predicament in Africa. This chapter examines the advances in legal protection that would benefit refugees on the continent focusing on the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention) and the activities of the African Commission on Human and Peoples' Rights (African Commission). The OAU (now African Union) adopted the 1969 Convention to address the challenges faced by refugees in Africa. However, several decades later, the legal protection assured to a refugee in Africa is still a far cry from allowing refugees to reach a fulfilling standard of living. The chapter therefore, particularly centres on the lacunae that erode the legal protection afforded to refugees on the continent, from an international and regional refugee law perspective. It argues that African states should strive to comply with the letter and spirit of the 1951 Convention and the 1969 Convention and persist in upholding their conventional generosity and liberal refugee protection systems in order to offer effective protection to refugees in Africa.*

### 1 Introduction

Protecting the rights of refugees has for many years been a major concern for the international community. The African continent in particular has long been engulfed in refugee protection crisis.<sup>1</sup> The quandary of refugees in Africa is a relic of a continuing bequest of the conflicts, political turmoil,

1 Some of the works recounting this crisis include J Crisp 'No solutions in sight: The problem of protracted refugee situations in Africa' in I Ohta & YD Gebre (eds) *Displacement risks in Africa: Refugees, resettlers and their host population* (2005) 17; R Ramcharan 'The African refugee crisis: Contemporary challenges to the protection of refugees and displaced persons in Africa' (2000) 8 *African Yearbook of International Law* 119; B Rutinwa 'The end of asylum? The changing nature of refugee policies in Africa' (2002) 21 *Refugee Survey Quarterly* 12; G Verdirame & B Harrell-Bond *Rights in exile: Janus-faced humanitarianism* (2005).

human rights violations,<sup>2</sup> poverty, natural disasters and environmental degradation<sup>3</sup> that have inundated the continent and has led to the displacement of millions of people over several decades.<sup>4</sup> In response to this, the Organisation of African Unity (now the African Union) adopted the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention)<sup>5</sup> to fill the gaps left by the 1951 United Nations (UN) Convention Relating to the Status of Refugees (the 1951 Convention). Africa therefore boasts of one of the most innovative and pragmatic refugee protection regimes in the world. Nonetheless, the 1969 Convention remains largely beyond stern examination.<sup>6</sup> Justifiably, attention has been focused on the Convention's notable legal novelty.<sup>7</sup> For almost half a century since its adoption, the discussion has scarcely moved on amid declining standards of refugee protection in Africa.<sup>8</sup>

The ongoing armed conflicts in South Sudan, the brutal insurgencies in Somalia and northeastern Nigeria as well as the economic and political crises in Central African Republic, Burundi and Zimbabwe coupled with the adverse effects of global climatic change such as drought, reduced food production and famine in some parts of Africa<sup>9</sup> have all contributed to the large-scale flow of refugees across Africa. Other contributing factors include socio-economic problems; religious and ethnic tensions; internal conflicts; liberation struggles and civil wars. For decades, refugee-hosting States in Africa have expressed concerns over the economic, social and security implications of receiving large numbers of refugees and its impact

2 The African Union (formerly the Organisation of African Unity) has acknowledged the link between human rights violations and refugee movements. See OAU First Ministerial Conference on Human Rights in Africa, *Grand Bay(Mauritius) Declaration and Plan of Action*, (1999) 11 *African Journal of International and Comparative Law* 352-355.

3 See General Assembly Resolution S-19/2, 7, 9, 73, UN Doc A/RES/S-19/2 (19 September 1997).

4 UN Secretary General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Rep. of the Secretary-General*, paras 7–15, UN Doc A/52/871-S/1998/318 (13 April 1998); T Maluwa *International law in post-colonial Africa* (1999) 171–76.

5 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 10 September 1969, 1001 UNTS 45, 8 ILM 1288 (entered into force 20 June 1974) [*1969 Convention*].

6 M Sharpe 'The 1969 African Refugee Convention: Innovations, misconceptions, and omissions' (2012) 58 *McGill Law Journal* 95.

7 See e.g. G Okoth-Obbo 'Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 79; J Oloka-Onyango 'Human rights, the OAU Convention and the Refugee Crisis in Africa: Forty years after Geneva' (1991) 3 *International Journal of Refugee Law* 453; MB Rankin 'Extending the limits or narrowing the scope? Deconstructing the OAU Refugee definition thirty years on' (2005) 21 *South African Journal of Human Rights* 406.

8 Sharpe (n 6 above).

9 Although there has been improvement in some areas with the advent of the power sharing 'Inclusive Government' in 2011, the overall situation remains of concern. UK Foreign & Commonwealth Office, Human Rights and Democracy: The 2011 Foreign and Commonwealth Office Report, 2012 381-87 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32906/Cm-8339.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32906/Cm-8339.pdf) (accessed 2 May 2017), see generally A Meldrum *Where we have hope: A memoir of Zimbabwe* (2004).

on their capacity to cope.<sup>10</sup> The pull on resources, social cohesion and infrastructure, which has resulted from the so-called refugee burden has led to a more restrictive definition and application of refugee status, especially by the most stable and advanced economies on the continent.<sup>11</sup> Many asylum seekers and refugees are usually categorised as economic migrants and consequently denied refugee status.<sup>12</sup>

Nevertheless, African states have made significant advances in the progressive development of international refugee law despite often lacking the requisite resources to manage their refugee burden.<sup>13</sup> Due to its Pan-African approach, the African refugee regime gives prominence to the concept of asylum, local integration and the principle of *non-refoulement* in dealing with the refugee problem on the continent.<sup>14</sup> This chapter takes issue with the uniqueness of the African conception of asylum, local integration and the principle of *non-refoulement* to explore the developments in the African human rights system regarding the legal protection of refugees. Following the introduction is a discussion on the African refugee crises. Section three examines the advances made in protecting the rights of refugees in Africa emphasising the African Union (AU)'s concepts of asylum, local integration and the principle of *non-refoulement*. In section four, is an analysis of the manner in which the rights of refugees can be effectively protected, followed by a conclusion.

## 2 Legal protection for refugees in Africa: Conceptual issues

Shortly after the UN was formed, the international community introduced conventions, declarations and policies to offer adequate protection<sup>15</sup> to refugees.<sup>16</sup> The legal system protecting refugees is typified by the principle of state sovereignty and the exigent doctrine of humanitarian

10 UN Secretary-General, *Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, UN Doc A/67/205\*-S/2012/715 (27 July 2012, reissued in 19 September 2012) para 56.

11 See C D'Orsi 'Legal aspects of asylum in sub-Saharan Africa: A deadlock or a concrete hope for a better future?' (2010) 7 *Regent Journal of International Law* 223 232–33.

12 GJ Naldi & C D'Orsi, 'The multi-faceted aspects of asylum-law applicable to Africa: Analysis for reflection' (2014) 36 *Loyola of Los Angeles International & Comparative Law Review* 115.

13 Naldi & D'orsi (as above); A Edwards 'Refugee status determination in Africa' (2006) 14 *African Journal of International and Comparative Law* 204 232-33; GJ Naldi *The Organisation of African Unity: An analysis of its role* (1999) 89.

14 See generally OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art 2.

15 The Inter-Agency Standing Committee (IASC) argues that protection comprises all relevant activities targeted at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law. See IASC 'Protection of Internally Displaced Persons: Inter-Agency Standing Committee Policy Paper' (1999) 4.

16 UNHCR 'The 1951 Convention and its 1967 Protocol: The legal framework for protecting refugees' (2010) 2.

considerations derived from international law.<sup>17</sup> Legal protection for refugees can be traced back to the Universal Declaration of Human Rights (Universal Declaration).<sup>18</sup> The critical and continuing refugee problems that confronted Africa in the 1960s such as mass population displacement due to the struggle for independence, drought and famine led the Organisation of African Unity (OAU) to come to the view that the 1951 Convention<sup>19</sup> did not fully meet refugee needs in Africa.<sup>20</sup>

The OAU then adopted the 1969 Convention in 1969 which sought to deal with these problems in an African context. The 1969 Convention has since been an effective regional complement to the 1951 Refugee Convention;<sup>21</sup> it does not seek to rule out the functioning of the 1951 Convention in Africa. To a certain extent, the substantive procedures of protection provided for therein but excluded in the 1969 Convention apply. D'Orsi observes that the 1951 Convention, the 1967 Optional Protocol relating to the Status of Refugees (1967 Protocol) and the 1969 OAU Convention remain the key international human rights instruments for protecting the rights of refugees in Africa.<sup>22</sup> Lomo argues that these instruments guarantee the rights of all refugees to *inter alia* housing<sup>23</sup>, work<sup>24</sup>, education<sup>25</sup> access to the courts<sup>26</sup>, and freedom of movement within the territory<sup>27</sup> and be issued identity and travel documents<sup>28</sup> for refugees, to enable them to live decent lives.<sup>29</sup>

States are obliged to protect these rights since they are applicable to all situations.<sup>30</sup> Protection forms part of an integrated approach to fulfilling the basic needs of refugees and in obtaining full respect for the rights of

17 EA Daes *Status of the individual and contemporary international law: Promotion, protection and restoration of human right at national, regional and international levels* (1992) 34.

18 Universal Declaration, arts 7 & 14 (1).

19 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 (entered into force 22 April 1954) [The 1951 Convention].

20 F Viljoen *International human rights law in Africa* (2007) 254–55.

21 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art 8 (2). The preamble recognises that the UN Convention represents the fundamental instrument relating to the status and treatment of refugees in Africa. *Doebbler v Sudan*, Comm No 235/00, 27th Activity Report 2009, 125 [http://www.achpr.org/files/sessions/46th/communications/235.00/achpr46\\_235\\_00\\_eng.pdf](http://www.achpr.org/files/sessions/46th/communications/235.00/achpr46_235_00_eng.pdf) (accessed 7 April 2017).

22 C d'Orsi 'Strengths and weaknesses in the protection of the internally displaced persons in sub-Saharan Africa' (2012) 77 *Connecticut Journal of International Law* 73.

23 Art 21 of the 1951 Convention.

24 Arts 17, 18 & 19 of the 1951 Convention.

25 Art 22 of the 1951 Convention.

26 Art 16 of the 1951 Convention.

27 Art 26 of the 1951 Convention.

28 Art 27 and 28 of the 1951 Convention.

29 ZA Lomo 'The struggle for protection of the rights of refugees and IDPs in Africa: Making the existing international legal regime work' (2000) 18 *Berkeley Journal of International Law* 6.

30 Lomo, as above.

refugees under international human rights law.<sup>31</sup> António Guterres, the former UN High Commissioner for Refugees (UNHCR) emphasises that:

preserving humanitarian space, granting asylum, strengthening legal and institutional frameworks and achieving durable solutions with a holistic perspective of refugees, human rights and humanitarian protection combined underscores the critical importance of international organisations, governments and the civil society.<sup>32</sup>

From the above, it is obvious that protecting the human rights of refugees is a basic obligation of the state parties to the relevant refugee conventions.<sup>33</sup> Jastram and Achiron outline two conditions that states must meet to effectively protect the rights of refugees. First, the state must adopt domestic refugee legislation and policies that comply with international standards to create a basis for improving the conditions of refugees.<sup>34</sup> Second, it must incorporate international human rights laws into domestic legislation specifically in critical areas where the Refugee Conventions are silent.<sup>35</sup> Meeting these criteria would require states to institute an expert body to examine applications in order to guarantee the availability of procedural safeguards at the various levels to speed up the process.<sup>36</sup> The UNHCR Executive Committee therefore encourages states to promote initiatives that offer durable solutions to ensure that local standards conform to the international normative standards for protection that is also responsive to particular regional and national circumstances.<sup>37</sup>

Thus, the rights of refugees can be effectively safeguarded when states comply with international human rights standards and norms. Furthermore, African States that are signatories of relevant UN conventions have an inherent obligation to incorporate international human rights norms, standards, and good practice in their laws in line with the stated objectives of the UN under the UN Charter.<sup>38</sup> There must also be a national body of experts to ensure compliance and speedy processing of refugee status applications to facilitate prompt local integration. Goodwin-Gill argues that 'protection policies must be derived from the principles, explicit or implicit, in the existing law as developed and interpreted in practice and from the principles of fundamental human

31 *United Nations Relief and Works Agency (UNRWA) 'Interim Programme Strategy 2008-2009'* (2007) 9.

32 A Guterres 'From the Cartagena Declaration to the Brazil Plan of Action: The new frontiers of protection in the Americas' The UNHCR's 57th Lecture of the Americas, Washington DC, 22 April 2015 <http://www.unhcr.org/553a475c9.html> (accessed 2 May 2017).

33 K Jastram & M Achiron 'Refugee protection: A guide to international refugee law' (2001) 5 available at [http://www.ipu.org/pdf/publications/refugee\\_en.pdf](http://www.ipu.org/pdf/publications/refugee_en.pdf) (accessed 2 May 2017).

34 As above.

35 As above.

36 UNHCR (n 16 above) 6.

37 UNHCR Executive Committee Conclusion No 81(k), 1997.

38 Art 1 of the 1945 UN Charter.

rights acknowledged by the international community.<sup>39</sup> This, he contends, has become necessary because 'it appears that protection had lost ground to the politics of solutions and to the even more uncertain politics of migration.'<sup>40</sup> In a different study, Goodwin-Gill argues that 'the conception of the refugee as an unprotected individual should be divorced from the politics of the moment and located in a space where the refugee can be recognised as a person of worth with dignity and basic human rights'.<sup>41</sup> Al Khataibeh and Al-Labady elaborate that the prime goal of refugee law is the protection of the rights of refugees in order to provide them with decent conditions, as well as to create the living conditions that will enable them to find a safe haven in the host country.<sup>42</sup>

Writing on the protection of urban refugees in Dar es Salaam in 1999, Sommers identified, profiled and categorised refugees into four different groups:

- (1) those who have officially registered as refugees and have permission to reside in the cities;
- (2) those who have officially registered as refugees but lack legal rights to live in the cities;
- (3) those who have migrated to the cities to seek asylum at the UNHCR office; and
- lastly (4) those claiming to be refugees but don't have any institutional recognition or protection.<sup>43</sup>

From this, he argues that it is as a matter of preference that many refugees move to the cities because even though refugees are victims they do not aim to remain victimised. Thus, most refugees try to make the best of living during their forced exile instead of waiting passively for several years to be repatriated to their countries of origin. He further emphasises that the often hostile attitudes of most African governments towards refugees makes them susceptible to abuse and argues that their aspirations, rights and socialization or integration should be considered in laws and policies.

A survey conducted by Asylum Access, a refugee rights organisation, revealed that, 'most refugees in Africa often lack legal status due to the fear of being apprehended and imprisoned.'<sup>44</sup> They also argue that this causes other protection challenges such as refugees being exploited by law enforcement officers as well as inadequate access to support services and durable solutions. For instance, although the 2006 Ugandan Refugees Act affords refugees the choice of self-settlement, the government has required

39 S Goodwin-Gill 'The dynamic of international refugee law' (2014) 25 *International Journal of Refugee Law* 651.

40 Goodwin-Gill (as above).

41 GS Goodwin-Gill 'The politics of refugee protection' (2008) 27 *Refugee Survey Quarterly* 8.

42 O Al Khataibeh & F Al-Labady 'Guarantees the protection of the rights of Syrian refugees in Jordan' (2014) 7 *Journal of Politics and Law* 10.

43 M Sommers 'Urbanisation and its discontents: Urban refugees in Tanzania' (1999) 4 *Forced Migration Review* 22.

44 Asylum Access 'No place called home: A report on urban refugee living in Dar es Salaam' (2011) <http://asylumaccess.org/AsylumAccess/wp-content/uploads/2011/11/No-Place-Called-Home.pdf> (accessed 28 August 2015).

the majority of them to go to camps and through other means, has made self-settlement difficult for refugees who opt to reside in the urban centres.<sup>45</sup> Some government officials in Africa have often adopted what may be termed a *de facto* approach of accepting refugees. Kagan describes *de facto* refugees as those who lack recognition for protection and assistance.<sup>46</sup> He posits that *de facto* refugee policy permits refugees to reside in the cities but denies them the rights or processes available to recognised refugees.

Pangilinan highlights that the legal and theoretical rationale for the strict measures that most governments adopt to reduce its refugee population include forced repatriation or outright rejection through closure of their borders.<sup>47</sup> He argues that a government's willingness to adopt alternatives to encampment demonstrates its openness to accept refugees into their cities, provided they meet set requirements. These eligibility requirements include demonstrable self-sufficiency, a place to live and employment.<sup>48</sup> He concludes by highlighting a major challenge faced by refugees: that even if they are willing to forego humanitarian protection and assistance, most of them still prefer to be regarded and treated as refugees rather than ordinary migrants, particularly if doing this permits them to undertake status determination and access resettlement or repatriation assistance.

### 3 Advances in protecting the rights of refugees in twenty-first century Africa

Before unpacking the African refugee regime, there is a need to set out the exact nature of protection afforded to refugees under the 1951 Refugee Convention. The unqualified use of the word 'asylum' can lead to misapprehensions. There is no right to asylum in international law, which only explicitly provides for refugee status. If asylum means granting of permanent residence in a state, that granting of residence is still subject to the discretion of the host state.<sup>49</sup> Although states can grant a right of permanent residence to recognised refugees, refugee status is not

45 KJ Norris 'Livelihood security among refugees in Uganda: Opportunities, obstacles, and physical security implications' (2013) *Independent Study Project (ISP) Collection Paper* 19.

46 M Kagan 'Legal refugee recognition in the urban South: Formal v. *de facto* refugee status' (2007) 24 *Refugee* 11.

47 C Pangilinan 'Implementing a revised refugee policy for urban refugees in Tanzania' (2012) 2 *Oxford Monitor of Forced Migration* 5.

48 J Bernstein & MC Okello 'To be or not to be: Urban refugees in Kampala' (2007) 24 *Refugee* 45.

49 Art 14 of the Universal Declaration of Human Rights, 1948 provide only a right to seek and to enjoy asylum, not a right to asylum. Furthermore, the UDHR is only a General Assembly Resolution and is not automatically legally binding. To be sure, some parts of the UDHR reflect customary international law or have been subsumed within rights in the International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights, but art 14 was not

necessarily permanent.<sup>50</sup> The 1951 Convention offers refugees the right to *non-refoulement* under article 33; in other words, the right not to be sent back to a state where the refugee's life or freedom would be threatened. However, if refugee status is accepted to be declaratory rather than constitutive, as is generally recognised,<sup>51</sup> then preventing a refugee from accessing the status-determination procedures within a state can be the equivalent of *refoulement*. For instance, article 14 of the Universal Declaration of Human Rights, on the right to seek asylum is an indispensable add-on to *non-refoulement*. Additionally, *non-refoulement* is a custom and protects anyone, whose life or freedom would be threatened, not just article 1A(2) refugees who are the beneficiaries of article 33.<sup>52</sup> Customary *non-refoulement* is drawn from article 3 of the UN's Convention against Torture.<sup>53</sup> Returning anyone to a place where they would face torture, inhuman or degrading treatment or punishment would be a breach of a state's international human rights law obligations.

In 1964, some African countries, including Burundi, Tanzania and Uganda realised that they were beset with the problems associated with hosting refugees and that the international community was not giving satisfactory consideration to the problems faced by both the host countries

included in either Covenant and state practice is not sufficiently consistent to suggest that art 14 has achieved customary status. The best that can be said is that aspects of art 14 are necessary for the proper implementation of *non-refoulement*. On the other hand, the draft Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003 Submitted to the President of the European Council in Rome, 18 July 2003 (2003/C 169/01), provides for a right to asylum in Art. II-18 but continues that it shall be 'guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution' – there is no right to asylum in the 1951 Convention.

- 50 See art 1C of the 1951 Convention, especially sub-para (5) 1C. This Convention shall cease to apply to any person falling under the terms of sec A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily reacquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.
- 51 See para 28 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, 1979 (re-edited 1992).28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.
- 52 See E Lauterpacht & D Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in E Feller, V Türk & F Nicholson (eds) *Refugee protection in international law* (2003) 87.
- 53 23 ILM (1984) 1027 and 24 ILM (1985) 535.



and hosted refugees alike.<sup>54</sup> The OAU Council of Ministers set up the Commission on the Problems of Refugees in Africa.<sup>55</sup> This Commission visited the above mentioned countries and subsequently wrote an extensive report on the problems faced by refugees they were hosting. After careful consideration of the findings of the Commission, the OAU Council adopted a resolution that implored the African Group at the United Nations, with the assistance of other interested groups, to put forward a resolution to the UN General Assembly entreating the UNHCR to boost the assistance it was giving to refugees in Africa. The resolution also 'invited the Commission to prepare a Draft Convention on all aspects of the problems faced by refugees in Africa'. Moreover, it appealed to the Administrative Secretary-General 'to circulate the draft Convention to member states of the OAU for their observations and comments'.<sup>56</sup>

The 1969 OAU Refugee Convention was expected to complement the 1951 UN Refugee Convention and focus principally on governing 'the specific aspects of refugee problems in Africa'.<sup>57</sup> Murray posits that<sup>58</sup> 'the adoption of the 1969 Convention could be construed to mean that African countries perceived the 1951 Convention as failing to adequately address some contextual refugee problems in Africa. The OAU considered it indispensable to adopt a convention that would address those problems. One such problem was the mass influx of refugees'.<sup>59</sup> It has been argued that the 1951 Convention was not drafted to deal with the problem of a mass influx of people fleeing various forms of persecution as is habitually the case with African refugees, but rather to deal with persons being persecuted by their countries. Mujuzi contends that this elucidates why the UNHCR had to deal with African refugees in the 1960s by relying on its 'Good Offices' established under the General Assembly Resolution 1673 (XVI) of 18 December 1961 instead of on the definition of a refugee provided by article 1 of the 1951 Convention.<sup>60</sup>

54 JD Mujuzi 'The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights' (2009) 9 *African Human Rights Law Journal* 160-182.

55 Resolution CM/Res 19(II).

56 Resolution CM/Res 36(III) 1964, paras 4-8.

57 Resolution CM/Res 88(VII) 1966. It has been observed that '[t]he growing refugee problem in Africa led to the emergence of a regional refugee instrument, the ... (OAU) Refugee Convention. This contained a broader refugee definition that took into account the possibility of mass influx and generalised fears of violence. However, Deputy High Commissioner Sadruddin Aga Khan spoke with relief when the OAU decided that African states, though members of the OAU Refugee Convention, still needed to accede to the 1951 Convention. He declared that this demonstrated that the Convention had become "more universally recognised" – implying, of course, that it was not before.' See SE Davies 'Redundant or essential? How politics shaped the outcome of the 1967 Protocol' (2007) 19 *International Journal of Refugee Law* 703 718.

58 R Murray 'Refugees and internally displaced persons and human rights: The African system' (2005) 24 *Refugee Survey Quarterly* 57.

59 Mujuzi (n 54 above).

60 As above.

It has been observed that many of the substantive provisions of the 1969 Convention signified a considerable departure from the 1951 Convention. This mirrored the objective of the 1969 Convention as proclaimed by its title to deal with specific aspects of the refugee problem in Africa. Rwelamira postulates that the final text of the 1969 Convention 'advanced for only the specific aspects of the refugee problems in Africa which were not satisfactorily provided for by the 1951 Convention'.<sup>61</sup> Consequently, many of the provisions in the 1969 Convention are seen as innovative.

The 1969 Convention enjoys a large support base from the 45 African states that have signed and ratified<sup>62</sup> it. Many African countries have also adopted national legislation to domesticate the convention. For example, most of this legislation has incorporated the definition of a refugee provided by the 1969 Convention. This definition has been included in the refugee legislation of various African countries, including Angola, Benin, Burkina Faso, Burundi, Central African Republic, Gabon, Congo Brazzaville, Ghana, Lesotho, Liberia, Malawi, Mozambique, Nigeria, Rwanda, Senegal, Somalia, South Africa,<sup>63</sup> Sudan, Tanzania,<sup>64</sup> Uganda<sup>65</sup> and Zimbabwe.<sup>66</sup> This is an indication of the loyalty of these countries to give cause to the convention and to make certain that they offer effective protection to refugees and asylum seekers within their territories.

The 1969 Convention provides a unique definition of a refugee. 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.<sup>67</sup> In contrast, 1969 Convention incorporates the same definition<sup>68</sup> but removes the 1 January 1951 date limitation provided in the 1951 Convention that was

61 MRK Rwelamira 'Some reflections on the OAU Convention on Refugees: Some pending issues' (1983) 16 *Comparative & International Law Journal of Southern Africa* 155-167.

62 Eritrea, São Tomé & Príncipe, the Sahrawi Arab Democratic Republic (SADR), and South Sudan have neither signed nor ratified the 1969 Convention. Morocco is not a party to the convention having withdrawn from the OAU in 1985 after the AU accepted SADR as a member state. Morocco has since rejoined in 2016. Djibouti, Madagascar, Mauritius, Namibia, and Somalia have signed but not ratified the convention.

63 South Africa Refugee Act (1998), sec 3.

64 Tanzania Refugee Act (1998), sec 4.

65 Uganda Refugee Act (2006), sec 4.

66 IC Jackson *The refugee concept in group situations* (1999) 143-176.

67 1951 Convention, art 1A provides: The term "refugee" shall apply to any person who: ... (2) who 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.

68 1969 Convention, art I(1).

later agreed by most states, through the adoption of the 1967 Protocol,<sup>69</sup> to no longer be applicable. Article I(2) of the 1969 Convention provides that:

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.

The UNHCR has been using both definitions in its operations in Africa<sup>70</sup> notwithstanding the comparative easiness in applying article I(2) of the 1969 Convention in the case of mass influxes which is a usual feature of refugee movements in Africa.<sup>71</sup> Practically, it has been observed that states and the UNHCR regularly rely only on article I(2) to recognise refugees in Africa. Article I(2) of the 1969 Convention unequivocally establishes objective principles which are based on the prevailing conditions in the country of origin to determine refugee status.<sup>72</sup> Mandal observes that this objective principles ‘entail neither the elements of deliberateness nor discrimination inherent in the definition of the 1951 Convention’.<sup>73</sup> Furthermore, article I(2) of the 1969 Convention contributed significantly to the drafting and adoption of the 1984 Cartagena Declaration. The Cartagena Declaration recommended the expansion of the traditional definition of a refugee in Latin America to embrace:

persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>74</sup>

The Executive Committee of the UNHCR (ExCom) held that the definition of refugee as provided in the 1951 Convention should be widened to include mass displacement and this was done without using the precise phrasing of article I(2) of the 1969 Convention.<sup>75</sup>

69 Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267, Can TS 1969 No 29 (entered into force 4 October 1967) [1967 Protocol], art 1(2).

70 EO Awuku, ‘Refugee movements in Africa and the OAU Convention on Refugees’ (1995) 39 *Journal of African Law* 81; UNHCR, Executive Committee of the High Commissioner’s Programme, *Note on International Protection*, 45th Session, UN Doc A/AC.96/830, (7 September 1994) at para 32.

71 See Part II.C.

72 P Weis ‘The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa’ (1970) 3 *Revue des droits de l’homme* 455.

73 R Mandal ‘Protection mechanisms outside of the 1951 Convention (‘Complementary Protection’), Legal and Protection Policy Research Series, (Geneva: UNHCR Department of Internal Protection, 2005) 13 <http://www.unhcr.org/435df0aa2.pdf> (accessed 13 April 2017).

74 OAS *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, OR OEA/Ser.L/V/II.66/Doc.10, rev.1 (1985) chapter V(IV), ‘Declaration of Cartagena’ at para 3.

75 R Greenfield ‘The OAU and Africa’s refugees’ in Y El-Ayouty & I W Zartman (eds) *The OAU after twenty years* (1984) 224.

It is also trite that the 1969 Convention advanced an individual right to asylum. Asylum is 'the foremost and most basic of the needs of a refugee and to grant him or her asylum represents the preliminary requirement for him or her to enjoy all the other rights'.<sup>76</sup> However, the 1951 Convention does not create any individual right to asylum. Conversely, the Universal Declaration protects the right of individuals to 'seek and to enjoy asylum'<sup>77</sup> but fails to recognise any individual right to asylum under international law. In 1981 however, the African Charter became the first international law instrument to give recognition to the right of persecuted individuals to 'seek and obtain asylum'.<sup>78</sup> The broad consensus is that the grant of asylum is within the restricted discretion of states since they have no responsibility to do so. Individual refugees have no right to asylum analogous to their right to 'seek and to enjoy' provided by the Universal Declaration.<sup>79</sup> While the 1969 Convention mirrors this consensus, it nevertheless appreciably 'strengthens the institution of asylum'<sup>80</sup> by providing that:

Member States of the OAU shall use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.<sup>81</sup>

This call on states to grant asylum is 'a further inroad into customary international law which tended to regard the grant of asylum as an exclusive right of the sovereign state,' but is 'certainly not a right to be enforced by an individual against a state'.<sup>82</sup> Thus, the 1969 Convention continuously advances but does not enshrine an individual right to asylum.<sup>83</sup> It characterises the grant of asylum as a 'peaceful and humanitarian act' that 'shall not be regarded as an unfriendly act by any Member State'.<sup>84</sup>

The 1969 Convention contributed to the advancement of the principle of *non-refoulement* especially its role in advancing a modest individual right

76 O Goundiam 'African Refugee Convention' (1970) 2 *Migration News* 9.

77 GA Res 217(III)(A), UNGAOR, 3d Sess, UN Doc A/810, (1948) 71, art 14(1). See generally Edwards, 'Human rights, refugees, and the right "to enjoy" asylum' (2005) 17 *International Journal of Refugee Law* 293.

78 27 June 1981, 1520 UNTS 217, art 12(3), 21 ILM 58 (entered into force 21 October 1986).

79 See Goodwin-Gill & McAdam, (n 15 above) 358; P Weis 'The United Nations Declaration on Territorial Asylum' (1969) 7 *Canadian Yearbook of International Law* 92 137-39.

80 R Hofmann 'Refugee law in the African context' (1992) 52 *Heidelberg Journal of International Law* 324.

81 1969 Convention (n 2 above), art II(1). Presumably, 'well-founded reasons' must be read as referring to both the art I(1) and art I(2) refugee definitions, despite the fact that only art I(1) explicitly includes a requirement that the reasons for flight be well-founded.

82 Rwelamira (n 61 above) 170.

83 See R Murray *Human rights in Africa: From the OAU to the African Union* 2004) at 189

84 1969 Convention (n 2 above), art II(2).

to asylum. The position of the 1969 Convention on the principle of *non-refoulement* as a key characteristic of the concept of asylum is to some extent very significant. The principle of *non-refoulement* protects a person from being returned to a state where there is an actual likelihood that he or she may face persecution or torture. Several international refugee<sup>85</sup> and human rights instruments<sup>86</sup> have codified this principle or have had it read into them by judicial and quasi-judicial treaty monitoring bodies. It has been argued that the principle of *non-refoulement* has obtained the status of customary international law.<sup>87</sup> This normative standard as expressed by article 33(1) of the 1951 Convention proscribes states from returning a refugee to a frontier where his or her life faces real risk or he or she faces persecution because of his or her race, religion, nationality, membership of a particular social group, or political opinion. Article 33 however permits a national security exception to this rule.

The provision on *non-refoulement* in the 1969 Convention borrows heavily from article 3(1) of the UN Declaration on Territorial Asylum.<sup>88</sup> The 1969 OAU Convention provides:

no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in article I, paragraphs 1 and 2.<sup>89</sup>

This provision is more expansive than the provision on *non-refoulement* in the 1951 Convention in two main respects. Firstly, the provision on *non-refoulement* in the 1969 Convention does not incorporate a national security exception. Nevertheless, it does not make *non-refoulement* absolute as has been argued by most scholars.<sup>90</sup> Per articles I(4)(f) and (g), the application of the 1969 Convention and therefore the protection from *refoulement* ceases when the person concerned engages in a serious crime of non-political nature outside the country of asylum after being admitted as a refugee or seriously violates the objectives and purposes of the convention. The implication of this is that the 1969 Convention, similar to the 1951 Convention, permits expulsion in limited situations despite dealing with

85 1951 Convention (n 10 above), art 33; 1969 Convention (n 2 above), art II(3).

86 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, art 3, Can TS 1987 No 36 (entered into force 26 June 1987); International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 7, Can TS 1976 No 47 (entered into force 23 March 1976).

87 Lauterpacht & Bethlehem, (n 52 above) 140-63; JC Hathaway 'Leveraging asylum' (2010) 45 *Texas International Law Journal* 503.

88 See Weis (n 72 above) 457.

89 1969 Convention (n 2 above), art II(3).

90 G Abi-Saab 'The admission and expulsion of refugees with special reference to Africa' (2000) 8 *African Yearbook of International Law* 71 90; R Murray 'Refugees and internally displaced persons and human rights: The African system' (2005) 24 *Refugee Survey Quarterly* 57.

the latter rather obliquely.<sup>91</sup> Secondly, the provision of *non-refoulement* as enshrined in the 1969 Convention is applicable at frontiers while the 1951 Convention lacks such an explicit provision. Consequently, it has been argued that the principle of *non-refoulement* under the 1969 Convention is wider than the 1951 Convention.<sup>92</sup> The international refugee regime has, however, been aligned to the principle of *non-refoulement* as enshrined in the 1969 Convention. Goodwin-Gill and McAdam posit that 'by and large, States in their practice and in their recorded views have recognised that *non-refoulement* becomes applicable at the moment when an asylum seeker presents himself or herself for entry either within a State or at its border.'<sup>93</sup> For that reason, the conception of *non-refoulement* in the 1969 Convention is not necessarily more expansive than that of the 1951 Convention as far as their applicability at frontiers is concerned.

The 1969 Convention also formalised responsibility-sharing, temporary protection and voluntary repatriation which are significant aspects of refugee law. Article II(4) provides that:

where a Member State finds it difficult 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.<sup>94</sup>

This provision clearly expresses the concept of responsibility-sharing since such 'appropriate measures' may include financial support, inter-country resettlement, and political responsibility-sharing. However, Durieux and Hurwitz contend that each possible means of responsibility-sharing has been inhibited in practice because most African states have inadequate resources.<sup>95</sup>

#### **4 A step towards refugee rights protection: African Commission on Human and Peoples' Rights**

Another significant contribution of the African human rights system to international refugee law is the rich jurisprudence and activities of the African Commission on Human and Peoples' Rights (the African Commission). Article 30 of the African Charter sets up the African

91 RM D'Sa 'The African refugee problem: Relevant international conventions and recent activities of the Organisation of African Unity' (1984) 31 *Netherland International Law Review* 388.

92 NS Okogbule 'The legal dimensions of the refugee problem in Africa' (2004) 10 *East African Journal of Peace & Human Rights* 184.

93 GS Goodwin-Gill & J McAdam *The refugee in international law* (2007) 208.

94 1969 OAU Convention, art II(4).

95 JF Durieux & A Hurwitz 'How many is too many: African and European legal responses to mass influxes of refugees' (2004) 47 *German Yearbook of International Law* 105.

Commission and article 45 mandates it to promote and protect the rights and liberties of African peoples on the continent as provided in the African Charter. The African Commission is further sanctioned to interpret human rights treaties and conventions in the African human rights system, which has been ratified by Member States. On this basis, the African Commission is authorised to interpret the 1969 Convention. Nevertheless, it is worth noting that the 1969 Convention was adopted a number of years prior to the adoption of the African Charter. The African Commission is further empowered, under articles 55 and 56, to receive individual communications claiming violations of any of the rights enshrined in the African Charter.

Through the individual communications mechanism,<sup>96</sup> the African Commission has developed a rich jurisprudence on various human rights and fundamental freedoms that are pertinent to the rights of refugees under the African Charter.<sup>97</sup> One such communication in which the African Commission dealt with the rights of refugees is the *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*.<sup>98</sup> In this communication, the complainant claimed that on 9 September 2000, the president of Guinea, Lansana Conté publicly declared on national radio that Sierra Leonean refugees residing in Guinea must be detained, investigated and restricted to refugee camps. The communication alleged that this speech impelled security officers, including police and military officials, as well as civilians to discriminate against refugees of Sierra Leonean origin and that this violated article 2 of the African Charter. It further claimed that Guinean security officials forcefully evicted Sierra Leonean refugees from their homes and refugee camps amidst widespread looting and extortion against them due to the same speech. In essence, the complainant claimed that the speech provoked security officials and civilians alike to team up against refugees of Sierra Leonean origin both inside and outside refugee resettlement camps. This led to widespread violence and abuse ranging from rape and physical assaults to shootings, which eventually resulted in 'countless deaths of refugees through these attacks with others sustaining permanent scars as reminders of their time in Guinea.'<sup>99</sup>

As would have been expected, the complainant did not claim that the government of Guinea had failed to comply with its commitment under the 1969 Convention and or the 1951 Convention. Nevertheless, the

96 Under arts 47 to 54, the African Commission has the mandate to entertain inter-state communications. However, at the time of writing this chapter, the African Commission had only dealt with one inter-state communication, *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004).

97 For a detailed discussion of the jurisprudence developed by the African Commission, see F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 385.

98 (2004) AHRLR 57 (ACHPR 2004).

99 20th Activity Report of the African Commission on Human and Peoples Rights, Annex IV, 132, para 4.

African Commission relied on its mandate under article 60 read with article 12(5) of the African Charter to find that Guinea had violated rights enshrined in these international refugee conventions. The African Commission pragmatically contended, in respect of the mass expulsion of the refugees on the grounds of their nationality, that this conduct is not only unlawful and prohibited by the African Charter but also violates the other legal instruments to which Guinea is a State Party.<sup>100</sup> Consequently, the Republic of Guinea was held to be duty bound to protect all persons against discrimination as provided in article 4 of the 1969 Convention, article 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 3 of the 1951 Convention.

Aside from its jurisprudence, the African Commission has passed a range of resolutions calling upon some State Parties to respect the rights of refugees. Examples of such resolutions include one that called on Zaire (now the Democratic Republic of Congo) to respect the rights of refugees in that country during the then conflict,<sup>101</sup> and later a similar resolution passed on Sudan.<sup>102</sup> A Memorandum of Understanding has also been signed between the African Commission and the UNHCR at the instance of the Commission with the intention to protect the rights of refugees in Africa.<sup>103</sup> The Memorandum of Understanding includes modalities to guide the implementation of the document that requires both institutions to appoint a focal person for advancing and protecting the rights of refugees in Africa.

At its 34th ordinary session, the African Commission appointed Bahame Tom Mukirya Nyanduga to act as the Focal Person on Refugees and Displaced Persons in Africa, an office that was later upgraded to Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa. The Special Rapporteur carried out various activities in promoting and protecting the rights of refugees and other forced migrants. For instance, in November 2008, the Special Rapporteur issued a statement condemning the xenophobic attacks that occurred in South Africa in 2008 and suggested a variety of measures that could be adopted by the South Africa government to protect migrant workers.<sup>104</sup> The Special Rapporteur further closely examined the condition of refugees and

100 20th Activity Report of the African Commission on Human and Peoples' Rights, Annex IV, 132, para 4.

101 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 (entered into force 22 April 1954) [1951 Convention] Annex IV.

102 The African Commission issued a resolution condemning the xenophobic attacks in South Africa; see Resolution on the Situation on Migrants in South Africa, ACHPR/Res 131 (XXXIII) 8 May 2008 [http://www.achpr.org/english/resolutions/resolution131\\_en.htm](http://www.achpr.org/english/resolutions/resolution131_en.htm) (accessed 9 March 2017).

103 16th Annual Activity Report of the African Commission Annex IV art I. For the history and details of this memorandum, see Murray (n 58 above) 61-62.

104 16th Annual Activity Report of the African Commission Annex IV art I. For the history and details of this memorandum, see Murray (n 3 above) 61-62. The report of Activities by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period from May to November 2008 (November 2008,



their rights in armed conflict and fragile countries and condemned the violation of refugee rights in those countries.<sup>105</sup> On the situation of refugee rights in the Democratic Republic of Congo, the Special Rapporteur emphatically expressed disapproval of ‘the calculated attack and emptying of a resettlement camps hosting 50 000 refugees and IDPs in that country’.<sup>106</sup> This is just a cursory discussion of some of the general activities of the African Commission pertinent to the promotion and protection of refugee rights in Africa.

## 5 Conclusion

The chapter discussed the advances made in protecting the rights of refugees in the African human rights system. It provided a brief description of the refugee problem in Africa and background to the adoption of the 1969 Convention. It has been illustrated that the 1969 Convention is innovative and addresses the unique challenges faced by refugees and hosting states in Africa. It also observes that the African Commission has put in place various measures to promote and protect refugee rights, ranging from the appointment of the Special Rapporteur to entertaining individual communications. It, however, argues that whereas the African Commission has considered various communications alleging violations of refugee rights, it has leaned more towards relying on the African Charter than the 1969 Convention.

Discussing the legal protection of refugees in Africa would not be complete without underscoring the relevance of finding sustainable solutions to the root causes of refugee production and flows. Conflicts, political crises and natural disasters are the dominant causes of forced displacement in Africa. This requires African states to take vigorous and pragmatic measures to prevent conflicts or to resolve political crises swiftly. Wide-ranging strategies for addressing the root causes of refugee flows should be put in place. This includes dealing with issues such as ethnic strife and conflicts, establishing firm foundations for democratic

paras 1 & 2: <http://www.achpr.org/english/Commissioner%27s%20Activity/44th%20OS/Special%20Rapporteurs/IDPs.pdf> (accessed 3 March 2017). See Resolution on the Situation of Migrants in South Africa (n 102 above). 16th Annual Activity Report of the African Commission Annex IV art I. For the history and details of this memorandum, see Murray (n 58 above) 61-62.

105 Eg, it is reported that ‘Commissioner Bahame Nyanduga reported on the situation of refugees, asylum seekers and IDPs and Migrants in Africa, in particular in countries affected by conflicts, namely, the DRC, Darfur-Sudan, Central African Republic, Chad, Somalia, Northern Uganda and Côte d’Ivoire. He observed that the conflict in these countries impacts negatively on the human rights of these people, in particular women and children.’ See 23rd Activity Report of the African Commission para 76. See also 24th Activity Report of the African Commission paras 167–171. He has also monitored the human rights situation in Burundi and the plight of Liberian refugees in Ghana and that of Saharawi refugees in Algeria. See 24th Activity Report of the African Commission paras 164-166.

106 *Report of Activities* (n 102 above) para 9.

governance, respect for human rights and the promotion of shared economic growth and social progress.

The African refugee situation should not be seen as intractable as there are many success stories such as the large-scale repatriations of millions of refugees through the resolution of several conflicts during the cessation of hostilities and signing of peace agreements. Several thousands of refugees have returned home to Angola, Burundi, Liberia, Mozambique, Namibia and Sierra Leone, and South Africa. African states should thus strive to comply with the letter and spirit of the 1951 Convention and 1969 Convention as well as persist in upholding their conventional generosity and liberal refugee protection systems. African governments must boldly defy enticement to whittle down the standards and obligations set out in international refugee protection laws through domestic legislation, policies and practices.