

## The 1969 OAU Convention and the continuing challenge for the African Union

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**Forty years after the OAU Convention on Refugees came into force, the dismal state in which refugees in Africa find themselves these days raises the question as to whether the Convention has lived up to expectations.**

Shortly after independence, many states in Africa were faced with the challenge of nation building along with the need to protect, assist and find durable solutions for refugees displaced by the wars of liberation and the struggle against apartheid in South Africa. The Organization of African Unity (OAU) was established in 1963<sup>1</sup> and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Refugee Convention) was enacted in 1969 and came into force in 1974. The primary concern then was the large number of Africans fleeing conflict arising from the struggles against colonialism. As then President of Tanzania, Mwalimu Julius Nyerere said: "We saw refugees coming out of colonial countries and our idea was, treat these people well."<sup>2</sup> It was not expected that after independence there would still be refugees – nor internally displaced persons (IDPs), who do not even feature in the OAU Convention.

In much of Africa what followed were internal conflicts; Angola, Mozambique, Uganda, Sierra Leone, Liberia and Rwanda are only a few examples. While recent years have seen the progressive return of peace and stability to those parts of the continent that were troubled then (and as a result many of the refugees and IDPs have been able to return home), at the same time new conflicts have emerged: in DRC, South Sudan, Egypt and Tunisia, and more recently in Mali and the Central African Republic, and in Somalia a never-ending war that has morphed into an atrocious politico-religious conflict. Thus while Africa succeeded in freeing itself from the yoke of colonialism, the continent has yet to free itself from its own transgressions. In all of this, large numbers of people are displaced,

many of them in static and protracted situations spanning years and in some cases decades. Unlike in the years leading up to independence, the leading causes of forced displacement in Africa today are largely home-grown, although on occasion there may be external factors influencing the situation.

The OAU Convention was enacted for the receiving countries to set the standard for the treatment of refugees in those countries and did not address itself to events in the country of origin.<sup>3</sup> But in most of Africa these days, refugees are not welcomed with the exuberant sense of solidarity that surrounded the promulgation of the OAU Convention. Instead, African states are increasingly following the lead of other regions by closing their borders and threatening to forcibly return those who have made it into their territories. Even in those countries where refugees are readily admitted and positive policies towards them are in force, their treatment is not always in keeping with the Convention. Previously such treatment was by states alone but today it is also the treatment by the general public that is the concern as hosting communities have become increasingly hostile to the refugees. In South Africa, for instance, where only recently many of its own citizens were themselves refugees for many years, xenophobic behaviour and intolerance towards refugees have become commonplace.

Since the rise of international terrorism, security has taken the prime position in the consideration of asylum for refugees. This development threatens the very survival of the institution of asylum in Africa. In the early part of the Convention's 40 years, the concern about security was largely to do with

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Antonio and his wife, sister and granddaughter are about to return home from DR Congo to Angola, 40 years after Antonio was originally displaced. Even if the family has many questions about their new life in Angola, their joy is far greater than their apprehension. "I am so moved to go back that I can't stop my tears. I will dance when we arrive at the border," said Antonio's sister Maria. Despite living as a refugee in a foreign country for 40 years, there is no question of where Antonio feels he belongs. "Angola is my home – it's my country," he says. (August 2014)

suspected subversive military and political activities perpetrated by refugees on their countries of origin. The Convention carries specific provisions addressing this concern, including an explicit stipulation prohibiting such subversive activities.<sup>4</sup> Early legislation on refugees also sought to control them and protect the receiving state. Not only is this posture increasingly threatening to make a forceful come-back but it also will probably be accompanied by more flagrant cases of *refoulement*. While states have a duty to protect themselves from harm, carrying out that duty should not justify the infringement of commitments made in the Convention.

### Performance so far

In discussing the 40 years of its existence, it is not the OAU Convention itself that is in review but performance of the States Party in achieving the initial expectations and vision of the Convention. When the Convention was adopted in Addis Ababa in September 1969, coming into force in June 1974, there was much acclamation about its timeliness and importance. The welcome for the Convention was supported by the international community, among them humanitarian actors,

human rights activists, academics and the rest of civil society. What was expected to follow was its implementation and, where there was reluctance on the part of States Party, a nudging by the international community to do so. It is fair to observe, however, that while the latter has diligently done its part in pushing for full implementation, States Party have largely reneged on their commitment.

The above notwithstanding, a few countries in Africa still strive to meet their obligations. Ethiopia, for instance, has adopted – and practises – an open-door policy towards refugees. Between 2009 and 2014 the country received nearly 450,000 refugees and in 2009 introduced an 'out-of-camp' policy according to which refugees are allowed to live outside camps provided they are able to support themselves. Originally applicable only to refugees from Eritrea, this policy is now applicable also to refugees of other nationalities who qualify. Ethiopia has admitted the refugees in the face of very difficult local challenges, such as the overwhelming impact on its fragile environment. Uganda too practises an open door policy and has, for instance, offered

refugees land to cultivate. These examples represent some of the good practices which should be encouraged.

The majority of countries hosting refugees in Africa, if not all of them, are poor to start with. Their resources are hardly sufficient to cover even the basic needs of their own people. The effect on these countries of hosting refugees is their constant refrain, many pointing to the negative consequences of their generous act. This also represents a challenge to the principle of burden sharing, about which the Convention states, "Where a member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU [African Union] and such Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum."<sup>5</sup>

This laudable principle remains an area in which more could have been done but with most States Party in similar socio-economic circumstances, and with the realities of geography, it would not be easy to re-distribute refugees among the countries. Perhaps it is time to explore other options, such as those discussed in the 1980s under the International Conference on Assistance to Refugees in Africa (ICARA)<sup>6</sup> when projects were launched with the objective of attracting donor interest for what was known at the time as refugee aid and development.

### Solutions

The existence of a mechanism to predictably and reliably convert refugee status into a properly arranged and enduring solution is required not only in relation to the countries that are currently taking refugees for resettlement but in relation to African countries as well. In the earlier days of the Convention, there were efforts to achieve this. In southern Africa at the time, refugees entering Swaziland from South Africa were immediately airlifted to destinations in Tanzania, Zambia and Uganda. There was also the commendable offer of resettlement

places by Burkina Faso and Benin. But there have been no recent similar initiatives by African states to relocate refugees from one to another in the spirit of burden sharing. States Party who are in a position to do so should be encouraged to consider receiving eligible African refugees for resettlement.

To give refugees hope and a tangible future, a provision allowing for employment was included in the Convention. The continuing overwhelming imposition of reservations on this provision and on its twin – freedom of movement – is not healthy. It is the obstinacy in maintaining these reservations on the Convention that is partly responsible for the secondary movement by refugees in search of livelihoods. In some cases, the concerns or contextual factors that led a State Party to enter these reservations have since disappeared. The reservations, however, have tended to remain in force, thereby undermining the strength of the protection regime. This is not what African states should be aspiring to. If nothing is done, many more refugees will simply move on in an irregular manner in search of a better life.

### Recognition of refugee status

Under the 1951 UN Convention definition many of the refugees hosted by Ethiopia in the early days would have had to prove well-founded fear of persecution on an individual basis in order to be recognised as such. However, Ethiopia granted them recognition via the *prima facie* mechanism which is intrinsic in the OAU Convention definition when dealing with an overwhelmingly large number of asylum seekers. Although the *prima facie* mechanism for refugee status determination was not the creation of the OAU Convention, nevertheless the OAU Convention has incidentally helped to promote a faster alternative to the slower and sometimes cumbersome process of individual status determination.

By providing legal cover for their consideration as refugees, the OAU Convention has surreptitiously covered even those fleeing environmental catastrophes

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such as drought and famine. In this case, the Convention has also operated as a human rights protection safety net for those who would otherwise ordinarily be denied it, although the Convention is silent as to whether victims of natural disasters can legitimately be considered as refugees. Moreover, with the refugee definition in the 1951 Convention remaining focused on the individual, by providing for this wider protection the OAU Convention has lived up to the general needs of the continent, even though the era of decolonisation in which it was conceived and enacted has long passed. Thus the real value that the OAU Convention has added in the last 40 years is that focus (in the definition) on the objective circumstances which compel flight and not linking the flight to the individual asylum seeker's subjective interpretation of danger arising from events around his or her person.

It is that added value that was borrowed and applied to the dilemma faced in the mass refugee exodus during the war in the Balkans, and that has been the inspiration for other similar legal projects such as the Cartagena Declaration. In return, the OAU Convention could learn from the Cartagena Declaration's discussion of generalised violence, internal aggression and massive violations of human rights.

Forty years on, the OAU Convention has remained the first reference point when addressing refugee problems in Africa itself and has considerably influenced the domestic legislation of most countries on the continent. Instead of the refugee-control-focused domestic legislation that the newly independent states in Africa were promulgating, the emphasis has shifted to the management of refugee matters.

The Convention has most recently had much to do with the development of the 2009 African Union Convention on the Protection and Assistance to Internally Displaced Persons in Africa (the 2009 Kampala Convention) since the OAU Convention itself does not cover the protection and assistance

needs of IDPs. In May 2006 a proposal was made by AU Member States to amend the OAU Convention to include provisions that would also address the protection and assistance of IDPs. When that idea was floated, there was opposition, not least from UNHCR, that held the view that the proposal posed serious risks to the integrity of the Convention.

While this may have saved the integrity of the OAU Convention and led to the Kampala Convention, it also represents a missed opportunity to take a critical look at the OAU Convention and if necessary adjust it to bring it to where it may need to be 40 years after its coming into force. That the Convention was not perfect and that it had its shortcomings must have been quite clear at the time of its adoption. Even so, it has not undergone any amendment and remains the same document that it was in 1969 even if the times have changed considerably and there have been calls for its review for some time.

There is a need to revisit the OAU Convention – to take another look at its provisions, including its definition of a refugee, in light of today's Africa, and ensure that it continues to reflect the actual situations which today cause people to flee. The times may have changed but the needs remain. To the hypothetical question as to what would happen were the OAU Convention to be annulled, the answer would most likely be that another one would have to be enacted.

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**Nothing in this paper reflects the official position of UNHCR and the author is wholly and solely responsible for the views expressed here.**

1. The Organisation for African Unity (OAU) has since morphed into the African Union (AU).
2. 'Africa: Innocence lost': in an interview for UNHCR *Refugees* magazine, 1999.
3. With the exception of Article V which sets out principles on voluntary repatriation.
4. Article 3.
5. Article II (4).
6. Held in the 1980s under the auspices of the UN, UNHCR and OAU.