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Engaging with refugee protection? The Organization of African Unity and African Union since 1963

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Introduction

Evaluations of the extent and efficacy of Organization of African Unity (OAU) and African Union (AU) engagement with refugee protection seem to depend on who stands in judgment. Not surprisingly, the impression given by officials is one of a highly engaged and effective organisation:

As a continental organization, the OAU has been sensitizing its Member States as well as the international community at large to the plight of refugees and displaced persons. The OAU continues to provide education, employment and resettlement opportunities to refugees. In situations of large influxes of refugees, the OAU has made material and financial contributions to Member States confronted with the problem of assisting refugees, returnees and displaced persons upon recommendations by the Commissioners. ... In recent years, the OAU has embarked upon promoting and strengthening the capacity of African non-governmental organizations ... Some of them have received financial assistance from the OAU to enable them to carry out their projects in favour of refugees, returnees and displaced persons. ... In the same vein, the OAU has been promoting cooperative partnerships with some sub-regional organizations.¹

Academics have been less generous in their assessments, seizing in particular on the OAU's failure to work systematically for the implementation of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa² (the 1969 Convention or the Convention). Oloka-Onyango, for example, notes,

there is no monitoring mechanism established by OAU (save for the limping Bureau for Refugees), that can effectively pursue the matter of adherence to the principles of the Convention, or indeed monitor the laws and practices of member States in this regard.³

Such divergent views stem in part from the lack of exhaustive accounts of OAU and AU engagement with refugee protection. Indeed, that the two quotes above address different aspects of the regional body's engagement with refugee protection is a function of the almost complete dearth of material on the subject.⁴ Despite the fact that Africa hosts almost a quarter of the world's refugees⁵ and is the only region of the developing world to have adopted a

¹ EM Ngung, 'The Role of Regional and Sub-Regional Organizations in Situations of Conflict and Displacement' (1999) 18 RSQ 97, 99–100; Ngung was the Director of the OAU's Bureau for Refugees, Displaced Persons and Humanitarian Affairs; see 'The Bureau for the Placement and Education of African Refugees' below.

² Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

³ Joe Oloka-Onyango, 'Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva' (1991) IJRL 453, 459.

⁴ Chapter 7 in Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) is a notable exception.

⁵ US Committee for Refugees and Immigrants, 'World Refugee Survey 2009' (2009 US Committee for Refugees and Immigrants)

<<http://www.refugees.org/article.aspx?id=2324&subm=179&area=About%20Refugees&>> accessed 20 December 2010. According to the US Committee for Refugees and Immigrants, at 31 December 2008 there were 2,941,000 refugees in Africa, of a global refugee population of 13,599,900.

legally binding refugee instrument, the limited impartial evaluations of the refugee work of the organisation responsible for adopting that instrument are either out of date⁶ or focus on only one discrete aspect of engagement.⁷

Informed by this existing body of secondary sources, primary archival and interview research conducted at the headquarters of the United Nations High Commissioner for Refugees (UNHCR) in Geneva⁸ and by primary OAU and AU materials, this paper attempts to consolidate knowledge of OAU and AU engagement with refugee protection from the time of the continental organisation's founding in 1963 up to the present day.⁹ It begins with an overview of each organisation.

The paper's third section is devoted to the OAU, beginning with a general history of what was the first and remains perhaps the most significant continental achievement in the field of refugee protection, the adoption of the 1969 Convention.¹⁰ All efforts that followed the Convention's adoption were anchored in it. Each is addressed in turn in its own sub-section, beginning with an overview of OAU bodies for refugee protection: the Commission of Ten (later of Fifteen, then of Twenty and finally of all member states) on Refugee Problems in Africa; the Bureau for the Placement and Education of African Refugees (BPEAR or the Bureau); and the Coordinating Committee (later the Coordinating Committee on Assistance to Refugees (CCAR)).

Select special refugee protection initiatives, in the form of conferences and summits, are then addressed. A final sub-section relates to legal instruments in addition to the 1969 Convention of relevance to refugees and adopted under the auspices of the OAU, namely the African Charter on Human and Peoples' Rights¹¹ (African Charter or the Charter) and the African Charter on the Rights and Welfare of the Child¹² (Children's Rights Charter).

The fourth section of the paper relates to the AU, the OAU's successor organisation. It begins with a discussion of AU refugee protection bodies: the Permanent Representatives Committee's (PRC) Sub-Committee on Refugees; the Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons (CCAPRRI); and the

⁶ See Philip E Chartrand, 'The Organization of African Unity and African Refugees: A Progress Report' (1975) 137 *World Aff* 265; Rose D'Sa, 'The African Refugee Problem, Relevant International Conventions and Recent Activities of the Organization of African Unity' (1984) 31 *NILR* 378; Richard Greenfield, 'The OAU and Africa's Refugees' in Y El-Ayouty and IW Zartman (eds), *The OAU After 20 Years* (Praeger 1984).

⁷ See Joe Oloka-Onyango, 'The Place and Role of the OAU Bureau for Refugees in the African Refugee Crisis' (1994) 6 *IJRL* 453.

⁸ This paper is a working draft. The final version will reflect forthcoming primary research at the AU Commission and UNHCR's regional office, both in Addis Ababa, and at the African Commission on Human and Peoples' Rights in Banjul.

⁹ This paper is concerned with OAU and AU activities. For an analysis of the organisations' evolving policy towards refugees, see Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21 *RSQ* 12; Murray (n 4) 201–227.

¹⁰ An analysis of the 1969 Convention as such is beyond the scope of this paper. For articles devoted to the 1969 Convention, see, for example, George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *RSQ* 79; Micah Bond Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On' (2005) 3 *S Afr J Hum Rts* 406; Marina Sharpe, 'The 1969 Refugee Convention: Innovations, Misconceptions and Omissions' (forthcoming).

¹¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 *ILM* 58.

¹² African Charter on the Rights and Welfare of the Child (adopted July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49.

Department of Political Affairs' Division of Humanitarian Affairs, Refugees and Displaced Persons (HARDP). The second sub-section focuses on select special refugee protection initiatives, again in the form of conferences and summits. Finally, an additional legal instrument of relevance to refugees and adopted under the auspices of the AU—the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹³ (Women's Rights Protocol)—is discussed.

The African Commission on Human and Peoples' Rights (African Commission or the Commission), having been formed under the OAU and persisted under the AU, is the subject of the paper's last substantive section. This is followed by a final concluding section. While this paper is primarily focused on describing the range of OAU and AU efforts on behalf of refugees, the conclusion will, in general terms, assess the overall effectiveness of OAU and AU engagement with refugee protection.

The OAU and AU

The Organization of African Unity (OAU) was established on 25 May 1963 to promote regional cooperation among newly independent African states. More specifically, the organisation's Charter¹⁴ lists its purposes as promoting the unity and solidarity of African states; co-ordination and co-operation among them to improve the lives of African peoples; defending their sovereignty, territorial integrity and independence; eradicating all forms of colonialism; and promoting international co-operation.¹⁵ Added to these goals were those of the Abuja Treaty¹⁶ establishing the African Economic Community, which since 1994 was a second legal basis of OAU operations.

Despite these lofty goals, the OAU was not created as a legislative body. Rather, OAU objectives were to be carried out primarily through the harmonisation of member states' policies.¹⁷ This was to occur through the Assembly of Heads of State and Government (AHG), the OAU's 'supreme organ',¹⁸ the role of which was to 'discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization'.¹⁹

The work of the AHG was to be operationalised by the Council of Ministers (CM or the Council), composed of member states' foreign or other ministers and charged with implementing AHG decisions and coordinating inter-African co-operation in accordance with AHG instructions.²⁰ In addition to the AHG and the CM, the OAU was also composed of a General Secretariat and a Commission of Mediation, Conciliation and Arbitration.²¹ Other bodies followed later in the organisation's development. For example, in 1993 the

¹³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005).

¹⁴ Charter of the Organization of African Unity (25 May 1963) 479 UNTS 39 (OAU Charter).

¹⁵ OAU Charter (n 14) art II.

¹⁶ Treaty Establishing the African Economic Community (adopted 3 June 1991, entered into force 12 May 1994) 30 ILM 1241.

¹⁷ Tiyanjana Maluwa, 'International Law Making in the Organization of African Unity: An Overview' (2000) 12 *Afr J Intl Comp L* 201, 201.

¹⁸ OAU Charter (n 14) art VIII.

¹⁹ *ibid.*

²⁰ OAU Charter (n 14) art XIII.

²¹ OAU Charter (n 14) art VII.

Mechanism of Conflict Prevention, Management and Resolution was established.²² Composed of representatives of member states, the Mechanism was formed to prevent future conflicts and to engage in peace building for those that were on-going.²³

The OAU, however, eventually came to be viewed as ineffective. Zard explains that the OAU's 'strict adherence to the principle of non-intervention and its subordination to state interest, combined with chronic financial difficulties, often precluded the organization from asserting any form of moral authority or leadership in tackling some of Africa's chronic problems'.²⁴ Such was especially the case in the face of modern challenges facing the continent.

Having focused on decolonisation and liberation from minority rule and committed to the principle of non-interference in the internal affairs of member states,²⁵ the OAU was not equipped to deal with contemporary issues such as economic growth and conflict. The first major move to revitalise the regional organisation came in 1999 with the Sirte Declaration, which set out plans to establish what would become the AU.²⁶ This new body was born—superseding the OAU and incorporating the African Economic Community—on 26 May 2001, with the entry into force of its Constitutive Act.²⁷

The AU's objectives, as set out in its Constitutive Act, were more comprehensive than those of its predecessor. It aims to achieve unity and solidarity among African states and peoples; defend the sovereignty, territorial integrity and independence of its member states, accelerate African political and socio-economic integration; promote and defend common African positions; encourage international co-operation; promote peace, security and stability, democracy and good governance and human and peoples' rights; foster strong African participation in the global economy and international relations; promote sustainable development, the integration of African economies and co-operation in all fields of human activity; co-ordinate and harmonise policies across the various regional economic communities; promote research; and engage in international co-operation for public health.²⁸

The machinery to achieve this broad range of goals is more extensive than that of the OAU. The AU is composed of: the Assembly of Heads of State and Government, which determines common policies; the Executive Council, which is composed of ministers or other authorities designated by member states and coordinates such policies; the AU Commission, which is the regional body's secretariat and handles eight discrete portfolios;²⁹ the PRC, which prepares

²² Organization of African Unity (Assembly of Heads of State and Government), 'Declaration on the Establishment, Within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution' (OAU Cairo 28-30 June 1993).

²³ See Chris J Bakwesegha, 'The Role of the Organization of African Unity in Conflict Prevention, Management and Resolution' (1995) 7 *IJRL* 207; Jeremy Levitt, 'Conflict Prevention, Management, and Resolution: Africa—Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the OAU, ECOWAS, SADC and IGAD' (2001) 11 *Duke J Comp & Intl L* 39.

²⁴ Monette Zard, 'African Union' in Matthew Gibney and Randall Hansen (eds), *Immigration and Asylum From 1900 to the Present* (ABC-CLIO 2005) 5, 6–7.

²⁵ OAU Charter (n 14) art III(2).

²⁶ Organization of African Unity (Assembly of Heads of State and Government), 'Sirte Declaration' (OAU Sirte 9 Sept 1999) AHG/Draft/Decl (IV) Rev 1.

²⁷ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 (AU Constitutive Act).

²⁸ AU Constitutive Act (n 27) art 3.

²⁹ Peace and security; political affairs; infrastructure and energy; social affairs; human resources, science and technology; trade and industry; rural economy and agriculture; and economic affairs.

the work of the Executive Council; the Peace and Security Council, which makes decisions on the prevention, management and resolution of conflicts; the Pan-African Parliament, which is the AU's legislative arm, whose members are elected by the legislatures of AU member states; the Economic, Social and Cultural Council, an advisory organ composed of social and professional groups from member states; the Court of Justice, which adjudicates disputes between member states stemming from AU legal instruments; the Specialized Technical Committees, which assist the Executive Council in substantive matters; and the financial institutions, which are the African Central Bank, the African Monetary Fund and the African Investment Bank. The AU also includes ad hoc bodies, such as the Panel of the Wise, a panel of five eminent persons drawn from each of the continent's regions with a mandate to prevent conflict.

OAU engagement with refugee protection: 1963 to 2002

It becomes clear from the above that the AU's explicit focus on human rights was not a feature of its predecessor. However, this did not prevent what is arguably Africa's most significant achievement in the field of refugee protection—the 1969 Convention—from emerging out of the OAU. Indeed, while refugee issues are today often viewed through the lens of human rights, the attention paid by the OAU to refugees was very much a product of its concern with liberating Africa from colonialism and minority rule. Nyanduga explains,

[t]he 1969 OAU Convention was adopted by African States at a time in history when the continent was gripped by the struggle for liberation, following the independence of many African States in the late 1950s and the 1960s. A considerable number of African States continued to be under colonial and foreign domination. Most of southern Africa was ruled by white racist regimes. ... The struggle for independence and liberation in Africa prior to and after the creation of the OAU had forced the outflow of people from their territories escaping colonial oppression and foreign domination. While in exile, many of these people organized movements for the freedom and liberation of their countries. Freedom was won peacefully in many cases, while several African States won their independence through armed struggle. It is thus inevitable that historically, refugee outflow in Africa cannot be divorced from the struggle against oppression, both foreign and internal.³⁰

An overview of the important legal instrument that arose from this context and, subsequently, its drafting history, begins the inventory of OAU engagement with refugee protection.

The drafting and adoption of the 1969 Convention

Despite the OAU's status as a largely co-ordinating, as opposed to legislative, body, it could nevertheless engage in international law making through the adoption of multi-lateral treaties. The 1969 Convention is one such instrument, governing the legal protection of refugees in Africa. It is relatively short, containing a preamble and 15 articles. The first article provides two refugee definitions. The first mirrors that found at article 1A(2) of the 1951 Convention

³⁰ Bahame Tom Mukirya Nyanduga, 'Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 *German YB Intl L* 85, 86.

relating to the Status of Refugees³¹ (1951 Convention), minus the 1 January 1951 date limit that most states later agreed, by way of a Protocol³² (1967 Protocol), not to apply. The second definition provides,

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.³³

Article I also includes paragraphs on cessation³⁴ and exclusion.³⁵ Each paragraph closely follows the 1951 Convention, with three additions. The additional two cessation clauses provide that the 1969 Convention shall cease to apply to any refugee who has ‘committed a serious non-political crime outside his country of refuge *after* his admission to that country as a refugee’³⁶ or has ‘seriously infringed’ the 1969 Convention’s purposes and objectives.³⁷

A further point of distinction is that the 1969 Convention does not include the clause present in the 1951 Convention mitigating against cessation in respect of a refugee who can ‘invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality’.³⁸ The additional exclusion clause adds ‘acts contrary to the purposes and principles of’ the OAU as a further ground of exclusion.³⁹

Article II relates to asylum. States are urged to grant it and it is characterised as a ‘peaceful and humanitarian act’ that ‘shall not be regarded as an unfriendly act by any Member State’.⁴⁰ Article II also provides for *non-refoulement*,⁴¹ responsibility sharing among African states,⁴² temporary protection⁴³ and that refugees who find asylum in states contiguous to their country of origin shall be settled at a reasonable distance from the border.⁴⁴ The third article articulates refugees’ duty to respect the laws and regulations of the host state, echoing article 2 of the 1951 Convention, and prohibits them from engaging in subversive activities against any OAU member state.

Article III is operationalised by the cessation clause described above, which terminates the refugee status of an individual who commits a serious non-political crime after the acquisition of such status. Article IV on non-discrimination in the application of the Convention follows article 3 of the 1951 Convention, however discrimination is prohibited

³¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

³² Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 1(2).

³³ 1969 Convention (n 2) art I(2).

³⁴ 1969 Convention (n 2) art I(4).

³⁵ 1969 Convention (n 2) art I(5).

³⁶ 1969 Convention (n 2) art I(4)(f) (emphasis added).

³⁷ 1969 Convention (n 2) art I(4)(g).

³⁸ 1951 Convention (n 31) art 1C(5).

³⁹ 1969 Convention (n 2) art I(5)(c).

⁴⁰ 1969 Convention (n 2) art II(2).

⁴¹ 1969 Convention (n 2) art II(3).

⁴² 1969 Convention (n 2) art II(4).

⁴³ 1969 Convention (n 2) art II(5).

⁴⁴ 1969 Convention (n 2) art II(6).

on the additional grounds of nationality, membership of a particular social group or political opinion.⁴⁵

The fifth article relates to voluntary repatriation. Article VI, like article 28 of the 1951 Convention, mandates contracting states to provide refugees with travel documents. Articles VII and VIII relate to state cooperation with the OAU and UNHCR, respectively. Article VIII(2) provides that the 1969 Convention ‘shall be the effective regional complement in Africa’ of the 1951 Convention. The final seven articles are technical provisions.

Work on the issue of refugee protection in Africa began very soon after the OAU’s formation, as evidenced by a 1964 resolution of the CM’s Second Ordinary Session in Lagos. The resolution established an ad hoc commission consisting of ambassadors to the OAU from Burundi, Cameroon, Congo-Léopoldville (as it then was), Ghana, Nigeria, Rwanda, Senegal, Sudan, Tanganyika (as it then was) and Uganda (the Commission)⁴⁶ to examine ‘(a) the refugee problem in Africa and make recommendations to the Council of Ministers on how it can be solved; [and] (b) ways and means of maintaining refugees in their country of asylum’.⁴⁷

The process this resolution ultimately gave rise to is the subject of varied and conflicting accounts, in part because there are no official *travaux préparatoires* for the 1969 Convention.⁴⁸ These accounts can, for ease of analysis, be divided into two categories. On the one hand are commentators on the 1969 Convention who address its drafting history only briefly, without reference to primary sources. They tend to note that the OAU’s interest in a regional refugee instrument was the result of the failure of the persecution-based 1951 Convention refugee definition to reflect African realities.⁴⁹ On the other hand is the handful of writers who have addressed the 1969 Convention’s drafting history in some depth.⁵⁰ Such accounts have consistently attributed the motivations behind the 1969 Convention to two factors:

[t]he first of these was the problem of subversive activities and the other the date line contained in Article 1A(2) of the 1951 Convention. The latter meant that whatever was the legal scope of application of the 1951 Convention, it did not apply to the new refugee situations which had arisen in Africa.⁵¹

The primary research conducted for this paper confirms this latter account. In particular, that early drafts of the 1969 Convention include only the 1951 Convention refugee definition

⁴⁵ The 1951 Convention prohibits discrimination on the grounds of race, religion or country of origin ((n 31) art 3).

⁴⁶ The Commission later became known as The Commission of Ten on Refugee Problems in Africa; see ‘The Commission of Ten/Fifteen/Twenty on Refugee Problems in Africa’ below.

⁴⁷ Organization of African Unity (Council of Ministers), ‘Resolution on the Problem of Refugees in Africa’ (OAU Lagos 24-29 February 1964) CM/Res 19 (II).

⁴⁸ Okoth-Obbo (n 10) 86.

⁴⁹ Okoth-Obbo (n 10) 109; see, for example, Ousmane Goundiam, ‘African Refugee Convention’ [1970] *Migr News* 3, 8; Jennifer L Turner, ‘Liberian Refugees: a Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (1994) 8 *Geo Immigr LJ* 281, 286; Jennifer Hyndman and Bo Victor Nylund, ‘UNHCR and the Status of Prima Facie Refugees in Kenya’ (1998) 10 *IJRL* 21, 34–35.

⁵⁰ Louise W Holborn, *Refugees: A Problem of our Time-The Work of the United Nations High Commissioner for Refugees, 1951-1972*, vol I & II (Scarecrow Press 1974) 183–188; Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 177–196; Okoth-Obbo (n 10) 109–112.

⁵¹ Okoth-Obbo (n 10) 109–110.

(without the dateline) confirms that dissatisfaction with it was simply not a factor initially motivating the adoption of a regional instrument.⁵² Until around the time the 1967 Protocol was adopted, work on the 1969 Convention was directed at making the 1951 Convention *applicable in Africa*; only later would addressing refugee issues *particular to Africa* become an explicit objective. Thus some authors have characterised the motivations behind the 1969 as existing in a hierarchy:

The principle objective of the OAU Refugee Convention is to ensure the security and peaceful relations among OAU member States, particularly in cases where the presence of refugees causes inter-State tension. The second objective was to complement the 1951 Convention with its temporal and geographical limitations. Finally, the drafters intended to address the refugee challenges peculiar to Africa. The concern was that the 1951 Convention did not include refugees displaced from countries ruled by colonial powers and white racist regimes.⁵³

With these first two concerns—‘that refugees might use countries of asylum as bases from which to seek the overthrow of the regimes from which they had fled’⁵⁴ and that the 1951 Convention then applied only to refugees in flight from events that had occurred before 1 January 1951—in mind, the Commission proceeded to draft its first report. Drawn up in Addis Ababa in 1964, the report became ‘guiding principles for OAU’s action in favour of refugees’.⁵⁵ The principles, many of which are reflected in the 1969 Convention, included the following:

1. Refugees who wish to return to their countries of origin must be helped to do so under the most peaceful and normal of conditions with a view to their complete integration.
2. In the countries of refuge, refugees must be settled, as far as possible, a long way from the frontiers of their countries of origin, for obvious security reasons, as much for the sake of the refugees themselves as for the countries of origin and of refuge.
3. The term ‘refugee’ will be limited to citizens of countries, the political, social, racial, or religious conditions of which have brought about a need for expatriation through fear or oppression, imprisonment or other similar difficulties.
4. Countries of refuge must in no case allow refugees to attack their country or origin. In the same way the countries of origin must not consider the harbouring of refugees as an unfriendly gesture, and must desist from any

⁵² Jackson also makes this point ((n 50) 181).

⁵³ Jacob van Garderen and Julie Ebenstein, ‘Regional Developments: Africa’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011) 188; it should be noted that there was never any geographical limitation preventing the 1951 Convention from applying in Africa. Article 1B(1) of the 1951 Convention allows states to opt out of its geographical limitation to Europe upon signature, ratification or accession.

⁵⁴ UNHCR, *The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 54; see also, Organization of African Unity (Assembly of Heads of State and Government), ‘Declaration on the Problem of Subversion’ (OAU Accra 21-25 October 1965) AHG/Res 27 (II).

⁵⁵ Ngung (n 1) 97.

attack on the countries of refuge through the media of press or radio or by resorting to arms.

5. Countries which have a refugee problem must begin or continue bilateral negotiations, with a view to solving all the difficulties likely to arise by peaceful means and in accordance with the principles and objectives of the Organization of African Unity [including] the principle of the settlement of refugees away from the border.⁵⁶

In addition, the Commission's report recommended that the OAU 'draft a special convention on the status of African refugees'.⁵⁷

At its Third Ordinary Session, held in Cairo in July 1964, the CM took note of the report and, further to it, invited the Commission to 'draw up a draft Convention covering *all aspects* of the problem of refugees in Africa'.⁵⁸ The CM requested that the draft, once complete, be circulated by the OAU's Administrative Secretary General to member states, with a view to considering the draft and comments thereon at its Fourth Ordinary Session. The CM also recommended that the Commission become a permanent OAU body.⁵⁹ Thus began work on the first draft of the 1969 Convention, known as the Kampala draft, after the Commission's meeting there in 1964.

The Kampala draft 'employed the form and much of the working of the 1951 Refugee Convention, although it eliminated the dateline contained therein'.⁶⁰ Moreover, while the draft was very similar to the 1951 Convention, it was in many respects far less liberal.⁶¹ This posed a significant problem for UNHCR. Jahn, then Deputy Director of UNHCR's legal division, summarised the concerns of his office as follows:

there are omissions which, from the point of view of the international protection of refugees, are undesirable. The Draft does not contain any provision on such elementary rights as wage-earning employment, elementary education, public relief, labour legislation and social security. It does not stipulate freedom of movement and is makes the issuance of travel documents merely optional and gives less protection against expulsion.⁶²

Similarly, in a letter of July 1965, the Deputy High Commissioner wrote,

[w]e are concerned at possibility of African Regional Convention which departs from universal 1951 Convention and provides substantially lesser standard of treatment for African refugees as for example on wage earning employment and expulsion. ... Moreover believe present draft would

⁵⁶ Cited in Holborn (n 50) 853–854.

⁵⁷ Holborn (n 50) 185.

⁵⁸ Organization of African Unity (Council of Ministers), 'Resolution on the Commission on the Problem of Refugees in Africa' (OAU Cairo 13-17 July 1964) CM/Res 36 (III) (emphasis added).

⁵⁹ *ibid.*

⁶⁰ Chartrand (n 6) 270.

⁶¹ Holborn (n 50) 186.

⁶² Eberhard Jahn, 'Development in Refugee Law in the Framework of Regional Organizations Outside Europe' (1966) 4 Association for the Study of the World Refugee Problem Bulletin, 82.

seriously jeopardise protocol or other instrument to extend effects 1951 Convention to post dateline refugees.⁶³

Most concerning was perhaps draft article 31, which provided that the African refugee convention would supersede all preceding bilateral and multilateral agreements relating to refugees.⁶⁴ Holborn explains that ‘the emergence of an instrument which in any sense superseded or competed with the 1951 Convention would seriously impair the universal character of the Convention which the UNHCR had spent years fostering’.⁶⁵ This concern is reflected in a letter from the then UNHCR representative in Tanzania to the then Deputy High Commissioner, which notes, ‘if the 1951 Convention was denounced by the African states, a refugee from an African state would have more rights in a European country than in an African brother country, which could hardly be the intention of the OAU’.⁶⁶

UNHCR shared its concerns with OAU officials—notably Assistant Secretary General Sahnoun—and member states, encouraging the latter to transmit comments on the Kampala draft that would reflect them.⁶⁷ UNHCR also moved to make an all-encompassing regional instrument unnecessary. Indeed, ‘[t]he High Commissioner’s interest in seeking the rapid adoption of the [1967] Protocol was partly stimulated by the efforts of the member states of the Organization of African Unity ... to draft their own regional convention on refugees’.⁶⁸ Thus while the OAU was working on an African refugee convention, UNHCR convened the Bellagio Colloquium, the work of which ultimately led to the adoption of the 1967 Protocol.⁶⁹

The Kampala draft was presented to the CM’s Fourth Ordinary Session, held in Nairobi in February and March 1965. Likely prompted by the state comments UNHCR had encouraged, the Council ultimately shared UNHCR’s view that the draft suffered serious shortcomings. Accordingly, it established a committee of legal experts (the Committee of Legal Experts) to revise it.⁷⁰ The experts were nominated by the ten states represented on the Commission and were instructed to meet prior to 30 July 1965 in order to have the revised draft convention ready in time for consideration at the CM’s Fifth Ordinary Session.

The OAU’s Assistant Secretary General suggested that UNHCR should provide the Committee of Legal Experts with a draft convention to serve as a basis for its work. A memo authored by UNHCR’s Jahn and titled ‘Action to be taken by the Legal Division in connection with the Draft Convention relating to the Status of Refugees in Africa’ explains,

Ambassador Sahnoun thought that since the Draft Convention relating to the Status of Refugees in Africa as it now stands [the Kampala draft], appears neither to meet the aims for which such an instrument was first envisaged by the OAU, nor to be in full harmony with the world-wide 1951 Convention, it would be preferable that the Committee of Legal Experts, when it meets in July 1965, does not adopt this Draft Convention. He rather had in mind a legal instrument much more concise and much more specifically relevant to

⁶³ Letter dated 14 July 1965, UNHCR archives, fonds 1/5/11/1.

⁶⁴ UNHCR memo dated 29 April 1965, UNHCR archives, fonds 1/5/11/1.

⁶⁵ Holborn (n 50) 185.

⁶⁶ Letter dated 5 July 1965, UNHCR archives, fonds 1/5/11/1.

⁶⁷ UNHCR memo dated 21 May 1965, UNHCR archives, fonds 1/5/11/1.

⁶⁸ UNHCR (n 54) 56.

⁶⁹ Holborn (n 50) 185–186.

⁷⁰ Organization of African Unity (Council of Ministers), ‘Resolution on the Problem of Refugees’ (OAU Nairobi 26 February–9 March 1965) CM/Res 52 (IV).

Africa; he described a ‘Protocole d’Accord’ which should regulate relations between Member States with regard to refugee problems in Africa; it should inter alia deal with asylum (not a hostile act), with the obligations of refugees and of asylum countries, with the problem of voluntary repatriation, with the possibility of settling problems between Member States in conformity with Article XIX of the OAU Charter. ... Ambassador Sahnoun said he would be very pleased if, on a very confidential basis, we could prepare for him a draft of such a Protocol which, after careful study by the Secretariat, could be proposed to the Committee of Legal Experts and to the Member States as a OAU Secretariat paper.⁷¹

Such a document was produced by UNHCR, annexed to a ‘Note Submitted by the United Nations High Commissioner for Refugees on Measures Being Examined Within the Framework of the Organization of African Unity for Regulating Refugee Problems Between Member States’.⁷² However, according to UNHCR’s representative in Léopoldville (now Kinshasa), where the committee of legal experts met in July 1965, ‘under the prevailing circumstances, it was completely impossible’ to have it adopted.⁷³ Indeed, the second draft convention, known as the Léo draft, was far from the *Protocole d’Accord* suggested by Sahnoun.

Rather, the Léo draft ‘largely followed ... the 1951 United Nations Refugee Convention, although the various standards of treatment provided for were not the same’.⁷⁴ Specifically, it contained a refugee definition, which reproduced the 1951 Convention definition without the dateline (article 1) and provisions concerning the general obligations of refugees (article 2); prohibition of subversive activities (article 3); non-discrimination (article 4); religion (article 5); rights granted apart from the convention (article 6); the term ‘in the same circumstances’ (article 7); exemption from reciprocity (article 8); exemption from exceptional measures (article 9); provisional measures (article 10); residence prior to the Convention (article 11); refugee seamen (article 12); personal status (article 13); moveable and immovable property (article 14); artistic rights and industrial property (article 15); right of association (article 16); access to courts (article 17); wage-earning employment and self-employment (article 18); liberal professions (article 19); identity papers (article 20); travel documents (article 21); fiscal charges (article 22); transfer of assets (article 23); refugees unlawfully in the country of refuge (article 24); expulsion (article 25); prohibition of expulsion or return (article 26); naturalisation (article 27); and executory and transitory provisions (articles 28–38).⁷⁵

With these provisions, the Léo draft ‘came closer to the wording of the 1951 Convention but still failed to win OAU approval because, in the eyes of many OAU members, it on the one hand, overlapped with the 1951 Convention and, on the other, was still far less liberal than the 1951 Convention since it reduced its standards’.⁷⁶ In the words of the OAU’s Sahnoun, ‘*l’impression qui se degage ici de plus en plus, est qu’en fait la convention adoptee à Léopoldville est encore moins libérale que la convention générale*’.⁷⁷ Similarly, UNHCR’s view of the Léo draft—like its opinion of the earlier Kampala draft—was that it would ‘dangerously impair the universal value of the principles of the 1951 Convention, and would

⁷¹ Memo dated 15 May 1965, UNHCR archives, fonds 1/5/11/1.

⁷² Dated June 1965, UNHCR archives, fonds 1/5/11/1.

⁷³ Memo dated 21 July 1965, UNHCR archives, fonds 1/5/11/1.

⁷⁴ Jackson (n 50) 180.

⁷⁵ Léopoldville draft, UNHCR archives, fonds 1/5/11/1.

⁷⁶ Chartrand (n 6) 270.

⁷⁷ Letter dated 27 July 1965, UNHCR archives, fonds 1/5/11/1.

hinder efforts currently being undertaken to extend the Convention's scope'.⁷⁸

With the OAU, many of its member states and UNHCR in agreement about the Léo draft's shortcomings, the two organisations worked together to move the drafting process forward. The OAU's Administrative Secretary General prepared a report for the October 1965 AHG meeting in Accra, highlighting the concerns his organisation and UNHCR shared. With the benefit of the OAU report, the AHG rejected the Léo draft and requested that the Commission 'provide legal experts at the highest level possible to re-examine the draft OAU convention on the status of refugees having regard to the views expressed by the Assembly at its present session and to report back to the Assembly'.⁷⁹ The AHG also requested that OAU member states that had not already done so 'ratify the United Nations Convention relating to the Status of Refugees and ... apply meanwhile the provisions of the said Convention to refugees in Africa'.⁸⁰

According to Jackson, this request 'can be taken as the first clear indication that the African refugee convention should not cover the same ground as the 1951 Convention, the overriding character of which was implicitly recognised'.⁸¹ Similarly, the then High Commissioner explained in his October 1965 statement to ExCom that most delegations at the Accra meeting had agreed that instead of creating a convention 'covering all aspects of the problem of refugees in Africa', the OAU should 'recognise the universal principles of the 1951 Convention and supplement the latter with a view to regulating certain aspects of the refugee problems peculiar to the region in particular in so far as they concern relations between member states'.⁸² Thus it was recognised that the regional instrument should not duplicate its international counterpart, but rather should address refugee problems particular to Africa.

Despite the consensus that emerged from the Accra meeting, the third draft convention, known as the Addis Ababa draft after the Committee of Legal Experts' September 1966 meeting there, 'still tended to cover the same ground as the 1951 Convention, though its provisions were more liberal than those of the preceding drafts and it contained new articles felt to be essential for dealing with the refugee situations in Africa'.⁸³ Jackson describes the Addis Ababa draft as being shorter than its predecessor because a number of the Léo draft's provisions corresponding to articles in the 1951 Convention were omitted.⁸⁴ Specifically, the Addis Ababa contained a preliminary conflict clause providing,

- (1) [i]n all matters relating to the status, condition and treatment of refugees Member States shall, save as hereinafter provided, apply the provisions of the convention relating to the status of Refugees signed in Geneva on 28 July 1951, irrespective of the dateline and of any geographical limitation.
- (2) Should the provisions of this Convention conflict with any of those of

⁷⁸ Jackson (n 50) 181.

⁷⁹ Organization of African Unity (Assembly of Heads of State and Government), 'Resolution on the Problem of Refugees in Africa' (OAU Accra 21-25 October 1965) AHG/Res 26 (II).

⁸⁰ *ibid*; this call was reiterated several times, next in Organization of African Unity (Council of Ministers), 'Resolution on the Problem of Refugees in Africa' (OAU Kinshasa 4-10 September 1967) CM/Res 104 (IX).

⁸¹ Jackson (n 50) 182.

⁸² UNHCR 'Statement by the High Commissioner to the 15th Session of the Executive Committee of the High Commissioner's Programme' (29 October 1965) A/AC.96/310.

⁸³ Holborn (n 50) 187.

⁸⁴ Jackson (n 50) 182.

the Convention of 28 July 1951, the provisions of this Convention shall prevail.⁸⁵

It went on to provide a refugee definition replicating that of the 1951 Convention and including a second clause outlining factors to consider in determining whether the African convention would apply *prima facie* to groups of refugees. Other provisions related to asylum (article III); general obligations (article IV); prohibition of subversive activities (article V); extradition (article VI); rights granted apart from the Convention (article VII); repatriation (article VIII); wage-earning employment and self-employment (article IX); liberal professions (article X); identity papers (article XI); travel documents (article XII); co-operation of the national authorities with the OAU and UNHCR (article XIII); and settlement of disputes (article XIV).

Like the Kampala and Léo drafts before it, the Addis Ababa draft failed to win the CM's support. At its Seventh Ordinary Session, held in October and November 1966 in Addis Ababa, the Council handed the job of drafting the African refugee convention over to the OAU Secretariat.⁸⁶ Furthermore, it expressed in no uncertain terms the consensus that had emerged informally from the Accra AHG, noting its desire 'that the African instrument should govern the *specifically African aspects of the refugee problem* and that it should come to be the *effective regional complement* of the 1951 United Nations Universal Convention on the Status of Refugees'.⁸⁷

This approach was inspired in part by the fact that by the time of the CM's Seventh Ordinary Session, the 1967 Protocol was well on its way to adoption, meaning that the 1951 Convention would soon be legally applicable in Africa.⁸⁸ Holborn describes the Council's Seventh Ordinary Session as 'a turning point in the drafting of the OAU Convention; from then on drafts almost totally omitted any reference to matters already covered in the 1951 Convention and concentrated instead on matters particularly affecting refugees in Africa'.⁸⁹

The Secretariat presented its draft convention, now the fourth to come before the CM, to that body's Ninth Ordinary Session, held in Kinshasa in September 1967. By this time, the 1967 Protocol had received three of the six accessions it needed to enter into force.⁹⁰ The imminent applicability of the 1951 Convention in Africa did not, however, obviate the need for a regional instrument. OAU member states agreed in Kinshasa that in light of its now complementary character, the regional convention remained necessary in order to address refugee situations specific to Africa.⁹¹

Furthermore, certain African states—notably Nigeria and Uganda—were critical of the 1967 Protocol because, while it removed the 1951 Convention's temporal limitation, it failed to address refugee protection concerns particular to their region.⁹² Yet while it was agreed that

⁸⁵ Cited in Jackson (n 50) 183.

⁸⁶ Holborn (n 50) 187; Organization of African Unity (Council of Ministers), 'Resolution on the Adoption of a Draft Convention on the Status of Refugees in Africa' (OAU Addis Ababa 31 October-4 November 1966) CM/Res 88 (VII).

⁸⁷ OAU (n 86) (emphasis added).

⁸⁸ Okoth-Obbo (n 10) 110.

⁸⁹ Holborn (n 50) 187.

⁹⁰ Holborn (n 50) 188.

⁹¹ *ibid.*

⁹² Sara E Davies, 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) 19 *IJRL* 703, 724–725.

an African refugee convention remained necessary, the Council did not accept the Secretariat's draft, and the Committee of Legal Experts was sent back to work on what would be the fifth and final, draft of the regional refugee convention.

An important source of inspiration to the Committee of Legal Experts in its final push on the convention—especially regarding the refugee definition—was the October 1967 Conference on the Legal, Economic and Social Aspects of African Refugee Problems,⁹³ jointly held in Addis Ababa by the United Nations Economic Commission for Africa (UNECA), UNHCR, the OAU and the Dag Hammarskjöld Foundation. The conference report⁹⁴ contained 13 official recommendations, five of which 'were directed at legal aspects of the African refugee problems and were to have an important effect upon the shaping of the OAU Refugee Convention during the final stage of its drafting'.⁹⁵

One such recommendation 'was the first occasion on which the view was *officially* expressed that the 1951 Convention definition—while universally applicable—might not be sufficient to cover all refugee situations in Africa'.⁹⁶ Specifically, recommendation II advised African countries that a new definition should be found for the term 'refugee', taking into account the specific aspects of the refugee situation in Africa.⁹⁷ Such 'specific aspects' were largely the result of persistent colonial domination and minority rule on the continent:

the question of whether the African Convention extends protection to persons engaged in military struggle remains a controversial one. ... This issue was discussed at length at the Conference on the Legal, Economic and Social Aspects of African Refugee Problem held in Addis Ababa in 1967. General consensus existed that the question of freedom fighters was intricately linked to the question of subversion. While support of freedom fighters intent on overthrowing a government of an independent African state could not conceivably be condoned in any way, it was accepted unreservedly that in a spirit of African solidarity it was the duty of every African country to assist freedom fighters who were fighting for the liberation of the African continent from colonial or racial domination. Such persons had no duty to abstain from activities aimed at overthrowing the internal structures in these colonial or minority-regime dominated countries. At any rate, African solidarity and the principles of the OAU as expressed in its Charter, clearly state that in seeking freedom for the African Continent, it is legitimate, indeed imperative to assist liberation movements. It was

⁹³ L-G Eriksson, G Melander and P Nobel, *An Analysing Account of the Conference on the African Refugee Problem, Arusha, May 1979* (Scandinavian Institute of African Studies 1981) 11; Greenfield (n 6) 222.

⁹⁴ UNECA and others, 'Final Report of the Conference on the Legal, Economic and Social Aspects of the African Refugee Problems' December 1968.

⁹⁵ Chartrand (n 6) 276.

⁹⁶ Jackson (n 50) 187 (emphasis added, as Egypt made this point unofficially at a 1964 Cairo meeting of the Asian-African Legal Consultative Committee (AALCC). There it expressed reservations about the inability of the 1951 Convention's refugee definition to cover those fleeing their country for generalised reasons. The AALCC's refugee work is described in Eberhard Jahn, 'The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees' (1967) 27 *Heidelberg J Intl L* 122).

⁹⁷ The Egyptian delegation, supported by several others, followed up on the view it had first expressed at the 1964 AALCC meeting and specifically requested that this definition apply to refugees obliged to flee from their country due to aggression or subversion coming from outside their homeland (Jackson (n 50) 189).

against this background that Article 1(2) was added to the general refugee definition taken from the 1951 Convention.⁹⁸

At its Tenth Ordinary Session held in Addis Ababa in February 1968, the CM took note of the conference report and drew the attention of member states and of the OAU's Administrative Secretary General to its recommendations.⁹⁹

The Committee of Legal Experts met in Addis Ababa in June 1968 to produce the fifth draft convention. They were provided by the OAU Secretariat with a report and, annexed thereto, a second Secretariat-produced draft, to serve as a basis for their work.¹⁰⁰ In light of the 1967 conference's second recommendation and the CM's endorsement of it, this Secretariat draft included the 1951 Convention refugee definition plus a second definition in which 'external aggression and occupation, foreign domination or internal subversion'¹⁰¹ were considered legitimate causes of flight. The Secretariat draft also included a clause governing the regional instrument's relationship to the 1951 Convention. It provided,

[i]n accordance with Resolution AHG/Res.26, Member States shall, save as herein provided, apply the provisions of the U.N. Convention of 26 July 1951 relating to the status of refugees, irrespective of the dateline and of any geographical limitation as provided in the Protocol on the Status of Refugees of 31 January 1967.¹⁰²

The Committee of Legal Experts maintained the Secretariat's draft with only minor revisions, including to its extended refugee definition. Specifically, it replaced the word 'subversion' with 'disorder', considering 'subversion' to be ambiguous,¹⁰³ and abandoned the Secretariat draft's concept that someone could become a refugee within their own country.¹⁰⁴ The clause relating to the relationship between the regional instrument and its global counterpart was also amended to read, 'Member States shall apply the provisions of the United Nations Convention of 28 July 1951 relating to the Status of Refugees, as modified by the Protocol on the Status of Refugees of 31 January 1967',¹⁰⁵ thereby eliminating the words 'save as herein

⁹⁸ Medard RK Rwelamira, 'Some Reflections on the OAU Convention on Refugees: Some Pending Issues' (1983) 16 Comp & Intl LJ S Afr 155, 169.

⁹⁹ Organization of African Unity (Council of Ministers), 'Resolution on the Problem on Refugees in Africa' (OAU Addis Ababa 20-24 February 1968) CM/Res 141 (X).

¹⁰⁰ 'Report of the Administrative Secretary-General for the Meeting of the OAU Commission on Refugees Held in Addis Ababa from 17th to 23rd June 1968', UNHCR archives, fonds 1/5/11/1.

¹⁰¹ *ibid*; the Secretariat's draft definition as a whole provides, '[t]he term 'refugee' shall also apply to every person who, owing to external aggression and occupation, foreign domination or internal subversion on a part of or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence whether inside or outside his country of nationality in order to seek refuge in another place within or outside his country or origin or nationality'.

¹⁰² OAU (n 100) art IX(2).

¹⁰³ Jackson (n 50) 190; presumably 'disorder' somehow eventually became the 1969 Convention's 'events seriously disturbing public order'.

¹⁰⁴ The draft definition adopted by the Committee of Legal Experts provides, '[t]he term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or internal disorder affecting 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 or origin or nationality' ('Draft OAU Convention Governing the Specific Aspects of the Problem of Refugees in Africa', UNHCR archives, fonds 1/5/11/1).

¹⁰⁵ 'Draft OAU Convention Governing the Specific Aspects of the Problem of Refugees in Africa', UNHCR archives, fonds 1/5/11/1, art VIII(2).

provided', which would have made the regional instrument supreme in specified instances.¹⁰⁶

At its Eleventh Ordinary Session, held in Algiers in September 1968, the CM requested that 'Member States, who have not yet done so, ... communicate to the General Secretariat before 15 December 1968 their comments on the OAU draft Convention on the Problem of Refugees, which Convention is actually in their possession'.¹⁰⁷ In February 1969, once such comments had been received, the Committee of Legal Experts presented its final draft to the CM, for what was by then the Council's fifth consideration of a draft African refugee convention. This time, however, the document won its unanimous support, and was signed by 41 African states on 10 September 1969.¹⁰⁸ It entered into force five years later on 20 June 1974, a day that has since been celebrated as Africa Refugee Day¹⁰⁹ and later became World Refugee Day.

The text of the 1969 Convention was widely welcomed as being well suited to addressing Africa's refugee problems, as evidenced by its wide ratification.¹¹⁰ It has also been internationally influential in that it contributed to the 1984 adoption of the Cartagena Declaration, which recommends that the traditional refugee definition be expanded in Latin America to include 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.¹¹¹

While the Convention itself has been lauded, 'if the law relating to refugees is to be effective, it is essential not only that relevant conventions be adopted and ratified, but also that there exist an effective machinery for their implementation'.¹¹² The 1969 Convention did not establish any self-sustaining institutional mechanism, such as a treaty body, for its implementation, nor was any oversight authority designated. This fact has not gone unnoticed:

very little development took place following the adoption of the OAU Refugee Convention. Unlike the 1951 Convention where the UNHCR ExCom has created a body of soft law through regular ExCom Conclusions on a variety of protection-related topics, the OAU/AU failed to further develop and clarify the treaty obligations and standards. The OAU/AU has for a long time failed to devise effective mechanisms to supervise the implementation of the OAU Refugee Convention.¹¹³

¹⁰⁶ No clause specifying that the 1951 Convention should be applied ultimately made its way into the version of the regional instrument that was adopted in 1969.

¹⁰⁷ Organization of African Unity (Council of Ministers), 'Resolution on the Problem of Refugees in Africa' (OAU Algiers 4-12 September 1968) CM/Res 149 (XI).

¹⁰⁸ Chartrand (n 6) 271.

¹⁰⁹ Organization of African Unity (Council of Ministers), 'Resolution on Africa Refugee Day' (OAU Addis Ababa 13-21 February 1975) CM/Res 398 (XXIV).

¹¹⁰ The 1969 Convention has been ratified by 45 of the AU's 53 member states. Eritrea, Sao Tomé & Príncipe and the Saharawi Arab Democratic Republic (SADR) have neither signed nor ratified the 1969 Convention; nor is Morocco a party to the Convention, having withdrawn from the OAU in 1985 after the SADR was accepted as a member state. Djibouti, Madagascar, Mauritius, Namibia and Somalia have signed but not ratified the Convention.

¹¹¹ Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190-193 (1984-1985) section III.3.

¹¹² Rwelamira (n 98) 162.

¹¹³ Van Garderen and Ebenstein (n 53) 203.

Yet the OAU did not fail to implement the 1969 Convention altogether. Rather, the Convention went on to underpin all OAU efforts in favour of refugees, reinforcing diplomacy, advocacy and political action.¹¹⁴ The way Nyanduga sees it, ‘the development of legal instruments ... [has] been important in the sustenance of political consciousness about the refugee problem’.¹¹⁵ Thus the implementation of the Convention fell in a general sense to the OAU’s political organs,¹¹⁶ which often highlighted refugee issues through AHG and CM resolutions, decisions and declarations.¹¹⁷ The OAU’s Secretary General also regularly reported on refugees to the CM, and the OAU established dedicated refugee protection bodies, organised conferences focused on refugee issues and made special provision for refugees in other legal instruments adopted under its auspices. Each initiative in this regard is addressed in turn below, beginning with the OAU’s refugee protection bodies.

OAU refugee protection bodies

Following the CM’s 1964 recommendation that the Commission become a permanent OAU body, its work focused primarily on drafting the regional instrument; once the 1969 Convention was adopted, the Commission went quiet. It was revived at the CM’s Nineteenth Ordinary Session, held in Rabat in June 1972, where the Council called on the OAU Secretariat to re-convene the Commission ‘to consider the current situation of refugees in Africa and the necessary measures to be taken with a view to their assistance and voluntary repatriation and their resettlement’.¹¹⁸ The ambassadors duly re-convened in Addis Ababa in December 1972, producing a report that was adopted by the CM at its Twentieth Ordinary Session, held in Addis Ababa in February 1973.¹¹⁹

It was at this meeting that the Commission was first officially referred to as the Commission of Ten on Refugee Problems in Africa,¹²⁰ and thereafter it began to meet annually and submit regular reports on ‘the situation of refugees, returnees and displaced persons in Africa, focusing on the contribution of the Organization in favour of those uprooted’¹²¹ to the CM. The Commission thus became the main policy making organ of the OAU on refugee

¹¹⁴ Interview with George Okoth-Obbo, Director, Africa Bureau, UNHCR, 20 June 2011.

¹¹⁵ Nyanduga (n 30) 102.

¹¹⁶ Nyanduga (n 30) 96.

¹¹⁷ The OAU’s AHG issued only a handful of resolutions and decisions relating to refugees: that relating to the drafting of the 1969 Convention, discussed above; a 1983 resolution on ICARA II (defined and described below); a 1995 resolution endorsing President Mobutu’s proposal to host a World Conference on Refugees and Displaced Persons in what was then Zaire (the conference never eventuated); a 2001 decision marking the fiftieth anniversary of the 1951 Convention; and a decision on the report of the Secretary General on the Situation of Refugees, Returnees and Displaced Persons, adopted at the AHG’s very last session in Durban in 2002. In addition, in 1994 it adopted the Tunis Declaration (Organization of African Unity (Assembly of Heads of State and Government) ‘Tunis Declaration on the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa’ (OAU Tunis 1994) AHG/Decl 216). The CM, by contrast, has adopted many refugee-related resolutions and decisions. Most of these served to take note of reports or establish or direct particular bodies or initiatives, and are cited where relevant throughout this paper, but several served the more general purpose of, among other things, highlighting refugee protection issues on the continent and/or calling on member states to ratify and implement the 1951 and 1969 Conventions.

¹¹⁸ Organization of African Unity (Council of Ministers), ‘Resolution on the Bureau for the Placement and Education of African Refugees’ (OAU Rabat 5-12 June 1972) CM/Res 266 (XIX).

¹¹⁹ Organization of African Unity (Council of Ministers), ‘Resolution on the Commission of Ten on Refugees’ (OAU Addis Ababa 5-9 February 1973) CM/Res 296 (XX).

¹²⁰ *ibid.*

¹²¹ Ngung (n 1) 98.

matters.¹²² Its activities included undertaking fact-finding missions to states, providing governments with advice and the provision of emergency financial assistance to states in need.¹²³ Moreover, it worked to shape the OAU's response to refugee issues.¹²⁴ Okoth-Obbo likens the Commission to the UNHCR's Executive Committee.¹²⁵

In 1980, it was decided that the Commission's membership should rotate and that it should be expanded to include representatives from 15 states;¹²⁶ initially, Angola, Cameroon, Mali, Niger, Nigeria, Senegal, Sudan, Swaziland, Tanzania, Uganda, Zaire (as it then was), Zambia and Zimbabwe.¹²⁷ In 1994, the Commission was further expanded to a total membership of 20 states, whose tenure did not rotate.¹²⁸ These states were Algeria, Angola, Cameroon, Côte d'Ivoire, Egypt, Gabon, Kenya, Malawi, Mali, Mozambique, Niger, Nigeria, Senegal, Sudan, Uganda, Tanzania, Zaire, Zambia and Zimbabwe.¹²⁹

Soon after its expansion to 20 states, the Commission's workings were formalised through the adoption of Rules of Procedure,¹³⁰ which defined the functions of the Commission in almost exactly the same terms as had been used in 1964, when the Commission was first convened as an ad hoc body. In 1998, the Commission was again enlarged, this time to include all OAU member states;¹³¹ its Rules of Procedure were revised accordingly.

The Commission played an important role in shaping and communicating the OAU's approach to particular refugee situations.¹³² Notably, it adopted the 1990 Khartoum Declaration on Africa's Refugee Crisis, which assessed national, sub-regional, regional and international responses to refugees in Africa and recommended follow-up action to be taken by the OAU and international community.¹³³ Yet, despite these achievements, Oloka-Onyango judged the Commission as ineffective:

[i]n the final analysis ... [the Commission] is constrained by its very composition and relationship to the OAU decision-making processes, which are ultimately politically controlled. ... Thus the extent of the impact of the ... [Commission] is clearly limited by considerations of *Realpolitik*, as well as by the very real constraint of the 'non-interference' clause that still holds considerable sway in Africa despite the recent examples of interventions.¹³⁴

¹²² *ibid.*

¹²³ Zard (n 24) 7.

¹²⁴ *ibid.*

¹²⁵ George Okoth-Obbo, 'The OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa-A Review Article' [Special Issue Summer 1995] *IJRL* 274, 283.

¹²⁶ Organization of African Unity (Council of Ministers), 'Resolution on the Situation of Refugees in Africa' (OAU Freetown 18-28 June 1980) CM/Res 814 (XXXV).

¹²⁷ Murray (n 4) 196.

¹²⁸ Organization of African Unity (Council of Ministers), 'Resolution on Refugees, Returnees and Displaced Persons in Africa' (OAU Tunis 6-11 June 1994) CM/Res 1521 (LX).

¹²⁹ Organization of African Unity (Council of Ministers), 'Rules of Procedure of the OAU Commission of Twenty on Refugees in Africa' (OAU Addis Ababa 23-27 February 1998) in accordance with CM/Res 388 (LXVII).

¹³⁰ *ibid.*

¹³¹ Organization of African Unity (Council of Ministers), 'Decision on the Report of the Commission of Twenty on the Situation of Refugees, Returnees and Displaced Persons in Africa' (OAU Addis Ababa 23-27 February 1998) CM/Res 388 (LXVII).

¹³² Oloka-Onyango (n 7) 39.

¹³³ Organization of African Unity (Commission of Fifteen on Refugees), 'Khartoum Declaration on Africa's Refugee Crisis' (OAU Khartoum 22-24 September 1990) OAU Doc BR/COM/XV/5590.

¹³⁴ Oloka-Onyango (n 7) 39.

The Commission nevertheless survived the OAU's transformation into the AU¹³⁵ as its Commission on Refugees. In this guise it reports regularly on the situation of refugees, as well as that of returnees and internally displaced persons (IDPs), in Africa to the AU's Executive Council.

*The Bureau for the Placement and Education of African Refugees*¹³⁶

The BPEAR was created on 1 March 1968 further to recommendation XI of the 1967 Conference on the Legal, Economic and Social Aspects of African Refugee Problems,¹³⁷ with the task of promoting the resettlement and employment of African refugees and collecting and disseminating information concerning educational, training and employment opportunities for them;¹³⁸ the intention was that the Bureau would function as a continental academic and occupational placement system for qualified refugees.¹³⁹

Its mandate, however, expanded in practice over time from seeking economic and educational opportunities for refugees to include functioning as an information conduit to member states and the international community on the patterns, causes and consequences of refugee movements in Africa; equipping refugees with resources to assist them in coping with their displacement and eventual repatriation; mediating between host states and refugees regarding alleged violations of national law; and working with UNHCR, voluntary agencies and member states to further the objectives of the 1969 Convention.¹⁴⁰

Initially, BPEAR undertook these tasks as an autonomous body, entirely independent of the OAU and funded by outside sources (principally UNHCR), operating through a system of national correspondents—Bureau representatives placed within the executives of OAU member states. A standing committee of United Nations (UN) agencies—namely UNHCR, the International Labour Organization, the UNECA, the Educational, Scientific and Cultural Organization and the Development Programme—advised it on operational matters and the Bureau received policy advice from a consultative board composed of the same agencies plus an OAU representative and observers from non-governmental organisations (NGOs).¹⁴¹

In 1971, however, it was placed under the supervision of the OAU's Assistant Secretary General for Political Affairs.¹⁴² In 1974, the Bureau was further integrated into the OAU Secretariat pursuant to the recommendations of a Commission report,¹⁴³ becoming part of the OAU Secretariat's political department both organisationally and financially.¹⁴⁴ The 1974 restructuring also enlarged BPEAR's mandate to include legal assistance to refugees and

¹³⁵ Murray (n 4) 196.

¹³⁶ For an exhaustive analysis of the functions of BPEAR and its effectiveness, see Oloka-Onyango (n 7); see also Holborn (n 50) 942–947; Murray (n 4) 197–200.

¹³⁷ Chartrand (n 6) 280.

¹³⁸ UNECA (n 94) 115.

¹³⁹ Holborn (n 50) 943.

¹⁴⁰ Oloka-Onyango (n 7) 35.

¹⁴¹ UNECA (n 94) 115; Holborn (n 50) 943.

¹⁴² Organization of African Unity (Council of Ministers), 'Resolution on the Bureau for the Placement and Education of African Refugees' (OAU Addis Ababa 15-19 June 1971) CM/Res 244 (XVII).

¹⁴³ OAU (n 119); Organization of African Unity (Council of Ministers), 'Resolution on the OAU Bureau for the Placement and Education on African Refugees' (OAU Kampala 1-4 April 1974) CM/Res 329 (XXII); Organization of African Unity (Council of Ministers), 'Resolution on the OAU Bureau for the Placement and Education of African Refugees' (OAU Mogadishu 6-11 June 1974) CM/Res 346 (XXIII).

¹⁴⁴ Organization of African Unity (Council of Ministers), 'Resolution on the OAU Bureau for the Placement and Education of African Refugees' (OAU Mogadishu 6-11 June 1974) CM/Res 346 (XXIII).

rural resettlement programmes, and gave the Bureau a formal role in assisting the Commission in the formulation of the OAU's refugee policy.¹⁴⁵

Oloka-Onyango's exhaustive analysis of the BPEAR concludes that it has had

great difficulty in meeting the conditions of its establishing mandate, and effectively expanding that mandate to deal with the critical issues concerning African refugees presently. The problems of the Bureau for Refugees basically stem from two factors: first, the fashion in which it has conceptualized its role, which is also a function of the influence of the OAU over its programming. The second issue relates to the question of finances.¹⁴⁶

Others have echoed his view. Nobel, for example, explains that while

potentially helpful, the BPEAR has been a disappointment due to what appears to be incompetence and mismanagement. A critical analysis has identified problems in the lack of efficient correspondents in member states, lack of economic support, and perhaps, weaknesses inherent in the OAU system itself.¹⁴⁷

Such generalised problems translated into quite specific shortcomings. For example, the Bureau's work on implementing the 1969 Convention was judged a failure, with it ultimately abandoning its 'attempt to persuade member States either to incorporate the provisions of the 1969 Convention into their domestic law, or to amend their immigration and refugee legislation so that they are brought into conformity with the Convention'.¹⁴⁸ Moreover, Chartrand notes a disjuncture between the efforts of and investment in the Bureau and the number of refugees actually placed in employment or education.¹⁴⁹

Perhaps as a response to such critiques, in the early 1990s BPEAR was renamed the Bureau for Refugees, Displaced Persons and Humanitarian Assistance.¹⁵⁰ However this further change did not solve its problems:

conceptually, the successive changes in the nomenclature of the bureau may reflect metamorphosing mandate, and are in part reflective of the role that the bureau was supposed to play in the ever-changing refugee situation on the continent. However, in practical terms the operations of the office have remained largely the same since its inception.¹⁵¹

¹⁴⁵ *ibid.*

¹⁴⁶ Oloka-Onyango (n 7) 47.

¹⁴⁷ Peter Nobel, 'Refugees, Law, and Development in Africa' (1982) 3 *Mich YB Intl L Stud* 255, 258.

¹⁴⁸ Oloka-Onyango (n 7) 49.

¹⁴⁹ Chartrand (n 6) 280.

¹⁵⁰ Murray (n 4) 197.

¹⁵¹ Lawyers' Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (Lawyers' Committee for Human Rights 1995) 140.

Thus, not surprisingly, the transition from the OAU to the AU marked the demise of the Bureau for Refugees, Displaced Persons and Humanitarian Assistance.¹⁵² Its Coordinating Committee did, however, survive—but under another name, as is explained below.

The Coordinating Committee (on Assistance to Refugees)

The standing committee and consultative board formed to advise BPEAR merged in 1970 to form the Bureau's Coordinating Committee.¹⁵³ In 1974, as part of the BPEAR restructuring described above, the Committee's membership was expanded to include representatives from the Executive Secretariat of the OAU's Liberation Committee and the Chairman of the Annual Conference of Liberation Movements, and its role was formalised.¹⁵⁴ Then, in 1981, the Coordinating Committee was re-named the CCAR and given a specific mandate to assist the OAU's Secretary General with the organisation of the two ICARA conferences (defined and described below). In spite of this specific mandate, the CCAR also evolved into an advisory committee to the Commission and a liaison body between the BPEAR the outside agencies that provided it with organisational support and funding.¹⁵⁵

According to Oloka-Onyango, the CCAR has not been as successful as it might have been in fulfilling its broader mandate. He explains that

even in the admission of members of the CCAR, it is clear that the Committee has not done as much as it could have, particularly in terms of meeting financial commitments made to Bureau programmes. At present, this body is largely inactive, in part because of the relative malaise of the Bureau, but also because the members of the committee do not fully believe in its effectiveness, or in the capacity of the OAU to tackle the refugee question in a forthright, non-political fashion.¹⁵⁶

Despite such manifest failures, the CCAR, like the Commission, survived the transition to the AU as the CCAPRRI, the work of which is described below in the section devoted to the AU.¹⁵⁷

Special refugee protection initiatives

In addition to establishing dedicated refugee protection bodies, the OAU has convened or co-convened a number of major conferences and meetings dedicated to aspects of refugee protection in Africa. Twelve years after the 1967 Addis Ababa conference discussed above, the OAU co-hosted its next significant gathering devoted to refugees, the Pan-African Conference on the African Refugee Problem, held in Arusha from 7 to 17 May 1979.¹⁵⁸ While

¹⁵² Murray (n 4) 200.

¹⁵³ Holborn (n 50) 943.

¹⁵⁴ Organization of African Unity (Council of Ministers), 'Resolution on the OAU Bureau for the Placement and Education of African Refugees' (OAU Mogadishu 6-11 June 1974) CM/Res 346 (XXIII).

¹⁵⁵ Oloka-Onyango (n 7) 39.

¹⁵⁶ Oloka-Onyango (n 7) 40.

¹⁵⁷ See 'The Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons' below.

¹⁵⁸ Extensive documentation and analysis of this gathering can be found in Eriksson, Melander and Nobel (n 93).

the conference was hosted by the OAU and UNHCR, with assistance from UNECA, it was an initiative of the All African Conference of Churches. The umbrella organisation

sensed that a new refugee conference was needed primarily to document the sufferings and problems of large numbers of refugees before their existence could be denied completely by many political leaders of independent Africa. Equally important was the task of discussing these difficulties and possible solutions with the international community, the intergovernmental organizations, the nongovernmental organizations, and the voluntary agencies.¹⁵⁹

The conference was attended at ministerial level by 38 OAU member states, 20 non-African countries, five liberation movements recognised by the OAU, 16 inter-governmental and regional organisations and 37 NGOs involved in refugee work in Africa.¹⁶⁰ It adopted a range of recommendations, which ‘can essentially be sub-divided into two categories. The first concerns the legal and protection problems of refugees, and the other concerns the social and economic, institutional, administrative and financial problems to which refugees give rise’.¹⁶¹

Among recommendations in the first category, recommendation 7 called on OAU member states that had not already done so to ratify the 1951 Convention, its 1967 Protocol and the 1969 Convention and to domesticate them.¹⁶² The CM endorsed the conference’s recommendations¹⁶³ and they subsequently received the support of the United Nations General Assembly.¹⁶⁴

Following the conference, the OAU and UNHCR constituted a joint working party for the implementation of its recommendations, which met for the first time in May 1980 in Addis Ababa and ultimately recommended a plan of action.¹⁶⁵ At its second meeting, the working group adopted model legislation for the domestic implementation of the 1969 Convention, which ultimately proved influential to how states parties domesticated it.¹⁶⁶

The next major conference to address refugee protection in Africa was convened not by the OAU but by the UN Secretary General further to a CM resolution, which invited

[t]he Secretary-General of the OAU in collaboration with the UN Secretary-General and ... [UNHCR] to hold consultations with governmental and non-governmental organizations as well as governments of countries which are likely to offer contributions and the UN Specialized Agencies, in order to assess the possibility of holding a pledging conference for African refugees under the auspices of the United Nations.¹⁶⁷

¹⁵⁹ Nobel (n 147) 259.

¹⁶⁰ Greenfield (n 6) 225.

¹⁶¹ D’Sa (n 6) 391; for a summary of the conference’s recommendations, see D’Sa (n 6) 391–394; the recommendations are reproduced in their entirety in Eriksson, Melander and Nobel (n 93) 47–62.

¹⁶² Eriksson, Melander and Nobel (n 93) 52.

¹⁶³ Organization of African Unity (Council of Ministers), ‘Resolution on the Situation of Refugees in Africa and on Perspective Solutions to their Problems in the 1980s’ (OAU Monrovia 6-20 July 1979) CM/Res 727 (XXXIII) Rev 1.

¹⁶⁴ UNGA, Res 34/61 (29 November 1979).

¹⁶⁵ D’Sa (n 6) 394.

¹⁶⁶ Jackson (n 50) 194–196.

¹⁶⁷ OAU (n 126).

The UN General Assembly subsequently noted the inadequacy of the assistance provided to African refugees¹⁶⁸ and the UN Secretary General, in cooperation with UNHCR and the OAU, accordingly convened the International Conference on Assistance to Refugees in Africa (ICARA), to 'mobilize assistance for refugees in Africa'.¹⁶⁹ ICARA was held on 9 and 10 April 1981 in Geneva and raised approximately US\$570 million,¹⁷⁰ however none of these funds were allocated directly to the OAU; rather, they went to cover UNHCR programmes Africa. The OAU had by then, however, established a Special Refugee Contingency Fund, to which UNHCR contributed.

The OAU Secretariat convened a meeting of NGOs involved in assisting refugees in Africa from 21 to 25 March 1983 in Arusha. While not on the same scale as the Arusha meeting before it, the gathering's opening address was delivered by President Nyerere of Tanzania, suggesting that the refugee issue remained a high profile one. The meeting produced a range of recommendations under 12 broad headings,¹⁷¹ including 'Preparation for ICARA II'. Indeed, further to the success of ICARA, a second fundraising conference was at the request of the UN General Assembly¹⁷² convened in Geneva from 9 to 11 July 1984.

This time, however, funds were raised for UNHCR as well as to assist African host countries, 14 of which submitted 128 proposals for specific infrastructural projects in advance of the conference.¹⁷³ ICARA II also resulted in the adoption by consensus of a Declaration and Programme of Action aimed at an effective long-term strategy for African refugees.¹⁷⁴

While preparations for ICARA II were on-going, the OAU turned its attention from fundraising back to substantive issues, in particular to the situation of refugees from the racist regime ruling South Africa. At its Fortieth Ordinary Session, held in Addis Ababa in February and March 1984, the CM called on the Southern African Development Co-ordinating Conference (now the Southern African Development Community) to organize, in collaboration with the OAU, UN and UNHCR, 'an international conference on all aspects of the refugee problem in Southern Africa, in order to co-ordinate and harmonize approaches to refugee matters'.¹⁷⁵

In July 1986, the CM called for substantive preparations to begin.¹⁷⁶ The conference, titled 'International Conference on the Plight of Refugees, Returnees and Displaced Persons in

¹⁶⁸ UNGA, Res 35/42 (25 November 1980).

¹⁶⁹ *ibid.*

¹⁷⁰ UNSG 'Report of the Secretary General on the International Conference on Assistance to Refugees in Africa' UN Doc A/37/522 (1982); see also Organization of African Unity (Secretary General), 'Report of the Secretary General on the International Conference on Assistance to Refugees in Africa' CM/1130 (XXXVII) Rev 1.

¹⁷¹ Preparation for ICARA II; protection; voluntary repatriation; awareness building and public information; cooperation in refugee assistance at the national, regional and international levels; root causes; education, training and scholarships; employment; counselling; settlement and resettlement; role of voluntary agencies during emergencies; and general; Organization of African Unity, 'Recommendations of the Meeting of the OAU Secretariat and Voluntary Agencies on African Refugees' (OAU Arusha 21-25 March 1983).

¹⁷² UNGA, Res 37/197 (18 December 1982).

¹⁷³ D'Sa (n 6) 396.

¹⁷⁴ UN 'Declaration and Program of Action of the Second International Conference on Assistance to Refugees in Africa' UN Doc A/CONF.125/L.1 (10 July 1984).

¹⁷⁵ Organization of African Unity (Council of Ministers), 'Resolution on the Situation of Refugees in Africa' (OAU Addis Ababa 27 February-5 March 1984) CM/Res 939 (XL).

¹⁷⁶ Organization of African Unity (Council of Ministers), 'Resolution on the Situation of Refugees in Africa' (OAU Addis Ababa 21-26 July 1986) CM/Res 1040 (XLIV); see also Organization of African Unity (Council of Ministers), 'Resolution on International Conference on the Plight of Refugees, Returnees and Displaced Persons

Southern Africa' (SARRED), was held in Oslo from 22 to 24 August 1988. It resulted in the adoption of the Oslo Resolution, Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa,¹⁷⁷ which was subsequently endorsed by the CM.¹⁷⁸

In 1994, the OAU and UNHCR co-convened the 'Commemorative Symposium on Refugees and the Problems of Forced Population Displacements in Africa'.¹⁷⁹ The impetus for it came from two resolutions, one issued by UNHCR's ExCom¹⁸⁰ and the other by the CM.¹⁸¹ Held from 8 to 10 September in Addis Ababa, the gathering commemorated the twenty-fifth anniversary of the adoption of the 1969 Convention and the twentieth year of its entry into force, however it also had a substantive purpose, as evidenced by the 34 recommendations it produced in the form of the Addis Ababa Document on Refugees and Forced Population Movements in Africa.¹⁸²

The Document's ten topics¹⁸³ broadly represent the Symposium's main themes.¹⁸⁴ Among the recommendations, number five calls on states to ratify, uphold, domesticate and implement the 1969 Convention. While the Symposium was a success in terms of the sheer number of participants it managed to attract—340 from OAU member states, other states, UN agencies and NGOs—it failed to advance thinking on substantive issues. Rather,

the Symposium succeeded mainly only in echoing the familiar call urgently to address the root causes of refugee flows and other forms of coerced population movements. Having not tackled root causes with any rigour, it also could not etch out clearly the essential legal, policy, and operational groundmarks for tackling those issues in a concrete and result-producing manner.¹⁸⁵

in Southern Africa, Oslo, Norway 22-24 August 1988' (OAU Addis Ababa 19-23 May 1988) CM/Res 1150 (XLVIII).

¹⁷⁷ Organization of African Unity, 'Oslo Resolution, Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa' (OAU Oslo 22-24 August 1988) <<http://www.unhcr.org/refworld/category,POLICY,UNGA,,,3ae68f410,0.html>> accessed 10 October 2011; the declaration portion of the Oslo document addressed root causes; basic principles on humanitarian assistance (the linkage between relief, recovery and development assistance and burden sharing); and specific refugee related issues (asylum and military and armed attacks on refugees). The plan of action addressed humanitarian and rehabilitation assistance (emergency preparedness, needs assessment and the delivery of assistance, recovery and development and the mobilisation of resources); durable solutions (voluntary repatriation and return, local integration and resettlement); public information and dissemination; and follow-up and evaluation.

¹⁷⁸ Organization of African Unity (Council of Ministers), 'Resolution on the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa' (OAU Addis Ababa 20-25 February 1989) CM/Res 1181 (XLIX).

¹⁷⁹ Okoth-Obbo provides an exhaustive analysis of this symposium in Okoth-Obbo (n 125).

¹⁸⁰ UNHCR ExCom 'Report of the Forty-Fourth Session of the Executive Committee of the High Commissioner's Programme' (12 October 1993) A/AC.96/821.

¹⁸¹ Organization of African Unity (Council of Ministers), 'Resolution on Refugees, Returnees and Displaced Persons in Africa' (OAU Addis Ababa 31 January-4 February 1994) CM/Res 1489 (LIX).

¹⁸² Organization of African Unity and UNHCR, 'The Addis Ababa Document on Refugees and Forced Population Displacements in Africa, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, 8-10 September 1994, Addis Ababa, Ethiopia' [Special Issue Summer 1995] IJRL 303.

¹⁸³ Root causes; the 1969 Convention; refugee protection in Africa; material assistance; internal displacement; solutions; other populations in need of protection and assistance; emergency preparedness and response; the relief to development continuum; and institutional aspects.

¹⁸⁴ Okoth-Obbo (n 125) 285.

¹⁸⁵ Okoth-Obbo (n 125) 281.

Just as South Africa's apartheid regime had focused OAU attention on refugees in southern Africa, resulting in SARRED, the 1994 Rwandan genocide and ensuing refugee crisis led to a series of initiatives focused on the Great Lakes region. First was the OAU/UNHCR Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, held in Bujumbura from 12 to 17 February 1995. This meeting resulted in a Plan of Action, later 'reiterated' by the UN General Assembly,¹⁸⁶ the implementation of which led to a series of follow up meetings.¹⁸⁷ On 8 and 9 May 1998, the OAU and UNHCR held another regional meeting on refugee issues in the Great Lakes region, this time in Kampala.

Around the same time, there was also a focus on refugee women and children as a particular population of concern: from 12 to 15 October 1998, the OAU convened in Addis Ababa its Regional Seminar on Enhancing the Participation of Returnee, Refugee and Internally Displaced Women and Children in Reconstruction, Rehabilitation and Peace-Building. The seminar adopted a Plan of Action.¹⁸⁸

While it is clear that many of the OAU's special refugee protection initiatives were organised in partnership with UNHCR and other UN agencies, one of the last refugee-related gatherings before the OAU became the AU was an exclusively OAU affair: the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa, held in Khartoum on 13 and 14 December 1998. The meeting produced both a Declaration¹⁸⁹ and recommendations.¹⁹⁰ The former, *inter alia*, appealed to states to ratify the 1951 Convention and its 1967 Protocol as well as the 1969 Convention and to domesticate and implement them. The latter consisted of 34 recommendations grouped under seven broad themes.¹⁹¹

The OAU's final special refugee protection initiative, co-organised with UNHCR, was a meeting of government and non-governmental experts held in Conakry from 27 to 29 March 2000, on the occasion of the thirtieth anniversary of the adoption of the 1969 Convention. This meeting 'consolidated the OAU's approach [to refugees] and directed the way in which it would operate in the future'¹⁹² and resulted in a Comprehensive Action Plan,¹⁹³ which was subsequently endorsed by both the CM¹⁹⁴ and the AHG.¹⁹⁵

¹⁸⁶ UNGA, Res 51/71 (12 December 1996) para 9.

¹⁸⁷ For example, in February 1996, the Second Meeting of the Follow-Up Committee on the Implementation of the Bujumbura Conference Plan of Action on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region.

¹⁸⁸ Organization of African Unity, 'Plan of Action for Enhancing the Participation of Refugee, Returnee and Internally Displaced Women and Children in Rehabilitation, Reintegration, Reconstruction and Peace-Building' (OAU Addis Ababa 12-15 October 1998).

¹⁸⁹ Organization of African Unity, 'Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa' (OAU Khartoum 14 December 1998); not to be confused with the Khartoum Declaration of 1990 (n 133).

¹⁹⁰ Organization of African Unity, 'Khartoum Recommendations of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa' (OAU Khartoum 14 December 1998).

¹⁹¹ Root causes; refugee instruments; strengthening refugee protection in Africa; durable solutions; consolidating the reintegration process; building Africa's capacity to respond to refugee and internal displacement situations; and assistance and resolving the problem of internally displaced persons in Africa.

¹⁹² Murray (n 4) 192.

¹⁹³ Organization of African Unity and UNHCR, 'Comprehensive Action Plan adopted by the Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the Thirtieth Anniversary of the 1969 OAU Refugee Convention' (OAU & UNHCR Conakry 27-29 March 2000) CONF/EAU30th/CORE/4-Rev1.

¹⁹⁴ Organization of African Unity (Council of Ministers), 'Decision on the Situation of Refugees, Returnees and Displaced Persons in Africa' (OAU Lome 6-8 July 2000) CM/Res 2171 (LXXII).

Among the recommendations contained in the Action Plan, one suggested that UNHCR and the OAU convene a working group to consider amendments to the 1969 Convention, including the designation of an oversight body.¹⁹⁶ Another directed UNHCR to conclude a Memorandum of Understanding with the African Commission on Human and Peoples' Rights in order to strengthen 'its monitoring capacity and programme of work with respect to the human rights of refugees and asylum seekers'.¹⁹⁷

While this and indeed most of the recommendations flowing from the OAU's various special refugee protection initiatives seem sound, there is reason to be sceptical. An NGO delegate to the 1994 Commemorative Symposium remarked,

there is no shortage of declarations, recommendations, or plans of action to solve the refugee and displacement crisis in Africa. If even half of these were to be implemented, there would be virtually no refugees or displaced persons in Africa today and none for the whole of the twenty-first century.¹⁹⁸

The sheer number of declarations, recommendations and plans of action emanating from gatherings in Africa devoted to refugees evidences the essential truth of this somewhat sweeping observation; if even one plan of action were to be fully implemented, there would likely be little need for all those that came after it. Indeed, Okoth-Obbo notes that a number of conference documents have not shown a record of implementation commensurate with the effort and cost that had gone into their elaboration.¹⁹⁹ Perhaps of greater value, therefore, are legally binding instruments. Two relevant to refugees have been adopted under the auspices of the OAU, in addition to the 1969 Convention.

Other legal instruments

The African Charter was adopted in 1981 and entered into force five years later. Its civil and political and socio-economic rights guarantees are owed to 'every individual';²⁰⁰ the African Commission has clarified that the rights in the Charter are therefore owed to nationals and non-nationals alike.²⁰¹ Refugees thus benefit from the protection of the Charter during the period of asylum. Thus, as Nyanduga explains, 'a refugee whose rights are violated by a member State, either country of origin ... [or] host state, can have recourse to the African Commission ... under the individual communications procedure'.²⁰²

Of particular relevance to refugees are article 5 prohibiting torture and cruel, inhuman or degrading treatment (CIDT), which has been interpreted as protecting an individual from being returned to a state where he or she is likely to face torture or CIDT;²⁰³ article 12(3) on the right to seek and *obtain* asylum, which bolsters—though likely does not enshrine—an

¹⁹⁵ Organization of African Unity (Assembly of Heads of State and Government), 'Decision on the Fiftieth Anniversary of the Adoption of the 1951 Convention on the Status of Refugees' (OAU Lusaka 9-11 July 2001) AHG/Dec 6 (XXXVII).

¹⁹⁶ OAU and UNHCR (n 193) action 4.

¹⁹⁷ OAU and UNHCR (n 193) action 15.

¹⁹⁸ Cited in Okoth-Obbo (n 125) 297.

¹⁹⁹ Okoth-Obbo (n 125) 298.

²⁰⁰ African Charter (n 11) art 2.

²⁰¹ *Rencontre Africaine pour la defense des droits de l'homme (RADDHO) v Zambia*, comm no 71/92, 10th Annual Activity Report of the Af Cm HPR (2000) para 22.

²⁰² Nyanduga (n 30) 101.

individual right of asylum; article 12(4) prohibiting the arbitrary expulsion of non-nationals; and article 12(5) prohibiting the mass expulsion of non-nationals. How these provisions have been interpreted in favour of refugees is addressed below in the section on the African Commission.²⁰⁴

Like the African Charter, the Children's Rights Charter is relevant to refugees in a general sense. However, it also contains a refugee-specific provision. Its article 23 provides in part,

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

That the Children's Rights Charter, adopted almost a decade after the African Charter, explicitly addresses refugees, while its more general predecessor does not, suggests a shift in the OAU's view of the issue. Initially, refugees were seen as a threat to inter-African relations; later, their connection to development came to the fore; finally, the increasing regard paid to human rights resulted in a recognition of the linkages between human rights violations and forced population displacement.

Nyanduga has observed the first change: '[t]he refugee problem was increasingly seen not merely as a destabilization and subversion concern, but also recognized to constitute a major drain of scarce resources and an impediment to development'.²⁰⁵ The complete shift—from subversion to development to human rights—is evidenced by the ninth paragraph of the Grand Bay (Mauritius) Declaration and Plan of Action (Grand Bay Declaration), the result of the First OAU Ministerial Conference on Human Rights held from 12 to 16 April 1999. It provides,

[w]hile welcoming the improvements which have taken place in addressing the refugee problem, the conference believes that the high number of refugees, displaced persons and returnees in Africa constitutes an impediment to development. It recognizes the link between human rights

²⁰³ Rachel Murray, 'Refugees and Internally Displaced Persons and Human Rights: the African System' (2005) 24 RSQ 56, 59.

²⁰⁴ See 'The African Commission on Human and Peoples' Rights' below.

²⁰⁵ Nyanduga (n 30) 99.

violations and population displacement and calls for redoubled and concerted efforts by States and the OAU to address the problem.²⁰⁶

Indeed, recognition of the importance of human rights contributed to the decision to replace the OAU with the AU. Thus it is not surprising that the connection between the protection and promotion of human rights on the one hand and refugee protection on the other constitutes a salient feature of AU engagement with refugee issues.

AU engagement with refugee protection: 2002 to the present

If the Grand Bay Declaration foreshadowed the AU's approach to refugees, then in calling on member states to recognise forced displacement as a grave violation of human rights to peace, security and dignity,²⁰⁷ the Kigali Declaration—the result of the First AU Ministerial Conference on Human Rights—consolidated it. This shift in approach was in part the result of changing patterns of forced displacement. When the OAU first addressed refugee protection with the drafting and adoption of the 1969 Convention, 'the major cause for refugees was the problem related to colonial occupation'²⁰⁸ but 'as the years went by, civil wars and ethnic conflict in many member States became a major cause of refugee outflow'.²⁰⁹ In addition to focusing attention on human rights, new causes of displacement widened the AU's focus: whereas the OAU had primarily been focused on refugees, the AU paid equal attention to IDPs and returnees.

However, while the shift from the OAU to the AU heralded a more human rights oriented approach to refugees and brought IDPs and returnees to the fore, the transition was also a missed opportunity. The adoption of the AU's Constitutive Act raised the prospect of creating a dedicated continental refugee protection body,²¹⁰ or at the very least the opportunity of designating a body with supervisory authority over the 1969 Convention. Neither of these opportunities was seized. Instead, in the years after its establishment, the AU developed a number of bodies responsible for refugee issues, thereby replicating the somewhat fragmented approach to refugee protection of its predecessor.

AU refugee protection bodies

The PRC is composed of representatives from each AU member state and is charged with assisting and preparing the work of the Executive Council. Its Sub-Committee on Refugees is a committee of the whole represented by a bureau of five members. The Sub-Committee meets twice per year while the bureau meets as often as is necessary.²¹¹ The Sub-Committee on Refugees is a decision-making body and supports the work of the AU Commission in refugee matters.²¹² In particular, it provides political leadership in formulating responses to

²⁰⁶ Organization of African Unity, 'Grand Bay (Mauritius) Declaration and Plan of Action' (OAU Grand Bay 12-16 April 1999) CONF/HRA/Dec 1.

²⁰⁷ Organization of African Unity, 'Kigali Declaration of the First AU Ministerial Conference on Human Rights in Africa' (OAU Kigali 8 May 2003) MIN/CONF/HRA/Dec11 (I) para 11.

²⁰⁸ Nyanduga (n 30) 96.

²⁰⁹ *ibid.*

²¹⁰ Nierum S Okogbule, 'The Legal Dimensions of the Refugee Problem in Africa' (2004) 10 E Afr J Peace & Hum Rts 176, 189.

²¹¹ Patrick Tigere and Rita Amukhobu, 'The African Union's Institutional Framework for Responding to Forced Displacement in Africa' [2005] Conflict Trends 48, 53.

²¹² *ibid.*

humanitarian emergencies; conducts field missions and in-country needs assessments; where possible, provides refugee hosting states with financial assistance; and works to sensitise member states and the international community to the plight of displaced persons in Africa.²¹³

The Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons

This advisory body was born under the OAU as the BPEAR's Coordinating Committee, and later became the CCAR.²¹⁴ As an AU organ, the CCAR is known as the CCAPRRI and is meant to function as an advisory body to the PRC's Sub-Committee on Refugees and 'provide a forum and interface between the [refugee] practitioners and the decision-making and policy organs'.²¹⁵ Yet joining the new continental organisation did little to reinvigorate what had been a largely dormant OAU entity. At a 2003 meeting between UNHCR and the African Commission,²¹⁶ it was suggested that CCAPRRI should 'examine the feasibility of promoting the adoption of a Protocol to the 1969 OAU Refugee Convention which would expand its scope to cover issues not adequately addressed therein',²¹⁷ however given the body's inactivity then, such never occurred.

In 2004, Murray noted that the AU was working with UNHCR to revive the CCAPRRI, including by updating its membership.²¹⁸ Indeed, the Executive Council requested the same of the AU Commission at its Fifth Ordinary Session.²¹⁹ The call was reiterated in 2005 'as a matter of urgency'.²²⁰ According to Tigere and Amukhobu, the CCAPRRI was finally revitalised in 2005,²²¹ and indeed the Executive Council commended UNHCR and the AU Commission for their efforts in this regard.²²² Yet the Committee's revised Rules of Procedure were not adopted until 2008²²³ and in late 2009 efforts to expand CCAPRRI membership remained on-going.²²⁴ Whether the CCAPRRI will play a significant refugee protection role within the AU thus remains to be seen.

The Division of Humanitarian Affairs, Refugees and Displaced Persons

HARDP is a division of the AU Commission's Department of Political Affairs. It functions as a secretariat to all AU bodies dealing with refugees, facilitating their activities, decision

²¹³ *ibid.*

²¹⁴ See 'The Coordinating Committee (on Assistance to Refugees)' above.

²¹⁵ Tigere and Amukhobu (n 211) 53.

²¹⁶ See 'The African Commission on Human and Peoples' Rights' below.

²¹⁷ Murray (n 4) 195.

²¹⁸ Murray (n 4) 201.

²¹⁹ African Union (Executive Council), 'Decision on the Situation of Refugees, Returnees and Displaced Persons' (AU Addis Ababa 30 June-3 July 2004) EX/CL/Dec127 (V) para 12.

²²⁰ African Union (Executive Council), 'Decision on the Situation of Refugees, Returnees and Displaced Persons' (AU Abuja 24-28 January 2005) EX/CL/Dec179 (VI) para 7.

²²¹ Tigere and Amukhobu (n 211) 53.

²²² African Union (Executive Council), 'Decision on the Situation of Refugees, Returnees and Displaced Persons' (AU Sirte 28 June-2 July 2005) EX/CL/Dec197 (VII) para 10.

²²³ African Union (Executive Council), 'Decision on the Rules of Procedure of the Revitalized African Union Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons in Africa' (AU Addis Ababa 25-29 January 2008) EC/CL/Dec382 (XII).

²²⁴ AU 'Statement of HE Mrs Julia Dolly Joiner AU Commissioner for Political Affairs to the 59th Session of the Executive Committee of the High Commissioner's Programme' (6-10 October 2009) 1.

making and policy development.²²⁵ HARDP also coordinates the interface between the AU's humanitarian actors and its decision-makers.²²⁶ According to Tigere and Amukhobu, HARDP is central to the 'coordination, documentation and liaison of the work of the AU Commission, AU organs and other partners on matters related to forced displacements'.²²⁷

In its own words, HARDP is charged with the following:

Provide assistance in collaboration with other departments and relevant agencies/organizations to refugees, displaced persons and victims of humanitarian crisis;

Harmonize policies and activities among countries and RECs [regional economic communities], including the repatriation and resettlement of displaced persons;

Promote cooperation with relevant regional and international organizations;
Promote International Humanitarian Law;\

Seek for a lasting solution to the problems of refugees and displaced persons.²²⁸

Another HARDP source described its main activities—presumably undertaken with a view to discharging the above functions—as visiting AU member states affected by displacement, participating in meetings and seminars and monitoring the humanitarian crises that produce mass movements of population on the continent.²²⁹ Some practical examples of its work in this regard are described below in the section devoted to special AU refugee protection initiatives.

Special refugee protection initiatives

Although the AU has never held an inter-organisational gathering along the lines of the OAU's 1967 Addis Ababa conference or its 1979 Arusha meeting,²³⁰ like its predecessor it regularly convenes ministerial meetings on refugees, returnees and IDPs in Africa. The first such AU meeting was held in Ouagadougou on 1 and 2 June 2006—eight years after the

²²⁵ Tigere and Amukhobu (n 211) 53.

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ African Union (HARDP), 'Humanitarian Affairs, Refugees and Displaced Persons Division' <http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/Humanitarian%20Affair.pdf> accessed 4 November 2011.

²²⁹ African Union (HARDP), 'Humanitarian Affairs, Refugees and Displaced Persons' <http://www.africa-union.org/Structure_of_the_Commission/depPOLITICAL%20AFFAIRS%20DIRECTORATE.htm#HUMANITARIAN> accessed 4 November 2011.

²³⁰ It should, however, be noted that such inter-organisational gatherings still occur in Africa, though not, thus far, under AU auspices. One such meeting was the Regional Parliamentary Conference on Refugees in Africa, held in Cotonou in June 2004. This meeting was organised by the African Parliamentary Union and UNHCR (UNHCR (n 54) 49).

OAU's ministerial meeting in Khartoum—at the behest of an Executive Council decision adopted the previous year.²³¹

The meeting resulted in the adoption of the Ouagadougou Declaration²³² and during the gathering it was decided that ministerial meetings devoted to forced displacement should be convened every two years. Accordingly, ministers met again in November 2008 in Addis Ababa. There they worked towards an even higher-level gathering: the AU Special Summit on Refugees, Returnees and Internally Displaced Persons in Africa, which was ultimately held from 19 to 23 October 2009 in Kampala.

The Special Summit produced the Kampala Declaration, which addressed prevention; protection; women, children and other vulnerable groups; the forging of partnerships to address forced displacement;²³³ and, most importantly, adopted the landmark Convention for the Protection and Assistance of Internally Displaced Persons in Africa.²³⁴ The AU Commission was tasked with implementing the Kampala Declaration and was requested to formulate a Plan of Action in this regard.²³⁵ To build consensus around and formalise its draft Plan of Action, on 4 and 5 June 2010 HARDP convened the third meeting of ministers in charge of forced displacement matters in Addis Ababa. The ministers adopted the Plan of Action and it was subsequently welcomed by the Executive Council.²³⁶ A 'consultative meeting' aimed at its implementation was convened by HARDP on 20 and 21 May 2011 in Kinshasa.

In addition to special initiatives devoted to them, refugees have also received the attention of more general AU initiatives. The Conference on Security, Stability, Development and Cooperation in Africa, a policy development process, notes among its 'core values' that the 'plight of African refugees and internally displaced persons constitutes a scar on the conscience of African governments and people' and provides an undertaking to strengthen refugee protection.²³⁷

Moreover, among the Conference's key performance indicators, all AU member states were expected to have ratified and implemented the 1969 Convention by 2003; it was proposed that the AU should review the Convention's scope by 2005, ensuring in particular the strength of oversight mechanisms; and states were requested to provide the Conference with information on the condition of refugees, the protection of their human rights and mechanisms for the mitigation of their situation.²³⁸ While such effective implementation of the Convention has yet to occur, the range of binding legal protections applicable to refugees has expanded under the AU.

²³¹ AU (n 220) para 8.

²³² African Union, 'Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa' (AU Ouagadougou 1-2 June 2006) AU/MIN/HARDP/Dec11.

²³³ African Union, 'Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa' (AU Kampala 22-23 October 2009) Ext/Assembly/AU/PA/Draft/Decl (I) Rev1.

²³⁴ Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, opened for signature 23 October 2009) 49 ILM 86.

²³⁵ African Union (Executive Council), 'Decision on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa' (AU Addis Ababa 25-29 January 2010) EX/CL/Dec529 (XVI) para 6.

²³⁶ African Union (Executive Council), 'Decision on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa' (AU Kampala 19-23 July 2010) EX/CL/Dec558 (XVII) para 4.

²³⁷ Murray (n 4) 193.

²³⁸ *ibid.*

Other legal instruments

In 2003, the AU adopted the Women's Rights Protocol. It contains several provisions devoted to refugees. Article 4 on the rights to life, integrity and security of the person commits states parties to ensuring that

women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.²³⁹

Article 10 on the right to peace further commits states parties to ensuring the increased participation of women 'in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women'²⁴⁰ and 'in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women'.²⁴¹ Finally, with article 11 on the protection of women in armed conflict states parties undertake

to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.²⁴²

The African Commission on Human and Peoples' Rights²⁴³

The African Commission derives its mandate to 'promote human and peoples' rights and ensure their protection in Africa'²⁴⁴ from the African Charter and began operating from its seat in Banjul in 1987. It was until 2006 the AU's—and the OAU's before it—principal human rights body. Since then, it has shared this role with the African Court on Human and Peoples' Rights.²⁴⁵ The Court's decisions are binding, unlike those of the Commission.²⁴⁶ However, individuals and NGOs do not have automatic standing before the Court, but do before the Commission. As a result, the Commission remains the more active of the two bodies, especially in relation to refugees, with which the Court has not engaged at all.

One of the earliest examples of African Commission engagement with refugees was the appearance of the issue on the agenda of its Eighth Ordinary Session in 1990.²⁴⁷ Not long

²³⁹ Women's Rights Protocol (n 13) art 4(2)(k).

²⁴⁰ Women's Rights Protocol (n 13) art 10(2)(c).

²⁴¹ Women's Rights Protocol (n 13) art 10(2)(d).

²⁴² Women's Rights Protocol (n 13) art 11(3).

²⁴³ This paper is a working draft. This section will be updated further to a forthcoming research visit to the African Commission on Human and Peoples' Rights in Banjul.

²⁴⁴ African Charter (n 11) art 30.

²⁴⁵ For more on this and the impending establishment of the African Court of Justice and Human Rights, see Sonia Sceats, *Africa's New Human Rights Court: Whistling in the Wind?* (Chatham House, 2009).

²⁴⁶ For a survey of compliance with African Commission decisions, see Frans Viljoen and Lirette Luow, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 AJIL 1.

²⁴⁷ Murray (n 203) 58.

after, in February 1994, the Commission co-hosted a Harare seminar titled ‘African Refugees and Internally Displaced Persons’.²⁴⁸ The Commission has also regularly highlighted refugees as being among the vulnerable groups in need of special protection.²⁴⁹ Yet, despite these initiatives, Commission engagement with refugee protection did not commence in earnest until it began collaborating with UNHCR.

An early example of such collaboration was a December 1998 workshop of the two organisations in Dakar.²⁵⁰ The following year, UNHCR attended the Commission’s Twenty-Sixth Ordinary Session in Kigali, where discussions were held about cooperation between the two bodies.²⁵¹ This led in 2000 to the recommendation of the Conakry meeting discussed above: that UNHCR and the African Commission should conclude an agreement aimed at strengthening the Commission’s monitoring capacity and programme of work regarding the human rights of refugees and asylum seekers.²⁵² Further discussions were held on 20 and 21 March 2003 at an Addis Ababa meeting of UNHCR and the Commission. This meeting concluded that

refugees are endowed with the same rights and responsibilities as all other human beings. The specific rights of refugees are an integral part of human rights and are universal, indivisible, inter-dependent and inter-related. Where national laws on refugees are inadequate or non-existent, general human rights law should therefore be invoked to protect refugees.²⁵³

The meeting also recommended, *inter alia*, that the African Commission should become a member of CCAPRIDP²⁵⁴ and, importantly, that it should monitor the implementation of the 1969 Convention.²⁵⁵ This call was reiterated two months later in an expert report that emanated from the AU’s First Ministerial Meeting on Human Rights, held in Kigali on 5 and 6 May 2003.²⁵⁶

The Memorandum of Understanding between the Commission and UNHCR was signed shortly after the Kigali meeting, on 26 May 2003 during the Commission’s Thirty-third Ordinary Session; its imminent signature had been ‘welcomed’ by the Ministerial Meeting’s Kigali Declaration.²⁵⁷ The Memorandum identifies several areas of cooperation, including: information sharing; joint dissemination of and the provision of training in international human rights, refugee and humanitarian law; joint research and publication; joint action to implement Commission resolutions on refugees; and the promotion of closer cooperation

²⁴⁸ *ibid*; the conference’s recommendations are attached to the African Commission’s Seventh Annual Activity Report.

²⁴⁹ Murray (n 203) 59.

²⁵⁰ Murray (n 4) 194.

²⁵¹ Murray (n 203) 61.

²⁵² *ibid*.

²⁵³ Cited in Murray (n 4) 194.

²⁵⁴ Murray (n 4) 195.

²⁵⁵ Murray (n 4) 194.

²⁵⁶ Organization of African Unity, ‘Report of the Meeting of Experts of the First AU Ministerial Conference on Human Rights in Africa’ (OAU Kigali 5-6 May 2003) EXP/CONF/HRA/RPT (II) para 40(2) cited in Murray (n 203) 62.

²⁵⁷ OAU (n 207) para 15.

between UNCHR, the Commission and the AU more broadly and communication between UNCHR and the Commission.²⁵⁸

The Memorandum also provides that both organisations should draw inspiration from UN treaty monitoring and Charter-based bodies, ExCom and relevant AU organs.²⁵⁹ Yet while the Conakry recommendation that the Commission should conclude an agreement with UNHCR came to fruition, no further action was taken on the various recommendations that the Commission should become the 1969 Convention's supervisory body. Thus the Convention remains without any formal supervisory authority.

The collaboration with UNCHR seemed to raise the profile of refugees within the Commission. At its Thirty-fourth Ordinary Session in November 2003, Bahame Tom Nyanduga, a Tanzanian who was then a member of the Commission, was appointed as its Focal Point on Refugees and Displaced Persons in Africa. This role was upgraded the following year during the Commission's Thirty-sixth Ordinary Session, when Nyanduga was appointed as the first Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa.²⁶⁰ The Special Rapporteur has a mandate to

- a. seek, receive, examine and act upon information on the situation of refugees, asylum seekers and internally displaced persons in Africa;
- b. undertake studies, research and other related activities to examine appropriate ways to enhance the protection of refugees, asylum seekers and internally displaced persons in Africa;
- c. undertake fact-finding missions, investigations, visits and other appropriate activities to refugee camps and camps for internally displaced persons;
- d. assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers and internally displaced persons in Africa;
- e. cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental and non-governmental bodies, international and regional mechanisms involved in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons;
- f. develop and recommend effective strategies to better protect the rights of refugees, asylum seekers and internally displaced persons in Africa and to follow up on his recommendations;

²⁵⁸ African Commission on Human and Peoples' Rights and UNHCR, 'Memorandum of Understanding Between the African Commission on Human and Peoples' Rights and the United Nations High Commissioner for Refugees' (26 May 2003)

<http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/achpr-unhcr%20agreement,%20english.pdf> accessed 15 October 2011, art 2.

²⁵⁹ *ibid.*

²⁶⁰ African Commission on Human and Peoples' Rights, 'Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa' (Thirty-sixth Ordinary Session of the ACmHPR Dakar 7 December 2004).

g. raise awareness and promote the implementation of the UN Convention on Refugees of 1951 as well as the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa;

h. submit reports at every ordinary session of the African Commission on the situation of refugees, asylum seekers and internally displaced persons in Africa.²⁶¹

Not surprisingly given his role, Nyanduga maintains that ‘the continued use of the African Commission as a forum for discussion refugee rights issues is an important protection mechanism for refugees’.²⁶² Yet others are sceptical. According to Murray,

the African Commission ... cannot be said to have developed a coherent policy on human rights and refugees and displaced persons. In addition, until recently, the OAU/AU organs and the African Commission ... seemed to operate, in this area as well as many others, in splendid isolation. Neither referred to each other’s documents or jurisprudence in their own work nor drew upon each other to enforce decisions or recommendations.²⁶³

That the Commission has failed to adopt a coherent refugee policy within its promotional mandate points to the importance of its protective mandate as a source of refugee protection standards. Indeed, the African Commission has issued several decisions elaborating the role of the African Charter for refugees, some of which are discussed below.

The body of law that can be applied by the Commission is broad. According to article 60 of the Charter,

[t]he Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

The Commission may, therefore, apply the 1969 Convention; it did so in favour of Sierra Leonean refugees in Guinea in a case brought on their behalf by an NGO.²⁶⁴ The President of Guinea proclaimed over the radio that Sierra Leonean refugees should be arrested, searched and detained, leading to massive violations of their rights by civilians and the military and forcing many into flight for a second time.

²⁶¹ *ibid*, para 1.

²⁶² Nyanduga (n 30) 103.

²⁶³ Murray (n 203) 61.

²⁶⁴ *African Institute for Human Rights and Development (on Behalf of Sierra Leonean Refugees in Guinea) v Guinea* comm no 249/2002, 20th Annual Activity Report of the Af Cm HPR (2004).

The Commission held that this violated several provisions of the African Charter, including article 12(5) prohibiting the mass expulsion of non-nationals, and the 1969 Convention's non-discrimination provision. The Commission also invoked the Charter's prohibition of mass expulsion in *Organisation mondiale contre la torture et al. v Rwanda*,²⁶⁵ which alleged the collective expulsion of Burundian refugees from Rwanda. Thus '[b]y interpreting the Charter for the benefit of refugees ..., the African Commission ... has enabled these individuals to use its communication procedure to enforce their rights'.²⁶⁶

Moreover, while there is no body specifically designated as having oversight of the 1969 Convention, its provisions can be enforced on a case-by-case basis at the African Commission. While useful for those refugees who can access the Commission, this case-by-case enforcement ultimately yields only patchwork or fragmented protection. In this regard and as a result of the above-mentioned shortcomings of the Commission's promotional work in favour of refugees, African Commission engagement with refugee protection mirrors that of the OAU and AU more generally.

Conclusion

If this survey has demonstrated anything, it is that the OAU and AU have engaged consistently with refugee protection. Both organisations have adopted legal instruments, staged gatherings resulting in resolutions, declarations, decisions, recommendations and plans of action and created bodies with refugee-focused mandates. Whether such initiatives have been effective is, however, another matter.

Many of the authors cited herein have questioned their effectiveness; according to Nyanduga, 'accountability for violations of refugee rights is lacking'²⁶⁷ and '[u]nenforceability of resolutions and decisions of regional political and quasi-judicial bodies remains a major handicap for the legal protection mechanism'.²⁶⁸ Indeed, refugee numbers in Africa are high, their predicament is protracted and violations of their rights are rife.²⁶⁹ Thus it may be a question of quantity over quality and rhetoric over reality: while there is no shortage of OAU and AU standards, principles and mechanisms, it is not clear that they have prevented displacement or produced better outcomes for refugees.

The transition from the OAU to the AU represented a significant opportunity to change this. While 'non-interference by any Member State in the internal affairs of another'²⁷⁰ remains an AU principle, the new continental body is not as strictly bound by the provision as was the OAU.²⁷¹ Rather, in the AU there is the right 'to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide

²⁶⁵ *Organisation mondiale contre la torture et al. v Rwanda* comm nos 27/89, 49/91 and 99/93, 7th Annual Activity Report of the Af Cm HPR (1996).

²⁶⁶ Murray (n 203) 59.

²⁶⁷ Nyanduga (n 30) 102.

²⁶⁸ *ibid.*

²⁶⁹ See, for example, Jeff Crisp, 'No Solution in Sight: The Problem of Protracted Refugee Situations in Africa' in I Ohta and YD Gebre (eds), *Displacement Risks in Africa: Refugees, Resettlers and Their Host Population* (Kyoto University Press 2005); Robin Ramcharan, 'The African Refugee Crisis: Contemporary Challenges to the Protection of Refugees and Displaced Persons in Africa' (2000) 8 Afr YB Intl L 119; Rutinwa (n 9); Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus Faced Humanitarianism* (Berghan Books 2005).

²⁷⁰ AU Constitutive Act (n 27) art 4(g).

²⁷¹ See OAU Charter (n 14) art III(2).

and crimes against humanity',²⁷² which have been the cause of some of the continent's worst refugee crises.

Moreover, the AU's focus on democracy, social and economic development, peace and security and human rights—the latter marked in particular by the creation of a binding regional human rights court—is more in line with refugee protection than its predecessor's preoccupation with decolonisation and the consolidation of the post-colonial state. Finally, the establishment of the AU was a fortuitous moment for institution building.

Yet conflicts such as that in Darfur continue to produce large-scale displacement, effective action for refugees has been lacking and instead of building one effective AU organ for refugees, a number of bodies with obscure and possibly overlapping mandates were formed in an ad hoc fashion reminiscent of the OAU approach. The AU's legal foundations permit high expectations in the field of refugee protection and the scale of the refugee problem in Africa demands them. It is time for the AU to focus on the quality of initiatives over their quantity, and for rhetoric to give way to reality.

²⁷² AU Constitutive Act (n 27) art 4(h).

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