

Introduction: Refugees, Returnees and Internally Displaced Persons in Africa

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On 10 September 2019, the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) turned 50, while on 23 October 2019 the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) turned 10. It is against this backdrop that the designation by the AU Assembly of Heads of State and Government of 2019 as the Year of Refugees, Returnees and Internally Displaced Persons (IDPs) in Africa,¹ is significant.

As an effective complement to the 1951 UN Convention Relating to the Status of Refugees (UN Refugee Convention), the OAU Refugee Convention reinforces the importance of protecting persons who have fled their countries of origin due to a well-founded fear of persecution on five identified grounds. The contextual significance of the OAU Refugee Convention lies in the manner in which it expands on the very definition of “refugee”, as well as specific

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1 “Refugees, returnees and internally displaced persons: Towards durable solutions to forced displacement in Africa” (concept note on the theme of the year), doc EX.CL/1112(XXXIV)Rev.1 (2019).

issues cardinal to refugee protection, such as *non-refoulement*² and burden sharing. In fact, the concept of “burden /responsibility sharing” has only fairly recently started to gain global resonance with the emergence of the 2018 Global Compact on Refugees (GCR).

Although the OAU Refugee Convention has been ratified by 46 of the 55 AU member states,³ a cursory reflection on the refugee situation on the continent reveals that the full and effective implementation of the convention remains a challenge. This is manifest in the barriers to asylum processes, restriction on movements, societal xenophobic rhetoric and the conflation of criminal and administrative measures in the treatment of refugee populations in parts of the continent. Although the OAU Refugee Convention strengthens the corpus on refugee protection, the extent to which its progressive contents, such as “burden sharing”, will find actual resonance in practice will be a litmus test for its continuing relevance, even as it moves beyond its golden jubilee.

Unlike the OAU Refugee Convention, the Kampala Convention emerged at a time when the OAU had transformed into the AU and the agenda that started the regional organisation had morphed from the rhetoric of decolonisation into more concrete policies for the delivery of good governance and human rights. This development is reflected in both the formation and content of the Kampala Convention. As the first binding continental instrument on internal displacement, the Kampala Convention has been hailed as a global blueprint. While reflecting the 1998 UN Guiding Principles on Internal Displacement (UNGP), the Kampala Convention builds on the UNGP in various ways, including in its recognition of contemporary and context-specific root causes of internal displacement, such as climate change and harmful practices. Over the last decade, the Kampala Convention has been ratified by 31 African states.⁴

Both instruments have shaped the regional landscape on forced migration and have found expression in national frameworks. Given their importance in furthering protection for forcibly displaced populations in Africa, it is crucial to reflect on the experience of the intervening 50 and 10 years after the promulgation of these instruments. It is against this background that this special issue was conceived and has materialised. Articles in this special issue

2 This principle prohibits states from returning refugees or asylum-seekers to territories where there is a risk that their life or freedom would be threatened.

3 “List of countries which have signed, ratified / acceded to the OAU Convention Governing Specific Aspects of Refugee Problem in Africa” (May 2019), available at: <<https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf>> (last accessed 26 January 2021).

4 “List of countries which have signed, ratified / acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)” (June 2020), available at: <<https://au.int/sites/default/files/treaties/36846-sl-AFRICAN%20UNION%20CONVENTION%20FOR%20THE%20PROTECTION%20AND%20ASSISTANCE%20OF%20INTERNALLY%20DISPLACED%20PERSONS%20IN%20AFRICA%20%28KAMPALA%20CONVENTION%29.pdf>> (last accessed 26 January 2021).

reflect on specific issues integral to the theoretical and legal aspects of these instruments.

Opening the substantive discussion, Sara Palacios-Arapiles reflects on Africa's contribution to refugee law through the OAU Refugee Convention, including its impact on the framework of other regional processes in Europe and the Americas. She further examines the progressive interpretation of refugee rights given by institutions within the regional human rights system, which have enriched regional refugee protection and international refugee law.

Fatima Khan and Cecile Sackeyfio examine the potential impact of the GCR in providing adequate protection for refugees in camps across Africa in low-income refugee hosting countries. While both the UN Refugee Convention and the OAU Refugee Convention provide detailed provisions on refugee protection and are in fact complementary, they argue that "there have been few tangible outcomes for refugees who are 'languishing in camps'". They contend that the GCR is a practical tool for implementing responsibility-sharing and advancing sustainable development for refugees. Although they acknowledge that the GCR's "greatest drawback" is its soft law character, they argue that its potential benefit could be monumental.

Francis Deng and Romola Adeola consider the normative influence of the UNGP on the Kampala Convention. Reflecting on synergies and expansions, they argue that both instruments have significantly shaped the regional landscape on internal displacement. Moreover, they observe that there is a need to strengthen protection in three main areas. The first relates to developing contexts for which urgent solutions are required, including the COVID-19 pandemic and its impact on IDPs. The second area is the need to advance clarity on specific root causes of internal displacement leveraging on these instruments, including climate change and harmful practices. Thirdly, they emphasise that it is important to focus on future concerns, such as the issue of technology and possible linkages with internal displacement.

Olivia Lwabukuna critically reflects on the responsibility to protect (R2P) and the potential for leveraging this principle in advancing protection for IDPs. Reflecting on the underpinnings of R2P within the regional normative framework, she argues that the "reality of internal displacement in Africa, and the human rights violations that accompany and cause it, requires response capabilities that find preserve in collective accountability underlined within R2P". However, she contends that the successful application of the principle, which is often dependent on political conditions, is a drawback to generalizing about its potential. Drawing on legal and political responses to Kenya's post-election violence as a case study, she highlights the implications of applying R2P to situations of internal displacement.

Harmful practices constitute a root cause of internal displacement under the Kampala Convention. Romola Adeola examines how persons affected by these practices may be protected through the lens of the Kampala Convention, given its wide regional acceptance and the need to combat all forms of internal displacement in Africa. This article argues that the

Kampala Convention includes an absolute prohibition on harmful practices, which provides an important starting point from which to define state obligations. However, she argues that, where displacement occurs, protection, humanitarian assistance and durable solutions need be provided.

Benyam Mezmur and Romola Adeola consider the protection of internally displaced children (IDCs). They advance a doctrinal analysis of article 23(4) of the African Charter on the Rights and Welfare of the Child (African Children's Charter). They examine the notion of *mutatis mutandis* applying to the provision, arguing that it is two-pronged: it requires protection of IDCs to be read in light of the protection of "refugee children" in the African Children's Charter, and in light of the Kampala Convention (being the regional law on internal displacement). They emphasise that, in clarifying the interpretation of article 23(4), a General Comment on this provision by the African Committee of Experts on the Rights and Welfare of the Child would be of value. However, it would be important to have a background study on the general state of protection of internally displaced children to inform the development of such a General Comment.

Article 12(1) of the African Charter on Human and Peoples' Rights (African Charter) guarantees to all individuals the right to freedom of movement and residence within the borders of a state, provided they abide by the "law". Romola Adeola, Frans Viljoen and Trésor Makunya Muhindo provide a valuable commentary on General Comment No 5 of the African Commission on Human and Peoples' Rights on article 12(1) of the African Charter (General Comment No 5). In General Comment No 5, the commission elaborates on the content of the right to freedom of movement and residence within state borders. The authors draw on the content of the Kampala Convention, as internal displacement is a manifestation of movement within a state's borders. Although it is soft law, General Comment No 5 provides an important analysis of this provision and of issues that have emerged as challenges to the furtherance of this right. The authors argue that, as soft law, its "persuasive force" will depend on a range of factors, including "its use at the domestic level, its visibility and its integration into regional human rights jurisprudence".

Gideon Muchiri Kaungu reflects on the value of Ubuntu as an antidote to xenophobia and specifically the concern of afro-phobia in the South African context. He demonstrates how Ubuntu as a normative traditional principle can provide a basis on which to advance social cohesion in the South African context. He examines the place of Ubuntu within the legal and constitutional jurisprudence, demonstrating the transformative potential of this philosophy in responding to societal challenges.

Overall, this special issue advances critical insights into these instruments, opening space for further discussions on the protection of forcibly displaced populations in Africa beyond the rhetorical celebration of these important 50 and 10 year milestones.