

## Key legal considerations on the standards of treatment of refugees recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

1. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention)<sup>1</sup> complements the 1951 Convention relating to the Status of Refugees<sup>2</sup> and its 1967 Protocol (1951 Convention),<sup>3</sup> which remain the universal and primary legal protection instruments for refugees.<sup>4</sup>
2. The 1969 OAU Convention incorporates, in Article I(1), the 1951 Convention definition of a refugee contained in Article 1A(2) of the 1951 Convention, as amended by the 1967 Protocol (hereafter referred to as the 1951 Convention definition),<sup>5</sup> and also elaborates on its application in different contexts. A principal purpose of the 1969 OAU Convention is to provide refugee protection in specific humanitarian situations, including large-scale arrivals of people fleeing situations or circumstances in their country of origin which fall within the OAU Convention's Article I(2) criteria.<sup>6</sup>
3. In applying Article I(1) and I(2) of the 1969 OAU Convention, the primacy of the 1951 Convention needs to be recalled, given its central legal position as the 'basic and universal instrument relating to the status of refugees', which is explicitly acknowledged in the OAU Convention itself.<sup>7</sup> The 1969 OAU Convention, by contrast, addresses specific challenges faced by African countries in responding to refugee crises on the continent.<sup>8</sup>
4. Most factual scenarios suggest the relevance and applicability of both the 1951 Convention definition and the 1969 OAU Convention Article I(2) definition to a person's claim for refugee status.<sup>9</sup> In limited situations, an individual may be a refugee under Article I(2) but not under the 1951 Convention definition, including where no causal link can be established

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<sup>1</sup> *Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45 (1969 OAU Convention), <http://www.refworld.org/docid/3ae6b36018.html>. The successor to the OAU is the African Union (AU), which was created in 2002.

<sup>2</sup> *Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137 (1951 Convention), <http://www.refworld.org/docid/3be01b964.html>.

<sup>3</sup> *Protocol Relating to the Status of Refugees* (31 January 1967) 606 UNTS 267 (1967 Protocol), <http://www.refworld.org/docid/3ae6b3ae4.html>.

<sup>4</sup> EXCOM Conclusion No. 87 (L) 1999, para. (f); EXCOM Conclusion No. 89 (LI) 2000 and EXCOM Conclusion No. 103 (LVI), 2005. See also: 1969 OAU Convention, note 1 above, preambular paragraph 9, referring to the 1951 Convention, as modified by the 1967 Protocol, as the basic and universal instrument relating to the status of refugees, and Article VIII(2) affirming the 1969 OAU Convention as the 'effective regional complement' of the 1951 Convention.

<sup>5</sup> Contrary to Article 1A(2) of the 1951 Convention, Article I(1) of the 1969 OAU Convention does not include the temporal limitation of having a well-founded fear as a result of 'events occurring before 1 January 1951'; a limitation later removed with the adoption of the 1967 Protocol, Article I(2).

<sup>6</sup> UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, para. 5, <http://www.refworld.org/docid/555c335a4.html>. UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, para. 6, <http://www.refworld.org/docid/583595ff4.html>.

<sup>7</sup> 1969 OAU Convention, note 1 above, preambular paragraph 9.

<sup>8</sup> UNHCR Guidelines on International Protection No. 12, note 6 above, para. 45.

<sup>9</sup> *Ibid.*, note 6 above, paras. 8 and 86 to 88.

between her or his fear of being persecuted and a Convention ground. In such circumstances, Article I(2) expands the potential range of persons eligible for refugee status.<sup>10</sup>

5. In comparison to the 1951 Convention, the 1969 OAU Convention contains a more limited set of rights for refugees, ranging from protection from *refoulement*,<sup>11</sup> voluntary repatriation<sup>12</sup> and the issuance of a travel document.<sup>13</sup> The 1969 OAU Convention does not – unlike the 1967 Protocol – explicitly incorporate the entire standard of treatment found in Articles 3 to 34 of the 1951 Convention.<sup>14</sup>

6. For most refugees in Africa who are recognized under the 1969 OAU Convention, the limited package of rights included in the 1969 OAU Convention does not pose a significant problem in practice, as the majority of African Union Member States are party to both the 1951 Convention and/or its 1967 Protocol, as well as the 1969 OAU Convention.<sup>15</sup> In these countries, refugees recognized under the 1969 OAU Convention, whether under Article I(1) or I(2), benefit from the 1951 Convention’s rights framework.<sup>16</sup> 1969 OAU Convention refugees and 1951 Convention refugees are similarly situated, with indistinguishable status attached, regardless of the legal basis of their protection needs.<sup>17</sup> A difference in treatment would be neither reasonable nor objectively justified, would disregard the complementary character of the 1969 OAU Convention,<sup>18</sup> and would amount to discrimination.<sup>19</sup> Moreover, the preamble of the 1969 OAU Convention recognizes the need and desire to establish common standards for the treatment of refugees.<sup>20</sup>

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<sup>10</sup> *Ibid.*, para. 8.

<sup>11</sup> 1969 OAU Convention, note 1 above, Article II(3), providing that no person shall be subjected to measures compelling her or him to return or remain in a territory where her or his life, physical integrity or liberty would be threatened.

<sup>12</sup> *Ibid.*, Article V(1).

<sup>13</sup> *Ibid.*, Article VI(1).

<sup>14</sup> 1967 Protocol, note 3 above, Article I(1).

<sup>15</sup> To date, of the African Union’s 54 Member States only the Comoros, Eritrea, Libya and Mauritius have neither signed nor ratified the 1951 Convention or its 1967 Protocol. South Sudan has signed but not yet ratified the 1951 Convention and its 1967 Protocol. Madagascar is a party to the 1951 Convention but not to the 1967 Protocol. Madagascar and the Republic of Congo continue to recognise the 1951 Convention’s geographical limitation. Finally, Cabo Verde is party to the 1967 Protocol but not the 1951 Convention.

<sup>16</sup> See for a detailed analysis and references to further academic writing: M Sharpe, “The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions”, *McGill Law Journal* (2012) 58, p 124 to 147.

<sup>17</sup> UNHCR, *Persons in need of international protection*, June 2017, p. 3,

<http://www.refworld.org/docid/596787734.html>, considering that ‘all persons who meet the refugee criteria under international law are refugees for the purposes of international law’.

<sup>18</sup> 1969 OAU Convention, note 1 above, Article VIII(2). G Okoth-Obbo, “Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa”, *Refugee Survey Quarterly* (2001) 98. J F Durieux and A Hurwitz, “How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees”, *German Yearbook of International Law* (2004) 126.

<sup>19</sup> *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, Article 26, <http://www.refworld.org/docid/3ae6b3aa0.html> (ICCPR), protecting equality before the law and equal protection of the law, irrespective of, inter alia, any status, unless differentiation in treatment is reasonable, objective and in pursuit of a legitimate aim. See also: UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 13, <http://www.refworld.org/docid/453883fa8.html>, and preambular paragraph 6 of the 1969 OAU Convention, note 1 above, recalling the Charter of the United Nations and the Universal Declaration of Human Rights having affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. Finally, see J Pobjoy, “Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection”, *Melbourne University Law Review* (2010).

<sup>20</sup> 1969 OAU Convention, note 1 above, preambular paragraph 9.

7. However, African Union Member States that are not party to the 1951 Convention and/or its 1967 Protocol, or that have retained the former instrument's geographical limitation, are not legally bound by the rights framework set out in the 1951 Convention.<sup>21</sup> Nonetheless, the preamble of the 1969 OAU Convention calls upon Member States of the African Union to accede to the 1951 Convention and its 1967 Protocol and meanwhile to apply the provisions of the 1951 Convention to refugees in Africa.<sup>22</sup> Further, refugees recognized under the 1969 OAU Convention by African Union Member States not party to the 1951 Convention and/or the 1967 Protocol are protected in accordance with international<sup>23</sup> and regional human rights law.<sup>24</sup>

8. The international legal framework for the protection of refugees comprises, inter alia, international refugee law as well as international human rights law.<sup>25</sup> Of particular importance for Africa is the African Charter on Human and Peoples' Rights (Banjul Charter),<sup>26</sup> to which all Member States of the African Union are a party. The Banjul Charter contains a range of civil and political as well as economic, social and cultural rights applicable to every individual, irrespective of the person's nationality or legal status and without distinction of any kind.<sup>27</sup> As

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<sup>21</sup> This would concern: the Comoros, Eritrea, Libya, Madagascar and the Republic of Congo, see note 15 above.

<sup>22</sup> 1969 OAU Convention, note 1 above, preambular paragraph 10, referencing Resolution 26 of the OAU Assemblies of Heads of State and Government, which explicitly requests (rather than calls upon) Member States of the OAU to ratify the 1951 Convention and to apply meanwhile the provisions of that Convention, see: OAU AHG/Res.26(II), para. 7. Noting also in this regard the continuous call by the Executive Committee of the High Commissioner's Programme (EXCOM) and the United Nations General Assembly to states that are not parties to the 1951 Convention and/or 1967 Protocol to accede to these instruments, including in the UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, para. 65, <http://www.refworld.org/docid/57ceb74a4.html>. See also: EXCOM Conclusions No. 1 (XXVI) 1975, para. (c); No. 2 (XXVII) 1976, para. (b); No. 11 (XXIX) 1978, para. (g); No. 14 (XXX) 1979, para. (f); No. 16 (XXXI) 1980, para. (g); No. 21 (XXXII) 1981, para. (c); No. 25 (XXXIII) 1982, para. (g); No. 29 (XXXIV) 1983, para. (f); No. 33 (XXXV) 1984, para. (i); No. 36 (XXXVI) 1985, para. (d); No. 42 (XXXVII) 1986, para. (f); No. 43 (XXXVIII) 1986, para. 1; No. 51 (XXXIX) 1988, para. 2; No. 65 (XLII) 1991, para. (k); No. 68 (XLIII) 1992, para. (b); No. 71 (XLIV) 1993, para. (c); No. 74 (XLV) 1994, para. (d); No. 77 (XLVI) 1995, para. (c); No. 79 (XLVII) 1996, para. (d); No. 81 (XLVIII) 1997, para. (m) No. 99 (LV) 2004, para. (c); No. 102 (LVI) 2005, para. (c); and No. 108 (LIX) 2008. UNGA resolutions 48/116. 20 December 1993, para. 2; 51/75, 12 December 1996, para. 2; 52/102, 12 December 1997, para. 4; 53/123, 9 December 1998, para. 3; 54/144, 17 December 1999, para. 5; 55/77, 4 December 2000, para. 10; 56/134. 19 December 2001, para. 3; 56/135, 19 December 2001, para. 8; 57/183, 18 December 2002, paras. 8 and 10; 58/149, 22 December 2003, para. 9; 58/154, 22 December 2003, para. 3; and 71/172 (2017), para. 7;

<sup>23</sup> See for country-by-country status of ratification of UN human rights treaties,

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN).

<sup>24</sup> 1969 OAU Convention, note 1 above, preambular paragraph 6, reminding AU Member States that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. Core regional human rights instruments for AU Member States in this regard are the *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58

(1982), <http://www.refworld.org/docid/3ae6b3630.html>; African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July

2003, <http://www.refworld.org/docid/3f4b139d4.html>; and African Union, *African Youth Charter*, 2 July

2006, <http://www.refworld.org/docid/493fe0b72.html>.

<sup>25</sup> The international legal framework for the protection of refugees comprises of international refugee law, international human rights law and international humanitarian law, as reaffirmed in the New York Declaration, note 22 above, para. 66. Also, EXCOM Conclusion No. 87 (L), para. (c). On the complementarity between international refugee law, international human rights law and international criminal law, see: UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, <http://www.refworld.org/docid/4e1729d52.html>.

<sup>26</sup> Banjul Charter, note 24 above.

<sup>27</sup> *Ibid.*, Article 2 (non-discrimination) and Article 3 (equality before the law and equal protection of the law). *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, 249/02, African Commission on Human and Peoples' Rights, December 2004, para. 68, <http://www.refworld.org/cases,ACHPR,51b6fc794.html>. Also, ICCPR, note 19 above, Article 2(1).

such, refugees benefit from the protection of the Banjul Charter with the exception of Article 13, which is owed explicitly to 'citizens'.<sup>28</sup> Of particular relevance for the protection of refugees, in comparison to the standard of treatment found in Articles 3 to 34 of the 1951 Convention, are: the prohibition of all forms of exploitation and degradation (Article 5);<sup>29</sup> the right to liberty and security and the prohibition of arbitrary detention (Article 6);<sup>30</sup> the right to freedom of movement and residence (Article 12(1)); the obligation for States only to expel a lawfully admitted non-national pursuant a decision taken in accordance with the law (Article 12(4));<sup>31</sup> the prohibition of mass expulsion (Article 12(5));<sup>32</sup> the right to access public services (Article 13(3)); the right to property (Article 14); the right to work under equitable and satisfactory conditions and with equal pay for equal work (Article 15); the right to health (Article 16); the right to education (Article 17); the right to family life (Article 18(1) and (2)); and the right to special measures corresponding with their needs for the elderly and persons with disabilities (Article 18(4)).

9. Further, Article 12(3) of the Banjul Charter provides that '[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions'. As such, States Parties to the Banjul Charter are obliged to ensure full respect for the institution of asylum, including the principle of *non-refoulement*;<sup>33</sup> admission to territory and access to fair and efficient asylum procedures;<sup>34</sup> access to UNHCR; and the applicability of human rights law standards to people seeking asylum.<sup>35</sup> Also, in accordance with Article 12(3), seeking asylum is not an unlawful act. However, in exercising the right to seek asylum, people are often compelled to arrive at, enter, or stay in a territory without authorisation or with no, insufficient, false or fraudulent documentation.<sup>36</sup> They may, for example, be unable to obtain the necessary documentation

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<sup>28</sup> Banjul Charter, note 24 above, Article 13(1) and (2) concerns every citizen's right to political participation and access to public services.

<sup>29</sup> *John K. Modise v. Botswana*, Comm. No. 97/93, African Commission on Human and Peoples' Rights, 6 November 2000, para. 92, <http://www.refworld.org/cases,ACHPR,52ea58d04.html>.

<sup>30</sup> *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda*, 27/89-46/90-49/91-99/93, African Commission on Human and Peoples' Rights, October 1996, para. 29, <http://www.refworld.org/cases,ACHPR,51b6f4374.html>.

<sup>31</sup> *Ibid.*, para. 31.

<sup>32</sup> *Ibid.*, para. 33. *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, 292/04, African Commission on Human and Peoples' Rights, May 2008, para. 69, <http://www.refworld.org/cases,ACHPR,51b6fd4e7.html>. *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia*, 71/92, African Commission on Human and Peoples' Rights, October 1996, paras. 19 to 28, <http://www.refworld.org/cases,ACHPR,51b6f3524.html>.

<sup>33</sup> Banjul Charter, note 24 above, Article 5, prohibiting all forms of exploitation and degradation, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment; Article 12(4), providing that a non-national legally admitted may only be expelled pursuant a decision taken in accordance with the law; and Article 12(5), prohibiting the mass expulsion of non-nationals.

<sup>34</sup> Note in this regard procedural safeguards provided for in the Banjul Charter, including the right of every individual to have her or his cause heard (Article 7) and the right to receive information (Article 9). See also: *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, 292/04, African Commission on Human and Peoples' Rights, May 2008, para. 84, <http://www.refworld.org/cases,ACHPR,51b6fd4e7.html>, in which the Commission considered that '[e]ven in such extreme circumstances as expulsion, however, the affected individuals should be allowed to challenge the order/decision to expel them before competent authorities, or have their cases reviewed, and have access to legal counsel, among others'; and, regarding the applicability of Article 7(1) of the Banjul Charter in expulsion cases, *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda*, 27/89-46/90-49/91-99/93, note 32 above, paras. 34 and 35 and *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia*, note 33 above, para. 30.

<sup>35</sup> EXCOM Conclusion No. 82 (XLVIII) 1997, para. (d).

<sup>36</sup> EXCOM Conclusion No. 58 (XL) 1989, para. (a).

in advance of their flight because of their fear of serious harm and/or the urgency of their departure. These factors, as well as the fact that refugees have often experienced traumatic events, need to be taken into account in determining whether any form of penalization can be applied, including restrictions on freedom of movement based on irregular entry or presence.<sup>37</sup> In UNHCR's view, the use of national laws and policies penalizing irregular entry and presence carries the risk that persons seeking asylum may not have access to fair asylum procedures and protection.<sup>38</sup>

10. Also, under the heading 'asylum', Article II of the 1969 OAU Convention obliges African Union Member States to use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of refugees who are unable or unwilling to return home.<sup>39</sup> The ultimate goal of international protection is to achieve durable solutions for refugees.<sup>40</sup> The 1969 OAU Convention foresees in this regard the voluntary repatriation of refugees to their country of origin, or the (re-)settlement, in the asylum country or in a third country, of refugees who are unable or unwilling to return home.<sup>41</sup> Of particular importance for the settlement of refugees are the granting of a secure legal status and a progressively wider range of rights and entitlements that are broadly commensurate with those enjoyed by nationals of the host country. The 1951 Convention, the 1969 OAU Convention and human rights instruments provide a useful legal framework for this.<sup>42</sup>

11. Finally, under international law a State is required to ensure the effective implementation of its international legal obligations in good faith.<sup>43</sup> In this regard, the 1969 OAU Convention requires AU Member States to provide information to the AU on the condition of refugees, the implementation of the Convention and – more broadly – on the laws, regulations and decrees in force relating to refugees.<sup>44</sup> In addition, Member States are obliged to cooperate with UNHCR, including to ensure that the 1969 OAU Convention is the effective regional complement in Africa of the 1951 Convention<sup>45</sup> and to allow UNHCR to exercise its international protection function under its mandate, including in countries that are not party to the 1951 Convention and/or 1967 Protocol.<sup>46</sup>

**UNHCR**  
**19 December 2017**

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<sup>37</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 1, para. 11, <http://www.refworld.org/docid/503489533b8.html>

<sup>38</sup> UNHCR, *Note on international protection*, 16 June 2017, EC/68/SC/CRP.12, para. 24, <http://www.refworld.org/docid/595e1f684.html>.

<sup>39</sup> 1969 OAU Convention, note 1 above, Article II(1).

<sup>40</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), <http://www.refworld.org/docid/3ae6b3628.html>. EXCOM Conclusion No. 104 (LVI) 2005, preambular paragraph 3.

<sup>41</sup> 1969 OAU Convention, note 1 above, Articles V (on voluntary repatriation) and II(1), II(4) and II(5) (on settlement and resettlement).

<sup>42</sup> EXCOM Conclusion No. 104 (LVI) 2005, para. (I).

<sup>43</sup> *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331, Article 26, <http://www.refworld.org/docid/3ae6b3a10.html>.

<sup>44</sup> 1969 OAU Convention, note 1 above, Article VII.

<sup>45</sup> *Ibid.*, Article VIII and preambular paragraph 11.

<sup>46</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paras. 1 and 8, notably para. 8(f), <http://www.unhcr.org/refworld/docid/3b00f0715c.html>. EXCOM Conclusions No. 4 (XXVIII) 1977, para. (d); No. 5 (XXVIII) 1981, para. (e); No. 21 (XXXII) 1981, para. (a); No. 90 (LII) 2001, para. (c);