

## **An African Protocol on Mass-Influx of Refugees**

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According to a 2004 Conclusion (No. 100) adopted by the Executive Committee (ExCom) of the Programme of the United Nations High Commissioner of Refugees (UNHCR)<sup>1</sup>, the following characteristics can be attributed to the phenomenon of ‘mass-influx’ of refugees:

- 1) “considerable numbers of people arriving over an international border;
- 2) a rapid rate of arrival;
- 3) inadequate absorption or response capacity in host States, particularly during the emergency phase;
- 4) individual asylum procedures, where they exist, which are unable to deal with assessment of such large numbers.”

This description contains very broad references that can be applied to Africa, which is often referred to as a ‘continent of mass-influx.’

In 2016 alone, five African countries made the list of the top 10 major refugee-hosting countries in the world [<https://theconversation.com/refugees-in-africa-faced-bitter-disappointments-in-2016-69231>]. Ethiopia was the highest, followed by Kenya, Uganda, Democratic Republic of Congo (DRC), and Chad. With growing violence and insecurity in 2016, many South Sudanese people fled to Sudan and Uganda; meanwhile nearly 250,000 Sudanese refugees fled to Sudan since the start of war in the Nuba Mountains in 2011. Similarly, Nigerians fled to Niger and Cameroon, Mozambicans to Malawi, and Malians to Mauritania, to list a few more examples. At the end of 2015, Africa, including North Africa, hosted 4,811,365 refugees and 1,367,409 asylum-seekers [chrome-

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<sup>1</sup> No.100 (LV) – 2004 – International Cooperation and Burden Responsibility Sharing in Mass Influx Situations, The Thematic Compilation of Executive Committee Conclusions: chrome-extension://oemmndcbldboiebfnladdacbfmadadm/http://www.unhcr.org/53b26db69.pdf

extension://oemmnrcbldboiebfnladdacbfmadadm/https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf].

Considering these alarming statistics, and the fact that there is renewed commitment on the part of UNHCR to help countries hosting a large number of refugees [http://www.unhcr.org/news/latest/2016/1/568e82ff6/solutions-needed-stem-global-refugee-crisis-says-grandt.html], it may be high time to consider the drafting of a specific African legal instrument on mass-influx.

Although in numerical terms what amounts to ‘large-scale’ or ‘mass-influx’ differs from country to country and from region to region, the abovementioned characteristics can describe the forced displacement of many people throughout the entirety of Africa. With the Protocol to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) in mind, a new protocol must elaborate further on how to help countries in Africa better tackle hosting refugees with more efficiency [Full Text: <http://www.unhcr.org/en-us/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html>]. A new protocol should be open to accession of all African States, the majority of which, although in different periods, have hosted large numbers of refugees. Each country would likely benefit from a common governance framework that would apply to all forcibly displaced persons across the entire continent.

Practical guidelines on the management of asylum claims, and in the framework of burden and responsibility-sharing, should be provided for [See Article 2.4 of the 1969 OAU Convention] and could constitute one of the main features of the new instrument. However, a requirement should be placed on African actors to implement cooperative burden-sharing efforts, because, and in spite of regional declarations aiming to respect it, burden-sharing currently remains an unavoidable obstacle to refugee management in Africa.

The feat of creating operations of responsibility-sharing should specifically recognize the different capacities of African countries to contribute to an equitable distribution of burdens.

A country like Uganda, for instance, whose resources are strained, cannot afford to be the main and sole host country to refugees in Central-East Africa. Involvement in burden and responsibility-sharing must go beyond short-term emergency assistance and take into account that the participation by States may fluctuate according to specific situations. The analysis on burden and responsibility-sharing should also secure practicable durable solutions for refugees, ensuring that they receive a treatment consistent with international standards in the country of asylum.

With regards to large-scale situations in Africa, the debate about what kind of legal protection is afforded by the 1969 OAU Convention with mass-influx must also be addressed. Large-scale situations generally involve groups of persons recognised as refugees as a consequence of objective reasons for flight from the country of origin. As the assessment of the individual status is not immediately possible to make, such a situation has led to use of a *prima facie* refugee status.

In effect, while Article 1.2 of the 1969 OAU Convention's refugee definition does not preclude such a practice, according to renowned scholars (such as J.F. Durieux) a more attentive reading of the same instrument reveals no specific intent to introduce *prima facie* refugee determination. At the same time, however, in Africa, alternative specific procedures to *prima facie* status determination have rarely been put in place to promote group determination.

The determination of refugee status on a *prima facie* basis in situations of mass-influx is not a product of the 1969 OAU Convention, nor is it exclusively linked to that instrument. It is rather a matter of practical necessity. In this regard, UNHCR also observed that, for instance, there is nothing inherent in the provisions of the 1951 Convention Relating to the Status of Refugees and its relative 1967 Protocol to preclude *prima facie* determination from being applied in mass-influx situations [<http://www.unhcr.org/en-us/1951-refugee-convention.html>].

That is why, in conceiving a possible, African legal instrument on mass-influx, drafters should not disregard the different provisions contained in the universal instruments on the protection of refugees.

Another feature to analyse in the drafting of an African Protocol on mass-influx would be the role of temporary protection and, when this is not available because of protracted refugee situations, the feasibility of durable solutions. Since the adoption of the 1981 ExCom Conclusion No.22 by UNHCR, voluntary repatriation in Africa represents the most appropriate solution [http://www.unhcr.org/en-us/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html]. But there are still a number of protracted situations on the continent demanding attention with solutions that, although linked to burden and responsibility-sharing arrangements, may necessitate a specific, more comprehensive approach.

A solution like resettlement, which is linked to the concept of burden-sharing, does not historically constitute a viable solution for African refugees seeking to remain in Africa. UNHCR highlights that, when repatriation is not possible, primary consideration should be given to the possibility of finding suitable solutions within the regional context.

The concept of “lawful stay” should also be assessed in a new African Protocol, which encompasses standards of treatment for those under international protection in large-scale situations. Currently a common standard is lacking, and African countries have different policies and practices in this regard. In Sierra Leone, for instance, individual protection in a mass-influx situation would be excluded or revoked. Similar conditions will also conclude international protection for the members of an entire group of refugees who fled *en masse* from their country of origin. This is despite the fact that Sierra Leone introduced a specific section (No.22) in its 2007 Refugees Protection Act, which deals with the measure to adopt in case of mass-influxes of refugees into the country. Moreover, Article III of the 1969 OAU Convention on the prohibition of subversive activities could constitute a point of departure for the relative analysis.

The African Protocol should absolutely take into the highest consideration the United Nations General Assembly (UNGA) recommendations on refugees, which were organized at a meeting on September 19, 2016. The three main pillars of the recommendations include: “Uphold safety and dignity in large movements of both refugees and migrants; adopt a Global Compact on responsibility-sharing for refugees; work towards a Global Compact for safe, regular and orderly migration.” Moreover, the United Nations Secretary General (UNSG) recommendations, underlined in the 2016 Report on the Mass Movements of Refugees, should also be taken into account: “[I]n situations of mass inflows, national capacities to identify, register, and document new arrivals and to provide them with necessary assistance are severely stretched [...] Receiving States are often left to respond to a mass influx of new arrivals on their own. Regional mechanisms to share responsibility have been found wanting” [chrome-extension://oemmndcbldboiebfnladdacbfdmadadm/http://www.un.org/pga/70/wp-content/uploads/sites/10/2015/08/21-Apr\_Refugees-and-Migrants-21-April-2016.pdf].

Despite the fact that an increasing number of African countries are keen to follow a “Refugees? No, thanks” policy, the international community should favour better management of large-scales influxes, and a big effort must be accomplished at both the universal and regional levels,