

ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION



THE STATUS AND TREATMENT OF REFUGEES

Prepared by:

**The AALCO Secretariat
29-C, Rizal Marg
Chanakyapuri Diplomatic Enclave
New Delhi – 110021
INDIA**

Contents

	Page No
I. Introduction	1-2
A. Background	1-2
II. An Overview of the 1969 OAU Convention	2-9
A. History of the 1969 OAU Convention	2-3
B. Origin of the refugee problem in Africa	4-7
C. Salient features of the 1969 OAU convention	7-9
III. A Review of the Impact of the 1969 OAU Convention on the African Refugee Situation	9-12
IV. Refugee Situation in Africa: Past Trends and Future Challenges	12-16
V. Comments and Observations of the AALCO Secretariat	16-17

The Status and Treatment of Refugees

I. INTRODUCTION

A. Background

1. The Asian-African Legal Consultative Organization (AALCO) has been concerned with the protection of refugees ever since this topic was introduced in its agenda in 1964 at the behest of Arab Republic of Egypt. Within AALCO, this has been a keenly debated subject during Sessions, which has contributed immensely to the exploring and framing of policies that take into account the rights of refugees in the Member States. While working in pursuance of its mandate, AALCO has collaborated with the Office of the United Nations High Commissioner for Refugees (UNHCR), both formally as well as informally. This cooperation and mutual assistance was formalized by the Signing of the Memorandum of Understanding (MOU) between the two Organizations on 23rd May 2002¹. The MOU provides for the undertaking of joint study and envisages holding of seminars and workshops on topics of mutual interest and concern.

2. It is pertinent to remember here the distinguished record of contributions on the part of AALCO to the cause of the protection of refugees. This includes the adoption of the “Principles Concerning the Treatment of Refugees” in 1966 at its eighth session, which are commonly known as ‘Bangkok Principles’. Further study improved upon these principles by adopting two addendum. The first which was adopted in 1970 at the Accra session, contained an elaboration of the ‘right to return’ of any person who, because of foreign domination, external aggression or occupation, has left his habitual place of residence. Furthermore, in the year 1987, AALCO had adopted ‘Burden Sharing Principles’ as an addendum to the Bangkok Principles of 1966. These principles have highlighted the growing trend towards finding durable solutions to the refugee problems and for international assistance to relieve the burden of those faced with large scale influx of refugees. Burden and responsibility sharing arrangements, including resettlement, represent a significant component of durable solutions for displacement situations. These principles provide a legal framework, which while “recommendatory in nature” nevertheless forms guiding principles for state practices in the Asian-African region. They remain a term of reference and an expression of the our region’s concern for refugees.

3. Apart from the adoption of the 2001 Revised text of the Bangkok Principles, two other important initiatives of AALCO related to the refugee protection has been the preparation of the “Model Legislation of Refugees” and the “Concept of Establishment of safety Zones for Internally Displaced persons”.

¹ The MOU was signed by Mr. Rudd Lubbers, the then UN High Commissioner for refugees and Dr. Wafik Zaker Kamil, the former Secretary-General of AALCO.

4. It should also be recalled here that AALCO has conducted a number of seminars/workshops on the problem of refugees over the years. The two day seminar which was convened in 2003 in cooperation with UNHCR on “Strengthening refugee Protection in Migratory movements” deserved special mention in this regard. This seminar focused on a number of issues that include, the root causes of refugee flows, the principle of non-refoulement, the principle of burden sharing, the determination of refugee status among other things.

5. It is pertinent here to recall the special study that was undertaken by AALCO along with UNHCR on “*The Problem of Statelessness: An Overview from the African Asian and Middle Eastern Perspective*”, which was released during the formers’ Forty-Sixth Annual Session in Cape Town. The item was not deliberated at the Forty-Seventh Annual Session.

This year’s brief has its focus on the situation of Africa on account of three reasons:

6. *Firstly*, the 1969 OAU Convention, the only regional instrument governing the issues of refugees in Africa, is on the verge of completing its 40th Anniversary. This, it is believed, provides a good opportunity not only to review the achievements of and challenges facing the 1969 Convention but also to draw attention to the continuing urgency of the refugee and displacement crisis in Africa.

7. *Secondly*, the African Union has been taking concerted efforts in order to enact an African Convention on the Protection and Assistance of Internally Displaced Persons. The effort bore fruit in Nov.2008 when a draft African Union Convention was adopted by the African Ministers in charge of Forced Displacement matters. This draft Convention was expected to be formally endorsed at a special summit of the African Union in April 2009, which did not materialize. This is indeed an immensely important development, since, if adopted, it represents the first attempt ever made in the world to codify the rights of Internally Displaced Persons [IDPs].

8. *Lastly*, the overall situation in Africa with regard to the rights of refugees, asylum seekers, IDPs has of late, witnessed an increase in the new refugee emergencies. Hence it is considered necessary to focus on these issues to find out the real issues involved and chart out the future course of action.

II. AN OVERVIEW OF THE 1969 OAU CONVENTION

a. History of the 1969 OAU Convention

9. As a regional complement of the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol, the 1969 OAU Convention Governing the Specific Aspects of Refugee problems in Africa [the OAU Convention] has been a strong pillar for refugee protection and solutions in Africa. It has enabled the provision of

asylum to refugees and the implementation of voluntary repatriation in a way that has consolidated brotherhood and comity among African States. It has also inspired the development of favourable refugee laws, policies and practices in Africa and indeed in other regions of the world, most notably in the Latin American region. The Convention remains the only international legal instrument which contains elaborate principles on the voluntary repatriation of refugees. Before we proceed to analyse the historical circumstances of the 1969 OAU Convention, it is indispensable, that, this Convention is located within the broader international legal framework concerning the protection of refugees. This, it is believed, will go a long way in identifying the similarities and differences that exist in the refugee protection regime under the 1951 UN Refugee Convention and 1969 OAU Refugee Convention.

10. The central source of international law regarding refugees is the 1951 Convention relating to the Status of Refugees, the protections of which were made universal by the 1967 Protocol relating to the Status of Refugees. The 1951 Convention defines a refugee as a 'person who is outside of his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself or herself of the protection of that country, or return there, for fear of persecution'. This definition is by now both well known and universally recognized as the standard by which one's claim to refugee status is adjudged. Those states that are parties to the Refugee Convention undertake to provide the standards of protection spelled out in its provisions.

Main Provisions of the 1951 UN Refugee Convention

Who is a refugee?

11. A refugee is a person who is outside his or her country of origin (or habitual residence in case of statelessness) and who, owing to a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unable or unwilling to avail himself or herself of the protection to which he or she is normally entitled from that country.

12. The decision as to whether a person is entitled to refugee status is taken by each State in accordance with its own established procedures, consistent with international standards, on the basis of criteria laid down in Article 1 of the Convention. UNHCR plays a role in these procedures if and as requested, and is thus able to share its accumulated experience with Governments regarding status determination and the general handling of refugee problems. Such participation is in line with Article 35 of Convention and the corresponding Article II of the Protocol, which are described below in the section on the United Nations High Commissioner for Refugees (UNHCR) and the 1951 Convention/1967 Protocol.

Cessation of Refugee Status

Article IC of the Convention provides that a person shall cease to be a refugee if:

1. he or she has voluntarily re-availed himself or herself of the protection of the country of his or her nationality;
2. having lost his or her nationality, he or she has voluntarily re-acquired it;
3. he or she has acquired a new nationality and enjoys the protection of the country of his or her new nationality;
4. he or she has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution;
5. the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist, and he or she can no longer continue to refuse the protection of the country of his or her nationality; or
6. he or she without nationality, but because of a change of circumstances in connection with which he or she has been recognized as a refugee have ceased to exist, is able to return to his or her country of former habitual residence.

13. Thus, a contracting State may resort to this provision to determine that the refugee status of an individual or a group has ceased. It should, however be noted that there may nevertheless be circumstances in individual cases which could make it unreasonable to expect a person (or his or her family members) to return to the country of origin. Severely traumatized persons should not be forced to return to their country of origin.

Exclusion from Refugee Status

14. Article 1 of the Convention identifies, in section D, E and F, cases in which persons otherwise having the characteristics of refugee are excluded from refugee status. Such persons fall into three groups:

- **The first group** consists of persons already receiving protection or assistance from agencies or organs of the United Nations other than UNHCR. Such people include the Palestinians who, in parts of the Middle East, receive assistance from agencies or organs of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA);
- **The second group** consists of persons who are not considered to be in need of international protection. Those are persons who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, short of formal citizenship. For example, people of German descent from Central Europe and the former Soviet Union, irrespective of nationality, are thus protected under the German Constitution, and are therefore not refugees under the 1951 Convention;
- **The third group** comprises categories of persons who are not considered to be deserving international protection, because there are serious reasons for considering that they have committed a crime against peace, a war crime or a crime against humanity, or a serious non-political crime outside the country of refugee prior to

admission to that country as refugees; or they have been guilty of acts contrary to the purposes and principles of the United Nations.

The Rights of Refugees

15. In order to secure the legal status of refugees in the country of asylum, the Convention contains comprehensive provisions regarding refugees' rights. Except where more favourable rights are explicitly provided for in the Convention, refugees are accorded as a minimum standard the same rights as are granted to aliens generally. Beyond this, a refugee is to be granted specific rights not normally enjoyed by ordinary aliens, owing to the fact that he/she lacks the protection of his/her State of nationality. Furthermore, the provisions of the 1951 Convention apply to all refugees without discrimination as to race, religion or country of origin (Article 3).

Among the rights granted to refugees under the Convention are the following:

- a) **the right not to be returned to a country where they are likely to face persecution (“Principle of non-refoulement”):** Article 33 gives expression to the principle of “non-refoulement” which prohibits the expulsion or return of a refugee, in any manner whatsoever, to a territory where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The principle of “non-refoulement” is generally considered as a rule of customary international law. The protection of Article 33, however, cannot be claimed by a refugee who is, on reasonable grounds, regarded as a danger to the security of the country of asylum or has been convicted of a particularly serious crime and therefore constitutes a danger to the community;
- b) **the right not to be expelled, except under certain strictly defined conditions:** pursuant to Article 32, Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. The Article also details the procedural standards which are to be satisfied before expulsion;
- c) **exemption from penalties for illegal entry into the territory of a Contracting State:** due to the circumstances in which refugees may be obliged to leave their home country it may not be possible for them to enter their potential country in a regular manner, e.g., with a valid passport and/ or entry visa. Ordinarily, such illegal entry or presence is punishable by imprisonment or fines. Such punishment should not, however, be imposed on refugees. Article 31 protects refugees from penalties for unlawful entry or presence, provided they present themselves without delay to the competent authorities and show good cause for their illegal entry or presence;
- d) **freedom of religion and free access to courts:** these freedoms are deemed so important that the relevant provisions of the Convention (Articles 4 and 16, para 1, respectively) cannot be made the subjects of reservations by Contracting States. Like the principles of non-discrimination and non-refoulement, these provisions

- of the Convention are so fundamental that, if they are not accepted by state parties, the convention cannot fulfil its purpose:
- e) **freedom of movement:** Contracting States are required to accord to refugees lawfully in their territory the right to choose their place of residence and to move freely within their territory, subject to any regulations applicable to aliens generally in the same circumstances (Article 26);
 - f) **the right to identity papers and travel documents:** Article 27 of the Convention that once a refugee is recognized, Contracting States should issue the corresponding identity documents. Further, Article 28 provides that Contracting States shall issue travel documents to lawfully staying refugees. The issuance of a travel document does not imply the granting of nationality to a refugee. Nevertheless, such documents are of particular importance to refugees in facilitating travel to other countries, be it for purpose of study, employment, health or resettlement;
 - g) **the right to public education:** with respect to elementary education, refugees shall receive the same treatment as nationals.
With respect to secondary and higher education, the State Parties to the 1951 Convention shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances (Article 22);
 - h) **other rights:** the Convention also deals with a variety of matters which have an important effect on a refugee's day-to-day life, such as movable and immovable property (Article 13), gainful employment (Article 17, 18 and 19), housing (Article 21), public relief (Article 23) and labour legislation and social security (Article 24).

b. Origin of Refugee Problem in Africa

16. Historically speaking, the refugee problem in Africa was the product of the 1960s, the decade of maximum decolonization and of the intensification of the struggles for independence by African nations. Refugees came primarily from two main groups of States: the colonial and dependant States and the independent African States. Over half of all refugees came from the former, and of these most came from the Portuguese colonies. Less than fifty percentage came from the remaining thirty-eight independent African States.

17. The enormous refugee problem in dependant and colonial territories in Africa stemmed primarily from oppression and racism. The root causes of the refugee problem in independent African States are even more complex. Partly they stem from the colonial legacy: as a result of the rather arbitrary manner in which the Continent of Africa was carved up among the colonial powers, most African States today consist of a medley of different ethnic, cultural and tribal groups; refugees are often the product of clashes between these groups. The continued interference of former colonial and other external powers in the international affairs of the recently formed States, and levels of neo colonial involvements. Also explain at times the exodus of nationals from their home

countries. The problems associated with the establishment of viable and sovereign States are yet another contributing factor; refugees are at times a product of the attempts by the new States to ensure external and internal security, internal stability, and economic and social reconstruction.

c. Salient Features of the 1969 OAU Convention

18. From the very beginning of the drafting of the OAU Convention most African States agreed that the meaning of 'refugee' had to be expanded. There was consensus that the definition in the 1951 UN Convention was not sufficiently broad to cover all the situations of African refugees. Despite their acceptance of the 1951 UN Convention many States felt that an African Convention merely reiterating its provisions and making only a few modifications was not justified. The definition of refugee adopted by the 1969 OAU Convention has incorporated these aspects. Article 1 of the 1969 OAU Convention defines the term refugee as:

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. 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.

3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

19. The broader definition of refugee adopted by the 1969 OAU Convention contained a number of unprecedented stipulations. Para 2 of Article 1 made the term 'refugee' applicable to asylum seekers who left their country of origin owing to external aggression, occupation, foreign domination, or events seriously disturbing the public order. Individuals in these situations would acquire, *ipso facto*, the status of refugee. They would not have to justify their fear of persecution, as would have been required under the 1951 UN Convention.

20. The new definition of refugee is qualitatively different from the classical definitions for it considers situations where the qualities of deliberateness and

discrimination need not be present. These more far reaching provisions reflected the reality of the armed conflicts so pervasive in Africa before and during the period of the drafting of the 1969 OAU Convention. The terminology utilized in the refugee definition of this convention, which reflected the urgency of responding to the African reality, established an important precedent in international law. The new terminology responded to obvious humanitarian concerns and sought to provide a practical solution to the problem of determining refugee status; the massive migrations occurring at the time made individual determinations quite impractical. Unlike developed countries, where the existence of refugee determination procedures allowing case by case determination is assumed, the absence of decision making infrastructures in Africa demanded not only a humanitarian but also a pragmatic approach. In responding to the real and urgent African needs, the drafters of the new definition gave secondary consideration to the strict legal meaning of its terminology and to case law.

21. It is also important to remember here that the characterization of refugee agreed in the 1969 OAU Refugee Convention included terms that lacked a firm definition under international law. Terms such as 'external aggression' 'occupation' and foreign domination were not yet established in international law practice.

22. Another major difference between the 1951 UN Refugee Convention and the 1969 OAU Convention pertains to the question of voluntary repatriation, one of the durable solutions promoted by the UNHCR. Unlike the 1951 UN Convention which was actually an instrument of rather limited intent, addressed particularly to the question of the status of refugees, not to solutions or to causes, the 1969 OAU Convention has dealt with the solutions to the problems of refugees in a lucid manner. Hence, the principle of voluntary repatriation forms a subject of more concrete and detailed legal provisions in the 1969 OAU Convention [Article 5]. The 1969 OAU Convention in addition to affirming the voluntary character of repatriation, calls upon countries of asylum in collaboration with countries of origin, to make adequate arrangements for the safe return of refugees who request repatriation. It moreover calls upon countries of origin, on receiving back refugees to facilitate their resettlement and to grant them the full rights and privileges of nationals of the country and subject them to same obligations.

23. The OAU Convention was also a significant advance from the 1951 UN Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions—particularly on voluntary repatriation, in contrast to the integration bias of the 1951 Convention—and through its promotion of a burden-sharing approach to refugee assistance and protection.

24. It further provides that refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. On account of these detailed obligations on voluntary repatriation contained explicitly in the 1969 OAU Convention, this has proved to be a particularly important solution for the refugee problems of the African region. Besides, the 1969 OAU Convention reaffirms the principle of *non-refoulement* in even greater detail than the 1951 UN Convention. It specifically prohibits rejection at the frontier and also explicitly provides for the grant of temporary asylum where a refugee is denied a refugee status [Article 2 (2) and (3)].

25. Despite the strong protection from *refoulement*, the 1969 OAU Convention does not enumerate the rights that refugees enjoy as contained in the 1951 UN Convention. It only emphasizes non- discrimination, voluntary repatriation and the issue of travel documents. It does not impose an obligation on States to ensure the right to an effective remedy to refugees nor does it in the least provide for the right to access to courts as in the 1951 UN Refugee Convention. Since the OAU Convention is only complementary to the 1951 UN Refugee Convention and actually recognizes it as the basic and universal instrument relating to the status of refugees, the rights stipulated in the latter instrument do apply in the former.

26. It also needs to be mentioned here that an important additional source of protection for African refugees is provided by the 1981 African Charter on Human and People's Rights or the Banjul Charter as it is called. This Charter:

- i. Prohibits forced exile and the collective expulsion of foreign nationals, including refugees.
- ii. Guarantees every persecuted individual the right to seek and obtain asylum. The inclusion of a right 'to obtain' asylum was a significant advance on the Universal Declaration of Human Rights (1948) which merely provides the right to seek asylum.

27. The African charter was thus unique in creating an obligation on States Parties to grant refugee protection through the asylum process. The OAU system has also created important supplementary forms of protection for vulnerable groups amongst the forcibly displaced. The African Charter on the Rights and Welfare of the Child which entered into force in 1999, requires Parties to ensure appropriate protection and assistance to the child asylum seeker or refugee (one below 18 years of age)).

28. It is pertinent to remember here that in the "Bangkok Principles" adopted by the AALCO in 1966, the definition of 'refugee' was patterned on the definition of the 1951 UN Convention albeit without any dateline or geographical limitation. Importantly, it also included 'colour' as an additional reason for fear of persecution. In the 'Cartagena Declaration' adopted in the year 1984 by the Latin American States, the definition of 'refugee' went even a step further than the 1969 OAU Convention's definition by applying the refugee concept also to 'persons fleeing from massive violation of human rights'.

III. A REVIEW OF THE IMPACT OF THE 1969 OAU CONVENTION ON THE SITUATION OF AFRICAN REFUGEES

29. The decision to draft an Africa-specific treaty on refugees was said to have been due to various factors. It was argued that the 1951 UN Convention on Refugees was European in focus and not suitable for the African situation particularly as many refugees were seen at that stage as being the result of the flight for independence. Thus, the

African attitude was not so much to broaden the scope of the Convention but rather to draft a document that would “cover all aspects of the problems” in Africa².

30. As has been already seen, the 1969 OAU Convention has envisaged an expanded definition for ‘refugee’. This expanded definition was prompted by the need to protect freedom fighters and those who were fleeing places under colonial domination. The 1969 OAU Convention was innovative for a number of other reasons as well. First, it referred to the need for States to consider the grant of asylum, although it could not really be said to amount to a right as such. Furthermore the principle of *non-refoulement* appears to be absolute. Besides, the 1969 OAU Convention is the only Convention on the issue of refugees which has explicitly spelled out the principle of voluntary repatriation as a solution to the refugee problem [Article5].

Having seen the major positives of the 1969 OAU Convention on refugees, now let us consider some of its shortcomings.

31. Firstly, the definition of a ‘refugee’ in the 1969 OAU Convention, it has been argued, does not go far enough: it is entirely silent on issues of ‘mass influx’. This is a crucial omission given the fact that the kind of refugee movements that Africa generally witnesses is of mass and protracted nature. Secondly, the procedure for determining who is a refugee has been largely left to the State’s discretion under the 1969 OAU Convention. This also has immense implications in that, Countries frequently do not put in place any refugee determining procedure at all for a long time. In the absence of this mechanism, the task of protecting the rights of refugees becomes virtually impossible.

32. Another criticism waged against the 1969 OAU Convention pertains to the overall thrust of it. It is claimed that it does not take a strong human rights approach in that, there is no real mention of the rights of refugees beyond those discussed above. For instance, it does not deal with women who form a significant chunk of African refugees and that it restricts freedom of movement and the rights of expression and association.

33. One major legal lacuna in the body of the 1969 OAU Convention is the specific problem of the “Internally Displaced Persons”, (IDPs) often referred to as *de facto* refugees as opposed to *de jure* refugees. The 1969 OAU Convention is silent on this point³. This problem, however, concerns three times as many people and is potentially even more explosive than the refugee crisis In the context of Africa. In the next part of the brief, we will look at the problem of IDPs as prevailing in Africa and the legal efforts that have been made to address this issue.

34. Furthermore, in contrast to the international refugee protection regime, the African system lacks a general supervisory or monitoring body akin to the UNHCR, which potentially makes the provisions of the 1969 OAU Convention less effective. In

² G. Okoth-Obbo, “Thirty Years on : A Legal Review of the 1969 OAU Convention”, *African Yearbook of International Law*, Vol.8, 2000, pp.3-70, at 14.

³ Ibid, p.25.

order to address this glaring gap, the UNHCR together with the African Commission on Human and Peoples' Rights came up with a Comprehensive Implementation Plan (CIP⁴), which included proposals to strengthen refugee protection in Africa. This CIP was later endorsed by both the OAU Council of Ministers and the OAU Assembly of Heads of States and Governments, which directed that the UNHCR conclude an agreement with the African Commission with one of the aims being strengthening the African Commission's monitoring capacity and programme of work with respect to human rights of refugees and asylum-seekers. Pursuant to the ensuing Memorandum between the African Commission and the UNHCR, the African Commission established the position of the Special Rapporteur on refugees, asylum-seekers and Internally Displaced Persons (IDPs) in Africa.

35. The Special Rapporteur's mandate, with regard to refugees, involves: a) to seek, receive, examine and act upon information on the situation of refugees; b) to undertake studies and research to examine appropriate ways to enhance protection of refugees; c) to undertake fact-finding missions, investigations and visits to refugee camps; d) to assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees; e) to co-operate and engage in dialogue with Member States and other stakeholders; f) to develop and recommend strategies to better protect the rights of refugees; g) to raise awareness and promote implementation of refugee law instruments; h) to submit reports to the African Commission on the situation of refugees in Africa.

36. This mandate is much narrower than that of the UNHCR since it caters more for promotional and supervisory activities rather than protection activities. In fact from the reports of the Special Rapporteur to the African Commission, most of his activities involve attending conferences and writing to respective Governments to comply with their international obligations. The African Commission will in turn make a report to the African Union (AU) Heads of States and Governments. The wide mandate of the Special Rapporteur that covers refugees, asylum seekers and IDPs in Africa seems to be too onerous a task for one person to handle considering the great extent of the problem in Africa and that the Rapporteur in his capacity as a Commissioner also has other duties to handle. This burdensome work is aggravated by the fact that no additional resources appear to have been allocated to the Commission for the additional task of monitoring the OAU Convention.

37. A fundamental problem that has affected the African region is the issue of what the UNHCR calls the 'protracted refugee situation'. The UNHCR defines a protracted refugee situation as 'one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance'.

⁴ Adopted by the Special OAU/UNHCR Meeting of Govt. and non Govt. Technical Experts on the occasion of the 30th Anniversary of the 1969 OAU Convention in Conakry Guinea on 29th March 2000.

38. It would be highly misleading to suggest that there are any quick or easy solutions to the problem of protracted refugee situations in Africa. Indeed, some of the proposals currently made in relation to such situations - including the notion of linking refugee aid to development programmes that also involve and bring benefits to the host population – have been tried in the past with relatively little success.

39. Other suggestions - such as the ‘rights-based’ proposal that long-term refugees should not be confined to camps but should be allowed to settle wherever they wish in their country of asylum - would not appear to be politically feasible in many refugee-hosting countries. Indeed, it is clear that many refugees in Africa would be at risk of early refoulement if UNHCR were to advocate such an approach.

40. While it is difficult to be optimistic, a number of proposals might warrant additional consideration if the problem of Africa's protracted refugee situations is to be effectively addressed.

IV. REFUGEE SITUATION IN AFRICA: PAST TRENDS AND FUTURE CHALLENGES

41. African refugee situation did not start overnight and it is widely believed that refugee problem has emerged gradually all over the African continent. However, 1961 marked the genesis of massive movement of refugees in Africa because that period coincided with the rise of national independence movements and the attainment of independence. Over the years it had increased tremendously on account of various reasons.

42. Paradoxically, the end of Cold War which people had thought would bring peace and stability in the world failed to fulfill these expectations, instead, increasing waves of violence rooted in conflict became the dominant issue world wide which resultantly led to the production of refugees out flows which badly affected and worsened the refugee situation in Africa. Almost all African countries are affected because as it is now, when any African country does not experience refugee outflows, it must experience internal displacement. Enduring conflicts, ethnic tensions, political instability and various other factors are responsible for the refugee situation in Africa.

43. African countries are not only prone to refugees but also to internally displaced people. The latter differs from the former because the internally displaced persons have not crossed the international boundary of another nation. Thus, while attention has long been focused on the plight of the refugees, the plight of internally displaced persons has only recently received attention.

44. At this point, it becomes important to refer to the efforts that African Union and its Members heads of States and leaders have taken to mitigate the problem of refugees. The Pan –African Conference on the Situation of Refugees in Africa which was held in 1979 at Arusha came out with a number of recommendations. The initial impetus to limit

the dependency of refugees on international assistance and to create situations of 'integrated development and self-reliance came from this conference. Besides, the Conference also produced what are called '*Arusha Recommendations*' in order to ameliorate the conditions of refugees in Africa.

45. Two years later, the first International Conference on Assistance to Refugees in Africa (ICARA I) was held in Geneva. This conference focused on the linkages between UNHCR Relief programmes for refugees and broader development programmes in refugee hosting countries. In 1984, a second International Conference (ICARA II) attempted to get donors, international organizations and host governments to commit themselves to development-oriented approaches to refugee assistance. The initiatives agreed on the Conference were however overshadowed by the magnitude of the new refugee crisis in Africa at the time, many of which were exacerbated by severe drought.

46. The adoption of the "*Khartoum Declaration on Africa's Refugee Crisis*" at the OAU Seventeenth Extraordinary Session of the Commission of Fifteen on Refugees Meeting in Khartoum, Republic of Sudan in 1990 is of critical importance. This declaration which reflected a new perspective on refugees reaffirmed the themes important to the Organization of African Unity at that stage including a focus on root causes and a recognition that refugees are the responsibility of African's themselves, though there was a need for international assistance.

47. Another important effort in this context was the adoption of the "*Addis Ababa Document on Refugees and Forced Population Displacements in Africa*", made at the end of the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa held in 1994 in Commemoration of the twenty-fifth anniversary of the adoption of the 1969 OAU Convention. While acknowledging the challenges facing the Convention, the Symposium reaffirmed its belief in the continued validity of the 1969 OAU Convention as the regional foundation for providing protection and finding solutions for refugees in Africa. The Symposium also believed that the Convention provided a good basis for developing the legal tools and mechanisms for solving the problems of refugees and forced population displacements as a whole. It had also adopted 'Eleven Recommendations' which called for decisive national and international measures to create stable, viable and progressive solutions to the African refugee problem.

48. The Agenda for Protection, adopted in October 2002 by the Executive Committee of UNHCR at the end of the Global Consultations process, reflects the main concerns of African States and provides a framework for addressing refugee problems in Africa. Another important effort in this direction was the convening of the Regional Parliamentary Conference on Refugees in Africa: The Challenges of Protection and Solutions a conference that was held from 1-3 June 2004 in Cotonou. The conference adopted by acclamation the *Cotonou Declaration and Programme of Action*. The Declaration and Programme of Action describe very practical strategies and activities to help African Parliaments in their work in favour of protecting refugees and finding

durable solutions for their plight. While the declaration stressed the continuing vitality of the OAU 1969 Convention, the Programme of Action came up with 11 Recommendations.

49. An important and progressive development that took place in the context of the refugee protection in Africa was when African Union Ministerial Conference on Human Rights was convened at Kigali in 2003. It called for mechanisms to be set up to address the root causes of refugee issues in Africa. The *Kigali Declaration* stressed that African Union organs, in the exercise of their peace building and conflict resolution functions ensure the inclusion of human rights, humanitarian principles and other legal protection measures in peace agreements in order to facilitate the voluntary repatriation and reintegration of refugees, returnees and former combatants in their countries of origin. However for the first time the African Union identified a body which should have responsibility to enforce the 1969 OAU Convention, recommending that the African Commission on Human and Peoples' Rights has oversight on the 1969 OAU Convention and monitor compliance with it. This firmly placed the issue of refugees within a human rights context.

50. It also needs to be specifically highlighted here that under its mandate, the African Commission on Human and Peoples' Rights is charged with overseeing implementation of the 1981 African Charter on Human and Peoples' Rights, which includes the right to seek and obtain asylum from persecution. This offers an opportunity to better monitor implementation of the 1969 OAU Convention by States Parties through the various mechanisms at the disposal of the Commission.

51. As for the current refugee population of African region is concerned, at the end of 2007, African nations hosted 10.5 million people of concern to UNHCR, some one million more than in 2006 and a third of those of concern worldwide. Internally displaced persons (IDPs) made up the majority of this total. Some 5.8 million of the estimated 12.7 million conflict-generated IDPs living in sub-Saharan Africa receive protection and assistance from UNHCR. Meanwhile, the number of refugees fell to 2.3 million in 2007, continuing the downward trend begun in 2001, while the number of asylum-seekers increased to over 252,000 persons, some 13.5 per cent more than in 2006.

52. These numbers reflect both significant progress in achieving durable solutions for refugees and IDPs, as well as the impact of new population movements across the continent. Both 2007 and 2008 saw the development of comprehensive strategies to address protracted refugee situations. These were aided by the consolidation of peace and stability in some countries of origin, the generosity of African States that offered local integration, and the willingness of countries elsewhere in the world to provide resettlement opportunities.

53. Another pressing problem that has been plaguing Africa has been the challenges posed by the issue of 'Internally Displaced Persons' [the IDPs]. The grave situation of the IDP crisis is revealed clearly when we consider the fact that Africa houses the largest number of IDPs in the world. This concern is amply reflected in the unanimous

recognition of the Heads of States and Governments of Africa of the ‘Guiding Principles on Internal Displacement’(1998) as an important framework for the protection of internally displaced persons in the world in 2005.

54. Africa has shown leadership in the area of IDP protection. A number of states have developed national policies or laws based on the ‘Guiding Principles’ which basically lay out the responsibilities of governments to prevent displacement, to assist and protect those who have been forced to flee and to aid the reintegration and rehabilitation of those who wish to return to their homes once the causes of their displacement have been resolved. Though not legally binding, the Guiding Principles have gained widespread international recognition. In this connection it is very important to remember that the *The Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons*, signed in 2006 obliges signatory states to incorporate the Guiding Principles into domestic law. More importantly, in Nov. 2008, the African Ministers in charge of forced displacement matters adopted a historic draft African Union Convention on the Protection and Assistance for Internally Displaced Persons (IDPs) in Africa.

The objectives defined in the draft Convention are to:

- a. Promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions;
- b. Establish a legal framework for preventing internal displacement, where possible, and protecting and assisting internally displaced persons in Africa;
- c. Establish a legal framework for solidarity, cooperation, promotion of durable solutions and mutual support between the States Parties in order to combat displacement and address its consequences;
- d. Provide for the obligations and responsibilities of States Parties, with respect to the prevention of internal displacement and protection of, and assistance, to internally displaced persons;
- e. Provide for the respective obligations, responsibilities and role of armed groups, non-state actors and other relevant actors, including non-governmental organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons;

55. The Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa, was expected to be endorsed at a Special Summit of the African Heads of States and governments at Uganda in April 2009. This Special Summit did not take place as planned and hence the draft Convention was not endorsed. But as and when adopted, the Convention would be a historical document for Africa owing to its mechanism for the protection and assistance of IDPs

and the first of its kind to address the challenges faced by the Continent. Also, the Convention would be the first instrument in the world introduced by a regional intergovernmental organization to officially codify the rights of IDPs. It should also be highlighted that the Convention will come into being 40 years after the development of the equally groundbreaking 1969 OAU Convention, thus constituting another landmark in Africa's efforts in dealing with the problem of forced displacement.

V. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

56. Even though the overall situation with regard to the rights of refugees, asylum seekers and IDPs has improved in the African Continent in recent years, the enduring conflicts in the East and central Africa have worsened the refugee situation in the region. The conflicts have created a number of new refugee emergencies both internally and externally. Unless concerted efforts are taken to address the root causes of the refugee problems in all its dimensions, the creation of refugees will not subside. As we have seen, the legal regime governing refugee law in Africa is comprised of three main legal instruments: the 1951 UN Refugee Convention (47 States Party in Africa) and its 1967 Protocol (47 States Party in Africa), the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa (44 States Party) and the African Charter on Human and People's Rights (53 States Party).

57. As for the legal regime, the 1969 OAU Convention indeed brought about novel concepts the effects of which have been registered both in Africa and elsewhere. On the legal level, the most important of these, respectively, are the influences on domestic refugee law and the migration of the expanded definition to other regions. Yet, it is also seen that the Convention primarily was a legal vessel designed to secure priorities which were eminently political and not mainly legal. At the time the Convention was being designed, the destabilizing effects of the politicization of the asylum and refugee regime were evident already and threatening its coherence. Thus, granted that the Convention engineered novel concepts in the legal sphere, its most important and enduring contribution was in the stability, coherence and predictability it invested upon the refugee regime in Africa at the political level.

58. As with most international and regional laws, problems have been encountered in implementing the OAU Convention at the national level. With few exceptions many countries have been reluctant to replace their domestic legislation governing immigration, aliens, national security and the like with the Convention. In many instances, this legislation is contrary to the protective regime provided for by the OAU Convention. The lack of human resources needed to implement the regime is yet another serious obstacle to the implementation of the OAU Convention's provisions. Several countries have adopted the necessary implementing legislation but lack adequately trained personnel to see that it is observed.

59. As for the IDPs, legal developments over the past decade have not only strengthened and consolidated the law underpinning the 'Guiding Principles' but have

also been influenced by them. As we have seen, the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons commits member states to enact national legislation to incorporate the Principles fully into their national legal systems. In this regard, the attempt on the part of the African Union to conclude a Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa, represents a monumental effort to deal with the deplorable situation of IDPs and to secure their rights. In this regard, Africa is far ahead of the UN Member States who think that it is an internal problem of States.

60. Although the protection of refugees in Africa is far from complete, it is at least in principle more inclusive than in many, if not all, other regional systems. One of the most significant aspects of this relatively new model of protection is that it has prompted other regional systems, in particular the Inter-American system, to emulate its positive factors and minimize its inadequacies.