

## “Assessing the 1969 Convention Governing Specific Aspects of Refugee Problems in Africa”

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### Abstract

Refugee protection at the global level has a long history that dates back to the 1951 Convention. In this regard, the protection given according to that treaty targeted those who fled their countries because of events of such kind that happened in Europe at the time specified by such a particular treaty. Some years later, the need arises to globalize the treaty by including people in other regions who, by the cause of war, fled their countries and were incorporated as refugees under the 1951 definition. In 1969, Africa adopted the Convention Governing Specific Aspects of Refugee Problems in Africa, which intends to cover the specific aspects of events in Africa that cause people to flee their countries of origin and grant them refugee status. However, the treaty adopted the same definition as reflected in the 1951 refugees' convention. Over the years, Africa has been overwhelmed with arms conflicts and political instability in many countries, which produces a large number of refugees and sometimes pushes them to risk their lives by crossing to Europe to seek refuge. In the midst of that, some countries are facing natural calamities, which also pushes people to flee the countries of origin to save their lives. In this regard, the article intends to give a response to two questions: firstly, whether the law is effective to cause the member states to fulfill the obligations under the treaty to which there are parties. Secondly, whether there is legal mechanism in protecting other people who are pushed to flee their countries of origin by other factors other than war.

**Keywords:** Refugee, Refugee principles, human rights, refugee protection, international law, State commitments.

### 1. Introduction

Refugee is a person who flees the country of his origin out of a “well-founded fear” of persecution.<sup>1</sup> A person is considered to be a refugee to the circumstances specified under the Refugee Convention: (1) if that person has already been considered a refugee under the standard provided under the treaty<sup>2</sup>, or (2) the person is out of the country of the origin or having no nationality, and under those circumstance he is unable and unwilling to avail himself of the protection of that country due to well-founded fear of being persecuted for reasons of

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<sup>1</sup> Hathaway, James C., and William S. Hicks. "Is There A Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear." *Mich. J. Int'l L.* 26 (2004): 505.

<sup>2</sup> Article 1A (1) of Refugee Convention, 1951 (a person who has been considered a refugee under the Arrangements of May 12, 1926 and June 30, 1928, or under the Conventions of October 28, 1933 and February 10, 1938, the Protocol of September 14, 1939, or the Constitution of the International Refugee Organization)

race, religion, nationality, or membership in a social group or political opinion.<sup>3</sup> However, the fear can be founded on various aspects, like wars, calamities like hunger, and political threats. Modern trends on refugees include grounds such as climate change and pandemics (e.g., COVID-19). The refugee's definition is enshrined in various instruments (domestic, regional, and international), which together give the refugees the status of an international custom. The 1951 Convention on Refugee Protection is considered to be the foundational document for refugee protection worldwide. According to Article 1A (2) of the 1951 Convention, everyone who leaves their country out of fear of persecution is considered a refugee. The 1951 Convention's definition, however, did not initially take into account the conditions in the African continent or other regions of the world.<sup>4</sup> The 1967 Protocol to 1951 Refugees was adopted to move the date barrier and geographical limit that were set by the Convention and make it a global instrument. The 1951 Convention and its Protocol have modeled many regional conventions, including the 1969 Convention. This paper will address different concepts and principles on refugee protection, the current position of laws in offering the protection, pitfalls available and the way forward toward the effective protection.

## 2. Methodology

The question of refugee protection and its rising number has been a challenge not only in the Africa region but also in other parts of the world. This has attracted many scholars to research. However, the area still needs to be researched, as the challenges are increasing almost every day due to unstated circumstances under the law that do not grant that particular group refugee status. In this regard, the study has employed the doctrinal research methodology. In the sense that the use of primary and secondary sources will reach the objectives. The primary sources here include the use of international instruments in relation to the subject matter, human rights treaties, and domestic laws (statutes). However, the secondary sources imply the use of legal books written by scholars eminent in that area of study, journal articles, e-books, libraries, reports and statistical data from refugee protection agencies websites among other sources, which all together will make the study successful. The use of these sources will open the academic discourse on fulfilling the vacuum left in the study by discussing whether the available treaty needs to be updated as it leaves unprotected other people who are also leaving their countries by other circumstances that threaten their lives.

## 3. Principles related to refugee protection

When it comes to implementing the protection of refugees worldwide, there are several universally acknowledged principles:

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<sup>3</sup> Article 1A (2) of Refugee Convention, 1951

<sup>4</sup> B.C. Nindi, "The Problem of Refugees in Africa: A Case Study," *Institute of Muslim Minority Affairs. Journal* 8, no. 2 (1987): 387–96, <https://doi.org/10.1080/02666958708716046>.

## i. Non-refoulement

The doctrine denotes the practice whereby, when the victim fled the country in which he availed his protection to another country for safety purposes, he should not be returned.<sup>5</sup> This Principle constitutes the cornerstone of international protection. Since not all nations have embraced this international customary norm, its validity is still up for debate; breaking it will put that person's life in danger.<sup>6</sup> According to Article 33 of the 1951 Refugee Convention, it is the contractual party's mandatory duty to refrain from sending a refugee back to a country where their life is in danger because of a war or other circumstances that lead them to believe their home country is unable to provide them with protection. Still, member state compliance has not been ensured by the provision.<sup>7</sup> Still, member state compliance has not been ensured by the provision.<sup>8</sup> The 1951 Refugee Convention is not the only international document that upholds this principle; additional documents include:

Article 3 of the 1967 Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967<sup>9</sup> provides that;

- “1. No person referred to in article 1, paragraph 1 [seeking asylum from persecution], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.
3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.”

The said declaration has set out the mandatory obligation of the state to principally not return the refugee to the place they fled. Doing this will be like submitting the victims to the monsters, expecting them to be safe. The same resolution has included an exception to the general rule that, if there is an issue of national security in receiving such a person, the only exception after

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<sup>5</sup>Chan, Phil CW. "The protection of refugees and internally displaced persons: Non-Refoulement under customary international law?" *The International Journal of Human Rights* 10.3 (2006): 231-239.

<sup>6</sup>Supaat, Dina Imam. "Escaping the Principle of Non-refoulement." *International Journal of Business, Economics and Law* 2.3 (2013): 86-97.

<sup>7</sup>Coleman, Nils. "Non-Refoulement Revised-Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law." *Eur. J. Migration & L.* 5 (2003): 23.

<sup>8</sup>Costello, Cathryn, and Michelle Foster. "Non-refoulement as custom and jus cogens? Putting the prohibition to the test." *Netherlands Yearbook of International Law* 2015: *Jus Cogens: Quo Vadis?* (2016): 273-327.

<sup>9</sup>A/RES/2132 (XXII) of 14 Dec. 1967

the receiving state has assessed the gravity of the risk that a refugee will incur is to allow him to find an asylum in another country.

Article 7 of the ICCPR, 1966 provides that, 'no one should be subjected to torture or in cruel inhuman or degrading treatment or punishment.' In its General Comment No. 20 (1992), the UN Human Rights Committee reiterated this stance, adding a non-refoulement component and holding that no one should be subjected to torture or cruel, inhuman, or degrading treatment or punishment upon being extradited, expelled, or refouled back to another nation.

The states' obligation on non-refoulement also has been reflected under regional treaties. Notably the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, particularly article II (3) provides that "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras. 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order]."<sup>10</sup> Article 22(8) of the 1969 American Convention on Human Rights reads "In no case may an alien be deported or returned to a country, regardless of whether or on it his country of origin, if in that country his rights to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."<sup>11</sup> The principle outlined in the 1951 Refugee Convention has been applied to all other treaties with the same meaning, i.e., that state members are required to uphold this commitment. The "international custom, as evidence of a general practice accepted as a law," is one of the legal sources that the International Court of Justice considers when making decisions regarding disputes that comply with international law, according to Article 38 (1) (b) of the Statute. The practices to acquire the legal status of being an international norm then it has to fit the two point of intersection which are, first, the consistent state practice and opinion juris.

## ii. Asylum

Etymologically, the word asylum is the Latin counterpart Greek work '*asylon*' meaning the freedom from seizure.<sup>12</sup> According to Cambridge Dictionary, asylum means the safety or protection which is given by a government to people who have been forced to leave their own countries for their safety or because of war. Sinha, in his book, connects the asylum with ancient history, where people used to shelter themselves. He is further adding that the places where people used to seek refuge were regarded as sacred places with superstitious or

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<sup>10</sup> OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45, entered into force 20 June 1974

<sup>11</sup> 1969 American Convention on Human Rights "Pact of San José, Costa Rica", 1144 U.N.T.S. 123, *entered into force* 18 July 1978

<sup>12</sup> Boed, Roman. "The state of the right of asylum in international law." *Duke J. Comp. & Int'l L.* 5 (1994): 1.

supernatural protection, and those places were much respected.<sup>13</sup> In that regard, that particular person covered in those places will have his protection assured. The practice of men seeking the practice has a long history, and it has undergone various transformations until it became documented and officially recognizable as a right.<sup>14</sup> Unfortunately, when it comes to actual application, the right to asylum is more of a state discretionary obligation than a personal one. It needs to be comprehensible concerning asylum matters:

First, granting refuge is the state's responsibility. According to international law, this right is unambiguously established (the state's territorial jurisdiction has to be respected). The reason behind it is that every state has sovereign power over its territory, and basically, it has the right to regulate its domestic affairs and have exclusive control over its people without interference from any other foreign power. So even in granting asylum, yes, the law has set up the requirement, but the state may default on implementing it if it believes, for example, that granting asylum to that person will jeopardize the peace and security of the receiving country.<sup>15</sup> This has been proved by various legal instruments both internationally and regional level. Article 1(1) of the Declaration on Territorial Asylum, 1967 provides that “[a]sylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights...shall be respected by all other States.”<sup>16</sup> Furthermore, article 1(3) of the Declaration lefts gives the discretionary powers to the authority of state “to evaluate the grounds for the grant of asylum.” on the same footings, the regional treaties as per the international treaties maintains the discretionary powers which a state enjoys in granting an asylum. ‘Article II (1) of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969,’ the member states to the treaty “shall use their best endeavors consistent with their respective legislations to receive refugees.”<sup>17</sup> Similarly, Article 1 of the Convention on Territorial Asylum adopted by the Organization of American of American States in 1954, stipulates that “[e]very State has the right, in the exercise of its sovereignty, admit into its territorial such persons as it deems advisable, without, through the exercise of the right, giving rise to complaint by any other state.”<sup>18</sup> ‘Article III (1) of the Asian-African Consultative Committee, 1966,’ states that, “[a] State has the Sovereign right to grant or refuse asylum in its territory to a refugee.”<sup>19</sup>

Second, individual’s right to seek an asylum. A person who looks for an asylum is called an asylum-seeker. The law grants a person a right to run to any country where he believes that his security will be granted; and when exercising this right and been received by a country which

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<sup>13</sup> Sinha, S. Prakash. Asylum and international law. [By] S. Prakash Sinha Martinus Nijhoff The Hague, 1971

<sup>14</sup> Boed, Roman. "The state of the right of asylum in international law." *Duke J. Comp. & Int'l L.* 5 (1994): 1.

<sup>15</sup> Sinha, *supra* note 12

<sup>16</sup> Declaration on Territorial Asylum adopted by the General Assembly of the United Nations in 1967

<sup>17</sup> The OAU Convention Governing Specific Aspects of Refugee Problem in Africa, 1969 art. 11(1), 1001 U.N.T.S. 45, 48

<sup>18</sup> Convention on Territorial Asylum, Mar. 28, 1954, OEA/Ser. X/1

<sup>19</sup> Principles Concerning Treatment of Refugees, 1966, art. 111(1), reprinted in UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 201, 203 (1979)

has accepted that person the not country (of the origin or where he is a resident) can claim them back.<sup>20</sup> This right is also enshrine in various regional and international treaties. Article 13(2) of the Universal Declaration of Human Rights, 1948 provides that, “[e]very one has the right to leave any country, including his own.” This unique Declaration contains “the inalienable and invisible rights of all members of the human family and [to constitute] an obligation for the members of the international community.”<sup>21</sup> The freedom of leaving the country has been outlined by international law as a contemporary international custom. Since the 1966 adoption of the International Covenant on Civil and Political Rights, this identical right has been legally obligatory. “[Everyone shall be free to leave any country, including his own,” according to Article 12(2) of the Covenant.<sup>22</sup>

The third is the right to asylum as an individual. Given that it is recognized by international law, this is one crucial element that falls under the purview of the right to asylum. But it's important to keep in mind that while someone has the right to asylum, the state nonetheless has the final say over whether to grant it. Yes, the international refugee treaties, regional treaties, and human rights treaties have the same preposition on recognizing such rights; however, the same does not deny the state the decision on whether to grant or not, and thus lacks enforceability.

### iii. Non-discrimination

One of the fundamental ideas contained in many domestic and international treaties, as well as other legal frameworks, is this one. “All we are borne free and equal in rights,” states article 1 of the 1948 Universal Declaration of Human Rights. The 1951 Refugee Convention's Article 3 also mentions this principle.

### iv. Not punishing refugees for entering and remaining in illegally

Given the conditions in their home countries that have demonstrated to pose a threat to their lives, refugees who enter the nation in search of asylum should not be considered to be in violation of the law. The 1951 Convention on the Status of Refugees states in Article 31(1) that:<sup>23</sup>

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<sup>20</sup> Green, L. C. (1981). *Territorial Asylum*. By Atle Grahl-Madsen. (Published under the auspices of the Swedish Institute of International Law.) Stockholm: Almqvist & Wiksell; London, Rome, New York: Oceana Publications, Inc., 1980. Pp. xvi, 231. Index. \$28. *American Journal of International Law*, 75(1), 189–191. <http://doi.org/10.2307/2201436>

<sup>21</sup> Proclamation of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 U.N. GAOR, U.N. Doc. A/CONF. 32141 (1968)

<sup>22</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., 183d plen. mtg., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Note that as of June 1, 1993, the Covenant has entered into force for 116 states parties.

<sup>23</sup> The Convention relating to the Status of Refugees, adopted on 28<sup>th</sup> July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons Convened under General Assembly resolutions 429 (V) of 14 December 1950.



“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

The treaty calls upon the contracting states (member states) to ensure that they waive the penalties for the refugees as their entry was illegal. This is done in order to ensure the protection of the refugees, as they cannot wait any longer at the borders for the legal clearances so that they can enter the country they flee to. Therefore, the treaty counts such an entrance as an exception to the illegal crossing of the border for a person who flees his country of origin. However, the practices in other places have shown that, the states detain the asylum seekers not to enter into another their countries and seems to be a legal created gape as the States enjoys the unlimited discretion on whether to grant an asylum or not.

#### **4. Refugee protection at international level**

Refugees’ protection caters to both refugees’ treaties and international human rights treaties. This makes these instruments interdependent when it comes to refugee protection. When it comes to human rights treaties, refugees are normal human beings like others, so they deserve their rights to be promoted and protected as well.<sup>24</sup> On the other hand, the circumstances (as per the current position of law) like war (political instability), which pushes those people to flee their countries for the well-established fear and insecurity and persecutions, may give them the status of refugees. Here are how refugees are protected under international law.

##### **4.1 The international bill of rights**

The International Covenant of Social, Economic, and Cultural Rights (1966), the International Convention on Civil and Political Rights (1966), and the Universal Declaration of Human Rights (1948) are the three foundational human rights documents that make up the Bill of Rights.<sup>25</sup> The universal, indivisible, inseparable, and inviolable characteristics of human rights are demonstrated by the fundamental rights entrenched in these instruments.<sup>26</sup> Like all other people, refugees have the right to be treated equally and with dignity. Before the law, they must be given equal treatment. A significant document in the history of human rights is the UDHR. The writing involved representatives from various legal and cultural backgrounds. The

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<sup>24</sup> Worster, William Thomas. "The evolving definition of the refugee in contemporary international law." *Berkeley J. Int'l L.* 30 (2012): 94.

<sup>25</sup> Tarnopolsky, Walter S. "Human Rights, International Law and the International Bill of Rights." *Sask. L. Rev.* 50 (1985): 21.

<sup>26</sup> Pobjoy, Jason. "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* 34.1 (2010): 181-229.

preambles of almost seventy human rights treaties, which are currently in force on a permanent basis at the international and regional levels, make mention of them.<sup>27</sup>

These agreements now serve as a pillar for the international protection of human rights. The Bill of Rights has been incorporated into most state constitutions. As a result, the Bill of Rights is now considered an international standard that needs to be upheld. A person's right to seek asylum from persecution abroad is recognized in Article 14 of the 1948 Universal Declaration of Human Rights, which serves as the foundation for both the 1951 Convention and its supplementary Protocol.<sup>28</sup> The notion that asylum should not be granted due to discrimination based on sexual orientation, age, gender, disability, or any other legitimate reason is further supported by the evolution of human rights law. Like all declarations, the UDHR is just that—a pronouncement. The respect it receives from other domestically adopted and domesticated human rights agreements that have been made enforceable is what distinguishes it from others. The topic of refugee protection continues to be left up to the governments' discretion in addition to their adoption of the human rights values outlined in the treaties.<sup>29</sup> States may refuse to accept an applicant for asylum if doing so would compromise public safety or security, and no nation will force a state to provide an applicant for asylum the status of a refugee.<sup>30</sup> While upholding the principles of international law as enshrined in the United Nations Charter, the legal system within the domestic framework for refugees is characterized by the principle of state sovereignty and related principles of territorial supremacy, self-defense, and self-preservation.<sup>31</sup>

#### **4.2 The 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.**

The international tools that designate refugees are actually in line with the European horrors that led to the mass displacement of millions of people in Europe during World War II.<sup>32</sup> A key agreement on the subject of refugee protection was the 1951 Convention Relating to the Status of Refugees, which came into effect on April 22, 1954. Prior to the 1967 Protocol amendment, the concept of a refugee under this instrument was subject to time and geographic limitations, which effectively determined the European (Western) circumstances.<sup>33</sup> Before the Protocol was ratified, on January 1, 1951, the 1951 Convention defined "refugee," limiting its

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<sup>27</sup> Baderin, Mashood A., and Manisuli Ssenyonjo. "Development of International Human Rights Law before and after the UDHR." *International Human Rights Law*. Routledge, 2016. 19-44.

<sup>28</sup> Alice Edwards and Alice Edwards, "Articles Human Rights, Refugees, and The Right ' To Enjoy ' Asylum" 50, no. 50 (2005), <https://doi.org/10.1093/ijrl/eei011>.

<sup>29</sup> Goodwin-Gill, Guy S. "The Protection of Refugees: Law, Discretion, and Justice." *Discretion, and Justice* (September 8, 2022) (2022).

<sup>30</sup> Purkey, Anna Lise. "Questioning governance in protracted refugee situations: The fiduciary nature of the state-refugee relationship." *International Journal of Refugee Law* 25.4 (2013): 693-716.

<sup>31</sup> Goodwin-Gill, Guy S. "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees." *Mich. YBI Legal Stud.* 3 (1982): 291.

<sup>32</sup> Jane Mcadam, "The Enduring Relevance of the 1951 Refugee Convention" 29, no. 1 (2017): 1–9, <https://doi.org/10.1093/ijrl/eex017>.

<sup>33</sup> Peter Nobel and Peter Nobel, "Refugees, Law, and Development in Africa Refugees, Law, and Development in Africa" 3, no. 1 (1982).



meaning to individuals escaping events that happened within Europe and prior to that date.<sup>34</sup> As a result, the instrument did not have the same ubiquitous coverage as it did in other countries before the change. For instance, the leaders of the African liberation movement against colonial powers were compelled to escape their oppressor out of fear of persecution; nonetheless, they were not considered refugees under the 1951 Convention. To achieve universal coverage, the 1951 Convent's limitation was changed with the 1967 Protocol's ratification.

As the name implies, the 1951 Convention Relating to the Status of Refugees was ratified to grant legal status to individuals who had fled the Second World War. Among other things, the declaration is regarded as the founding text for the defense of refugee rights.<sup>35</sup> As a result, the main tools for protecting refugees and those seeking asylum are the 1951 Convention and the 1967 Protocol. However, in certain circumstances, extra protection may be provided by other international human rights instruments and the treaty bodies established under international human rights bodies.<sup>36</sup> As stipulated by the Convention, the state's fundamental responsibility is to guarantee the safety of its citizens. Therefore, the need for asylum and the duty of another state to provide it ought to occur only in situations in which the asylum seeker's own state has been unable to offer sufficient protection. Protecting refugees is the goal of the 1951 Convention, which defines a refugee as "anyone who is outside his country of nationality or habitual residence, has a well-founded fear of being persecuted because of his race, religion, nationality, or membership in a particular social group or political opinion, and is unable or unwilling to avail herself of the country's protection or return there for fear of persecution."

Individuals who fit the definition described in Article IA (2) of the Convention are bound by the obligations and entitled to the rights specified therein. Additionally, the 1951 Convention established a list of individuals who ought not to be granted refugee status and are deemed ineligible for it. This includes those who have been convicted of actions that are against UN goals or who have substantial grounds to believe that they have committed serious non-political crimes, war crimes, crimes against humanity, or crimes against peace outside of their country of refuge.

## **5. The refugee protection as an international norm**

The principle of refugees' protection, which states that if someone escapes their place of origin and applies for asylum elsewhere, their new government should not send them back. This principle is practically a human right, as stated in the Universal Declaration of Human Rights.<sup>37</sup> The right to request and receive asylum is protected under UDHR Article 14(1). Ensuring the protection of human rights generally is essentially cemented by the provisions mentioned above. The ability to travel to another nation in search of safe haven is one of the rights known

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<sup>34</sup> Santhosh Persaud, "Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights," *New Issues in Refugee Research*, no. 132 (2006).

<sup>35</sup> Mc Adam, "The Enduring Relevance of the 1951 Refugee Convention."

<sup>36</sup> Santhosh Persaud, "Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights," *New Issues in Refugee Research*, no. 132 (2006).

<sup>37</sup> Article 14(1) of the Universal Declaration of Human Rights, 1948

as freedom of movement. After someone arrives, is accepted, and is granted asylum, the receiving state is not required to send them back to their home nation.<sup>38</sup> Returning someone to a situation that compelled them to relocate to a secure nation would be against their human rights. States are not required to grant refuge, though; this depends on a number of considerations, including the potential harm to national security upon arrival.

The question of whether refugee protection ought to become a worldwide custom is one that academics are still fiercely debating. A second basis of international law is "international custom, as evidence of a general practice accepted as law," according to article 38 (1) (b) of the Statute of the International Court of Justice. Two essential components must be proven in order for an international custom to be accepted:

- i. States' real practices and
- ii. States' approval of those practices as legal

The duration, consistency, recurrence, and generality of a certain type of activity by states are just a few of the components that make up the actual practice of states. Giving the concentration on "the status of refugees, the concept of asylum, and the nature of protection afforded to refugees, it would require a measure of subsequent acceptance by non-parties before it could be regarded as a rule of customary rule."<sup>39</sup> The way refugee protection is appears under the international law, does not make itself an international customs, rather its principles (non-refoulement in particular) "seems as if the principle is more important as a moral means of convincing a government than as a basis for a legal argument."<sup>40</sup> The contribution made by international human rights laws to the concepts of refugee protection cannot be disregarded, even though the question of whether or not refugee protection has the status of an international norm is still up for debate.<sup>41</sup> The fundamental components of refugee safeguards, like the acknowledgment of the right to asylum and the non-refoulements principles, have been greatly aided by international human rights law.<sup>42</sup> States are called upon by the UDHR to declare their commitment to upholding and defending fundamental rights and human dignity.

Although they are not enforceable, it appears that this is not a typical assertion; however, it is supported by enforceable instruments.<sup>43</sup> The establishment of two international agreements (the ICCPR and the ICESCR of 1966), which established the enforceability of the UDHR's declarations, was prompted by the states' commitment to uphold the rights guaranteed by this

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<sup>38</sup> Weis, Paul. "Human rights and refugees." *Israel Yearbook on Human Rights*, Volume 1 (1971). Brill Nijhoff, 1971. 35-50.

<sup>39</sup> Grahl-Madsen, Atle. "The European Tradition of Asylum and the Development of Refugee Law." *The Land Beyond*. Brill Nijhoff, 2001. 34-46.

<sup>40</sup> Greig, Donald W. "The protection of refugees and customary International Law." *Aust. YBIL* 8 (1978): 108.

<sup>41</sup> Costello, Cathryn, and Michelle Foster. "Non-refoulement as custom and jus cogens? Putting the prohibition to the test." *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (2016): 273-327.

<sup>42</sup> Gil-Bazo, María-Teresa. "Refugee protection under International Human Rights Law: From non-refoulement to residence and citizenship." *Refugee Survey Quarterly* 34.1 (2015): 11-42.

<sup>43</sup> Costello, Cathryn, and Michelle Foster. "Non-refoulement as custom and jus cogens? Putting the prohibition to the test." *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (2016): 273-327.

instrument.<sup>44</sup> Taking into account both Covenants, the three fundamental human rights enshrined in the UDHR—the right to property, the right to nationality, and the right to seek asylum—have not been included in the treaties.

The right to apply for asylum under Article 14(2) of the UDHR is a fundamental component of the refugee conventions, as this article attempts to address the issue of limitations on the definition of refugees under the relevant refugee accords. If a country that is a party to the 1951 Convention and its 1967 Protocol or the 1969 Refugee Convention is the destination that an asylum seeker is ready to go, neither of these agreements offer any enforcement mechanisms. According to Article 9 of the 1969 Convention, the "Commission for Mediation, Conciliation, and Arbitration of the Organization of African Unity" may be consulted by the States signatories in any disputes pertaining to the interpretation of the Convention.

The forum is exclusively accessible to signatory states and cannot be accessed by private parties in the event of a dispute arising from the interpretation of this treaty. As the international bill of human rights established the protection of human rights where refugees cannot be separated, the 1969 Convention and the 1967 Additional Protocol to the 1951 Convention were fully incorporated into the human rights law.<sup>45</sup> Human rights legislation can be applied through the refugee law, according to Li Yao.<sup>46</sup>

## **6. Refugee's Protection at the regional level (Africa)**

Like other regions, Africa has embraced the instrument especially for the protection of refugees. With the specific aim of addressing refugee problems in Africa, Africa, through the Assembly of the Heads of State and Government, adopted the 1969 Convention on the Specific problems of Refugee Problems on September 10, 1969, during its Sixth Ordinary Session in Addis Ababa. The definition of a refugee under Article I (2) of this regional treaty is the same as that of the July 28, 1951, Convention pertaining to the Status of Refugees.

According to the 1951 Refugee Convention, the definition of a refugee did not include events that seriously disrupted public order, occupation, foreign dominance, or external aggression as valid reasons for leaving the country; instead, it focused primarily on events occurring in Europe, meaning that the convention lacked an international perspective. The circumstances that were producing refugees in 1951 were included. Therefore, the treaty was not offering protection to events that were happening in Africa during that year. Although the scope of application between these two treaties differs, these two conventions share the same meaning when it comes to defining a refugee. From its inception, the 1969 Convention gives refugee protection to those who flee their countries as a result of fear or persecution generated from the

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<sup>44</sup> Gil-Bazo, María-Teresa. "Refugee protection under International Human Rights Law: From non-refoulement to residence and citizenship." *Refugee Survey Quarterly* 34.1 (2015): 11-42.

<sup>45</sup> David James Cantor, "The End of Refugee Law?" 2017, 1–9, <https://doi.org/10.1093/jhuman/hux022>.

<sup>46</sup> Li, Yao. *Exclusion from Protection as a Refugee: An Approach to a Harmonizing Interpretation in International Law*. Vol. 9. Brill, 2017.

struggle for independence, activism, among other factors. For example, Samora Machel of Mozambique fled his country to Tanzania in 1963 to join the liberation army of Frelimo in exile. In the preamble of the AU Convention, it is made clear that the Convention does not depart from or supplant the UN Convention, as it recognizes that:<sup>47</sup>

“...the UN Convention of 28 July 1951, as modified by the Protocol of 31 January 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects deep concern of States for refugees and their desire to establish common standards for the treatment.”

The Preamble demonstrates that the Convention serves as a reminder to the members of the African Union that both documents apply *mutatis mutandis* with regard to refugee status. The 1969 Convention requires governments to work with the UNHCR in order to acknowledge the important role it plays in society.<sup>48</sup>

The AU Convention requires States Members to collaborate with the AU and UNHCR under Articles VII and VIII, respectively. According to Article VII, all Member States are required to assist the AU Secretary-General in his or her work by making sure the Secretariat has access to pertinent data and information regarding the status of refugees and the degree to which the Convention is being implemented, including how closely the member nations have adhered to the Convention's tenets.

As with the 1951 Convention, the 1969 Convention has maintained all core principles on refugees' protections:

**Non-refoulement:** This fundamental tenet of international refugee law, which is represented in both the 1951 and 1969 Conventions, has come to be recognized as an international standard.<sup>49</sup> There can be no exceptions or reservations to this fundamental premise. It states that no one may forcibly remove or return (also known as "refouler") a refugee against their will or in any way to a place where they fear for their life or freedom.<sup>50</sup> In actuality, there isn't a clause in the Convention that makes the responsibilities outlined in the agreement effective to implement.

Actually, there is no provision under the Convention that renders effective the implementation of the obligations set out in the treaty. This is to say, in the event of a violation of the principles enshrined in the treaty by the state member, there will be no legal action to be taken against the violating state. However, the 1969 Convention has empowered the African Union to make

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<sup>47</sup> Rose M D Sa, “Netherlands International Law Law Review; The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity,” no. 1984 (2009): 378–97, <https://doi.org/10.1017/S0165070X00013619>.

<sup>48</sup> Lewis, Corinne. *UNHCR and international refugee law: from treaties to innovation*. Routledge, 2012.

<sup>49</sup> Article I of Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”) (1969).

<sup>50</sup> Annick Pijnenburg, “Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?” *Human Rights Law Review* 20, no. 2 (2020): 306–32, <https://doi.org/10.1093/hrlr/ngaa011>.

collections of the statistical data from the member states, make reports from them, and resolve disputes in that regard.<sup>51</sup>

## 7. The Group unprotected under 1969 Refugees' Convention

The refugee's definition, as provided by the refugee's treaties, does recognize factors that would cause well-founded fear and push people to flee their countries of origin. The treaties do not offer protection to people who are also forced to flee their countries due to other factors other than war and political instability. Regardless of the war being a good producer of refugees in Africa due to war and political instabilities, there are still other factors that are also forcing people to flee from countries of origin, and yet the law does not offer them protection as refugees. The 2022 WFP Southern Africa report estimates that 1.1 million refugees and asylum seekers, the majority of whom are from Burundi, the Democratic Republic of the Congo (DRC), Rwanda, and South Sudan, and 6.7 million internally displaced people (IDPs) reside in Southern Africa.<sup>52</sup>

*Civil wars:* among the factors that contribute to the increase in the number of refugees in Africa are wars. The wars or events that are seriously disturbing public order in either part or the whole of the country of origin are the factor. UNHCR reiterates that five countries alone hosted 65% of the region's refugees and 20% of the global refugee population.<sup>53</sup> The report shows that the leading countries in producing the largest number of refugees are the Central African Republic (CAR),<sup>54</sup> the Democratic Republic of Congo (DRC),<sup>55</sup> Somalia, South Sudan,<sup>56</sup> and Ethiopian ongoing conflict at Tigray. Actually, the large number of people who flee their countries to seek asylum in other places, mostly because of democratic situations in their countries of origin.<sup>57</sup>

*Natural/ecological calamities:* The refugees' definition by the Convention does not fit the circumstances under this factor. This seems to have been forgotten by the conventions' drafters. For them, not being recognized by the Refugees' Conventions meant that they could not access legal protection for their human rights, which could protect them from threats like deportation.

Former UN Environmental Programme (UNEP) expert El-Hinnawi refers to these overlooked victims of the global climate as refugees. These people have been "forced to leave their

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<sup>51</sup> Willie, Ncumisa, and Popo Mfubu. "Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa." *African Human Mobility Review* 2.3 (2016).

<sup>52</sup> WFP Southern Africa: Regional Refugee Update, Issue No. 3-April 2022

<sup>53</sup> OSPAR Regional Summaries, "Regional Summaries."

<sup>54</sup> According to UNHCR report of 2020 on Central African Republic situation, there are over 632,108 refugees from Central African Republic and 630, 834 displaced inside Central Africa Republic. The report available <https://www.unhcr.org/central-african-republic-situation.html> retrieved on 27 April 2021 at 10:00 A.M

<sup>55</sup> As per UNHCR report on DR Congo: refugee 524,193, Asylum seekers 3275, returned refugee 23,861, returned IDPs 34,349 and IDPs 5,014,253. Report available in <https://reporting.unhcr.org/drc> retrieved on 27 April 2021 at 10:00 A.M

<sup>56</sup> OSPAR Regional Summaries, "Regional Summaries."

<sup>57</sup> Ferdinand Ntani, "Should Africa Redefine Democracy and Human Rights?" 4531 (n.d.): 225–34.



traditional habits, temporarily or permanently, because of marked environmental disruptions," according to his classification.<sup>58</sup> People who experience natural disasters like droughts are often forced to leave their home countries and migrate to different parts of Africa and the world.<sup>59</sup> There was a statement made stating that drought kills more people in Africa than all other natural disasters. The World Bank estimates that approximately 800,000 deaths in Africa between 1970 and 2010 were directly related to drought.<sup>60</sup> If it so, then it will be very reasonable for people to flee their countries for fear of deaths.

Take Somalia, where many citizens were forced to flee their country because of droughts that led to great famine. Taking Somalia as an example, a report shows that almost 140,000 people were refugees in Kenya because of famine, which was caused by drought.<sup>61</sup> Droughts created fear of death between them because people were starving for lack of food and animals were dying for lack of pastures and water.<sup>62</sup> There are other countries whose citizens were forced by calamities to flee their countries, particularly in those places where it occurs habitually. However, the refugee definitions in both instruments are very limited to those circumstances that would cause people to flee their countries. Some scholars have criticized the shallowness of the refugee definition, as it has just focused on the criteria of war as a major cause, which would result in well-founded fear, and left out other factors like climate change (i.e., droughts), which may also cause fear and make them flee their countries of origin.<sup>63</sup> In my opinion, what would create a well-founded fear would not necessarily be a war or political instability alone. There would be other factors that would have to be measured on a scale. For example, if people who live in drought experience severe hunger and their government has failed to provide a means to save them, they will automatically go to other places, including crossing the borders to neighboring countries, so that they can spare their lives. The refugee who are produced by other factors, like climate changes and natural calamities has raised the attention from member of academia.<sup>64</sup>

According to Sahinkuye, natural disasters should be included in the definition of a refugee since they pose a threat to individuals and may lead them to escape their home nations in search of economic safety elsewhere (abroad).<sup>65</sup> The UN Human Rights Council declared in March 2018 that a large number of individuals who have been displaced from their homes as a result

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<sup>58</sup> El-Hinnawi, E. 1985. Environmental Refugees. United Nations Environment Programme, Nairobi, 4

<sup>59</sup> Brookings.edu, "Somalia: Drought + Conflict = Famine?" 2016, 97–113.

<sup>60</sup> Brookings.edu.

<sup>61</sup> Platform on Displacement, "Driven out by Drought," n.d.

<sup>62</sup> Nobel and Nobel, "Refugees, Law, and Development in Africa Refugees, Law, and Development in Africa."

<sup>63</sup> M G Sahinkuye, "A Theoretical Framework for the Protection of Environmental Refugees in International Law," *Transnat'l Hum. Rts. Rev.* 6 (2019): 1.

<sup>64</sup> Sahinkuye, Mathias G. "A theoretical framework for the protection of environmental refugees in international law." *Transnat'l Hum. Rts. Rev.* 6 (2019): 1.

<sup>65</sup> Sahinkuye, Mathias G. "A theoretical framework for the protection of environmental refugees in international law." *Transnat'l Hum. Rts. Rev.* 6 (2019): 1.



of climate change do not meet the criteria for being considered refugees, and they were dubbed "the world's forgotten victims."<sup>66</sup>

### **8. How Effective is the Protection of Refugees under the Regional treaty?**

The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa serves as the legal framework for refugees on the continent. Given that the treaty's operational territory is Africa, the ratifying African states are its members. After the 1951 Convention and its subsequent protocol were adopted as an international instrument for refugee protection, they have gained the stature of 'international customary law' in accordance with the principles contained within, including the non-refoulement principle. Africa ratified the convention. African refugee protection is governed by the 1969 AU Convention, which is also the world's first regional pact on refugee protection.<sup>67</sup>

The 1951 Convention's guiding ideas were incorporated into the 1969 Convention by its drafters. By taking into account Africa's historical background, the 1969 Refugee Convention sought to address the issue of refugees in the continent. It was approved at a time when certain African republics were fighting for independence, and it's likely that some leaders of liberation organizations were afraid of being prosecuted.<sup>68</sup> Slightly different from the 1951 Convention, the 1969 Convention's definition of refugee includes a regional definition that grants protection to people who, in fear, left their home countries due to "external aggression, occupation, foreign domination, or serious events disturbing public order."<sup>69</sup> According to international law, the definitions of both agreements provide the same protection.

Many elements of the 1951 Convention are reflected in the 1969 AU Refugee Convention. Both specify the requirements for obtaining refugee status and the conditions under which it expires or is withdrawn.<sup>70</sup> Convention states that a person who has committed a major crime is not eligible to receive a travel document or refugee status. Furthermore, if someone is eligible for refugee status, it must be awarded without bias. 46 of the 55 member states of the Africa Union have ratified the convention since it was adopted, which is a huge accomplishment for its acceptance.

Notwithstanding the fact that Africa has integrated refugee concepts into its regional instruments—for instance, the African Charter on Human and Peoples' Rights, 1981 (the Charter)—a person is entitled to apply for asylum under Article 12(3). Similar to other human rights accords, the African Charter has acknowledged the UDHR since it upholds an

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<sup>66</sup> <https://www.zurich.com/en/media/magazine/2022/there-could-be-1-2-billion-climate-refugees-by-2050-here-s-what-you-need-to-know> retrieved on 24th July 2022 at 17:10

<sup>67</sup> UNHCR, "1969 OAU Refugee Convention," no. May (2019): 2019.

<sup>68</sup> UNHCR, "1969 OAU Refugee Convention," no. May (2019): 2019.

<sup>69</sup> Article 1 of Refugee Convention, "CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA" 2312, no. December 1967 (1969).

<sup>70</sup> Article 5 of Refugee Convention, "CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA" 2312, no. December 1967 (1969).

individual's right to apply for refuge. The Charter has acknowledged some rights as essential freedoms that all people must have, including the right to be protected and to exercise other rights in the country of asylum without facing prejudice, threats, or coercion to return to one's place of origin. It is not in the spirit of the refugee conventions for the country where a person has sought asylum to reallocate them to another country, even if such a country is safer. The obligation to grant asylum is to the country where the seeker fled.

The right forms part of an international customary law principle as reflected in many international refugee conventions, particularly the non-refoulement principle. In the real sense, the domestication of refugee laws (principles) by the States makes the difference in their development in Africa. The continent is still facing refugee problems; one would imagine the existing problems stimulate an increasing number of people to flee the country, and bad enough, they are crossing the sea attempting to reach European shores. According to the Operational Data Portal Refugee Situation's report, the number of people reached 23,782 on July 17, 2022.<sup>71</sup> Whereby a large number of people are from Africa, where they have experienced political instability among other factors. The problems that raise challenges to Africa's refugee protection system, among others, are:

The unwillingness of states to accept the responsibilities enshrined in the convention pursuant to various instruments, both international and regionally in particular, requires the state's part to honor the agreement. The AU Convention on Refugee Protection calls together the parties to ensure the principles enshrined therein are well observed, such as to grant asylum to persons who qualify to be refugees<sup>72</sup> as per the meaning given under both the 1951 Refugee Convention and the 1969 AU Convention, including giving help to Member States that find it difficult to continue offering asylum. The problem that the asylum seekers are facing in the host countries poses the question of whether the 1969 Convention guarantees refugees and asylum seekers basic rights is effective. In fact, the Convention and other human rights instruments, such as the African Charter on Human and Peoples Rights and international conventions, provide a full spectrum of refugee protection rights and obligations. Nonetheless, there have been and still are shortcomings in the way these rights are protected.<sup>73</sup> It is not possible, in my opinion, to attribute the failure to the 1969 Convention itself. Although there are instances where refugees' incapacity to exercise their full legal rights is because of objective, material, social, economic, or political circumstances, rundown governmental behavior is typically the issue. The Convention makes no mention of the procedures that a refugee or applicant for asylum may use if their right to seek asylum is violated or not guaranteed.<sup>74</sup>

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<sup>71</sup> Operational Data Portal Refugee Situation retrieved on [https://data.unhcr.org/en/situations/mediterranean/location/5205?fbclid=IwAR3aue78JQrosSDJIosd8tYao6arwBwLBhCqctJsaMNM-BHbzpD0Lg\\_RoWcon](https://data.unhcr.org/en/situations/mediterranean/location/5205?fbclid=IwAR3aue78JQrosSDJIosd8tYao6arwBwLBhCqctJsaMNM-BHbzpD0Lg_RoWcon) 24<sup>th</sup> July 2022 at 14:29 pm

<sup>72</sup> Article 1 of Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention") (1969).

<sup>73</sup> Gil Loescher and James Milner, 'The Missing Link: The Need for Comprehensive Engagement in Regions of Refugee Origin' (2003) 79 *International Affairs* 595, 609.

<sup>74</sup> Gil Loescher and James Milner, *Protracted Refugee Situations: Domestic and International Security Implications* (Routledge 2005) 11.

## Conclusion

The refugees' protection under the international and regional refugees' treaties has all shared the same development and background. The refugee's definition gains momentum as seen today in treaties from the events before (happened in Europe)<sup>75</sup> and after the first world war, which all together considered the refugees as people who flee their countries, with the pushing factor being the fear of persecution and political instability.<sup>76</sup> The 1951 Refugee Convention, its Protocol, and other regional conventions, which are also benchmarked by the domestic laws of different countries, remained unchanged, maintaining the same definitions as per conventions. It is disputed that societies are not static; the same applies to the circumstances that are happening; they can change from time to time (simply to say that history can change). Since the adoption of the first Refugee Convention and later its Protocol, which extended the scope of protection, the definition of refugees has been the same due to the war history and political instability in Europe, and later on, the First and Second World Wars.<sup>77</sup> Today, the world, and Africa in particular, are facing the refugees' challenges as people flee their countries of origin to other countries to seek safe refuge, and the factors for their fleeing no longer remain the same. Issues like natural calamities have been a good producer of those who flee their countries (and remain not to be named 'the refugees'). On the other hand, the question of the effective legal protection of refugees is also doubtful, as the state exercises the vast discretionary power to grant a person who was forced to flee the country asylum and refugee status or not, and yet the decision will not be questionable. On the other hand, refugee protection has not acquired the status of being an international custom as per standards set under international laws. Therefore, there is still a need for the convention to be updated so that the definition includes other factors that could force people to flee their countries and strong enforcement mechanisms can be established so that the refugees may be protected.

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<sup>75</sup> Dragostinova, Theodora. "Refugees or immigrants? The migration crisis in Europe in historical perspective." *Origins: Current Events in Historical Perspective* 9.4 (2016): 1-16.

<sup>76</sup> Bilgic, Ali, and Michelle Pace, "The European Union and refugees. A struggle over the fate of Europe *Global Affairs* 3.1 (2017): 89–97

<sup>77</sup> Ahonen, Pertti. "Europe and refugees: 1938 and 2015–16." *Patterns of Prejudice* 52.2-3 (2018): 135-148.

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