

Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa

Ncumisa Willie* and Popo Mfubu**

Abstract

In most African countries, refugees are not welcomed with the sense of regional solidarity that surrounded the promulgation of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Instead, African states have increasingly followed the lead of European states by closing their borders, deporting those who have made it into their territories or restricting them to camps. Even in those countries where refugees are admitted, their treatment does not meet the Convention's standards and obligations. Despite South Africa having enacted legislation, the Refugees Act, which is hailed as one of the most liberal domestic refugee protection frameworks in Africa, it has regressed in its refugee protection policy.

Continued conflict in the Horn of Africa, environmental disasters and struggling economies have resulted in a migratory flow of people to South Africa. This paper will argue that due to the fragmented manner in which African states approach refugee protection, countries such as South Africa, that have liberal and progressive refugee protection frameworks, will continue to experience higher migration flows and thus shoulder a greater responsibility.

In response to this migratory pressure, this paper will demonstrate how the South African government has begun to intentionally and unlawfully violate the Refugees Act as well as regional obligations, and will demonstrate how South Africa has adopted policies and practices aimed at hindering, discouraging and restricting access to asylum. This paper will propose that African states should adopt a unified regional approach to refugee protection in order to share the responsibility of refugee protection.

* Refugee Rights Unit, University of Cape Town, South Africa. Email: ncumisa.willie@uct.ac.za.

** Refugee Rights Unit, University of Cape Town, South Africa. Email: popo.mfubu@uct.ac.za.

Keywords Refugee protection, Africa, coordinated approach, responsibility sharing, burden sharing.

Introduction

At the end of 2014, the office of the United Nations High Commissioner for Refugees (UNHCR, 2015c: 4) reported that there were 59.5 million people globally who had been displaced by conflict, persecution, violations of human rights and generalised violence. Of the fifteen conflicts throughout the world that have erupted or reignited, over fifty percent of them have taken place in Africa, specifically in Côte d'Ivoire, the Central African Republic, Libya, Mali, the north eastern parts of Nigeria, the Democratic Republic of Congo, South Sudan and more recently Burundi (UNHCR, 2015a). By mid-2015, the conflict in Somalia resulted in 1.1 million people fleeing the country as refugees, the third highest number of people seeking refuge in Africa. Somalia is closely followed by South Sudan (744,100), Sudan (640,900), the Democratic Republic of Congo (535,300) and the Central African Republic (470,600) (UNHCR, 2015b: 6). Sub-Saharan Africa alone accounts for more than 4.1 million refugees, which is the largest proportion of the world's total refugees hosted by a single region, with more than half of the top ten refugee producing countries located in sub-Saharan Africa.

The above figures reveal the magnitude of the ongoing humanitarian crisis in Africa, particularly in sub-Saharan Africa, and with so many people in need of urgent protection, the next logical question is who must shoulder the responsibility of providing protection to the ever growing number of refugees in Africa? Importantly, given the inordinate pressure placed on some domestic states and not others, how must the responsibility be shared amongst African states in an equitable manner informed by a human rights approach in accordance with international refugee protection law?

Without a well-coordinated and uniform approach to refugee protection, many asylum seekers and refugees are left to the mercy of unilateral domestic refugee legislation and policies that are often restrictive and not in line with the principles, ethos and obligations of either the 1951 United Nations Convention and the subsequent Protocol of 1967 Relating to the Status of Refugees (herein after the "1951 UN Convention") or the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (herein after the "1969 OAU Refugee Convention").

This paper will critically examine African states' fragmented approach to refugee protection, with most adopting policies, legislation and other measures in response to the growing numbers of refugees in order to shirk or shift their international responsibility towards refugees, ultimately contributing to the uneven distribution of refugees on the continent. Furthering this argument, we focus on South Africa as one of the examples of a worrying trend throughout the region that indicates an absence of solidarity and responsibility sharing in relation to refugee protection. We conclude this paper with some recommendations on how African states need to approach the African refugee problem in a coherent and unified manner.

Methodology

From a research methodology perspective, this paper will primarily draw on the authors' own experiences as practising refugee law attorneys in South Africa. The discussions will also stem from an analysis of international and regional refugee protection instruments, including domestic refugee legislation from various African states, reports and statistical data from refugee protection agencies such as the UNHCR and secondary sources such as discussion papers and research papers from distinguished migration and refugee scholars.

Brief Overview of International Refugee Protection Instruments

After the Second World War, when the world witnessed some of the gravest human rights violations and atrocities in history, it became clear that international mechanisms to protect and uphold human rights were needed. In 1948, at a sitting in Paris, the United Nations General Assembly adopted the Universal Declaration of Human Rights. Apart from fostering domestic respect for human rights among member states, the Universal Declaration of Human Rights envisioned that there would be times, as history had proven, when people's lives or human rights would be at risk and they would need to seek asylum in other countries. Article 14(1) of the Universal Declaration of Human Rights provides that: "Everyone has the right to seek and to enjoy in other countries, asylum from persecution." The right to seek asylum would later be echoed on a regional level by Article 12(2) of the African Charter on Human and Peoples Rights (1981).

In essence, Article 14(1) of the Universal Declaration of Human Rights provided the foundation for later discussions that led to the formulation and adoption of the 1951 UN Convention which gave life and meaning to the right

to seek asylum in Article 14(1) of the Universal Declaration of Human Rights. The 1951 UN Convention was initially aimed at affording protection to people who were forced to flee their countries as a result of the conflicts in Europe at the end of the Second World War. Therefore, the 1951 UN Convention was initially limited in its application to those fleeing Europe before 1 January 1951. However, the 1951 UN Convention was amended by the 1967 Protocol which broadened the scope of its geographic limitation to include the rest of the world and to also include those who fled their countries before 1 January 1951. The 1951 UN Convention defines a refugee as a person who is outside of their country of origin and, due to a well-founded fear of persecution because of their race, religion, nationality, membership to a particular social group, or political opinion, is unable and unwilling to return to their country of origin (1951 UN Convention, Article 1(2)). This definition of a refugee focuses on the refugee as an individual and assesses the basis of their individual fears. The determination of refugee status is thus predicated on an adjudication of their claim on an individual basis.

The 1951 UN Convention and its definition of a refugee did not adequately cater for refugees fleeing war or generalised violence, a phenomenon which has and continues to plague African states. The 1969 OAU Refugee Convention was adopted in 1969 and formally came into force in 1974. The 1969 OAU Refugee Convention was specifically adopted to fill the gaps in international refugee protection that were not covered by the 1951 UN Convention and the Protocol of 1967 Relating to the Status of Refugees (George Okoth-Obbo, 2001: 87).

The 1969 OAU Refugee Convention expanded the definition of a refugee and catered to refugee situations that were, at the time, unique to Africa. The 1969 OAU Refugee Convention was intended to provide mechanisms to protect and assist the masses of people displaced by ongoing conflict and to provide durable solutions to the refugee problem in Africa. The definition introduced by the 1969 OAU Refugee Convention, whilst incorporating the 1951 UN Convention, includes people who are forced to flee their countries of origin and seek refuge in another country due to external aggression, occupation, foreign domination and events seriously disturbing public order (1969 OAU Refugee Convention, Article I(2)). This expanded definition focused on the context in which refugees find themselves in their countries of origin. This definition was particularly cognisant of the need to cater for people who flee in large groups (mass influx) during conflicts, thus making it impractical to determine refugee status on an individual basis.

The 1969 OAU Refugee Convention promotes the recognition of prima facie refugee status, especially during times of mass influx precipitated by conflict. Here, the reasons for seeking asylum are not directly linked to individual circumstances. This approach involves the recognition of refugee status based on objective evidence and information about events in the country of origin, all of which advance a finding that a group of people from a particular country or area qualify for refugee status on a prima facie basis (UNHCR, 2005). For example, and as advanced in our daily work, Somalis fleeing parts of Mogadishu where the Al-Shabaab militia rebels have a stronghold are regarded as prima facie refugees because the conflict is recognised as pervasive and ongoing and because large numbers of people are fleeing ongoing violence caused by the civil war. The same can be said for parts of South Sudan and the eastern part of the Democratic Republic of Congo.

The 1969 OAU Refugee Convention was welcomed at the time, as an African solution to a largely African problem however, as will become clear in the next part of this paper, the implementation of the 1969 Refugee Convention has been largely disappointing throughout most of Africa.

The State of Refugee Protection in Africa

There has been a gradual but serious erosion of hospitality towards asylum seekers and refugees in Africa. The increased emphasis among African states is one geared towards tightening borders or containing refugees as opposed to protecting them. This approach is influenced by political, economic and security considerations instead of the humanitarian approach articulated in the preamble of the 1969 OAU Refugee Convention. These sentiments were also echoed by George Okoth-Obbo (2001), Assistant High Commissioner for Operations at UNHCR in 1999 who lamented:

Not surprisingly, there has been strong impetus in some African countries to emulate [the restrictive approach being pursued in other regions]. Instances in which borders were closed in the face of refugees fleeing real danger have already been witnessed. Mistreatment of refugees and asylum-seekers as deliberate State policy has also taken place. On the whole however, the negative creep has been relatively contained. The moral effect of the Convention in Africa itself has a lot to do with the restraint. The fact that the Convention is so highly regarded particularly among its African stakeholders has definitely encouraged political adherence to its principles. Indeed, had there been no OAU Convention in Africa when the more restrictive tendencies

emerged the whole system of asylum and refugee protection would by now have collapsed.

The adoption of the 1969 OAU Refugee Convention came at a time of great African solidarity. Many African countries, bound together in their mutual desire to be free and independent from colonial control, supported each other on a regional level in their struggle for autonomy. Therefore, African states welcomed refugees with 'open arms' (Rutinwa, 1999: 7). Unfortunately, not long after many of these countries had finally attained independence from their colonial oppressors, many of them soon erupted in civil war which, as time has shown, has been difficult to quell.

Sudan is but one of the many examples of this. In 1956, Sudan attained independence from colonial rule and shortly thereafter, in 1958 General Ibrahim Abboud led a military coup against the civilian government elected earlier in the year. By 1962, a full civil war besieged the south, led by the Anya Nya movement, a civil war that has taken on a different dimension today but still rages on (Fahmi, 2013). In explaining these tragic events, Douglas Johnson (2003) explains that "Sudanese independence was thrust upon the Sudan by a colonial power eager to extricate itself from its residual responsibilities; it was not achieved by national consensus expressed through constitutional means." This has been the destructive cocktail that has plagued most of Africa; governance attained by liberation movements is by itself an illegitimate means to secure power. The disturbing trend has shown that not soon after independence is attained, this illegitimate attainment of power is challenged and is itself overthrown.

Although in some circumstances conflicts in Africa have erupted as a result of external influences, many are a result of internal factors, the majority of which are ethnic and religious tensions and political differences. These civil wars have resulted in many people being internally displaced and those that flee remain in protracted refugee situations, such as those in refugee camps in Kenya which have served Somali populations for more than 20 years.

The exodus of people feeling conflict situations within Africa has largely not been met with an eagerness to receive them and to provide them with protection. In the 1990s, the Democratic Republic of Congo (then, Zaire) and Tanzania closed their borders at a time when the Rwandan Patriotic Front's rebel soldiers had started a civil war that claimed many lives (d'Orsi, 2008: 1062). With few alternative routes to escape, it is likely that many Rwandans, prevented from crossing into the Democratic Republic of Congo or Tanzania,

were victims of the conflict and were therefore in desperate need of aid and assistance. Many writers, though critical of the Democratic Republic of Congo and Tanzania's decision to close their borders during a time of great humanitarian need, argued that it was an understandable and practical response to the seemingly unending flow of Rwandans that sought refuge in the two countries. This could have been seen as a desperate act of frustration in the face of large numbers of refugees entering the countries. In March 1995, when the government of Tanzania closed its borders with Rwanda and Burundi at the height of the genocide in Rwanda, the then Minister of Foreign Affairs, declared: "We are saying enough is enough. Let us tell the refugees that the time has come for them to return home and no more should come" (The Guardian, 1995; Rutinwa, 1999: 295).

The actions of the Democratic Republic of Congo and Tanzania in closing their borders in order to prevent asylum seekers from entering their territories and therefore preventing them from seeking asylum, was in direct violation of arguably the most important principle in refugee law contained in the 1969 OAU Refugee Convention (of which both the Democratic Republic of Congo and Tanzania were signatories and which both had ratified). This is the prohibition against the refusal to allow asylum seekers to enter a state territory or the expulsion of such an asylum seeker if they face risk of harm in their country of origin. This principle is referred to as *non-refoulement* and is considered the cornerstone of refugee protection. It is contained in Article II of the 1969 OAU Refugee Convention which provides:

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, paragraphs 1 and 2.

The prohibition against *non-refoulement* in the 1969 OAU Refugee Convention is without qualification, a significant departure from the 1951 UN Convention. The 1951 UN Convention provides an exception to the prohibition of *non-refoulement* and provides that *non-refoulement* will not apply in times where a refugee may be "[...] a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. The above exception in the 1951 UN Convention has been invoked (arguably without merit and as a devious guise to avoid responsibility for refugees) by countries such as Turkey and Germany during the Syrian refugee crisis. This is the

difficulty faced by countries that experience mass influxes of refugees. Apart from the sometimes insufficient assistance they receive from UNHCR, they are left to solely carry the ever growing responsibility of affording protection to refugees, protection that comes at a great cost to the national fiscus. In these difficult times, other African states do not respond with solidarity or assistance which further exacerbates the unwillingness of affected nation states to extend protection to those seeking refuge in their territories.

In 2001, the Namibian government ordered its national defence forces to 'shoot to kill' anyone trying to cross the Kavango bank – these were Angolan refugees trying to flee UNITAS soldiers. In 1999, Zambia forcibly deported large numbers of refugees and nationals from the Democratic Republic of Congo when they began to put a strain on Zambia's local economy (d'Orsi, 2008). On July 14 and 15 2010, Ugandan police rounded up more than 1,700 Rwandans, including recognised refugees, in the Nakivale and Kyaka camps and forcibly sent them back to Rwanda (Human Rights Watch, 2010). In August 2015, Cameroon forcibly returned over 15,000 refugees from Nigeria who had fled the civil war waged by Boko Haram in the north, a war that is still ongoing.

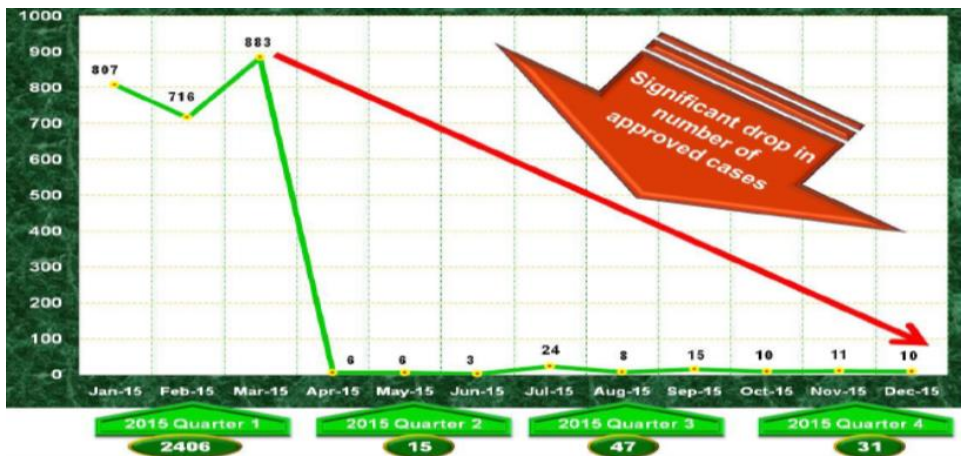
In 2000, close to 1000 Sudanese refugees living in Ugandan refugee camps were forced to return home even though at the time, Sudan's seventeen-year civil war still raged on, with bombings of civilian targets and humanitarian aid projects by government planes, slave raids by pro-government militia, the collapse of a two-year ceasefire in a key province and a reluctant decision by eleven international aid agencies to stop their operations in southern Sudan (Reliefweb, 2000). Media reports confirm that Kenya will begin construction of a 700 kilometre-long security wall along the north-eastern border with Somalia as part of a broader national security plan to curb cross-border terror attacks by Somali terrorist group, Al-Shabaab, a move the UNHCR has criticised as an attempt to curb the flow of Somali refugees into Kenya (AllAfrica, 2015).

Preventing asylum seekers and refugees from entering a country's territory is not the only tactic employed by some African states. Some neglect to provide sufficient assistance to refugees or asylum seekers who are within their territories, leaving them in such deplorable conditions that they opt to leave on their own.

Even in countries such as South Africa that have liberal and progressive refugee protection legislation, the implementation of the legislation and the

asylum application process is, in our experience, arduous for asylum seekers. This is largely because the attitude and unspoken policy of the Department of Home Affairs (DHA) is to find ways to reject applications for asylum rather than to genuinely evaluate them on a case by case basis (Amit, 2012).

Figure 1: Monthly asylum approval rates for 2015.



Source: Department of Home Affairs, 2016.

The figure above indicates that in 2015, the rejection rate for asylum applications in South Africa was over 95% (Department of Home Affairs, 2016). Mr Mandla Madumisa, Acting Chief Director of Asylum Seeker Management for the DHA presented these figures in parliament before the Portfolio Committee of Home Affairs on 8 March 2016 with great pride as though rejecting applications for asylum is the main task of the DHA. In our experience, even when the merits of an asylum application warrant the granting of refugee status in terms of section 3 of the Refugees Act, they are still rejected regardless. More than 90% of the clients we assist at the UCT Refugee Rights Clinic are asylum seekers whose claims have been rejected and, of those, 80% have genuine refugee claims.

A policy of leaning towards the rejection of applications for asylum has resulted in many applications bottle-necking with the Refugee Appeal Board, which is charged with adjudicating appeals from asylum seekers whose claims have been rejected as unfounded. The current backlog faced by the Refugee Appeal is, according to the DHA, approximately 12,361 applications. Applications also bottle-neck with the Standing Committee for Refugee Affairs,

which is charged with reviewing decisions to reject asylum applications as manifestly unfounded or those that the DHA deems to be abusive or fraudulent. The current backlog faced by the Standing Committee for Refugee Affairs is 44,048 (Department of Home Affairs, 2016). There is such a significant backlog of applications that some asylum seekers have been waiting for the resolution of their applications for more than 10 years.

In our experience, the lines at Refugee Reception Offices in South Africa are often so long that asylum seekers have reported to us that it often takes several days, if not weeks, for an asylum seeker to finally make their way inside the Refugee Reception Office in order for them to lodge an application for asylum. It has been the experience of the authors that asylum seekers often give up and remain undocumented. South Africa has the largest number of pending and unresolved asylum applications in the world (UNHCR, 2015b:13). Undocumented asylum seekers are unable to access social services and are exposed to the risk of arrest and deportation. A study in September 2007 estimated that approximately 470 asylum seekers were being “turned away” every day at the five Refugee Reception Offices (Human Rights Watch, 2008). When these undocumented asylum seekers are eventually detained by the police or immigration officials they are often sent to the Lindela Repatriation Centre, which is South Africa’s main deportation and repatriation holding facility. Some of those detained and awaiting deportation at the Lindela Repatriation Centre are in fact asylum seekers, which is in clear violation of South Africa’s Refugees Act and both the 1969 OAU Refugee Convention and the 1951 UN Convention. A report by the South African Human Rights Commission released in 2000 about the conditions at the Lindela Repatriation Centre found that “[...] people at Lindela who claimed that they were asylum seekers were not given the opportunity to apply for asylum, as was the policy.” Detaining and deporting asylum seekers whose claims have not been adjudicated is in violation of both domestic and international refugee law and often leads to refoulement. It is almost chilling to imagine how accurately the Office of the UNHCR predicted the future state of refugee protection in Africa (Okoth-Obbo, 2001: 87) when it stated that:

[...] in this relationship between African refugee law, policy and practice on the one hand, and global trends on the other lies the most serious likelihood of a further lowering of the thresholds of refugee protection in Africa. As has often been remarked, with the end of the Cold War, the political and ideological value attaching to refugees has waned. The attachment to upholding refugees’ rights which may have previously characterized the approach to asylum is in

fierce competition with tendencies towards the most restrictive and minimalist legal regimes, policies and practices... It is difficult to expect that these trends will not be observed in Africa, where the underlying social and economic constraints are even more compelling. Indeed, the tendency to emulate these trends is said by some already to be in evidence.

The only solace to the poor implementation of South Africa's refugee legislation has been a strong and vigilant civil society that has largely been the gatekeeper of the rights of refugees and has on many occasions litigated against the state in order to vindicate the rights of refugees where the state has failed to implement legislation. However, the space for civil society to engage and challenge the government has begun to shrink and will continue to do so with the introduction of amendments to refugee legislation. The South African Government is currently attempting to introduce the Refugees Amendment Bill.

Our view is that that the changes proposed in the Refugees Amendment Bill are by and large an attempt to narrow the scope of refugee protection in South Africa and in some respects to limit the rights afforded to asylum seekers and refugees. The proposed amendments introduce additional administrative hurdles which may have the effect of causing further delays in processing applications for asylum. The asylum application system is already fraught with huge backlogs, a lack of human capacity and corruption, but regrettably the new proposed changes do not deal with any of these systemic issues.

One of the more alarming amendments proposed by the Refugees Amendment Bill is the removal of the right to seek and attain employment which is currently afforded to asylum seekers. In removing this right to seek and attain employment, the Refugees Amendment Bill fails to deal with how asylum seekers will be able to obtain food, shelter, clothing and other basic necessities for themselves and for their families. Both the right to engage in work and self-employment have already been adjudicated by our courts and the courts have held that the freedom to engage in productive work is an important component of human dignity and our view is that the lacunae created by the Refugees Amendment Bill will lead to the gross violation of human rights. An approach which aims to roll back on the progressive approach to refugee protection is also echoed in South Africa's Green Paper on International Migration (herein after the "Green Paper"), which is a policy paper that seeks to overhaul the country's migration and refugee protection policy. The Green Paper proposes the establishment of "Asylum Seeker Processing Centres"

which will aim to house asylum seekers and restrict their movement while their applications are being processed. This will be in conflict with South Africa's urban refugee policy which includes free movement. The Green Paper is silent on who will provide food and basic services to asylum seekers housed in these processing centres. The proposed removal of the right to work and the introduction of quasi camp like centres is an attempt to make South Africa less of a desirable asylum destination and to curtail what the state refers to as "pull factors" that draw asylum seekers and especially migrants to South Africa.

Additionally, the South African government is proposing a Border Management Bill which is also in line with this worrying trend towards the securitisation of South Africa's borders. The Border Management Bill proposes the establishment of a Border Management Agency (BMA). The new agency will assume full control of ports of entry and borderline functions and will, once it is operational, take over responsibility for all ports of entry into South Africa. Its purpose is to exercise border law enforcement functions, manage legitimate movement of persons and goods across borderlines and at ports of entry, co-ordinate with "other organs of state, through the principles of co-operative governance" (Border Management Agency Bill, 2015:13) the functions performed by them in border management and provide "an enabling environment to facilitate legitimate trade" (Border Management Agency Bill, 2015:13). The draft bill also envisages the creation of a border guard which ties in with a December 2014 statement by Minister in the Presidency, Jeff Radebe, that both a border and coast guard will come into being as part of the BMA. There is currently no indication of whether the border guard will be staffed by soldiers currently in the South African National Defence Force or whether new recruits, who have to be trained and equipped, will be sought.

In summary, South Africa appears to have moved away from its national, regional and international obligations which require a humanitarian approach to refugee protection and towards an approach which holds securitisation and deportation as paramount considerations. As will be demonstrated in the latter part of this paper, this trend is unfortunately not unique to South Africa.

The above overview of the refugee situation in Africa paints a grim and depressing picture of the manner in which many African states have fallen so far below the standards envisioned by the 1969 OAU Refugee Convention or the 1951 UN Convention. A toxic combination of a lack of cooperation amongst African states and a focus on self-preservation and deliberate political isolation have largely led to this failure to provide protection to refugees in a

meaningful manner. As will be argued in the next section, establishing solidarity mechanisms during times of mass influxes of refugees is very much like an insurance scheme. If a state comes to the aid of another state which is experiencing an influx of a large number of refugees, certainly the affected state would reciprocate such aid.

Responsibility/Burden Sharing in Africa

It is worth noting that the term 'responsibility sharing' in relation to the protection of refugees is used in the title of this paper and is referred to in the introductory sections, as opposed to the term 'burden sharing' which is used in the 1969 OAU Refugee Convention and the 1951 UN Convention on Refugees. The term 'responsibility sharing' is preferred because it emphasises a commitment to the principle of human rights and solidarity which form the underlying premise for refugee protection. This differs from the potentially negative connotations that 'burden' may have on African countries' understandings of their obligations towards the reception of asylum seekers and the protection of refugees. However, for completeness and to avoid confusion the term 'burden sharing' will be used.

The concept of burden sharing only appears in the preamble of the 1951 Convention on Refugees:

[...]considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

The 1951 Convention contains no further provisions or direction as to how this "co-operation" is to take place or how it is meant to be implemented in practical terms. The 1951 Convention creates no obligation on member states to cooperate or to share the burden of refugee protection but merely creates a context in which the Convention should be interpreted.

The 1969 OAU Convention Refugee Convention in Article II (4), though also unsatisfactory, goes a bit further and provides that:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

There has been no example in the history of refugee protection in Africa since the adoption of the 1969 OAU Refugee Convention where this provision has successfully been invoked and has resulted co-operation which has caused a 'lightening of the burden' on a host country.

People who flee from their countries of origin on account of war or persecution often flee to neighbouring countries or to countries that appear politically stable and economically viable. African states that find themselves neighbours to refugee producing countries or those that appear to be prosperous in relative terms, tend to, due to their proximity, shoulder the greatest responsibility of refugees fleeing from neighbouring countries. The distribution of refugees is thus, as Hathaway & Neve (1997) put it, an "accident of geography." Of the 616,220 South Sudanese refugees at the end of 2015, Ethiopia hosted 275,400 of them followed by Sudan which hosted 190,700 and Uganda which hosted 179,600. These three countries, due to their proximity, host the largest populations of South Sudanese refugees (UNHCR, 2015b: 6). Geographic proximity is an imbalanced way of sharing the responsibility of refugees on the continent. It is for this reason that many African countries who border refugee producing countries opt to restrict refugees to camps or find ways to prevent or discourage them from arriving in their territories. Where refugees do manage to cross into neighbouring countries, they are soon returned or forced to return to their countries of origin.

Other African states that are not neighbours to refugee producing countries have become a preferable choice for asylum seekers due to the perceived liberal refugee protection mechanisms provided in those countries. When African asylum seekers or refugees decide where to seek asylum, they are generally faced with only two options: being restricted to a camp and spending years in deplorable conditions or being able to live in an urban setting and with the opportunity to seek employment. Faced with these two options, the choice of where to seek asylum arguably becomes an easy one. In pursuit of a place of safety where they can live with some semblance of dignity and normality, asylum seekers will often travel across the continent of Africa to seek asylum.

Therefore, African states with more liberal and progressive refugee protection laws and policies and better economic prospects see higher refugee numbers. One such example is South Africa. South Africa's Refugees Act 180 of 1998, that includes an urban refugee framework and affords broad access to the same socio-economic rights as citizens, makes the country an attractive place of refuge. As of December 2015, South Africa hosted 912,592 asylum seekers and

refugees (UNHCR, 2015b: 6). Even though South Africa is in the southernmost point of Africa, it draws asylum seekers from as far as the eastern and western parts of Africa. In 2015 alone, South Africa received 71,914 new asylum applications, 9,322 of which came from as far as Ethiopia and 6,554 were from Nigeria (Department of Home Affairs, 2016). Asylum seekers from these two countries skipped Tanzania, Zambia, Namibia and Botswana and opted to apply for asylum in South Africa because it is perceived as an ideal place to seek protection.

However, over the past 10 years there has been a decrease in the number of registered asylum seekers in South Africa. In 2010, there were 222,324 asylum applications in South Africa as compared to 71,914 applications in 2015 (Department of Home Affairs, 2016).

Figure 2: Cumulative registered asylum seekers, 2006-2015.



Source: Department of Home Affairs, 2016.

The decrease in new asylum applications is not as a result of more peaceful times in Africa, in fact conflict has been on the increase; with the escalating violence being waged by armed forces such as Boko Haram in northern Nigeria and Mai Mai rebels in the eastern parts of the Democratic Republic of Congo who continue to force more people to flee from their countries. We postulate that the decrease in asylum applications in South Africa is due to the implementation of new policies and amendments to legislation which South

Africa has adopted to make the country a less desirable place to seek asylum. These include heightened border restrictions and security, an increased focus on deportation and, importantly, an effort to make the application process for asylum so laborious that it becomes discouraging.

It is arguably no surprise that invoking the principle of burden sharing in Africa has been unsuccessful because there is no clear or concrete administrative or enforcement mechanisms. As Peter (1982: 280) argues "legal and administrative machineries for burden sharing must be constructed and implemented."

Recommendation Eight adopted at the Recommendations from the Pan-African Conference on the Situation of Refugees in Africa, Arusha (Tanzania) (1986), also advocates for this initiative, stating that it:

Recognizes that the effective implementation in Africa of the principles relating to asylum will be further advanced by the strengthening and development of institutional arrangements for "burden sharing" adopted within the framework of African solidarity and international co-operation, defined in paragraph 8 of the Preamble and Article II, paragraph 4 of the 1969 OAU Refugee Convention.

The solidarity and co-operation envisioned by the 1969 OAU Refugee Convention remains but an elusive dream in the 21st century. In 1999, on the occasion of the 30th anniversary of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa and Geneva, Dr Ahmed Salim, Secretary-General of the OAU, and Mrs. Sadako Ogata, the United Nations High Commissioner for Refugees, noted the following in a joint statement:

[...] thirty years after the adoption of the OAU Convention, the continent is still afflicted by the plight of over four million refugees on the continent and several times that number of displaced people inside their countries caused by socio-economic and political factors including, in particular, conflicts, political violence and instability. This situation is unhealthy and unacceptable. Such a large number of refugees and internally displaced persons poses a heavy burden on OAU Member States already saddled with tremendous security, social and economic hardships. We are concerned with evident compassion fatigue within and outside the continent which is undermining the very principle which guided the founding fathers in framing the OAU Refugee Convention (George Okoth-Obbo, 2001: 90).

What has become increasingly clear is that not even Europe has formulated an effective policy framework for burden sharing. The recent Syrian refugee crisis has exposed the inherent weaknesses in the Dublin System which is Europe's system of burden sharing. In theory it was meant to ensure that asylum claims are adjudicated expeditiously in the first European Union country an asylum seeker enters. Its key weakness is that it places the greatest burden on the country of first asylum as the primary actor responsible for refugee status determination. This is the first country that an asylum seeker enters. In relation to the Syrian refugee crisis, the countries of first asylum in Europe, due to geography, have been Greece and Italy. With a small stream of people seeking asylum the Dublin System holds, but as soon as the numbers of people seeking asylum increase, as we have seen in the Syrian refugee crisis, it completely collapses. The Dublin System shelters countries that are furthest from refugee producing countries. In 2015 alone, 850,000 people entered Greece with another 200,000 arriving in Italy. Without assistance, asylum determination at the rate required is nearly impossible. With little or no assistance from the rest of the European Union, the Syrian crisis started to turn into Greece and Italy's sole problem. What Greece and Italy began doing was to simply allow Syrian refugees to pass through their territories without processing them so that they became the problem of whichever country the eventually ended up in. This is often referred to as 'burden shifting.'

One of the only relatively successful burden sharing frameworks was the Comprehensive Plan of Action for Indo-Chinese Refugees that was adopted in 1989 to respond to the many thousands of people fleeing Vietnam and Laos in the 1980s. The Comprehensive Action Plan was established as a framework for international cooperation at a time when asylum in South-East Asia was in crisis. It created a system of refugee status determination (screening) in the countries of first asylum that allowed those who met the criteria to be resettled, but those who did not qualify were swiftly returned to their countries of origin. While it restored asylum in the region, there were many problems with the Comprehensive Action Plan that led to concerns that it was merely an example of political expediency (Towle, 2006).

The 'every man for himself' approach to refugee protection has neither worked in Europe nor in Africa. Without a clear commitment to address the refugee problem in a coherent and coordinated manner that ensures that all states pitch in and contribute their collective resources regardless of geographic proximity, the refugee problem in both regions will continue to spiral out of control.

Towards a Unified Refugee Protection and Burden Sharing Framework in Africa

The following section provides broad recommendations on how African states should approach refugee protection in Africa in a coordinated manner that is consistent with the notion of a humanitarian approach as envisioned by the 1969 OAU Refugee Convention.

1. Ratification and Domestication of International and Regional Instruments

The most obvious starting point is to encourage African states that have not already signed and ratified both the 1951 UN Convention and the 1969 OAU Refugee Convention to do so urgently. This would provide, at the very least, a level of international and regional accountability.

The next step would be to encourage African states to promulgate domestic legislation that gives effect to obligations in both the 1951 UN Convention and the 1969 OAU Refugee Convention. The enactment of domestic legislation should however be coupled with the political will to implement the legislation fully. Countries like South Africa have progressive legislation but the implementation of that legislation falls short. Countries must be willing to employ their resources in order to appropriately provide protection to refugees and asylum seekers in times of need. To this end, Article I(1) of the 1969 OAU Refugee Convention encourages states to “use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.” This disjuncture between legislation and its implementation was also cited by UNHCR as a challenge to refugee protection in Africa in UNHCR’s Special Issue of the International Journal of Refugee Law (Office of the UNHCR; 1995: 69-70) when it noted:

While the elaboration of legal standards is an important function in devising the framework for refugee protection, the optimal realization of these standards lies in essentially non-legal considerations of an institutional, resource-based, logistic and material nature. In other words, the elaboration of the appropriate legal regime for refugee protection must be underpinned by the consolidation of technical know-how and resources, logistic and other infrastructures and other material resources.

Domestic refugee legislation also provides recourse through domestic courts to asylum seekers and refugees in times where the state violates their rights or is in breach of its obligations. In this regard, Civil Society Organisations in South Africa has been very vigilant in times where the South African Government has violated the rights of asylum seekers and has used domestic legislation to champion the rights of asylum seekers and refugees. But for this to be possible, the legal and institutional refugee protection apparatus must be available.

2. A Uniform Approach to Accepting and Processing Refugees During Times of Mass Influx

The 1951 Convention or the 1969 OAU Refugee Convention do not provide a framework on how to receive and process refugees. In 2003, UNHCR published Procedural Standards for Refugee Status Determination which provides a guiding framework on how to receive and process asylum seekers.

This is perhaps the most onerous aspect of refugee protection in Africa, or anywhere in the world for that matter. How does a receiving state manage sometimes thousands of asylum seekers that have been displaced? African states have to date dealt with asylum seekers in times of mass influx on an ad hoc basis often with the assistance of the UNHCR. There is no uniform approach in terms of how African states deal with large numbers of refugees. Often when camps are set up it is with no involvement from the receiving government and the UNHCR bears the responsibility of documenting refugees and providing them with assistance, as in the case of the of the nearly 330,000 Somali refugees currently living in four refugee camps in Kenya. It is often unclear as to where the UNHCR's responsibility begins and ends, and what involvement the host country has. In South Africa for example, there are no camps due to South Africa's urban and integrated refugee policy, and asylum seekers and refugees enjoy access to basic services. The responsibility in this case rests with the South African Government. There need to be clear and predictable standards and approaches to dealing with refugees during times of mass influx. This can be developed as protocol in the 1969 OAU Refugee Convention and can take various regional forms to take into account conditions specific to that region.

3. Harmonisation of treatment and rights afforded to asylum seekers and refugees

As it has been argued earlier in this paper, the unequal treatment of refugees throughout the continent manifests in an unequal distribution of refugees throughout the continent. The 1951 UN Convention sets out broad rights that should be afforded to asylum seekers and refugees such as access to wage-earning employment and self-employment, housing, public education, identity documents and most importantly the right to choose their place of residence and to move freely. It is interesting to note that the right to free movement which is in Article 26 of the 1951 Convention has the most reservations by African countries. The reservations of the right to free movement indicate the preoccupation by African states with encampment. Most camps provide a method for African states to shirk their responsibility of caring for refugees and places emphasis on donor or UNHCR assistance. However, encampment creates dependency upon the state or the UNHCR to provide constant assistance for all of the needs of a refugee.

The 1969 OAU Refugee Convention is completely silent on what fundamental core rights should be afforded to refugees. It missed an opportunity to address and codify questions around humanitarian standards for the treatment of refugees such as free movement versus encampment of refugees, access to social services, safety and access to food. It is recommended that at the very least African states should afford refugees with access to the same social welfare services that are afforded to citizens as is required by Article 23 of the 1951 UN Convention which provides that “[...] Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.”

The authors are, however, cognisant of the real financial challenge experienced by many African states which are themselves developing nations. Many struggle to provide basic services for their own citizens especially in times of economic hardship brought on by floods and drought. However, with the combined assistance of the UNHCR and other African states, it can be argued that they should at the very least provide assistance at a level equal to that of their citizens.

There is also predominantly no freedom of movement afforded to refugees by many African states. Namibia, Swaziland and Zimbabwe’s refugee legislations require refugees to reside in designated areas. As stated before, South Africa

has an urban refugee framework but Angola, Lesotho and Mozambique's refugee legislations are silent in this regard.

Article 17 which affords refugees with the right to employment has the second most reservations entered by African states. South Africa and Mozambique afford refugees and even asylum seekers with the automatic right to employment. South Africa is, however, reviewing the right for asylum seekers to work and plans to amend its Refugees Act to narrow this right through a Bill. Tanzania, Zambia and Botswana require refugees to obtain work permits before they can work.

It is recommended that at a regional level African states determine minimum core standards for the treatment of refugees within domestic jurisdictions. A useful point of departure would be to revisit the recommendations of the Final Report on the Legal, Economic and Social Aspects of African Refugee Problems (1967) which provides a useful roadmap of minimum standards that should be afforded to refugees. It is unfortunate that these standards did not make it into the final 1969 OAU Refugee Convention.

4. Harmonisation of Durable Solutions to Refugees

Local integration and naturalisation of refugees remains a thorny issue and a bone of contention amongst African states. Many African states are reluctant to provide the right to naturalise to refugees. Lesotho, Mozambique and South Africa create the possibility for a refugee to naturalise if certain conditions are met. In South Africa, a refugee can apply for permanent residence if they have lived in South Africa for a period of five years as a refugee and where it appears that they will remain refugees for the foreseeable future. Malawi, Botswana, Tanzania, Zambia and Zimbabwe's legislation is silent on the question of naturalisation. Tanzania used to naturalise refugees as a matter of policy but no longer does so. It is recommended that African states develop common approaches that allow for the integration and naturalisation of refugees especially those that have been residing in host countries for many years with a particular focus on second and third generation refugees.

5. Establishment of an Institutional Regional Body to Coordinate Refugee Protection

The 1969 OAU Refugee Convention only empowers the Organisation for African Unity (now the African Union) to resolve disputes and to collect statistical data from member states and to compile reports. A regional body such as the African Union together with the technical assistance of the UNHCR

could provide an operational, coordinating, monitoring and supervisory role in relation to refugee protection in Africa. The UNHCR was instrumental as the coordinating body during the South-East Asia refugee crisis.

6. Contributions to a Refugee Protection Fiscal Fund or Scheme

Hathaway and Neve (1997) advocate for states to contribute to a burden sharing ‘insurance’ scheme of sorts. The reality of refugee protection is that it requires financial and other resources. Hosting refugees not only comes at a social and political cost but has a fiscal strain on host countries in times of mass influx of refugees. Often expenditures arise from the national budget that have not been planned or provisioned for. Unless refugees are on a member state’s territory they do not regard themselves obligated to assist. The UNHCR is often also unable to provide sufficient relief and aid for extended periods. In this regard, Hathaway and Neve (1997) note:

[The] distribution of the responsibility [...] is not offset by any mechanism to ensure adequate compensation to those governments that take on a disproportionate share of protective responsibilities. To the contrary, any fiscal assistance received from other countries or the UNHCR is a matter of charity, not of obligation, and is not distributed solely on the basis of relative need.

Where a financial resource scheme exists, it minimises the fiscal risk or exposure of refugee hosting countries when the need arises. An equitable system could be developed to determine contributions from member states which is based on ability and capacity. A method could also be developed to determine how refugee hosting countries draw on the fund when the need arises.

Conclusion and recommendations

As conflicts in Africa continue to rage on with no apparent end in sight, African states have begun to retreat in their approach to refugee protection which has moved from what Bonaventura Rutinwa (1999: 30) described as the “open door” policy to one of self-interest and self-preservation. This has been caused by a lack of capacity to host refugees in the face of ever increasing flows and the impact of refugees on host countries, a lack of a coordinated approach and an unwillingness to share the responsibility for refugees.

It is important to note that refugee protection and burden sharing in Africa should always be complemented with efforts to address the situations in

countries of origin that force people to flee in the first place. The UNHCR and many refugee law academics such as James Hathaway have written extensively on the need to address what is typically referred to as the 'root cause' of refugees or the conditions in their countries of origin that compel people to flee. Together with refugee protection, states must work to resolve the situations in home countries that force people to flee. The authors strongly agree with that argument and have not preoccupied themselves with that discussion in this paper because it has been dealt with at great lengths by other authors.

The implementation of the 1969 OAU Refugee Convention has been fragmented and inadequate amongst African states. This has been largely due to a lack of resources, capacity and a shortage of political will to do so. Refugee protection is made more complex and difficult in the African context due to the fact that the majority of refugees often seek asylum in some of the world's poorest countries who are struggling to cater for their own citizens. However, with greater coordination of efforts, harmonisation of domestic policies and legislation, Africa can begin to share the financial and physical responsibility of refugee protection.

References

Primary

1948 Universal Declaration of Human Rights.

1951 Convention Relating to the Status of Refugees.

1966 International Covenant on Civil and Political Rights.

1967 Protocol Relating to the Status of Refugees.

1969 Convention Governing the Specific Aspects of Refugee Problems in Africa.

1981 African Charter on Human and Peoples Rights.

Conference on the Legal, Economic and Social Aspects of African Refugee Problems. Final Report, Addis Ababa (Ethiopia), October 9-18, 1967.

Recommendations from the Pan-African Conference on the Situation of Refugees in Africa, Arusha (Tanzania), May 17, 1979.

United Nations High Commissioner for Refugees, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, November 20, 2003.

Secondary

AllAfrica. 2015. Kenya: Anti-Terror Border Wall Sparks Heated Debate. From <<http://bit.ly/1WvgQm6>> (Retrieved May 19, 2016).

Amit, R. 2012. No Way in Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices. *ACMS Research Report*, Johannesburg: South Africa. From <<http://bit.ly/2gxpj3f>> (Retrieved May 20, 2016).

Department of Home Affairs. 2016. *2015 Asylum Statistics; Analysis and Trends – Presentation to the Portfolio Committee of Homes Affairs*. From <<https://pmg.org.za/committee-meeting/22163/>> (Retrieved May 10, 2016).

d'Orsi, C. 2008. Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging? *Heidelberg Journal of International Law* (ZaōRV), 68:1057-1081. From <<http://bit.ly/2g9j2ih>> (Retrieved May 10, 2016).

Fahmi, M. 2013. Is Identity the Root Cause of Sudan's Civil Wars? *E-International Relations*. From <<http://bit.ly/2g9FeO6>> (Retrieved May 9, 2016).

Hathaway, JC. and Neve, RA. 1997. Making refugee law relevant again: A proposal for collectivized and solution-oriented protection. *Harvard Human Rights Journal*, 10: 115. From <<http://bit.ly/2gxqzgg>> (Retrieved May 22, 2016).

Human Rights Watch. 2008. *Failings in the Asylum and Deportation Systems Leading to Refoulement of Zimbabweans*. From <<http://bit.ly/2gy8ZVW>> (Retrieved May 10, 2016).

Human Rights Watch. 2010. Uganda/Rwanda: Halt Forced Returns of Refugees. From <<http://bit.ly/2fHyI0C>> (Retrieved May 19, 2016).

Johnson, D. 2003. *The Root Cause of Sudan's Civil Wars*. Indiana: Indiana University Press.

Noble, P. 1982. *Refugees, Law and Development in Africa*. Michigan Yearbook of International Legal Studies. Michigan. Clarke Boardman and Co, New York, 255 –287.

Okoth-Obbo, G. 2001. Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa.

Refugee Survey Quarterly, 20(1). From <<http://bit.ly/2gxqGbX>> (Retrieved May 19, 2016).

Reliefweb. 2000. *Mid-Year 2000: Sudan: War Grinds On*. From <<http://bit.ly/2g9N1f3>> (Retrieved 19 May, 2016).

Rutinwa, B. 1999. The End of Asylum? The Changing Nature of Refugee Policies in Africa. *New Issues in Refugee Research, Working Paper No.5*, Oxford: United Kingdom. From <<http://bit.ly/2gn1CBs>> (Retrieved May 9, 2016).

Towle, R. 2006. Processes and critiques of the Indo-Chinese Comprehensive Plan of Action: An instrument of international burden-sharing? *International Journal of Refugee Law*, 18(3-4): 537-570.

United Nations High Commissioner for Refugees. 2005. *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*. From <<http://www.unhcr.org/558a62299.pdf>> (Retrieved May 8, 2016).

United Nations High Commissioner for Refugees. 2015a. *World at War: UNHCR Global Trends – Forced Displacement in 2014*. From <<http://bit.ly/1TKpnTo>> (Retrieved May 10, 2016).

United Nations High Commissioner for Refugees. 2015b. *Mid-Year Trends 2015*. From <<http://www.unhcr.org/56701b969.pdf>> (Retrieved May 8, 2016).

United Nations High Commissioner for Refugees. 2015c. *World at War. Global Trends. Forced Displacement in 2014*. From <<http://bit.ly/1TKpnTo>> (Retrieved May 8, 2016).