

Refugees and Migrants on the Sea Under African Continental Maritime Regime

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ABSTRACT

The movement of refugees and migrants across the sea has been on the increase in recent times. The United Nations Refugee Agency has often raised alarm on the increasing level of fatalities occurring as people move for safety or to greener pastures across the sea. In the case of Africa, the situation is dire as, according to the Agency, 6 persons die every day on the Mediterranean Sea, for example. In 2018, en-route to Europe from Libya, 1 out of every 14 persons perished compared to 1 out of 38 in the previous year. No less than a total of 2628 persons-including children- lost their lives. There have been calls for regional action to tackle this problem. The issue is whether African Union has got specific instruments to deal with this problem in specific terms in addition to general obligations of member States in International Law. While the African Union's Refugee Convention has provisions governing the precarious problem faced by refugees, it doesn't envisage the kind of problems arising from the movement of refugees and asylum seekers on the sea. Over the past decade, the continental organization has developed a robust set of instruments to govern the sea including treaties such as the African Maritime Transport Charter (AMTC) and the African Charter on Maritime Security and Safety and Development (ACMSSD), the latter instrument yet to come into effect. The African Union has also got a continental strategy on the sea, the African Integrated Maritime Strategy (AIMS) whose dedication page reads in part: "To those who died while at sea trying to earn a better quality of lives." There are general provisions in these instruments that are relevant for the protection of refugees on the sea such as those relating to the safety of vessels(AMTC) and those dealing with human trafficking and smuggling on the sea(ACMSSD, AIMS). However, there are questions as to the extent to which these instruments offer specific and comprehensive regimes such as to proscribe the behavior of states preventing search and rescue of refugees in danger in the name of serving as a deterrent to would-be immigrants. The purpose of this paper is to examine the existing continental instruments for provisions relevant to refugee governance and protection. The paper, based on the examination, makes relevant recommendations.

Keywords: *maritime refugee/migrants, African continental law, international law, maritime regime.*

1. INTRODUCTION

Unlike during the slave trade when Africans were being forcefully moved across the sea by slave masters, today several factors drive them to undertake the journey by themselves. People have taken to the sea in search of life opportunities, protection from persecution or other risks to their lives, and threats to their rights. [1]

Although refugees and migrants have undertaken risky sea movements in different parts of the world, the situations in the Mediterranean Sea are

particularly perilous. Similarly, refugees and migrants from the Horn of Africa crossing the Gulf of Aden and the Red Sea for Yemen have faced dangerous situations. [1]

The African continent is surrounded by water, such that, major routes available for the movement of people fleeing danger or seeking greener pasture is the sea.

The United Nations High Commission for Refugees (UNHCR) has often raised alarm on the increasing level of fatalities occurring as people move for safety or greener pastures across the sea. According

to one report, more than 17,000 refugees and migrants were reported dead or missing in the Mediterranean Sea between the year 2014 to 2018. In that year, en-route to Europe from Libya, a report says that 1 out of every 14 persons perished compared to 1 out of 38 in the year before. A total of not less than 2, 628 persons including children lost their lives. [2]

The situation is dire in the case of Africa. According to UNHCR, 6 persons die every day on the Mediterranean Sea, for example; in the year 2019, the UNHCR reported that at least 1,000 migrants and refugees had died in the Mediterranean Sea. This was described as a “bleak milestone”. [3]

There have been calls for regional and continental actions to tackle this problem. In particular, several issues arise relating to these maritime refugees such as general issues of maritime governance and specific issues like the right to be rescued.

In what follows, the paper examines the extent to which African continental instruments address the issues surrounding maritime refugees and migrants. The instrument which set out overall maritime policy and projections for the continent is the African Integrated Maritime Strategy (AIMS). Its dedication reads as follows:

“This strategy is dedicated to the memory of those who died at sea trying to earn a better quality of life, and of those who passed away on the oceans in the course of the slave trade, colonialism, and the fight for Africa’s self-determination and independence...” [4]

2. RESEARCH METHOD

The study employs doctrinal legal methodology. This entails research into doctrines and analysis of the relevant legal instruments including continental instruments, viz; African Integrated Maritime Strategy and African Charter on Maritime Security and Safety and Development (ACMSSD) citing secondary materials where issues need to be placed in contexts.

3. FINDINGS AND DISCUSSION

Maritime Refugee and Migrants

Ordinarily, people use the word ‘refugee’ to refer to someone who has fled his or her home whether to escape war, natural disaster, hardship, or political persecution. Similarly, the term ‘migrant’ has been used to ordinarily refer to a person moving from his or her country or region to another place to search for greener pasture or improve his

or her material and social conditions. Exploring economic opportunities is a main driver of migration. [5] In fact, unemployment, low wages, meager career prospects for highly educated people, the significant country risk for national investors in the home country are all factors that propel people to move to other countries.

The 1951 Convention Relating to the Status of Refugees describes a ‘refugee’ as someone with a well-founded fear of persecution on the basis of his or her race, religion, nationality, membership of a particular social group, or political opinion. [6] The 1969 African Convention on the Status of Refugees has two-pronged definitions, one of which mirrors the 1951 Convention definition and the other more inclusive. In terms of that convention, the word ‘refugee’ also applies to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin or nationality. This definition uniquely and clearly provides a broader coverage for protecting a person whose life, physical integrity, or liberty would be threatened because of the aforementioned predicaments. Broadly interpreted, this would cover an environmental refugee such as, a person living in a coastal community whose place of residence was displaced by sea-level rise, whose livelihood has been affected negatively, and whose life is put at risk by natural disaster. [7]

Where a person is seeking international protection and his claim has not yet been finally decided, he is called an asylum seeker. Thus, not every asylum-seeker will ultimately be recognized as a refugee, and thus refugee status is ‘declaratory’—that is, determining refugee status does not necessarily make a person a refugee, but rather recognizes that a person is a refugee. [8]

International Protection of Maritime Refugees and Migrants

A number of international instruments provide protection to refugees and migrants. Notable among them is the 1951 UN Refugee Convention which offers protection to any person facing persecution and discrimination. It prohibits States from returning a refugee to territory where there is a risk that his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion while permitting a national security exception. [9]

There are a number of other relevant international instruments which protect refugees and migrants in general. These include the 1966 International Covenant on Civil and Political Rights, [10] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which imposes an obligation not to return a person where there are substantial grounds for believing that there is a real risk of irreparable harm.

In the context of Law of the Sea and maritime refugee, the 1982 United Nations Convention of the Law of the Sea is to the effect that;

“every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:(a) to render assistance to any person found at sea in danger of being lost;(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him”. [11]

UNCLOS further obligates coastal State Parties to ‘... promote the establishment, operation, and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighboring States for this purpose’ [12]

In specific, the 1974 International Convention for the Safety of Life at Sea (SOLAS) obliges the ‘master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, ... to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so’.[13] The SOLAS mandates each State Party to ‘ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary ...’ [14]

The 1979 International Convention on Maritime Search and Rescue (SAR Convention) obliges State Parties to “ensure that assistance [is] provided to any person in distress at sea ... regardless of the nationality or status of such a person or the circumstances in which that person is found” [15] and to “provide for their initial medical or other needs, and deliver them to a place of safety”. [16]

In view of the above, a few questions may be asked, is there a duty to rescue refugees and

migrants in distress at sea, and to where may survivors be taken? Could they be taken to where they were taken? The import of the above includes that International law provides a duty to rescue everyone in distress at sea. This duty is applicable regardless of the nationality or status of the persons in distress or the circumstances in which they are found.

Accordingly, there is no doubt that not only regular seafarers but also refugees and migrants are covered by this obligation. Maritime rescue operations usually entail recovering survivors and bringing them onboard ships or other rescue units.[17] It has been argued that the meaning of the concept of ‘place of safety is broader than it first may seem.

There was the adoption of amendments to the main treaties establishing the international legal framework for maritime search and rescue: The International Convention for the Safety of Life at Sea, and the International Convention on Maritime Search and Rescue. The key purpose of these amendments is that everyone rescued at sea shall be ‘disembarked ... and delivered to a place of safety. The general character of the terms is a reflection of the legal complexities and different interests that tend to arise in situations when refugees and migrants are rescued at sea. Indeed, ‘place of safety is not defined in either the SOLAS Convention or the SAR Convention, or any other treaty. Instead, the application is guided by a set of non-binding recommendations from the International Maritime Organization (IMO). [18]

Africa Union Instruments

The primary instrument governing refugee protection in Africa is the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (1969 Convention). It offers protection to a refugee in many ways. The Convention addresses voluntary repatriation, setting out the core principle by requiring that voluntary character of repatriation is respected in all cases and that no refugee shall be repatriated against his will’. [19]

The clauses that follow the core principle are premised on the assumption that the conditions for safe return have been met and detail the duties of countries of asylum and origin and refugee assisting agencies. The sending state, in collaboration with the receiving state, must ‘make adequate arrangements for the safe return of refugees who request repatriation’,[20] while the country of origin must ‘facilitate their resettlement and grant them the full rights and privileges of nationals of

the country, and subject them to the same obligations'. [21]

The 1969 Convention is the first and remains the only international legal instrument to formally insist on the voluntariness of refugee repatriation, however, it is worth noting that the concept appears in UNHCR's statute as a result of a UN General Assembly resolution adopted 19 years prior to the 1969 Convention. Its originality aside, Article V (1) is a 'powerful statement of principle' which is hailed as representing an early articulation of a principle that went on to represent a cornerstone of the international regime for refugee protection. [22]

It protects refugees from discrimination in terms of the provisions in the 1951 Refugee Convention while prohibiting discrimination on the additional grounds of nationality, membership of a particular social group, or political opinion. [23]

The Convention also provides that no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would force him or her to return to or remain in a territory where his life, physical integrity, or liberty would be threatened. [24]

This is broader than the 1951 Convention's non-refoulement provision in several ways including that it does not include a national security exception like the one found in the 1951 Convention. It also protects refugees from returning to territories where their 'life, physical integrity or liberty would be threatened. Assuming that freedom and liberty are analogous, the 1969 Convention explicitly protects persons from one additional type of harm: threats to physical integrity. In practice, however, protection from threats to physical integrity is likely implicitly included in protection from threats to life.

The Convention mandates countries of asylum, countries of origin, voluntary agencies, and international and inter-governmental organizations to assist refugees with the process of return, [25] providing in particular that states of origin should use the news media and the AU to invite refugees home and provide assurances regarding the circumstances prevailing there, and host countries should ensure that such information is received. [25] The Convention further provides that upon return, refugees must not be penalized for having fled. [25]

The Convention underlines the significance of cooperation relating to state cooperation with the AU and the office of the United Nations High Commissioner for Refugees ('UNHCR'). [26] in addition, it provides that the Convention 'shall be the effective regional complement of the 1951

United Nations Convention on the Status of Refugees in Africa', which implies that refugees recognized only under Article 1(2) of the 1969 Convention are legally entitled to the refugee rights enumerated in the 1951 Convention. [26]

The African Integrated Maritime Strategy

The African Integrated Maritime Strategy is the African Union strategy for multi-sectoral engagement with the sea. As noted earlier its dedication page recognizes Africans who died traversing the seas. However, this dedication does not reflect in the level of provisions on the issue.

In general, AIMS requires AU to collaborate with relevant stakeholders to assist the Member States with the development and implementation of sound migration policies aimed at addressing trafficking in human beings, especially women and children. [27] It is clear that the development of migration policies is seen more through the prism of human trafficking and migrant smuggling. [28]

This is consistent with the trend in AIMS for example in dealing with "the maritime dimension of the seven missions" of AIMS which "embraces virtually all major issues that Africa is confronted with" namely "diverse illegal activities which include toxic waste dumping and discharge of oil, dealing in illicit crude oil, arms and drug trafficking, human trafficking and smuggling, piracy and armed robbery at sea". [29] Among others, the stated threats and vulnerabilities to the African Maritime Domain include "Transnational Organized Crimes in the maritime domain (includes Money Laundering, Illegal Arms and Drug Traffic, Piracy and Armed Robbery at Sea, Illegal Oil bunkering / Crude Oil Theft along African coasts, Maritime Terrorism, Human Trafficking, Human Smuggling and Asylum Seekers Travelling by Sea" [30]

While affirming human trafficking as an offense, [31] it seeks to deal with it as a scourge by creating awareness and capacity building in source and transit countries to deal with human trafficking. [32]

It has, however, been posited that characterization that includes refugees and irregular migrants together with terrorists, saboteurs, and drug traffickers is wholly undesirable, or categorizes them merely as 'problem' and 'a threat', ignore the complexities of the issue. It is not even accurate to regard people who are traveling on the high seas as having an 'illegal migrant' status because as long as they have not crossed into another state's jurisdiction, they are subject to the jurisdiction of the state of their own citizenship and the boat's

registration, and only become 'illegal' by definition of the receiving state's controls.

While making adequate provisions on migrant smuggling and human trafficking help in tackling these problems, there are at least two problems associated with the way it is provided for in AIMS. One is those provisions do not specifically consider the rights of those involved for example right to life when they are in danger particularly smuggled migrants. Second is that AIMS do not devote enough attention to refugee and other categories of migrants. Despite this, AIMS provide important general (not specific and comprehensive) interventions in several ways on the issue of refugees and migrant.

Firstly, it recognizes the significance of tackling the root causes of maritime and governance problems on the continent. For example, it says (again with reference to human trafficking for instance) that; AU shall work towards addressing the root causes of human trafficking, which include poverty, unbalanced distribution of wealth, unemployment, armed conflicts, poor law enforcement system, degraded environment, poor governance, societies under stress, corruption, lack of education, lack of respect for universal human rights and discrimination, increased demand for the sex trade and sex tourism.

Secondly, it seeks to create a spatial framework for dealing with this and other maritime problems. Christened Combined Exclusive Maritime Zone of Africa (CEMZA), the spatial framework is to be established "as appropriate and when permissible". [33] CEMZA is geared towards granting Africa cross-cutting geostrategic, economic, political, social benefits." [33] It is a concept which aims at "Boosting intra-African Trade" "contribute to the integration of the internal market for intra-AU maritime transport and services", as well as eliminating or simplifying administrative procedures in intra-AU maritime transport" the goal being to "make it more attractive, more efficient and more competitive, and do more to protect the environment. "[34] More specifically CEMZA will "allow for the convergence of existing and future monitoring and tracking systems used for maritime safety and security, protection of the marine environment, fisheries control, trade and economic interests, border control and other law enforcement and defense activities." In summary, CEMZA will be "a common African maritime space without barriers" [34] and thus should be expected to contribute to free movement of persons and goods across Africa, help in rescue and search operations and possibly helping to serve as a platform for

conveying refugees and migrants to safe haven after rescue.

The third intervention relates to the provision concerning search and rescue. AU in collaboration with relevant stakeholders is expected to "make an assertive call to establish and constantly update co-operation and hence coordination between the Member States to enhance regional co-operation, especially between or among those sharing common borders and Search and Rescue (SAR) areas" [35] It is also required to "conduct regular, inclusive, multi-agency maritime disaster management exercises, in national and regional sea areas". [36] In so doing and in every other area, it is required to "maintain compliance with relevant international conventions." [37]

Africa Charter on Maritime Security and Safety and Development

One of the aims of the AU Charter on Maritime Security, Safety, and Development is to boost the implementation of AIMS. [38] It also seeks to "prevent and suppress national and international crime" including migrant smuggling, trafficking in persons, and all kinds of trafficking transiting through the sea" [39] and promote cooperation in that regard. [40] Like AIMS, there is also an emphasis on human trafficking which it describes as "Trafficking in persons means the recruitment, transportation, transfer, harboring or receipt, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for exploitation." This is further established by the provision requiring State Parties to develop and implement sound immigration policies aimed at eliminating trafficking in human beings, especially women and children as well as smuggling of migrants by sea.

The Charter commits Parties to cooperate in the field of Search and Rescue in line with SOLAS Convention. To achieve this and other objectives, it requires inter-agency cooperation and trans-national coordination [41] as well as training of relevant officials for responsible and safe use of the African Maritime Domain. [42] In that regards, according to their realities, States are required to strengthen law enforcement at sea, maintain patrols, surveillance, reconnaissance in the anchorage areas, the exclusive economic zone, and continental shelf for law enforcement search and rescue operations. [43]

It also seeks to force the committed members to establish appropriate institutions to achieve safe and secure use of the sea [44]. In achieving all these objectives and the implantation of the Charter, AU and its member States will be guided by several principles including “the free movement of people and goods” and the protection of fundamental human rights and freedoms as well as the observance of the rules of International Humanitarian Law” [45] and where required harmonize their policies to conform to these international instruments. [46] In the latter case, the Charter affirms member States’ commitment to the Universal Declaration of Human Rights (1948) and the African Charter on Human and Peoples Rights (1981). Indeed, the African Court for Human and Peoples Rights is recognized as a forum for settling disputes relating to the Charter. [47] In these contexts, the right of States to protect their maritime territories is recognized, however, they must do so in conformity with this and other international laws and principles. [48] This, of course, includes the rights of refugees and migrants. One important provision in the Charter is that it helps to create Africa Maritime Domain and provides for its proper governance as outlined in AIMS which also proposes CEMZA as discussed above. Such frameworks may also help in contributing to refugee and migrant governance in the context of the marine space if properly annexed.

Revised African Maritime Charter

The main objective of this Charter is to articulate African Maritime Policies [49] while promoting international maritime policies to which Members are parties. [50] To that effect, State parties commit to ensure a safe and secure sea and to cooperate in the field of Search and Rescue. [51] It also requires members to enact legislation and take all necessary measures for the safety of shipping [52]. The Charter requires State Parties to ‘articulate within the framework of international maritime law, national, sub-regional or regional strategies concerning places of refuge for ships in distress taking into real consideration and potential danger they pose to the marine environment and maritime navigation. [53] The Charter requires state parties to establish specialized structure and competent international and regional institutions and structure as well as central coordinating organ for the implementation of the Charter and such structure shall also play an advocacy role. [54] State shall enact maritime policies including those impacting on refugees and migrants. They must however do so in conformity with the relevant international conventions.

4. CONCLUSION

The paper examines the African continental instruments provisions on maritime refugees and migrants. This is against the background problem encountered by refugees and migrants across the marine space. To put that context, the United Nations High Commission for Refugees has often raised alarm on the increasing level of fatalities occurring as people move for safety or to greener pastures across the sea. It was found on a general note that African Refugee Convention offers robust general protection. Specifically, African instruments such as AIMS, African Charter on Maritime Security, Safety provide a general framework for maritime governance that will be useful for issues relating to maritime refugees and migrants. They also have general provisions on rescue and search. However, migration issues are couched more in these instruments in terms of migrant smuggling and human trafficking. It is conceded that making adequate provisions on migrant smuggling and human trafficking helps in tackling these problems, there are at least two problems associated with the way it is provided for in AIMS. One is those provisions do not specifically consider the rights of those involved (for example; right to life) when they are in danger particularly smuggled migrants. Second is that AIMS do not devote enough attention to refugee and other categories of migrants. Despite this, AIMS, ACMSSD, and AMTC provide general (not specific and comprehensive) interventions in several ways that would have effects on the issue of refugees and migrants. The instruments recognize the significance of tackling the root causes of maritime and governance problems on the continent that may have rob effects on maritime refugees and migrants. AIMS seeks to create a spatial framework for dealing with this and other maritime problems it christened Combined Exclusive Maritime Zone of Africa (CEMZA), a spatial framework to be established “as appropriate and when permissible” and expected is geared towards granting Africa cross-cutting geostrategic, economic, political, social benefits. It is recommended that future protocols to these instruments should deal more specifically and comprehensively with issues relating to maritime refugees and migrants on the continent. There is a need for greater maritime cooperation at the continental levels to reject hostile perceptions of maritime refugees and migrants with provisions made for an effective rescue mechanism, dismemberment system, and refugee burden-sharing mechanisms.

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