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The Multi-faceted Aspects of Asylum-Law Applicable to Africa: Analysis for Reflection

GINO J. NALDI AND CRISTIANO D'ORSI*

I. INTRODUCTION

The plight of Africa's refugees and displaced persons remains an enduring legacy of the conflicts, political unrest, human rights abuses,¹ impoverishment, natural disasters and environmental degradation² that has plagued the continent and contributed to the displacement of millions of people over many decades.³ Most recently, the conflict in the Darfur region of Sudan,⁴ the economic,

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1. The United Nations (UN) established links between human rights violations and population displacements. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, § 1 ¶ 23(2), U.N. Doc. A/CONF.157/23 (July 12, 1993); United Nations Millennium Declaration, G.A. Res. 55/2, § 6 ¶ 26, U.N. Doc. A/RES/55/2 (Sept. 8, 2000); Rep. of the Group of Governmental Experts on Int'l Co-operation to Avert New Flows of Refugees, 41st Sess., U.N. Doc. A/41/324 (May 13, 1986); Rep. of the Secretary-General, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Human Rights, Mass Exoduses and Displaced Persons*, ¶¶ 4-12, 25, U.N. Doc. E/CN.4/1996/42 (Feb. 8, 1996). The Organization of African Unity (OAU), the predecessor of the African Union (AU), which was formally dissolved in 2002, also acknowledged this nexus. See OAU First Ministerial Conference on Human Rights in Africa, *Grand Bay (Mauritius) Declaration and Plan of Action*, 11 AFR. J. INT'L & COMP. L. 352, 355 ¶ 9 (1999).

2. See G.A. Res. S-19/2, ¶¶ 7, 9, 73, U.N. Doc. A/RES/S-19/2 (Sept. 19, 1997).

3. U.N. Secretary General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Rep. of the Secretary-General*, ¶¶ 7-15, U.N. Doc. A/52/871-S/1998/318 (Apr. 13, 1998) [hereinafter *Causes of Conflict 1998*]; TIYANJANA MALUWA, *INTERNATIONAL LAW IN POST-COLONIAL AFRICA*, 171-76 (1999).

4. Over two million people have been displaced as a result. Rep. of the Secretary-

social and political collapse in Zimbabwe,⁵ drought, crop failure and famine in east Africa,⁶ and the political revolution known as the “Arab Spring” that swept much of North Africa in 2011 have all added to the large-scale flow of refugees and those seeking asylum. Over the years, host States have expressed concern about the social, financial and security implications caused by the reception of large numbers of refugees and refuge seekers⁷ and their ability to cope.⁸ The strain on resources, infrastructure and social cohesion imposed by the so-called refugee burden has given rise to a more restrictive application and definition of refugee status, particularly among European States, which have developed concepts such as “safe countries of origin,” “in-country processing” and “safe return.”⁹ Some States have even resorted to extraterritorial processing centers for refuge seekers.¹⁰ Many refuge seekers are classified as

General, *Specific Groups and Individuals: Mass Exoduses and Displaced Persons*, ¶¶ 6, 9, U.N. Doc. E/CN.4/2006/71/Add.6 (Feb. 13, 2006).

5. Although there has been improvement in some areas with the advent of the power-sharing “Inclusive Government” in 2011, the overall situation remains of concern. U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY: THE 2011 FOREIGN & COMMONWEALTH OFFICE REPORT, 2012 381-87, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32906/Cm-8339.pdf [hereinafter HUMAN RIGHTS 2011]; see generally ANDREW MELDRUM, *WHERE WE HAVE HOPE: A MEMOIR OF ZIMBABWE* (2004).

6. The crisis is acute in Somalia. HUMAN RIGHTS 2011, *supra* note 5, at 316.

7. The term “refuge seeker” will be used in this essay in preference to that of “asylum seeker” since the latter can be given pejorative connotations.

8. See generally U.N. Secretary-General, *Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, ¶ 56, U.N. Doc. A/67/205*-S/2012/715 (July 27, 2012, reissued in Sept. 19, 2012) [hereinafter *Causes of Conflict* 2012].

9. See Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 1997 O.J. (C 254) 1, (as amended by Council Regulation 343/2003, 2003 O.J. (L 50) 1 (EC)) (establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national); Council Directive 2004/83/EC, arts. 4–12, 20–37, 2004 O.J. (L 304) 12, 15–18, 20–23 (EC) (describing minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) [hereinafter *Qualification Directive*]; GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN THE STATES* 138–42 (1978). The European Court of Human Rights has criticized France’s use of “transit zones” to avoid examining asylum applications. *Amuur v. France*, 1996-III Eur. Ct. H.R. 826, 845-50. It appears that African States have not been immune from these restrictive trends. See Cristiano D’Orsi, *Legal Aspects of Asylum in Sub-Saharan Africa: A Deadlock or a Concrete Hope for a Better Future?*, 7 REGENT J. INT’L L. 223, 232–33 (2010).

10. For example, Australia has a policy of sending refuge seekers to Pacific Islands, such as Nauru. See Richard Barnes, *Refugee Law at Sea*, 53 INT’L & COMP. L.Q. 47, 48 (2004).

displaced persons or economic migrants and thus denied refugee status. Despite often lacking the necessary resources to cope with the refugee burden, African States have nevertheless contributed significantly to the progressive development of international refugee law and policy.¹¹ One of the distinctive features of the pan-African approach to dealing with the refugee problem is the prominence given to the concept of asylum, which is the focus of this essay.¹² However, before so doing, it is necessary to briefly explain the concept of asylum, and to distinguish it from that of the refugee; although they overlap, they are not identical.¹³

II. ASYLUM UNDER INTERNATIONAL LAW

The legal regime that seeks to protect the refugee or refugee seeker is characterized, on the one hand, by the principle of state sovereignty and, on the other hand, by competing principles of humanitarian considerations, derived in large measure from international law and the work of the United Nations (UN) and its agencies.¹⁴ While States have accepted limitations on their

11. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa is innovative in a number of respects. *See generally* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *adopted* Sept. 10, 1969 1001 U.N.T.S. 45; *See* MALUWA, *supra* note 3, at 180; *see also* GINO J. NALDI, *THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE* 89 (2d ed. 1999) [hereinafter NALDI, AU ORG.]; Paul Weis, *The Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa*, 3 *REVUE DES DROITS DE L'HOMME* 449, 449–64 (1970); Rainer Hofmann, *Refugee Law in an African Context*, 52 *HEIDELBERG J. INT'L L.* 318, 329 (1992); Emmanuel Opoku Awuku, *Refugee Movements in Africa and the OAU Convention on Refugees*, 39 *J. AFR. L.* 79, 83 (1995); Alice Edwards, *Refugee Status Determination in Africa*, 14 *AFR. J. INT'L & COMP. L.* 204, 232–33 (2006). The Convention, adopted under the auspices of the OAU, entered into force in 1974 and has been ratified by 45 of the AU's 54 Member States. *Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa*, ACHPR, <http://www.achpr.org/instruments/refugee-convention/ratification/> (last visited Dec. 26, 2013). All of the OAU/AU treaties are available at: <http://au.int/en/treaties>.

12. *See generally* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 2.

13. ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 187-89 (2005).

14. The United Nations High Commission for Refugees (UNHCR) has recognized that refugee seekers are in need of international protection. U.N. High Commissioner for Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009* (Conclusion No. 1-109) (Dec. 2009), *available at* <http://www.refworld.org/docid/4b28bf1f2.html>; *see* ERICA-IRENE A. DAES, *STATUS OF THE INDIVIDUAL AND CONTEMPORARY INTERNATIONAL LAW: PROMOTION, PROTECTION AND RESTORATION OF HUMAN RIGHT AT NATIONAL, REGIONAL AND INTERNATIONAL LEVELS* 34 (1992). Thus, the European Court of Human Rights has emphasized that a broad consensus exists to the effect that refugee seekers are members of a particularly underprivileged and vulnerable

sovereign rights over the entry of foreign nationals into their territory, it remains true that international refugee law is a legal regime of protection that is still far from comprehensive.

Asylum traditionally referred to sanctuary sought or offered to individuals fleeing political or other kinds of oppression; it essentially amounted to protection granted to a foreign national against the exercise of jurisdiction by another State.¹⁵ The refuge granted was usually considered temporary rather than permanent.¹⁶ Under traditional international law, States possessed a right to grant asylum.¹⁷ The so-called right of "territorial asylum," in the sense of refuge or protection, has been defined as "the competence of every State to allow a prosecuted alien to enter, and to remain on, its territory under its protection, and thereby to grant asylum to him."¹⁸ Lung-Chu Chen has described asylum as "peculiarly humanitarian, designed to provide a safe haven for individuals fleeing their land of origin to escape political, religious, or racial persecution."¹⁹ European Union ("EU") law has developed the concept of "subsidiary protection," sometimes described as "complementary international protection," which refers to a third country national or stateless person needing international protection based either on humanitarian grounds or human rights

population group in need of special protection. *M.S.S. v. Belgium and Greece*, 53 Eur. Ct. H.R. 28, ¶ 251 (2011).

15. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 172 (2d ed. 1996).

16. See Howard Adelman, *Refuge or Asylum A Philosophical Perspective*, 1 J. REFUGEE STUD. 7, 7–19 (1988). It is therefore interesting to note that Member States are required to provide people coming within the scope of the Directive 2001/55 of July 20, 2001 temporary leave to remain for no longer than one year in order to provide a coordinated response to large influxes of displaced peoples as a result of armed conflict, endemic violence, or serious human rights violations. See Council Directive 2001/55/EC, art. 4, 2001 O.J. (L 212) 12, 14 (EC).

17. Richard B. Lillich, *Civil Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 115, 152 (Theodor Meron ed., 1984).

18. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, VOL. I.—PEACE 678 (H. Lauterpacht ed., 8th ed. 1955). It has been said therefore that, "the right to asylum implies permitting the refugee to remain in the place of asylum." DAES, *supra* note 14, at 34. See also GOODWIN-GILL, *supra* note 9, at 138 ("[T]he right of asylum is the right of the State to grant protection, which in turn is founded on the 'undisputed rule of international law' that every State has exclusive control over the individuals within its territory. Today, this exclusively jurisdictional approach has been mitigated somewhat by increased recognition of protection as a humanitarian duty. . . . Nevertheless, it is still to be doubted whether there is any rule which obliges States to admit those fleeing from persecution.").

19. LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 187 (2d ed. 2000).

law “who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin . . . would face a real risk of suffering serious harm . . . and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.”²⁰ Asylum is therefore comprised of several components: admission of the individual to the territory of the host State,²¹ leave to remain in the territory of the host State, and *non-refoulement*, the principle that prohibits the expulsion or return of refugees to territories where their lives or freedom may be endangered.²² The important point to note is that the concept of asylum is broader than that of refugee; unlike refugee status, a well-founded fear of persecution is not a prerequisite for those seeking asylum since the root cause may well be conflict, natural disaster or other circumstances that do not satisfy the legal definition of persecution.²³ Thus, under the EU’s Qualification Directive, a person

20. Council Directive 2011/95/EU, art. 2(f), 2011 O.J. (L 337) 9, 13 (EC) [hereinafter Directive 2011/95/EU]; Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 78, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]; see Ryszard Piotrowicz & Carina van Eck, *Subsidiary Protection and Primary Rights*, 53 INT’L & COMP. L.Q. 107, 108 (2004).

21. However, it has been argued that under international human rights law, the need for international protection imposes upon States a positive duty to protect refuge seekers at risk in their own countries, for example, by issuing entry visas. See *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶¶ 177–78 (2012) (Pinto de Albuquerque, J., concurring); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 310 (2005). In fact, most States take active measures to prevent refugees reaching their territory. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160 (1993).

22. JOHN P. GRANT & J. CRAIG BARKER, PARRY & GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 511 (3d ed. 2009). See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, arts. 31–33; CHEN, *supra* note 19, at 186; Cristiano D’Orsi, *The AU Convention on Refugees and the Concept of Asylum*, 7 PACE INT’L L. REV. 225, 228 (2012) [hereinafter Convention Relating to Status of Refugees, 1951]. Forty-seven of the AU’s Member States, as well as Morocco, have ratified the UN Convention. *Convention Relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en#Participants (last visited Jan. 11, 2014).

23. See AUST, *supra* note 13, at 187; see also DAES, *supra* note 14, at 34. A well-founded fear of persecution is a core factor in the determination of refugee status. See Convention Relating to Status of Refugees, 1951, *supra* note 22, art. 1(A)(2); Directive 2011/95/EU, *supra* note 20, art. 2(d). The actual determination of this question has usually been a matter for the municipal courts, and their interpretations may be at variance. Compare the relatively restrictive definitions of the House of Lords in *R v. Sec’y of State for the Home Dep’t, Ex parte Sivakumaran*, [1988] 2 W.L.R. 92, 97–98, and the U.S. Supreme Court in *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987), with the more liberal opinion of the Australian courts exemplified in *M38/2002 v. Minister for*

who does not qualify for refugee status but is seeking subsidiary protection must establish “a real risk of suffering serious harm”²⁴—the concept of “serious harm” being defined as the death penalty, execution, torture, inhuman or degrading treatment, punishment of an applicant in the country of origin, or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.²⁵ Such individuals who are in need of complementary international protection are often known as humanitarian or de facto refugees.²⁶ The disadvantage, of course, is that States may rightly consider themselves as under no legal obligation to admit humanitarian refugees. This distinction has been criticized for creating a second-class category of refugees, subject to a discriminatory regime with fewer rights.²⁷

A central element of the traditional concept of asylum is that, while it entails a derogation from sovereignty, States generally retain absolute discretion as to who they admit into their territory; and ultimately, the granting of asylum remains within their

Immigration & Multicultural & Indigenous Affairs (2003) FCAFC 131 (Austl.). It has been held that those fleeing armed conflicts are not *per se* refugees under the terms of the UN Convention. See *Adan v. Sec’y of State for the Home Dep’t*, [1999] 1 A.C. 293 (H.L.) 296; *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. 35 (1992). However, the decisions of the European courts should now be read in light of the definition of “acts of persecution” contained in the Qualification Directive, article 9, and “reasons for persecution” set out in article 10 thereof. See Qualification Directive, *supra* note 9, arts. 9–10; Directive 2011/95/EU, *supra* note 20, arts. 9–10.

24. Helene Lambert, *The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 INT’L & COMP. L.Q. 161, 166 (2006); see also Case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 2009 E.C.R. I-00921, ¶ 26(2). But Member States may have more favorable standards for determining such status. See Qualification Directive, *supra* note 9, art. 3; see also Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v. B & D*, 2010 E.C.R. I-10979, ¶ 12.

25. See Qualification Directive, *supra* note 9, art. 15; see also *Elgafaji*, *supra* note 24, ¶ 12; *Piotrowicz & van Eck*, *supra* note 20, at 112–36. However, in European human rights law, the standard may be stricter: “the risk of serious harm may result from foreign aggression, internal armed conflict, extrajudicial death, enforced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, trial based on a retroactive penal law or on evidence obtained by torture or inhumane and degrading treatment, or a ‘flagrant violation’ of the essence of any Convention right in the receiving State (direct refoulement) or from further delivery of that person by the receiving State to a third State where there is such a risk (indirect refoulement).” See *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 168.

26. *Adelman*, *supra* note 16, at 7–19.

27. *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 170.

reserved domain.²⁸ If it were otherwise, States would be under a legal duty to grant it. In that regard, Philip C. Jessup wrote:

The right of asylum in international relations . . . has been talked about as if it were a right of the individual, whereas actually under traditional international law it has referred to the right of a state to afford a safe haven to individuals who sought its protection. The state was privileged, not obligated, to grant asylum . . . it must follow that even under a modern law of nations the individual would not have a right of asylum in the sense of a right to require any particular state to receive him. But precedent and humanity would suggest that every state should be under an obligation to grant temporary refuge to persons fleeing from persecution.²⁹

One learned author has pithily summed up the situation with: “[it is] the right of a state to grant asylum; an individual has no right to demand asylum.”³⁰ Another writer has written that “the grant of *asylum* . . . is conferred by states in their discretion. Aliens have no ‘right’ of asylum, it is merely the right of the state to grant it.”³¹ There is no entitlement on the part of the applicant who is at the mercy of the State’s exercise of discretion.³² However, this does not mean that the issue of asylum has wholly escaped international attention.

Since the end of the Second World War, attempts have been made, albeit tentative and piecemeal, to regulate and improve the status of humanitarian refugees.³³ These international developments, however modest, have nevertheless impacted States’

28. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 520 (7th ed. 2008); *Attorney-Gen. for the Dominion of Canada v. Cain*, [1906] A.C. 542 (P.C.) 546 (appeal taken from Ont.); *M38/2002 v. Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 131, ¶ 33 (Austl.). According to the established case law of the European Court of Human Rights “States have the right, as a matter of well-established international law . . . to control the entry, residence and expulsion of aliens.” *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 140. See generally *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. 34 (1985); *Saadi v. Italy*, 2008-II Eur. Ct. H.R. 145, 242.

29. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 82–83 (1948).

30. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 117 (7th rev. ed. 1997); see also OPPENHEIM, *supra* note 18, at 678; DAES, *supra* note 14, at 35; DAVID J. LATHAM, *PUBLIC INTERNATIONAL LAW* 132 (1970).

31. AUST, *supra* note 13, at 187; see also OPPENHEIM, *supra* note 18, at 675; DONALD W. GREIG, *INTERNATIONAL LAW* 441 (2d ed. 1976). See generally Cardoza-Fonseca, *supra* note 23, 480 U.S. 421.

32. Cardoza-Fonseca, *supra* note 23, 480 U.S. at 444.

33. THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 174–79.

sovereign right to determine who should be granted entry to national territory. The first significant step was Article 14(1) of the Universal Declaration of Human Rights (1948) (UDHR), which provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution."³⁴ Apart from the fact that the UDHR does not impose binding treaty obligations on States,³⁵ any assumed responsibility extends merely to conceding to individuals the right to *request* asylum, but not to compelling States to *grant* asylum.³⁶ According to Greig, "Article 14 gave no additional protection because it merely recognized the minimal entitlement of an individual to ask to enter or remain in the state of refuge."³⁷ Such modest progress was nevertheless welcomed because it signified "a deep community concern to transform the matter of asylum from the domain of 'state discretion' to that of international humanitarian concern."³⁸ The UN Convention on Refugees (1951) did not materially advance the cause of humanitarian refugees,

34. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 14(1), U.N. Doc. A/Res/217(III) (Dec. 10, 1948).

35. Although adopted as a hortatory document, it is widely believed that the UDHR has acquired a normative status, either because the UDHR constitutes an authoritative interpretation of the human rights provisions of the UN Charter, because in all important respects it has become customary international law, or because it reflects contemporary general principles of law. *See* Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 202–04 (July 22) (separate opinion of Judge Cançado Trindade); DAES, *supra* note 14, at 22; PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* note 28, at 559; IAN BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 255 (4th ed. 1995); A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD 29 (4th ed. 1996); John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 16 (1982); Bruno Simma & Philip Alston, *The Source of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. OF INT'L L. 82, 84, 93 (1992). However, Brownlie expressly makes an exception with regard to Article 14(1) which he writes "could hardly be said to represent legal rules." PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* note 28, at 559.

36. Lillich, *supra* note 17, at 152-53; PIRKKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITIONS AND INTERNATIONAL PROTECTION REVISITED 273 (1997). Thus the right of asylum enshrined in the UDHR is described as "more accurately the right of the state to grant asylum to individuals rather than the state's duty to honor an individual's request for asylum." ROBERT L. BLEDSOE & BOLESŁAW ADAM BOCZEK, THE INTERNATIONAL LAW DICTIONARY 89 (1987).

37. GREIG, *supra* note 31, at 442; *see also* THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 175; Humphrey, *supra* note 35, at 528. According to Ott, Lauterpacht was critical of UDHR, Article 14 for using misleading language which he believed did not, nor was intended to, confer a right to be granted asylum. DAVID H. OTT, PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD 252 (1987).

38. CHEN, *supra* note 19, at 185.

although certain provisions are applicable to the issue of asylum.³⁹ In 1967, the UN General Assembly expanded upon the basic right set out in the UDHR with the unanimous adoption of the Declaration on Territorial Asylum without affecting the underlying premise that the Declaration is without prejudice to the sovereignty of States.⁴⁰ No other universal instruments specifically dedicated to the issue of asylum have been adopted since.⁴¹ However, the influential Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, repeats all essential aspects of Article 14(1) of the UDHR.⁴²

Progress in the adoption of binding legal instruments at the regional level has been made, however. For the moment, leaving aside the situation in Africa—which will be discussed fully below—agreement on asylum as an individual right has been possible in the Americas region.⁴³ In 1954, Latin America states adopted the Caracas Convention on Territorial Asylum, which confers asylum on individuals who are persecuted in their States of origin for their beliefs, opinions or political affiliations, or for acts that may be considered political offences.⁴⁴ Significantly, the Cartagena Declaration on Refugees (1984) expanded the situations under which refugee status is recognized.⁴⁵ More important, however, is Article 22(7) of the American Convention on Human Rights (1969), adopted under the auspices of the Organization of American States,

39. GREIG, *supra* note 31, at 442 (writing that the Convention did not establish any right of entry for the refugee); see also *S115/00A v Minister for Immigration & Multicultural Affairs* [2001] 180 ALR 561, ¶ 6 (Austl.).

40. See Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), 22 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6716, at 81 (1967). According to Bledsoe and Boczek, the Declaration, “offers guidelines for granting asylum but is not legally binding upon states nor very specific in its content.” See BLEDSOE & BOCZEK, *supra* note 36, at 89.

41. Note the UN Draft Convention on Territorial Asylum. THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 510-12. According to GREIG, *supra* note 31, at 443, the text makes only limited progress as it “proved as difficult as ever to obtain agreement on a substantial modification of the principle of state sovereignty in favour of the position of the refugee.” In DAES, *supra* note 14, at 35, Daes writes that, while the UN Conference on Territorial Asylum in 1977 failed to adopt a treaty on the subject, it “had sufficient time to reject by an overwhelming majority language that would have accorded a right to asylum.”

42. See *Vienna Declaration and Programme of Action*, *supra* note 1.

43. American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1, available at <http://www.oas.org/en/iachr/mandate/Basics/2.AMERICAN%20DECLARATION.pdf>.

44. THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 436-38.

45. *Id.* at 21; see also *id.* at 444-48.

which states that every person has the right to seek and *be granted* asylum, albeit conditional upon “the legislation of the state and international conventions.”⁴⁶ This builds upon Article XXVII of the American Declaration of the Rights and Duties of Man 1948 that provides, *inter alia*, “Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and *receive* asylum in foreign territory.”⁴⁷ These documents are significant because they bestow a right on the individual, in particular, one that has been elevated to a human right capable of judicial enforcement.

In more recent years, the EU’s gradual removal of restrictions on the free movement of persons necessitated increased co-operation on a variety of issues, including asylum.⁴⁸ At a European Council meeting at Tampere in 1999, Member States set themselves the goal of establishing a common EU policy on immigration and asylum leading to a Common European Asylum System (C.E.A.S.).⁴⁹ To that end, harmonizing legislation has been adopted providing for common rules for refuge seekers.⁵⁰ What is relevant for the present

46. American Convention on Human Rights art. 22(7), Nov. 22, 1969, 1144 U.N.T.S. 123.

47. American Declaration of the Rights and Duties of Man, *supra* note 43, art. XXVII (emphasis added). While the American Declaration of the Rights and Duties of Man was adopted as a non-binding document, it is believed to have undergone a transformation similar to that of the UDHR and is today considered to be an authoritative interpretation of the human rights referred to in the Charter of the Organization of American States. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 43–45 (July 14, 1989).

48. Consolidated Version of the Treaty Establishing the European Community art. 63, Dec. 24, 2002, 2002 OJ (C 325) 33 [hereinafter TEEC].

49. Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999).

50. At the centre of the C.E.A.S. is the Qualification Directive that establishes minimum standards on the conditions to be satisfied by refuge seekers to be accepted into a EU Member State, and the content of the protection granted. The European Commission has found that the current EU asylum procedure is defective because the minimum standards are (a) insufficient and (b) vague. *M.S.S. v. Belgium and Greece*, 53 Eur. Ct. H.R. 28, ¶ 251 (2011). Nevertheless, refuge seekers are thereby accorded certain rights. For example, under Council Directive 2003/9/EC of 27 January 2003, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, EU member states must guarantee refuge seekers material reception conditions. “[M]aterial reception conditions’ shall mean the reception conditions that include housing, food and clothing.” Council Directive 2003/9/EC, 2003 O.J. (L 31) 18. In contrast, Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in member states for granting and withdrawing refugee status in the member states, guarantees certain procedural safeguards in relation to asylum applications. Council Directive 2005/85/EC,

discussion is that the directive that provides, on one hand, a definition of a “traditional” refugee and, on the other hand, those other persons in need of international protection. It should be observed initially that the EU’s Charter of Fundamental Rights, adopted in 2000 and binding as of 2009, guarantees the right to asylum, but besides the Charter’s restricted scope,⁵¹ the right is linked to the UN Convention and cannot, therefore, be said to expand the concept. Thus, the Qualification Directive provides a uniform definition of refugee that is based on the UN definition⁵² and describes who qualifies for “subsidiary protection” in the EU—somebody at “real risk of suffering serious harm.”⁵³

Attention should be drawn to a more recent positive development. The Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (AHRD), adopted by ASEAN in November 2012,⁵⁴ contains a qualified right of asylum.⁵⁵ However, it is important to note that the AHRD is a non-binding instrument and its significance should not therefore be over emphasized. Nevertheless, like the UDHR it may exercise a persuasive influence on ASEAN States.⁵⁶

The question arises whether a right of asylum can be said to exist in contemporary general international law. In the *Asylum Case*, the International Court of Justice, in the context of diplomatic asylum but which seems equally applicable to territorial asylum, dismissed the suggestion of the existence of such a customary right, stating that “the principles of international law do not recognise any rule of unilateral and definitive qualification by the state granting

2005 O.J. (L 326) 13; *see also* M.S.S. v. Belgium and Greece, 53 Eur. Ct. H.R. 28, ¶ 46 (2011). The view has been expressed that the content of international protection applicable to refugees and that applicable to refuge seekers is strictly identical for both categories of persons *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 170 (2012) (Pinto de Albuquerque, J., concurring).

51. Charter of Fundamental Rights of the European Union arts. 51-52, Dec. 12, 2007, 2010 O.J. (C 83) 389, 402–03.

52. Qualification Directive, *supra* note 9, art. 2(c).

53. *Id.* art. 2(e), at 14.

54. Association of Southeast Asian Nations [ASEAN], ASEAN Human Rights Declaration (Nov. 19, 2012), *available at* <http://www.asean.org/news/asean-statement-communications/item/asean-human-rights-declaration>.

55. *Id.* art. 16 (“Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.”).

56. *ASEAN Human Rights Declaration: A Step Forward or a Slide Backwards?*, CONVERSATION (Nov. 21, 2012), *available at* <https://theconversation.com/asean-human-rights-declaration-a-step-forward-or-a-slide-backwards-10895>.

asylum.”⁵⁷ Certainly, learned writers of the period shared this assessment.⁵⁸ H. Lauterpacht is also (perhaps reluctantly) of this view—he raised the question of whether it ought not to be considered as a general principle of law as understood by Article 38 of the Statute of the World Court.⁵⁹ Notwithstanding the passage of time, there appear to be no grounds to revise the view that there is little support for the international legal recognition of an individual's right to be granted asylum.⁶⁰ This indeed was the conclusion of the European Court of Human Rights in *Vilvarajah v United Kingdom*.⁶¹ Thus, Guy Goodwin-Gill writes that international instruments do not permit “the conclusion that States have accepted an international obligation to grant asylum to refugees [T]he humanitarian practice exists, but the sense of obligation is missing.”⁶² However, one contemporary author has written that “[i]t may be that in law a right of asylum will arise for ‘urgent and compelling reasons of humanity.’”⁶³ It therefore seems possible to conclude that while, in general, no right to asylum exists, states are under a moral and humanitarian obligation to consider pleas for asylum in good faith.

57. Asylum (Colombia v. Peru), Judgment, 1950 I.C.J. 266, 274 (Nov. 20).

58. See Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT'L L. 327, 352 (1949); Frank E. Krenz, *The Refugee as a Subject of International Law*, 15 INT'L & COMP. L.Q. 90, 115 (1966).

59. See OPPENHEIM, *supra* note 18, at 677.

60. See generally DAES, *supra* note 14. Lillich, *supra* note 17, at 153 thus concluding that asylum is “[c]ertainly . . . not part of customary international law.” See also THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, ch. 5; In 1966, Frank E. Krenz noted that “[t]he realisation of an individual right to asylum is still to await some kind of formal recognition.” Frank E. Krenz, *The refugee as a subject of international law*, 15 INT'L & COMP. L.Q. 90, 115 (1966). In 1949, Felice Morgenstern also observed, “It would thus appear that the practice of states has not created a right of individuals to asylum, except, perhaps, in the matter of non-extradition of political offenders.” See Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT'L L. 327, 352 (1949).

61. See generally *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. 34 (1992). It should be observed that no right of political asylum exists under the European Convention on Human Rights (ECHR). *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 1853; see also *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 140 (2012) (Pinto de Albuquerque, J., concurring); *Saadi v. Italy*, 2008-II Eur. Ct. H.R. 145, 242.

62. THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 178 (emphasis added).

63. MALCOLM N. SHAW, INTERNATIONAL LAW 759 (6th ed. 2008).

III. THE LAW OF ASYLUM IN AFRICA

A. *The OAU Convention on Refugees*

The grave and enduring refugee problems confronting Africa in the 1960s: mass population displacement caused by the struggle for national liberation, apartheid and drought and famine, convinced the Organization of African Unity (OAU) that the UN Convention on Refugees did not fully meet Africa's needs.⁶⁴ The Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the OAU in 1969 sought to engage with these problems in an African context. The OAU Convention is the effective regional complement to the UN Convention;⁶⁵ it does not seek to exclude the operation of the UN Convention from Africa, rather the substantive measures of protection provided for therein but not included in the OAU Convention apply.

The OAU Convention constituted an advance on the existing protection of refugees in a variety of ways. The narrower definition of a refugee contained in the UN Convention was considered ill-equipped to adequately address the specific problems that Africa was facing.⁶⁶ Consequently, the UN Convention definition, that is, persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion, is incorporated in Article 1(1) of the OAU Convention. But paragraph 2 thereof broadens it, stating that:

The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁶⁷

64. FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 254-55 (2007). In fact, eight different categories of African refugees have been identified. Hofmann, *supra* note 11, at 323.

65. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 8(2). The preamble acknowledges that the UN Convention constitutes the basic instrument relating to the status and treatment of refugees. Doebller v. Sudan, Comm. No. 235/00, 27th Activity Report 2009, ¶ 125, http://www.achpr.org/files/sessions/46th/comunications/235.00/achpr46_235_00_eng.pdf.

66. VILJOEN, *supra* note 64, at 255-56; NALDI, AU ORG., *supra* note 11, at 82-83.

67. Doebller v. Sudan, Comm. No. 235/00, ¶ 131.

The African definition of refugee is thus widened to include those in need of complementary international protection, namely, internationally or externally displaced persons and humanitarian refugees; that is, "all those persons who are forced to leave their country of origin in order to escape violence" or intimidation in various manifestations, "regardless of whether they are in fact personally in danger of political persecution."⁶⁸ The significance is that "objectively ascertainable circumstantial compulsion" becomes a factor in determining refugee status.⁶⁹ It has been suggested that this definition should be updated and expanded in line with the non-discrimination clause of Article 2 of the African Charter on Human and Peoples' Rights to encompass persons fearing persecution for reasons such as ethnicity, colour, language or sex.⁷⁰ Although the issue of large-scale influxes is not expressly mentioned in the OAU Convention, it seems that subsequent practice and policy has established that persons displaced as a result of conflict, famine or human-made or natural disasters come within the protective scope of the definition and would qualify as

68. Hofmann, *supra* note 11, at 323. See generally Hirsi Jamaa v. Italy, 55 Eur. Ct. H.R. 627, ¶¶ 177–78 (2012) (Pinto de Albuquerque, J., concurring). According to the African Commission, "[i]nternational protection is granted to refugees because they do not enjoy the protection of their own home countries." Doebller v. Sudan, Comm. No. 235/00, ¶ 149. The European concept of "subsidiary protection" as defined in the Qualification Directive thus appears indebted to the broader African definition.

69. VILJOEN, *supra* note 64, at 255; Awuku, *supra* note 11, at 81.

70. Rose M. D'Sa, *The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity*, 31 NETH. INT'L L. REV. 378, 382 (1984); see also African Charter on Democracy, Elections and Governance, art. 8(1), *adopted* Jan. 30, 2007, AFR. UNION, http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf. It should be observed that the AU Convention on the Protection and Assistance to Internally Displaced Persons in Africa 2009 (Kampala Convention), entered into force 6 December 2012, prohibits arbitrary displacement of persons as a result of racial discrimination. African Union Convention on the Protection and Assistance to Internally Displaced Persons in Africa, art. 4(4)(a), *adopted* Oct. 23, 2009, 49 I.L.M. 83 [hereinafter Kampala Convention]. See also Centre on Housing Rights and Evictions v. The Sudan, Communication Nos. 279/03 & 296/05, ACHPR, ¶ 223 (May 13–27, 2009), http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf (protecting the right of individuals and peoples "of every race, ethnicity, religion, and other social origins"). Given that consensual homosexual acts constitute criminal offences in many African countries, there is an argument for extending the definition to cover sexual orientation. It is interesting to note that the Qualification Directive specifically recognizes gender-based persecution, and persecution based on, *inter alia*, colour, ethnicity, and sexual orientation. Qualification Directive, *supra* note 9, arts. 9.2(f), 10.1(a), (d).

refugees for the purposes of the Convention.⁷¹ This generous regime appears to have been motivated, as stated in the preamble to the OAU Convention, by “the need for an essentially humanitarian approach towards solving the problems of refugees.”⁷² Later treaties adopted by the OAU/AU have sought to ensure that the more vulnerable members of society, particularly women and children, are equally protected by refugee law.⁷³ Therefore, the view that the restrictive concept of the refugee, as originally contained in the UN Convention, has evolved and expanded under the influence of progressive international human rights standards to encompass individuals in need of complementary international protection can tentatively be advanced.

B. Human Rights

Justice cannot be done to any discussion of the rights of refugees, humanitarian or other, without taking into consideration the relevance of human rights. As will be explained, human rights

71. African Charter on the Rights and Welfare of the Child, art. 23(4), *adopted* July 1, 1990, AFR. UNION, http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf. See also *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 170 (“Groups of refugees cannot be subject to a diminished status based on an ‘inherent’ mass-influx exception to ‘genuine’ refugee status. To provide reduced, subsidiary protection . . . for people who arrive as part of a mass influx would be unjustified discrimination.”). It is interesting to note that the definition of internally displaced persons (IDPs) expressly reflect such causes as they are defined as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” Kampala Convention, *supra* note 71, art. 1(k); Rep. of the Secretary-General, *Guiding Principles on Internal Displacement*, Introduction ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (by Francis M. Deng). A simpler definition is: those who have fled for reasons “traceable to conflicts, or radical political, social or economic changes.” DAES, *supra* note 14, at 34. It needs to be recalled that the Temporary Protection Directive was specifically designed to respond to large-scale influxes of displaced persons as a result of armed conflict, endemic violence, or systematic human rights violations. It does not extend to other situations such as natural catastrophes. Council Directive 2001/55/EC, *supra* note 16, art. 2(c).

72. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, preamble ¶ 2.

73. See African Charter on the Rights and Welfare of the Child, *supra* note 71, art. 23; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa arts. 4(2)(k), 10(2)(c)-(d), 11(3), *adopted* July 1, 2003, AFR. UNION, <http://www.au.int/en/sites/default/files/Protocol%20on%20the%20Rights%20of%20Women.pdf>; see also Kampala Convention, *supra* note 71, arts. 7(5), 9(2)(d), 13(4).

are applicable in principle to refugees and refugee seekers.⁷⁴ Given that this subject forms an integral part of this essay, it is necessary at this juncture to briefly explain the human rights regime specific to Africa. The protection of human rights in Africa is based principally on the African Charter on Human and Peoples' Rights (African Charter) adopted by the OAU in 1981.⁷⁵ The African Charter is distinctive for enshrining all three generations of human rights in a single binding legal document.⁷⁶ Responsibility for promoting and ensuring the protection of human and peoples' rights rests primarily with the African Commission on Human and Peoples' Rights (African Commission), a quasi-judicial body.⁷⁷ As part of its protective mandate, the African Commission is competent to entertain applications or communications alleging violations of the African Charter from individuals or NGOs.⁷⁸ Its decisions on communications do not formally have the binding force of a ruling of a court of law but, rather, have a persuasive authority.⁷⁹ However, an expectation of

74. See Qualification Directive, *supra* note 9, at art. 12; see Piotrowicz & van Eck, *supra* note 20, at 109–36. The European Court of Human Rights has stated that refugee seekers must not be deprived of the protection afforded by the UN Convention and the ECHR. *Amuur v. France*, 1996-III Eur. Ct. H.R. 826, 848; *M.S.S. v. Belgium and Greece*, 53 Eur. Ct. H.R. 28, ¶ 251 (2011); see also *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 185; *Saadi v. U.K.*, 2008-I Eur. Ct. H.R. 31, 47–50, 60–61; CCPR Communication No. 560/1993, 59th Sess., Mar. 24-Apr. 11, 1997, ¶ 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997). The applicability of human rights to such persons follows inexorably from the concept of jurisdiction as laid out in, for example, Article 1 ECHR. See generally DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 804-07 (2d ed. 2009). It should be observed that the Kampala Convention expressly affirms that IDPs enjoy human rights. See Kampala Convention, *supra* note 71, arts. 3(1)(d), 20(2).

75. African Charter on Human and People's Rights, adopted June 27, 1981, 1520 U.N.T.S. 217. It has been ratified by all the Member States of the AU, with the exception of South Sudan. *Ratification Table: African Charter on Human and Peoples' Rights*, ACHPR, <http://www.achpr.org/instruments/achpr/ratification/> (last visited Dec. 26, 2013).

76. Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, ACPR, ¶ 149 (Feb. 4, 2010), available at http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46_276_03_eng.pdf. See KONSTANTINOS D. MAGLIVERAS & GINO J. NALDI, THE AFRICAN UNION AND THE PREDECESSOR ORGANIZATION OF AFRICAN UNITY, 161–63 (2004); U. OJI UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 161–63 (1997).

77. African Charter on Human and People's Rights, *supra* note 75, arts. 30, 45. See MAGLIVERAS & NALDI, *supra* note 76, at 199–203; EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS: PRACTICE AND PROCEDURES 13-50 (1996).

78. These so-called "other" communications are governed by the African Charter. African Charter on Human and People's Rights, *supra* note 75, arts. 55–59. See MAGLIVERAS & NALDI, *supra* note 76, at 205–17.

79. African Charter on Human and People's Rights, *supra* note 75, art. 58(2).

compliance has developed.⁸⁰

The African Commission shares its protective mandate with the African Court on Human and Peoples' Rights.⁸¹ The contentious jurisdiction of the Court embraces all cases and disputes submitted that concern the interpretation and application of, *inter alia*, the African Charter and any other relevant human rights instrument which a State has ratified,⁸² such as the OAU Convention.⁸³ The African Commission has standing before the Court.⁸⁴ The judgments of the Court are binding on the parties.⁸⁵ The Court is empowered to adopt such provisional measures of protection as it deems necessary in cases of "extreme gravity and urgency" and "to avoid irreparable harm to persons."⁸⁶

80. *Id.* art. 1; Civil Liberties Organisation v. Nigeria, 129/94, ACHPR, ¶¶ 16–17 (Mar. 1995), http://www.achpr.org/files/sessions/17th/comunications/129.94/achpr17_129_94_eng.pdf. It seems that the African Commission has come to regard its decisions on communications as binding. International PEN and Others v. Nigeria, 137/94-139/94-154/96-161/97, ACHPR, ¶¶ 113–16 (Oct. 31, 1998), http://www.achpr.org/files/sessions/24th/comunications/137.94-139.94-154.96-161.97/achpr24_137.94_139.94_154.96_161.97_eng.pdf.

81. The Protocol entered into force on January 25, 2004 and, at the time of this writing, had been ratified by 27 AU Member States. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 2, *adopted* June 10, 1998, AFR. UNION, http://www.au.int/en/sites/default/files/PROTOCOL_AFRICAN_CHARTER_HUMAN_PEOPLES_RIGHTS_ESTABLISHMENT_AFRICAN_COURT_HUMAN_PEOPLES_RIGHTS_1.pdf [hereinafter Establishment of an African Court Protocol]. However, this Court is due to be replaced by the African Court of Justice and Human Rights. Protocol on the Statute of the African Court of Justice and Human Rights art. 2, *adopted* July 1, 2008, AFR. UNION, http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf.

82. Establishment of an African Court Protocol, *supra* note 81, art. 3; African Comm'n on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures, App. No. 004/2011, ACHPR, ¶¶ 14–19 (Mar. 25, 2011), <http://www.african-court.org/en/images/documents/Orders-Files/Copy%20of%20Order%20for%20provisional%20measures%20Appl%20004-2011%20%282%29-Copy.pdf>.

83. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 8(2).

84. Establishment of an African Court Protocol, *supra* note 81, art. 5(1)(a). In March 2011 the African Commission instituted proceedings against Libya alleging serious and massive violations of human rights guaranteed under the African Charter. African Comm'n on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures, App. No. 004/2011, ¶¶ 1–3.

85. Establishment of an African Court Protocol, *supra* note 81, arts. 28(2), 30.

86. Protocol on the Statute of the African Court of Justice and Human Rights, *supra* note 81, art. 27(2). In March 2011, the Court adopted provisional measures *proprio motu*

It must not be overlooked that the rights guaranteed by the African Charter have been deemed equally applicable to non-nationals and refugees.⁸⁷ This fact is especially significant because the protection afforded by international human rights law is more generous than that of international refugee law, which has had to adapt to comply with these often superior norms.⁸⁸ By virtue of Article 1 of the African Charter, State parties have assumed a binding legal obligation to recognize and uphold the rights, duties and freedoms therein⁸⁹ and, in accordance with Article 2 of the African Charter, they are additionally obliged to secure the rights protected by the African Charter to all persons within their jurisdiction, nationals and non-nationals alike.⁹⁰ Specific Charter rights relating to refugees that the African Commission has upheld include the right to life,⁹¹ the right to human dignity,⁹² the right to

ordering Libya to refrain from activities resulting in the violation of rights under, *inter alia*, the African Charter. African Comm'n on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures, App. No. 004/2011, ¶¶ 10-13.

87. Institute for Human Rights and Development in Africa v. Angola, 292/04, ACHPR, ¶ 84 (May 7-22, 2008), http://www.achpr.org/files/sessions/43rd/comunications/292.04/achpr43_292_04_eng.pdf. See generally RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION 185-234 (2004). The rights and freedoms enshrined in the African Charter are similarly relevant to the internally displaced. Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan, 279/03-296/05, ACHPR, ¶¶ 186-90 (2009). In Doebller v. Sudan, Comm. No. 235/00, ¶ 126, the African Commission expressed the view that the provisions of the UN Convention, the OAU Convention, and the African Charter complement each other.

88. Jane McAdam, *Research Paper No. 125, The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection*, UNHCR – NEW ISSUES IN REFUGEE RESEARCH, 3-4 (July 2006), <http://www.unhcr.org/44b7b7162.html>.

89. International PEN and Others v. Nigeria, 137/94-139/94-154/96-161/97, ACHPR, ¶ 116 (Oct. 31, 1998), http://www.achpr.org/files/sessions/24th/comunications/137.94-139.94-154.96-161.97/achpr24_137.94_139.94_154.96_161.97_eng.pdf; Sir Dawda K. Jawara v. Gambia, 147/95-149/96, ACHPR, ¶ 46 (May 11, 2000), http://www.achpr.org/files/sessions/27th/comunications/147.95-149.96/achpr27_147.95_149.96_eng.pdf; Purohit and Moore v. Gambia, 241/01, ACHPR, ¶ 43 (May 2003), http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf.

90. Institute for Human Rights and Development in Africa v. Angola, 292/04, ¶¶ 22, 84; Institute for Human Rights and Development in Africa v. Guinea, 249/02, ACHPR, ¶ 68 (2004), http://www.achpr.org/files/sessions/36th/comunications/249.02/achpr36_249_02_eng.pdf.

91. African Charter on Human and Peoples' Rights, *supra* note 75, art. 4; Organisation

liberty and security of the person,⁹³ the right of access to judicial protection,⁹⁴ and the right to property.⁹⁵ Article 8(2) of the African Charter on Democracy, Elections and Governance also reinforces the obligation of State Parties to guarantee, *inter alia*, the rights of refugees and displaced persons.⁹⁶

The violation of refugees' human rights on a massive scale in recent years has engaged the attention of the international community. The international community responded in a collective and forceful manner to the conflict in Sudan's Darfur region; the conflict broke out in 2002, and led to the forced displacement of civilian populations due to attacks and atrocities perpetrated against them by the Janjaweed militia.⁹⁷ The UN Security Council categorized this conflict as a threat to international peace and security.⁹⁸ In demanding that the Sudanese

mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union Interafricaine des Droits de l'Homme v. Rwanda, 27/89-46/91-49/91-99/93, ACHPR, ¶ 24 (Oct. 1996), http://www.achpr.org/files/sessions/20th/comunications/27.89-46.91-49.91-99.93/achpr20_27.89-46.91-49.91-99.93_eng.pdf; Institute for Human Rights and Development in Africa v. Guinea, 249/02, ¶¶ 33, 47.

92. Organisation mondiale contre la torture v. Rwanda, 27/89-46/91-49/91-99/93, ¶ 26; Institute for Human Rights and Development in Africa v. Guinea, 249/02, ACHPR, ¶¶ 57, 62. The European Court of Human Rights held in a number of cases that detention conditions for refugee seekers must be compatible with Article 3 of the ECHR. See *S.D. v. Greece*, App. No. 53541/07, Eur. Ct. H.R. (June 11, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93034>; see also *Tabesh v. Greece*, App. No. 8256/07, Eur. Ct. H.R., ¶¶ 38–44 (Nov. 26, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95892#>; *A.A. v. Greece*, App. No. 12186/08, Eur. Ct. H.R., ¶¶ 57–65 (July 22, 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100014>; *M.S.S. v. Belgium and Greece*, 53 Eur. Ct. H.R. 28, ¶ 72–79 (2011) (finding a further breach of Article 3 due to squalid living conditions in which applicant was forced to live).

93. Organisation mondiale contre la torture v. Rwanda, 27/89-46/91-49/91-99/93, ¶ 26. See also *Amuur v. France*, 1996-III Eur. Ct. H.R. 826, 848 (stating that under Article 5 of the ECHR, the confinement of, *in casu*, refugee seekers could only be brief and was acceptable only in order to enable States to prevent unlawful immigration).

94. Organisation mondiale contre la torture v. Rwanda, 27/89-46/91-49/91-99/93, ¶¶ 34–35; see also *Chahal v. United Kingdom*, 1996-V, Eur. Ct. H.R. 1831, 1871 (holding that an effective remedy against the rejection of an asylum application is required under Article 13 of the ECHR).

95. Institute for Human Rights and Development in Africa v. Angola, 292/04, ¶ 3.

96. African Charter on Democracy, Elections and Governance, *supra* note 71, art. 8(2).

97. John E. Tanagho & John P. Hermina, *The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice*, 6 LOY. U. CHI. INT'L L. REV. 367, 376–77 (2009).

98. U.N. S.C. Res. 1556, U.N. Doc. S/RES/1556, at 2 (July 30, 2004) (imposing sanctions on Sudan); e.g., S.C. Res. 1784, U.N. Doc. S/RES/1784, at 1–2 (Oct. 31, 2007). In 2004, the U.N. Secretary General, pursuant to Security Council Resolution 1564, and acting under

Government put a stop to these attacks and disarm the militia, the UN Security Council also called for measures to prevent or mitigate the humanitarian catastrophe.⁹⁹ An international presence was initially established by the AU in 2004 as a monitoring mission in the form of the African Union Mission in Sudan (AMIS), which was mandated, *inter alia*, to contribute to a secure environment for the delivery of humanitarian aid along with the return of refugees and the internally displaced.¹⁰⁰ A UN presence followed in the form of the United Nations Mission in Sudan (UNMIS), established under Security Council Resolution 1590, which was additionally given the task of facilitating the voluntary return of refugees and the internally displaced by helping establish the necessary security conditions.¹⁰¹ However, AMIS encountered numerous difficulties, including militia attacks and obstruction to humanitarian access, which led to the creation of a hybrid AU/UN peacekeeping operation, UNAMID.¹⁰² Furthermore, due to the destabilizing effect the Darfur conflict has had on neighboring

Chapter VII of the U.N. Charter, established an International Commission of Inquiry on Darfur to investigate alleged violations of human rights law and international humanitarian law. U.N. S.C. Res. 1564, U.N. Doc. S/RES/1564, ¶ 12 (Sept. 18, 2004); U.N. S.C. Rep. of the Secretary-General on the Sudan pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13 and 16 of Security Council Resolution 1556, U.N. Doc. S/2004/787 (Oct. 4, 2004). The Commission found that the Government of Sudan and the Janjaweed were responsible for serious violations of human rights law and international humanitarian law amounting to crimes under international law and recommended that the Security Council refer the Darfur conflict to the International Criminal Court. U.N. S.C. Rep. of the International Commission of Inquiry on Darfur to the Secretary-General, Feb. 1, 2005, U.N. Doc. S/2005/60, at 3-5 (2005). Under Resolution 1593, the U.N. Security Council referred the situation in Darfur to the Prosecutor of the International Criminal Court. U.N. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005). A warrant for the arrest of the President of Sudan, Omar Al Bashir, was re-issued in July 2010. Prosecutor v. Omar Hassan Ahmed Al Bashir, Case No. ICC-02/05-01/09-95, (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

99. See U.N. S.C. Res. 1556, *supra* note 98, ¶¶ 6-8, 12; see also U.N. S.C. Res. 1591, ¶ 7, U.N. Doc. S/RES/1591 (Mar. 29, 2005) (adopted pursuant to Chapter VII UN Charter). The African Commission has also expressed its concern for the situation in Darfur. See, e.g., African Union, *Twentieth Activity Report of the African Commission on Human and People's Rights*, Annex III, EX.CL/279 (IX) (2006). See Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan, 279/03-296/05, ACHPR, ¶¶ 2, 228 (2009) (where the African Commission found that Sudan had committed widespread and gross violations of the African Charter in Darfur).

100. See African Union, *Communiqué of the Seventeenth Meeting of the Peace and Security Council*, ¶¶ 4, 6, AU Doc. PSC/PR/Comm. (XVII) (Oct. 20, 2004) (endorsed by the UN Security Council Resolution 1556). See U.N. S.C. Res. 1556, *supra* note 98, at 2.

101. See U.N. S.C. Res. 1590, ¶¶ 1, 4(b), U.N. Doc. S/RES/1590 (Mar. 24, 2005).

102. See U.N. S.C. Res. 1769, ¶ 1, U.N. Doc. S/RES/1769, at 2-3 (July 31, 2007).

countries, the UN authorized, pursuant to Chapter VII of the UN Charter, the deployment of an EU operation in Eastern Chad and North-Eastern Central African Republic with a view, *inter alia*, to protect refugees and the internally displaced.¹⁰³

C. Asylum

A notable development, at the heart of this discussion, is the fact that the OAU Convention makes explicit acknowledgement of the issue of asylum.¹⁰⁴ Article 2(1) states: "Member States of the OAU shall 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."¹⁰⁵

It is important to understand that this provision does not confer an automatic right to asylum; there is no entitlement on the part of the applicant. The wording of this paragraph makes it clear that no legal obligation is imposed on States; the language used in this instance—"best endeavours"—is recommended rather than mandatory.¹⁰⁶ The States' ability to maintain and grant asylum, described in Article 2(2) as a "peaceful and humanitarian act,"¹⁰⁷ remains within their discretion.¹⁰⁸ This position was subsequently reaffirmed by the 1979 Arusha Conference,¹⁰⁹ which confirmed in

103. See U.N. S.C. Res. 1778, ¶ 1, U.N. Doc. S/RES/1778 (Sept. 25, 2007).

104. See Hofmann, *supra* note 11, at 324. At the very least, it goes beyond what is provided for in the UN Convention, but probably no further than what is provided for in the UN Declaration on Territorial Asylum. Awuku, *supra* note 11, at 82; Ahmad M. Rifaat, *Refugees and the Right of Asylum: an African Perspective*, 40(1) REVUE EGYPTIENNE DE DROIT INT'L 71, 106 (1984); Bahame Tom Mukirya Nyanduga, *Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 47 GER. Y.B. INT'L L. 85, 94 (2004).

105. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 2(1).

106. See Weis, *supra* note 11, at 457; Hofmann, *supra* note 11, at 324; Awuku, *supra* note 11, at 83. It has been claimed that the obligation is a moral rather than a legal one. See Paul Kuruk, *Refugeeism: A Dilemma in International Human Rights: Problems in the Legal Protection of Refugees in West Africa*, 1 TEMP. INT'L & COMP. L.J. 179, 218-19 (1987).

107. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 2(2). See, e.g., OAU, *Addis Ababa Document on Refugees and Forced Population Displacements in Africa* (Sept. 10, 1994) [hereinafter OAU Addis Ababa Doc].

108. See Hofmann, *supra* note 11, at 324; D'Sa, *supra* note 70, at 387.

109. The Pan African Conference on the Situation on Refugees in Africa held at Arusha, Tanzania in May 1979 and sponsored by the OAU, UNHCR, the ECA and voluntary

Recommendation 1 that general international law acknowledged no right of asylum and that the discretion of States remained unconstrained.¹¹⁰ Nevertheless, it was recognized that the OAU Convention constituted an improvement on the existing legal position and that the right of an individual to asylum seemed to be gaining wider acceptance throughout Africa.¹¹¹ In 1995, the OAU was therefore able to take the position that the granting of asylum should be considered a responsibility and an obligation under international law.¹¹²

Another humanitarian gesture is that of temporary residence, provided for by Article 2(5) of the OAU Convention: "where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee . . ."¹¹³ The view has been expressed that the combined effect of this accommodation and the principle of non-refoulement gives rise to a right of temporary admittance.¹¹⁴

Such limited advances must now be seen in light of a development of "real and practical significance,"¹¹⁵ that is, the inclusion of a right of asylum in Article 12(3) of the African Charter. This states that: "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions."¹¹⁶

An initial, but albeit significant, observation is that the right of asylum is enshrined in a human rights treaty capable of

organizations, was convened to review all aspects of refugee problems in Africa within the scope of the OAU and UN Conventions and their causes. D'Sa, *supra* note 70, at 390. The Arusha Conference "adopted a number of recommendations on "The Situation of Refugees in Africa and Perspective Solutions to the Problem in the 1980s." *Id.* at 390-91.

110. ORG. OF AFR. UNITY, THE RECOMMENDATIONS FROM THE ARUSHA CONFERENCE ON THE AFRICAN REFUGEE PROBLEM 8 (Scandinavian Institute of African Studies, 1981).

111. *Id.*

112. OAU, Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, 1995/BUJCONF.6, ¶ 25 (Feb. 17, 1995) [hereinafter OAU Great Lakes Refugees].

113. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 2(5).

114. See Awuku, *supra* note 11, at 83.

115. See ANKUMAH, *supra* note 77, at 139.

116. African Charter on Human and People's Rights, *supra* note 75, art. 12(3).

implementation and enforcement by an individual.¹¹⁷ According to the African Commission, this provision includes “a general protection of all those who are subject to persecution, that they may seek refuge in another state.”¹¹⁸ However, it would be unwise to assume that an open-door policy has been established. The definition of “persecution” assumes a critical importance.¹¹⁹ The wording of the provision, “when persecuted,” is capable of a restrictive interpretation in that refugees are required to have suffered actual persecution rather than simply demonstrating the more generous standard of a well-founded fear of persecution as required by refugee law.¹²⁰ The African Commission’s use of the phrase, “those who are subject to persecution,”¹²¹ suggests that this may well be the case. Therefore, does the definition also extend to people fleeing extreme poverty or environmental disasters? This is a question that awaits resolution.

D. Non-discrimination

Both the UN and OAU Conventions are to be applied to all refugees without discrimination on specified grounds.¹²² The grounds listed in the UN Convention are somewhat narrower in scope than those contained in Article 4 of the OAU Convention, which refers to race, religion, nationality, membership of a particular social group or political opinions.¹²³ This right is

117. See ANKUMAH, *supra* note 77, at 139.

118. See Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union Interafricaine des Droits de l’Homme v. Rwanda, 27/89-46/91-49/91-99/93, ACHPR, ¶ 31 (Oct. 1996), http://www.achpr.org/files/sessions/20th/comunications/27.89-46.91-49.91-99.93/achpr20_27.89_46.91_49.91_99.93_eng.pdf

119. See ANKUMAH, *supra* note 77, at 140. The definition of “acts of persecution” contained in the Qualification Directive, article 9, is therefore useful. See Qualification Directive, *supra* note 9, art. 9. It must be observed that, while such acts must be “sufficiently serious” or “sufficiently severe,” the definition is not exhaustive. See Directive 2011/95/EU, *supra* note 20, art. 9.

120. See ANKUMAH, *supra* note 77, at 139–40.

121. See Organisation mondiale contre la torture v. Rwanda, 27/89-46/91-49/91-99/93, ¶ 31.

122. See Convention Relating to Status of Refugees, 1951, *supra* note 22, art. 3; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 4. The Kampala Convention also contains a general non-discrimination clause. See Kampala Convention, *supra* note 71, arts. 3, 5; Council Directive 2001/55/EC, *supra* note 16, ¶ 16; Directive 2011/95/EU, *supra* note 20, ¶ 17.

123. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,

strengthened by the principle of non-discrimination enshrined in Article 2 of the African Charter.¹²⁴ As has been seen, Article 2 guarantees every individual the rights pledged therein without distinction on a wide number of specified grounds, including sex, race, ethnic or national origin, political opinion or religion.¹²⁵ The African Commission appears to be uncertain as to whether Article 2 is restricted to discrimination only with respect to the rights set out in the African Charter or whether it amounts to a general prohibition against discrimination. On the one hand, it has stated that Article 2 “does not stipulate a general banning of discrimination; it only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter.”¹²⁶ Yet on the other hand, it has stated that “Article 2 of the Charter lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. . . . [I]t is apparent that international human rights law and the community of States accord a certain importance to the eradication of discrimination in all its guises.”¹²⁷ Irrespective of this debate, the fundamental point is that the principle of non-discrimination can be invoked by refugees, usually in association with other rights.¹²⁸ In *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes*

supra note 11, art. 4.

124. African Charter on Democracy, Elections and Governance, *supra* note 70, art. 8.

125. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 245/02, ACHPR, ¶ 170 (May 11-15, 2006), http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf, the African Commission defined discrimination as “applying any distinction, exclusion, restriction or preference” based on grounds such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.”

126. See *Antonie Bissangou v. Congo*, 253/02, ACHPR, ¶ 69 (Nov. 15-29, 2006), http://www.achpr.org/files/sessions/40th/comunications/253.02/achpr40_253_02_eng.pdf.

127. *Malawi African Association et al v Mauritania*, 54/91, 61/91, 98/93, 164/97-196/97, 210/98, ACHPR, ¶ 131 (May 11, 2000), http://www.achpr.org/files/sessions/27th/comunications/54.91-61.91-96.93-98.93-164.97-196.97-210.98/achpr27_54.91_61.91_96.93_98.93_164.97_196.97_210.98_eng.pdf; see *Purohit and Moore v. Gambia*, 241/01, ACHPR, ¶ 43 (May 2003), http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf.

128. African Charter on Democracy, Election and Governance, *supra* note 70, art. 8; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 245/02, ¶ 171.

Democrates and Others v. Rwanda, the African Commission found that the expulsion of Burundi refugees from Rwanda was motivated by their nationality or membership of a particular ethnic group and was thus a clear violation of Article 2 of the African Charter.¹²⁹ In *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea*, the African Commission held that mass expulsion of refugees amounted to discriminatory action contrary to Article 4 of the OAU Convention and Article 2 of the African Charter.¹³⁰

E. Non-refoulement

Article 2(3) of the OAU Convention assures the principle of non-refoulement—that is, that a person classified as a refugee¹³¹ should not be returned or expelled to a country where they fear persecution or ill-treatment,¹³² or where “widespread serious

129. Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union Interafricaine des Droits de l'Homme v. Rwanda, 27/89-46/91-49/91-99/93, ACHPR, ¶ 23 (Oct. 1996), http://www.achpr.org/files/sessions/20th/comunications/27.89-46.91-49.91-99.93/achpr20_27.89_46.91_49.91_99.93_eng.pdf; see also 249/02: Institute for Human Rights and Development in Africa v. Guinea, 249/02, ACHPR, ¶ 69 (2004), http://www.achpr.org/files/sessions/36th/comunications/249.02/achpr36_249_02_eng.pdf.

130. See also Institute for Human Rights and Development in Africa v. Guinea, 249/02, ¶¶ 69, 74.

131. However, the argument has been advanced that the principle of non-refoulement applies equally to those who have not yet had their status determined. Evolving international refugee law, shaped by international human rights law, obligates the State to investigate, of its own motion, any situation involving a need of international protection. This State obligation applies even in cases where an explicit request for asylum is absent, and also in cases where evidentiary validation of the asylum application is inadequate. In such cases, no automatic negative conclusions should be drawn *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶¶ 170–71 (2012) (Pinto de Albuquerque, J., concurring).

132. Or “not sending a refugee to a country where the persecution in question is feared.” DAES, *supra* note 14, at 34. According to the UNHCR, non-refoulement is, in addition to a binding treaty obligation, a rule of customary international law and a human right, quoted in *M.S.S. v. Belgium and Greece*, 53 Eur. Ct. H.R. 28, ¶ 41–42 (2011)2. See also THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, 140–41; Zaoui v. Att’y Gen. [2005] 1 NZLR 690, ¶ 34 (SC) (N.Z.); *Revenko v. Sec’y of State for the Home Dep’t*, [2000] EWCA Civ. 500, [18], [2001] Q.B. 601, 612; Haitian Centre for Human Rights v. United States, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 88 (1997). According to the African Commission, non-refoulement is a principle “which has taken an increasingly fundamental character as one of the cornerstones of international refugee law.” *Doebbler v. Sudan*, Comm. No. 235/00, ¶ 150. Consequently, Judge Pinto de Albuquerque held it to be a rule of *jus cogens*. *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 172.

problems of insecurity” exist¹³³—is equally applicable to humanitarian refugees.¹³⁴ It is argued that the principle set out in the OAU Convention has a wider scope than that contained in its corresponding provision of the UN Convention, Article 33(1),¹³⁵ in that it applies also to measures such as *rejection* at the frontier, which would force a person to *remain* in an unsafe territory.¹³⁶ In essence, the non-refoulement obligation in the OAU Convention amounts to an obligation to admit and host humanitarian refugees. However, it appears that, in practice, there is little difference.¹³⁷ Ultimately, it would seem that a law-abiding, *bona fide* refugee cannot be expelled.¹³⁸

The UN Convention lists exceptions to the principle of non-refoulement in the interests of national security or public order.¹³⁹ By way of contrast, it has been suggested that the OAU Convention

133. See *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 147.

134. By analogy with the UN Convention. Convention Relating to Status of Refugees, 1951, *supra* note 22, art. 33; THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 137; Lambert, *supra* note 24, at 161–62; see TFEU, *supra* note 20, art. 78. The Qualification Directive explicitly states that the principle of non-refoulement recognized in Article 21.1 applies equally to persons eligible for subsidiary protection. Qualification Directive, *supra* note 9, art. 20.2; see also *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 170.

135. But only if interpreted restrictively. It should be observed that there is a lack of uniformity in the interpretation and scope of the principle in state practice. See generally Ellen F. D'Angelo, *Non-Refoulement: The Search For a Consistent Interpretation of Article 33*, 42 VAND. J. TRANSNAT'L L. 279, 279–315 (2009).

136. Hofmann, *supra* note 11, at 324–25. This is consistent with an expansive approach to the obligation under the UN Convention. D'Angelo, *supra* note 135, at 287.

137. THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 170–71.

138. Indeed, expelling refugees and refugee seekers to high-risk countries can constitute *arbitrary* repatriation. *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶¶ 147–48. In *Doebbler v. Sudan*, it was claimed that thousands of Ethiopian refugees were subjected to forced repatriation by Sudan and the UNHCR as a consequence of an agreement between the two parties whereby it was determined that said refugees were to lose their refugee status in accordance with Article 1(c)(5) UN Convention, the so-called “cessation clause.” However, the African Commission found no evidence that refugees had been returned or that their human rights had been violated. *Doebbler v. Sudan*, Comm. No. 235/00, ¶¶ 118, 163.

139. Such individuals do not qualify for or lose the status of refugees or protected person. Convention Relating to Status of Refugees, 1951, *supra* note 22, art. 33; see *Joined Cases C-57/09 & C-101/09, Bundesrepublik Deutschland v. B & D*, 2010 E.C.R. I-10979, ¶¶ 12, 101. Membership of a terrorist organization and participation in terrorist activities may be incompatible with the Qualification Directive, *supra* note 9, art. 12.2, but cannot automatically justify exclusion or loss of refugee status; an individual assessment of any threat posed must be made. *Id.* ¶¶ 91–94. It should be observed that human rights law has had a considerable impact on the application of these exceptions to the benefit of the refugee. *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶¶ 171–73.

guarantees the principle of non-refoulement without exception.¹⁴⁰ This is because the provision in question refers to a *person*, rather than a *refugee*. And, unlike the UN Convention, the OAU Convention is silent on the question of returning refugees. However, doubt has been cast on this view if other provisions of the OAU Convention are considered.¹⁴¹ Hence, refugee status may be lost where a person has committed or is suspected of committing a serious non-political crime outside the country of refuge,¹⁴² has “seriously infringed the purposes and objectives of this Convention,”¹⁴³ is guilty of acts contrary to the purposes and principles of the OAU and UN,¹⁴⁴ or is suspected of incidents of international crime.¹⁴⁵ Furthermore, since Article 3(1) of the OAU Convention states that a refugee is under a duty to abide by the laws of the country of asylum, including measures taken for the maintenance of public order, any breach thereof may result in the loss of refugee status and expulsion may ensue. Indeed, in *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea*, the African Commission held that the State was entitled to prosecute persons by necessary implication refugees who posed a security threat to the State.¹⁴⁶

An associated feature is the prohibition on refugees engaging in subversive activities contained in Article 3(1) of the OAU Convention.¹⁴⁷ This principle is in keeping with Article 4(o) of the

140. THE REFUGEE IN INTERNATIONAL LAW, *supra* note 15, at 140.

141. D’Sa, *supra* note 70, at 388. Thus, Awuku, *supra* note 11, at 82, is of the view that the OAU’s exclusion clause is stricter than that of the UN Convention.

142. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, arts. 1(4)(f), 1(5)(b); *see also* Convention Relating to Status of Refugees, 1951, *supra* note 23, art. 1(F)(b); Qualification Directive, *supra* note 9, art. 12(2)(b). Terrorist acts come within the scope of this provision. *Bundesrepublik Deutschland v. B & D*, 2010 E.C.R. I-10979, ¶ 81.

143. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 12, art. 1(4)(g).

144. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 12, art. 1(5)(c)-(d); *see also* Convention Relating to Status of Refugees, 1951, *supra* note 22, art. 1(F)(c); Qualification Directive, *supra* note 9, art. 12(2)(c). Terrorist acts are contrary to the purposes and principles of the UN. *Bundesrepublik Deutschland v. B & D*, 2010 E.C.R. I-10979, ¶ 83.

145. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 1(5)(a); *see also* Convention Relating to Status of Refugees, 1951, *supra* note 22, art. 1(F)(a); Qualification Directive, *supra* note 9, art. 12(2)(a), at 18.

146. *Institute for Human Rights and Development in Africa v. Guinea*, 249/02, ¶¶ 71–72.

147. Under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 3(2), State parties are under an obligation to prohibit refugees

AU's Constitutive Act¹⁴⁸ (and Article 3(5) of the OAU Charter before it), Article 23(2) of the African Charter, and the OAU Declaration on the Problem of Subversion.¹⁴⁹ This principle appears to be a sensible proscription to prevent unrest and incitement to violence.¹⁵⁰ A person who does not abide by such a prohibition could lose his/her refugee status in accordance with Article 1(4)-(5) of the OAU Convention and face expulsion.¹⁵¹ The conflict in the Great Lakes Region of Central Africa in recent years highlights the difficulties that these provisions seek to address. Forced population movements combined genuine refuge seekers with armed gangs and individuals who had committed serious crimes, including crimes against humanity.¹⁵² Unrest was fomented in refugee camps, which were used as bases to launch attacks against neighboring States.¹⁵³ As a result, security forces raided some refugee camps and refugees were killed and dispersed.¹⁵⁴ In order to protect bona fide refugees in these dangerous circumstances, the UNHCR put forward

residing in their territories from attacking, or engaging in any subversive activities, against any AU Member State.

148. See Protocol on Amendments to the Constitutive Act of the African Union art. 4(r), adopted July 11, 2003, AFR. UNION, http://www.au.int/en/sites/default/files/PROTOCOL_AMENDMENTS_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION.pdf.

149. GINO J. NALDI, DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 57 (1992).

150. In Resolution 1161, the UN Security Council acknowledged the threat posed to the stability of the Great Lakes Region of Central Africa posed by malicious propaganda. U.N. S.C. Res. 1161, U.N. Doc. S/RES/1161 (Apr. 9, 1998). See also *Causes of Conflict 1998*, *supra* note 3, ¶ 53. However, the term "subversive activities" has been criticized for vagueness and the possibility that it could be invoked to curb legitimate activities. Weis, *supra* note 11, at 459; Awuku, *supra* note 11, at 83.

151. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 1(4)-(5).

152. See generally *Causes of Conflict 2012*, *supra* note 8.

153. In *Congo v. Burundi*, the African Commission rejected as "impermissible" Uganda's argument that it had launched operations in the territory of Congo in order to safeguard its national security interests since armed rebel groups hostile to Burundi, Rwanda, and Uganda had sanctuary in the Democratic Republic of Congo. *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, 227/99, ACHPR, ¶ 76 (May 2003), <http://caselaw.ihrrda.org/doc/227.99/view/>. See also *Armed Activities on Territory of Congo (Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 35-36 (Dec. 19, 2005).

154. See also *OAU Great Lakes Refugees*, *supra* note 112, ¶ 15. See generally Institute for Human Rights and Development in Africa v. Guinea, 249/02, ACHPR, ¶ 71 (2004), http://www.achpr.org/files/sessions/36th/comunications/249.02/achpr36_249_02_eng.pdf (explaining that similar problems arose in Africa, and the African Commission acknowledged that Guinea had legitimate concerns about "threats to its national security posed by the attacks from Sierra Leone and Liberia with a flow of rebels and arms across the border").

what it described as a “ladder of options” which identifies proportionate measures to perceived threats.¹⁵⁵

It is important to note that the principle of non-refoulement is given measurable support by Article 12(3)-(4) of the African Charter.¹⁵⁶ The latter clause protects against arbitrary expulsions, stating that an alien lawfully in the territory of a State may be expelled only in accordance with due process of law.¹⁵⁷ The African Commission held that the provision must be interpreted to prevent unjustifiable expulsions.¹⁵⁸ Furthermore, if the procedure for

155. Under Chapter VI or Chapter VII of the UN Charter, the “ladder of options” includes the following measures: (a) enhancing existing national law enforcement mechanisms; (b) international support for national security forces; (c) deployment of international fact-finding missions and observers; (d) deployment of international/regional police forces; and the (e) deployment of international/regional military forces. U.N. Economic and Social Council Rep. of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, ¶ 41, U.N. Doc. E/CN.4/2005/80, 61st Sess. (Jan. 25, 2005) [hereinafter UNESC 2005 Doc.].

156. *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 167 (on Article 12(3) of the African Charter).

157. Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union Interafricaine des Droits de l’Homme v. Rwanda, 27/89-46/91-49/91-99/93, ACHPR, ¶ 30 (Oct. 1996), http://www.achpr.org/files/sessions/20th/comunications/27.89-46.91-49.91-99.93/achpr20_27.89-46.91-49.91-99.93_eng.pdf; *c.f.*, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Nov. 22, 1984, 1525 U.N.T.S. 195. *See generally* Katani and Others v. Germany, App. No. 67679/01, Eur. Ct. H.R. (May 31, 2001), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-32456> (it is regrettable for the interests of refugees that Article 6 of the ECHR has been found inapplicable to asylum procedures).

158. The African Commission states further that while the African Charter does not prohibit deportations as such, the State’s right to expel individuals does not justify the manner in which it does so. *Rencontre Africaine pour la Défense des Droits de l’Homme v. Zambia*, Comm. No. 71/92, ACHPR, ¶ 23 (1996); *see also* Union Interafricaine des Droits de l’Homme, et al. v. Angola, ACHPR, ¶¶ 19–20 (Nov. 11, 1997), http://www.achpr.org/files/sessions/22nd/comunications/159.96/achpr22_159_96_eng.pdf; Institute for Human Rights and Development in Africa v. Angola, 292/04, ACHPR, ¶ 63 (May 7-22, 2008), http://www.achpr.org/files/sessions/43rd/comunications/292.04/achpr43_292_04_eng.pdf. In such cases the ECHR has stated that a principal concern is whether effective guarantees exist that protect applicants against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled. *See generally, e.g.*, *Muslim v. Turkey*, App. No. 53566/99, Eur. Ct. H.R. (Apr. 26, 2005), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68896>. *See also* *M.S.S. v. Belgium and Greece*, 53 Eur. Ct. H.R. 28, ¶ 83 (2011); *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 147–48, 177–78 (2012) (Pinto de Albuquerque, J., concurring). Additionally, the ECHR held a refugee seeker should not be removed from their country of origin without having had the opportunity to make an effective asylum claim to the domestic authorities

expulsion entails arrest and detention, the safeguards relating to deprivation of liberty are applicable, as is the right to have the case reviewed.¹⁵⁹ This contention is supported in *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Democrates and Others v. Rwanda*, where the African Commission found that, by expelling Burundian refugees without giving them the opportunity to be heard by a competent court, Rwanda was in breach of Article 7(1) of the African Charter.¹⁶⁰ Consequently, Rwanda had additionally violated Article 12(4) of the African Charter by prohibiting the arbitrary expulsion of such persons from the country of asylum.¹⁶¹

Opinion is divided as to whether the principle of non-refoulement must be observed in cases of mass influx of displaced persons, or whether States may legitimately invoke the national security exception in such situations, absent as such from the OAU Convention.¹⁶² Events in the Great Lakes region of Central Africa in the mid-1990s highlighted the difficulties faced by African States in coping with the reception of large numbers of refugees.¹⁶³ Borders were closed and more than one million Rwandan and Burundian refugees were forced to leave Zaïre and Tanzania and return to their country of origin to face an uncertain future.¹⁶⁴ These events took place against a background of violence and infiltration by armed gangs who were opponents of the new regimes in Rwanda

or, should a need arise, an application to the Court for interim measures of protection. See *KRS v. United Kingdom*, App. No. 32733/08, Eur. Ct. H.R. (Dec. 2, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90500>.

159. *Organisation mondiale contre la torture v. Rwanda*, 27/89-46/91-49/91-99/93, ¶¶ 28, 34.

160. *Id.* ¶ 35.

161. *Id.* ¶ 31.

162. TFEU, *supra* note 20, art. 78, would suggest so. The Temporary Protection Directive explicitly applies the principle of non-refoulement to cases of mass influx of displaced persons. Council Directive 2001/55/EC, *supra* note 16, art. 3(2). Judge Pinto de Albuquerque was clearly of this view. *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 170.

163. Gérard Prunier, *The Geopolitical Situation in the Great Lakes Area in Light of the Kivu Crisis*, Feb. 1 1997, available at <http://www.refworld.org/docid/3ae6a6be0.html>.

164. See generally INT'L CRISIS GROUP, BURUNDIAN REFUGEES IN TANZANIA: A KEY FACTOR TO THE BURUNDI PEACE PROCESS, ICG CENTRAL AFRICA REPORT N°12 (1999). Further, under Article 2(4) OAU Convention, provision is made for burden sharing if a State finds difficulty in continuing to grant asylum to refugees. A State may thus appeal directly to other States or through the AU for appropriate measures to be taken in the spirit of African solidarity and international co-operation to lessen that burden. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 2(4).

and Burundi.¹⁶⁵ Many of these gangs were complicit with the massacres perpetrated in those countries, and used the refugee camps for subversive activities.¹⁶⁶ The African Commission will take note of the legitimate national security concerns of States,¹⁶⁷ which is not unlimited however.¹⁶⁸ Nevertheless, the practice of the African Commission establishes that the principle of non-refoulement is applicable in cases of mass influx of refugees.¹⁶⁹

An important consideration in this context is Article 12(5) of the African Charter. This article prohibits the mass expulsion of aliens and is described by the African Commission as “a special threat to human rights.”¹⁷⁰ This provision also applies to refugees and refuge seekers.¹⁷¹ In *Organisation Mondiale contre la Torture and the Association Internationale des Juristes Democrates and*

165. *Id.*

166. See generally INT’L CRISIS GROUP, *supra* note 164.

167. See *Rencontre Africaine pour la Défence des Droits de l’Homme v. Zambia*, Comm. No. 71/92, ACHPR, ¶ 23 (1996). However, the burden of proof lies with the State. In *Organisation mondiale contre la torture v. Rwanda*, 27/89-46/91-49/91-99/93, ¶ 1, the expulsion of refugees was justified by Rwanda on national security grounds. When the State failed to respond to the allegations of human rights abuses the African Commission decided on the facts provided by the complainant. The established practice of the Commission in such instances is that, “[i]f the government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at the least probable or plausible.” See Amnesty International, et al. v. Sudan, 48/90-50/91-52/91-89/93, ACHPR, ¶ 52 (Nov. 15, 1999), http://www.achpr.org/files/sessions/26th/comunications/48.90-50.91-52.91-89.93/achpr26_48.90_50.91_52.91_89.93_eng.pdf.

168. See *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, 227/99, ACHPR, ¶ 76 (May 2003), <http://caselaw.ihrrda.org/doc/227.99/view/>. See also *Armed Activities on Territory of Congo (Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 35–36 (Dec. 19, 2005).

169. In *Doebbler v. Sudan*, the question of whether the principle of non-refoulement applied to 14,000 Ethiopian refugees residing in Sudan was central to the case. *Doebbler v. Sudan*, Comm. No. 235/00, ¶ 146.

170. *Rencontre Africaine pour la Défence des Droits de l’Homme v. Zambia*, Comm. No. 71/92, ACHPR, ¶ 20 (1996); *Institute for Human Rights and Development in Africa v. Guinea*, 249/02, ACHPR, ¶ 69 (2004), http://www.achpr.org/files/sessions/36th/comunications/249.02/achpr36_249_02_eng.pdf. The conditions for mass expulsion are satisfied where arrests occur over a period of several months at different places and deportation orders are served at different dates. *Institute for Human Rights and Development in Africa v. Angola*, 292/04, ACHPR, ¶ 69 (May 7-22, 2008), http://www.achpr.org/files/sessions/43rd/comunications/292.04/achpr43_292_04_eng.pdf. The mass expulsion of aliens is prohibited by other treaties, such as the Fourth Protocol. European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 7, Nov. 4, 1950, 2004-2013 C.E.T.S. No. 204.

171. See *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶¶ 179–81 (2012) (Pinto de Albuquerque, J., concurring).

Others v. Rwanda the African Commission found that the expulsion of Burundian refugees on the basis of their nationality violated Article 12(5) of the African Charter.¹⁷² While the African Commission has taken cognizance of the economic and other challenges faced by many African States hosting large numbers of refugees and that States may sometimes resort to extreme measures to protect their citizens and economies, nevertheless, "such measures should not be taken to the detriment of the enjoyment of human rights" and the mass expulsion of persons, whether on the basis of nationality, race, ethnicity or religion, "is generally qualified as discriminatory in this sense as it has no legal basis."¹⁷³ The African Commission has therefore stressed that such expulsions must comply with the human rights obligations in the African Charter,¹⁷⁴ including due process requirements.¹⁷⁵

It is important not to overlook the fact that a state's ability to refoule a person may be constrained by the operation of other human rights commitments.¹⁷⁶ The non-refoulement obligation can become operative as a result of a breach or the risk of a breach of the spirit of any guaranteed right.¹⁷⁷ The degree of the obligation is dependent on the nature of the right at stake. When the receiving State is at risk of violating an absolute right, the obligation of non-refoulement assumes a categorical aspect.¹⁷⁸ When there is a risk of a violation of any other qualified right that allows for derogation,

172. Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union Inter africaine des Droits de l'Homme v. Rwanda, 27/89-46/91-49/91-99/93, ACHPR, ¶ 33 (Oct. 1996), http://www.achpr.org/files/sessions/20th/comunications/27.89-46.91-49.91-99.93/achpr20_27.89_46.91_49.91_99.93_eng.pdf.

173. Institute for Human Rights and Development in Africa v. Guinea, 249/02, ¶¶ 67–69. See also Union Inter africaine des Droits de l'Homme, et al. v. Angola, ACHPR, ¶¶ 15–16 (Nov. 11, 1997), http://www.achpr.org/files/sessions/22nd/comunications/159.96/achpr22_159_96_eng.pdf; Institute for Human Rights and Development in Africa v. Angola, 292/04, ¶ 68.

174. Institute for Human Rights and Development in Africa v. Angola, 292/04, ¶ 69.

175. Persons are thus "entitled to submit reasons against the expulsion, have the case reviewed and be represented for these purposes before a competent authority." *Id.* ¶ 70.

176. HATHAWAY, *supra* note 21, at 304–05.

177. HARRIS, *supra* note 74, at 80–85.

178. See, e.g., *Soering v. United Kingdom*, [1989] 11 EHRR 439; *Chahal v. United Kingdom*, [1996] 23 EHRR 413; *Othman (Abu Qatada) v. United Kingdom*, [2012] 55 EHRR 1, available at <http://www.echr.coe.int>. See also Article 22(8) of the American Convention on Human Rights; Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10 1984, 1465 U.N.T.S. 85. See *M38/2002 v. Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 131, ¶ 37 (Austl.).

the returning State is required to assess the proportionality of the competing principles at issue—except when the risk of a right’s violation in the receiving state is “flagrant” and the very essence of that right is in jeopardy.¹⁷⁹ Consequently, if refoulement were to result in a person facing torture, the returning State would be prevented by the operation of Article 5 of the African Charter (which protects human dignity) from doing so.¹⁸⁰ Whereas an individual’s separation from one’s family could be deemed a breach of Article 5 of the African Charter (which protects human dignity),¹⁸¹ it could be justifiable if the threat posed outweighed the rights secured to the individual. The same standard applies to universal human rights law, which may be binding on African States. Article 3(1) of the UN Convention Against Torture 1984 expressly prohibits refoulement where “substantial grounds” exist for believing that the person would be in danger of being tortured.¹⁸² Article 16(1) of the UN International Convention for the Protection of All Persons from Enforced Disappearance 2006 is basically identically worded.¹⁸³ Furthermore, while the ECHR contains no explicit prohibition, the principle has been acknowledged by the European Court of Human Rights as extending beyond the similar guarantee under international refugee law; its jurisprudence clearly establishes that expulsions will breach Article 3 of the ECHR if the individual in question faces a real risk of ill-treatment in the receiving State.¹⁸⁴ This

179. HARRIS, *supra* note 74, at 418-20. See also *M38/2002 v. Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 131, ¶ 39 (Austl.).

180. Based on the jurisprudence of the ECHR and by analogy to ECHR, article 3.

181. Amnesty International, et al. v. Sudan, 48/90-50/91-52/91-89/93, ACHPR, ¶ 54 (Nov. 15, 1999), http://www.achpr.org/files/sessions/26th/communications/48.90-50.91-52.91-89.93/achpr26_48.90_50.91_52.91_89.93_eng.pdf; Law Office of Ghazi Suleiman v. Sudan, 222/98-229/99, ACHPR, ¶ 44 (May 2003), http://www.achpr.org/files/sessions/33rd/communications/222.98-229.99/achpr33_222.98_229.99_eng.pdf.

182. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 3(1), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; *Elmi v. Australia*, Comm. No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999); U.N. G.A. Rep. of the Committee Against Torture, 50th Sess., ¶ 8.1, U.N. Doc. A/50/44 (July 26, 1995).

183. International Convention for the Protection of All Persons from Enforced Disappearances, *adopted* Dec. 20 2006, UNGA Res. 61/177, text A/RES/61/488.

184. *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 168 (2012) (Pinto de Albuquerque, J., concurring) (stating “[u]nder the European Convention, a refugee cannot be subjected to refoulement to his or her country of origin or any other country where he or she risks incurring serious harm caused by any identified or unidentified person or public or private entity”); see also *Chahal v. United Kingdom*, 1996-V, Eur. Ct. H.R. 1831, 1853; *Saadi v. Italy*,

also holds true for the 1966 International Covenant on Civil and Political Rights.¹⁸⁵

Other essential general principles applicable to the exceptions to non-refoulement are first—they must be interpreted restrictively or proportionately,¹⁸⁶ and secondly, must be applied only to the particular circumstances of the case and based on the personal conduct of the individual concerned.¹⁸⁷ Refoulement must therefore be compatible with human rights.

F. Voluntary repatriation

Article 5 of the OAU Convention contains another distinctive right in making provision for voluntary repatriation.¹⁸⁸ In light of the principle of non-refoulement, no refugee shall be repatriated against his/her will.¹⁸⁹ If a refugee does wish to be repatriated, the country of origin and the country of asylum are obliged to collaborate to ensure the refugee's safe return;¹⁹⁰ nor should returning refugees be victimized for having left.¹⁹¹ In addition, refugees who freely decide to return to their homeland on their own initiative or as the result of assurances, must have their return facilitated by the country of origin, the country of asylum, voluntary agencies, NGOs, and international organizations.¹⁹² While voluntary repatriation may offer one of the best solutions to the refugee

2008-II Eur. Ct. H.R. 145, 245; *Ismoilov v. Russia*, App. No. 2947/06, Eur. Ct. H.R., ¶¶ 115, 126, 128 (Apr. 24, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86086>. See generally Lambert, *supra* note 24, at 161–92.

185. International Covenant on Civil and Political Rights, *adopted* Dec. 16 1966, 999 U.N.T.S. 171. *ARJ v. Australia*, Human Rights Comm., 60th Sess., July 14-Aug. 1, 1997, ¶ 6.9, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997).

186. HARRIS, *supra* note 74, at 10–11.

187. Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v. B & D*, 2010 E.C.R. I-10979, ¶¶ 12, 106–09 (holding the test to be applied concerns the profound seriousness of the acts committed by the individual and of that individual's individual responsibility for them).

188. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 5. Note that Article 21(1) Temporary Protection Directive requires Member States to make voluntary return possible. Council Directive 2001/55/EC, *supra* note 16, art. 21(1).

189. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 11, art. 5(1).

190. *Id.* art. 5(2).

191. *Id.* art. 5(4).

192. *Id.* art. 5(5).

crisis,¹⁹³ it is apparent that unless the root causes that created the displacement in the first place are not remedied, the prospects of voluntary repatriation will prove negligible. Consequently, the return of relative stability and security to parts of Africa such as Angola, Liberia, Namibia, and Sierra Leone has led to the large-scale repatriation of refugees.¹⁹⁴ Moreover, voluntary repatriation can only be made more effective if human rights are protected, the rule of law is respected, property restitution is addressed, and the safety of returnees can be assured.¹⁹⁵

Naturally, voluntary repatriation would be meaningless if a refugee was prevented from returning to their country of origin. It needs to be recalled that according to international human rights norms, a person cannot be arbitrarily deprived of the right to return to their country.¹⁹⁶ The OAU Convention does not address this issue, but under general international law, a national cannot be denied entry to his or her country of origin.¹⁹⁷ According to Article 12(2) of the Banjul Charter, an individual has the right to return to his or her country subject to the law of public order and security.¹⁹⁸

193. Awuku, *supra* note 11, at 85. In resolution 2003/52, the UN Commission on Human Rights makes the point that return is not and should not be perceived as the only solution to forcible displacement, but that resettlement and local integration are policies that should also be considered. Comm'n on Human Rights Res. 2003/52, Human Rights and Mass Exoduses, U.N. Comm'n on Human Rights, 59th Sess., Apr. 4, 2003, U.N. Doc. E/CN.4/RES/2003/52 (Apr. 24, 2003). Under article 33 of the Qualification Directive, Member States are required to make provision for integration programs. Qualification Directive, *supra* note 9, art. 33.

194. See UNESCO 2005 Doc., *supra* note 155, ¶ 56. In *Doebbler*, the African Commission found that thousands of Ethiopian refugees repatriated voluntarily following the end of the Ethiopian-Eritrean war. *Doebbler v. Sudan*, Comm. No. 235/00, ¶ 161.

195. See Kigali Declaration, African Union [AU] Ministerial Conference on Human Rights in Africa, 1st Sess., Doc. Min/Conf/HRA/Decl.1(I), (May 8, 2003). In this respect the AU's Peace and Security Council has a role to play. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 14(3)(d), *adopted* July 9, 2002, AFR. UNION, http://www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf. According to Awuku, amnesty laws may have to be adopted where necessary. Awuku, *supra* note 11, at 85.

196. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, *supra* note 34, art. 13(2).

197. *Id.*; see also International Covenant on Civil and Political Rights art. 12(2), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; THE AM. SOC'Y OF INT'L LAW, STUDIES IN TRANSNATIONAL LEGAL POLICY NO. 23, THE MOVEMENT OF PERSONS ACROSS BORDERS 85 (Louis B. Sohn & Thomas Buergenthal eds., 1992).

198. *Alhassan Abubakar v. Ghana*, 103/93, ACHPR, ¶ 13 (Oct. 1996), http://www.achpr.org/files/sessions/20th/comunications/103.93/achpr20_103_93_eng.pdf.

IV. CONCLUSION

The OAU Convention advanced existing international refugee law, setting a more generous legal standard.¹⁹⁹ Particularly worthy of note is the extension of the definition of the concept of the refugee, its acceptance of asylum, the strengthening of the principle of non-refoulement and provision for voluntary repatriation.²⁰⁰ These were welcome humanitarian developments that sought to address Africa's considerable refugee problems in some way. These commitments were subsequently endorsed by the OAU and the UN in a number of special conferences—particularly, the 1979 Arusha Conference and the 1994 Addis Ababa Recommendations—convened to discuss the challenges posed by the refugee crises in Africa and to offer concrete proposals.²⁰¹ In urging the OAU Member States to comply more effectively with their international obligations, these conferences proved an important expression of the political will of OAU Member States to reaffirm their legal and humanitarian obligations in accordance with the UN and OAU/AU Conventions. Of course, this is not to suggest that the OAU Convention is a work of perfection. The OAU Convention certainly has its flaws as it does not provide the same degree of detail as the UN Convention. In light of other new developments, particularly in the EU, it seems fair comment that the African response, once considered pioneering, now appears somewhat dated.²⁰² For example, the discretion of States remains largely unfettered. Unlike the EU, there exists no uniform set of procedures for determination of refugee status and appeals.²⁰³ There should, therefore, be a uniform process that is fair and effective to deal with all applications for political asylum so that all humanitarian refugees

199. VILJOEN, *supra* note 64, at 258 (describing the OAU Convention as creating “an impressive normative framework”). Similar sentiments may be expressed in relation to the Kampala Convention, if for no other reason than the fact that currently it is the only universal or regional legal instrument specifically providing for the comprehensive protection of IDPs.

200. Hofmann, *supra* note 11, at 329; Awuku, *supra* note 11, at 86.

201. See generally International Conference on the Situation of Refugees in Africa, Arusha, Tanzania, May 7-17, 1979, *Recommendations from the Pan-African Conference on the Situation of Refugees in Africa, Arusha (Tanzania)*, (May 17, 1979); OAU Addis Ababa Doc., *supra* note 107.

202. It seems worth reiterating that with the Kampala Convention, Africa is again setting the pace.

203. Doebbler v. Sudan, Comm. No. 235/00, 27th Activity Report 2009, ¶ 165.

receive identical treatment.²⁰⁴ Detention of humanitarian refugees should be avoided unless there is no suitable alternative and should be monitored by judicial authorities.²⁰⁵ Procedural safeguards must be applied. All humanitarian refugees should have a right of appeal if their application is rejected by the receiving State in accordance with Article 7(1)(a) of the African Charter.²⁰⁶ Applications for asylum should be processed promptly and delays in reaching decisions should be kept to a minimum.²⁰⁷ The drafters of these treaties did not envisage a more recent phenomenon, that of large-scale illicit migratory flows by sea, including refugees and refugee seekers, from Africa to Europe. Certain North African States must therefore engage with their responsibilities towards the intercepted irregular migrants—usually victims of human trafficking—who are in need of international protection.²⁰⁸ And it is important that African States that have not yet done so accede to the UN and/or OAU Conventions.²⁰⁹ The African Commission has considerable influence on the progressive development of the law in this area. The fact that the African Charter, in addition to other human rights standards, is deemed applicable to refugees is highly significant

204. See *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶ 179–81 (2012) (Pinto de Albuquerque, J., concurring) (suggesting minimum refugee status determination procedures).

205. The right to liberty and security of the person is guaranteed by the African Charter, Article 6 and applies to all deprivations of liberty. *Purohit and Moore v. Gambia*, 241/01, ACHPR, ¶ 64 (May 2003), http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf.

206. Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union Interafricaine des Droits de l'Homme v. Rwanda, 27/89-46/91-49/91-99/93, ACHPR, ¶ 34 (Oct. 1996), http://www.achpr.org/files/sessions/20th/comunications/27.89-46.91-49.91-99.93/achpr20_27.89_46.91_49.91_99.93_eng.pdf. Cf. *Doebbler v. Sudan*, Comm. No. 235/00, ¶ 116 (However, the African Commission has expressed the view that it is not always reasonable to expect refugees to apply to the courts “given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation.”).

207. African Charter on Human and People's Rights, *supra* note 75, art. 7(1)(d).

208. See generally Protocol Against the Smuggling of Migrants by Land, Sea and Air, adopted Nov. 15, 2000, 2241 U.N.T.S. 507 (supplementing the United Nations Convention Against Transnational Organized Crime).

209. In *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶¶ 147–48, the European Court of Human Rights was critical of Libya, observing that it had not ratified the Geneva Convention on Refugee Status, that any asylum procedure was lacking and that the Libyan authorities refused to recognize the refugee status granted by the UNHCR.

because it means at the very least that refugees are entitled to basic rights and must be treated with dignity.²¹⁰ However, in practical terms, much remains to be done as African States generally lack the financial, logistical and material resources to deal with the challenges posed by refugee crises.²¹¹ Refugees are sometimes kept in degrading conditions. It is vital that minimum standards for the reception of refugees and asylum seekers in relation to healthcare, housing, education and work, for example, be adopted.²¹² It is clear that African States must acquire and develop early-warning and early-action systems—as called for by Resolution 2003/52 of the UN Commission on Human Rights—to react more promptly to evolving crises. Timely donor assistance, judiciously spent, is also important. But the root causes of mass displacement must be effectively addressed, which includes ending a culture of impunity for human rights and humanitarian law violations. Peace, security and stability must be the foremost consideration; otherwise the international community is dealing in palliatives and the sorry plight of refugees will continue to blight Africa.

210. Institute for Human Rights and Development in Africa v. Guinea, 249/02, ACHPR, ¶¶ 67–69 (2004), http://www.achpr.org/files/sessions/36th/comunications/249.02/achpr36_249_02_eng.pdf.

211. An additional difficulty is posed by a general lack of domestic legislation on the issue on the part of many African States. Hofmann, *supra* note 11, at 329-30; VILJOEN, *supra* note 64, at 258. See *Hirsi Jamaa v. Italy*, 55 Eur. Ct. H.R. 627, ¶¶ 147–48 (The European Court of Human Rights was deeply concerned with the absence of any form of asylum and protection procedure for refugees in Libya and the impossibility of making the Libyan authorities recognize the refugee status granted by the UNHCR, which meant there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin).

212. See *cf.* Council Directive 2003/9/EC, *supra* note 50, ¶ 18 (on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted).