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

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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,


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 seekers\(^7\) 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...
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. 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. 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.

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. While States have accepted limitations on their

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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. The refuge granted was usually considered temporary rather than permanent. Under traditional international law, States possessed a right to grant asylum. 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.” 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.” 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


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).
18. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. L—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.” DAE, 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.”).
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.”

Asylum is therefore comprised of several components: admission of the individual to the territory of the host State, 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.

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. Thus, under the EU’s Qualification Directive, a person

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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 refugee 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).


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 Dept’, 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”—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. Such individuals who are in need of complementary international protection are often known as humanitarian or de facto refugees.

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.

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

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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; 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 inhuman 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.


reserved domain.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{31} There is no entitlement on the part of the applicant who is at the mercy of the State’s exercise of discretion.\textsuperscript{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.\textsuperscript{33} These international developments, however modest, have nevertheless impacted States’


\textsuperscript{29} Philip C. Jessup, A Modern Law of Nations 82–83 (1948).

\textsuperscript{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).

\textsuperscript{31} Aist, 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.

\textsuperscript{32} Cardoza-Fonseca, supra note 23, 480 U.S. at 444.

\textsuperscript{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,

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; Piriko Kourila, Broading 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 & Boleslaw Adam Bozek, 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.\textsuperscript{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.\textsuperscript{40} No other universal instruments specifically dedicated to the issue of asylum have been adopted since.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{44} Significantly, the Cartagena Declaration on Refugees (1984) expanded the situations under which refugee status is recognized.\textsuperscript{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,

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\item \textsuperscript{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).
\item \textsuperscript{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.
\item \textsuperscript{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."
\item \textsuperscript{42} See Vienna Declaration and Programme of Action, supra note 1.
\item \textsuperscript{44} The Refugee in International Law, supra note 15, at 436–38.
\item \textsuperscript{45} Id. at 21; see also id. at 444–48.
\end{itemize}
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." 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." 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 cooperation on a variety of issues, including asylum. 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.). To that end, harmonizing legislation has been adopted providing for common rules for refuge seekers.

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).
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. "Material 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, 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 definition and describes who qualifies for “subsidiary protection” in the EU—somebody at “real risk of suffering serious harm.”

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, contains a qualified right of asylum. 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.

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).

52. Qualification Directive, supra note 9, art. 2(c).
53. Id. art. 2(e), at 14.
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.").
asylum.”  

Certainly, learned writers of the period shared this assessment. 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. 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. This indeed was the conclusion of the European Court of Human Rights in Vilvarajah v United Kingdom. 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.” 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.’” 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.

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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).
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.\(^6^4\) 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;\(^6^5\) 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.\(^6^6\) 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.\(^6^7\)

\(^6^4\) Frans Viljoen, International Human Rights Law in Africa 254-55 (2007). In fact, eight different categories of African refugees have been identified. Hofmann, \textit{supra} note 11, at 323.


\(^6^6\) Viljoen, \textit{supra} note 64, at 255–56; NALDI, AU Org., \textit{supra} note 11, at 82–83.

\(^6^7\) Doebbler 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.” The significance is that “objectively ascertainable circumstantial compulsion” becomes a factor in determining refugee status. 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. 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


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

refugees for the purposes of the Convention. 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.” 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. 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

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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.” DAEIS, 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.

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compliance has developed.\textsuperscript{80}

The African Commission shares its protective mandate with the African Court on Human and Peoples’ Rights.\textsuperscript{81} The contentious jurisdiction of the Court embraces all cases and disputes submitted that concern the interpretation and application of, \textit{inter alia}, the African Charter and any other relevant human rights instrument which a State has ratified,\textsuperscript{82} such as the OAU Convention.\textsuperscript{83} The African Commission has standing before the Court.\textsuperscript{84} The judgments of the Court are binding on the parties.\textsuperscript{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.”\textsuperscript{86}

\begin{footnotesize}
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\item[83.] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, \textit{supra} note 11, art. 8(2).
\item[85.] Establishment of an African Court Protocol, \textit{supra} note 81, arts. 28(2), 30.
\item[86.] Protocol on the Statute of the African Court of Justice and Human Rights, \textit{supra} note 81, art. 27(2). In March 2011, the Court adopted provisional measures \textit{proprio motu}
\end{itemize}
\end{footnotesize}
It must not be overlooked that the rights guaranteed by the African Charter have been deemed equally applicable to non-nationals and refugees. 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. 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 therein 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. Specific Charter rights relating to refugees that the African Commission has upheld include the right to life, the right to human dignity, 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.


91. African Charter on Human and Peoples’ Rights, supra note 75, art. 4; Organisation
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liberty and security of the person, the right of access to judicial protection, and the right to property. 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.

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. The UN Security Council categorized this conflict as a threat to international peace and security.

In demanding that the Sudanese...
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. 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. 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. 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. Furthermore, due to the destabilizing effect the Darfur conflict has had on neighboring


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


\(^{105}\) 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).


\(^{108}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 . . ."\textsuperscript{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.\textsuperscript{114}

Such limited advances must now be seen in light of a development of "real and practical significance,"\textsuperscript{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."\textsuperscript{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, \textit{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." \textit{Id.} at 390–91.

\textsuperscript{111.} \textit{Id.}
\textsuperscript{112.} OAU, Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, 1995/BUI/CONF.6, ¶ 25 (Feb. 17, 1995) [hereinafter OAU Great Lakes Refugees].
\textsuperscript{113.} OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, \textit{supra} note 11, art. 2(5).
\textsuperscript{114.} See Awuku, \textit{supra} note 11, at 83.
\textsuperscript{115.} See ANKUMAH, \textit{supra} note 77, at 139.
\textsuperscript{116.} African Charter on Human and People's Rights, \textit{supra} note 75, art. 12(3).
implementation and enforcement by an individual.\textsuperscript{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.”\textsuperscript{118} However, it would be unwise to assume that an open-door policy has been established. The definition of “persecution” assumes a critical importance.\textsuperscript{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.\textsuperscript{120} The African Commission’s use of the phrase, “those who are subject to persecution,”\textsuperscript{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.

\textbf{D. Non-discrimination}

Both the UN and OAU Conventions are to be applied to all refugees without discrimination on specified grounds.\textsuperscript{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.\textsuperscript{123} This right is

\begin{itemize}
  \item \textsuperscript{117} See \textsc{Ankumah}, supra note 77, at 139.
  \item \textsuperscript{119} See \textsc{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.
  \item \textsuperscript{120} See \textsc{Ankumah}, supra note 77, at 139–40.
  \item \textsuperscript{121} See Organisation mondiale contre la torture \textsc{v.} Rwanda, 27/89-46/91-49/91-99/93, ¶ 31.
  \item \textsuperscript{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.
  \item \textsuperscript{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. 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. 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.” 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.” 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. In Organisation Mondiale Contre La Torture and the Association Internationale des Juristes

supra note 11, art. 4.


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.”


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. 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.

E. Non-refoulement

Article 2(3) of the OAU Convention assures the principle of non-refoulement—that is, that a person classified as a refugee should not be returned or expelled to a country where they fear persecution or ill-treatment, or where “widespread serious...
problems of insecurity” exist—is equally applicable to humanitarian refugees. 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), in that it applies also to measures such as rejection at the frontier, which would force a person to remain in an unsafe territory. 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. Ultimately, it would seem that a law-abiding, bona fide refugee cannot be expelled.

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

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.\footnote{140}{The Refugee in International Law, supra note 15, at 140.} This is because the provision in question refers to a \textit{person}, rather than a \textit{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.\footnote{141}{DSa, 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.}

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,\footnote{142}{OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, supra note 12, art. 1(4)(g).} has “seriously infringed the purposes and objectives of this Convention,”\footnote{143}{OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, supra note 12, art. 1(5)(b).} is guilty of acts contrary to the purposes and principles of the OAU and UN,\footnote{144}{OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, supra note 11, art. 1(5)(c)-(d); 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 are contrary to the purposes and principles of the UN. Bundesrepublik Deutschland v. B & D, 2010 E.C.R. I-10979, ¶ 81.} or is suspected of incidents of international crime.\footnote{145}{OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, supra note 11, art. 1(F)(a); Qualification Directive, supra note 9, art. 12(2)(a), at 18.}

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 \textit{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.\footnote{146}{Institute for Human Rights and Development in Africa v. Guinea, 249/02, ¶¶ 71–72.}

An associated feature is the prohibition on refugees engaging in subversive activities contained in Article 3(1) of the OAU Convention.\footnote{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 Act (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. This principle appears to be a sensible proscription to prevent unrest and incitement to violence. 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. 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 refugee seekers with armed gangs and individuals who had committed serious crimes, including crimes against humanity. Unrest was fomented in refugee camps, which were used as bases to launch attacks against neighboring States. As a result, security forces raided some refugee camps and refugees were killed and dispersed. 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.


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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{157} The African Commission held that the provision must be interpreted to prevent unjustifiable expulsions.\textsuperscript{158} Furthermore, if the procedure for

\begin{quote}
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].


\end{quote}
expulsion entails arrest and detention, the safeguards relating to deprivation of liberty are applicable, as is the right to have the case reviewed. This contention is supported in *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Démocrates 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. 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.

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. 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. 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. These events took place against a background of violence and infiltration by armed gangs who were opponents of the new regimes in Rwanda.


161. *Id.* ¶ 31.


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

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.” This provision also applies to refugees and refuge seekers. In *Organisation Mondiale contre la Torture and the Association Internationale des Juristes Democrats and Human Rights*.
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.\textsuperscript{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.”\textsuperscript{173} The African Commission has therefore stressed that such expulsions must comply with the human rights obligations in the African Charter,\textsuperscript{174} including due process requirements.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{178} When there is a risk of a violation of any other qualified right that allows for derogation,
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. 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. 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), 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. Article 16(1) of the UN International Convention for the Protection of All Persons from Enforced Disappearance 2006 is basically identically worded. 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. This

180. Based on the jurisprudence of the ECHR and by analogy to ECHR, article 3.
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.\textsuperscript{185}

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

\textbf{F. Voluntary repatriation}

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

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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).


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).
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crisis, 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. 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.

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. 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. 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.


IV. CONCLUSION

The OAU Convention advanced existing international refugee law, setting a more generous legal standard. 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. 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. 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. 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. 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.


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

receive identical treatment.\textsuperscript{204} Detention of humanitarian refugees should be avoided unless there is no suitable alternative and should be monitored by judicial authorities.\textsuperscript{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.\textsuperscript{206} Applications for asylum should be processed promptly and delays in reaching decisions should be kept to a minimum.\textsuperscript{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.\textsuperscript{208} And it is important that African States that have not yet done so accede to the UN and/or OAU Conventions.\textsuperscript{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


\textsuperscript{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.

\textsuperscript{206} Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union Interafrique 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.”).

\textsuperscript{207} African Charter on Human and People’s Rights, supra note 75, art. 7(1)(d).


\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


\footnote{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; VILJEN, 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).}

\footnote{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).}